CHAUVINISM REJECTED: MEXICAN SUPREME COURT UPHOLDS THE CONSTITUTIONALITY OF THE MEXICAN ARBITRATION STATUTE

BY
FRANCISCO GONZÁLEZ DE COSSÍO

Vol. 22 No. 2 April 2005
ISSN 0255-8106

KLUWER LAW
INTERNATIONAL

NOTE TO AUTHORS

The Editor will be pleased to consider contributions provided they are not submitted for publication elsewhere. Articles must be presented in their final form, double-spaced, in English. Special attention should be given to quotations, footnotes and references, which should be accurate and complete and in accordance with the Journal style sheet, which is available from the address below, or online at http://www.kluweronline.com/issn/0255–8106. Due to strict production schedules, it is not possible to amend texts after acceptance or send proofs to authors for correction. The submission of a text indicates that authors consent, in the event of its publication, to the automatic transfer of all copyrights therefor to the publisher of the Journal of International Arbitration.

All correspondence should be addressed to:
Bette E. Shifman
Editor, Journal of International Arbitration; World Trade and Arbitration Materials
Principal Legal Counsel, Permanent Court of Arbitration
Peace Palace, Carnegieplein 2, 2517 KJ The Hague, The Netherlands
Tel.: +31 70 302 41 51, Fax: +31 70 302 41 67, Email: shifman@pca-cpa.org

ISSN 0255–8106
Mode of citation: 22 J.Int.Arb.2

Chauvinism Rejected: Mexican Supreme Court Upholds the Constitutionality of the Mexican Arbitration Statute

Francisco González de Cossío*

I. Introduction

In 1993, Mexico adopted the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law")[1] as its domestic arbitration law ("the Arbitration Law").[2] Since then, hundreds of arbitrations have been held in Mexico, and the number increases each year. As recently as August 2004, the Mexican Supreme Court delivered the first judgment on the Arbitration Law, which is the subject of this note.

II. The Challenge

Teléfonos de México, S.A. de C.V. ("*Telmex*") brought a constitutional ("*amparo*") suit alleging that the Arbitration Law was unconstitutional. The Mexican Supreme Court, in a landmark case, held otherwise. The challenge stemmed from a court resolution during an award enforcement proceeding that Telmex stood to lose.

Importantly, the provisions of the Arbitration Law are based on the UNCITRAL Model Law. Telmex claimed that Article 1435 of the Mexican arbitration statute failed to pass constitutional muster on two separate grounds:

(a) it failed to accord essential procedural formalities; and
(b) it granted unlimited authority.

The two issues will be discussed separately.

---

* Member of Barrera, Siqueiros y Torres Landa, S.C. in Mexico City. Author of Arbitraje (2004), and Professor of Arbitration.

[1] U.N. Doc. A/40/17, Annex I, adopted by the United Nations Commission on International Trade Law on June 21, 1985, *reprinted in* 24 I.L.M. 1302 (1985) [hereinafter "UNCITRAL Model Law"].

[2] Decreto por el que se reforman y adicionan diversas disposiciones del Código de Comercio y del Código Federal de Procedimientos Civiles, D.O., July 22, 1993.

Telmex referred to Supreme Court jurisprudence that established the due process requirements by which all procedural laws must abide in order to withstand constitutionality scrutiny. The requirements were:

(a) notice of the initiation of the proceeding and its consequences;
(b) the opportunity to offer and produce the evidence involving the claims and defenses the parties may wish to rely on;
(c) the opportunity to plead; and
(d) the issue of a resolution that resolves the disputed issues.

Telmex alleged that Article 1435 of the Arbitration Law (an almost verbatim reproduction of Article 19 of the UNCITRAL Model Law) failed the constitutionality test inasmuch as it only stated:

> Subject to the provisions of this title, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> Failing such agreement, the arbitral tribunal may, subject to the provisions of this title, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitration tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.[3]

The Supreme Court dismissed the argument. The court found the claim to be unsupported given that Article 1435 is only part of an integral law which, if analyzed in its entirety, met the constitutional requirements.

B. Unlimited authority

Telmex posited that the arbitration tribunal's authority to *conduct* ("*dirigir*" is the Spanish word) an arbitration procedure vested omnipotent authority in arbitrators and, hence, was unconstitutional. The Supreme Court rejected the claim. In doing so, it echoed the reasons for dismissing the first ground: no unbridled authority was granted inasmuch as the said proviso formed part of an integral law which contained due process limitations sufficient to conform with constitutional standards.

III. The Breadth of the Decision

As usual with important decisions, there is more than meets the eye. The decision's importance and impact deserves to be commented upon first, against the Mexican legal background and secondly, as regards the message it sends.

---

[3] *Id.* art. 19.

A. Background

Mexican courts and attorneys are, in a sense, "constitutionally biased". By formation, the Mexican judiciary and practitioners tend to view almost everything through a constitutional lens. Should a new law or act of authority seem questionable, constitutional violations are immediately alleged and the special constitutional remedy, the constitutional suit ("*juicio de amparo*") is invoked.

Arbitration was no exception. Ever since the institution gained currency in Mexico, there have been those (both from the ranks of the judiciary as well as from private practice) who have questioned the "constitutionality" of arbitration as a whole. As time has passed and arbitration has become the method of choice for business, international and complex disputes,[4] the concern has lost credence. However, no authoritative decision existed to back it up. The Supreme Court's ruling addresses this need comprehensively.

B. The message beneath

In the challenge, the two *specific* claims of unconstitutionality made by Telmex were aimed at one *general* target: they amounted to due process violations.[5] As part of the general argument, the view was expressed that the broad regulation of the arbitration tribunal's authority failed to provide the parties in arbitration with legal certainty as to how the procedure would be followed and with no guarantees that a level playing field existed.

To support the concern, alleged violations of procedural technicalities in the rendering of evidence were cited which had a procedural flavor reminiscent of a Mexican court.[6] This is another area in which the merit of the Supreme Court's judgment lies: not only does it uphold the constitutionality of the statute, but it specifically rejected scrutinizing the arbitration procedure as if it were a court proceeding where an argument of violation of procedural technicalities would hold. In doing so, the Supreme Court sent the message that arbitration is a realm of its own, and that court proceeding-type chicanery is to be rejected.

IV. Comparative Comment

Upon reading the foregoing, foreign arbitration practitioners and academics may have the impression that the decision is insipid and that the outcome is not only obvious, but "old news." However, to avoid a premature conclusion, or one that fails to assess the context in which the ruling was made, it is necessary to weigh the following factors. At one point or another, judiciaries of different jurisdictions have been asked to pass judgment

---

[4] González de Cossío, Arbitraje 567 (2004).

[5] Due process (called "*garantía de audiencia*" in the Mexican legal argot) is a guaranteed right ("*garantía individual*") under art. 14 of the Federal Constitution.

[6] For instance, the claim was made that evidence was produced in a manner contrary to procedural regulations, also that the expert witness did not prove his expertise under the rules of procedural codes. The said acts resulted in a failure to observe due process and legal certainty rights in detriment of Telmex.

works under. This time had not come in Mexico simply because the Arbitration Law was fairly recently enacted.[7] When such factors are analyzed, the impact and importance of the decision becomes apparent.

V. Final Comment

Generally, when assessing a country's merit as an arbitration venue, the following questions should be considered:

(1) Is there a good arbitration law in force?
(2) Is the country a party to the New York Convention?
(3) Is the domestic judiciary arbitration-friendly?

The answers to the above questions as they pertain to Mexico are:

(1) Yes, the Mexican Arbitration Law reflects the UNCITRAL Model Law.
(2) Yes, Mexico has ratified not only the New York Convention[8] but also the Panama Convention.[9]
(3) Increasingly so.

The Supreme Court decision furthers a positive answer to the third question. It is a step in the right direction and provides for additional grounds to support the comment increasingly heard in arbitration circles: Mexico is the Switzerland of Latin America.

---

[7] The Arbitration Law was published in the Federal Daily Official Gazette of July 22, 1993 and is almost a verbatim copy of the UNCITRAL Model Law.

[8] Mexico deposited the adhesion instrument to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("New York Convention") on April 14, 1971 and published the promulgation decree in June 1971.

[9] Mexico ratified the Inter-American Convention on International Commercial Arbitration ("Panama Convention") on February 15, 1978 and deposited it before the Secretary-General of the Organization of American States on March 27, 1978. Publication in the Federal Daily Official Gazette took place on April 27, 1978.

Published by Kluwer Law International Ltd
Croner House,
145 London Road
Kingston upon Thames Surrey KT2 6SR
United Kingdom

Sold and distributed in the North, Central and South America
by Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
USA

In all other countries, sold and distributed
by Extenza-Turpin Distribution Services
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0255-8106

Frequency of publication: Six times per year

Subscription queries should be directed to:

Extenza-Turpin Distribution Services
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Tel: +44 1767 604 958
Email: kluwerlaw@extenza-turpin.com

Subscription prices (including postage) 2005:
GBP 404.00/USD 681.00/EUR 577.00

Periodicals postage paid at Rahway, NJ, USPS nr. 001–798. US Mailing Agent: Mercury Airfreight International Ltd, 365 Blair Road, Avenel, NJ 07001. Postmaster please send all correspondence to: World Trade and Arbitration Materials, c/o Mercury Airfreight International Ltd, 365 Blair Road, Avenel, NJ 07001.

Journal of International Arbitration is indexed/abstracted in *European Legal Journals Index*.

Printed in The Netherlands.