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Arbitration - Mexico

Supreme Court interprets effects of arbitral awards

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Introduction

Facts

Decision

Comment

Introduction

In the resolution of review of *Amparo* 755/2011 the Supreme Court considered the power of judges regarding arbitration procedures and arbitral awards issued under the terms of the Commerce Code, and the effects of resolutions *ex aequo et bono* or as *amiable compositeur* (ie, based on what is fair and just, rather than on the letter of the law).

Among other comments related to the decision, several experts have considered that the Supreme Court's analysis suggests that:

- arbitral awards lack effect and binding force unless a judicial authority recognises them; and
- resolving cases *ex aequo et bono* or as *amiable compositeur* is comparable to a contractual procedure or a transaction.

Facts

On January 6 2000 two parties entered into a distribution agreement. The agreement included an arbitration agreement to settle any dispute before the National Chamber of Commerce of Mexico City. One of the parties terminated the agreement and two arbitration procedures were initiated in 2007 regarding the termination.

On October 12 2009 the arbitral tribunal issued the arbitral award. The award dismissed several claims of the claimant and several claims of the defendant. The arbitral tribunal determined that the costs of the arbitration procedure should be paid equally by both parties.

In January 2010 one of the parties requested the annulment of the arbitral award before the Superior Court of Justice of Mexico City. A civil judge of the court duly annulled the arbitral award. In 2010 writs of *amparo* (ie, remedies for the protection of constitutional rights) were filed by the parties against the decision of the civil judge. The claimants argued that the resolutions breached Articles 14 and 16 of the Constitution.

In December 2010 the trials were resolved in a decision of the Fourth District judge of the Federal District, who considered that the resolution of the civil judge breached the public order.

The parties filed a writ of review of *amparo* that was resolved by the Supreme Court. The Supreme Court analysed the power of judges regarding arbitration procedures and arbitral awards issued under the terms of the Commerce Code.

Decision

According to the Supreme Court, an arbitral tribunal may resolve cases *ex aequo et bono* only if the parties have expressly given their consent, provided that resolving *ex aequo et bono* or as *amiable compositeur* implies a contractual procedure in which the decision is more fair and equitable than legal or according to the applicable legislation, and based on the will of the parties. Therefore, this dispute resolution procedure concludes with an agreement that needs no legal grounds. The court also held that such legal grounds and the reasons behind the resolution need not be put in writing, because the procedure is a result of the will of the parties, which does not constitute an act of public authority.

Furthermore, the court considered that the recognition of an arbitral award is an act performed by the judicial authority that declares the award final and binding. The effect of such a judicial procedure is to provide the award with legal effect, but that does not imply its enforcement. An award can be recognised without being enforced. According to the Supreme Court, the enforcement of an award is the mechanism that involves judicial intervention to implement the effects of the arbitral award.

Comment

The Supreme Court's arguments regarding *ex aequo et bono* resolutions have met with some criticism. Notwithstanding that an arbitral tribunal resolves cases as *amiable compositeur*, its decision is issued as an arbitral award and not as an agreement. Moreover, the rules of the most important arbitral institutions and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration require that the arbitral award include legal grounds and reasons, regardless of whether the resolution is *ex aequo et bono* or in strict compliance with the law.

On the other hand, the distinction between recognition and enforcement presented in the court's analysis is consistent with the distinction set forth in the Commerce Code and the UNCITRAL Model Law on International Commercial Arbitration, which derives from the New York Convention.

However, the wording used by the Supreme Court in connection with the effects of recognition of an arbitral award may be confusing. An arbitral award is final and binding when issued by the arbitral tribunal and may produce effects regardless of such recognition – which is only the formal act that facilitates enforcement of the arbitral award. For example, if the parties comply with the arbitral award issued by the arbitral tribunal, recognition and enforcement before a judicial authority would be unnecessary and it would be incorrect to state that such parties comply with a non-binding and non-final resolution.

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