

# Resolution on the Authentication of Arbitration Awards in Commercial Matters

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In the constitutional lawsuit (*amparo*) with court docket number 7856/2019, the First Chamber of the National Supreme Court of Justice analyzed the constitutionality of Article 1461, second paragraph, of the Commercial Code, which states, in its relevant part, that a party interested in enforcing an arbitration award must file the original arbitral award “duly authenticated”.[fn]Precedent generated by Contributors (CAMYA ABOGADOS)[/fn]

It is relevant to stress that, in the Mexican legal system, authentications are mostly conducted by public notaries and brokers. Thus, the point to elucidate is to understand how this requirement is met.

It should be noted the existence of a judicial precedent issued by the Fourteenth Collegiate Circuit Court in Civil Matters from the First Circuit (Mexico City). The referred precedent established that duly authentication implies that the interested party proves that the arbitral award was issued by the respective arbitrator or arbitrators. Hence, the arbitrator or arbitrators shall attend before a notary public or public broker to certify that the signatures in the award are their own.

## **Relevant background**

In the case at hand, the parties involved in this arbitration, seated in London, and conducted under the rules of the London Maritime Arbitrators Association, settled the respective dispute, and the arbitrators issued a consent award.

Due to the fact that the consent award was not fully complied with by the losing party (the respondent), the claimant initiated the special procedure for recognition and enforcement of the arbitration award in Mexico, under the application of the Commercial Code.

Therefore, the plaintiff submitted before the competent judge a copy certified by a notary public in Mexico City, in which this one certified that the photostatic copy of the consent award was consistent with the original.

## **Legal issues to be resolved**

As it was stressed before, one of the legal issues to determine in the recognition and enforcement procedure was to establish whether the notarial certification of an arbitration award, complied with the formality contained in Article 1461, second paragraph of the Commercial Code. The foregoing with respect to the obligation that the interested party needs to exhibit the original award duly authenticated.

In the case at hand, the Fifteenth Collegiate Circuit Court in Civil Matters from the First Circuit (Mexico City), stated that the authentication requirement is met with the presentation of the original award or a certified copy. The court reasoned that the award enjoys a presumption of validity, hence, it is presumed valid unless the defendant proves the falsity of its content or of the arbitrators' signatures. Therefore, if the lack of authenticity is not accredited, the award can be executed even if it is not authenticated by a public notary. Otherwise, it would be contrary to article 17 of the Political Constitution of the United Mexican States ("**Mexican Constitution**"), which guarantees parties' access to justice.

Due to the discrepancy of its decision with the previous judicial precedent issued by the Fourteenth Collegiate Circuit Court in Civil Matters from the First Circuit, the Fifteenth Collegiate Circuit Court raised this issue before the Circuit Plenum in Civil

Matters from the First Circuit.

However, in parallel to the foregoing, the defendant filed an extraordinary challenge against the decision issued by the Fifteenth Collegiate Circuit Court, which was admitted by the First Chamber of the Supreme Court of Justice.

## **Analysis and resolution of the First Chamber of the Supreme Court of Justice**

In a thorough analysis of the fundamental right to an effective judicial protection, the First Chamber considered the following arguments:

1. Judges must resolve conflicts that arise before them without obstacles or unnecessary delays.
2. It is within judges' duties to avoid formalisms or unreasonable or unnecessary interpretations that impede or hinder the judicial process on its merits.
3. The requirements established by the legislator to admit lawsuits are of strict interpretation so as not to limit the fundamental right to an effective judicial protection. Hence guaranteeing -essentially- the exercise of this right based on the *pro homine* and *in dubio pro actione*.

With these aspects in consideration, the First Chamber noted that the United Nations Commission on International Trade Law (UNCITRAL) revised the Arbitration Model Law in 2006 and, among other aspects, modified Article 35. Such provision, like the New York Convention, originally required parties seeking enforcement to submit the duly authenticated original award. Nevertheless, as a result of the revision, such provision now reads: “(...) 2) *The party relying on an award or applying for its enforcement shall supply the original award or copy thereof (...)*”

The First Chamber also stressed out that, in the explanatory note of the amendment, the UNCITRAL specified that the Model Law does not lay down procedural details of recognition and enforcement. The latter in order for this aspect to be determined by the laws and procedural practices of each country. In the same vein, footnote of article 35 of the Model Law states:

*“(...) The conditions set forth in this paragraph are intended to set maximum*

*standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.”*

The First Chamber also pointed out that the aforementioned amendment is viable, even though it removed a requirement set forth in Article IV of the New York Convention. This is so because, pursuant to Article VII of such convention, its procedural provisions may be waived if the law of a State Party offers more favorable terms to parties seeking to enforce awards therein.

It is recognized that, Article 1461 of the Commercial Code, which resembles the former version of Article 35 of the Model Law, has not been amended yet. Furthermore, since the Model Law is only a guiding document this situation cannot be an argument in favor or against the constitutionality of the regulatory portion of the provision in question. In this sense, the analysis in question is not whether Article 1461 matches the Model Law, but whether it is in line with Article 17 of the Mexican Constitution.

## **Conclusion**

The Court concluded that Article 1461 of the Commercial Code was disproportionate and, hence violated Article 17 of the Mexican Constitution.

The First Chamber emphasized that arbitral awards enjoy a presumption of validity, which is binding for parties within the arbitration and for the judicial authorities, in accordance with the commitments acquired by the Mexican State under international treaties on the matter.

Consequently, “due authentication” cannot be understood as a requirement aimed at endorsing or demonstrating the formal and material validity of the award or its binding nature. Hence an authentication can only be understood as a mechanism to provide the award with greater certainty as to its authenticity, in order to reduce the probability of a possible imputation of falsity by the respondent. The ultimate purpose of the due authentication of the award is the legal certainty of the judicial process, and primarily, to avoid as far as possible that the respective procedure may be hindered or delayed with disputes over the award’s authenticity. In such way, that the lack of authentication cannot conduct to assume its falsity.

The authentication through the intervention of a notary public or public broker, in order to satisfy the requirement set forth in the provision under study, as a general rule will and must be through the recognition and ratification of the signature of the arbitrator or arbitrators. However, regarding an arbitration award, it is not expected, nor can it be required, that the authentication referred to in the legal rule under analysis be performed through the presence of the notary public at the time of signing the award. It is not customary in the arbitration field, under the principle of good faith, and it is not contemplated in this way under the Commercial Code.

Based on the aforementioned considerations, the First Chamber concluded that the authentication requirement is disproportionate and unnecessary, due to the fact that there is no dispute over the authenticity of the award. Therefore, inasmuch as the necessity of the measure has not been demonstrated, this was sufficient to hold its unconstitutionality.