CHAMBERS

Global Practice Guides

International Arbitration

Mexico – Law & Practice

Contributed by
Von Wobeser y Sierra, SC

2015

CHAMBERS® AND PARTNERS

MEXICO

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law & Practice

Contributed by Von Wobeser y Sierra, SC

CONTENTS

1. Authors

Managing partner **Claus von Wobeser** is a highly regarded arbitrator and litigator with expertise at both a national and international level with almost 40 years of experience. He has been appointed by leading international companies and governments involved in commercial and investor-state disputes. He has experience of disputes across Latin America, North America, Europe , Africa and Asia and has served as an arbitrator ICC, AAA, ICDR, Inter-American Commercial Arbitration Commission, NAFTA chapter XI, ICSID and ICSID Additional Facility Mechanism, Hong Kong International Arbitration Center, LCIA and Energy Charter Treaty.

Adrian Magallanes has been part of Von Wobeser y Sierra S.C. since 2002. He is a Partner of the firm with ample experience offering legal counsel for Fortune 500 companies, local enterprises and government entities throughout the world. He has a solid track record and has international expertise working in law firms in Mexico, the United States and Asia. He is admitted to practice in Mexico and New York, and his main practice areas include International & National Arbitration, Constitutional (Amparo) & Administrative Proceedings, Government Procurement & Public Works, Civil & Commercial Litigation and Anticorruption & Compliance.

Von Wobeser y Sierra, S.C has acted as arbitrator and counsel for major multinational companies involved in international commercial disputes. Members of the team have also participated in arbitration proceedings as expert witnesses in Mexican commercial law. Work undertaken includes advising on all commercial arbitration proceedings, including those conducted according to the rules of the International Chamber of commerce, the Inter-American Arbitration Commission, the UNCITRAL and in relation to NAFTA's Chapters 11 (investment) and 19 (review and dispute settlement in anti-dumping and countervailing duty matters).

2. General

2.1 Prevalence of Arbitration

Over the past few years, the use of arbitration has gained ground in Mexico and its practice has spread to many sectors of the economy. State-owned companies like Petróleos Mexicanos (PEMEX) and the Federal Electricity Commission (CFE) have also followed suit establishing, in their agreements with individuals or private entities, arbitration clauses under the rules of the International Chamber of Commerce (the ICC) and the London Court of Arbitration (the LCIA).

Mexican legislation is favourable to arbitration and the Courts in general terms uphold pro-arbitration criteria. This has no doubt contributed to an increase in the proceedings as well as the quality. However, the number of domestic arbitration cases are still low in comparison to other countries with similar or smaller economies.

2.2 Trends

One of the arbitration cases which will definitely have an important effect on arbitration practice in Mexico is to be deliberated by the Mexican Supreme Court of Justice during 2015. It is the case of Conproca, SA de CV v Pemex. The case is based on a 1997 agreement to modernise and expand one of Pemex's refineries in Cadereyta, Mexico.

Pemex claimed that Conproca breached the agreement by exceeding the original budget, whilst Conproca stated that it was asked by Pemex to carry out works not included in the original scope of the contract. The dispute was submitted to arbitration and eventually an Arbitral Tribunal issued an award in favour of Conproca, finding Pemex liable for the payment of damages.

Pemex attempted to set aside the award through a challenge proceeding before a District Court in Civil Matters of the Federal District, which was eventually declared unfounded. Pemex then filed an amparo lawsuit against the said ruling and the corresponding Collegiate Circuit Court declared it was also unfounded and confirmed the District Court's decision.

Against the ruling issued by the Collegiate Circuit Court, Pemex filed a motion for review and managed to obtain its admission by the Supreme Court of Justice, arguing that the judgment included a direct interpretation of constitutional provisions and involved matters of national importance and predominance.

The Supreme Court of Justice's ruling is still pending but once it has been issued, it is bound to become a highly relevant precedent in arbitration practice in Mexico, not only because of its economic significance (the debt generates a daily interest of around MXN1 million) but also because it will be an opportunity for the highest court to analyse certain important issues related to arbitration, such as the notion of public policy.

2.3 Key Industries

The industries with significant international arbitration activity are still the same as in the last decade, the most important of these being commercial contracts and infrastructure.

Nevertheless, oil and gas disputes based on the new Hydrocarbons Law are likely to be another significant sector. 2014 marked an important milestone in Mexico with the opening-up of the energy industry to private investment, with the approval of the constitutional reforms by the Mexican Con-

gress and a package of legislation published in the Official Gazette of the Federation in August 2014. Those amendments and new legislation are referred to, as a whole, as the 'Energy Reform'.

2.4 Arbitral Institutions

The most commonly used institutions for international arbitration in Mexico are the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the International Centre for Dispute Resolution (ICDR).

With respect to domestic arbitrations, the most commonly used institutions are the Mexico City National Chamber of Commerce (CANACO) and the Arbitration Centre of Mexico (CAM).

3. Governing Law

3.1 International Legislation

International arbitration in Mexico is governed by the Commerce Code, which was amended in 1993 to incorporate, with a few minor modifications, the United Nations Commission on International Trade Law (UNCITRAL) Model Law of 1985 as Mexico's arbitration law. The corresponding chapter of the Commerce Code applies to all commercial disputes submitted to arbitration in Mexico.

Two of the main differences between the Commerce Code and the UNCITRAL Model Law are: (i) the provisions on interim relief requested to a court, given that the Commerce Code establishes a complete trial for its issuance; and (ii) the rules on the number of arbitrators in the absence of an agreement between the parties, where the UNCITRAL Model Law provides that three arbitrators must be appointed, whilst the Commerce Code orders the appointment of a single arbitrator.

3.2 Changes to National Law

There have not been any significant changes to the Commerce Code. However, the Code of Civil Procedure of Mexico City was recently amended to incorporate similar provisions to that of the Commerce Code regarding the enforcement of awards. The Code of Civil Procedure of Mexico City applies to disputes that are civil in nature.

The distinction between civil and commercial law is non-existent in many jurisdictions. However, in Mexico, commercial law regulates merchants and business activities with speculative intent. Civil law regulates the acts of individuals or companies not engaged in acts of commerce.

4. The Arbitration Agreement

4.1 Enforceability

Pursuant to Article 1423 of the Commerce Code, in order for an arbitration agreement to be enforceable it has to be in writing and duly signed by the parties; however, it may also be established in an exchange of letters, telexes, telegrams or faxes, or any other means of telecommunication that properly record the agreement.

The arbitration agreement can be derived from an exchange of a written complaint and a written answer in which one of the parties affirms its existence and the other one refrains from denying it. Even a reference to a document that contains an arbitration clause will constitute an agreement to arbitrate, as long as such an agreement is in writing and the reference implies that such a clause is part of the agreement.

It is important to bear in mind that, to be enforceable, the arbitration agreement must meet the basic requirements of any contract: (i) it must have a legal purpose; (ii) the consent of the parties must not have been given in error or obtained by fraud or under duress; and (iii) the parties must have had full capacity to sign the agreement at the time they did so.

4.2 Approach of National Courts

Mexican courts tend to favour enforcement of arbitral agreements, given that the legislation is favourable to arbitration and the highest courts have issued important pro-arbitration criteria.

It should be noted that in the COMMISA case a Collegiate Court on Civil Matters of the Federal District set aside an International Chamber of Commerce (ICC) arbitral award in favour of the company Corporación Mexicana de Mantenimiento Integral (COMMISA), against Pemex.

It was a highly complex case involving exceptional circumstances that resulted in the annulment of an ICC award by the Mexican courts, based on an administrative rescission. The award involved a multimillion dollar sum and it was issued against Pemex.

In 2010, Pemex filed an annulment request before the Mexican courts, arguing that the dispute was not arbitrable because it involved an act of authority and that the decision on jurisdiction issued by the Arbitral Tribunal breached public policy. Ultimately, in October of 2011, the Mexican courts annulled the award on the grounds alleged by Pemex, and concluded that acts of authority, such as an administrative rescission, could not be arbitrated.

The COMMISA case, although highly relevant and well-known at national and international levels, is not represent-

ative of common practice in Mexico for the enforcement of arbitration agreements and awards.

4.3 Validity of Arbitral Clause

According to Article 1432 of the Commerce Code, an arbitration clause included within a contract is considered to be an agreement, independent of any other provisions of the contract. Therefore, in the event that the contract is declared null and void, such a declaration does not imply the nullity of the arbitral clause. In other words, a ruling issued by an arbitral tribunal declaring a contract null and void does not void the arbitration clause. The above is in conformity with the principle of autonomy that has been recognised by the First Chamber of the Mexican Supreme Court of Justice in the binding precedent 25/2006 under the heading 'Commercial Arbitration. The jurisdiction to hear the nullity action of the arbitration agreement provided in the first paragraph of Article 1424 of the Commerce Code corresponds to the Judge and not to the Arbitral Tribunal".

5. The Arbitral Tribunal

5.1 Selecting an Arbitrator

In principle, under Mexican law, the parties have no limits to the selection of the members of an Arbitral Tribunal. In that respect, according to Articles 1427 and 1428 of the Commerce Code, the parties have the right to agree on the number of arbitrators, the requirements they must meet and the procedure for their appointment; they can also decide simply to incorporate the rules of any arbitration institution.

The only limitation specially provided in the Commerce Code is that arbitrators have to be impartial and independent, which is obvious.

5.2 Challenging or Removing an Arbitrator

The challenge or removal of arbitrators is governed by Articles 1427 to 1429 of the Commerce Code and by the rules agreed upon by the parties.

According to Article 1428 of the Commerce Code, the appointment of an arbitrator may be challenged only if there are circumstances that cause justifiable doubts with respect to the impartiality or independence of the arbitrator, or in the event that the arbitrator does not possess the characteristics previously established by the parties. There is a special rule concerning the challenge of the arbitrator appointed by the challenging party, which limits the possibility of challenging causes arising after the appointment.

According to Article 1429 of the Commerce Code, the parties have the right to agree on the procedure to challenge arbitrators but where there is no such agreement, the challenging party has 15 days to submit in writing before the Arbitral Tribunal the circumstances that justify the doubts on the impartiality or independence or the lack of the requirements established by the parties; such a term begins to run from the date on which the Arbitral Tribunal is constituted or from the time at which the party gains knowledge of the relevant facts. After the challenge is received, the arbitrator can resign voluntarily or the opposing party can accept the challenge; if neither of these situations occurs, the Arbitral Tribunal must issue a ruling.

In the event that a challenge is rejected by an Arbitral Tribunal, the challenging party has the right to commence a case before the Mexican Courts within 30 days starting from the notice of the ruling in which the challenge was rejected. During the proceedings of the trial, the Arbitral Tribunal can continue with the arbitration proceedings and even issue an award. The judgment eventually issued by the court is not appealable.

Courts only intervene in the selection of arbitrators in two cases: (i) if the parties agreed to have a single-arbitrator proceeding but fail to reach an agreement on the appointment of that arbitrator, the court can select one upon the request of either party; and (ii) in an arbitration with three arbitrators, each party is to appoint one arbitrator and the appointed two are to name the third; however, if one of the parties fails to name an arbitrator within 30 days from a request by the other party, or if both arbitrators named by the parties do not agree on the third arbitrator within 30 days from their designation, the appointment can be made by a court upon the request of either party.

5.3 Independence, Impartiality and Conflicts of Interest

Under Mexican law, the only requirements for arbitrators are provided in Article 1428 of the Commerce Code, according to which arbitrators must be impartial and independent. However, those concepts are not defined by the law and are therefore left to the interpretation of the interest parties and, as the case may be, Mexican courts.

In order to ensure their impartiality and independence, the person who has been appointed as an arbitrator is required to reveal to the parties from the time of appointment, and during the time of the performance of the arbitration functions, without any delay, all circumstances that could imply doubts about their impartiality.

There are no specific rules regarding the disclosure of potential conflict of interest; however, the IBA Guidelines on Conflicts of Interest in International Arbitration are applied if the parties have previously agreed so. Both Arbitral Tribunals and arbitration institutions in Mexico are normally guided in their decisions by taking these Guidelines into consideration.

6. Jurisdiction

6.1 Matters Excluded from Arbitration

The subject matters that may not be referred to arbitration can be found in different statutes of the Mexican legal system, such as the following:

a) According to Article 568 of the Federal Code of Civil Procedure, national courts have exclusive jurisdiction over disputes derived from: (i) land and water resources located within national territory; (ii) resources of the exclusive economic zone or resources related to any of the sovereign rights applicable to such a zone; (iii) acts of authority or those related to the internal regime of the state and of the federal entities; and (iv) the internal regime of Mexican embassies and consulates and their official proceedings.

b) According to Article 52 of the Superior Court of the Federal District Organisation Act, issues related to family law and civil status must be ruled by national courts. As stated in Article 1 of the National Code of Criminal Procedure, criminal liability is not arbitrable.

c) Pursuant to Article 14 of the Tax and Administrative Federal Court Organisational Law, matters related to taxes are not arbitrable.

d) Article 1 of the Bankruptcy Law establishes that personal and commercial bankruptcy is subject to the exclusive jurisdiction of national courts.

e) Also, Article 123 section XXXI of the Mexican Constitution provides that Labour disputes must be ruled by special Boards and Tribunals.

f) According to Article 27 section XIX of the Mexican Constitution Agrarian, disputes are not arbitrable.

g) Article 227 of the Industrial Property Law provides that parties may submit a dispute to arbitration only when the controversy affects private rights exclusively; if the dispute concerns the public interest, it is not arbitrable.

h) The Law of Acquisitions, Leases, Services of the Public Sector, as well as the Law of Public Works and Related Services, expressly exclude from arbitration any dispute regarding the lawfulness of administrative rescissions or early terminations of contracts executed between public entities and private parties under the framework of those laws.

i) Finally, the new Hydrocarbons Law published in August 2014 provides that disputes arising from administrative rescission of contracts executed under the scope of this law are not arbitrable.

6.2 Challenges to Jurisidiction

In recognition of the competence-competence principle and according to Article 1432 of the Commerce Code, an arbitral tribunal has the authority to rule on its own jurisdiction. Arbitral Tribunals can resolve the defence of lack of jurisdiction raised by a party a priori or in the final award on the merits.

Pursuant to Article 1432 of the Commerce Code, parties have to raise any challenges to the jurisdiction of the Arbitral Tribunal before the answer to the complaint is filed, and if a party considers that the arbitrators exceeded their powers, they must file an objection as soon as the issue arises during the arbitration proceeding.

The challenge of the jurisdiction of a tribunal by a party is to be made at the latest when the respondent presents their response on the merits (Article 1432, Commerce Code). The resisting party is not precluded from doing so by participating in the proceedings or nominating an arbitrator.

National courts may only address issues of jurisdiction once the Arbitral Tribunal has declared itself competent, regardless of the procedural phase in which this happens. The ruling eventually issued by the court cannot be appealed.

6.3 Timing of Challenge

The parties cannot go to a national court to challenge the jurisdiction of the Arbitral Tribunal until the arbitrators have issued a ruling regarding their own jurisdiction. Once this ruling has been issued, parties have 30 days to request a court to review the arbitrators' decision regarding their own jurisdiction.

6.4 Standard of Judicial Review for Jurisdiction/ Admissibility

There is no standard of judicial review for questions of admissibility and jurisdiction; courts have full discretion to analyse those matters, as long as they are empowered by an express provision of the Commerce Code or any other applicable law.

6.5 Breach of Arbitration Agreement

Pursuant to Article 1424 of the Commerce Code, in a case where a trial is initiated despite the existence of an arbitration agreement, the Court before which the proceeding has been initiated will, upon the request of any party, remit the parties to arbitration, unless the arbitration agreement is declared null and void, ineffective or impossible to enforce. But even if an action to nullify or declare ineffective an arbitral agreement has been initiated, the arbitration proceeding

may be initiated and an award may be issued whilst the matter is still pending before the court.

According to Article 1464 of the Commerce Code, if a party seeks to be remitted to arbitration, they must follow the following rules:

1. First, the requesting party must submit a request in the first written motion they file regarding the merits of the controversy.

2. The court has to give the other party the opportunity to respond and immediately issue a decision.

3. If the court considers the parties should be remitted to arbitration, it can also order the suspension of the judicial proceedings.

4. Once the dispute has been finally settled in arbitration, upon the request of either party, the judge has to declare the judicial proceedings terminated.

5. In the event that the arbitration agreement is declared to be null and void, the arbitral tribunal is declared incompetent or if for any reason the dispute is not settled in arbitration, the suspension of the judicial proceed ings is lifted, upon the request of either party, and only after all parties involved have received the opportunity to be heard.

6. Finally, there is no defence available against the decision issued inthe aforementioned proceeding.

6.6 Right of Tribunal to Assume Jurisdiction

There is no specific provision under Mexican law that regulates the circumstances in which third parties or non-signatories can be considered to be bound by an arbitration agreement.

7. Preliminary and Interim Relief

7.1 Types of Relief

In principle, the rules agreed upon by the parties determine the Arbitral Tribunal's authority to award preliminary or interim relief. However, according to Article 1433 of the Commerce Code, if the parties did not establish any limitation in this regard, the arbitrators have the authority, upon the request of either party, to grant provisional remedies that are deemed necessary to preserve the subject matter of the dispute. If damage can be caused to the other party as a consequence of the preliminary or interim reliefs granted, the Arbitral Tribunal may require a guarantee from the requesting party.

Interim measures granted by an Arbitral Tribunal are considered binding and are enforceable upon request to the courts, regardless of the stage at which they have been ordered. The party who requests or obtains the recognition or the enforcement of an interim measure is bound to inform the court immediately in the event of revocation, suspension, or modification of such a measure. According to Article 1479 of the Commerce Code, the court which receives a request for recognition or enforcement of an interim measure can, if appropriate, order the requesting party to give a guarantee in case the Arbitral Tribunal has not issued a decision regarding such a guarantee or if it is necessary to protect third-party rights.

7.2 Role of Courts

National courts have the authority to grant preliminary or interim relief in support of arbitration proceedings. According to Article 1425 of the Commerce Code, the parties may request a court to grant provisional relief before or during the arbitration proceedings. As stated in Article 1478 of the Commerce Code, where a request for preliminary relief has been received, courts have full discretion to adopt the interim measures they deem appropriate.

There is no specific provision or case law which establishes that any court-ordered provisional relief will cease to have effect following the constitution of the arbitral tribunal.

7.3 Security for Costs

The Commerce Code does not provide any particular rule regarding security for costs, but Article 1456 grants arbitral tribunals the authority to request each party to deposit equal amounts as an advance of the arbitrator's fees, travel expenses and any other expenses incurred by the arbitrators, as well as for the costs of expert evidence or for any other advice required by the tribunal.

During the proceedings, the Arbitral Tribunal may request the parties to make additional deposits. Upon a request by any of the parties and only where the court is in agreement, the Arbitral Tribunal can fix the amount of such deposits or of any additional deposits, with prior consultation with the court, who may intervene and make any observations and clarifications it deems appropriate.

8. Procedure

8.1 Governing Rules

Article 1435 of the Commerce Code establishes that the parties may freely agree on the procedure to be followed by the arbitral tribunal. In the absence of such an agreement, the tribunal may conduct the proceedings as it deems ap-

propriate, but always following the general guideline of due process which allows both parties to be treated equally and to have a full opportunity to exercise their rights. This power conferred to the arbitral tribunal includes the possibility to determine the admissibility and relevance of the evidence.

8.2 Procedural Steps

According to Articles 1435 and 1436 of the Commerce Code, all procedural steps can be agreed upon between the parties and in the absence of such an agreement, the Arbitral Tribunal may issue the rules it deems appropriate. Thus, there are no particular procedural steps required by Mexican law. However, due process must be observed.

8.3 Legal Representatives

Under Mexican law, there are no particular qualifications or requirements for legal representatives to appear in arbitration proceedings in Mexico, therefore in principle the representation in arbitration is not limited. However, Mexican law establishes certain requirements for legal representatives to be eligible to act before courts, amongst which is the authority to exercise the profession of lawyer, as established in Article 1069 of the Commerce Code.

9. Evidence

9.1 Collection and Submission of Evidence

There is no specific law governing document production in domestic or international arbitration in Mexico, thus the arbitration rules chosen by the parties in each particular case are applicable. Unlike other jurisdictions, in Mexico it is not very clear what happens if a party fails to comply with an Arbitral Tribunal's request to submit a specific document but it is commonly accepted that the Tribunal can draw inferences from the conduct of the parties.

Disclosure or document production in arbitration is commonly used in Mexico; however, there are no specific legal provisions governing such matters. Consequently, the approach taken by courts to disclosure or discovery in arbitration would depend upon the agreement between the parties, if any, on the institutional rules chosen by the parties and on the broad discretion of the Arbitral Tribunal to conduct the proceedings as it deems appropriate. The IBA Rules are commonly established as mandatory between the parties or are at least used as guidelines.

Regarding privilege, in Mexico there are no detailed rules on the issue and the Attorney work-product doctrine does not exist as understood in other jurisdictions. It is therefore sometimes difficult to determine which information must be considered privileged. In any case, the consequences of breaching privilege derive from the regulations of the General Professions Act and the Federal Criminal Code.

Bar associations in Mexico usually have Codes of Ethics or Conduct which are very useful in determining the type of information that cannot be revealed. However, the language used in the provisions of these codes is usually very broad.

The use of written witness statements and cross-examination is very common. Direct oral examinations are also used. It is common practice for arbitrators to question witnesses

9.2 Rules of Evidence

According to Article 1435 of the Commerce Code, parties may freely agree on the procedure to be followed by the arbitral tribunal. In the absence of such an agreement, the tribunal can conduct the proceedings as it deems appropriate. This power conferred on the arbitral tribunal includes the possibility to determine the admissibility and relevance of the evidence, and therefore, the tribunal has the power to determine, in each case, the procedural rules applicable to evidence.

It is common for parties to agree on the adoption of the IBA Rules on the Taking of Evidence to guide arbitration proceedings. The arbitral tribunal will normally refer to these Rules as guidelines or as a reference point in the conduct of the proceedings.

Pursuant to Article 1442 of the Commerce Code, unless otherwise agreed to by the parties, the arbitral tribunal may appoint one or more experts to inform it on specific matters, and request either party to provide experts with all the information that is relevant or give them access to all documents, merchandise or other assets that are necessary for the inspection of such evidence.

Additionally, Article 1443 of the Commerce Code provides that, unless the parties have agreed otherwise, and if either of them so requests or the tribunal deems it necessary, after presenting their findings in writing or orally, the expert is to participate in a hearing at which the parties will have the opportunity to question them and to offer other experts to testify on disputed findings.

9.3 Powers of Compulsion

There are no specific provisions regarding the arbitrators' powers of compulsion to order the production of documents or require the attendance of witnesses, but either they or the parties can request assistance from a court.

10. Confidentiality

Under Mexican law, there is no specific provision that regulates the confidentiality of arbitration proceedings. Although the chapter on arbitration of the Commerce Code adopts the UNICITRAL Model Law, it is silent on the issue of confiden-

tiality of arbitration proceedings. Nevertheless, as per Article 1435 of the Commerce Code, the parties have broad discretion to decide the rules that will govern arbitration proceedings, and within those rules they can determine whether the arbitration should be confidential. Naturally, the arbitrators will be bound by any confidentiality agreement included in the arbitration agreement.

Under the rules of arbitration of certain institutions, such as the CAM and CANACO, arbitration proceedings are confidential, unless otherwise agreed by the parties.

11. The Award

11.1 Legal Requirements

According to Article 1448 of the Commerce Code, in order for an award to be valid, it must be in writing and signed by the arbitrators. If there is more than one arbitrator, the signatures of a majority will be sufficient, as long as the reasons why the remaining arbitrators failed to sign are clearly established.

The award must be a reasoned decision, unless the parties have agreed otherwise or have reached a settlement.

Also, the award must set forth the date it was entered and the place where the arbitration was held.

Once the award has been issued, the tribunal must give notice to the participating parties by delivering to them a copy of the award, signed by the arbitrators.

11.2 Types of Remedies

The types of remedies that an Arbitral Tribunal may award are not limited under Mexican law. Arbitral Tribunals may grant any type of remedy or relief and the only limitation would be its lack of authority to grant enforcement relief, since it would necessarily have to be requested from a court.

11.3 Recovering Interest and Legal Costs

The parties are entitled to recover interest and legal costs. According to Article 1455 of the Commerce Code, the costs of arbitration are to be borne by the unsuccessful party. However, the Arbitral Tribunal can determine to divide the costs on a pro rata basis, if appropriate and considering the specific circumstances of the dispute.

As per Article 1416, paragraph IV of the Commerce Code, the costs which the successful party is entitled to recover include the fees of the arbitral tribunal, the travel and other expenses incurred by the arbitrators, the fees for expert advice or any other assistance required by the tribunal, travel and other expenses incurred by the witnesses if approved by the arbitral tribunal, the costs and legal fees of the prevailing party if they are claimed during the arbitration, and only in an amount approved by the arbitral tribunal as reasonable, and the fees and expenses of the institution that appointed the arbitrators.

12. Review of an Award

12.1 Grounds for Appeal

Given that the chapter on arbitration of the Commerce Code follows the UNCITRAL Model Law, arbitral awards are considered final and binding upon the parties and cannot be appealed. However, they can be challenged in setting-aside proceedings.

From the terms of Article 1457 of the Commerce Code, it should be concluded that national courts are prohibited from reviewing the merits of a final award, but they may set aside an award on one of the following grounds:

1. If the party requesting it proves that: (i) if one of the parties to the arbitration agreement was subject to a legal disability, the agreement is invalid pursuant to the laws that were designated; or if no other laws were designated, is invalid under Mexican law; (ii) the party in question was not given proper notice of the designation of one of the arbitrators or of the arbitration proceedings, or was impaired by any other reasons to assert their rights; (iii) the award refers to a controversy not contemplated within the arbitration agreement or contains a ruling that exceeds the terms of the arbitration agreement; (iv) the constitution of the arbitral tribunal or the arbitration procedures were not conducted in accordance with the agreement between the parties, unless that agreement is in conflict with the provisions of the Commerce Code, which the parties cannot waive; or, in the absence of such an agreement, the proceedings were not in conformity with the provisions of the Commerce Code.

2. If the judge considers that, in accordance with Mexican law, the object of the dispute is not arbitrable, or the award is contrary to public policy.

The request to set aside an award is to be filed within a period of three months from the date on which notice of the award is received. However, in the event that either party requests the tribunal to correct any errors of the award, to give an interpretation of that award or to enter an additional award, regarding claims which were presented in the proceedings but omitted from consideration in the award, the aforementioned three-month period is to begin on the date that the petition was ruled on by the arbitral tribunal.

The average duration of challenge proceedings is from six months to one year, and may be more in complex cases.

Pursuant to Article 1457 of the Commerce Code, the grounds to challenge an arbitral award are the same as those established for refusing to enforce an award.

12.2 Excluding/Expanding the Scope of Appeal

Under Mexican law, arbitral awards cannot be appealed but can be challenged through a special trial before local or federal courts. It is arguable that the right to challenge an arbitration award is considered to be a provision of a public policy nature and therefore, that it is not allowed to be waived. However, this issue has not been resolved by Mexican courts.

Expanding the scope of the agreement does not violate public policy and consequently the parties are free to establish the corresponding proceeding. The prevailing opinion is that such a proceeding will have to be a full trial as provided in Articles 1052 and 1053 of the Commerce Code, but the rules that will govern it will be those agreed upon between the parties. Hence, it would not be an appeal but rather a special trial which would need to be agreed upon in writing before a notary public as per the terms of the Commerce Code.

12.3 Standard of Judicial Review

There is no specific standard of judicial review of the merits of a case. Rather, Mexican courts are not allowed to revisit the merits of a final award and according to Article 1457 of the Commerce Code, Arbitral awards may only be challenged and declared null and void by the competent court if the requesting party proves: (i) that one of the parties was subject to a legal disability at the time they signed the agreement; (ii) that a party did not receive proper notice of the designation of one of the arbitrators or of the initiation of the arbitration proceedings, or was unable to assert their rights for any other reasons; (iii) that the award refers to a controversy not included within the scope of the arbitration agreement or contains rulings that exceed the terms of the arbitration agreement; (iv) that the integration of the arbitral tribunal or the arbitration procedures were not performed in accordance with the agreement between the parties, unless that agreement contravenes any provision of the Commerce Code which the parties cannot waive; or, in the absence of such an agreement, the proceedings were not performed in compliance with such provisions; or (v) that the court considers that under Mexican law, the subject matter of the controversy is not arbitrable or the award is contrary to public policy.

13. Enforcement of an Award

13.1 New York Convention

Mexico is party to the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of 1958, which was ratified in 1971, and it made no declarations or reservations upon the execution of the New York Convention.

Mexico is also party to the Inter-American Convention of Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention), which was ratified in 1987, and to the Inter-American Convention on International Commercial Arbitration (Panama Convention).

13.2 Enforcement Procedure

In order to enforce an award in Mexico, Article 1461 of the Commerce Code establishes that the interested party must file a request for recognition and enforcement before a Mexican commercial court. According to the Commerce Code, the recognition and enforcement of awards must be effected through the special procedure pertaining to commercial transactions and arbitration. Regardless of the country in which an award has been issued, it must be deemed valid and binding and must be enforced, upon written request to the court.

The initial request must contain: (i) the original arbitration agreement or a certified copy of it; (ii) the original award duly authenticated or a certified copy of it; and (iii) if the award or the agreement to arbitrate is not in Spanish, a certified translation.

According to Articles 1473 and 1474 of the Commerce Code, the court has to notify the defendants and inform them that they have 15 business days to file an answer. Upon the expiry of such a term and in the event that the parties do not produce any additional evidence and the court does not consider that further evidence is necessary, the parties will be summoned to a hearing that is to take place within the next three business days.

On the other hand, if any party requests production of evidence or if the court considers it necessary, in terms of Article 1475 of the Commerce Code, the court grants a period of ten days to produce evidence. Once the evidentiary hearing is held, the court issues a judgment. Pursuant to Article 1077 of the Commerce Code, the court should issue judgment within 15 business days after the execution of all the previous procedural acts.

An enforcement decision issued by a court can be challenged by an amparo proceeding, before the Federal Courts. Amparo trails are constitutional remedies intended to protect constitutional rights.

13.3 Approach of the Courts

In the vast majority of cases, Mexican courts favour the enforcement of national or foreign awards, unless such enforcement implies a violation of due process.

A court can refuse to recognise and enforce an award under Mexican law only for the following limited reasons, established in Article 1462 of the Commerce Code, which mirror those provided for in the New York Convention:

- In the event that the arbitration agreement was null or the parties lacked capacity to execute the agreement.
- If the appointing authority did not give the losing party proper notice of the appointment of the arbitrator or of the initiation of the arbitration proceedings, or the losing party was otherwise unable to present its case.
- In a case where the award deals with a matter not contemplated within the scope of arbitration agreement.
- If the integration of the arbitral tribunal or the arbitral procedure breaches the parties' agreement or, in the absence of any such agreement, the law of the place where the arbitration took place.
- The award is either not yet binding in, or was set aside by a court at, the seat of arbitration.
- The subject matter of the parties' dispute is not arbitrable under Mexican law.
- Recognition or enforcement of the award would be contrary to public policy.

Only the resisting party can raise the first five of these causes and that party has the burden of proof. However, a court may invoke the last two causes ex officio. Mexican courts can only rule on the nullity of an award based on those limited grounds. For this reason, they have been careful not to attend arguments which result in the revisiting of the merits of the controversy. In fact, there have even been some rulings of Mexican courts denying the nullification of awards based on allegations of breach of public policy which are intended to revisit the merits of the case.