

The International Comparative Legal Guide to:

# International Arbitration 2008

A practical insight to cross-border International Arbitration work



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# Mexico

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## 1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Mexico?

Following the spirit of modern doctrine and international conventions, the requirements for the validity of arbitration agreements, under Mexican law, are that:

- the parties are legally capable, or their representatives have proper authority (in the case of minors, legal entities);
- the agreement to arbitrate has to be executed in writing (including the exchange of letters, fax and/or electronic communications); and
- the subject matter of the arbitration is specified therein, and the dispute can be submitted to arbitration.

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

No, there are no requirements other than those mentioned in question 1.1 above.

1.3 What other elements ought to be incorporated in an arbitration agreement?

Basically, the elements that must be incorporated in an arbitration agreement are the language and place of arbitration, as well as the applicable substantive law. Selecting an arbitration centre for the administration of the proceedings and its procedural rules is most advisable, as opposed to ad hoc arbitrations.

1.4 What has been the approach of the national courts to the enforcement of arbitration agreements?

Even though Mexican law has long recognised arbitration as a means for the resolution of civil and commercial disputes, in actual practice it was seldom used, and naturally, our courts had little experience in this area. However, due to the efforts of certain institutions and specialised attorneys, the trend is changing and Mexican courts are now more involved with the concept of arbitration, and the need to enforce arbitral awards which are legally passed.

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

Based on comments made in question 1.4 above, it can be said that nowadays, the Mexican courts approach to enforce ADR agreements is increasing, based on the fact that our law recognises the need to enforce valid agreements, and also the right of interested parties to settle disputes of certain nature (namely those which can be described as of a private nature, in opposition to public policy matters) by means different from judicial proceedings.

## 2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration agreements in Mexico?

To answer this question, certain distinctions have to be made, namely:

1. the civil or commercial nature of the dispute submitted to arbitration; and
2. whether the arbitration is domestic or international.

In the first scenario the procedural rules are those of the applicable State or Federal Code of Civil Procedure, or those of the Commercial Code.

If the arbitration is domestic, the national procedural rules would apply; if it is international, it will be governed by the provisions of conventions such as:

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The Inter American Convention on International Commercial Arbitration (Panama Convention).

The Inter American Convention on the Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention).

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

In Mexico, the law governing commercial arbitration, whether domestic or international, is the Code of Commerce, specifically, its Chapter IV. It is important to stress the fact that provisions contained in said chapter expressly refer to the applicability of international conventions signed and ratified by our country.

In the case of civil disputes submitted to arbitration, the procedural rules will be those of the applicable State or Federal Code of Civil

Procedure, as the case may be; however, the provisions of those codes are similar to, and consistent with, the generally accepted arbitration rules.

### 2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

Yes. The provisions of the Mexican Code of Commerce in regard to arbitration follow those of the UNCITRAL Model Law, and the few differences are of no significance.

## 3 Jurisdiction

### 3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Mexico? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Yes. There are certain matters which cannot be submitted to arbitration, such as disputes related to:

- Land and waters (lakes, rivers, sea).
- Family cases (parenthood, divorce, etc.).
- Consular and diplomatic cases.
- Antitrust.
- Criminal, labour and tax matters.

The concept of "public policy" is the general or main principle which has to be taken into account, in order to determine the arbitrability of a dispute.

### 3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Yes. In Mexico the doctrine of "compétence compétence" is accepted; however, if the ruling declares that the arbitrator is competent/does have jurisdiction, the party who contested that authority may ask the competent court to review such decision, within thirty days counted from the date in which it was notified.

### 3.3 What is the approach of the national courts in Mexico towards a party who commences court proceedings in apparent breach of an arbitration agreement?

There is no consequence other than referring the parties to arbitration, based on their agreement to arbitrate the dispute.

### 3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

Mexican courts are only empowered to address this issue, in any of the three following circumstances:

- a) when there are grounds to presume that the arbitration agreement is null;
- b) when the party alleges that the arbitrator or the arbitration tribunal does not have authority to decide the dispute, provided such party files the corresponding petition before the court, within thirty days after the arbitrator has sustained his/her jurisdiction; and
- c) when enforcement of the award is sought.

### 3.5 Under what, if any, circumstances does the national law of Mexico allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Under no circumstance may an arbitrator assume jurisdiction over individuals and/or entities which are not party to the arbitration agreement.

## 4 Selection of Arbitral Tribunal

### 4.1 Are there any limits to the parties' autonomy to select arbitrators?

No. In principle, independence and impartiality are the essential requirements for arbitrators to be appointed. Other qualifications of the arbitrator are often taken into account by the parties or the appointing authority (i.e. his/her expertise).

### 4.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. The Mexican Code of Commerce empowers the courts to make the appointment(s) when: i) the parties to an ad-hoc arbitration fail to choose arbitrator(s); or ii) the chosen arbitration centre is unable to do so.

### 4.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes. The court will make the appointment at the request of the interested party when, as mentioned in question 4.2 above, the parties or the appointing authority fail to agree or appoint the arbitrator(s).

### 4.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

Basically, once a person is notified as to his/her appointment as arbitrator and together with his/her acceptance, such person is obligated to submit a statement of independence and impartiality, and also, his/her acceptance of the duty to inform the parties and the arbitral agent (in the case of institutional arbitration) as to any impediment which may arise thereafter.

## 5 Procedural Rules

### 5.1 Are there laws or rules governing the procedure of arbitration in Mexico? If so, do those laws or rules apply to all arbitral proceedings sited in Mexico?

Yes, there are Mexican legal provisions governing arbitral proceedings of both, Civil and Commercial nature. They apply to all arbitrations sited in Mexico, but only in a supplementary manner, when the rules of procedure chosen by the parties do not cover certain aspect or question.

### 5.2 In arbitration proceedings conducted in Mexico, are there any particular procedural steps that are required by law?

No. Under Mexican law there are no particular procedural steps or requirements; however, certain essential principles such as due process (i.e. timely and proper notice of initiation of the proceeding,

of appointment of arbitrators, of hearings, etc.), equality of the parties and impartiality of arbitrators have to be duly complied with.

### 5.3 Are there any rules that govern the conduct of an arbitration hearing?

No. The parties are free to agree the manner in which the hearings will be conducted, and if they fail to do so, the arbitrator(s) will make the determination, provided that the agreement or the decision, as the case may be, comply with the requirements mentioned in question 5.2 above.

### 5.4 What powers and duties does the national law of Mexico impose upon arbitrators?

Mexican law gives arbitrators the same authority as that of a court of law, except for the power to enforce procedural decisions, provisional and final awards. The basic or essential duties which our law imposes on arbitrators are to observe the principles of due process and impartiality.

### 5.5 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Mexican courts have a limited role in the processing of an arbitration. In summary, they are empowered to act in regard to the enforcement of interim measures and final awards; review and decide issues related to the validity of the arbitration agreement, and competence of the arbitrator or arbitral tribunal.

### 5.6 Are there any special considerations for conducting multiparty arbitrations in Mexico (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

Mexican arbitration law does not contain any special provision or consideration regarding multiparty arbitrations. It relies on the agreement of the parties involved, the arbitration rules chosen by them, and the criterion of arbitrator(s). No third party can join or intervene in an arbitration, unless it is so agreed by all the parties involved and, if this is the case, we can no longer refer to a “third party”.

### 5.7 What is the approach of the national courts in Mexico towards *ex parte* procedures in the context of international arbitration?

Mexican experience shows that the number of *ex parte* procedures is not significant. It should be mentioned that article 1425 of the Code of Commerce establishes the right of a party to initiate this kind of procedures (i.e. provisional attachments) before or after the arbitration proceeding is initiated.

## 6 Preliminary Relief and Interim Measures

### 6.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Yes. Under Mexican law, and at the request of the interested party,

the arbitrator is empowered to award preliminary or interim relief which he/she deems to be necessary to preserve the subject matter of the arbitration, and to conduct the arbitral proceedings in an adequate manner.

It must be noted that the authority granted to arbitrators by the applicable rules is broader than that given by the procedural rules to the courts of law; therefore, it is possible to face the situation in which a court refuses to enforce an arbitrator order.

Basically, the type of interim measures which an arbitrator may award, are: attachment of property, production of documents, statements of witnesses, etc.

Since arbitrators have no authority to enforce their decisions, the assistance of the courts of law is needed.

### 6.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes. Under Mexican law, the courts are empowered to grant preliminary relief when the requested measures are urgent, and the arbitrator or arbitration panel has not been appointed.

Considering that such petitions have to be very specific, they should not affect the jurisdiction of the arbitration tribunal, once it is set up, since from that moment, and as mentioned above, the role of the courts of law is very much limited.

### 6.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The Mexican experience in this area does not allow one to speak of a “practice”; however, and from a legal stand point, should the requested court find the petition to be justified, it should grant the requested relief. It is very likely the courts would require the petitioner to guarantee those damages which may be caused to the other party, as result of the interim measure, in the event that the petitioner’s main action does not succeed.

### 6.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

No. However, it must be noted that the Mexican Code of Commerce and the rules of many arbitration centers authorise the arbitrator(s) to suspend, and even declare terminated the arbitration proceeding, when certain fees are not paid.

## 7 Evidentiary Matters

### 7.1 What rules of evidence (if any) apply to arbitral proceedings in Mexico ?

Considering that Mexican law relies on the agreement of the parties to arbitrate, and the criterion of the arbitrator, it can be said that there are no rules on evidence. In any event, admissibility and evidentiary value will always be governed by the general rules of evidence.

### 7.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

Yes. As mentioned in question 7.1 above and even though in

Mexico there are no specific rules of evidence for arbitration proceedings, general discovery is forbidden. However, and consistent with the freedom of the parties, they may establish certain rules for “discovery”, and they will be obligated thereunder.

Under the rules of judicial procedures, the parties are obligated to produce (disclosure) the documentary evidence in their possession, allow the inspection of documents, locations, property, etc. under their control, provided the corresponding request is specific (documents, things to be inspected, etc. are properly identified).

Third parties do have the same obligation; however, the party requesting their cooperation must pay the expenses in which those third parties may incur.

### 7.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

Mention must be made to the fact that judicial assistance is only needed when the parties to an arbitration do not comply with their undertakings and/or the arbitrator’s decisions. The same applies when third parties are in possession or control of documents, objects, property or information pertinent to the dispute.

Therefore, and as mentioned above, considering that Mexican courts have the obligation to enforce decisions passed by arbitrators, upon receipt of an arbitrator order for disclosure which is consistent with comments made in question 7.2 above, the court will be able to act accordingly.

### 7.4 What is the general practice for disclosure/discovery in international arbitration proceedings?

There is no “general practice” for disclosure/discovery in international proceedings conducted in Mexico. The process to do so in Mexico will have to be conducted in accordance with comments made in questions 7.2 and 7.3 above.

### 7.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

In Mexico there are no laws, regulations or professional rules applicable to the production of written and/or oral testimonies.

Consistent with the UNCITRAL Model Law, the Mexican Code of Commerce grants the arbitral tribunal authority to determine the manner in which the arbitration proceeding will be conducted, whenever the parties are not able to agree. Thus, the arbitrator may, but does not have to require witnesses to be sworn.

Mexican arbitration rules do not address cross-examination; however, if it is requested, the arbitrator should allow it.

### 7.6 Under what circumstances does the law of Mexico treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

Mexican arbitration rules do not refer to privileged documents and/or information. However, if invoked by the interested party, there are certain legal provisions which would apply as it is the case of testimony of spouses, attorney-client communications, etc.

## 8 Making an Award

### 8.1 What, if any, are the legal requirements of an arbitral award?

The legal requirements of an arbitral award are: a) to be in writing; b) signed by the arbitrator(s); c) exception made of *ex aequo et bono* arbitrations, the award must express the factual considerations and legal provisions upon which the decision is made; and d) state the date and place in which the award is issued.

## 9 Appeal of an Award

### 9.1 On what bases, if any, are parties entitled to appeal an arbitral award?

In principle, arbitral awards cannot be appealed; however, and in the unlikely event that the parties so agreed, or the chosen rules of arbitration allow the parties to appeal, Mexican law would recognise the validity of such agreement or rule.

### 9.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

No. However, and in support of the response, from the Mexican legal perspective, the following comments are pertinent:

- i) It is a generally accepted principle that arbitral awards are final decisions (non-appealable), and consistent with the above, our arbitration rules do not address the appeal recourse.
- ii) The grounds for appeal are different from those upon which a petition for annulment or refusal to recognise and enforce an award may be based.

Therefore, and under Mexican law, our courts would not recognise validity to an agreement whereby the parties waived the recourse to set-aside the award.

Notwithstanding the above, it must be noted that, if under the rules applicable to a specific arbitration proceeding conducted abroad, the award is appealable, the award will not be recognised and enforced by Mexican courts, until the same becomes final, pursuant to those rules.

### 9.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Even though from a contractual standpoint the answer is affirmative, comments made in question 9.2 above should be considered.

### 9.4 What is the procedure for appealing an arbitral award in Mexico?

Again, in Mexico there is no recourse of appeal against arbitral awards; our law only recognises the recourse to set-aside those decisions, and the procedure is:

- i) The petition for annulment must be filed within three months, counted from the date in which the award was notified to the contesting party.
- ii) An original or certified copy of the award, duly authenticated, has to be attached to the petition.

- iii) The court will serve the petition to the other party(ies) who, in turn, have a three business day term to respond.
- iv) Thereafter, if the parties ask the court to receive evidence, or the latter decides that certain evidence should be presented, the same will be received within a term of ten days.
- v) Thereafter, the court will schedule a hearing to receive closing arguments, and shall pass its decision within five days.

## 10 Enforcement of an Award

### 10.1 Has Mexico signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes. Mexico is a party to the New York Convention; it did not make any reservations. The relevant national legislation for commercial arbitration is the Mexican Code of Commerce.

### 10.2 Has Mexico signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Yes. As mentioned in question 2.1 above, Mexico is a party to the Panama Convention and the Montevideo Convention.

### 10.3 What is the approach of the national courts in Mexico towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

It must be said that even though Mexican law has long accepted arbitration as an alternative to the resolution of disputes, the fact is that such alternative was seldom used in Mexico. Thus and due to the growth of international transactions, an educational process began. Said process has not been completed; however, it is fair to say that our courts favour the recognition and enforcement of domestic and foreign arbitral awards.

In order to obtain the recognition and enforcement of an arbitral award, the interested party must file its petition before the competent court. An original or certified copy of the award must be attached to the petition.

The court will serve the party against whom enforcement is sought, and pass its resolution. The party who may be affected by the decision of the court can appeal the same.

### 10.4 What is the effect of an arbitration award in terms of *res judicata* in Mexico? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

In Mexico, an arbitral award is considered "*res judicata*", that is to say, a final decision, binding upon the parties; therefore all issues decided therein cannot be re-heard in a Mexican court of law.

## 11 Confidentiality

### 11.1 Are arbitral proceedings sited in Mexico confidential? What, if any, law governs confidentiality?

Mexican legal provisions governing arbitral proceedings do not

address the issue of confidentiality; therefore, this issue has to be stipulated by the parties, or resolved pursuant to the applicable rules and/or the criterion of the arbitrator.

In any event, consideration must be given to the nature of the information and the provisions of other laws, for instance, the Industrial Property Law, Copyrights Law, Federal Criminal Code, etc.

### 11.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Again, Mexican arbitration law does not contain specific provisions on this issue; however, in addition to comments made in question 11.1 above, and taking into account that disputes submitted to arbitration are matters of a private nature, we believe that the information disclosed therein should not be made available to third parties without specific authorisation by the litigating parties.

### 11.3 In what circumstances, if any, are proceedings not protected by confidentiality?

When the need to consult or review specific information disclosed in an arbitration procedure arises from a legal duty or a judicial order; however, in this scenario the obligation of confidentiality would be extended to the private individuals and/or public officials who have access to said information.

## 12 Remedies / Interests / Costs

### 12.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Mexican legislation only recognises the concepts of: i) compensatory damages; and ii) loss of profit. However, if the substantive law applicable to the dispute recognises other types of damages, the award ordering to pay them should also be enforced in Mexico, taking into account that our law recognises the applicability of foreign substantive law.

### 12.2 What, if any, interest is available?

Under Mexican law, the parties to a commercial transaction can freely agree the rate of ordinary and penalty interest, and in the absence of such agreement, the legal rate would apply, namely, six percent per year for commercial transactions and nine percent for those of civil nature.

Now, if the substantive law applicable to the dispute is different from Mexican law, interest, and rate of interest, will be determined by the provisions of the applicable law.

### 12.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Yes, the prevailing party is entitled to recover fees and expenses, in accordance with the agreed terms, or pursuant to the rules of the arbitration centre which the parties selected and, in lieu of the above, the arbitrator shall make the corresponding decision.

Regarding "shifting of fees and costs", there is no general or common practice in Mexico.

12.4 Is an award subject to tax? If so, in what circumstances and on what basis?

No. Under Mexican law arbitral awards are not taxed; however, the prevailing party may be obligated to pay income tax, value added tax, and other fiscal duties.

### 13 Investor State Arbitrations

13.1 Has Mexico signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

No, it has not.

13.2 Is Mexico party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID)?

Yes. Mexico has ratified many multilateral and bilateral conventions, among them the North American Free Trade Agreement; however, none of those conventions refer to resolution of investment disputes by arbitration before the International Centre for the Settlement of Investment Disputes.

Mexico is not a party to the Energy Charter Treaty.

13.3 Does Mexico have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

Mexico does not have standard terms for investment treaties; however, Mexican negotiators use as reference the language of the North American Free Trade Agreement.

13.4 In practice, have disputes involving Mexico been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in Mexico been to the enforcement of ICSID awards?

Since Mexico is not a party to the Washington Convention, no disputes have been arbitrated pursuant to its rules, and there are no court precedents.

13.5 What is the approach of the national courts in Mexico towards the defence of state immunity regarding jurisdiction and execution?

Whenever the Mexican government or a local government and their agencies and branches are parties to a legal relationship which can be described to be of private nature, they cannot invoke official immunity.

In fact, and according to the Federal Code of Civil Procedure, federal and state governments are to be treated in the same manner as any other individual or entity, exception made of the fact that their property cannot be attached, and if a decision is passed against them, compliance therewith will be made through the competent authorities, namely, the Executive or Legislative branch, depending on the obligation to be discharged.

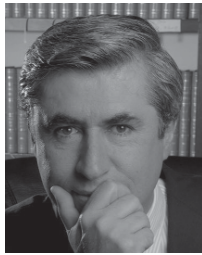
### 14 General

14.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Mexico? Are certain disputes commonly being referred to arbitration?

It is worth mentioning that, due to the efforts of specialised attorneys and the efficiency of the Camara Nacional de Comercio de la Ciudad de México (CANACO) and the Centro de Arbitraje de México (CAM), an increasing number of Mexican businessmen and corporations are entering into arbitration agreements.

14.2 Are there any other noteworthy current issues affecting the use of arbitration in Mexico?

Even though there has been a limited number of a questionable decision related to arbitration in Mexico, the general trend towards its development can be regarded as positive.



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The firm offers services in various areas of the law including: administrative, bindings and privatisations, arbitration, civil and commercial litigation, consumer protection, corporate and contracts, criminal litigation, franchising, health, immigration, labor, mergers and acquisitions, real estate, social security, tax and trusts.

Our firm currently has 4 partners, and 15 associates, and a supporting staff including paralegals, translators, technical specialists and administrative staff, with offices in Mexico City and Queretaro, Mexico.

The specialisation and development of each practice area of the firm, the support provided among different areas, and the deep knowledge which we have of Mexico, its legal system, markets and industry, enables the firm to offer clients innovative, timely, and complete solutions to their needs in a very good and competitive prices. In order to avoid problems before they develop, we take a preventive, coordinated, and strategic approach to advise our clients.

The firm and its lawyers actively participate in various public and private organizations at an international level, something that keeps us attuned to what is happening in the community and the world at large. It enables us to not only understand better and be closer to client needs, but also to participate in and have an influence upon the changes affecting them.

More detailed description and further information is available upon request at [cportilla@portilla.com.mx](mailto:cportilla@portilla.com.mx); [ruy-diaz@portilla.com.mx](mailto:ruy-diaz@portilla.com.mx) or at our World Wide Web [www.portilla.com.mx](http://www.portilla.com.mx)