

# DEVELOPMENTS OF ARBITRATION IN MEXICO

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## I. INTRODUCTION

Mexico has been called the place of choice for arbitration in Latin America. This note seeks to explain why by answering frequently asked questions about arbitration in Mexico.

## II. THE LAW AND THE PRACTICE

### A. THE INDISPENSABLE INGREDIENTS: THE NEW YORK CONVENTION AND THE UNCITRAL MODEL LAW

In 1971 Mexico ratified the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In 1993 the UNCITRAL Model Law on International Commercial Arbitration was adopted with no more than cosmetic changes. In doing so Mexico met what several experienced international arbitration practitioners call the *sine qua non* requirements for a friendly arbitration environment. Additionally, in 1978 Mexico ratified the (Panama) Inter-American Commercial Arbitration Convention.

The Mexican arbitration statute has just turned ten years old. Coupled with the New York and Panama Conventions, the North American Free Trade Agreement and other international instruments having a bearing on the subject, as well as the increasing regularity arbitration is sought after, an interesting corpus of experience has been generated which warrants the identification of certain trends. These are the trends which shall be addressed.

### B. THE ARBITRATION AGREEMENT

For their enforceability, arbitration agreements need be only in writing and signed by the parties. The “in writing” requirement as well as the other circumstances deemed to satisfy the same have by and large been met with positive application by Mexican courts. This plausible pattern

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promises to improve given the recent adoption of the UNCITRAL Model Law on electronic commerce.

Court referrals to arbitration are made with increasing regularity. The testing of the judicial waters has reached the appellate level with a clearly positive balance: referrals are confirmed and questionable denials revoked. What was initially an obscure process is increasingly becoming a regularly-used mechanism.

#### C. THE ARBITRATION PROCEDURE

The Mexican arbitration statute, given its UNCITRAL heritage, contains state of the art arbitration-procedure provisions. Sophisticated arbitration proceedings can be—and frequently are—followed under the Mexican statute in congruence with international arbitration practices.

#### D. THE JUDICIARY

Mexican courts have slowly but surely become arbitration-friendly. Although mistakes have been made (as in all jurisdictions), the initial reluctance displayed *vis-à-vis* arbitration (perhaps grounded more on prudence in the face of a new legal institution than atavism) has in general evolved into a growing acceptance of arbitration by the Mexican judicial milieu.

The arbitration procedure provisions have thus far generally been adequately interpreted and applied by Mexican courts. The judicial “hands-off” approach dictated by the UNCITRAL Model Law is generally respected and involvement in arbitration proceedings continues to be the exception.

Frequent mistakes encountered in other jurisdictions (*e.g.*, second-guessing, discovery blocking measures, restraints on evidence, Monday-morning judicial quarterbacking, anti-arbitration suits, etc.) have not been echoed in Mexico. In a nutshell, horror stories found rampant in other jurisdictions are less frequently heard of in Mexico.

#### E. ARBITRABILITY

The Mexican approach to arbitrability continues to be somewhat ambiguous. Although a few topics are expressly excluded as non-arbitrable, in general no bright-line rule exists as to which matters may be submitted to arbitration. As in other jurisdictions, the rule is a conceptual one

and may be summarized as follows: all disputes which are not expressly excluded, do not involve public policy matters or do not impinge upon third-party rights may be arbitrated.

Commercial and monetary disputes are by and large arbitrable and contractual commercial disputes are the class of conflicts most frequently submitted to arbitration. However, arbitration has found and/or is creating a market niche in several other fields such as intellectual property, copyright, telecommunications, government procurement, foreign investment, and sports. Whether other fields of questionable arbitrability (such as antitrust, tax, and labour law) will open up to arbitration is a matter of debate.

#### F. NO LOCAL PECULIARITIES HAVE BEEN IMPOSED

Mexican courts have not succumbed to the temptation of imposing domestic peculiarities for arbitration hearings, proceedings or standards of annulment/enforcement. A caveat applies: the scope of the public policy exception is still an open issue. Also, the due process violation appears to be the most frequently used exception.

#### G. INTERIM RELIEF

Interim measures of relief is currently a hot topic. Judicial review of the extent of the power of courts to issue said measures in aid of arbitration is currently taking place. Although the cases in question involve situations of assertive (sometimes aggressive!) use of said instrument, a subtle point worth making (of particular interest for arbitration practitioners) is that the statute has been interpreted in a wider sense for arbitration purposes than for domestic court procedures. The message is clear: arbitration is a new ball game and the old rules need to evolve to meet the new challenges.

As per tribunal-issued measures, arbitrators sitting in Mexico habitually issue sophisticated measures deemed necessary in arbitration proceedings. And they are respected by domestic courts.

#### H. CONFIDENTIALITY

As in other (even advanced) jurisdictions, confidentiality is non-existent by law. The foregoing, although counter-intuitive given the inherent confidential nature frequently attributed to arbitration, has been demonstrated by several cases which have shown, sometimes with more

candour than was welcome, that the matter, in the absence of a specific party-crafted proviso, is entirely up to the ethics of the parties involved.

#### I. ARBITRATION INSTITUTIONS

The exponential growth of arbitration in Mexico has been met with the creation of two arbitration institutions which stand out as reliable: CAM (Mexican Arbitration Centre—“*Centro de Arbitraje de México*”) and CANACO (Mexico City Chamber of Commerce —“*Cámara Nacional de Comercio de la Ciudad de México*”). Although fairly new, the case load of these institutions has grown impressively and the arbitration-expertise displayed by both has been nurtured not only from practice, but also from the renowned practitioners they receive advise from.

#### J. THE AWARD

Awards are enforceable in Mexico in an even faster manner than foreign judgments. The foregoing is not only provided for by statute but has also become apparent from practice. Granted; situations have taken place where a recalcitrant loser employs all available chicanery to jeopardize the award’s enforcement. Nonetheless, the outcome has thus far been conclusive: *caveat debtor*. The delays have not become material and awards are by and large enforced.

Per the standard of review, a practice sometimes observed is courts performing a less than restricted review of the award at the annulment/enforcement stage. By statute, the standard of review is restricted: courts are required not to look into the vowels of the award. However, courts sometimes appear to act as courts of appeal. Fortunately, the seriousness of this practice has been diminished by the fact that, to annul or refuse enforcement, the tendency continues to be that the onus to meet a high burden remains on the party resisting enforceability.

#### K. INVESTMENT ARBITRATION

Mexico has taken investment arbitration very seriously. It has ratified in excess of 31 treaties providing for arbitration and has tackled the cases it has been involved in with a sophisticated and well-advised team of internationally-trained lawyers. The message is clear: Mexico has put its money where its mouth is. Encouragement of foreign investment through arbitration has been honoured.

### III. CONCLUSION

Mexican arbitration law and practice has come of age. This comment is grounded in that Mexico has displayed a disposition to shed-off earlier prejudices involving arbitration, has adopted legislation congruent with modern international trends, has a judiciary which has increasingly shown its willingness to respect arbitration proceedings and enforce awards, and the local bar has quickly learned the inner intricacies of the field.

Contrary to other Mexican recipes, arbitration *à la mexicaine* offers just the right touch of spice to please even demanding palates.