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Mexico

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A. Legislation and rules

A.1 Legislation

On 11 January 2018, Mexico became the 162nd country to sign the Convention on the Settlement of Investment Disputes between States and Nationals of other States (“ICSID Convention”), that allows foreign investors from countries where Mexico has signed International Investment Agreements (“IIAs”) to access dispute settlement mechanisms in case of a breach of obligations.⁴

The ICSID Convention entered into force on 26 August 2018,⁵ stating that disputes between nationals of other Contracting States and

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⁴ International Bank for Reconstruction and Development, “Mexico Signs the ICSID Convention,” 11 January 2018.

<https://icsid.worldbank.org/en/Pages/News.aspx?CID=267>.

⁵ International Bank for Reconstruction and Development, “Mexico Ratifies the ICSID Convention,” 27 July 2018.

<https://icsid.worldbank.org/en/Pages/News.aspx?CID=285>

Mexico (and vice versa) may be settled by ICSID Arbitration, depending on the choices available under the specific IIA. In the press release from the Ministry of Economy, Mexico states that the signature of the Convention will “strengthen the position of Mexico as a safe, reliable and attractive country for investments, that protect foreign investment, and provides greater legal certainty to investors in the country.”⁶

Regarding domestic legislation, there have not been any changes in Mexico’s national legislation this year. The Commercial Code continues to govern both international and domestic arbitration in Mexico. The Code incorporates the provisions of the UNCITRAL Model Law in its relevant section. Mexico is a signatory to the New York and Panama Conventions on the enforcement of foreign arbitral awards.⁷

However, Mexico has taken some steps that may change the rules of Investor-State Dispute Settlement (“ISDS”) between the country and investors from the US and Canada. On 30 September 2018, Mexico, Canada and the United States (the “Parties”) reached an agreement to replace NAFTA. The new agreement, USMCA, is not in force yet, but it provides for significant changes in the ISDS field upon ratification. First, it completely eliminates ISDS between Canadian investors and Mexico. Second, it restricts ISDS between US investors and Mexico, discriminating between investors that have contracts with the Mexican government and those that do not.

⁶ Ministry of Economy, “Mexico signs the ICSID Convention,” 11 January 2018, <https://www.gob.mx/se/prensa/mexico-firma-el-convenio-sobre-arreglo-de-diferencias-relativas-a-inversiones-entre-estados-nacionales-y-de-otros-estados>.

⁷ Mexico ratified the New York Convention on 14 April 1971. New York Arbitration Convention, “Contracting States,” <http://www.newyorkconvention.org/countries>. Mexico signed the Panama Convention on 27 October 1977. It was ratified on 15 February 1978. Organization of American States, “*Inter-American Convention On International Commercial Arbitration*,” <http://www.oas.org/juridico/english/Sigs/b-35.html>.



Once the USMCA enters into force, Canadian and US investors will have three years to file arbitration claims in connection with investments made between NAFTA's entry into force and its termination (USMCA's entry into force). During the three year period, investors will still have access to arbitration under NAFTA Chapter 11. Once this period elapses, Canadian investors will have no access to arbitration under the USMCA and some US investors will only have limited access to it.

After the above three-year period, Canadian investors will not have access to international arbitration under the USMCA against Mexico. If they have a claim against Mexico, they will have to rely on the CTPP, which entered into force on 30 December 2018.⁸ The CPTPP, also known as TPP-II, succeeds the Trans-Pacific Partnership which never entered into force after the United States withdrew its support in early 2017. The ISDS provisions under the CPTPP are narrower than those under Chapter 11 of NAFTA. They impose a higher burden of proof on investors to establish breaches of investment obligations and give governments more leeway to implement public welfare measures without giving rise to claims of expropriation.

As discussed above, US investors will have access to arbitration even after the three-year period. Mexico and the US have conditioned and limited their consent to arbitration, distinguishing between claimants who have regular investments and claimants who are parties to covered government contracts.⁹

US claimants with regular investments may only challenge measures in breach of articles 14.4 (national treatment), 14.5 (most-favored-

⁸ Jamie Smyth and Robin Harding, "Trans-Pacific Partnership to start in December," 30 October 2018, <https://www.ft.com/content/274d411c-dc99-11e8-9f04-38d397e6661c>.

⁹ The USMCA defines covered government contracts as "a written agreement between a national authority of [Mexico or the US] and a covered investment or investor of [Mexico or the US], on which the covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector."

nation treatment), and 14.8 (expropriation, excluding indirect expropriation).

Moreover, and importantly, these claimants must initiate domestic litigation in Mexican courts before submitting their claim to arbitration. They can only commence arbitration if there is a final decision of a “court of last resort of the respondent or 30 months have elapsed” after the initiation of the domestic court proceedings. Another noteworthy addition is a four-year statute of limitations for investment-related claims. This means that investors may have to be quick to bring their claim in the courts in order to make sure they have time to bring their arbitration claim following the 30 month litigation period.

US claimants who are parties to covered government contracts enjoy a broader scope and direct access to arbitration (after a six-month cooling off period). They may challenge measures in breach of the whole of chapter 14. Claims under a covered government contract will be subject to a three-year statute of limitations.

A.2 Institutions, rules and infrastructure

The *Cámara de Comercio* (CANACO) and the *Centro de Arbitraje de México* (CAM) are the most important local arbitration institutions in Mexico. The Mexican Chapter of the ICC (ICC Mexico) is located in Mexico City but has recently extended to various major cities in the country.

Additionally, most of the major arbitration institutions operate in Mexico. The ICDR and the LCIA are better known and widely chosen. Mexican users and lawyers are getting familiar with these institutions and their rules.

Each arbitration institution has its own infrastructure that is currently expanding to other major cities in the country, as arbitration is more commonly resorted to for settling disputes.



B. Cases

B.1 Arbitrators not to be subject to *amparo* actions

As discussed in previous Arbitration Yearbooks, the *Amparo Law*¹⁰ permits constitutional challenges against private entities or individuals that perform activities equivalent to those performed by government authorities.¹¹

Disgruntled parties in arbitrations have filed lawsuits against arbitrators under the *Amparo Law* as if they were authorities (similar to state judges) and have challenged awards alleging human rights violations.

However, as of 2015, there have been several judicial decisions confirming the private nature of commercial arbitration. On 16 October 2018, the federal Mexican judiciary held that arbitrators are not state authorities under the *Amparo Law*.¹²

The core reasoning is identical to the precedents mentioned in previous editions of this Yearbook.¹³ First, arbitrators lack *imperium*,

¹⁰ Amparo refers to an extraordinary judicial remedy intended to allow a person to question whether or not a certain action or law conforms with the rights protected under the Mexican Constitution.

¹¹ Article 5 of the current Amparo law reads: “Are parties to the *amparo* proceeding: ... II. The responsible authority, being held as such, despite of its formal nature, the one that pronounces, orders, enforces or attempts to enforce the act that creates, modifies, or terminates legal situations in a unilateral and obligatory manner; or fails to perform the act, that if performed, it would create, modify or terminate such legal situations.

For the purpose of this Law, private parties will be held as a responsible authority when they perform acts equivalent to those of an authority, that affect rights in terms of this section, and whose functions are determined by a general law. ...”

¹² Thesis I.12o.C.14 K (10a.) of the Twelfth Collegiate Tribunal in Civil Matters of the First Circuit, published in the weekly Gazette of the Federal Judiciary on 26 October 2018 under the name “Private arbitrators in the arbitral proceeding. They are not authorities in the *amparo* proceeding.”

¹³ Thesis I.8o.C.23 C (10a.) of the Eighth Collegiate Tribunal in Civil Matters of the First Circuit, published in the weekly Gazette of the Federal Judiciary on 15 May

so a court cannot treat them as state authorities. Their actions are not equivalent to those of an official authority. Second, arbitrators are private individuals and all their activities to solve dispute have the same character. Third, they are not authorities since their powers derive from the will of the parties and not from a general rule. Finally, arbitrators do not act in the public interest, as a state organism, but in their own private interest.

As discussed in previous editions of this Yearbook, this precedent is important to prevent threats on arbitration using the *amparo* as a means to delay and obstruct the arbitrators' appointment or the continuance of arbitral proceedings. This precedent confirms the principle of "no judicial intervention" in arbitration and that the only remedies against the acts of the arbitrators are those established in the arbitration law, which in Mexico are simply those of the UNCITRAL Model Law.

B.2 Arbitral tribunals lack legal standing to request the review of an *amparo* decision

On 16 March 2018, a federal court held that arbitral tribunals lack legal standing to request the review of an *amparo* decision suspending the rendering of the final award.¹⁴

In the case, two governmental entities commenced arbitration proceedings. The arbitral tribunal rendered a partial award on jurisdiction. The losing party filed an *amparo* action against the award and requested an interim measure (procedural stay) to halt the rendering of the final award. The *amparo* court granted the interim measure. Consequently, the arbitral tribunal challenged the decision.

2015 under the name "Private arbitrators. Do not have the character of responsible authorities in the *amparo* proceeding."

¹⁴ Thesis I.11o.C.26 K (10a.) of the Eleventh Collegiate Tribunal in Civil Matters of the First Circuit, published in the weekly Gazette of the Federal Judiciary on 16 March 2018 under the name "Review of an *amparo* decision. The arbitral tribunal, by exception, lacks of legal standing to request the review of the decision that granted a procedural stay, issued in the *amparo* proceeding."



The core reasoning in this precedent is as follows: First, the arbitrator becomes the director of the proceedings and “judge” of a specific dispute. For that reason, an award is materially a jurisdictional act, which in itself equates the arbitration authority to a jurisdictional one. Second, the decision granting the interim measure does not directly or indirectly affect the interests of the arbitral tribunal as a decision-maker. Finally, even when the arbitral tribunal is a party to the *amparo* proceeding, and as such, it may request for the remedies provided therein, there is an exception in case of an arbitral tribunal, who must not be involved in the interest of the parties in the legal dispute.

This case contrasts with recent judicial precedents that established that the arbitrators cannot be considered as “responsible authorities” in an *amparo* trial. Law practitioners and the arbitrators themselves will have to insist on the private nature of the arbitral awards.

B.3 The seizure of properties shall prevail until the arbitral award is enforced

During a dispute held between two parties, the claimant requested a Mexican court to issue an interim measure in support to arbitration, since arbitral tribunals lack jurisdiction to provide them. These comprised the order to defendant to refrain from making use of real estate property that secured its obligations *vis-à-vis* the claimant, and the seizure of the properties.

Once the arbitral tribunal granted the award in favor of the claimant, a federal district court declared the end of the interim measures. After a series of appeals and constitutional challenges,¹⁵ the claimant filed a final appeal against the resolution that ordered the cancellation of the seizure inscription at the Real Estate Registry. Therefore, the tribunal had to decide whether the seizure of the properties should remain valid or not, bearing in mind that the arbitration award had not been executed yet.

¹⁵ *Amparo* lawsuits.

At last, the tribunal determined the guarantees had to prevail until the enforcement of the arbitral award, reasoning that the interim measures had been granted to secure a payment obligation, which had not been satisfied by the defendant in fulfillment of the arbitral award.

This decision is relevant as a precedent, although it is not mandatory because it will allow parties that already have a guarantee in their favor to secure the owed payment until the award is enforced.

C. Diversity in arbitration

Diversity has taken a major spotlight in every area, including arbitration around the world. The issues faced by international arbitration begin in gender equality as the ICC data on arbitral appointments for 2016 reveal that only 20% of arbitrators appointed were women.¹⁶ Also, even if there are few statistics on minority ethnic and racial representation in arbitration tribunals, it is suggested that the majority of men appointed as arbitrators are Caucasian men of advancing age.¹⁷ Therefore, it is determined that gender, age and ethnicity play important roles in assignments of arbitration seats.

Furthermore, to add efforts towards diversity into the domestic and international politics, both CAM and ICC Mexico have subscribed to the Pledge.¹⁸

ICC Mexico continues to draw efforts in order to include young lawyers under 40 years old into the alternative dispute resolution methods, by creating the *Comité de Jóvenes Árbitros* (Young Arbitrators Committee) in Mexico City, Nuevo León, Jalisco and El Bajío. The ultimate goal of this program is to allow young professionals to be immersed and included in arbitration topics.

¹⁶ Berwin Leighton Paisner LLP, “International Arbitration Survey: Diversity on Arbitral Tribunals,” https://www.blplaw.com/media/download/BLP-Diversity_on_Arbitral_Tribunals_-_Survey_Report.pdf, p 2.

¹⁷ *Id.*

¹⁸ Equal Representation in Arbitration Pledge available at: <http://www.arbitrationpledge.com/organisations>.



To comply with international requirements and goals, Mexico has begun to promote and include diversity topics by incorporating basic rules on gender equality and promoting the participation and inclusion of under-represented groups within the arbitration institutions.