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David's Loss? InfoRed vs. Radio Centro before the Supreme Court of Mexico

By *Mauricio Foeth* and *Javier Quijano Baz*, Mexico-City*

Introduction

During the years 2006 and 2007, the Mexican society was consumed and split by a controversial arbitration procedure that later became a constitutional procedure before the Mexican Supreme Court. The case is known as "InfoRed v Grupo Radio Centro" and represented the struggle of David against Goliath. Both, InfoRed and Grupo Radio Centro are prominent Mexican radio broadcasting companies. The difference between them is that Radio Monitor is a small radio station basically run by one person, José Elías Gutiérrez Vivó. It focuses on news, information and opinion programs. The station broadcasts from Mexico City, and its news programming was among the most popular in the country. Grupo Radio Centro, on the other hand, is a multi-million Dollar corporation that runs program radio.

After a lengthy legal battle with Grupo Radio Centro that went up to the Mexican Supreme Court over the Grupo Radio Centro's arbitrary 2004 decision to cancel its broadcast of Radio Monitor's programs, InfoRed succumbed to economic and administrative pressures. InfoRed incurred in debts that forced its closing by the withdrawal of government advertising contracts. This also led to the cancellation of private advertising contracts, leaving Radio Monitor without income. The publicity boycott was said to be in retaliation for InfoRed's coverage of the campaign of Andrés Manuel López Obrador, Ex-President Vicente Fox's rival in the 2006 federal elections.

On June 29, 2007, after 33 years on air, Radio Monitor broadcast its last program. With its disappearance a voice for freedom of expression was lost. The purpose of this paper is to briefly summarize the main arguments presented in the constitutional complaint brought before the Supreme Court. The constitutional complaint challenges a ruling by a Circuit Collegiate Court in a direct *amparo* proceeding.

The Mexican procedure of *amparo* is an order for protection on a constitutional basis against the acts of authorities, including court judgments. The *amparo* is governed by the

* *Hummer, Waldemar, Dr. iur., Dr. rer. pol., Dr. phil.*, Legal Adviser to the Argentine Embassy in Vienna (1967-1969); Head of Department for European Law and International Development Law (1978-1984), University of Linz. Full Professor of Public International Law and European Law, Faculty of Law, University of Innsbruck/Austria (1984 ff.); e-mail (Office): sekretariat.hummer@uibk.ac.at

Mexican Constitution and the Amparo Law. There are two different types of amparo procedures: The direct amparo (*amparo directo*) which is provided under section V of Article 107 of the Constitution; and the indirect amparo (*amparo indirecto*) which is provided under section VII of Article 107 of the Constitution. The direct amparo involves the cessation or annulment of a court judgment, providing an additional forum to challenge a “final” judgment. The indirect amparo is a separate and independent proceeding involving review of a court ruling by District Courts and Circuit Courts and in exceptional cases the Supreme Court on a Constitutional basis.

1. Facts and Prior Proceedings

During 1995 and 1996, Radio Centro acquired radio stations owned by InfoRed as well as the exclusive radio broadcasting rights to the news and talk radio program *Monitor*. In 1998, Radio Centro entered into an agreement with InfoRed and Mr. Gutierrez Vivó, to provide Radio Centro with news programs and special-event programs for radio. According to the Agreement, Mr. Gutierrez Vivó would continue as Monitor's host until at least the end of 2003.

In 2002, the Plaintiffs initiated an arbitration proceeding before the International Chamber of Commerce (ICC) pursuant to which they sought rescission of the Agreement and damages. The arbitration was based on the arbitration clause included in the Agreement. The clause provided that the arbitral tribunal (the “Tribunal”) had to be comprised of three arbitrators (the “Arbitrators”) who were experts in the subject matter. Both parties to the arbitration expressly accepted the members of the Tribunal as Arbitrators and their expertise in the matter in question.

In March 2004, the ICC notified the parties that the Tribunal had made an award (the “Award”) holding by a majority vote that Radio Centro was in breach of the Agreement. The Agreement was rescinded and InfoRed and Mr. Gutierrez Vivó together were awarded an indemnity payment.

Radio Centro challenged the validity of the Award before Civil Judge 63 of the Federal District Superior Court of Justice (“Civil Judge 63”) through an incidental plea for annulment (*incidente de nulidad*). Radio Centro argued that the Arbitrators were not recognized as experts and had not proven their expertise in the subject matter. In November 2004, Civil Judge 63 nullified the Award, holding that the Tribunal had in fact not proven its expertise in issues relating to the radio industry.

Both parties contested Civil Judge 63's decision in an indirect amparo proceeding before District Judge 6 of Civil Matters of the Federal District (“District Judge 6”). InfoRed argued that Civil Judge 63 had not considered the arbitration clause of the Agreement, nor the relevant arbitration rules of the ICC and applicable international treaties. In May 2006, District Judge 6 awarded protection under the amparo to InfoRed by declaring Civil Judge 63's decision null and void and ruling that the incidental plea for annulment of the original Award was without merit.

Radio Centro appealed this decision before the Thirteenth Collegiate Court on Civil Matters of the First Circuit (the “Appellate Court”).

While the decision of the Appellate Court was still pending, two judges of the First Chamber of the Supreme Court tried to get the Supreme Court to review the proceeding pursuant to the indirect amparo. However, in March 2006, a majority of the Supreme Court’s First Chamber voted against accepting the proceeding for review.

In June 2006, the Appellate Court held that the proceeding at hand was not an indirect amparo but in fact a direct amparo for which the Appellate Court was the only forum. Then, instead of analyzing the arguments made in the amparo on appeal, the Appellate Court proceeded to render a judgment on the facts of the case. The Appellate Court denied the amparo by majority vote, thereby confirming Civil Judge 63’s decision to nullify the Award.

In response to this decision, on July 3, 2006, Plaintiff’s counsel filed a constitutional complaint before the Supreme Court in which they alleged that the Appellate Court had misinterpreted certain constitutional concepts and thus wrongly decided that the proceeding at hand was a direct amparo without a right to review by the Supreme Court. The Plaintiffs argued that the decision would deprive them of a second appellate forum and thus of their constitutional right to a fair hearing and due process of law.¹

2. Legal Issues Presented in the Constitutional Complaint

The Plaintiffs’ Constitutional complaint presents the following legal issues:

1. Whether an interlocutory judgment in an incidental plea for annulment of an arbitral award (*incidente de nulidad de laudo arbitral*) must be considered a definitive judgment that ends the relevant judicial proceeding (*juicio*) in accordance with section V of Article 107 of the Constitution, and
2. Whether an incidental plea for annulment of an arbitral award as contemplated by the Mexican Commercial Code has the same judicial meaning and effect as a judicial proceeding.

2.1. Procedural Aspects

The requirements that must be met to establish a Constitutional complaint under an indirect amparo are governed by section IX of Article 107 of the Constitution, Article 82, section V of Article 83, section II of Article 84, Article 86 and Article 88 of the Law of Amparo as well as the first paragraph of Accord No. 5/1999 of the Assembly of the Supreme Court. In accordance with these provisions, the following requirements must be met:

- The contested ruling of the Circuit Collegiate Court must be final and by way of a direct amparo,

¹ InfoRed et Mr. José Gutierrez Vivó v. Radio Centro et al.; Suprema Corte de la Nación; Constitutional Complaint; Exp. No. R.C. 311/2005-13; July 3, 2006.

- The court must directly interpret an Article of the Constitution, and
- The importance and significance of this interpretation must be without doubt.

In the proceeding at hand, the Appellate Court held that the procedure must be considered a direct amparo and not, as the parties had assumed, an indirect amparo.

The Appellate Court directly interpreted the second paragraph of Article 14, sections III, V and VII of Article 107 and Article 133 of the Constitution. The interpretation of a Constitutional Article is defined as “the definition by the Circuit Collegiate Court of the meaning of a Constitutional provision, determining its legal effect”². However, it is the Supreme Court that must establish a definitive interpretation of any constitutional concept, as it is the highest authority on these matters.

Through its interpretation of “definitive judgment”, “judgments that end a judicial proceeding”, “definite judgments in commercial judicial proceeding”, “amparo against acts in judicial proceedings, outside judicial proceedings and after judicial proceedings” (Article 107 of the Constitution), “incidental plea”, “essential formalities of a judicial proceeding” (Article 24 of the Constitution) and “they will be adjusted to treaties” (Article 133 of the Constitution) the Appellate Court determined through legal and methodological analysis the meaning and effect of these terms and concepts. In fact, the Appellate Court determined that the terms “judicial proceeding” (*juicio*) and “incidental plea” (*incidente*) must be considered to be the same.

The Plaintiffs argue that, given that applicable law uses “judicial proceeding” and “incidental plea” in different procedural contexts and with different procedural effect. It is of the utmost importance to clarify whether they are two different procedural concepts or are indeed the same. This determination also is relevant to determining whether Plaintiffs are entitled to a direct or indirect amparo *procedure*, and which court is competent to decide the proceeding.

The purpose of the Appellate Court’s direct constitutional interpretation was to establish jurisdiction over the proceeding in order to decide it anew and not to limit itself, as it should have, to resolving the issues raised on appeal. The Appellate Court instead interpreted the terms “judicial proceeding” and “incidental plea”, concluding that they were the same and therefore a direct amparo was the proper procedure.

The foregoing issues are clearly important with respect to the legal certainty of the relevant matters. The proponent of the proceeding and the lower courts must know:

1. which is the correct appellate entity to review an amparo judgment, and
2. which amparo proceeding is applicable— the direct or the indirect amparo – to review the judgment in an incidental plea for annulment.

² Burgoa, Ignacio, *El Juicio de Amparo*, vigésima primera edición, México 1984, p. 586.

2.2. *Legal Merits of the Case*

2.2.1. Systematic interpretation

The Appellate Court erroneously equated the different uses of the term “judicial proceeding” (*juicio*) in Article 14 and Article 107 of the Mexican constitution. The court held that both concepts involve the same procedural stages comprising the basic elements of a judicial proceeding: complaint, answer, offering of evidence, legal arguments and judgment. According to the Appellate Court, what is relevant is the presence of these procedural stages, not the fact that a proceeding may be called an “incidental plea” as opposed to a “judicial proceeding”.

However, it should be noted that the term *juicio* as used in Article 107 of the Constitution strictly refers to a judicial procedure, while the term *juicio* as used in Article 14 of the Constitution must be understood more broadly. Article 14 is part of the Constitution’s *Magna Carta*, granting the fundamental right to any Mexican that he shall not be deprived of his property, life or other rights without a prior proceeding (*juicio*) before the corresponding courts with due process of law. Thus, the use of the term in Article 14 must be considered distinguishable from the strictly procedural use in Article 107 of the Constitution and should be interpreted in the broadest sense. Article 14 of the Constitution grants the citizen a general right to a fair trial before the corresponding judicial institutions. But this does not imply that the term *juicio* in Article 14 of the Constitution should be interpreted narrowly as a judicial proceeding as used in section V of Article 107 of the Constitution.

Moreover, in other proceedings, courts have ruled that minimum standards of due process must be observed in accordance with Article 14 of the Constitution but have not equated the proceeding with a “judicial proceeding” under section V of Article 107 which only allows an appeal by direct amparo. Such is the case with the “incidental plea for execution of an arbitral award”.

Also, the Appellate Court in its decision ignores that section VII of Article 107 of the Constitution clearly establishes that decisions which determine an intermediate issue and are not the final decision of the court with respect to the principal issue shall be appealed by means of the indirect amparo.

Accordingly, if the Constitution makes this obvious distinction, there is no room for the Appellate Court’s interpretation that the incidental plea for annulment must be considered a judicial proceeding which puts a definite end to the disputed issue and must thus be appealed by means of the direct amparo.

2.2.2. Grammatical interpretation

The conclusions are the same when a linguistic or grammatical interpretation is applied to the relevant terms and issues.

The term “incidental plea” describes a concept that is ancillary to the principal suit or action. The word “incidental” derives from the Latin *incido incidens* (interrupt, suspend) which means, in a broader sense, depending on or appertaining to something else as primary. Legally speaking, it refers to a question that arises in a primary suit to which it is related.

The annulment of an arbitral award must be sought through an incidental plea as it is ancillary to the primary arbitration claim. An ancillary question to be determined is whether the award is valid or null and void. The arbitration procedure is the “judicial proceeding” as it provides all of the procedural stages of a primary lawsuit. However, it should be clarified that although the arbitral award is considered a judgment that concludes a “judicial procedure”, a party cannot challenge the arbitral award by means of a direct amparo because the arbitral award does not constitute the act of an authority under the Law of Amparo. The award must be converted into the act of an authority by way of an “incidental plea of annulment”. Only the judicial determination of the “incidental plea” is considered to be the act of an authority and may be challenged through an amparo.

The principles of civil procedure in the context of Article 107 of the Constitution clearly indicate that the terms “incidental plea” and “judicial proceeding” refer to different procedural actions and have different procedural effects. A “judicial proceeding” in this sense is a “proceeding which begins in any form until the judgment is executed through any means.”³ It is clear that a judicial proceeding is understood to mean a lawsuit that puts a definite end to a legal proceeding through a final judgment with respect to the substantive issue.

On the other hand, “incidental pleas” are “proceedings that resolve issues ancillary and directly connected to the primary issue.”⁴

Moreover, a definitive judgment is understood to mean “a resolution by a judge or tribunal in order to resolve the substantive issue of the suit, conflict or controversy, which is a normal conclusion of the procedure”⁵

In drafting the provisions of Article 107 of the Constitution governing the amparo procedure, Congress clearly distinguished between sections V and VII of Article 107. In section V, the Circuit Collegiate Courts were granted jurisdiction to resolve direct amparo proceedings which are brought against definitive judgments or awards and resolutions which end a primary “judicial proceeding”. In section VII, Congress provided that all other judgments that do not definitively end a primary issue are subject to review by means of an indirect amparo under the jurisdiction of a District Court and review by a Circuit Collegiate Court.

³ Quinta Época, Tercera Sala, Semanario Judicial de la Federación LXXXVIII, página 1024, tesis aislada, material Civil. Citada en Diccionario Jurídico Mexicano, segunda edición, México 1988, página 1848.

⁴ Diccionario Jurídico Mexicano, segunda edición, México 1988, página 1665.

⁵ Diccionario Jurídico Mexicano, segunda edición, México 1988, página 2891.

However, it should be noted that the determining factor is not whether the issue is decided definitively, as is the case in an interlocutory judgment, but whether the ruling itself is definitive and finally and completely puts an end to the controversy. As an “incidental plea” is not the equivalent of a “judicial proceeding,” and an interlocutory judgment is not equivalent to a definitive judgment, an incidental plea does not meet the requirements for a direct amparo under section V of Article 107 of the Constitution.

3. Arbitral award and its homologation

The Appellate Court also misinterpreted the concept of an arbitral award and its transformation into the official act of an authority for Constitutional purposes. The Appellate Court erroneously ruled that the arbitral award becomes the official act of an authority capable of being challenged by an indirect amparo through the transformation of the award itself rather than through the judicial ruling that effects such transformation. The Appellate Court’s interpretation would permit the courts to review substantive issues decided in an arbitral award. This was clearly not the intent of the Congress. The conditions under which an arbitral award may be annulled are listed in article 1457 of the Mexican Commercial Code, and this list is exclusive and does not include the review of the substantive issues resolved in the award.

Furthermore, the Appellate Court’s reasoning is flawed and contradictory. The Appellate Court first states that, under contractual theory in arbitration, the annulment of an arbitral award may only be requested once the award has been transformed into the official act of an authority. The Court Appellate also indicates that the arbitral award becomes subject to the jurisdiction of the courts and a plea for annulment of the award may be considered by the courts even before the award is transformed. At the same time, the Appellate Court states that the resolution of the plea for annulment of the award is a definitive judgment and puts an end to the proceeding.

The contradiction consists of the following: if the award becomes jurisdictional and definitive only through the transformation, then if the plea for annulment proceeds before the transformation, neither the award nor the annulment ever become a definitive judgment.

4. Conclusion

By judging that the incidental plea for annulment was in fact a “judicial proceeding” which puts a definitive end to the case and against which the direct amparo proceeds, the Appellate Court violated Plaintiff’s constitutional right to a fair hearing and due process of law. The Appellate Court deprived the Plaintiffs from the procedure stipulated in section VII of Article 107 of the Constitution with all its procedural aspects, rules, effects and consequences.

The Plaintiffs have a constitutional right that their amparo is to be heard in an indirect amparo proceeding in which a District Court judges over the issue followed by a principal

and concurring revision before the Circuit Collegiate Court in which only the issues brought forward in the revision are to be judged.

5. Post Data

In a close vote, five against four, the judges of the Supreme Court approved the reasoning of InfoRed. The Supreme Court turned the case in January 2007 to the Federal District's Thirteenth Circuit Court of Civil Matters instructing the court to reexamine the matter under different procedural rules. The court decided in favor of InfoRed, granting the amparo *indirecto* and thus confirming the enforceability of the Award. InfoRed is currently executing the Award.