The Arbitration Review of the Americas

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Mexico: the aftermath of the Lion award

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Summary

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Discussion points

- Surge in denial of justice claims against Mexico for acts of its judiciary
- Analysis of the reasoning in the ***PACC Offshore Services Holdings LTD v United Mexican States*** award
- Analysis of a recent precedent issued by the Mexican Supreme Court regarding the annulment of awards

Referenced in this article

- ***Finley Resources Inc, MWS Management Inc, and Prize Permanent Holdings, LL v United Mexican States***
- ***Amerra Capital Management, LLC, Amerra Agri Fund, LP Amerra Agri Opportunity Fund, LP JPMorgan Chase Bank, National Association, on behalf of the JPMorgan Chase Retirement Plan v United Mexican States***
- Goldgroup Mining Inc press release dated 6 March 2023
- ***Goldgroup Resources, Inc v United Mexican States***
- ***PACC Offshore Services Holdings LTD v United Mexican States***
- ***Amparo Directo en Revisión*** 7790/2019 and non-binding precedents stemming from this ruling

Proliferation of denial of justice claims following Lion

In the previous edition of the ***Arbitration Review of the Americas***, the authors of this chapter outlined the novel aspects surrounding the final award rendered in ***Lion Mexico Consolidated LP v United Mexican States***, as well as the estimated impact it would have in

other investment disputes against Mexico. ***Lion*** stemmed from a commercial trial brought by Lion, a Canadian investment management corporation, against a Mexican businessman. The claimant argued that the defendant benefited from the Mexican supposed judiciary's flaws in preventing the Canadian corporation from collecting the mortgages that secured the debtor's payment. After years of litigation, the claimant was unable to recover the owed amounts. This result prompted Lion to initiate an ICSID arbitration on the grounds of denial of justice. In September 2021, a NAFTA tribunal declared Mexico liable for denial of justice for acts of the Mexican courts and ordered the country to repair the damages caused to Lion.

The authors of this chapter predicted that a likely consequence of the ***Lion*** award would be an increase in denial of justice claims against Mexico based on the formalism and idiosyncrasies of the Mexican courts. ***Lion*** created an alternative path for investors to seek a review of the decisions rendered by national tribunals. New claims against Mexico confirm a trend in this direction.

On March 2021, Finley Resources Inc, MWS Management Inc and Prize Permanent Holdings, LLC (Finley et al) filed a request for arbitration against the United Mexican States asserting a failure to provide justice to the claimants by the Mexican courts and sought relief under NAFTA and USMCA.[1] The facts of the ***Finley*** case concern three public contracts entered into between the claimants and Pemex – the Mexican oil and gas utility – which Pemex allegedly breached, leading to several civil and administrative lawsuits.[2] According to the claimants' statement of claim, Mexican courts denied justice and due process by, among other actions, issuing irregular decisions and judgments, contradicting fundamental principles of Mexican procedural law and failing to adjudicate the claims expeditiously.[3]

To uphold these allegations, Finley et al expressly referred to the standards set by the tribunal in ***Lion*** to assert that the undue delay in the exercise of justice must be considered a breach of the fair and equitable treatment standard provided in NAFTA.[4] The claimants pointed out that, although the lawsuits against Pemex had been filed since September 2015, as of March 2021, cases were pending. In their view, this situation amounted to a denial of justice, as it exceeded the 30-month benchmark of domestic litigation set by the USMCA.[5]

Through the remaining stages of the arbitration, the parties will discuss whether Mexican courts acted irregularly and whether a denial of justice can be established. The tribunal will also have to determine if claimants' assertions regarding the breach of fundamental procedural principles can be reviewed in this venue or if these claims belong to an appeal challenge before local courts.

Similarly, in December 2020, Amerra Capital Management LLC and others (Amerra et al) notified their intention to commence an investment arbitration against the United Mexican States. Amerra et al also claim violations of the fair and equitable treatment standard, deriving from a failure to exercise their rights within their debtors' bankruptcy proceedings.[6] According to the notice of arbitration filed in August 2022, the case involves four creditors that granted a loan to Mexican companies, secured with two mortgages on property located in the state of Sinaloa. After the debtors' default, the creditors sought to foreclose the mortgages through various claims that local courts allegedly thwarted.[7]

The claimants allege that Mexican courts acted irregularly. Among others, the claimants affirm that seven years elapsed since the beginning of the mortgage trial and the local court failed even to serve the defendants with their claim.[8] Furthermore, Amerra et al.indicate that the bankruptcy proceedings of one of the real estate's owners – and debtor of the loan

– were polluted with illegal actions by both the conciliator and the judge, which led to the unduly adjudication of the real estate.[9] Thus, claimants expressed their intention to claim damages from Mexico for an alleged breach of the fair and equitable treatment standard following a denial of justice by Mexican courts.

Lastly, another denial of justice claim was recently brought by Goldgroup Resources, Inc (Goldgroup) – a Canadian mining company – against Mexico. In a recent press release, the claimant confirmed its intention to seek damages for Mexico's alleged breach of NAFTA. Apparently, Goldgroup will assert claims for expropriation and denial of justice caused by 10 years of litigation without relief.[10] According to the request for arbitration, the dispute involves the Mexican subsidiary of DynaResource, Inc, in relation to the San José de Gracia gold exploration project located in the state of Sinaloa.[11] The case was filed just months before the deadline for investors to file legacy claims under NAFTA.[12]

The cases discussed above share the denial of justice claim as a common thread. Investors' ground for such a claim is twofold. First, delays in the adjudication of the trials are alleged. Second, claimants plead irregularities during the proceedings. Both allegations were addressed in the ***Lion*** award as relevant parameters to determine whether Mexican courts' thwarted the investors rights of due process and access to justice.

The arbitral tribunals hearing these cases will need to conduct a detailed examination of the actions carried by the Mexican courts in each specific instance. However, the commonalities among them give rise to concerns about a potential issue. Specifically, the consistent allegations in investment arbitrations regarding the routine practices of the Mexican judiciary might suggest an nonconformity with the general structure of Mexican courts and procedural law, rather than a deliberate attempt by the Mexican state to prevent investors from utilising the national courts to assert their rights effectively.

Posh v the United Mexican States: an analysis of fair and equitable treatment and judicial expropriation

Within the last year, a remarkable event in the investment arbitration arena was the award rendered in the arbitration commenced by PACC Offshore Services Holdings LTD (Posh). The facts of this dispute involved a Singaporean marine services provider that claimed the unlawful seizure of vessels during a fraud investigation of Mexican oil company Oceanografía (OSA), a provider of offshore oil services to Pemex. Posh asserted that, owing to a politically driven campaign aimed to bring down OSA, its investment was destructed by the allegedly arbitrary, irregular and illegal actions of both judicial and administrative Mexican authorities.

In its final award, the first publicly available concerning the Oceanografía saga, the tribunal granted the claimant relief for damages caused by the Mexican authorities' order to seize certain vessels, which prevented the claimant from obtaining the proceeds during the detention period.[13] The tribunal found that these actions constituted a ***temporary*** deprivation of their investment and, thus, a breach of the fair and equitable treatment.[14] According to the award, the detention of the vessels was indeed unjustified, as proven by the fact that the ultimate reason for their release was already known to Mexico before their seizure. Thus, the tribunal marked Mexico's actions as arbitrary, grossly unfair and unjust.

On another note, this decision holds particular interest as it directly addresses allegations of judicial expropriation based on an alleged denial of due process and lack of access to courts. Posh submitted this claim following the determination of a Mexican Federal Court to dismiss an ***amparo*** lawsuit – a constitutional claim – filed by Posh, grounded on lack of standing or legal interest. The tribunal highlighted that, as Posh maintained other ordinary remedies before Mexican courts in its reach, it could not be concluded that there was a denial of due process or lack of access to courts. Rather, the tribunal found that this situation only showed the 'differences in legal standing depending on the exact remedy to be pursued', which is a common distinction within legal systems.[15]

In the award, the tribunal acknowledged that the acts of the judiciary should not be prima facie excluded from being considered as an expropriation. It also warned that, in claims arising from alleged restrictions to access to justice and due process, the role of the arbitral tribunal should not be confused with the role of an appellate court in domestic decisions.[16] To uphold this finding, the tribunal noted that, in accordance with the precedents cited by the parties, this standard requires the convergence of certain circumstances, such as appalling and shocking conduct by the national courts.

Consequently, the tribunal concluded that, in this case, the judicial Mexican authorities did not seem to have acted egregiously or shockingly to the extent that a judicial expropriation had taken place. Hence, the tribunal was compelled by Posh's assertions in connection with a lack of fair and equitable treatment while it dismissed the allegations concerning a judicial expropriation resulting from a denial of due process and lack of access to the courts.

Posh v Mexico shows another example of the complexities an arbitral tribunal may face in cases against Mexico involving denial of justice and judicial expropriation claims. In these cases, the tribunals must ascertain whether the domestic courts' decisions comply with the applicable legal provisions that, in any case, should be regarded in an appeal instance or if these decisions are indeed proof of a breach by the state of its obligation to provide adequate judicial measures to ensure the investor's effective protection.

The Mexican Supreme Court provides guidance on the annulment of arbitral awards

The Mexican Supreme Court recently issued two new precedents regarding the annulment of arbitral awards that arise from the same dispute. The non-binding precedents (***tesis aisladas*** 1a XXX/2022 (10a) and 1a XXXII/2022 (10a)) were published in December 2022 and confirm Mexico as a pro-arbitration forum.

In the case that led to these precedents, the claimants were unsuccessful in an ICDR arbitration and challenged the award before Mexican courts. A federal district court annulled the award, and a collegiate court, following the defendant's ***amparo*** claim, reversed the decision and affirmed the validity of the award. The claimants challenged this last ruling through an extraordinary appeal before the Mexican Supreme Court. The Court's First Chamber issued the ruling 7790/2019, which dismissed the challenge and upheld the collegiate court's decision – and, thus, the arbitral award.

The key issue in dispute was whether article 1457(I)(b) of the Mexican Commercial Code could ground the annulment of the award, in relation to article 1434. The Mexican

Commercial Code Title IV, Book V – Mexico's ***lex arbitri*** – was drafted with language essentially identical to that of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985. Specifically, article 1457(I)(b) uses wording nearly identical to that of Model Law article 34(1)(a)(ii), stating that Mexican courts may annul arbitral awards should the party making the application prove that it 'was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case'. On the other hand, article 1434 replicates the wording used in Model Law article 18, providing that 'parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'.

Throughout the annulment proceeding, the claimants argued that the arbitral tribunal favoured the respondent and overlooked relevant evidence that claimants produced – even applying different standards of proof to the parties. The result, according to claimants, falls within article 1457(I)(b) and infringes article 1434. The award contained a blatantly illegal decision, claimants asserted, which Mexican courts could not uphold. In the claimants' words, lack of judicial scrutiny in a case like this would turn arbitration into a mechanism to 'legally' violate the law, contravening the Mexican Constitution.

The District Court concluded that the arbitral tribunal indeed violated due process and treated the parties unequally. This ruling sustained that the arbitral tribunal (1) failed to examine witness statements and documents that claimants produced under the same standard and requirements for both parties, (2) failed to weigh a relevant and material document and (3) failed to consider arguments related to a disputed matter brought by claimants, thus preventing them from presenting their case. The District Court considered that its ruling did not constitute a reexamination of the evidence of the case – which is reserved to the arbitral tribunal – but only determined that parties were subjected to different standards of proof allegedly applied by the tribunal. For the District Court, the tribunal's duty to hear the parties includes a full study of arguments and evidence that the parties brought.

The Collegiate Court, after the defendant's ***amparo*** claim, ruled that articles 1457(I)(b) and 1434 relate to procedural rights throughout the conduct of the arbitral proceedings and not to the award itself. The arbitral tribunal, according to the Collegiate Court, applies standards of proof and requirements and weighs evidence when adjudicating the case. That is a matter of the merits of the case, not procedural. Then, as reasoned by the Collegiate Court, articles 1457(I)(b) and 1434 are inapplicable to these duties of the tribunal – and this interpretation respects the parties' free will to submit the dispute to arbitration.

The claimants insisted in their extraordinary appeal before the Mexican Supreme Court that the award, and the Collegiate Court's ruling that upheld it, were illegal. The First Chamber of the Supreme Court unfolded the matter into three issues:

- first, if the right to be heard under the Mexican Constitution, applicable to Mexican authorities, should be considered applicable by analogy to arbitral proceedings;
- second, which is the correct interpretation of articles 1457(I)(b) and 1434 of the Mexican Commercial Code; and
- third, if these articles violate a principle of arbitral due process.

On the first issue, the First Chamber of the Supreme Court reasoned that according to its own line of precedents, the rights to be heard and due process are ***procedural***.[17] Those rights arise during proceedings to ensure the parties the opportunities to present their case ***before***

judgment. The ruling itself is an essential component of the proceedings, but due process only guarantees the parties the right to have the ruling issued. Whether the outcome of the ruling is right or wrong, supported by law or not, and duly reasoned or not is a matter of legality, a different right that the Mexican Constitution also protects – dismembered in the principles of clarity, congruence, completeness and others that any ruling should comply with.

The ruling quotes some of the Supreme Court's precedents to explain that the Mexican Constitution does not directly control due process and legality in arbitration. As arbitrators are not authorities, these principles shall apply according to the nature of arbitration and in line with international treaties and the governing law. The analogous interpretation of constitutional principles may only be a viable tool to define the scope of due process and legality in arbitration, in light of its nature and purpose.[18] At its core, the First Chamber reasons, arbitration is a method to seek justice. Then fundamental rights like equality or the right to be heard apply, adapted to the features and purposes of arbitration.

In the second issue, the First Chamber compared the 1985 UNCITRAL Model Law and the Mexican Commercial Code, which replicates it. Both, according to the First Chamber, consider the rights of equality and defence as procedural or instrumental, separate from the rules that control the award. For example, the award should solve the dispute by applying the rules that the parties chose, considering commercial practices, and reasoning its decision – a different set of rights than those pertaining to the proceedings.[19]

The scope and purpose of the rights of equal treatment and defence relate to the proceedings, before adjudication.[20] However, if the award solves a new matter that the parties did not dispute, that award would violate the procedural right of defence. This violation would arise in the award, but it was during proceedings that the parties were not heard over that new issue. Such a case is different, according to the First Chamber, to the assessment of the evidence in the award itself, or wrong reasoning, or the omission to consider a party's arguments – none of which contravene the procedural right to be heard.

On the third issue, the First Chamber reasoned that articles 1457(I)(b) and 1434 of Mexican Commercial Code do not violate arbitral due process. Claimants argued that procedural protections in Mexico are insufficient to ensure arbitral due process as there is no further challenge or appeal against the award as there is with a judicial ruling. The arbitral due process, according to the claimants, demands higher protection and cannot be limited to procedural rights previous to the decision but must be extended to the award to determine if the parties were equally heard.

The First Chamber explained that arbitration is anchored into the parties' free will and the finality of the award is an admissible feature conforming to the nature and purpose of arbitration. Judicial review is exceptional in nature, and judges must self-restrain. If the claimants' view prevailed, the freedom that the Constitution grants to choose arbitration would lose any sense and judges would materially solve arbitration cases with ***de novo*** reviews. That, the First Chamber ruled, would contradict the parties will to arbitrate. Then, the Commercial Code does not violate arbitral due process.

In conclusion, the Supreme Court ruled that articles 1457(I)(b) and 1434 of Mexican Commercial Code must be strictly construed. Judicial review is limited according to these provisions to procedural violations that arose during the arbitration proceeding – and could not touch the merits of the award under these provisions. The assessment of evidence and

deficiencies on reasoning and completeness of the award does not fall within the scope of articles 1457(I)(b) and 1434. In a case of blatant mistakes or misjudgments related to the merits of the dispute, the affected party may argue a violation of public policy and seek annulment on that ground.

This new precedent fits as a new piece of a pro-arbitration puzzle that the Supreme Court has built in Mexico in the past decade.

Footnotes

[1] See Request for Arbitration, available at: https://www.italaw.com/sites/default/files/case-documents/italaw170575.pdf.

[2] Id.

[3] See Statement of Claim paragraphs 369–378, available at: https://www.italaw.com/sites/default/files/case-documents/italaw170581.pdf.

[4] Id.

[5] Id.

[6] See ***Notificación de intención de someter una reclamación a arbitraje***, available at: https://www.gob.mx/cms/uploads/attachment/file/627035/2020-12-03_AMERRA_et_al_NOI_vpubl_cl.pdf.

[7] See Notice of Arbitration, available at: https://www.gob.mx/cms/uploads/attachment/file/824290/2022-08-03_AMERRA_et_al_NOA_ENGt.pdf.

[8] Id.

[9] Id.

[10] See Goldgroup Mining Inc press release dated 6 March 2023, available at: https://www.italaw.com/sites/default/files/case-documents/italaw171253.pdf.

[11] See Request for Arbitration, available at: https://www.gob.mx/cms/uploads/attachment/file/818079/Solicitud_de_Arbitraje._ENG.pdf.

[12] Since the NAFTA treaty expired on 1 July 2020, with the entry into force of the USMCA, which states that investors can bring NAFTA 'legacy investment claims' for a period of three years after the expiration date of NAFTA (or until 1 July 2023), then investment arbitration claims brought under the NAFTA can only be raised until such date (also known as sunset period).

[13] See final award, available at: https://www.italaw.com/sites/default/files/case-documents/italaw170260.pdf.

[14] Id.

[15] Id.

[16] Id.

[17] Mexican Supreme Court of Justice, ***Amparo directo en revisión*** 7790/2019, paragraph 63.

[18] Ibid, paragraph 88.

[19] Articles 28, 1) and 31, 2) of the Model Law, and 1445 and 1448 of Mexican Commercial Code.

[20] ***Amparo directo en revisión*** 7790/2019, op cit, paragraph 110.

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PROLIFERATION OF DENIAL OF JUSTICE CLAIMS FOLLOWING LION

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POSH V THE UNITED MEXICAN STATES: AN ANALYSIS OF FAIR AND EQUITABLE TREATMENT AND JUDICIAL EXPROPRIATION

Within the last year, a remarkable event in the investment arbitration arena was the award rendered in the arbitration commenced by PACC Offshore Services Holdings LTD (Posh). The facts of this dispute involved a Singaporean marine services provider that claimed the unlawful seizure of vessels during a fraud investigation of Mexican oil company Oceanografía (OSA), a provider of offshore oil services to Pemex. Posh asserted that, owing to a politically driven campaign aimed to bring down OSA, its investment was destructed by the allegedly arbitrary, irregular and illegal actions of both judicial and administrative Mexican authorities.

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Consequently, the tribunal concluded that, in this case, the judicial Mexican authorities did not seem to have acted egregiously or shockingly to the extent that a judicial expropriation had taken place. Hence, the tribunal was compelled by Posh's assertions in connection with a lack of fair and equitable treatment while it dismissed the allegations concerning a judicial expropriation resulting from a denial of due process and lack of access to the courts.

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THE MEXICAN SUPREME COURT PROVIDES GUIDANCE ON THE ANNULMENT OF ARBITRAL AWARDS

The Mexican Supreme Court recently issued two new precedents regarding the annulment of arbitral awards that arise from the same dispute. The non-binding precedents (***tesis aisladas*** 1a XXX/2022 (10a) and 1a XXXII/2022 (10a)) were published in December 2022 and confirm Mexico as a pro-arbitration forum.

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The key issue in dispute was whether article 1457(I)(b) of the Mexican Commercial Code could ground the annulment of the award, in relation to article 1434. The Mexican Commercial Code Title IV, Book V – Mexico's ***lex arbitri*** – was drafted with language essentially identical to that of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985. Specifically, article 1457(I)(b) uses wording nearly identical to that of Model Law article 34(1)(a)(ii), stating that Mexican courts may annul arbitral awards should the party making the application prove that it 'was not given proper notice of the appointment of an arbitrator or of the arbitral

proceedings or was otherwise unable to present his case'. On the other hand, article 1434 replicates the wording used in Model Law article 18, providing that 'parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'.

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The District Court concluded that the arbitral tribunal indeed violated due process and treated the parties unequally. This ruling sustained that the arbitral tribunal (1) failed to examine witness statements and documents that claimants produced under the same standard and requirements for both parties, (2) failed to weigh a relevant and material document and (3) failed to consider arguments related to a disputed matter brought by claimants, thus preventing them from presenting their case. The District Court considered that its ruling did not constitute a reexamination of the evidence of the case – which is reserved to the arbitral tribunal – but only determined that parties were subjected to different standards of proof allegedly applied by the tribunal. For the District Court, the tribunal's duty to hear the parties includes a full study of arguments and evidence that the parties brought.

The Collegiate Court, after the defendant's ***amparo*** claim, ruled that articles 1457(I)(b) and 1434 relate to procedural rights throughout the conduct of the arbitral proceedings and not to the award itself. The arbitral tribunal, according to the Collegiate Court, applies standards of proof and requirements and weighs evidence when adjudicating the case. That is a matter of the merits of the case, not procedural. Then, as reasoned by the Collegiate Court, articles 1457(I)(b) and 1434 are inapplicable to these duties of the tribunal – and this interpretation respects the parties' free will to submit the dispute to arbitration.

The claimants insisted in their extraordinary appeal before the Mexican Supreme Court that the award, and the Collegiate Court's ruling that upheld it, were illegal. The First Chamber of the Supreme Court unfolded the matter into three issues:

- first, if the right to be heard under the Mexican Constitution, applicable to Mexican authorities, should be considered applicable by analogy to arbitral proceedings;
- second, which is the correct interpretation of articles 1457(I)(b) and 1434 of the Mexican Commercial Code; and
- third, if these articles violate a principle of arbitral due process.

On the first issue, the First Chamber of the Supreme Court reasoned that according to its own line of precedents, the rights to be heard and due process are ***procedural***.[17] Those rights arise during proceedings to ensure the parties the opportunities to present their case ***before*** judgment. The ruling itself is an essential component of the proceedings, but due process only guarantees the parties the right to have the ruling issued. Whether the outcome of the ruling is right or wrong, supported by law or not, and duly reasoned or not is a matter of legality, a different right that the Mexican Constitution also protects – dismembered in the principles of clarity, congruence, completeness and others that any ruling should comply with.

The ruling quotes some of the Supreme Court's precedents to explain that the Mexican Constitution does not directly control due process and legality in arbitration. As arbitrators are not authorities, these principles shall apply according to the nature of arbitration and in line with international treaties and the governing law. The analogous interpretation of constitutional principles may only be a viable tool to define the scope of due process and legality in arbitration, in light of its nature and purpose.[18] At its core, the First Chamber reasons, arbitration is a method to seek justice. Then fundamental rights like equality or the right to be heard apply, adapted to the features and purposes of arbitration.

In the second issue, the First Chamber compared the 1985 UNCITRAL Model Law and the Mexican Commercial Code, which replicates it. Both, according to the First Chamber, consider the rights of equality and defence as procedural or instrumental, separate from the rules that control the award. For example, the award should solve the dispute by applying the rules that the parties chose, considering commercial practices, and reasoning its decision – a different set of rights than those pertaining to the proceedings.[19]

The scope and purpose of the rights of equal treatment and defence relate to the proceedings, before adjudication.[20] However, if the award solves a new matter that the parties did not dispute, that award would violate the procedural right of defence. This violation would arise in the award, but it was during proceedings that the parties were not heard over that new issue. Such a case is different, according to the First Chamber, to the assessment of the evidence in the award itself, or wrong reasoning, or the omission to consider a party's arguments – none of which contravene the procedural right to be heard.

On the third issue, the First Chamber reasoned that articles 1457(I)(b) and 1434 of Mexican Commercial Code do not violate arbitral due process. Claimants argued that procedural protections in Mexico are insufficient to ensure arbitral due process as there is no further challenge or appeal against the award as there is with a judicial ruling. The arbitral due process, according to the claimants, demands higher protection and cannot be limited to procedural rights previous to the decision but must be extended to the award to determine if the parties were equally heard.

The First Chamber explained that arbitration is anchored into the parties' free will and the finality of the award is an admissible feature conforming to the nature and purpose of arbitration. Judicial review is exceptional in nature, and judges must self-restrain. If the claimants' view prevailed, the freedom that the Constitution grants to choose arbitration would lose any sense and judges would materially solve arbitration cases with ***de novo*** reviews. That, the First Chamber ruled, would contradict the parties will to arbitrate. Then, the Commercial Code does not violate arbitral due process.

In conclusion, the Supreme Court ruled that articles 1457(I)(b) and 1434 of Mexican Commercial Code must be strictly construed. Judicial review is limited according to these provisions to procedural violations that arose during the arbitration proceeding – and could not touch the merits of the award under these provisions. The assessment of evidence and deficiencies on reasoning and completeness of the award does not fall within the scope of articles 1457(I)(b) and 1434. In a case of blatant mistakes or misjudgments related to the merits of the dispute, the affected party may argue a violation of public policy and seek annulment on that ground.

This new precedent fits as a new piece of a pro-arbitration puzzle that the Supreme Court has built in Mexico in the past decade.

Endnotes

1 See Request for Arbitration, available at: https://www.italaw.com/sites/default/files/case-documents/italaw170575.pdf. Back to section

2 Id. Back to section

3 See Statement of Claim paragraphs 369–378, available at: https://www.italaw.com/sites/default/files/case-documents/italaw170581.pdf. Back to section

4 Id. Back to section

5 Id. Back to section

6 See*Notificación de intención de someter una reclamación a arbitraje*, available at: https://www.gob.mx/cms/uploads/attachment/file/627035/2020-12-03_AMERRA_et_-al_NOI_vpubl_cl.pdf. Back to section

7 See Notice of Arbitration, available at: https://www.gob.mx/cms/uploads/attachment/file/824290/2022-08-03_AMERRA_et_-al_NOA_ENGt.pdf. Back to section

8 Id. Back to section

9 Id. Back to section

10 See Goldgroup Mining Inc press release dated 6 March 2023, available at: https://www.italaw.com/sites/default/files/case-documents/italaw171253.pdf. Back to section

11 See Request for Arbitration, available at: https://www.gob.mx/cms/uploads/attachment/file/818079/Solicitud_de_Arbitraje._ENG.pdf. Back to section

12 Since the NAFTA treaty expired on 1 July 2020, with the entry into force of the USMCA, which states that investors can bring NAFTA 'legacy investment claims' for a period of three years after the expiration date of NAFTA (or until 1 July 2023), then investment arbitration claims brought under the NAFTA can only be raised until such date (also known as sunset period). Back to section

13 See final award, available at: https://www.italaw.com/sites/default/files/case-documents/italaw170260.pdf. Back to section

14 Id. Back to section

15 Id. Back to section

16 Id. Back to section

17 Mexican Supreme Court of Justice,*Amparo directo en revisión* 7790/2019, paragraph 63. Back to section

18 Ibid, paragraph 88. Back to section

19 Articles 28, 1) and 31, 2) of the Model Law, and 1445 and 1448 of Mexican Commercial Code. Back to section

20 *Amparo directo en revisión* 7790/2019, op cit, paragraph 110. Back to section

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