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"Amparo" v. "Mandado de Segurança" and their application in International Arbitration in Mexico and Brazil

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Both Mexican and Brazilian arbitration framework are relatively new and arbitration-friendly. Both countries have adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and the Panama Convention on International Commercial Arbitration (the "Panama Convention). They have been in force in Mexico since 1971 and 1977, respectively, and since 2002 and 1995 in Brazil. Mexico incorporated the UNCITRAL Model Law into the Mexican Commercial Code in Book V, Title VI (articles 1415 to 1463)[1], and Brazil has adopted it in law 9.307/96 (Lei de Arbitragem).

The Brazilian Arbitration Law initially faced a constitutional challenge, but the Brazilian Supreme Court ultimately held it to be constitutional in 2004, significantly encouraging the inclusion of arbitration clauses in contracts, especially those involving Brazilian parties. The challenge faced by the Court was mostly against the provision stating that arbitral awards are not subject of appeal to a State Court, since the Constitution guarantees, in Article 5, XXXV that “no law will exclude from the Judiciary the injury or threat to a right[2].”

Mexican arbitration system has also faced constitutional challenges, allegedly because it violated articles 13 and 17 of the Mexican Constitution[3], as well as articles 14 and 16 – which provide the guarantee of legal security. However, after the 2010 Amendment to the Constitution, Article 17 now provides that laws will provide for alternative ways for dispute resolution. In addition to that, such as the Brazilian Supreme Court did in Brazil, the Mexican Supreme Court decided for the constitutionality of arbitration in Mexican territory[4].

In fact, after the above-mentioned decisions, both Judiciary systems have expressed their support towards arbitration, favoring arbitral tribunals with autonomy and independence, reviewing arbitral awards only in a restricted sense, and in accordance with the international conventions already mentioned, as well as their national laws on Arbitration.

Since Article III of the New York Convention states that the rules of procedure for enforcement of foreign awards shall be done in accordance with the rules of procedure of the country where enforcement is sought, and thanks to the interaction between arbitral tribunals and national courts, knowing the procedural rules related to arbitration in both countries is extremely important. On the one hand, Mexico has the “Amparo” (amparo) remedy, which can be applied in arbitration, in some specific ways that will be herein discussed, thus raising a few questions over the true autonomy that arbitral tribunals actually have in that country; on the other hand, although not many questions about the applicability of the Brazilian “Mandado de Segurança” (mandado de segurança) remedy in arbitration were raised – which may sound as something absurd to most of jurists in that country – it is becoming an issue since a decision of the Court of São Paulo that has accepted its applicability.

It is important now to analyze both remedies and decide whether or not they should be applied in arbitration proceedings in both countries.

II. The traditional application of Amparo in International Arbitration in Mexico.

In Mexico, intellectual groups, scholars, students, and members of the judicial branch are polarized in two different ideologies: constitutionalism and the liberalism. The constitutionalists are those who defend the

legal system and the supremacy of the Constitution, as well as the fundamental rights that the Mexican Constitution grants . They argue that the legal system should have mechanisms to control every law or act that violates the Constitution and the rule of law. Thus, under this view, there is no reason to deny amparo when the arbitral award violates the rights granted by the Mexican Constitution, and at the same time, amparo might be granted if the essential human rights are violated.

In turn, of course liberals respect the Constitution, but they are more concerned with Mexican's image in an international context, and they give more importance to commerce and investment. Under this view, an arbitral award should be respected and not challenged, since parties agree to submit themselves to its special jurisdiction, and a judicial review of the award would result in negative effects of Mexican's image.

A foreigner willing to enforce an award in Mexico must have in mind that the amparo traditionally provides the party that disagrees with a decision of the judge in the incidental proceeding of enforcement with a separate and constitutional possibility to challenge it.

The Constitution and the Amparo Law bring the amparo to the Mexican system. Basically, the Mexican procedure of amparo is an order for protection on a constitutional basis against acts of authorities, including court judgments[6]. There are two different types of amparo procedures: the direct amparo (amparo directo), and the indirect amparo (amparo indirecto). The former is provided under section V of Article 107 of the Mexican Constitution, and the latter is provided under section VII of Article 107 of the Constitution. The Mexican Supreme Court has consistently decided that whenever a decision of enforcement is challenged by amparo, the correct proceeding to follow is that of the indirect amparo to be brought before federal judges, as established in Article 114, section III, second paragraph of the Amparo Law, as the challenged act is a series of complex acts[7].

In a 2012 lecture, Professor Francisco Gonzalez de Cossío showed that the use of amparo has not impacted the effectiveness of the Mexican arbitral system – in fact, Mexico is one of the biggest arbitration sites in Latin America. The arguments pro-amparo have occasionally been that it has actually helped to clarify the constitutionality of arbitration in Mexico, as well as it clarifies the limited grounds for setting aside and not enforcing an award.

In addition to the constitutional challenge of the arbitration system, certain parties have filed amparo against the arbitral award, and it was already decided that under the current Amparo Law, arbitral tribunals are not authorities, meaning that amparo cannot be filed against an award. Thus, an arbitral award cannot be considered an act of authority, since an act of authority is an act made by the State, when the State, through the legal system, enforces an act and orders its execution with or without the will of the private parties . Moreover, the only thing that can be submitted to constitutional review pursuant to an amparo is an act of authority of recognition or enforcement, which is not necessarily given, for example, in an award of absolution[9].

Another issue that has been faced by Mexican courts is the filing of amparos against the provision of impossibility of appeal of arbitral awards in national courts. The Mexican Supreme Court confirmed that this provision does not violate the Constitution[10].

Finally, in respect to the relationship between amparo and arbitration in Mexico, many amparos have been filed arguing that some provisions in Mexican arbitration law violates the control of legality found in articles 14 and 16 of the Mexican Constitution, and this issue is still being discussed by the national courts.

If the relationship between amparo and arbitration in Mexico has been satisfactory and gives space for arbitration in Mexico, one may see no reason for a big discussion on the issue of whether amparo takes away the autonomy of arbitration. One of the reasons for the discussion of its applicability lay on Mexico's Constitutional reform in relation to amparo – in force since 2011 – and the Mexican Amparo Law – which includes the possibility to file an amparo writ not only against public authorities, but also private individuals, possibly including arbitrators and/or arbitration tribunals.

In sum, the text of the Amparo Law makes acts perpetrated by private individuals equivalent to those made by authorities, thus raising the discussion of whether an arbitral award is an act of authority for purposes of filing the amparo.

III. The Amparo Law in Mexico and its possible consequences.

Article 5, II of the Amparo Law, states, in part, regarding authorities:

> "The responsible authority, with such characteristic, independently of its formal nature, that one which dictates, orders, executes or attempts to execute the action that creates, modifies or extinguishes legal situations in an unilateral and obligatory way; or omits the action that if done creates, modifies or extinguishes such legal situations.
>
> For the purposes of this law, private parties shall be authorities for amparo purposes when they perform actions equivalent to those of authority, that affect rights in terms of this section, and which functions are determined by a general norm[11]."

Although some may defend that this provision does not apply to arbitration, nowhere in this law one can see a provision excluding arbitration from its range, leaving this matter opened for strong and endless discussions. If the Mexican courts interpret this provision in a literal way, arbitration in Mexico is doomed to failure, since the courts would decide that an arbitral tribunal is in fact an authority for purposes of amparo. Subject to amparo, awards would lose their efficiency, autonomy and limited review discussed above, and parties would face extensive litigation in Mexican courts.

The argument to take away the application of the Amparo Law as a remedy for reviewing arbitral awards is that arbitrators must not be considered authorities under the new law. This is so because in theory they do not fulfill the requirements of acting unilaterally and the functions are not determined by a general norm or law, since they act under the will of the parties.

One of the main purposes that parties choose arbitration in place of national courts to hear a case is that arbitration is not only most of the times cheaper, but it is also faster, thanks to the impossibility to appeal an arbitral award in a regular court – unless the exception of Article V(2)(b) of the New York Convention applies. One may note that if courts in Mexico start applying amparo with no restrictions in arbitration - as it has happened before -, these basic principles would be disregarded.

In conclusion, the excessive use of amparo in arbitration proceedings would not only violate the basic principles of arbitration, but it would also violate every convention that Mexico has signed, including those related to human rights. The only way to save the Mexican system of arbitration from failure under the international community view, is to exclude an act of arbitration as an act of authority, which is already happening[12] – since arbitral tribunals resolve disputes of parties which entered in an agreement for arbitration in a horizontal relation, instead of a vertical one.

To complement the discussion of the amparo system and its applicability in arbitrations, it is also important to compare it with the Brazilian approach on the writ of mandado de segurança. There are similarities between both systems, and the opinion of the applicability or not of amparo in Mexican arbitration works well for the applicability of mandado de segurança in Brazil, as it will be argued below. But first one may understand how the process of recognizing the constitutionality of the Brazilian Arbitration Law was, as well as some of the important provisions of the Mandado de Segurança Law.

IV. Constitutionality and application of the Brazilian Arbitration Law.

The constitutionality of the Brazilian Arbitration Law was debated in an incident of unconstitutionality ("incidente de inconstitucionalidade") while the Supreme Court was recognizing a Spanish arbitral award[13]. Justice's Marco Aurélio Mello opinion was the one that prevailed, and in a 7-4 decision, the Supreme Court decided for the constitutionality of the above-mentioned law, as a way of private resolution of disputes and waiving of state jurisdiction, except to the extent that support for enforcement is needed and/or nullity of the arbitration proceeding is claimed, hypothesis in which the state jurisdiction can apply.

The decision was based on an explanation of the jurist and co-author of the law, Carlos Alberto Carmona, which stated:

> "It is said that a right is disposable when it may or may not be exercised freely by its owner, without having any cogent rule imposing the compliance with such principle, under penalty of

> the committed act being considered null or void. Thus, those properties which are in a position to be freely sold or negotiated are transferable, as they are clear, whereas the seller has full juridical capacity to do so[14]".

Going back to Justice Mello's opinion, he stated that "the legislator was careful, and he did not bar access to the judiciary when non-disposable rights are involved ", thus not violating the principle of wide access to the judiciary system granted by Article 5, XXXV, of the Brazilian Constitution.

In short, for a right to be considered disposable under the Brazilian law, it is necessary that (i) there is no mandatory rule that imposes the compliance with such principle; and (ii) the owner of the right is in judicial conditions to exercise such right. Without these requirements, a right is not freely disposable and, therefore, cannot be subject to arbitration.

V. "Mandado de Segurança" (writ of security) in Brazil.

According to the Brazilian Constitution and the new Law 12.016/2009, Mandado de Segurança is a remedy used to protect either individual or collective rights[16], against illegal acts made by authorities that threatens or effectively violates a right. It resembles in some respects the writ of amparo in Mexico, although there are a few differences to be distinguished.

The law of mandado de segurança (Law n 12.016/2009), states in Article 1[17]:

> "It will be granted a writ of security to protect a clear legal right, not covered by habeas corpus or habeas data, every time that, illegally or by abuse of power, any person or entity suffers a violation or there is a serious risk to suffer it by part of an authority, whatever category it is and whatever functions it is engaged in".

Once the writ is filed, it is possible to obtain a preliminary injunction (medida liminar cautelar), if the two conditions for concession are fulfilled: *Fumus boni juris* and *Periculum in mora* (plausibility of the claim and urgency, respectively).

As opposed to the Mexican amparo, one cannot file mandado de segurança against a law, nor even to argue its unconstitutionality[18], since a law contains a general and abstract precept, and thus, it would not affect, immediately a person or entity ("pessoa física" or "pessoa jurídica"). The constitutionality of a law or norm must be challenged in accordance with Article 102, I, "a" of the Federal Constitution, by special means.

Now that the generalities of the mandado de segurança writ are known under the provisions in the Constitution and the Federal Law 12.016/2009, it is important to understand if it is applicable or not in arbitrations held in Brazil.

VI. "Mandado de Segurança" in Arbitration.

The analysis of the applicability of mandado de segurança that challenges an arbitral decision in extremely important, since its admissibility can produce an effect that permits the Judiciary Branch review an act made by the arbitral tribunal.

In a 2010 decision, – Mandado de Segurança n 053.10.017261-2, *Companhia do Metropolitano de São Paulo (Metrô) v. Tribunal Arbitral do Processo 15.283/JRF of the ICC, 13a Vara da Fazenda Pública de São Paulo – Metrô* filed a mandado de segurança writ against a "partial[19]" decision issued by the ICC "Tribunal Arbitral do Processo n. 15.283/JRF", which had recognized the right from "Consórcio Via Amarela" for indemnity in order to restore the economic balance of the administrative contract, and rejected the expert evidence for calculating the value for the condemnation of Metrô.

Under the "*fumus boni juris*" and the "*periculum in mora*" allegations, the Court of São Paulo granted Metrô a preliminary injunction for taking evidence from an expert - which was later revoked, in 2012. Even before the Court's final decision, another interlocutory decision was issued in the mandado de segurança process, pointing three fundamental reasons that must be analyzed in order to decide if arbitration is permissible in a certain case, especially considering that Metrô is a "sociedade de economia mista" - joint capital, or mixed

capital company - which is a society that works with private and public capital: (a) a “sociedade de economia mista” can only submit itself to an arbitration proceeding whenever it explores economic activity, because only in this case there would be a disposable right; (b) if the “sociedade de economia mista” provides public services, there will be applied the supremacy of the public interest provision, which makes the right a non-disposable one; and (c) the contract signed by Metrô and Consórcio Via Amarela is deprived of a purely commercial nature, because Metrô manages essential public interest, what makes the involved patrimony a non-disposable one.

At the end of its decision, the Court finally decided that that were irregularities in the election of the arbitral tribunal as a way of dispute resolution. It can be concluded that the vast majority of the Brazilian doctrine do not support the outcome of this decision, which was revoked by the Court of Appeals of São Paulo.[20]

However, the analysis of this decision is important and it can be argued that it contains many conceptual, systematic and procedural mistakes.

According to Paulo Osternack[21], the nature of the performance of the Public Administration is irrelevant for identifying the scope of application of arbitration in this case. The “purely commercial nature” does not consist itself in an admissible legal factor to take away the arbitration tribunal from the case. Article 23-A of Law n. 8.987/95[22] provides that arbitration is applicable in contracts involving public services concessions. The only possible conclusion is that the applicability of arbitration lays on the nature of the right that is being disputed, which may be disposable and patrimonial.

In the case in discussion, the right in dispute is eminently patrimonial and disposable, since it is in respect with the economic imbalance caused by the alteration of a construction method in São Paulo’s subway system. The reestablishment of the economic balance is granted by the Constitution, in article 37, XXI[23]. Thus, according to Osternack, there are no irregularities in constituting an arbitral tribunal, and the arbitration was in fact admissible in this case.

In addition to that, by submitting a dispute to arbitration, the Administration is not giving up any legal position. Nor is it disposing the public interest. If this thought were true, the above-mentioned Law 8.987/95, for example, would be unconstitutional, because it permits the resolution of a dispute in a public concession contract (Public-Private-Partnership, or PPP) by arbitration.

It was mentioned earlier in items II and III that parties choose arbitration in order to avoid the slow process of the Judiciary system – which is especially a huge problem in Brazil – and seek a just and rapid solution reached by the arbitrators, who are most of the times, and especially in this case, experts in the subject matter dispute. The review by the Judiciary of any decision made by an arbitrator would make the basic principles of arbitration impossible to be respected.

Now, as we did in the analysis of the Mexican amparo, it is convenient to mention the real applicability of a mandado de segurança in arbitration, and why it should be departed once and for all.

It is clear that mandado de segurança is applicable for judicial acts in any hypothesis when the system itself does not provide a suitable mechanism to take away the effects of a wrongful decision, which may cause injury to someone’s rights.

However, the application of this orientation in an arbitral procedure may cause undesirable effects. The reason is that the impossibility to appeal is inherent to an interlocutory decision (which is not a final decision, including the urgent ones) made by the arbitral tribunal. Therefore, this could lead to a hasty interpretation that, as there is no mechanism to challenge an arbitral award, it would be admissible to file this writ against any decision in the course of any arbitration proceeding. Again according to Osternack, this is obviously impossible in arbitration.

The discussion of whether an arbitral tribunal is an authority or not for the effect of appliance of mandado de segurança is not as troubling as it is in the Mexican amparo system. It is well known that an arbitrator or an arbitral tribunal cannot be considered authorities, and thus they cannot be parties in a mandado de segurança writ . Thus, we reach the same conclusion as for amparo purposes: the arbitrator or the arbitral tribunals are not public agents and do not act under the name of the State. By definition, they are private persons chosen voluntarily by the parties in order to give an out-of-state solution to a dispute .

Moreover, it is important to notice that article 485, VII[26] of the "Código de Processo Civil" states that the judge shall extinguish the judicial process, without analyzing the merits of the writ, whenever there is an arbitration clause.

It does not mean, however, that a judge cannot review an arbitral award. According to the Brazilian Arbitration Law, only after the final award is rendered that the parties can challenge the award in the regular Judiciary system, through "ação anulatória de sentença arbitral", which has the objective to make the award null and void, and "impugnação de cumprimento de sentença", if the arbitral award violates the Brazilian public order, for example. However, the Judiciary cannot review the merits of the award, in accordance to the same law and the already mentioned conventions that Brazil is a member.

In conclusion, the judicial decision that accepted to hear the case above-mentioned goes against the majority of the Brazilian doctrine and jurisprudence. Filing a writ of mandado de segurança against any decision during arbitration is inconceivable. The review of an award will be made in a restricted basis and only after the final award has been given. Moreover, arbitrators are not authorities, and their acts are not likely for mandado de segurança purposes. In the merits of this dispute, the admissibility of arbitration involving disputes of administrative nature is widely recognized by the doctrine and jurisprudence in Brazil.

VII. Final Conclusion.

It is important to have in mind that the correct application of the Arbitration Law (this involves national laws and international conventions that both countries are members) is a fundamental element for the success of this method of dispute resolution. In an international contract, for example, the more the Judiciary systems understand how arbitration works, more easily national business companies will negotiate arbitration clauses, choosing countries where arbitration is well applied.

The advanced stage that Brazil and Mexico have reached in terms of arbitration are due thanks to their intense economic activity, and especially thanks to the good decisions about the topic that their Supreme Courts and Court of Appeals have taken – the exceptions are some of the decisions in lower courts, as discussed above in item VI, where the lower judge, Maria Gabriella Pavlópoulos Spaolonzi, states in its own decision that she took a long time to decide the issue thanks to the lack of knowledge of arbitration rules.

As it was mentioned before, the incorrect interpretation of arbitration's rules and the excessive use of judicial remedies in arbitration proceedings could produce a negative and undesirable effect, and could lead to a inestimable damage to Brazilians and Mexicans citizens and companies.

Finally, we are from the opinion that judicial remedies must be avoided in almost all circumstances, except for those of clear disregard of the countries' public order, laws and international conventions.

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1 Article 1421 of the Commercial Code states that the provisions "shall apply to national and international commercial arbitration when the site of arbitration is in the national territory, except as provided in international treaties to which Mexico is a party."

2 Art 5, XXXV of the Brazilian Constitution states, in Portuguese: "a lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça a direito".

3 Article 13 of the Mexican Constitution reads in part, in English: "No one can be judged under private laws or special tribunals(…); Article 17 stated: "Every person has the right to be administered justice by tribunals that will be expedited to impart it in the periods and terms established by the laws."

4 Federal Judicial Newspaper, Ninth Epoch, Volume XXI, 2005, p. 411.

5 Carlos da Silva Nava, Seminario sobre Arbitraje Comercial Internacional, in Arbitraje Comercial Internacional 163 (Leonel Pereznieto Castro ed. 2000).

6 Article 1 of the Amparo Law states that the "Juicio de Amparo" has the objective of solving controversies resulted from laws or acts of authorities.

7 Octava Época, Contradicción de tesis 21/93 – Entre las sustentadas por los Tribunales Tercero y Segundo Colegiados, por una parte, y Quinto Tribunal Colegiado, todos en la Materia Civil del Primer Circuito. – 18 de octubre de 1993. –Unanimidad de votos. – Ponente: Miguel Montes García. – Secretario: Jorge L. Rico Rangel; Apéndice 1917-1995, Tomo IV, Primera Parte, página 181, Tercera Sala, tesis 267.

8 http://biblioteca.upaep.mx/pdf/L_DE_Tellez_Leon_H.pdf, at 65-66.

9 *Arbitraje Comercial Internacional*, 124 (Leonel Pereznieto Castro ed. 2000); Eduardo Pallares, in *Arbitraje Comercial Internacional*, 118 (Leonel Pereznieto Castro ed. 2000).

10 See Articles 14 and 17 of the Mexican Constitution and Supreme Court's decisions in Federal Judicial Newspaper, Ninth Epoch, Volume XXVI, 2007, p.141.

11 Article 5, II, states, in Spanish: "La autoridad responsable, teniendo tal carácter, con independencia de su naturaleza formal, la que dicta, ordena, ejecuta o trata de ejecutar el acto que crea, modifica o extingue situaciones jurídicas en forma unilateral y obligatória; u omita el acto que de realizarse crearía, modificaría o extinguiría dichas situaciones jurídicas.

Para los efectos de esta Ley, los particulares tendrán la calidad de autoridad responsable cuando realicen actos equivalentes a los de autoridad, que afecten derechos en los términos de esta fracción, y cuyas funciones están determinadas por uma norma general.

12 – Case number 384/2013, by the Fifth Collegiate Civil Court of the First Circuit, deciding on the competence to decide an amparo claim.

– Case number 129/2014, under the jurisdiction of the Twelfth District Civil Judge in the Federal District, concerning a ruling ordering the recognition and enforcement of an arbitral award.

– Case 195/2014, by the Eight Collegiate Civil Court of the First Circuit.

13 Agravo Regimental em Sentença Estrangeira 5206-8/247.

14 Arbitragem e processo, 2nd ed. São Paulo: Atlas, 2004, p. 56.

15 Mello's opinion can be found in www.stf.gov.br, Agravo Regimental em Sentença Estrangeira 5206-8/247.

16 Article 5, LXX of the Constitution states that mandado de segurança can be filed by (a) a political party with representation in the National Congress; and (b) trade unions, class entities or legally constituted associations in work for at least one year, in defense of its members or associates' interests.

17 Article 1 of the law states in Portuguese: "Conceder-se-á mandado de segurança para proteger direito líquido e certo, não amparado por habeas corpus ou habeas data, sempre que, ilegalmente ou com abuso de poder, qualquer pessoa física ou juridica sofrer violação ou houver justo receio de sofrê-la por parte de autoridade, seja de que categoria for e sejam quais forem as funções que exerça."

18 Súmula 266 of the Supreme Court.

19 By "partial" it is meant "not final".

20 Processo n° 0017261-67.2010.8.26.0053, TJ/SP

21 AMARAL, Paulo Osternack. Mandado de segurança contra decisões arbitrais: inviabilidade. Informativo Justen, Pereira, Oliveira e Talamini, Curitiba, n. 44, outubro 2010, available in http://www.justen.com.br//informativo.php?&informativo=44&artigo=476&l=pt.

22 Article 23-A states: "The contract of concession can provide the applicability of private mechanisms for dispute resolutions arising from or in relation with the contract, including arbitration…".

23 Article 37, XXI, states: "(…) Except for the cases specified by law, works, services, purchases and disposals shall be contracted by public bidding process to ensure equal conditions to all bidders, with clauses that establish payment

obligations, maintaining the effective conditions of the proposal in the terms of the law, which will only allow the requirements of technical and economic qualifications indispensable to guarantee the fulfillment of the obligations."

24 AMARAL, Paulo Osternack, supra.

25 Id.

26 Article 485 states, in Portuguese: "O juiz não resolverá o mérito quando: VII - acolher a alegação de existência de convenção de arbitragem ou quando o juízo arbitral reconhecer sua competência."

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