ZFZ | ZEILER FLOYD ZADKOVICH

GUIDE TO MEXICAN ARBITRATION LAW

NEW YORK | VIENNA | LONDON | MEXICO CITY | CHICAGO | HOUSTON | SYDNEY

1. INTRODUCTION

The purpose of this guide is to provide a practical introduction to Mexican arbitration law which is also of sufficient depth for the legal background of the law to be fully understood. In 1993, Mexico adopted most parts of the 1985 UNCITRAL Model Law in International Commercial Arbitration (the "1985 UNCITRAL Model Law") as its arbitration law. The provisions of the 1985 UNCITRAL Model Law were incorporated in Articles 1415 to 1463 of the Mexican Commerce Code ("CCo").

In 2011, the CCo was amended to incorporate changes arising from the 2006 UNCITRAL Model Law and Chapter X (Articles 1464-1480) concerning procedural aspects of court assistance in arbitration.

The CCo is a federal act which applies to the entire Mexican territory.[1] There are no local regulations on commercial arbitration. The arbitration law provisions contained in the CCo govern national and international arbitration of a 'commercial' nature.

Mexico is a party to several international treaties on arbitration, most importantly the New York Convention, the Panama Convention and the ICSID Convention. This guide will refer to these instruments in the relevant context.

Together with the international treaties adopted by Mexico and the extant binding jurisprudence on the matter, the CCo provisions on arbitration constitute the Mexican legal framework for arbitration. Mexican courts regard this legal arbitration framework as a specialized, self-contained framework and thus no other law applies on a subsidiary basis.[2]

[1] According to Article 73(X) Mexican Constitution commercial matters fall within federal legislative powers.
[2] Seventh Collegiate Court in Civil Matters of the First Circuit, December 2010, Tesis Aislada I.7o.C.150 C, registered under N° 163413.

2. THE ARBITRATION AGREEMENT

2.1. **Definition and Validity**

Article 1416 (I) of the CCo defines 'arbitration agreement' as the agreement according to which the parties decide to submit to arbitration all or certain disputes between them arising or potentially arising from a specific contractual or non-contractual legal relationship. The dispute covered by the arbitration agreement must be of a legal nature. This means that the parties must have conflicting legal views regarding the dispute.

As with any other agreement in Mexico, the arbitration agreement has to comply with certain existence and validity requirements.

The existence requirements are consent and object.

- Consent: Article 1423 of the CCo stipulates the forms in which consent to arbitration can be externalized. Express consent requires that both parties expressly agree to arbitration in written form. Tacit consent refers to situations where the parties' acts or omissions serve as evidence of their agreement to submit to arbitration.

- Object: The object of an arbitration must be a specified legal relationship capable of being subjected to arbitration.[3]

The validity requirements are legal capacity, form, licit purpose, and absence of defects affecting consent.

- Legal Capacity: The legal capacity or subjective arbitrability of the parties must be analyzed under the law which is applicable to the personal status of each party (See Section 7 below for a detailed explanation).

[3] See Section 3.

- Form: Under Mexican arbitration law, arbitration agreements must be concluded in written form (See Section 2.3 below for a detailed explanation).

- Licit Purpose: The purpose sought with the arbitration must be licit under Mexican law and must be arbitrable.[4]

- Absence of defects affecting consent: Consent must not have been granted by mistake, violent acts or willful mischief.

In addition, the arbitration agreement can and should contain optional agreements on:

- the seat of the arbitration;

- the number of arbitrators;

- the rules of the arbitral proceedings; and,

- the language of the proceedings.

2.2. **Interpretation**

Mexican arbitration law does not contain provisions on how to interpret the arbitration agreement. However, general rules for the interpretation of agreements are contained in Articles 1851 to 1857 of the Federal Civil Code. These rules are as follows:

Firstly, the literal meaning of the agreement text is to be considered.[5] Secondly, the intention of the parties at the time of the conclusion of the agreement is to be

[4] See Section 3.
[5] Federal Civil Code, Article 1851.

considered.[6] If the intention of the parties appears to contradict the agreement text, the former will take primacy over the latter.[7]

If the terms of the agreement have more than one meaning, the meaning to be attributed to such terms is the one that more fully conforms with the object and purpose of the agreement.[8] Mexican trade usages and customs will be considered in order to decide on ambiguities contained within the agreement.[9]

In the event of a conflict of rights, the conflict must be decided in favor of the party who wishes to avoid detriment and not in favor of the party claiming it will obtain benefit.[10] If both parties find themselves in the same circumstances, the controversy must be decided as equitably as possible.[11]

With regard to the interpretation of international agreements, the 2006 UNCITRAL Model Law suggests that the interpretation has to consider "*its international origin and [ ] the need to promote uniformity in its application and the observance of good faith*."[12] It further states that: "[q]*uestions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based*".[13]

2.3. **Form**

Under Article 1423 of the CCo, arbitration agreements must be concluded in writing.

There are different forms that an arbitration agreement may take:

[6] Federal Civil Code, Article 1851, 1852.
[7] Federal Civil Code, Article 1851.
[8] Federal Civil Code, Article 1855.
[9] Federal Civil Code, Article 1856.
[10] Federal Civil Code, Article 20.
[11] Federal Civil Code, Article 20.
[12] UNCITRAL Secretariat, UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006), Article 2A (1) (2008).
[13] UNCITRAL Secretariat, UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006), Article 2A (2) (2008).

- A written arbitration agreement or clause contained in a document signed by the parties;
- An exchange of written communications between the parties; and,
- A written contract which incorporates a document containing an arbitration agreement by referring to that document. This is conditional on the reference being understood as making the arbitration agreement part of the contract.[14]

Accordingly, an arbitration agreement would be valid if consent to arbitration is contained in a document signed by the parties, or, alternatively, contained in written communications between the parties.

Furthermore, if the parties conclude a contract and incorporate an arbitration agreement in it by explicitly referring to that arbitration agreement, the parties must clearly state their intention that the content of the referenced document should constitute part of the underlying contract.

Article 1423 of the CCo also stipulates that an arbitration agreement may be concluded where statements of claim and defense are exchanged, whereby the existence of an arbitration agreement is alleged by one party and not denied by another.

2.4. **Principles Governing Arbitration Agreements**

Mexican arbitration law recognizes two universal principles which govern arbitration agreements: the principle of separability and the principle of competence-competence.

[14] Commerce Code, Article 1423.

Article 1432 of the CCo recognizes the principles of separability of the arbitration clause from the underlying contract or legal relationship and stipulates that:

> *(…) the arbitration clause contained in a contract must be considered an* ***independent agreement*** *from the rest of the contract stipulations. The decision by the arbitral tribunal annulling the contract does not amount to the annulment of the arbitration clause per se.* (emphasis added)

The independence of the arbitration clause from the underlying contract is closely connected to the principle of competence-competence. The latter principle stipulates that arbitrators have jurisdiction to decide on their own jurisdiction.[15] Therefore, domestic courts have no jurisdiction to decide on this matter as a general rule.

The principle of competence-competence was originally embedded in Articles 1424 and 1432 of the CCo. Article 1424, which is directed at the courts, stipulates that on request by one party, the court must refer the parties to arbitration if the dispute is covered by an arbitration agreement, "*except when it is evidenced that this agreement is null and void, inoperative or incapable of being performed*".

The terms 'null and void' refer to the lack of existence or validity of elements described in Section 2.1 above. The term 'inoperative' refers to cases where the arbitration agreement was valid at the time of its conclusion but was rendered ineffectual by an *a posteriori* act (e.g. novation, revocation of the agreement or failure of the parties to comply with the time limits).[16] Finally, the notion of 'incapable of being performed' refers to factual impediments (e.g. the non-existence of the chosen arbitral institution).[17] According to a Mexican court, a party's inability to pay the arbitration expenses cannot be regarded as sufficient grounds to consider the arbitration agreement 'incapable of being performed'.[18]

---

[15] NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN AND MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 340 (2015).

[16] NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN AND MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 138 (2015).

[17] NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN AND MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 138 (2015); FRANCISCO GONZALEZ DE COSSIO, ARBITRAJE 971 (2018).

[18] Third Collegiate Court in Civil Matters of the First Circuit, December 2005, Tesis Aislada I.3o.C.522 C, registered under N° 176594.

Furthermore, Article 1432 of the CCo, which is directed at arbitrators, stipulates that "*the arbitral tribunal is authorized to decide on its own jurisdiction, including deciding on objections concerning the existence or validity of the arbitration agreement*."

In 2006, the Mexican Supreme Court analyzed the relationship between Articles 1424 and 1432. The Supreme Court decided that if a party objects to the validity or existence of the arbitration clause before a domestic court, the court has the jurisdiction to decide on the objections ("Jurisprudence 25/2006"). This jurisprudence damaged the effectiveness of the principle of competence-competence

In 2011, the CCo was expanded to include Articles 1464 and 1465 in order to reinforce the protection of the principle of competence-competence. Article 1464 outlines the procedure that a party has to follow in order to request that a court refers a dispute to arbitration.

Article 1465 stipulates that immediate remission to arbitration can only be denied by the court:

> *a) If in the reply to the request for remission to arbitration it is shown that the arbitration agreement was declared null and void by final decision, whether in the form of a judgment or an arbitral award, or*
>
> *b) If the nullity, ineffectiveness or impossibility of execution of the arbitration agreement has been **notorious** since the reply to the request for remission to arbitration. In making this determination, the court shall follow a **strict criterion**.* (emphasis added)

This provision expressly incorporates a high threshold for the court to retain jurisdiction.

Therefore, read together, Articles 1424, 1432, 1464 and 1465 generally show that if a party objects to the validity or existence of an arbitration agreement, the arbitral tribunal has the primary jurisdiction to decide on the question. There are exceptions to this principle if it is evident from the outset that: (i) there is a final decision or

arbitral award annulling the arbitration agreement, or (ii) the nullity, ineffectiveness or impossibility of execution of the arbitration agreement is notorious.

2.5. **Effects of Arbitration Agreements**

The main effect of an arbitration agreement is the parties' obligation to submit the disputes covered by this agreement to the exclusive jurisdiction of arbitrators.[19] Consequently, it prevents domestic courts from deciding on these disputes, except in the case of the limited exceptions described in Section 2.4 above.

If an applicant submits a dispute covered by an arbitration agreement to a domestic court, the court would notify the respondent of the claim. The respondent would then have a fifteen-day period in which to reply to the merits of the claim. In the first reply to the merits, the respondent must object to the court's jurisdiction in view of the existence of an arbitration agreement and request that the court refers the parties to arbitration.[20]

The court will grant the applicant the opportunity to raise their arguments against the respondent's objections.[21] The applicant would then have the opportunity to lay claim to and provide evidence of one of the limited exceptions set forth in Article 1465 of the CCo.[22] If the court decides that none of the exceptions is applicable, the court must immediately refer the parties to arbitration and suspend the judicial proceedings.[23] It is not possible to appeal against the decision to refer a dispute to arbitration.[24] However, it can be subject to *amparo* proceedings if the decision violates the parties' constitutional rights.

[19] Holtzmann and Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary 302 (1989).
[20] Commerce Code, Article 1464(I).
[21] Commerce Code, Article 1464(II).
[22] See Section 2.4.
[23] Commerce Code, Article 1464(II) and (III).
[24] Commerce Code, Article 1464(VI).

Where the arbitral tribunal decides that the arbitration is null and void or non-existent, jurisdiction over the dispute may be returned to a domestic court. This may also happen if part of the dispute submitted to arbitration is not resolved therein.[25]

3. OBJECTIVE ARBITRABILITY

The substantive scope of application of Mexican arbitration law is restricted to 'commercial' arbitration. There is no clear definition of the term 'commercial'. Article 1416 of the CCo defines 'arbitration' as "*any arbitration proceedings of a commercial nature (...)*". However, this commercial nature does not refer to the proceedings but to the nature of the underlying dispute.

In the event of national arbitration proceedings, the term should be interpreted literally and in accordance with Mexican trade usages. For international arbitration proceedings, as stated by the UNCITRAL Digest of Case Law on the Model Law, the term 'commercial' has to be interpreted widely[26] and in accordance with international standards.[27]

Investment arbitration is not covered by the arbitration law contained in the CCo.

In general, all commercial disputes are subject to arbitration unless they are exclusively reserved for domestic judicial or administrative courts or concern third party interests or public interests.

Some of the matters excluded from arbitration include the following:

- land and water resources located within the Mexican territory;[28]

[25] Commerce Code, Article 1464(V).

[26] UNCITRAL SECRETARIAT, 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, commentary to Article 1, 7 (2012).

[27] Footnote 2 in Article 1 UNCITRAL Model Law provides an illustrative, open-ended list of relationships that might be described as commercial in nature under an international standard. UNCITRAL SECRETARIAT, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 (WITH AMENDMENTS AS ADOPTED IN 2006) Article 1, fn 2 (2008).

[28] Federal Code on Civil Proceedings, Article 568.

- resources within the Mexican 'exclusive economic zone' or resources related to any of the sovereign rights regarding this zone;[29]
- acts related to the internal regime of the Mexican State and its federal entities;[30]
- the internal regime of Mexican embassies and consulates abroad and their official proceedings;[31]
- bankruptcy proceedings;[32]
- administrative rescission or the early termination of contracts entered into by public entities with private parties under the Law of Public Works and Related Services and the Law of Acquisitions, Leases, Services of the Public Sector;[33] and,
- industrial property disputes between private parties and the authorities.[34]

In addition, most family,[35] criminal,[36] tax,[37] and labor[38] matters also fall under the exclusive jurisdiction of domestic courts and the so-called 'labor boards' respectively.

An award on a matter which is not arbitrable can be set aside in challenge proceedings regardless of whether the argument was raised by the parties or not.[39]

---

[29] Federal Code on Civil Proceedings, Article 568.
[30] Federal Code on Civil Proceedings, Article 568.
[31] Federal Code on Civil Proceedings, Article 568.
[32] Bankruptcy Law, Article 1.
[33] Law of Public Works and Related Services, Article 98; Law of Acquisitions, Leases, Services of the Public Sector, Article 80.
[34] Industrial Property Law, Article 227.
[35] Federal Civil Code, Articles 2946-2951.
[36] FRANCISCO GONZALEZ DE COSSIO, ARBITRAJE 286 (2018).
[37] Federal Tax Code, Article 125. Nevertheless, some double taxation treaties provide for arbitration. For example, the Convention Between the Government of the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, 1 January 1994, Article 26(5).
[38] Mexican Federal Constitution, Article 123 (XX).
[39] See Section 7.

4. TYPES OF ARBITRATION PROCEEDINGS

Article 1416(II) of the CCo recognizes two types of commercial arbitration proceedings: (i) institutional arbitration and (ii) ad-hoc arbitration proceedings.

Institutional arbitration is governed by an arbitral institution under its own rules of arbitration whereas ad hoc proceedings are not governed by an arbitral institution.[40]

There are two main Mexican arbitral institutions: (i) the Arbitration Commission of the National Chamber of Commerce (referred to as "CANACO" using its Spanish acronym), and (ii) the Arbitration Center of Mexico (referred to as "CAM" using its Spanish acronym). However, the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA"), and the International Centre for Dispute Resolution ("ICDR") also have a strong presence in the country.

During institutional arbitrations, the rules of the chosen institution govern most matters concerning the constitution of the arbitral tribunal and the way in which the proceedings are to be conducted. If the rules do not contain a provision on a particular procedural aspect, the arbitrators can decide based on the parties' will, the provisions of the CCo, whether the seat of the arbitration is Mexico, or exercise their discretionary powers.

By contrast, the CCo provides most of the relevant rules on how the proceedings should be conducted for ad-hoc arbitration proceedings seated in Mexico. In the absence of a particular provision, the tribunal may decide based on the parties' will or exercise its discretionary powers within the limits of due process.

[40] NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN AND MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 44 (2015).

5. THE TRIBUNAL

5.1. **Constitution of the Tribunal**

Parties are free to agree on the number of arbitrators either in the arbitration agreement or at the beginning of the arbitration. The law does not impose any limitations in this regard.[41] However, the default proceedings are essentially designed for one or three arbitrators, as explained below.

If the parties fail to agree on how many arbitrators there should be, the CCo stipulates that the dispute must be decided on by a sole arbitrator.[42] This default rule is different to the default rule contained in the UNCITRAL Arbitration Rules, according to which three arbitrators are to be appointed where there is disagreement.[43]

Each party may also choose the identity of the party-appointed arbitrators. Anyone may serve as an arbitrator as long as he or she is impartial and independent.

In arbitration proceedings conducted before arbitral institutions, the rules of the institution provide the mechanisms for the constitution of the arbitral tribunal. This includes measures required to prevent the proceedings from being paralyzed should the parties fail to agree on these terms.

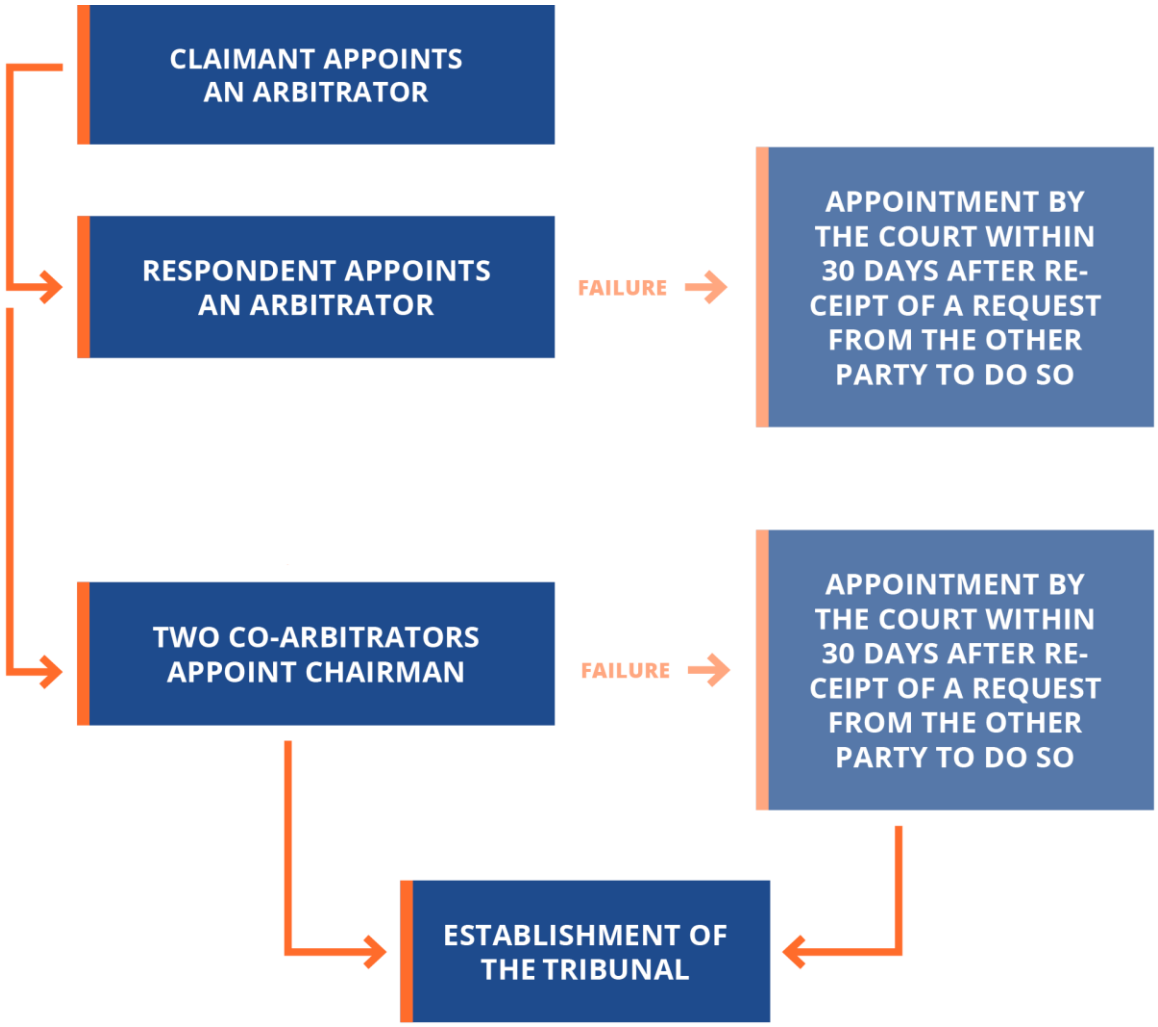
In ad-hoc arbitration proceedings seated in Mexico, the parties are free to determine the rules for the constitution of the arbitral tribunal. However, if the parties fail to agree on such rules, the CCo contains a fallback mechanism.

[41] Commerce Code, Article 1426.
[42] Commerce Code, Article 1426.
[43] UNITED NATIONS, UNCITRAL ARBITRATION RULES (AS REVISED IN 2010) Article 7 (2011).

The fallback mechanism is as follows:

SOLE ARBITRATOR

THREE-MEMBER TRIBUNAL



The court may also assist the parties in the constitution of the arbitral tribunal on request by either party where an arbitral institution has failed to perform any function conferred upon it.[44]

When appointing the sole or third arbitrator, the court will take into consideration whether it is beneficial to appoint an arbitrator with a nationality other than that of the parties.[45]

In 2011, Articles 1466 and 1467 were incorporated into the CCo to explicitly regulate the domestic proceedings that must be followed in order to implement the default mechanism for the appointment of arbitrators.[46]

Article 1466 of the CCo stipulates that a party may request that the court intervene in the appointment of the sole arbitrator or the constitution of the arbitral tribunal through a type of proceeding called *jurisdicción voluntaria*.[47] Following the request, the court must hear the parties' positions and consult, *inter alia*, a list of available arbitrators provided by one or more arbitral institutions and chambers of commerce.[48] If the court decides that it is not convenient to use the institutions' list or the parties reject the use of this system, the court is to send the parties a list of at least three potential arbitrators.[49]

In both cases, the parties may return the list to the court having deleted the names of the arbitrators which they object to and having listed the remaining arbitrators in order of preference within ten business days after being provided with the list.[50] Once the ten-day period has elapsed, the court must appoint the arbitrator based on the parties' comments on the list.[51]

The appointment is conditional on the arbitrator's statement of impartiality and independence. This statement must disclose all circumstances that may give rise to justified doubts as to the ability of the arbitrator to act impartially and independently

[44] Commerce Code, Article 1427(IV).
[45] Commerce Code, Article 1427(V).
[46] Instituto Mexicano de Arbitraje, Legislación Mexicana de Arbitraje Comercial 299-300 (2015).
[47] Commerce Code, Article 1466 refers to the Federal Civil Proceedings Code, Articles 530-532 and 534-537, which govern this type of proceeding.
[48] Commerce Code, Article 1467 (I) and (II).
[49] Commerce Code, Article 1467 (III) (a).
[50] Commerce Code, Article 1467 (III) (b).
[51] Commerce Code, Article 1467 (III) (c).

in the respective case at the time of the appointment.[52] The arbitrator's obligation to reveal potential conflicts of interest applies for the entire duration of the proceedings.[53]

5.2. **Challenges**

An arbitrator may only be challenged if: (i) there are justified doubts concerning his/her impartiality and independence; or, (ii) he/she does not possess the qualifications required by the parties to act as an arbitrator in the respective case, e.g. the language of arbitration, necessary time, etc.[54] The arbitrator's nationality or his/her lack of legal education are not justified grounds *per se* for a challenge.[55]

Article 1428 of the CCo, which provides for the impartiality and independence of arbitrators and the way in which the proceedings are to be conducted, constitutes law that must be observed. The parties may not waive or agree to waive grounds for a challenge in advance. They may only do so after specific grounds for a challenge have become known to them.

A party who has appointed an arbitrator may challenge the appointed arbitrator only if the challenge is based on circumstances which have come to the attention of this party after the appointment was made.[56]

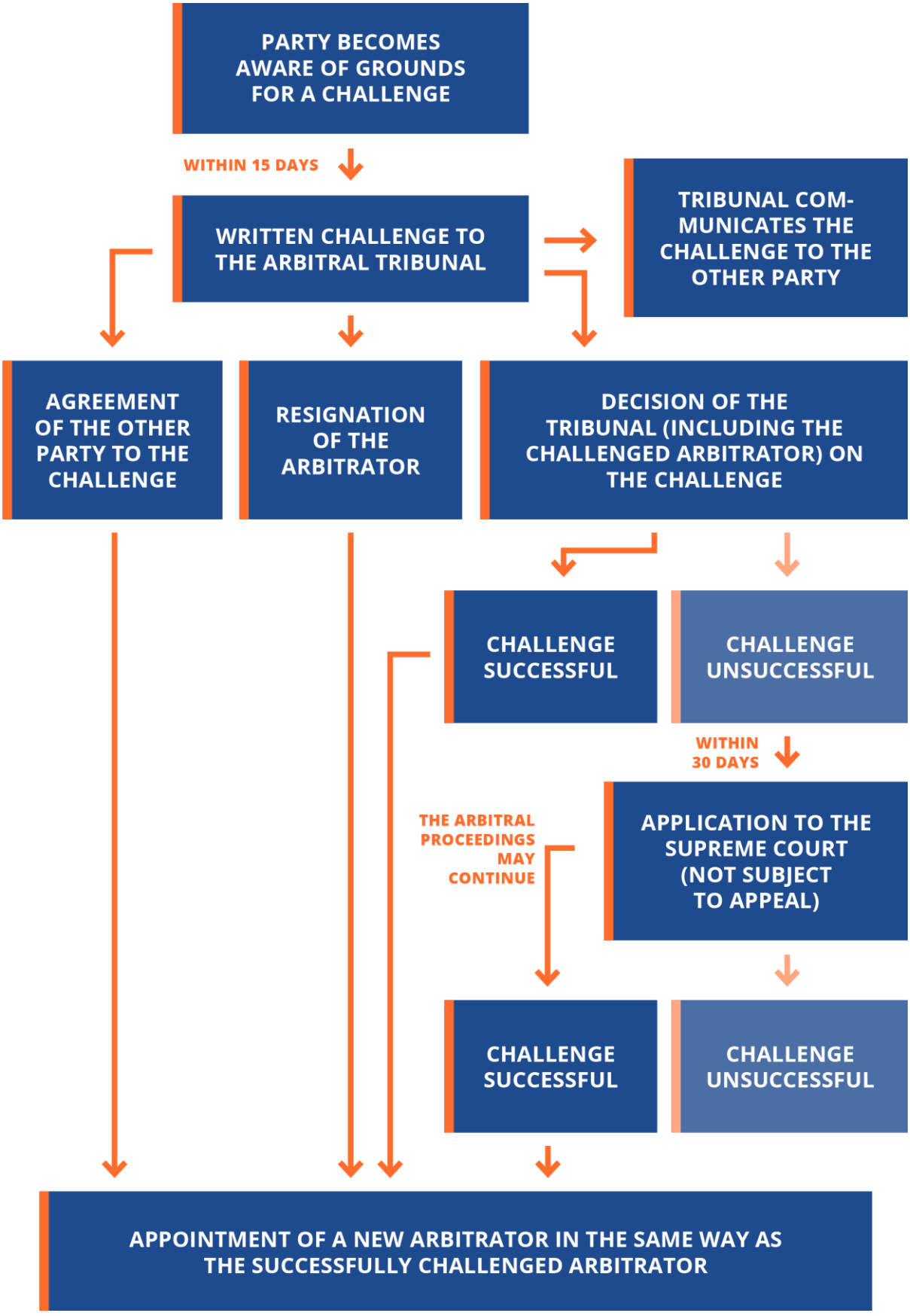
The CCo does not stipulate what constitutes justified doubt as to the impartiality or independence of an arbitrator. However, it is common practice to take into consideration the IBA Guidelines on Conflicts of Interest in International Arbitration in order to define situations which could give rise to justified doubts in more abstract terms.

---

[52] Commerce Code, Article 1428. Third Collegiate Court in Civil Matters of the First Circuit, May 2011, Tesis Aislada I.3o.C.994C., registered under N° 162,067.
[53] Commerce Code, Article 1428.
[54] Commerce Code, Article 1428.
[55] Commerce Code, Article 1427 (I); INSTITUTO MEXICANO DE ARBITRAJE, LEGISLACIÓN MEXICANA DE ARBITRAJE COMERCIAL 93 (2015).
[56] Commerce Code, Article 1428.

The parties may design the proceedings for challenging and replacing arbitrators themselves.[57] In practice, parties regularly find such agreement by subjecting their arbitration to institutional arbitral rules. Virtually all institutional arbitral rules set out a specific procedure for challenging arbitrators.[58] The court may only become involved if the rules are silent on this matter or are not duly followed by the parties. However, if the parties fail to agree on these proceedings, Mexican arbitration law provides the following fallback mechanism:[59]

[57] Commerce Code, Article 1429.
[58] E.g. CAM Arbitration Rules, Articles 17 and 18.
[59] Commerce Code, Article 1429.



Failure to comply with the applicable rules on the constitution of the arbitral tribunal or the challenge or replacement of arbitrators may result in the annulment of the arbitral award.[60]

5.3. **Early Termination of the Arbitrator's Mandate**

Articles 1430 and 1431 of the CCo list grounds for the early termination of an arbitrator's mandate demonstratively.

GROUNDS FOR EARLY TERMINATION:

- Successful challenge.
- Agreement of the parties.
- Withdrawal from office.
- Inability to comply with his/her duties or failure to do so within a reasonable period.
- Any other factual or legal impediment to the exercise his/her duties as an arbitrator (e.g. death).

The early termination of an arbitrator's mandate will result in the appointment of a substitute arbitrator. The appointment of the substitute arbitrator is made in accordance with the same procedure that was applicable to the appointment of the arbitrator being replaced.

The interested party may request the court's assistance in replacing an arbitrator on this basis.[61]

[60] See Section 7. Third Collegiate Court in Civil Matters of the First District, May 2011, Tesis Aislada I.3o.C.946, registered under N° 162070.
[61] Commerce Code, Article 1430.

6. THE ARBITRAL PROCEEDINGS

6.1. **General**

Article 1435 of the CCo enshrines the primacy of party autonomy regarding the way in which the arbitration will be conducted. The parties are free to agree on how the procedure should be conducted within the limits of the mandatory regulations set out by Mexican arbitration law.

In doing so, the parties may not only formulate rules of procedure but also refer to pre-existing rules of procedure (e.g. rules provided by arbitral institutions). If the arbitration is not conducted in accordance with the agreement of the parties, recognition and enforcement of the award may be refused.[62]

In the absence of an agreement between the parties, the arbitral tribunal has to apply the provisions of the arbitration law contained in the CCo including its non-mandatory provisions. Thus, the hierarchy of rules within the CCo regarding the way in which the arbitration proceedings will be conducted is headed by the mandatory provisions set forth therein, including annulment grounds. These are followed by an agreement between the parties, and subsequently – after observance of these rules and the non-mandatory provisions contained within the CCo – the discretion of the arbitral tribunal.

6.2. **Mandatory Provisions**

Most provisions governing arbitration proceedings contained in the CCo allow the parties to agree to the contrary. This means that Mexican arbitration law considers the will of the parties as the main driving force behind the proceedings. However,

[62] See Section 7.

there are also a few provisions that cannot be overridden by an agreement between the parties.

DUE PROCESS

Article 1434 of the CCo stipulates that the parties must be treated equally and must be granted full opportunity to present their case during the arbitration proceedings. The parties' opportunity to present their case includes, in particular:

- The parties' right to be notified of all written communications and submissions.[63]
- The parties' right to participate in the constitution of the arbitral tribunal.[64]
- The parties' right to have the proceedings conducted by impartial and independent arbitrators.[65]
- The parties' right to broaden and modify their claims within certain time limits.[66]
- The parties' right to an oral hearing and to be notified in advance of the date of the hearing.[67]
- The parties' right to be notified of the arbitration award.[68]

[63] Third Collegiate Court in Civil Matters of the First Circuit, May 2011, Tesis Aislada I.3o.C.994C., registered under N° 162,067.
[64] Third Collegiate Court in Civil Matters of the First Circuit, May 2011, Tesis Aislada I.3o.C.994C., registered under N° 162,067.
[65] Third Collegiate Court in Civil Matters of the First Circuit, May 2011, Tesis Aislada I.3o.C.994C., registered under N° 162,067.
[66] Third Collegiate Court in Civil Matters of the First Circuit, May 2011, Tesis Aislada I.3o.C.994C., registered under N° 162,067.
[67] Third Collegiate Court in Civil Matters of the First Circuit, May 2011, Tesis Aislada I.3o.C.994C., registered under N° 162,067.
[68] Third Collegiate Court in Civil Matters of the First Circuit, May 2011, Tesis Aislada I.3o.C.994C., registered under N° 162,067.

A violation of these rights may constitute grounds for annulment under Article 1457 Subsection (1)(B) of the CCo.

FURTHER MANDATORY PROVISIONS

Article 1428 of the CCo stipulates that arbitrators must be and remain impartial and independent as of the date they are informed of their appointment and throughout the entire proceedings.

In addition, the parties may not exclude the possibility of judicial assistance by the state courts where the CCo provides for this.[69]

6.3. **Seat**

Under Article 1436 of the CCo, the parties are free to agree on the 'seat' of the arbitral tribunal. The precise scope of the effects of the seat "*may differ from one jurisdiction to another, because the states determine which issues relating to arbitration conducted in their territory will be regulated and how*".[70] The law of the seat of arbitration (*lex loci arbitri*) further becomes the *lex arbitri* and usually determines some or all of the following issues:[71]

- the formal validity of the arbitration agreement;
- the arbitrability of the dispute;
- the composition of the arbitral tribunal in the absence of agreement between the parties;
- the mandatory provisions governing the proceedings;
- the limited supervisory and supportive role of the courts; and,
- the nationality of the award relevant for the purposes of potential annulment in particular.

[69] For example: Commerce Code, Article 1444.
[70] Alexander J. Bělohlávek, *Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth*, 31 ASA BULLETIN 2/2013 (June), 268.
[71] Alexander J. Bělohlávek, *Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth*, 31 ASA BULLETIN 2/2013 (June), 268.

The parties may agree on the seat in the arbitration agreement, either by expressly stipulating the seat or by referring to specific institutional arbitration rules which often contain provisions determining the seat. There need not be any nexus between the chosen seat of arbitration and the subject matter of the case or the parties.

The seat of arbitration should not be confused with the venue. Regardless of the seat, the arbitral tribunal may meet in any place they deem appropriate for deliberating, hearing the parties, witnesses and experts or reviewing evidence.[72]

DETERMINATION BY THE TRIBUNAL

If the parties fail to agree on the seat of arbitration, the arbitral tribunal may decide on the seat on proper consideration of the circumstances of the case including the parties' convenience.[73] The arbitral tribunal should also consider whether the seat is a member state of the New York Convention because this would facilitate the enforcement of the arbitral award.[74]

6.4. **Applicable Law**

Article 1445 of the CCo grants the parties the freedom to agree on the law applicable to the dispute. The parties can either agree on the law of a specific state or on a set of rules not bound to a particular nation.

An arbitral tribunal seated in Mexico is to apply the substantive law chosen by the parties. The final sentence of Article 1445 CCo paragraph (1) excludes *renvoi*. Hence, rules on the conflict of laws contained within the chosen law will not apply. Furthermore, the choice of law also includes trade usages.[75]

---

[72] Commerce Code, Article 1436. Alexander J. Bělohlávek, *Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth*, 31 ASA BULLETIN 2/2013 (June), 267.

[73] Commerce Code, Article 1436.

[74] INSTITUTO MEXICANO DE ARBITRAJE, LEGISLACIÓN MEXICANA DE ARBITRAJE COMERCIAL 137 (2015).

[75] Commerce Code, Article 1436 paragraph (4).

The parties' freedom to choose the applicable law is subject to limitations. First, the application of the chosen law may not result in a violation of the Mexican *ordre public*. Second, the parties' choice of law cannot override the application of mandatory rules of law.

In the absence of a choice of law, the tribunal is to apply the law it considers appropriate having taken into consideration the characteristics of the case.[76]

Furthermore, Article 1445 of the CCo paragraph (3) gives the parties the opportunity to expressly agree on a decision *ex aequo et bono*. This means that the arbitrators are granted the power to base their decision on principles of equity.[77]

The power to decide in equity means, for instance, that the tribunal:[78]

- should apply relevant rules of law to the dispute, but may ignore any rules that are purely formalistic; or
- should apply relevant rules of law to the dispute, but may ignore any rules that appear to operate harshly or unfairly in the particular case before it; or
- should decide according to general principles of law; or
- may completely ignore any rules of law and decide the case on its merits as they seem to the arbitral tribunal.

6.5. **Language**

PARTIES' AGREEMENT

Under Article 1438 of the CCo, the language of the proceedings is determined by the agreement between the parties. They are not bound by their own nationality, the nationality of the arbitrators or any aspects of the subject-matter when agreeing on

[76] Commerce Code, Article 1445 paragraph (2).
[77] Juan Pablo Cárdenas Mejía, *El arbitraje en equidad*, 105 Vniversitas, 356 (June 2003).
[78] Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration 217 (2015).

the language. They may also decide that the arbitration proceedings are to be held in two or more languages.

The agreed language applies to all written submissions, hearings, awards, decisions and communications relating to the arbitration proceedings.[79]

DETERMINATION BY THE TRIBUNAL

In the absence of an agreement between the parties, the language of the proceedings will be determined by the tribunal.[80] The tribunal shall take the circumstances of the case into account, including the language of the contract, the parties' correspondence, efficiency, costs of the proceedings, etc. It is important that the tribunal chooses a language which both parties and the arbitrators are able to work with because the parties' ability to present their case fully may otherwise be affected.[81]

In making this determination, the tribunal must ensure both parties' right to be heard.

The tribunal also has the power to order the translation of documentary evidence into the agreed language(s).[82]

6.6. **Initiation of the Proceedings**

The date on which arbitration proceedings are initiated is relevant for the determination of any interruptions to the statutory limitation periods applicable to the respective claim.

Under Article 1437 of the CCo, arbitration proceedings commence on the date when the respondent receives the request for arbitration unless otherwise agreed by the

[79] Commerce Code, Article 1438.
[80] Commerce Code, Article 1438.
[81] INSTITUTO MEXICANO DE ARBITRAJE, LEGISLACIÓN MEXICANA DE ARBITRAJE COMERCIAL 145 (2015).
[82] Commerce Code, Article 1438.

parties.[83] The latter possibility is always the case for ad-hoc arbitrations seated in Mexico. However, in institutional arbitrations, some institutional arbitration rules determine the beginning of the arbitration proceedings as being the point in time at which the institution receives the request for arbitration.[84]

Mexican arbitration law does not outline the elements that the request for arbitration must contain. However, in practice, the request should at least contain the following: (i) the names of the parties and their contact details, (ii) a brief description of the facts and legal circumstances giving rise to the claimant's claims, (iii) a statement of the relief sought, (iv) the language of the arbitration proceedings, (v) the applicable law, and (vi) a proposal as to the number of arbitrators and any nomination of the arbitrator required as part of that. Furthermore, a copy of the arbitration agreement and the underlying contract is usually annexed to the request. In contrast to a court claim or the statement of claim, a request for arbitration does not have to expound the case in full.

The request for arbitration is usually followed by a reply to the request from the respondent.

6.7. **Written Exchange of Submissions**

After the arbitral tribunal has been constituted,[85] the tribunal will agree on a timeline for the stages of the proceedings at a prior consultation on the parties' opinions. This includes the date for written submissions, document production and the hearing.

Traditionally, the written stage of arbitration proceedings consists of three exchanges of written submissions. There are two rounds of written submissions before the hearing and one round afterwards.

Under Article 1439 of the CCo, the statement of claim must at least include: (i) the underlying facts of the claim, (ii) the merits of the dispute and (iii) the request for relief sought. Furthermore, the claimants must submit all of the evidence in their control

[83] Commerce Code, Article 1437.
[84] E.g. Article 6(2), CAM Arbitration Rules.
[85] See Section 5.1.

that supports their claim.[86] The arbitral tribunal may terminate the arbitration proceedings if the claimant fails to submit the statement of claim within the given period.[87]

In the statement of defense, the respondent must reply to all arguments raised by the claimant and submit all of the evidence in his/her control that supports his/her objections or counterclaims.[88] Most importantly, the respondent must raise any objections to the jurisdiction of the arbitral tribunal.[89] The arbitral tribunal may allow late objections on jurisdiction if it considers the delay to have been justified.[90] Failure to submit the statement of defense within the determined period is not regarded as a tacit admission of the claims' veracity and does not affect the continuation of the arbitration proceedings.[91]

The arbitral tribunal may decide on the jurisdictional objections raised by the respondent on or before the issuance of the final award. In the event of an early decision on jurisdiction, the affected party has thirty days after having received notice of the decision to raise objection to it with the court for final ruling. The subsequent court ruling on this matter cannot be appealed against.[92] However, it can be subject to *amparo* proceedings if the decision violates the parties' constitutional rights.

[86] Commerce Code, Article 1439.
[87] Commerce Code, Article 1441(I).
[88] Commerce Code, Article 1439.
[89] Commerce Code, Article 1432.
[90] Commerce Code, Article 1432.
[91] Commerce Code, Article 1441(II).
[92] Commerce Code, Article 1432.

6.8. **Interim Measures**

Interim measures under Mexican arbitration law can be issued by courts and tribunals.

INTERIM MEASURES ISSUED BY COURTS

Article 1425 of the CCo stipulates that the existence of an arbitration agreement does not prevent the parties from seeking the protection of the courts through interim measures. This provision is in line with Article 9 of the UNCITRAL Model Law. The latter regulation also explicitly states that an application for an interim measure cannot be regarded as a submission on the substance of the case to the court.[93] Therefore, a party's request on judicial interim measures should not be understood as a waiver of the party's right to arbitration.

The court may order interim measures before the arbitral tribunal has been constituted or during the arbitration proceedings.[94] This possibility cannot be deviated from by an agreement between the parties.

The fact that the tribunal is not seated in Mexico is irrelevant for the jurisdiction of Mexican courts.[95] However, the Mexican court's *iure imperii* to enforce interim measures is limited to Mexican territory.

In 2011, Articles 1479 and 1480 were incorporated into the CCo following the 2006 UNCITRAL Model Law on the recognition and enforcement of interim measures issued by arbitral tribunals.[96]

---

[93] Holtzmann and Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary, 332 (1989); Instituto Mexicano de Arbitraje, Legislación Mexicana de Arbitraje Comercial 73 (2015).

[94] Commerce Code, Article 1425.

[95] Commerce Code, Article 1479; Instituto Mexicano de Arbitraje, Legislación Mexicana de Arbitraje Comercial 74 (2015).

[96] José María Abascal Zamora, Cooperación Judicial en Medidas Precautorias, in Retos Contemporáneos del Arbitraje Internacional 217, 218 (Hector Flores Sentíes ed., 2018)

INTERIM MEASURES ISSUED BY TRIBUNALS

Under Article 1433 of the CCo, tribunals seated in Mexico can issue interim measures unless otherwise agreed by the parties. The interim measures granted by the tribunal must be 'necessary' with respect to the subject-matter of the dispute.

No other requirements are established in the law. However, arbitral practice and academic experts on the field maintain that interim measures must be: (1) necessary to avoid irreparable harm; (2) urgent; and, (3) proportional.[97]

PROCEDURE

All interim measures require that a party make application to the arbitration for these to be implemented.[98] The court or tribunal cannot act *ex officio*.

Article 1470 Subsection (III) of the CCo establishes that a request for interim measures before the court must follow the procedure contained in Articles 1472-1476 (enforcement and recognition procedure).[99]

Given the urgent nature of interim measures, a Mexican court ruled that they may be granted *ex parte*.[100]

The CCo does not explicitly state that interim measures may only be directed against a party to the arbitration and that they may not affect third parties. However, in view of due process, the court's and tribunal's powers can only extend *prima facie* to the parties of the respective dispute.

The court and the arbitral tribunal have the power to order sufficient security for the parties in order to offset any potential damage that the interim measures might cause. The court and the arbitral tribunal have broad discretion to determine the type and amount of security that may be ordered.

TYPES OF MEASURES

[97] FRANCISCO GONZALEZ DE COSSIO, ARBITRAJE 833 (2018).
[98] Commerce Code, Articles 1425, 1433.
[99] See Section 8.1.
[100] Second Collegiate Court in Civil Matters of the Third District, February 2013, Tesis Aislada III.2.C.8.C. (10a), registered under N° 2002829.

Article 1478 of the CCo stipulates that the court has discretionary powers to adopt the interim measures it deems appropriate. This provision clarifies that the court's powers to grant interim measures within an arbitration context is flexible.[101] Therefore, their being granted is not limited to the general rules on interim measures in commercial judicial proceedings contained in Articles 1168-1193 of the CCo.[102]

Similarly, Article 1433 of the CCo stipulates that the tribunal has flexibility to order the interim measures it deems 'necessary' with respect to the subject-matter of the dispute.

Mexican law does not provide a definition of the term 'interim measures'. However, the 2006 UNCITRAL Model Law defines interim measures as

> *any temporary measure, (...) by which, (...) the arbitral tribunal orders a party to:*
>
> *(a) Maintain or restore the status quo pending determination of the dispute;*
>
> *(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;*
>
> *(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or*
>
> *(d) Preserve evidence that may be relevant and material to the resolution of the dispute.*

This definition serves as a guide for determining the purpose that the measures issued by the court or the tribunal should fulfil.[103] Examples of interim measures include: (1) an order to supply a bank guarantee; (2) the prohibition of the sale of certain assets; (3) the conservation and production of evidence; (4) protection of the

[101] Fourth Collegiate Court in Civil Matters of the First District, September 2016, Tesis Aislada I.4o.C.34 C(10a), registered under N° 2012480.

[102] FRANCISCO GONZALEZ DE COSSIO, ARBITRAJE 837-844 (2018).

[103] José María Abascal Zamora, Cooperación Judicial en Medidas Precautorias, in Retos CONTEMPORÁNEOS DEL ARBITRAJE INTERNACIONAL 217, 226 (Hector Flores Sentíes ed., 2018)

tribunal's jurisdiction; and (5) an order to make down payments on administrative procedural costs.[104]

Other possible measures that have been ordered by Mexican courts include an order to: (6) discontinue complying with the terms and conditions of a contract; (7) forego the collection or transfer of a promissory note; (8) continue works stipulated under a contract.[105]

ENFORCEMENT OF INTERIM MEASURES

The parties may request the court's assistance in enforcing the interim measures ordered by the arbitral tribunal. Mexican law allows for the enforcement of interim measures related to domestic as well as foreign arbitral tribunals,[106] irrespective of an enforcement treaty and irrespective of reciprocity.

Article 1479 of the CCo stipulates that interim measures granted by the arbitral tribunal are binding and that any party may request the court's assistance in their enforcement. As a general rule, the court should enforce the interim measures ordered by the arbitral tribunal. However, Article 1480 of the CCo provides a comprehensive list of grounds on which a court may deny the enforcement:

- If the court knows that denying the interim measures is justified under grounds (a), (b), (c), and (d) of Subsection (I) of Article 1462 on the non-enforcement and recognition of arbitration awards.
- If the court knows that the parties have not complied with the security ordered by the arbitral tribunal.
- If the court knows that the tribunal has ordered the revocation or suspension of the interim measures.

[104] INSTITUTO MEXICANO DE ARBITRAJE, LEGISLACIÓN MEXICANA DE ARBITRAJE COMERCIAL 119 (2015).
[105] FRANCISCO GONZALEZ DE COSSIO, ARBITRAJE 830, 832 (2018).
[106] Commerce Code, Article 1479.

- If the court decides that the interim measures are incompatible with the court's powers. In this case, the court may reformulate the tribunal's order to make it compatible with their powers.

- If the court decides that enforcing the interim measures would fall within the grounds set forth in Subsection (II) of Article 1462 on the non-enforcement and recognition of arbitration awards.

6.9. **Evidence and Oral Hearing**

The arbitral tribunal has discretionary powers to evaluate the evidence submitted by the parties.[107] Thus, Mexican rules on the admission, relevance and scope of evidence are not necessarily applicable in an arbitration unless the arbitrators decide to apply them.[108] The arbitrators' discretionary powers have to be exercised within the boundaries of the principles of due process and equal treatment.[109]

In addition to the evidence submitted with the written statements, the parties may agree on a stage in the proceedings at which the production of documents may be requested and an evidentiary hearing.

If deemed necessary, the arbitral tribunal may appoint experts to explain a particular technical point of law or fact. These experts are to be distinguished from the experts that the parties may nominate to support their arguments.[110] The purpose of the experts appointed by the arbitrators is mainly to: (i) clarify contradictory reports from party-appointed experts or (ii) complement the evidence presented by the parties if incomplete or insufficient with particular regard to technical issues.[111]

Following the submission of the parties' case, a hearing may be held to address the claims and evidence presented by the parties, including the examination of experts and witnesses.[112]

---

[107] Commerce Code, Article 1435.
[108] INSTITUTO MEXICANO DE ARBITRAJE, LEGISLACIÓN MEXICANA DE ARBITRAJE COMERCIAL 133 (2015).
[109] See Section 2.4.
[110] Commerce Code, Article 1439.
[111] INSTITUTO MEXICANO DE ARBITRAJE, LEGISLACIÓN MEXICANA DE ARBITRAJE COMERCIAL 160-161 (2015).
[112] Commerce Code, Article 1443.

6.10. **Court Assistance**

The principle of minimum court intervention is established in Article 1421 of the CCo and stipulates that there should not be any judicial intervention in any aspects governed by Mexican arbitration law, apart from the exceptional cases provided for in the law.[113]

Court assistance is necessary where one of the parties does not want to cooperate or comply voluntarily with the tribunal's decisions because arbitral tribunals lack coercive powers.

- The following are instances where court assistance may occur:[114]
- the order of interim measures (Article 1425);
- remission of the parties to arbitration (Articles 1424 and 1464);
- the appointment of arbitrators (Article 1427);
- a challenge to arbitrators in ad-hoc proceedings (Article 1429);
- the replacement of arbitrators (Article 1430);
- a final decision on a negative jurisdictional decision of the tribunal (Article 1432);
- the production of evidence (Article 1444); and,
- a review of arbitrators' fees (Article 1454).

[113] Commerce Code, Article 1421.

[114] Third Collegiate Court in Civil Matters of the First District, March 2007, Tesis Aislada I.3o.C.566 C(9a), registered under N° 172973.

Court assistance by Mexican courts is not limited to arbitration proceedings which have their seat in Mexico. According to Article 1415 of the CCo, court assistance may be granted even where the seat is not Mexico in the following cases:

- remission to arbitration;
- the adoption of interim measures; and,
- the enforcement and recognition of arbitral award.

Although not expressly provided for in Article 1415, enforcement of interim measures is also possible even where the seat is not Mexico.

A request for court assistance may be submitted by either party to the arbitration proceedings.

Under Article 104(II) of the Mexican Constitution, commercial matters are subject to concurrent jurisdiction. This means that federal and local courts have the jurisdiction to decide on commercial disputes. Therefore, due to the underlying commercial matters of arbitration proceedings, if the parties require court assistance to set arbitration proceedings in motion, the competent court will be a federal court of first instance or a local court on civil and commercial matters at the location where the arbitration is to take place.[115]

7. THE AWARD

7.1. **The Decision Making of the Tribunal**

The tribunal must decide on the dispute according to the law chosen by the parties or, in the absence of such an agreement, according to the law determined by the tribunal. In addition to the applicable law, the tribunal must decide on the basis of the terms of the underlying contract and Mexican trade usages.[116]

Decisions by a panel of three arbitrators are taken by a majority of the tribunal.[117] Purely procedural issues can be delegated to the chairman either by agreement

[115] Commerce Code, Article 1422.
[116] Commerce Code, Article 1445.
[117] Commerce Code, Article 1446.

between the parties or by all members of the tribunal.[118] Such decisions do not include the determination of points which are of fundamental importance to the proceedings such as the seat of arbitration.

7.2. **The Award**

THE TERM

The CCo does not contain a legal definition of the term 'award'. In an international context, there is no unanimously accepted definition either. However, a definition of the term proposed by academics refers to a document issued by the arbitrators that contains:

> *the decision of the arbitral tribunal that definitively resolves all or part of the merits of the dispute or a jurisdictional aspect that results in the termination of the arbitral proceedings or the adoption of a settlement between the parties [...]*[119]

All other decisions that do not refer to the merits of the dispute submitted to the tribunal, its jurisdiction or the adoption of a settlement between the parties are procedural orders or communications.

[118] Commerce Code, Article 1446.
[119] POUDRET J.-F., BESSON S., DROIT COMPARE DE L'ARBITRAGE INTERNATIONAL, 870 (2002).

TYPES OF AWARDS

Depending on the scope and matter of the decision, the tribunal can render *inter alia*

- final awards;
- partial awards;
- interim awards;
- awards on jurisdiction;
- awards on costs; and,
- supplementary awards.

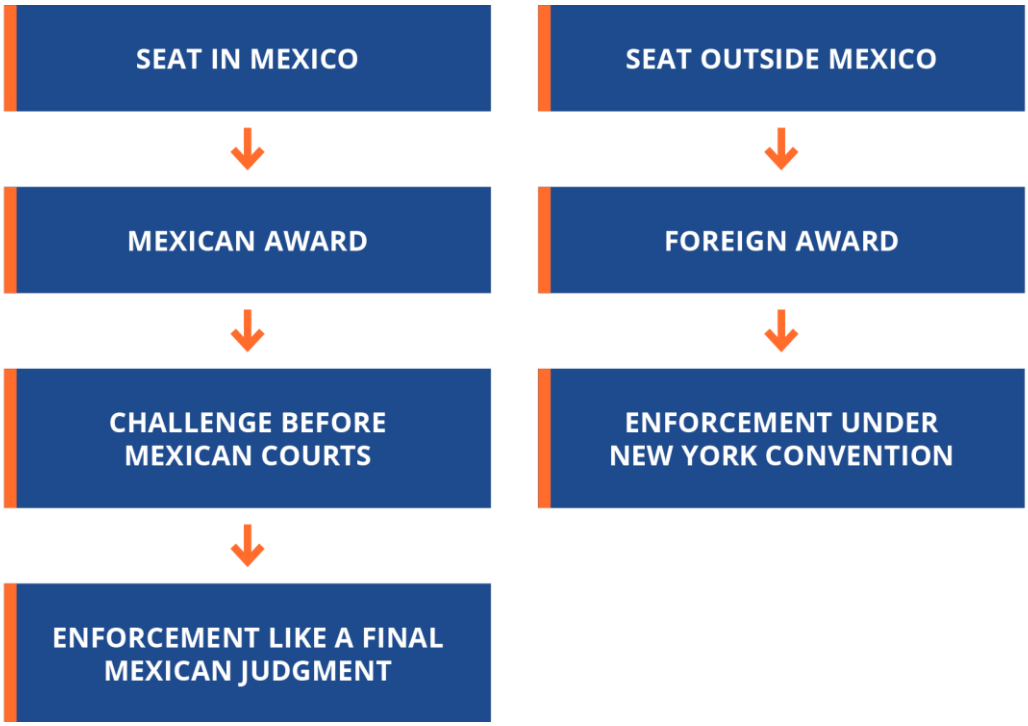
In addition, the parties may settle the dispute before the issuance of an award. This settlement may be elevated to the form of a final arbitral award if both parties request this. However, the arbitral tribunal has the discretionary power to decide whether the terms of an agreement between the parties are legally capable of being elevated to a consent award.[120]

Under the CCo, a consent award enjoys the same enforcement protections as any other final arbitral awards.[121] Therefore, if a party fails to comply with the award, the relevant enforcement and recognition proceedings are available to the interested party.

[120] Commerce Code, Article 1447.
[121] Commerce Code, Article 1447.

FOREIGN AND DOMESTIC AWARDS

The seat of arbitration determines the nationality of the award.[122]



NECESSARY ELEMENTS OF THE AWARD

The award must[123]

- be in written form;
- state the date on which it was rendered;
- the seat of arbitration;

[122] Commerce Code, Article 1448.
[123] Commerce Code, Article 1448.

- a reasoning (if the parties have not agreed otherwise or if it is not a consent award);
- state the identity of the arbitrator(s), the parties;[124] and,
- be provided to the parties.[125]

SIGNING OF THE AWARD

The award shall be in writing and signed by the arbitrators.[126] Signatures from the majority of a tribunal will be sufficient, provided that the reasons for refusing to sign are stated in the award by the signing arbitrators or the refusing arbitrator.[127]

The CCo does not envisage the attachment of dissenting opinions to an award. However, the inclusion of dissenting opinions is common practice.

7.3. **The Legal Effects of the Award**

Under Article 1461 of the CCo, the award is final and binding upon the parties. The findings of the award are *res judicata*. This means that

> *if a party were to bring a court or arbitral action against the other in relation to the subject matter of arbitration based on the same cause of action between the same parties, the court or tribunal would dismiss the action on the ground that the issues had been disposed of and were* res judicata.[128]

[124] This requirement is not provided for in Article 1448 Commerce Code. However, it is a common practice useful for a potential setting aside or recognition and enforcement request.
[125] Commerce Code, Article 1448.
[126] Commerce Code, Article 1448.
[127] Commerce Code, Article 1448.
[128] NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN AND MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 560 (2015).

7.4. **Decision on Costs**

Articles 1452 and 1453 of the CCo stipulate that the tribunal must issue a decision on costs if the parties have not agreed otherwise. The tribunal will determine the costs of the proceedings and the distribution of the costs between the parties.

Under Article 1455 of the CCo, the costs shall be covered by the losing party.[129] However, the tribunal may decide otherwise and distribute the costs between the parties in consideration of the circumstances of the case.[130] These circumstances include, for example, the conduct of the parties during the proceedings.

The tribunal's decisions with respect to costs can take the form of an order or an award.[131] For example, the tribunal may request through a procedural order that the parties make down payments for part of the costs.[132] However, a final determination on costs is usually issued through an award in order to ensure its enforcement.

The tribunal can decide on costs even if it transpires that it does not have jurisdiction to decide on the case or if it renders a consent award.[133]

Together with the decision on costs, the tribunal must issue a balance statement detailing the parties' down payments and must reimburse them any amounts paid in excess.[134]

[129] Commerce Code, Article 1455.
[130] Commerce Code, Article 1455.
[131] Commerce Code, Article 1455.
[132] Commerce Code, Article 1456.
[133] Commerce Code, Article 1455.
[134] Commerce Code, Article 1456.

7.5. **Termination of the Proceedings**

The arbitration proceedings may end with:

- the claimant's failure to submit the statement of claim or the withdrawal of the claim, except where the respondent opposes the termination (e.g. because the respondent insists that a legal position be established); or,
- the parties mutually consenting to terminate the arbitration proceedings; or,
- a final award; or,
- the tribunal's corroboration that the continuance of the proceedings has become impossible.[135]

7.6. **Correction, Interpretation and Supplementation of the Award**

Not all arbitral tribunal powers end with the rendition of an award. Within the thirty days following the date on which the award was communicated to the parties:

1. Either party, on giving notice to the other, may request that the arbitral tribunal correct mechanical mistakes in the arbitral award. Examples of mechanical mistakes include typos in the names of the parties, experts, or witnesses, mathematical errors, quotation errors, etc. The tribunal may render a corrected award within the thirty days following the request from the applicant.[136]

2. The parties may request that the tribunal interpret a particular aspect or part of the decision. If the tribunal deems the interpretation to be justified, it will provide the interpretation within the thirty days following the request

[135] Commerce Code, Article 1449.
[136] Commerce Code, Article 1450(I)

from either of the parties. The interpretation will become part of the award.[137]

3. Either party, on giving notice to the other party, may request that the arbitral tribunal issue an additional award, whereby the tribunal decides on a particular claim raised by the party during the arbitration proceedings but which was not decided on in the final award. If the tribunal deems that an additional award is justified, it will provide the additional award within sixty days following the request.[138]

The tribunal may choose whether or not to make changes or additions requested by the parties. Furthermore, any correction, interpretation or supplementation made to the award cannot alter the merits of the tribunal's decision.[139] The statutory periods granted to the tribunal to issue their decision on these matters may be extended by the tribunal if deemed necessary.[140] Any change or addition made by the tribunal must follow the same formalities as the ones applicable to the final award.[141]

The law expressly stipulates that the tribunal's decision on the correction or interpretation of the arbitral award is part of the final award. In contrast, additional awards are independent of the final award. Therefore, domestic courts have determined that the annulment of additional awards does not necessarily amount to the annulment of the final award.[142]

No additional arbitrators' fees will be incurred in the event of any of the above-mentioned requests being made by either of the parties.[143]

[137] Commerce Code, Article 1450(II)
[138] Commerce Code, Article 1451.
[139] Seventh Collegiate Court in Civil Matters on the First District, April 2009, Tesis Aislada I.7o.C.128, registered under N° 167458. INSTITUTO MEXICANO DE ARBITRAJE, LEGISLACIÓN MEXICANA DE ARBITRAJE COMERCIAL 197-198 (2015).
[140] Commerce Code, Article 1451.
[141] See Section 7.2.
[142] Seventh Collegiate Court in Civil Matters on the First District, April 2009, Tesis Aislada I.7o.C.126, registered under N° 167441.
[143] Commerce Code, Article 1455.

7.7. **Setting Aside Proceedings**

Article 1457 of the CCo enumerates a list of grounds for the setting aside of the award:

- the lack of subjective arbitrability or of a valid arbitration agreement;
- the violation of the right to be heard;
- the award was *ultra petita*;
- the constitution or composition of the tribunal was not in line with an agreement between the parties or statutory laws;
- the lack of objective arbitrability; and,
- the violation of *ordre public*.

LACK OF SUBJECTIVE ARBITRABILITY

An award can be set aside if a party lacked the capacity to conclude an arbitration agreement under the law applicable to his/her personal status.[144] As indicated in Section 2.1, subjective arbitrability is a requirement for the validity of the arbitration agreement.

Under Article 13 of the Federal Civil Code, the personal state and capacity of natural persons is governed by the law of their domicile. In most cases, minors[145] and persons with a disability that impedes them from expressing their will do not have the legal capacity to conclude arbitration agreements[146] and thus they cannot agree to submit their disputes to arbitration.

[144] Third Collegiate Circuit Courts, May 2011, Tesis Aislada I.3o.C.943, registered under N° 162072.
[145] In Mexico, 18 years old is the threshold of adulthood recognized in law. Federal Civil Code, Article 646.
[146] Federal Civil Code, Article 450.

The applicable law for determining the capacity of legal entities is more complex. However, the applicable law that governs this aspect is the law of their place of incorporation or main seat of business in most cases. The corporate purpose of legal private entities must allow them to conclude arbitration agreements. In the case of public entities, their applicable law must allow them to conclude arbitration agreements.

Legal entities act through their legal representatives. In Mexico, an individual who concludes an arbitration agreement on behalf of a legal entity must have power-of-attorney to refer any matter to arbitration and to conclude an arbitration agreement.[147]

LACK OF ARBITRATION AGREEMENT

Article 1457 Subsection (1) paragraph (a) of the CCo applies both to arbitration agreements which do not meet the requirements set out in Section 2.1 above as well as to cases in which an arbitration agreement is completely lacking.

The law applicable to the validity of the arbitration agreement is the law agreed on by the parties or, in the absence of such an agreement, the law of the seat of arbitration.[148]

The invalidity of an arbitration agreement owing to a lack of form must be invoked by the respondent before or together with the first submissions on the merits of the case (Article 1432 of the CCo). Failure to do so would cause the defect in the form of the arbitration clause to heal unless there is a justified reason for the delay.[149]

If one of the parties raises an objection in a timely manner, the tribunal will decide on its own jurisdiction. If one party challenges the tribunal's decision on its jurisdiction before a court, the tribunal can nevertheless continue with the proceedings until judgement has been passed.[150]

[147] FRANCISCO GONZALEZ DE COSSIO, ARBITRAJE 213, 214 (2018).
[148] FRANCISCO GONZALEZ DE COSSIO, ARBITRAJE 965 (2018).
[149] See Section 2.4.
[150] Commerce Code Article 1432.

The parties can also challenge an award where the tribunal has denied its jurisdiction due to the lack of a valid arbitration agreement before a court.

VIOLATION OF THE PARTIES' RIGHT TO BE HEARD

Mexican courts have held that the right to be heard includes the right of the parties to be informed about: (i) the initiation of the arbitration proceedings; (ii) the parties' right to participate actively in the arbitration proceedings; and, (iii) the absence of serious irregularities that prevent the parties from presenting their case.[151]

DECISION ULTRA PETITA

Arbitral awards which decide matters beyond the claims submitted by the parties to the tribunal or exceed the *ratione personae* or *materiae* of the arbitration agreement can be set aside.

Whether the tribunal's decision has exceeded the claims of the parties is to be determined by reference to the claim (and, if applicable, the counterclaim) submitted in the statement of claim (which may be extended or amended for the duration of the proceedings). Some institutional arbitration rules also stipulate 'Terms of Reference' which identify the mandate of the tribunal.[152]

Whether the tribunal's decision has exceeded the *ratione personae* or *materiae* of the arbitration agreement is to be determined by reference to the arbitration agreement.

If only a stand-alone part of the tribunal's award which can be separated from the remaining award exceeds the claims submitted, only this part of the award will be set-aside.[153]

---

[151] FRANCISCO GONZALEZ DE COSSIO, ARBITRAJE 989 (2018), quoting a Mexican court.
[152] ICC Arbitration Rules, Article 23(2).
[153] Third Collegiate Circuit Courts, May 2011, Tesis Aislada I.3o.C.945, registered under N° 162071.

CONSTITUTION OR COMPOSITION OF THE TRIBUNAL NOT IN LINE WITH AN AGREEMENT BETWEEN THE PARTIES

Awards can be set aside if they were rendered by a tribunal which was not constituted in accordance with an agreement between the parties or the applicable rules. In order to challenge the award, the parties must object to any defect in the constitution of the arbitral tribunal without delay. The same applies in cases in which the parties want to set aside the award due to the partiality of an arbitrator.

LACK OF OBJECTIVE ARBITRABILITY

An arbitral award can be set aside if the subject matter of the dispute is not arbitrable.[154] This ground for annulment must be considered *ex officio* by the courts (Article 1457 Subsection (II) of the CCo).

VIOLATION OF ORDRE PUBLIC

An arbitral award must be set aside if it contradicts the Mexican substantive *ordre public*. The courts must consider this ground for annulment *ex officio* (Article 1457 Subsection (II) of the CCo).

The term '*ordre public*' is not defined in Mexican law. Therefore, the legal standard should be sought in case law. Mexican courts have come across different cases where this ground has been discussed.

In one case, the court defined *ordre public* as:

> *A set of rules which, according to a certain historical vision of social life and relationships between individuals, is necessary for the existence of the state and the development of the individual in equilibrium, harmony*

[154] See Section 3.

> *and peace, concerning the defense of the freedoms, rights or fundamental goods of man and the principles of his legal organization in order to fulfil himself as a member of a society.*[155]

In another case, the court defined it as:

> *a set of rules on which the common good rests and before which particular rights are ceded because it is in the interest of society as a whole rather than in the interest of individual citizens.*[156]

These definitions are imprecise. However, they both somehow refer to fundamental principles of the Mexican legal system which protect the interests of Mexican society as a whole.

Other courts have tried to identify *ordre public* by referring to notions that should not be confused with *ordre public*:

- disputes on public assets;[157]
- non-arbitrability;[158]
- mandatory provisions;[159]
- public interest;[160] and,
- public law.[161]

The Mexican Supreme Court, in the *Amparo* 755/2011, determined that *ordre public* is an undetermined notion.[162] However, it posited that *ordre public* is:

---

[155] Third Collegiate Circuit Court in Civil Matters of the First District, *Maquinaria Igsa, S.A. de C.V. et al*, 7 October 2010, *Amparo en Revisión* 195/2010 (Unofficial English Translation)
[156] Judge 56° on Civil Matters of the First Circuit, 7 November 2011, Judgment 596/2011.
[157] Judge 12° on Civil Matters in Mexico City, 28 March 2006, Judgment 213/2005-V.
[158] Third Collegiate Circuit Court in Civil Matters of the First District, *Maquinaria Igsa, S.A. de C.V. et al*, 7 October 2010, *Amparo en Revisión* 195/2010
[159] Third Collegiate Circuit Court in Civil Matters of the First District, *Maquinaria Igsa, S.A. de C.V. et al*, 7 October 2010, *Amparo en Revisión* 195/2010
[160] Third Chamber of the Supreme Court, 27 November 1989, Judgment 2/89.
[161] Judge 46° on Civil Matters in Mexico City, Judgment 596/2011.
[162] Supreme Court, 14 October 2010, *Amparo en Revisión* 755/2011, paras. 69, 70.

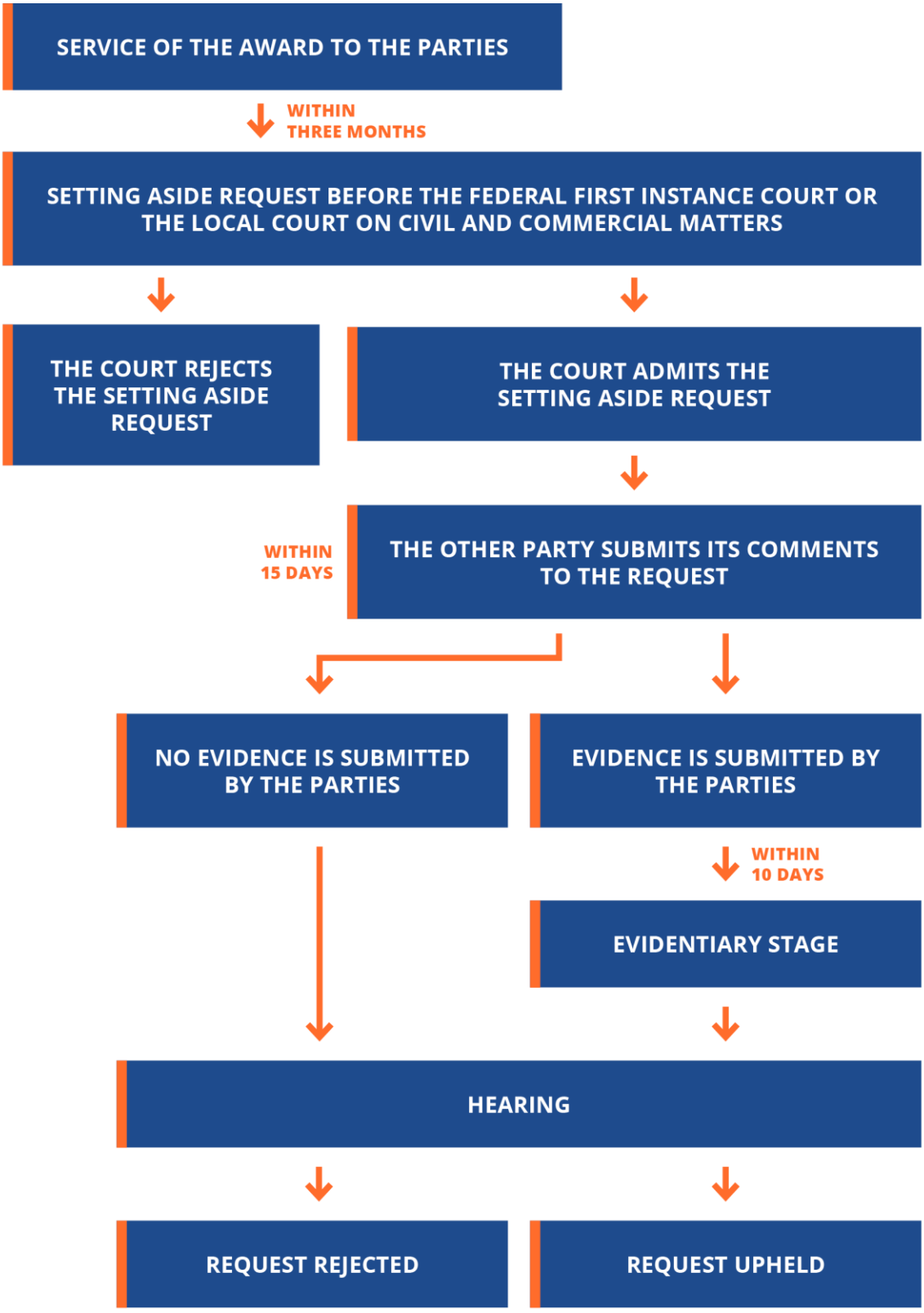
> *[t]he mechanism through which the state prevents certain particular acts from affecting the fundamental interests of society.*[163]

The court went on to hold that an award would violate the Mexican *ordre public* when the decision contained therein exceeds the limits of the institutions, principles and notions of the Mexican legal system and that such a transgression would affect society due to its seriousness.[164]

In the field of telecommunications, the Supreme Court held that interconnection issues are related to the Mexican *ordre public* as an example of what constitutes *ordre public.*[165]

In the context of arbitration, the courts have maintained that *ordre public* cannot be used to frustrate arbitrations as an alternative dispute settlement mechanism. Therefore, they have maintained that for legal certainty, the application of *ordre public* has to be made as precise as possible.[166]

[163] Supreme Court, 14 October 2010, *Amparo en Revisión* 755/2011, para. 81 (Unofficial English Translation).
[164] Supreme Court, 14 October 2010, *Amparo en Revisión* 755/2011, para. 81.
[165] Supreme Court, July 2011, Jurisprudence P./J. 10/2011, registered under N° 161445.
[166] Third Collegiate Circuit Court in Civil Matters of the First District, May 2011, Tesis Aislada I.30.C.953 C., registered under N° 162053.



If the award is set aside, the dispute may be resubmitted to arbitration (unless a challenge found the arbitration agreement to be invalid).

8. RECOGNITION AND ENFORCEMENT OF THE AWARD

Under Article 1461 of the CCo, domestic arbitral awards are immediately enforceable in Mexico. This rule also applies to awards rendered by tribunals seated in other countries which are party to the New York Convention.

The New York Convention has 164 parties (as of June 2020). It governs the recognition of foreign arbitral awards (not, however, of consent awards) regardless of whether these awards were rendered in states which are party to the Convention.

8.1. **Procedure**

Enforcement is initiated when the party seeking enforcement makes application for this. The procedure follows the same steps of the setting aside proceedings.

The applicant is to submit

- an original award or a certified copy thereof to the court. The award or the copy must be "duly authenticated".[167] Under Mexican law, there are no provisions on the meaning of authentication. However, courts have determined that the purpose of authentication is to make sure that the signatures of the arbitrators are authentic. Therefore, the authentication process can be performed by a public notary.[168] The courts have also stipulated that the certified copy of the award can be issued by the arbitral institution or the arbitrators.[169]

- the original arbitration agreement or a certified copy thereof.[170]

[167] Commerce Code Article 1461 and New York Convention Article IV(1)(a).
[168] Fourth Collegiate Circuit Court in Civil Matters of the First District, September 2018, Tesis Aislada I.14o.C.26 C., registered under N° 2017915.
[169] Fourth Collegiate Circuit Court in Civil Matters of the First District, September 2018, Tesis Aislada I.14o.C.26 C., registered under N° 2017915.
[170] Commerce Code Article 1461 and Article IV(1)(b) New York Convention.

- a translation of the award into Spanish if this is not the language in which it was rendered. The translation must be made by a certified translator.[171] For the enforcement of foreign awards, the translation may also be made by a diplomatic or consular agent.

8.2. Grounds for Refusing Recognition and Enforcement

The CCo adopted the grounds listed in the New York Convention. The New York Convention contains two categories of grounds: Article V Subsection (1) Litera (a) to (e) contains grounds which must be invoked and established by a party. The grounds listed in Article V Subsection (2) must be considered by the court *ex officio*.

- the lack of subjective arbitrability or of a valid arbitration agreement;
- the violation of the right to be heard;
- the award was *ultra petita*;
- the constitution of the tribunal or the proceedings were not in accordance with an agreement between the parties or the *lex arbitri;*
- the award has not yet become binding or has been set aside in the state of origin;
- the lack of objective arbitrability under the law of the state in which recognition and enforcement is applied for; and,
- the recognition and enforcement of the award would violate the *ordre public* of the state in which recognition and enforcement is sought.

A court decision on recognition and enforcement of the arbitral award is not subject to appeal. However, it can be subject to *amparo* proceedings if the decision violates the parties' constitutional rights. In December 2019, the

[171] Commerce Code Article 1461 and Article IV(2) New York Convention.

Mexican Supreme Court ruled that the appropriate type of *amparo* proceedings is a dual instance *amparo* (*amparo indirecto*).[172]

8.3. Interplay between Setting Aside and Recognition and Enforcement Proceedings

It is common practice for the parties to initiate setting aside proceedings and proceedings for the recognition and enforcement of the award respectively at a similar time. These proceedings can be initiated in the same or different countries.

If this happens, the Mexican court deciding on the enforcement may stay its decision until the decision on setting aside has been issued. Furthermore, on request from an applicant that proceedings be stayed, the court may request that the other party provide sufficient security.[173]

If both proceedings are conducted before Mexican courts at the same level (i.e. federal or local courts) and in the same territorial jurisdictions, a party may request that either court order the accumulation of the proceedings.[174] Accumulation is only possible if the request is made before the hearing has been held.[175]

[172] Supreme Court, December 2019, Jurisprudence 1a./J. 87/2019 (10a.), registered under N° 2021235.
[173] Commerce Code Article 1464.
[174] Commerce Code Article 1477.
[175] Commerce Code Article 1477.

ZFZ | ZEILER FLOYD ZADKOVICH

SYDNEY
Zeiler Floyd Zadkovich LLP
Level 15, 1 O'Connel Street, Sydney
NSW 2000

T +61 27 908 26 26
E sydney@zeilerfloydzad.com

VIENNA
ZFZ Zeiler Rechtsanwälte GmbH
Stubenbastei 2
Entrance Zedlitzgasse 7
3rd floor: conference area
6th floor: office
1010 Vienna, Austria

T +43 1 890 10 87 – 0
E vienna@zeilerfloydzad.com

LONDON
Zeiler Floyd Zadkovich LLP
Summit House
12 Red Lion Square
London WC1R 4QH, United Kingdom

T +44 203 740 25 76
E london@zeilerfloydzad.com

NEW YORK
Zeiler Floyd Zadkovich (US) LLP
215 Park Avenue South
11th floor
New York, NY, 10003 USA

T +1 332 213 06 70
E usa@zeilerfloydzad.com

MEXICO CITY
Zeiler Floyd Zadkovich S.C.
G. González Camarena No. 1600,
4th floor Suite 80, Santa Fe, 01210
Mexico City, Mexico
Alcadía Alvaro Obregón

T +52 55 5081 8457
E mexico@zeilerfloydzad.com

CHICAGO
Zeiler Floyd Zadkovich (US) LLP
500 West Madison Street
10th floor
Chicago, Illinois, 60661 USA

T +1 708 320 00 10
E usa@zeilerfloydzad.com

HOUSTON
Zeiler Floyd Zadkovich (US) LLP
4265 San Felipe Street
Suite 1100
Houston, Texas 77027 USA

T +1 346 235 01 19
E usa@zeilerfloydzad.com