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A commentary article reprinted from the August 2007 issue of Mealey's International Arbitration Report

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Commentary

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By
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[Editor's Note: Francisco González de Cossío, of González de Cossío Abogados, S.C. (www.gdca.com.mx) is an active arbitrator in domestic and international disputes. He is a professor of arbitration at the Universidad Iberoamericana in Mexico City. He authored 'Arbitraje' (Porrúa, 2004), 'Arbitraje Deportivo' (Porrúa, 2006) and 'Arbitraje y la Judicatura' (Porrúa, 2007). Copyright 2007 by the author. Views are welcome to fgcossio@gdca.com.mx.]

I. Introduction

Recently, the Mexican Supreme Court of Justice (the "Court") tackled an appellate court contradiction involving the admissibility of interim challenges in arbitration award enforcement proceedings.[1]

To grasp the issue a background comment is warranted. The Mexican Arbitration Statute[2] provides that arbitration awards shall be enforced following a procedure that mimics 'incidental' proceedings under the Mexican Federal Code of Civil Procedure (*FCP*). Judgments stemming therefrom are final and may not be challenged.[3] The vagueness of said proviso raised questions galore in the minds of courts and practitioners. One of them has been put to rest in the recent ruling: whether the ban against challenging the *final* judgment extended to interim procedural steps. In doing so a valuable taste of the Mexican-court approach *vis-à-vis* arbitration is gained.

II. Contradiction

Whilst the Seventh Civil Appellate Court of the First Circuit (the "Seventh Court") considered that judges' determinations during enforcement proceedings of arbitration awards are challengeable,[4] the Fourth Civil Appellate Court of the First Circuit (the "Fourth Court") held they are not.[5]

A. Rationale Of The Seventh Court

In allowing challenges against interim procedural steps the Seventh Court reasoned that, notwithstanding that article 1463 of the Commerce Code provides for an exception to the principle of challengeability of all court determinations, it may not be understood as applicable to *every* step in enforcement proceedings given that exceptions need to be applied narrowly.[6]

B. The Fourth Court's *Ratio*

The Fourth Court disallowed procedural challenges. It premised its position on the following:

1. The legislative intent in tailoring the enforcement proceeding was to create a quick procedure, responsive to the needs of business, particularly international, by avoiding obstacles and dilatory tactics.

2. The *travaux preparatoires* of the Mexican arbitration statute privilege the enforcement of arbitration awards.

3. The profound reconstruction of the Commerce Code underwent adopting the UNCITRAL Model law on international arbitration as the Mexican *lex arbitrii* aimed at inserting Mexico in the globalization movement. It included eradicating vernacular and outdated legal institutions, expediting dispute resolution methods

by simplifying them, thereby fostering legal certainty in business dealings.

III. Criterion Of The Supreme Court

The Supreme Court favored the position of the Fourth Court — and in a binding manner.[7] In doing so, it premised its position on the following:

1. Unavailability of challenge provides greater legal certainty to the arbitration award enforcement proceedings.

2. The procedural design reflected an unmistakable legislative *ratio legis:* encouraging the enforceability of arbitration awards.[8]

In essence, the Supreme Court construed (or rather stretched) the ban against the challenge of the *final* judgment stemming from an arbitration award enforcement proceeding as applicable to the *entire* process.

IV. Opinion

The Contradiction is praiseworthy[9] — not only as to content but also as to method.

As to *content*, an interpretation that diminishes challenges against a procedure which ultimate goal is to be fast, is commendable. As to *method,* the reasoning of the Court reflects an unmistakable pro-arbitration attitude.

Bertrand Russell insightfully warned: what people are willing to assume when faced with inconclusive evidence tells us a lot about them. The Mexican Supreme Court faced a decision which was (plausibly) arguable either way. That it chose to follow the pro-arbitration route says a lot about its predisposition towards arbitration.

Endnotes

1. Contradiction 40/2007-PS between the Fourth and Seventh Civil Appellate Courts (*Tribunales Colegiados de Circuito)* of the First Circuit.

2. Articles 1415 to 1463 of the Commerce Code include the Mexican arbitration law, which mirrors the UNCITRAL Model Law on International Commercial Arbitration.

3. Article 1463 of the Commerce Code.

4. *Amparo en revisión* 284/2002.

5. *Queja* Q.C. 6/2007.

6. Two types of remedies exist in Mexican commercial proceedings: appeal (*apelación*) and revocation (*revocación*) (Article 1334 of the Commerce Code). The appeal is usually applicable to final determinations, whereas revocation is usually applicable to procedural steps within proceedings.

7. The votes the resolution mustered provide it '*jurisprudencia*' pedigree, which resembles *stare decisis* in that it binds all lower courts.

8. The Mexican Arbitration Statute (§1463) refers to §360 of the FCP and expressly circumvents §§1353 and 1354 of the Commerce Code and §574 of the FCP, as the applicable regime to arbitration award enforcement proceedings. In doing so, it irrefutably sought speed over other goals, for the latter provisions — albeit more natural candidates — are longer and more cumbersome.

9. From the domestic procedural standpoint, a caveat may apply: the alternate interpretation would have had a positive effect: allowing for the possibility of eliminating procedural mistakes (which in turn reduces the admissibility of *amparo* against the final judgment). Paradoxically, this would have resulted in reducing — albeit not eliminating — dilatory tactics. ■

MEALEY'S INTERNATIONAL ARBITRATION REPORT
edited by Edie Scott
The Report is produced monthly by

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ISSN 1089-2397