

OBSTACLES FOR REQUESTING THE RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD BEFORE A MEXICAN COURT WHEN THE PROCEEDING WAS CONDUCTED EX PARTE

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Executive Summary:

- The recognition and enforcement of an arbitral award in Mexico may be denied if there are irregularities in the notification of certain proceedings within the arbitral procedure, as due process -a constitutional principle- requires that the Respondent be properly notified, contrasting with the flexible practices allowed in arbitration.
- Mexican Courts tend to prioritize proper notification over the flexibility allowed in arbitration when assessing the validity of an arbitral award in a recognition and enforcement request.

The request for recognition and enforcement of an arbitral award before a judicial authority requires that the award contains certain characteristics conforming its validity and legal conformity with the applicable laws where enforcement is sought. While an arbitral award is presumed valid, Article 1462 of the Commercial Code outlines specific scenarios in which its recognition and enforcement may be denied. Among these grounds for invalidity, Article 1462(b)(I) highlights improper notification of certain procedural actions within the arbitration, such as the appointment of the Arbitral Tribunal, procedural orders, or even notice of the initiation of the arbitration.

Most arbitration centers rules allow notifications to be made by any means, whenever the effective delivery can be proven, and in some cases, delivery to the party's domicile is sufficient. In contrast, Mexican law treats service of process as an "Essential Procedural Formality," where notification of a claim is a critical act that ensures the Respondent's access to justice and the opportunity to oppose claims -a principle enshrined in due process to guarantee the respondent adequate means of defense-.

In arbitration, however, these "Essential Procedural Formalities" are waived, permitting a more flexible framework wherein notifications may occur by any practicable means, so long as their delivery is evidenced. In practice, there remains a risk that the Respondent may employ a strategy of non-appearance if inconsistencies are present in the notifications. If a party subsequently requests judicial recognition and enforcement of the award, a judge -initially persuaded to confirm validity and order enforcement- may be obstructed upon detecting any irregularities that could impair the award's validity.

One of the most common reasons identified when the procedure is conducted ex parte consists in a potential irregularity in notifications, such as delivery to an incorrect address or exclusive use of electronic notifications[1]. Mexican courts, guided by precedents, have adopted a protective stance on due process, ensuring parties full opportunity to assert their rights, even when they have waived formal notification procedures by explicitly submitting to arbitration rules. Thus, Mexican Courts have concluded -upholding due process and the right to

equal treatment and opportunity for both parties[2]- that arbitral awards should be examined in light of due process principles, prioritizing the Respondent's notification rights over the procedural flexibility allowed in arbitration.

Therefore, if notification irregularities are identified in an arbitral proceeding -or if the rules applied significantly diverge from the lex arbitri- there is a high risk that the award will not be recognized as valid or enforced.

[1]For example, Articles 2.1 and 2.2 of the UNCITRAL Arbitration Rules allow notifications to be made solely by email.

[2] Article 1434 of the Commercial Code: The parties must be treated with equality and each of them must be given full opportunity to assert their rights.

Roberto Fernández del Valle
Partner
rfernandez@s-s.mx

Mariano Calderón
Partner
mcalderon@s-s.mx

Carlos Brehm
Partner
cbrehm@s-s.mx

Francisco Aguilar
Associate
faguilar@s-s.mx