



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Working Session “State Court Participation in Arbitration – Help or Hindrance?”

Commission(s) in charge of the Session/Workshop:

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National Report of Mexico

Eduardo J. De la Peña Bernal

Astigarraga Davis Mullins & Grossman, P.A.
1001 Brickell Bay Drive, 9th floor, Miami, Fl.
33134, United States of America
Tel: +1-305-372-8282
Email address: edelapena@astidavis.com

General Reporters:

Silvia Pavlica Dahlberg, VINGE, Gothenburg, Sweden
Arnoldo Lacayo, Astigarraga Davis, Miami, USA
Gunnar Pickl, Dorda Brügger Jordis, Vienna, Austria

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1. Enforcement of the Arbitration Agreement and other issues related to Jurisdiction

1.1. *In your jurisdiction, is there an obligation for state courts to enforce an arbitration agreement, i.e. to deny or otherwise refrain from exercising jurisdiction on that ground?*

Yes. Mexico has adopted in its Commercial Code the UNCITRAL Model Law on Commercial Arbitration with some modifications. Hence, pursuant to Mexico's article 1424 of its Commercial Code, "[t]he judge before whom an action is brought in a matter which is the subject of an arbitration agreement shall, when requested by a party, refer the parties to arbitration unless he finds that the agreement is null and void, inoperative or incapable of being performed."¹

1.2. *If so, how is the enforcement carried out? Please give a short overview of the procedure and the type of decision that the court would issue.*

In accordance with article 1464 of Mexico's Commercial Code, the request to compel to arbitration must be made by the applicant in the first brief on the merits of the matter. The court shall decide immediately after granting to any other parties in the proceedings their right to be heard.

If the court orders that the litigation must be referred to arbitration, then the court shall order as well the stay of the proceedings. By request of any of the parties, the court shall deem the proceedings as concluded once the matter has been finally settled in arbitration. The order deciding on the application to compel to arbitration is not subject to appeal.

1.3. *Is it required that the respondent(s) challenge or object to the court's jurisdiction or would the court enforce the arbitration agreement on its own motion, provided that it becomes aware of the fact that an arbitration agreement between the parties exists?*

As noted above, Mexico's article 1424 of its Commercial Code provides that "[t]he judge before whom an action is brought in a matter which is the subject of an arbitration agreement shall, when requested by a party, refer the parties to arbitration unless he finds that the agreement is null and void, inoperative or incapable of being performed." It follows that a party must move to compel to arbitrate. Courts cannot *sua sponte* refrain from adjudicating a dispute in lieu of an arbitration agreement.

1.4. *Does your jurisdiction allow a party to bring a declaratory action or any other kind of action to obtain an affirmative declaration by the court about an arbitration agreement (e.g. that an arbitration agreement exists between the parties, that it has a certain scope or that it covers a specific dispute between specific parties)?*

¹ Please also note as well that Mexico is party to the New York Convention, and as such article II.3 of the same applies in Mexico.



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There is no such specific cause of action provided under Mexican law. Having said that, an action of such nature could be theoretically filed. Mexico's Federal Civil Procedure Code in its article 1 recognizes the right to parties to bring declaratory actions to obtain affirmative declarations from the court about parties' rights.

1.5. *If so, what are the procedural requirements, if any, for bringing such a declaratory action? Please focus on the requirements which are specific for this type of action.*

As with any other action filed, the statement of claim must identify the court before which the action is being filed, the name of the plaintiff(s) and defendant(s), the facts and legal grounds upon which the claim is based, and a precise and exact recitation of the relief sought.² It is important to note that the claimant must file with its complaint all documents in his possession that would serve as evidence to prove his claims.³

1.6. *Are there any restrictions as to timing for asserting an objection to the state court's jurisdiction or to bring an action for an affirmative declaration about arbitral jurisdiction? E.g. would on-going challenge proceedings on the ground that the tribunal lacked jurisdiction prevent such an action from being brought?*

In accordance with article 1464 of Mexico's Commercial Code, the objection to the court's jurisdiction (and seeking to compel arbitration), must be brought with the first substantive pleading filed by the applicant in the litigation.

1.7. *When deciding on arbitral jurisdiction, do the courts in your jurisdiction apply the doctrine of assertion or any other doctrine according to which evidence is not required with respect to certain facts (so-called facts of double relevance) or the standard of proof is lowered compared to decisions on the merits in regular civil litigations? If so, does the doctrine apply equally in a declaratory action regarding arbitral jurisdiction and in a litigation case where an objection to the court's jurisdiction has been made with reference to an arbitration agreement? Please describe.*

No such evidentiary doctrines are applied in Mexico. That said, it is important to highlight that in accordance with article 1465 of the Mexican Commercial Code, courts shall adopt a strict criterion when deciding if an arbitration agreement is void, inoperative or incapable of being performed.

1.8. *When deciding on arbitral jurisdiction, how does your jurisdiction handle the situation where there are several alternative grounds for the claims, some covered by the arbitration agreement and some not (e.g. one ground based on contract, one on tort)? Will the courts split the case between different fora or if not, what forum will it refer the entire dispute to?*

In general terms, arbitral tribunals cannot decide matters not covered by the arbitration agreement. Under Mexican law, awards deciding issues not covered by the arbitration agreement or exceeding its terms can be set aside or denied enforcement.⁴ If other issues are decided in

² See Mexico's Federal Code of Civil Procedure, art. 322.

³ See Mexico's Federal Code of Civil Procedure, art. 323 & 324.

⁴ See Mexico's Commercial Code arts. 1457 & 1463.



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such award which are indeed covered by the arbitration agreement, then as to such issues the award will be enforced (or not subject of annulment).⁵

However, please note that the doctrine of *kompetenç-kompetenç* which grants the arbitrators the power to decide its own jurisdiction is recognized under Mexican law.⁶ As such, if a court orders to compel arbitration, declaring a stay on the litigation, but the jurisdiction of the arbitral tribunal is found lacking or if for any reason the dispute is not resolved in whole or in part in the arbitration, then the court can lift the stay on the litigation.⁷

1.9. Does your jurisdiction allow for anti-arbitration injunctions or any other types of decisions attempting to prevent an arbitration from being initiated or from proceeding? Please describe.

No such injunctive relief is expressly referred to (either allowing or rejecting it) under Mexican law. Please note however that Article 384 of Mexico's Federal Code of Civil Procedure provides that before an action is filed, or during the course of the proceedings, courts can issue any measure necessary to preserve the status quo.

1.10. If so, who can such an injunction be directed at – a party, the arbitrator(s), an arbitral institute, etc.?

As no such injunctive relief is expressly referred to (either allowing or rejecting it) under Mexican law, the particularities regarding the same such as who can such an injunction be directed at, are not addressed in the applicable law.

1.11. What connection to your jurisdiction is required for the state courts to be competent to bear such a request?

As no such injunctive relief is expressly referred to (either allowing or rejecting it) under Mexican law, the particularities regarding the same are not addressed in the applicable law.

In general terms, Mexico's arbitral legislation applies to domestic commercial arbitration and international commercial arbitration when the place of arbitration is located in Mexico.⁸ However, when dealing with preliminary measures, Mexico's arbitral provisions apply even if the place of arbitration is located outside Mexico.⁹

Also generally, Mexico's courts will typically have jurisdiction on matters where the place of arbitration is located in Mexico.¹⁰ If the place of arbitration is outside Mexico, the competent judge for recognition and enforcement of the award shall be the first instance Federal or state

⁵ See Mexico's Commercial Code arts. 1457 & 1463.

⁶ See Mexico's Commercial Code art. 1432.

⁷ See Mexico's Commercial Code art. 1464.

⁸ See Mexico's Commercial Code art. 1415.

⁹ See Mexico's Commercial Code art. 1415.

¹⁰ See Mexico's Commercial Code art. 1422.



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judge of the domicile (within Mexico) of the person against whom enforcement is to be made or, absent such domicile, the place where the goods are located (within Mexico).¹¹

1.12. *Are you aware of any case in the past ten years where an anti-arbitration injunction or a similar type of decision has been issued by a state court in your jurisdiction? If so, please describe briefly the facts and what the effect of the injunction ultimately was.*

Yes. However, the specific case is currently ongoing and not part of the public record as of now. As a result, it is not possible at this moment to expand on its factual background and the effect of the injunction issued.

2. The Arbitral Tribunal

2.1 *Does your jurisdiction offer assistance by the state courts in appointing arbitrators? If so, please describe briefly what options are available.*

Yes. Absent an agreed procedure to appoint arbitrators in the arbitration agreement (either expressly or by reference to an institution's rules), courts can under certain circumstances appoint arbitrators.

2.2 *What prerequisites, if any, must be satisfied for the court to deal with the appointment of an arbitrator (timing, failure by a party to act, etc.)?*

According to article 1427 of Mexico's Commercial Code, absent an agreed procedure to appoint arbitrators in the arbitration agreement (either expressly or by reference to an institution's rules), courts can under the following circumstances appoint arbitrators:

- In case of a sole arbitrator, where parties cannot agree on its designation, upon the request of any party, the court will appoint the sole arbitrator;
- In case of a three member panel, where a party fails to designate an arbitrator within thirty days the other so requires, the court will appoint the arbitrator upon request;
- In case of a three member panel, where the two party appointed arbitrators cannot agree on the designation of the third arbitrator, upon the request of any party, the court will appoint the third arbitrator.

2.3 *When deciding thereon, will the court consider whether there is arbitral jurisdiction? If so, what level of review will the court undertake in this respect?*

The competent Mexican court will only undertake to appoint arbitrators absent an agreed procedure to appoint arbitrators in the arbitration agreement (either expressly or by reference to an institution's rules).

¹¹ See Mexico's Commercial Code art. 1422.



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It is important to note as well that pursuant to article 1427 of Mexico's Commercial Code, where, under an appointment procedure agreed upon by the parties, a party fails to act as required under such procedure, or the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the judge to take the necessary measures to secure the appointment, unless the agreement on the appointment procedure provides other means to achieve it.

2.4 Please describe briefly the procedure for the appointment of arbitrators by the state courts, including any time-limits.

According to article 1467 of the Commercial Code, unless that under the circumstances of the case it may be inappropriate, for the appointment of an arbitrator or arbitrators or adopting the measures for securing such appointment, and upon application of one of the parties, the following shall be observed:

- The court must hear all the parties previously. For such purpose, if it deems it appropriate, the court can call them for a hearing so they can state their positions.
- The court must previously seek advice, from one or several arbitral institutions, chambers of commerce or industry selected to its discretion.
- Unless parties agree otherwise or that the court determines to its discretion that the list-procedure is not appropriate for the case, the court shall observe the following:
 - a. Shall send all the parties an identical list containing at least three names.
 - b. Within 10 days after the receipt of this list, each party may return the list to the court, after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference. If a party does not make comments, it shall be understood that it agrees with the list communicated by the court.
 - c. After the expiration of the above time period, the court shall appoint the arbitrator or arbitrators from among the persons approved in the lists returned to it and in accordance with the order of preference indicated by the parties.
 - d. If for any reason the appointment cannot be made according to this list-procedure, the court shall use its discretion for appointing the arbitrator or arbitrators.
 - e. Before making the appointment, the court shall request the arbitrator or the arbitrators appointed, to divulge any circumstance that might give rise to justifiably doubts as to its impartiality and independence.

2.5 How does the court decide which arbitrator to appoint? Is there a list of arbitrators available to the court?

The court must in accordance with article 1467 of the Commercial Code: hear all the parties, seek advice, from one or several arbitral institutions, chambers of commerce or industry selected to its discretion, and follow a list-procedure unless inappropriate.



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2.6 *Does the above apply irrespective of whether the arbitration is administered by an institute or not?*

No. According to article 1427 of Mexico's Commercial Code, only absent an agreed procedure to appoint arbitrators established in the arbitration agreement (either expressly or by reference to an institution's rules), courts can under certain circumstances appoint arbitrators.

2.7 *Does your jurisdiction offer assistance by the state courts to remove or replace an arbitrator?*

Yes. Please note though that such judicial assistance will only be available absent an agreed procedure to challenge and replace arbitrators established in the arbitration agreement (either expressly or by reference to an institution's rules). As stated by article 1429 of Mexico's Commercial Code, the parties are free to agree on a procedure to challenge arbitrators.

2.8 *If so, please describe the procedure therefore briefly.*

Failing an agreement by the parties on a procedure to challenge arbitrators (either expressly or by reference to an institution's rules), pursuant to article 1429 of Mexico's Commercial Code, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties, send a written statement of the reasons for the challenge to the arbitral tribunal.

Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.¹² If the challenge is not successful, within thirty days after having received notice of the arbitral tribunal's decision, the challenging party may apply, in the form of a complaint, to the court to rule on the challenge.¹³

Once the claim is admitted, the court shall notify the defendant(s), granting him (them) a fifteen day period to answer.¹⁴ The court may grant a subsequent ten-day period to produce or hear any evidence.¹⁵ If no evidence is filed by the parties, or the court deems that none is necessary after receiving defendant's responsive pleading (or if none was filed), the court will hear oral argument at a hearing set within three days.¹⁶ The court then will render judgment deciding the challenge.¹⁷

While such a procedure is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration and even issue an award.¹⁸

¹² See Mexico's Commercial Code art. 1429.

¹³ See Mexico's Commercial Code arts. 1429, 1470, 1472 & 1473.

¹⁴ See Mexico's Commercial Code art. 1473.

¹⁵ See Mexico's Commercial Code art. 1475.

¹⁶ See Mexico's Commercial Code art. 1474

¹⁷ See Mexico's Commercial Code art. 1476

¹⁸ See Mexico's Commercial Code art. 1429.



3. Interim Measures

3.1 *In your jurisdiction, does an arbitral tribunal have the power to issue an interim injunction? If yes, what is the way to enforce such interim injunction?*

Yes, pursuant to Mexico's Commercial Code article 1433, an arbitral tribunal may issue interim measures unless otherwise agreed by the parties. Moreover, according to article 1479 of Mexico's Commercial Code, any interim measure ordered by an arbitral tribunal shall be recognized as binding and, except that the arbitral tribunal provides otherwise, it shall be enforced upon request made, in the form of a complaint, to the court.

Once a claim seeking the recognition and enforcement of an interim measure issued by the arbitral tribunal is admitted, the court shall notify the defendant(s), granting him (them) a fifteen day period to answer.¹⁹ The court may grant a subsequent ten-day period to produce or hear any evidence.²⁰ If no evidence is filed by the parties, or the court deems that none is necessary after receiving defendant's responsive pleading (or if none was filed), the court will hear oral argument at a hearing set within three days.²¹ The court then will render judgment deciding whether to recognize and enforce, or deny, the interim measure(s) issued by the Arbitral Tribunal.²²

3.2 *In your jurisdiction, what is the way, if any, to enforce an interim injunction issued by an arbitral tribunal having its seat outside your jurisdiction?*

The same as the one described in the response to the preceding question 3.1.

3.3 *If a specific interim measure as issued by a foreign arbitral tribunal is not available in your jurisdiction where it is sought to be enforced, what would be the way to proceed?*

The same as the one described in the response to the preceding question 3.1. Please note that under Mexican law the grounds to deny recognition and enforcement of an interim measure are limited.²³ For instance, Mexican courts will enforce an interim measure, unless such measure is incompatible with the powers conferred to the court.²⁴ The same court can decide to redefine the measure to adapt it to its own powers and proceedings in order to be able to enforce it without modifying its content.²⁵

¹⁹ See Mexico's Commercial Code art. 1473.

²⁰ See Mexico's Commercial Code art. 1475.

²¹ See Mexico's Commercial Code art. 1474.

²² See Mexico's Commercial Code art. 1476.

²³ See Mexico's Commercial Code art. 1480.

²⁴ See Mexico's Commercial Code art. 1480, II.a.

²⁵ See Mexico's Commercial Code art. 1480, II.a.



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3.4 *In your jurisdiction, are state courts competent to decide on a request for interim relief despite the fact that the parties entered into an arbitration agreement? May a party file for interim relief with a state court even before arbitration proceedings are initiated? If yes, what are the consequences with respect to the "main" claim that is sought to be secured by such interim injunction, i.e. is the party asking for interim relief obliged to commence arbitration within a certain period of time?*

Pursuant to article 1425 of Mexico's Commercial Code, even if there is an arbitration agreement, parties may apply to a competent court to issue interim measures of protection before arbitral proceedings are initiated. There are no specific provisions under Mexican law requiring that the party asking for interim relief to commence arbitration within a certain period of time.

3.5 *May parties file for interim relief with a state court even though an arbitration is already pending in the respective matter?*

Yes. Pursuant to article 1425 of Mexico's Commercial Code parties may apply before the court to issue interim measures of protection during the course of arbitral proceedings.

3.6 *In your jurisdiction, does a state court have the power to order reimbursement of legal costs in proceedings for interim relief? If yes, what are the consequences if the claim that is sought to be secured by interim relief is subject to an arbitration agreement?*

There are no specific provisions under Mexican law addressing whether courts have the power to order reimbursement of legal costs in proceedings for interim relief. Please note however that courts have complete discretion in the adoption of interim measures as stated by article 1478 of Mexico's Commercial Code.

4. Evidence

4.1 *In your jurisdiction, do the state courts play a role in the gathering of evidence for use in arbitration?*

Pursuant to article 1444 of Mexico's Commercial Code, courts can provide assistance in the gathering of evidence if either the Arbitral Tribunal or any party with the approval of the latter so request.

4.2 *If your state courts play a role in the gathering of evidence for use in arbitration, how is the assistance or intervention of the state court requested (letters rogatory, petition, motion, filing of an action, etc.)?*

Through petition within the framework of a special proceeding provided in law for acts where an intervention by a judge is required but where no right is to be adjudicated amongst the parties with that proceeding.²⁶

4.3 *Is there specific legislation or other legal authority governing the assistance that the state courts can provide?*

Mexico's Commercial Code arts. 1444, 1466, and 1469, as well as Mexico's Federal Code of Civil Procedure, arts. 530-532 and 534-537.

²⁶ See Mexico's Commercial Code art. 1466 and Mexico's Federal Civil Code of Procedure, arts. 530-532 & 534-537.



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4.4 *What requirements must the party requesting the evidence-gathering assistance satisfy in order to obtain the state court's assistance?*

In accordance with article 1444 of Mexico's Commercial Code, the arbitral tribunal must approve the request for assistance by the court prior to its filing by any of the parties.

4.5 *What kinds of evidence gathering can the state courts authorize or assist in (document production, sworn interrogation, depositions, in-court examination by the judge, inspections, etc.)?*

There is no specific provision either limiting or establishing the kind of evidence gathering that state courts can authorize or assist in. Mexico's Commercial Code in its article 1444 states that the arbitral tribunal and the parties (when the tribunal allows them) may seek the court's assistance in the gathering of evidence. Thus, courts are empowered to order the relief of any evidence that the arbitral tribunal requests or that a party with the consent of the tribunal so requests. In practice though, it is unlikely that American style evidence gathering standards and means would be implemented.

4.6 *What rules govern the evidence gathering (rules of the state court, rules of the arbitral institute, others)?*

Mexico's arbitration laws as contained in Mexico's Commercial Code.

4.7 *Does the kind of arbitration (domestic vs. international, investor-state, commercial, etc.) impact what evidence can be gathered with the assistance of the state court?*

No.

In general terms, Mexico's arbitral legislation applies to domestic commercial arbitration and international commercial arbitration when the place of arbitration is located in Mexico.²⁷ However, in some instances such as when dealing with the enforcement of arbitration agreements, preliminary measures, enforcement and set aside of arbitral awards, Mexico's arbitral provisions apply even if the place of arbitration is located outside Mexico.²⁸

Also generally, Mexico's courts will typically have jurisdiction on matters where the place of arbitration is located in Mexico.²⁹ If the place of arbitration is outside Mexico, the competent judge for recognition and enforcement of the award shall be the first instance Federal or state judge of the domicile (within Mexico) of the person against whom enforcement is to be made or, absent such domicile, the place where the goods are located (within Mexico).³⁰

²⁷ See Mexico's Commercial Code art. 1415.

²⁸ See Mexico's Commercial Code art. 1415.

²⁹ See Mexico's Commercial Code art. 1422.

³⁰ See Mexico's Commercial Code art. 1422.



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4.8 *Who can the courts order disclosure or discovery from? In other words, who do the state courts have jurisdiction over?*

Mexico's courts will typically have jurisdiction over the parties on matters where the place of arbitration is located in Mexico.³¹

4.9 *Does the state court have the power to compel the discovery or disclosure target to give the evidence? When will the state court take that step?*

Yes, Mexican courts can issue the pertinent measures required to assist the Arbitral Tribunal in the gathering of evidence. Please note however that it is unlikely that American style evidence gathering standards and means would be implemented.

4.10 *What can the state court do if the discovery or disclosure target fails to comply?*

Generally speaking Mexican courts have contempt powers.

4.11 *Who can request assistance from the state court (parties to the arbitration, the tribunal, the arbitral institution, others)?*

Mexico's Commercial Code in its article 1444 states that the arbitral tribunal and the parties (when the tribunal allows them) may seek the court's assistance in the gathering of evidence.

4.12 *Can the disclosure or discovery target seek relief from state court or to otherwise modify or prevent the disclosure or discovery?*

Mexico's Commercial Code in its article 1469 states that before any assistance in the taking of evidence is given, all parties in the arbitration shall be heard.

4.13 *What consideration will be given by the state court to concerns about the invasion of a privilege (attorney-client, etc.), confidentiality protections, or potential criminal liability in the event of disclosure? Whose laws and rules will the state court apply?*

Mexico's arbitral legislation does not address specifically any of these issues. Please note that the IBA Rules in the Taking of Evidence are generally well received and followed in Mexican arbitral practice. Likely then such concerns as privilege and *confidentiality protections* would have been addressed before the arbitral tribunal approves the assistance sought from the court.

4.14 *Do the state courts need to enquire into the view of the arbitral tribunal on the disclosure or discovery?*

Yes, since pursuant to Mexico's Commercial Code article 1444 the arbitral tribunal must approve any assistance sought from the court.

4.15 *Do the state courts need to enquire into the ultimate admissibility of the evidence in the arbitration?*

No, since pursuant to Mexico's Commercial Code article 1444 the arbitral tribunal must approve any assistance sought from the court.

³¹ See Mexico's Commercial Code art. 1422.



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4.16 Do the state courts have the power to order reimbursement of attorneys' fees or expenses incurred by the disclosure or discovery target? If so, in what instances will they order that?

There are no specific provisions under Mexican law addressing whether courts have the power to order reimbursement of legal costs in such proceedings.