

U.S. Courts Recognize NAFTA Award Against Mexico

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The legal news has been awash lately in the recognition and enforcement of investment arbitration awards by U.S. courts. Most of the press is on the long-running and still-unfolding saga regarding Spain (see [here](#) and [here](#)). And a new decision recognizing an award against Zimbabwe was just issue at the end of December, as well. Here, however, we would like to add to the news with the recent decision recognizing an investment arbitration award against Mexico in *United Mexican States v. Lion Mexico Consolidated*.

Like most investment arbitrations, the decision tells a sordid tale. Lion Mexico Consolidated (LMC) is a Canadian company which provided financing to a Mexican businessman, Mr. Hector Cardenas Curiel, to develop real estate projects in Nayarit and Jalisco, Mexico. Cardenas' company failed to pay on the loans, and LMC tried for years to obtain payment, all to no avail. Cardenas then began what was described as a "complex judicial fraud" to avoid payment, including a forgery and a subsequent lawsuit in a Jalisco court to cancel the loans. LMC was never informed of the suit and therefore, never appeared. The Jalisco Court issued a default judgment discharging the loans and ordering LMC to cancel the mortgages; Cardenas then arranged for an attorney to act fraudulently on LMC's behalf to file and then purposefully abandon the appeal. LMC only learned of the entire scheme when they attempted to file their own constitutional challenge and were rejected. The Mexican Courts refused to allow LMC to submit evidence of the forgeries, so LMC brought a NAFTA Chapter 11 arbitration against Mexico for its failure to accord Lion's investments protection under Article 1105(1) of NAFTA.

In the arbitration, Mexico argued that Article 1105(1)(b) only applies to investments, and because LMC is an investor, it could not seek relief under Article 1105(1). The arbitral tribunal disagreed and awarded LMC over US\$ 47 million in damages. In the U.S. courts, Mexico petitioned to vacate the Award, and LMC cross-petitioned to affirm it.

Mexico conceded that the DC Circuit's power to vacate an arbitral award is limited: as long as the tribunal "interpreted" 1105(1) the Court must confirm the award even if serious interpretive error was committed. Mexico attempted to skirt this issue by claiming that the Tribunal did not "interpret" anything. Instead, in Mexico's view, they simply ignored the literal meaning of investments of investors by granting relief to Lion.

The Court was not impressed by this argument. It held that "[t]he Tribunal addressed Mexico's interpretation of Article 1105(1) head on, employed common interpretative tools to reach a different conclusion, cited authorities in support of its reading, and explained its reasoning. By any definition of the word, the Tribunal interpreted Article 1105(1). Because the Court can't second-guess that interpretation, the Court DENIED Mexico's Petition to Vacate the Arbitral Award, and GRANTED LMC's Cross- Petition for Confirmation, Recognition, and Enforcement of the Arbitral Award."

Additionally, the Court denied a motion to intervene filed Hector Cardenas Curiel. Cardenas knew that the arbitral case hinged upon his fraud but did not pursue intervention at the arbitral stage. The Court found that Cardenas' attempt to intervene at this stage was "too little too late", and Cardenas did not meet the requirements for intervention under Federal Rule of Civil Procedure 24(a)(2) or 24(b).

This decision is important because it follows a long line of cases giving deference to arbitrators in investment treaty cases; when they interpret the governing treaty and decide cases thereunder, their decisions will not be second-guessed by U.S. courts later.