

PARTIAL TRANSLATION

REVIEW OF DIRECT AMPARO
7856/2019

Mexico City. Decision of the First Chamber of the Supreme Court of Justice of Mexico, corresponding to its virtual session of October fourteenth of two thousand and twenty.

...

27. Examining article 1461 second paragraph of the Commerce Code, in the legal portion "duly authenticated", we come to the conclusion that **it is unconstitutional**.

...

62. According to the foregoing, it is important to point out that **the authentication** is not related in any manner to the *formal or substantial validity of the award as arbitral determination*, nor to its *binding force before the parties as the deciding act of the arbitration proceeding*. Hence, strictly speaking, these characteristics of the award -its validity and binding force- are not useful to support the constitutionality or unconstitutionality of the aforementioned requirement.
63. It is true that in the arbitral system, the award, as the decision in a dispute between the parties in a formalized proceeding created and carried out according to the will of the parties in the sphere of private justice with constitutional recognition and protection, undoubtedly **has a presumption of validity**, which if there was a case of opposition to such condition would have to be fully proven wrong. Moreover, this Chamber in its judicial precedents related to arbitration, has already stated that the reasons for formally and materially challenging an award, are only those expressly provided in a limited manner in article 1457 of the Commerce Code, and which must be understood as cases of exception, and therefore, interpreted and applied in a strict manner.
64. By the same token, there is no doubt as to the fact that the arbitral award, on its own, as a private document, regardless of the country in which it was rendered, has **a binding force** for all the parties in the arbitration, and with that character must be seen by the judicial courts before which its recognition and enforcement is requested. The foregoing because that was the obligation acquired by Mexico by signing without reservation the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; binding force that is established in the first paragraph of article 1461 of the Commerce Code, and which, we insist, must be understood in the sense that any arbitral award that is put forward before a national judge for its recognition and enforcement, by its sole nature, **has inherently a presumption of validity and binding force**. Hence, a refusal by the judge to recognize it and enforce it, must be the result of full demonstration of one of the express and limited reasons established in article 1462 by

the party that is opposing such petition, reasons that, as it has been mentioned, must be applied and interpreted in a strict manner.

65. But the “**due authentication**”, established for the case that an original award or a certified copy thereof is put forward in a special procedure for recognition and enforcement, must not be understood as a requirement with the purpose of confirming or demonstrating the formal and material **validity** of the award, nor its **binding force**. As it has been explained, **the authentication** is only a mechanism with the purpose of giving the award, as document, additional certainty as to its authenticity, as the signatures of the arbitrator or arbitrators contained therein have been recognized and ratified before a notary public, in order to reduce as much as possible the probability of a possible accusation of falsehood of the document on itself by the defendant, and therefore, additionally creating certainty for the judge and diminishing the probability that an apocryphal document is presented before the judge and giving legal protection in the process.
66. For the same reason, **the lack of authenticity** of the award, may neither be understood necessarily **as lack of authenticity** of the document put forward. The fact that an original award or a certified copy thereof is put forward, without having been authenticated through a public deed that recognizes and ratifies the signature of the arbitrator or arbitrators, does not mean that the award is not authentic (that it is false) or that we must presume it as false, or else, that it lacks on itself all evidentiary value for its nature of private document; because evidently such conclusion could not derive from the mere lack of authentication, since that would imply not acknowledging all the demonstrative value and effectiveness of a private document that the law does not request any formality for its configuration.
67. It is for that reason that this Chamber finds that the requirement of *due authentication* contained in the analyzed provision has as ultimate purpose, indeed the legal protection of the judicial process, but more than that, **avoiding as much as possible that the procedure for recognition and enforcement is obstructed, delayed or complicated with contentions as to the authenticity of the award**, which duly or unduly could be argued by the defendant, and which necessarily would result in the filing of technical evidence and of other kind in order to prove the falsehood, even when the awards were rendered in other countries, therefore creating the need of filing such evidence through international cooperation, since such procedure, by its special nature must be a brief proceeding in which procedural economy prevails.
68. This purpose of the requirement of authentication of the arbitral award, results in the consideration that it is a provision for *excluding or reducing the possibility that the proceeding is obstructed or delayed with the introduction of a contention on the authenticity of the award*, and *for granting more legal protection to the proceeding in that sense*. But the lack of authentication by the party requesting the recognition and enforcement that is putting forward the original award or a certified copy thereof, *without the award being authenticated before a notary public*, does not presuppose its falsehood, nor its lack of evidentiary value for purposes of a procedure for recognition

and enforcement. For that purpose, the lack of authentication must unavoidably be proven.

...

78. But the requirement of authentication **is not necessary**, because its effect of adding certainty to the authenticity of the document for evidentiary purposes, as it has been seen, does not result, *contrario sensu*, in the consideration that the lack of authentication implies the falsehood or presumption of falsehood of the document, nor does it hinder the ability to assess the document as a private instrument, even that its authenticity be tacitly or expressly recognized by the defendant. Moreover, in case that the party against which the execution is being carried out does not recognize the document or argues that it is false, both parties would be in a position to present evidence to prove the authenticity or lack of authenticity thereof, according to the reasons of contestation. The foregoing shows that the authentication is not the only manner of proving the authenticity of the award.
79. In view that it has been shown that the measure is not necessary, that is enough to support its unconstitutionality.