

# Mexico: a new “*haut lieu*” of international arbitration

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The contemporary history of arbitration in Mexico can be characterized by a 3 stage movement: from a hostile anti-arbitration period to a pro-arbitration period, that today has achieved a consolidated stage. 2007 has been the year of consecration resolving fundamental questions like the constitutionality of arbitration,<sup>1</sup> the autonomy of the arbitration agreement and so on.<sup>2</sup> 2008 gave federal courts the opportunity to eliminate procedural obstacles in order to give full efficiency to arbitration. Even if the judicial proceeding is not the same as in France for instance, there is no doubt that Mexico has the same “in favor” approach than the French *Cour de cassation*, and thus can be considered as the most advanced Latin American Country in regard to international arbitration, having on one hand the UNCITRAL Model Law as legislative background,<sup>3</sup> and on the other hand, a real pro-arbitration case law. It is thus not surprising that Mexico finally has earned its quote in international forums,<sup>4</sup> and can be characterized as a new « *haut lieu* » of international arbitration.

The legal fundament, common to all those “in favor” arbitration decisions, is a “discovered” principle of “expeditiousness”. The Supreme Court has established, in an *obiter dictum*, that procedural rules in regard to arbitration must be interpreted in the light of the principles of “celerity” and “expeditiousness”, underlining thus the “special” nature of arbitration within the Mexican legal system.<sup>5</sup> Recently, the *Maquinaria Igsa* decision has confirmed that expeditiousness is a general principle of Mexican arbitration law, in particular in regard to the enforcement of awards.<sup>6</sup>

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<sup>1</sup> Pereznieto & Graham, Mexican Supreme Court clarifies procedure for constitutional challenges to arbitration awards, 13 *IBA Newsletter* 31 (2008).

<sup>2</sup> Pereznieto & Graham, Crónicas de jurisprudencia mexicana, *Revista Latinoamericana de Medicación y Arbitraje*, 2008.115, www.med-arb.net.

<sup>3</sup> Pereznieto & Graham, *Tratado de Arbitraje Comercial Internacional Mexicano*, Limusa, 2009, n. 52 sq.

<sup>4</sup> Quoted as an international arbitration place like Paris or London : ICC, *Observations sur le Rapport relatif à l'application du Règlement de Bruxelles I dans les Etats membres de l'Union européenne, dit « Rapport Schlosser »* p.13.

<sup>5</sup> 20/6/2007 in: Pereznieto & Graham, *Tratado...*, *op.cit.*, n: 621.

<sup>6</sup> TERCER TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO. Amparo en revisión 274/2008. Maquinaria Igsa, S.A. de C.V. 4 December 2008 (To be published at: <http://adidem.blogspot.com>).

Consequently, it has been decided that are no appeals admissible during the enforcement proceeding.<sup>7</sup> Article 1463 of the Commercial Code foresees that the applicable judicial procedure to enforce awards is the one established by article 360 of the Federal Civil Procedure Code and that the final judicial decree cannot be appealed. However, in practice, there is not just a single final decision in the enforcement procedure but many interlocutory decrees, and litigators are used to appeal them systematically, each of these appeals being subject to the constitutional recourse known as “amparo”. Now, with the present decision, that has the character of a binding precedent on all inferior federal and state courts, the Justices have ruled that no decision of any kind rendered by a judge in such an enforcement procedure can be appealed.

Secondly, another decision,<sup>8</sup> - handed down in a national arbitration but which *dictum* can be extended to international arbitration -, the First Circuit has set forth in which moment respondent has to file his recourse against the enforcement decision. In effect, practitioners used to oppose the enforcement and only sought constitutional remedies once the enforcement procedure had been materially executed. However, following the present decision, respondent has to file his recourse against the decision of admission of the enforcement proceeding and not wait till the enforcement in itself has been executed.

Another federal decision has dealt with the very particular case in which it is legally or materially impossible to comply with what has been ruled in an award.<sup>9</sup> *In casu*, claimant sought enforcement before the State Court and respondent argued that he was in a legal situation that rendered the compliance with the award impossible. Taking into account that the Commerce Code does not establish anything in regard to such circumstance, the First Circuit decided to refer to the rules of the Federal Civil Code and to apply them analogically. These said rules establish that if an obliged party does not comply with its obligation to do or not to do, it has to pay damages.<sup>10</sup> Consequently, if it results that the condemned party really cannot comply with what has been ordained in the award, damages are due to the creditor of the award, without taking into account the liability of the debtor for the impossibility of the non compliance. Furthermore, the claim has not to be the object of a new trial, since it can be presented in a summary proceeding.<sup>11</sup> This leads to the conclusion that it is even possible to claim the damages during the recognition proceeding if at that stage it is already clear that there is a legal or material impossibility to enforce the award.

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<sup>7</sup> See Graham, Mexican Supreme Court decisions on the authority of courts over arbitration agreements and the enforcement of awards, 13 *IBA Arbitration Newsletter* 30 (2008).

<sup>8</sup> SEGUNDO TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO. Amparo en revisión 233/2008. Joaquín Arturo Vega Morales y otra. 4 September 2008.

<sup>9</sup> TERCER TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO. Amparo en revisión 17/2008. Enrique Autrique Gómez y otra. 19 May 2008.

<sup>10</sup> Art. 2104.

<sup>11</sup> Known in Mexican Law as “*incidente*”.