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THE PROCESS OF AMPARO IN COMMERCIAL MATTERS

CARLOS LOPERENA RUIZ*

I. INTRODUCTION

Amparo was first created to ensure the protection of individual rights guaranteed by the Mexican Constitution.¹ However, the origins of amparo have long been a source of controversy.² Nevertheless, amparo was ultimately codified in the Mexican Federal Constitution of 1857³ and later enacted by the Mexican Federal Constitution of 1917.⁴ Initially, the law of amparo was divided into four sections regarding: violations of the rights of individuals, federal laws and acts violating the sovereignty of the states, laws and acts of the states infringing upon the power of the Union, and decisions and sentences.⁵ Amparo has subsequently been expanded to include a far wider range of contexts. For example, amparo is now used in criminal, tax, administrative, labor, and civil cases which includes commercial matters. This paper explores the complex amparo process and its connections with commercial affairs, particularly commercial arbitration awards.

II. AMPARO CHARACTERISTICS

There are four fundamental characteristics of amparo. First, amparo is an autonomous legal proceeding.⁶ That is, it is an independent legal proceeding possessing its own body of law. Second, amparo guarantees the protection of rights enumerated in the Federal Constitution against all classes of authorities.⁷ Amparo is unenforceable against private citizens. This distinction confuses some lay persons. For instance, amparo can act as a type of habeas corpus in criminal cases⁸ or a restraining order against the authorities. As a result, many lay persons consider

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1. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS (Mexico 1917) [MEXICAN CONSTITUTION] [hereinafter MEX. CONST.].

2. Helen L. Clagett, *The Mexican Suit of Amparo*, 33 GEO. L.J. 418, 420 (1945) ("Some Mexican legal historians hold that it developed gradually from traditional customs coming to Mexico from her mother country, Spain. Other authors contend that it came into existence through the influence of the constitutions of France and the United States on the Spanish Constitution of 1812, which was in force in Spain's colonies for a short time before the consummation of independence of 1821."). See also, Héctor Fix Zamudio, *A Brief Introduction to the Mexican writ of Amparo*, 9 CAL. W. INT'L L.J. 306, 309-10 (1979) ("The name amparo derives from its antecedents in the provinces of Castille and Aragon."). For more information on the origins of the writ of amparo, see RICHARD D. BAKER, *JUDICIAL REVIEW IN MEXICO* (1971).

3. CONSTITUCIÓN FEDERAL DE LOS ESTADOS UNIDOS MEXICANOS (Mexico 1857) [MEXICAN CONSTITUTION].

4. MEX. CONST., *supra* note 1.

5. Clagett, *supra* note 2, at 423.

6. Carlos del rio Rodriguez, *Origins of Mexico's Supreme Court and its Interpretation of Judicial Review Up to the Middle of the Nineteenth Century*, 20 CAL. W. INT'L L.J. 10, 14 (1989-1990). See also, Phanor J. Eder, *Judicial Review in Latin America*, 21 OHIO ST. L.J. 570, 600 (1960) and Lucio Cabrera & William Cecil Headrick, *Notes on Judicial Review In Mexico and the United States*, 5 INTER-AM. L. REV. 253, 255 (1963).

7. *Id.*

8. Zamudio, *supra* note 2, at 309 (The Anglo-American writ of habeas corpus was incorporated into the amparo proceeding). See also Clagett, *supra* note 2, at 431 ("The U.S. writ of habeas corpus vindicates only the right of personal liberty, when illegally restrained, while the Mexican action protects not only the body of the individual, but also his interests and property."). See Eder, *Habeas Corpus Disembodied: The Latin American Experience*, XX CENTURY COMPARATIVE AND CONFLICTS LAW-LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 473 (K. Nadelmann, A. von Mehrens & J. Hazard eds. 1961).

amparo a tangible piece of paper that will protect them from the authorities. The statement "I have my amparo in my pocket and I cannot be arrested" is a misnomer. This is not amparo, but rather a certified copy of an injunctive order to stop or prevent the authorities from arresting individuals. In short, amparo can be used in a variety of contexts, but it can only be enforced against authorities and not against private individuals.⁹

The third amparo characteristic is only federal courts, not state courts, can hear the amparo proceeding.¹⁰ Article 103 of the Mexican Constitution provides that "the district courts, the circuit courts, and the Supreme Court of Justice of the Nation, shall take cognizance of all controversies arising out of the laws or acts of the authorities which shall infringe upon any personal guarantees."¹¹ Depending on the circumstances, amparo can be filed in either district court or in circuit court. In district court, amparo is applied to challenge a specific procedure rather than to challenge a final judgment. In circuit court, amparo is used to contest final judgments entered on the merits of the case.¹²

The final amparo characteristic is only the complainant or aggrieved party receives the benefit of the court decision granting amparo.¹³ This characteristic is applied in the Otero Formula, which basically states that judgments pronounced in amparo proceedings only apply to the petitioner or complainant who filed the amparo petition to that specific case.¹⁴ Therefore, persons claiming the same violation must file their own amparo petition in order for the court's decision to be applicable to them. Recently, there has been a belief that the Otero Formula should be eliminated so that numerous persons may receive the benefit of a single amparo decision.¹⁵

III. AMPARO FUNCTIONS

Amparo is a combination of procedural instruments, each with a specific protective function. There are five distinct functions: protecting individual guarantees, determining the constitutionality of laws, contesting judicial decisions, petitioning against official administrative acts and resolutions, and protecting social rights of farmers.¹⁶ Since this paper is focusing on commercial matters, the following sections will only discuss two specific functions: the constitutionality of laws and the challenge of judicial decisions.¹⁷

9. MEX. CONST., *supra* note 1, art. 103(I).

10. Rodriguez, *supra* note 6.

11. MEX. CONST., *supra* note 1, art. 103(I).

12. See Zamudio, *supra* note 2.

13. Rodriguez, *supra* note 6.

14. Zamudio, *supra* note 2, at 319. See also LAW OF AMPARO, art. 76(I).

15. Claggett, *supra* note 2, at 436 ("Mexican authors in the field of constitutional law claim that there is a drawback in the Mexican suit when the effect of a favorable decision is merely to excuse one individual from compliance with the law, while it obliges other persons to bring analogous suits for similar violations for which the court, in its discretion, may or may not protect them against the law. As a matter of fact, there is nothing to prevent the same person from being injured anew by the same law.")

16. Zamudio, *supra* note 2, at 316.

17. For further discussion of the other amparo functions, see Zamudio, *supra* note 2.

A. *Challenging the Constitutionality of Laws*

This challenge is specifically called the *amparo contra leyes* (amparo against laws). The procedure for *amparo contra leyes* may be attained in either of two ways. First, the unconstitutionality of the law may be attacked in an adversary proceeding with a state official as the opposing party to the complainant.¹⁸ The constitutional challenge is first brought in Federal District Court.¹⁹ Once the district court enters an amparo judgment, the appeals process known as *revisión* (review) may begin. The *revisión* is filed before the circuit court.²⁰ Upon receiving the losing parties' arguments and pleadings, the court will render a judgment on the *revisión*. This judgment is final and unchallengeable.

The second method of challenging a law is "recourse".²¹ This method does not directly challenge the constitutionality of the law, but rather the complainant requests that the reviewing court determine whether the lower court's decision was based on unconstitutional law. A violation of the federal supremacy clause will result if the reviewing court determines that the lower court decision was based on unconstitutional law.²² The judgment rendered by the lower court is subject to an appeal. However, if there is any appeal, remedy, or means to challenge a judicial decision available, the appeal will not be granted.²³ In other words, all ordinary remedies or appeals must be exhausted before amparo may be used.²⁴ The appeal can either be initiated in circuit court or the Supreme Court, with the understanding that the circuit court's decision may ultimately be reviewed by the Supreme Court.²⁵

B. *Challenging Judicial Decisions*

This type of amparo constitutes more than eighty percent of amparo proceedings. The judicial amparo is codified in article 14 of the Mexican Constitution.²⁶ Amparo may be asserted against judicial and quasi-judicial judgments in criminal, civil, administrative, and labor cases.²⁷

Two types of violations may be alleged from a judicial amparo: *error en procedando* (procedural errors) and *error en judicando* (substantive flaws in the court's judgment). Procedural errors can only be appealed if the error effects the final decision of the court.²⁸ The court on appeal may only review the facts found by the lower court, it can not perform its own fact-finding process (i.e. no *de novo* review).²⁹

There are five distinct functions of amparo. A petitioner may choose one of the functions depending on what they are alleging. The procedure and the court used during the amparo process in turn depends on the type of function alleged.

18. Zamudio, *supra* note 2, at 320.

19. MEX. CONST., *supra* note 1, art. 107(VII).

20. Zamudio, *supra* note 2, at 342.

21. *Id.* at 322.

22. MEX. CONST., *supra* note 1, art. 133.

23. MEX. CONST., *supra* note 1, art. 107(III).

24. *Id.*

25. MEX. CONST., *supra* note 1, art. 107(IX).

26. MEX. CONST., *supra* note 1, art. 14.

27. Zamudio, *supra* note 2, at 324.

28. LAW OF AMPARO, art. 158.

29. MEX. CONST., *supra* note 1, art. 107(IX).

Therefore, people filing an amparo petition need to be cognizant of the category the amparo falls within.

IV. AMPARO PROCESS

There are two basic types of amparo process: the indirect amparo and the direct amparo. The type of amparo process used will determine the route within the Mexican court system the petitioner will follow.

A. *Indirect Amparo*

To commence the indirect amparo process, the district court requires a filing of a written amparo petition. The answer must be filed within five days of that petition. In addition, all interested third parties must be notified of the petition and answer. Typically, an agent of the *Ministerio Publico* (Public Ministry - public prosecutor) may intervene in the amparo process by giving an opinion whether the amparo should be accepted or rejected by the court.³⁰

The district court will then set a date for a public hearing. During the hearing, the amparo petitioner has the burden to show that a violation has occurred. The parties are allowed to file written pleadings during the hearing. However, the parties are not required to file pleadings if the amparo judge believes the petition is sufficient.³¹ In addition, the judgment in the amparo case should be rendered during the public hearing.³² However, rendering the decision can sometimes take weeks, even months, depending on the complexity of the case. Regardless, the judgment is dated as the day of the hearing.

B. *Direct Amparo*

The direct amparo addresses final judgments.³³ It is called direct amparo because it originates in the circuit court. The amparo petition contains the evidence required by the plaintiff to prove their rights were violated. The evidence is not presented in a hearing but rather in a judicial file, which contains the challenged final judgment.³⁴ The *Ministerio Publico* is also encouraged to submit a written brief supporting the reasons why the amparo should be rejected or accepted by the reviewing court.

Additionally, there are several other procedures that may occur during the direct amparo process. Written pleadings from the opposing party can be presented to the circuit court. Moreover, attorneys may participate in *ex parte* interviews with the justice deciding the amparo case. Indeed, *ex parte* interviews are an integral part of the amparo process. A personal interview is conducted with the justice drafting the resolution and the other two justices signing the resolution. Once the draft of judgment is completed, it is disclosed in a session with the three justices. The justices explain that the decision is final and unchallengeable. Simply put, this is the last judicial word in the country.

30. MEX. CONST., *supra* note 1, art. 107(XV). See also Zamudio, *supra* note 2, at 330.

31. MEX. CONST., *supra* note 1, art. 107. See also Zamudio, *supra* note 2, at 330.

32. Zamudio, *supra* note 2, at 330.

33. *Id.* at 331.

34. *Id.* at 331.

C. *Jurisprudence*

The Mexican circuit courts sometimes render contradictory judgments. Therefore, parties may win or lose depending on the circuit court involved. When a contradiction of opinions occurs between two circuit courts, the Supreme Court will decide which judgment is the prevailing decision. The Supreme Court's opinion can become *jurisprudencia* (mandatory law), if the Supreme Court rules the same way on five consecutive decisions.³⁵ However, even if *jurisprudencia* is established, the decision will not retroactively effect the circuit court cases that involved the contradiction.³⁶ Simply put, once the circuit court has ruled and rendered its decision, the decision is final and unchallengeable, even though contradictions may be resolved by the Supreme Court.³⁷

In conclusion, there are two methods of filing an amparo petition. The first is the indirect amparo, which requires the amparo petition to be filed initially with the district court. The district court's decision is not final but can be appealed to either the circuit court or the Supreme Court. The second method is the direct amparo. This petition is directly filed with the circuit court and becomes a final decision. The Supreme Court will review the amparo case if contradictory circuit court decisions are rendered.

II. AMPARO AND COMMERCIAL ARBITRATION AWARDS

The recent increase in international commerce has spurred the heightened use of arbitration. Parties prefer arbitration to litigation because they can predetermine the forum and the controlling law to be applied in a dispute. If an arbitration procedure involves a Mexican party, the parties need to be conscious of amparo since it is unwaivable. Therefore, judicial review of a commercial arbitration award by way of amparo may be against the will of the parties.

There are limited grounds, apart from amparo, to set aside a commercial arbitration award. The Mexican Constitution³⁸ provides that treaties to which Mexico is a participant are binding law. The following treaties are incorporated into Mexico's law: the New York Convention, the Inter-American Convention on Commercial Arbitration of 1975 (Panama Convention), and the Inter-American Convention Concerning the Extraterritorial Effect of Judgments and Arbitral Awards (Montevideo Convention).

In addition, Mexico has established a commerce code that defines which persons and judicial acts are deemed to be commercial.³⁹ The final articles of the 1989 revision of the Commerce Code provide for the recognition and execution of foreign arbitral awards in substantially the same terms as the New York convention.⁴⁰ The

35. LAW OF AMPARO, art. 192.

36. MEX. CONST., *supra* note 1, art. 107(XIII).

37. *Id.*

38. MEX. CONST., *supra* note 1, art. 133.

39. The Code of Commerce (C. Com.) was originally published in the *Diario Oficial de la Federacion* (D.O.), between October 7 and 13, 1889. The Decree of Amendment was published January 4, 1989.

40. C. Com. Arts. 1461-1463. Alexander C. Hoagland, *Modification of Mexican Arbitration Law*, 2 No. 2 MEX. TRADE & L. REP. 13, 15 (1992).

following order applies: treaties in force, the Commerce Code or the provisions of the arbitral agreement, the Code of Civil Procedure in the place of arbitration, and the Federal District Codes of Civil Procedure. The laws governing arbitration awards are somewhat limited.

Once the judgment to set aside an award is rendered, amparo can still be issued. In other words, "when parties decide to arbitrate a matter pending appeal in the courts, the award is final and unappealable, except by way of amparo."⁴¹ Nonetheless, the amparo should only address the setting aside of the award and the grounds to set aside the award. The merits of the award, the annulment or rescission of the contract, and the fairness of the award should not be addressed.⁴²

In fact, there is a commitment by the United States, Mexico, and Canada to encourage and facilitate the recourse of arbitration and other alternative dispute resolution (ADR) procedures even though there are limited governing laws.⁴³ This commitment must involve the dedication of the entire Mexican country since ADR has traditionally been a sensitive issue in Mexico. The dedication of the judicial branch is especially necessary, since it represents part of Mexico's supreme law.⁴⁴

In addition, the United States, Mexico, and Canada must comprehend the importance of amparo in arbitration cases. If amparo is misused in arbitration cases, it can lead to a breach of an international treaty.

For international disputes involving Mexican parties, arbitration has become a suitable alternative to litigation. The enforcement of a foreign award may be more feasible than the enforcement of a foreign judgment in Mexico. The award does not go through diplomatic channels nor does it require reciprocity. However, the Mexican courts do maintain a significant role in the arbitration award since amparo cannot be relinquished.

III. CONCLUSION

In conclusion, amparo is an integral part of Mexican law, and can be applied in various contexts, including commercial dealings. As Mexico strengthens its economy and with the creation of NAFTA, Mexico will not only expand its domestic business but also its international business. With the increase of international business, there is also the desire amongst the respective countries to place arbitration clauses in the international business agreements. Therefore, all countries involved with Mexico should be mindful of the amparo process and its influence on arbitration procedures.

QUESTIONS AND COMMENTS BY INSTITUTE MEMBERS

Q: Do you support Amparo Colectivo?⁴⁵

41. Hoagland, *supra* note 40, at 15. See also, C. Com. *supra* note 39, at 1425.

42. Hoagland, *supra* note 40, at 15.

43. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex. (effective Jan. 1, 1994), art. 202 [hereinafter NAFTA].

44. MEX. CONST., *supra* note 1, art. 133.

45. See Lucio Cabrera Acevedo, *The Collective Amparo: Past and Possible Future of the Amparo Process* ("A procedure or Judicial review that has two main purposes: (1) a practical end, in order to avoid numerous claims

Loperena: Human rights are important. Therefore, amparo should become more available for class action or collective amparos. I dislike what has been called the Otero Formula. It states that a judgment rendered in amparo will only protect that claimant.⁴⁶ This becomes important in constitutional law since the same issue would need to be litigated repeatedly.

Q: If a commercial agreement is drafted with an arbitration clause, is there any preference in using local arbitration law instead of using international rules?

LOPERENA: There is not a body of arbitration rules within the Mexican Code of Commerce, so international arbitration rules are used instead. Simply, the parties are free to agree on the rules to be applied to the arbitration process. In the absence of an agreement, the arbitrators will be free to conduct the arbitration as they deem correct, always respecting the equality of the parties and the right to present the case without any limitation on due process.

Therefore, if a party is involved in arbitration in Mexico, it is better to set the rules that they are going to follow. There are different arbitration rules that may be applied, including the Arbitration Rules of the United Nations Commission on International Trade Law, the Rules of Arbitration of the International Chamber of Commerce, or the American Commercial Arbitration Commission. This is not meant to be an all-inclusive list.

For example, there exists the National Chamber of Commerce of Mexico City and the Center for Arbitration and Mediation of the Americas. The latter is sponsored by the Quebec Arbitration Institute, the British Columbia Arbitration Center, the American Arbitration Association, and the Mexican Chamber of Commerce of Mexico City. There is also the Center for Dispute Resolution located in Las Cruces, New Mexico, which is oriented towards U.S. and Mexican arbitration.

that have the same purpose, as in the case of consumer rights; and (2) a legal end, for protecting new human rights including a healthy environment, equality of women, ethnic equality, etc.”).

46. Zamudio, *supra* note 2, at 319 (“The Otero Formula is embodied in both the Constitution and the Law of Amparo.”) See also MEX. CONST., *supra* note 1, art. 107(II) (as amended, Official Daily of Mexico (*Diario Oficial*), Dec. 30, 1950). See also LAW OF AMPARO, art. 76(I).

