

# Mediation and Commercial Arbitration in Mexico

Annual Report  
2009

**ACGR** | AZAR,  
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Dear friends,

We are pleased to present to you our usual annual report on mediation and commercial arbitration in Mexico. The information contained herein presents a follow up on the development of these ADR mechanisms in Mexico and seeks to contribute to the same by the analysis of amendments to legal provisions and relevant decrees on these matters, related judicial decisions and amendments to institutional rules on the administration of proceedings in mediation and arbitration.

As you will be able to see in this report, 2009 was a very active year with respect to court-annexed mediation; unfortunately, development on private mediation is still pending. On arbitration matters, the Supreme Court issued numerous statements with respect to the legal nature of arbitration and its general aspects, in our opinion, some better than others.

We hope that this report and its corresponding analysis are useful to you.

Best regards,

**Azar, Ortega & Gómez Ruano**

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## MEDIATION

### Court-annexed mediation. Alternative justice

#### I. Enactment of new laws

In 2009, two alternative justice state laws were enacted in Mexico corresponding to the States of Chiapas and Yucatán. This enactment took place within a new constitutional context since, in 2008 article 17 of the Constitution was amended in order to incorporate the following provision: "The laws will contain alternative dispute resolution mechanisms." These laws are the result of the efforts of the public and private sectors that have collaborated in seeking the consolidation of mediation in Mexico. Below we will comment on certain aspects of these laws. Likewise, we will review the States of the Mexican Republic that currently have an alternative justice law or a mediation law.

#### A. Alternative Justice Law of the State of Chiapas

On March 18, 2009 the Alternative Justice Law of the State of Chiapas was published; it entered into force on June 24, 2009. The law provides for mediation, conciliation and arbitration, and establishes that these mechanisms shall be applicable in conflicts over rights on which private parties may dispose freely under the principles of free will and contractual freedom, as well as in damage reparation as a result of criminal felonies, or the restoration of social relations affected by the execution of crimes.

The principles established in the law are: free will, confidentiality, flexibility, neutrality, impartiality, equity, legality, economy, professionalism, orality, celerity and protection of those most vulnerable. Some relevant data of its articles are:

- The parties may elect an alternative mechanism even when they have already initiated a judicial proceeding. In this case, the proceeding before the judge shall be suspended.
- Criminal mediation and justice for teenagers are also contained.
- Settlements reached through mediation may be formalized as *res judicata* once the General Director of the Alternative Justice Center has ratified them. The Director and Regional Sub-directors have the authority to certify acts and documents (*fe pública*), and the parties shall recognize in his/her presence the content and signature of the agreements reached to settle the conflict. Therefore, these agreements shall be considered as public documents.
- Judicial authorities that learn of a matter that is susceptible of solution through alternative methods shall guide the parties in the first filing of the judicial trial, so that they submit to the proceeding that suits them best. In other words, there is no compulsory referral by the judge, but only an obligation to guide the parties in the use of mediation.
- With this law the Alternative Justice Center is created within the jurisdiction of the State Judicial Power. Its services are for free.
- The law also contemplates private mediation, this is, the one performed by mediators that are not part of the Center. These mediators must be certified by the Center.

## B. Law on Alternative Dispute Resolution Methods of the State of Yucatán

Published on July 24, 2009, this law entered into force the first day of 2010. In its preamble, the Yucatán Congress recognizes that a manner of fulfilling the aspirations of article 17 of the Constitution is the use of alternative dispute resolution methods. These methods promote the solution of conflicts by means of dialogue and perform a moral transformation of its actors.

The law establishes, in particular, the use of court-annexed mediation and conciliation, as assisted autocompositional methods of conflict solution between private parties. Only those conflicts with respect to rights that are freely disposable by the parties may be mediated or conciliated.

In general terms, the law incorporates almost all principles of mediation and conciliation<sup>1</sup> that according to the *Mediation in Mexico Project*<sup>2</sup> must be taken into account for the design of legal provisions on this subject matter. The only principle that it does not expressly include is the one of flexibility; indeed, the regulation of the mediation or conciliation proceeding is rigid and does not allow the parties to adjust it to their controversy.

The law also contemplates the creation of a Mediation Center that shall have the economic, technical and human resources necessary for its effective functioning, with the purpose of alleviating the workload of the first instance courts and promoting the solution of conflicts through proceedings that are more agile, cost-free and less emotionally costly for the involved parties.

After a general analysis of the six chapters contained in this new law, we may reach the following conclusions:

- The law is based on the principles of gratuity, professionalism, neutrality, confidentiality, impartiality, celerity and equity.
- Although it differentiates the mediation proceeding from the conciliation proceeding, it allows for both of them to be undertaken simultaneously (on the same matter) if the case so demands it.
- The Center Director or the Regional Sub-director may formalize an agreement reached by the parties as *res judicata*.
- The law requires private mediators to become certified before the Court Mediation Center.
- It includes criminal mediation, which may be performed by the District Attorney's Office (*Ministerio Público*), before or after the preliminary inquest (*averiguación previa*).
- The mediation or conciliation proceeding may be undertaken at any moment, even if the conflict has already been taken before the courts. In this case, the Mediation Center shall inform the judge in charge of the matter, so that the judicial terms are suspended.

<sup>1</sup> Free will, confidentiality, flexibility, neutrality, impartiality, equity, legality and honesty.

<sup>2</sup> Sponsored by the Rights Consortium, composed by the Consejo para Iniciativas Legales en América Latina of the American Bar Association, Freedom House and the United States Agency on International Development (USAID).

**C. States of the Mexican Republic that have an alternative justice law**

Currently the following States have a mediation law or a law on alternative dispute resolution methods:

No.	States that have an alternative justice law	No.	States that have an alternative justice law
1	Aguascalientes	12	Morelos (only for criminal matters)
2	Baja California	13	Nuevo León
3	Chiapas	14	Oaxaca
4	Chihuahua	15	Quintana Roo
5	Coahuila	16	Querétaro
6	Colima	17	Sonora
7	Distrito Federal	18	Tamaulipas
8	Durango	19	Tlaxcala
9	Guanajuato	20	Veracruz
10	Hidalgo	21	Yucatán
11	Jalisco	22	Zacatecas

## II. Court-annexed mediation centers

In addition to the case of the new Alternative Justice Center of Chiapas, on 2009 two new court-annexed mediation centers began operating. These centers are:

- Alternative Justice Center of the High Court of Justice of the State of Zacatecas that began operating on January 5, 2009.
- Alternative Justice Center of the High Court of Justice of the State of Baja California that began operating on April 20, 2009.

In other cases, in Tamaulipas, where two court-annexed mediation centers already existed, three new ones were opened at: Matamoros, Reynosa and Nuevo Laredo. Likewise, several municipal centers began operating at the State of Oaxaca. The creation of these centers by the High Courts of the States, after the amendment of article 17 of the Constitution, reflects the will of the local judicial powers to strengthen their efforts of providing private parties with mechanisms that are alternative to judicial proceedings.

Currently, the States that have court-annexed mediation centers are the following:

No.	States that have a court-annexed mediation center	No.	States that have a court-annexed mediation center
1	Aguascalientes	14	Michoacán
2	Baja California	15	Morelos
3	Baja California Sur	16	Nuevo León
4	Campeche	17	Oaxaca
5	Chihuahua	18	Puebla
6	Colima	19	Querétaro
7	Coahuila	20	Quintana Roo
8	Distrito Federal	21	Sonora
9	Durango	22	Tabasco
10	Estado de México	23	Tamaulipas
11	Guanajuato	24	Tlaxcala
12	Hidalgo	25	Veracruz
13	Jalisco	26	Zacatecas

### III. Mexican Association of Imparters of Justice Project

The Mexican Association of Imparters of Justice Project (*Asociación Mexicana de Impartidores de Justicia or AMIJ*) is a body that involves judges, magistrates and Justices of the Supreme Court as representatives of the several authorities in charge of imparting justice in the country. The AMIJ supports and promotes projects for the obtaining of general benefits in training, technology application and modernization of the judicial career, in all judicial offices in Mexico.

In 2009, the AMIJ created a project named *Design and implementation of an effective model for the alternative resolution of conflicts in the Judicial Powers of the States of Guerrero and Colima*. Its development is in charge of a group of consultants coordinated by Cecilia Azar<sup>3</sup>. The study is divided in three parts: (i) elaboration of a diagnosis on the current situation of alternative justice in Mexico; (ii) designing of a mediation center operating model; and (iii) training of mediators and implementation of the model.

#### Private mediation

One of the pending matters in commercial mediation in Mexico is without doubt, the adoption of the UNCITRAL Model Law on International Commercial Conciliation. This project, although has been included in the Congress agenda, has not been analyzed yet. Notwithstanding, as mentioned in the foregoing section of this report, several legislations have opened the possibility of participation of private mediators, that in most cases must submit to a certification by the centers in question.

In 2009, the Judicial Counsel (*Consejo de la Judicatura*) and the High Court of Justice, both of the Federal District, inaugurated their first course on mediation specialized on civil-commercial matters. This course was offered to the public in general (including private mediators and judicial officers of the Federal District) and had as purpose the development of professional skills necessary for the effective execution of the mediator role. It comprised 120 hours, initiated on September 17, 2009 and had a cost of \$25,000.00 Mexican pesos.

This course is a requirement for the certification by the Mediation Center of the High Court of Justice of the Federal District. However, the course does not guarantee the certification. It is only a first step, since after the course further stages and requirements must be fulfilled. The certification of mediators is one of the powers of the Mediation Center granted by the Alternative Justice Law for the Federal District.

A main advantage of being a certified mediator by the Mediation Center, is that the agreements reached by the parties in a private mediation may be formalized as *res judicata*, therefore facilitating their enforcement. Federal District private mediators that wish to have this benefit in their mediations must obtain the aforementioned certification. Mention should be made that the proceeding by which the Mediation Center formalizes the settlement agreements reached by a private mediator as *res judicata* is not defined yet, and possibly will have an additional cost.

For further information on the development of mediation in our country, Azar, Ortega y Gómez Ruano recommends visiting the blog <http://blogdemediacionmonterrey.blogspot.com/> and takes advantage of this means to congratulate the work of its creators.

<sup>3</sup> Aghiana García, Ana Elena Fierro, Ignacio Lozano, Rafael Lobo, Luis Miguel Díaz, Macarena Romayo, Dirk Zavala, Sergio Ramos and Arjan Shahani.



## ARBITRATION

### Relevant reforms

One of the areas in which most frequently arbitration at an international level is used is infrastructure. The foregoing is due in part because, generally developing countries seek foreign investment in order to perform their big infrastructure projects and, on the other hand, foreign investors seek to invest under conditions that insure the legal security of their investments, among these, the possibility of resolving any dispute that could arise outside the local judicial courts. In view of the foregoing, one of the topics that arbitration practitioners in Mexico had noted as pending was the completion or amendment of the acquisitions and public works legal framework in order to provide for further certainty on the arbitration rules on these subject matters. In 2009, both the Acquisitions, Leases and Services of the Public Sector Law (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público or Acquisitions Law*) and the Public Works and Related Services Law (*Ley de Obras Públicas y Servicios Relacionados con las Mismas or Public Works Law*) were amended. We will comment the results below.

On the other hand also on arbitration matters, the Law on Enterprise Chambers and their Confederations (*Ley de Cámaras Empresariales y sus Confederaciones*) was amended with the purpose of a greater use of this dispute resolution mechanism.

### I. Acquisitions, Leases and Services of the Public Sector Law

On May 28, 2009 amendments to the Acquisitions Law were enacted. Prior to this reform, this law established arbitration in its general chapter under article 15. This, notwithstanding that it opened the possibility of submitting certain kinds of conflicts to arbitration, was inoperative since the general rules that would allow to know the kinds of conflicts that could be subject to arbitration were never issued by the Public Function Ministry with the prior opinion of the Ministry of Economy.

In view of the foregoing, only the decentralized bodies Pemex (*Petroléas Mexicanas*) and CFE (*Comisión Federal de Electricidad*) which had their own organic rules making reference to the possibility of arbitrating disputes, had the necessary clear legal framework to that effect.

After the 2009 reform, Title Sixth of the Acquisitions Law (beforehand named *Of infractions and sanctions*) was renamed *Of dispute resolution*, and its Chapter III dedicated to *Arbitration, Other Mechanisms of Dispute Resolution and Judicial Jurisdiction*. Article 80<sup>4</sup> of the new legislation establishes which controversies may be submitted to arbitration and these are: (i) conflicts with respect to interpretations of clauses of agreements provided for in section VI of article 3<sup>5</sup>, and (ii) conflicts derived from their execution. Likewise, said provision points out that the arbitration shall be conducted pursuant to the rules of Title Fourth of Book Fifth of the Commerce Code, in other words the Mexican arbitration law for commercial arbitration (as a results of the adoption of the UNCITRAL Model Law on International Commercial Arbitration by Mexico). However, within the legislator's delimitation of the scope of application of arbitration, he expressly left out arbitration disputes on administrative termination (*rescisión administrativa*) and anticipated termination of contracts, as well as any other that may be determined in the law regulations.

Mention should be made that the foregoing does not amend the legal framework applicable to Pemex and CFE since the Acquisitions Law expressly establishes that the foregoing provisions do not apply to public bodies that have their own special legal provisions on this matter.

<sup>4</sup> Article 80: An arbitral agreement may be entered into with respect to those disputes between the parties deriving from the interpretation of the clauses of the long-term services agreements established in section VI of article 3 of this Law or from questions related to their execution, pursuant to the provisions of Title Fourth of Book Fifth of the Commerce Code. Administrative termination (*rescisión administrativa*), anticipated termination of the contracts and those other cases provided for in the regulations of this law shall, not be subject to arbitration.

<sup>5</sup> The agreements referred to in section VII of article 3 are those long-term services agreements that involve the use of resources of several fiscal years, to be executed by an investor supplier (*inversionista proveedor*), who undertakes to render the services with assets of its own or of the property of a third party, pursuant to a project for the rendering of such services.

## II. Public Works and Related Services Law

The Public Works Law, which regulation on arbitration was similar to the one of the Acquisitions Law, was also modified on May 28. With the reform, Title Seventh (*beforehand named Of infractions and sanctions*) is now named *Of dispute resolution*, and in its Chapter III *Arbitration, Other Mechanisms of Dispute Resolution and Judicial Jurisdiction*<sup>6</sup> the possibility of submitting disputes that arise between the parties on the interpretation of the clauses of the agreements or on matters related to their execution is provided.

Unlike the Acquisitions Law, the Public Works Law does not restrict the kind of agreements in which alternative dispute resolution mechanisms may be agreed. However, it does agree on the unfortunate restriction on the scope of application of arbitration, leaving out of it the administrative termination and anticipated termination of contracts, as well as any other matter that may be determined in the law regulations.

By the same token, these provisions are not applicable to Pemex and CFE.

## III. Law on Enterprise Chambers and their Confederations

On June 9, 2009, the Law on Enterprise Chambers and their Confederations was also modified. Article 7 of the law provided already that Enterprise Chambers have within their functions to act as arbitrators in commercial, industrial, services or tourism matters with the purpose that the chamber members may resolve their disputes by means of arbitration before the chamber that they are part of. As in the case of Enterprise Chambers, Confederations of chambers also have as part of their functions to act as arbitrators in disputes between their members, through a body expressly established to that effect. The law does not regulate the proceeding to be undertaken in this arbitrator role.

In addition, this law provides in its article 16 the Chambers and Confederations' obligation to have these dispute mechanisms proceedings in their bylaws so that their members can opt to use them.

To the aforementioned, the 2009 reform added the Chambers and Confederations' obligation to divulge among their members the alternative dispute resolution mechanisms, among them, arbitration. Moreover, it opened the opportunity for the Chambers and Confederations to execute agreements with commercial arbitration institutions.

Notwithstanding the fact that the changes to this law were minimum, the intention of this reform is big, since it seeks to promote arbitration, not as a choice, but as an obligation of the Chambers and Confederations. No doubt, the purpose of this reform is to increase the use of arbitration among the members of the Enterprise Chambers.

### Arbitral institutions

#### **CAM Arbitration**

On July 1<sup>st</sup>, 2009, the new Rules of Arbitration of the Arbitration Center of Mexico (*Centro de Arbitraje de México* or CAM) entered into force. This is the first amendment to the rules as from the creation of the CAM on 1997. Among the changes the following are relevant: the inclusion of urgency interim measures, and the possibility of withdrawing a case if the parties do not cover the advance on costs of the arbitration.

<sup>6</sup> Article 98: An arbitral agreement may be entered into with respect to those disputes between the parties deriving from the interpretation of the clauses of the contracts or from questions related to their execution, pursuant to the provisions of Title Fourth of Book Fifth of the Commerce Code. Administrative termination (*rescisión administrativa*), anticipated termination of the contracts and those other cases provided for in the regulations of this law shall not be subject to arbitration.

## Judicial decisions

As we always do, we have divided our comments to judicial decisions by topics. For those interested in updating the content of Annex 1 on judicial criteria related to arbitration included in our *Ley Comentada*, please print out the content of the following link: Actualización 2009.

## Arbitration, its legal concept, purpose, sub-classifications and generic characteristics

In September 2009 eight judicial extracts (*tesis*) were published in the Federal Judicial Gazette by which the First Chamber (*Primera Sala*) of the Mexican Supreme Court of Justice seems to have wished to redefine the concept of arbitration, as well as to provide a new determination on its purpose, classifications and characteristics.

In defining the generic concept of arbitration, the First Chamber of the Court points out that arbitration does not imply the solution of conflicts through a judicial proceeding, but has as origin the will of the parties. However, it states that this will of the parties when submitting to arbitration is to "agree on their disagreements based on the advice or compromise provided by a third party of their trust (individual or collective) that normally is known as arbitrator or conciliator (*avenidor*)."<sup>7</sup> In our opinion, this statement is delicate since it results in a lack of clarity as to the role of the arbitrator and its tasks. We believe that the arbitrator should always be an individual (*persona física*) whether it resolves individually or collectively, and its purpose is to provide a definitive solution to a conflict, not to advice the parties as if it were a parties' counsel, or to reach a compromise between the parties as a conciliator or mediator would do. It is interesting to point out the terms "individual or collective" in this context, since generally the use of the first is not opposed to collective but to entity (*persona moral*); the use of the terms "individual or entity" in another judicial extract by the same court<sup>8</sup>, suggests that it may have wanted to refer to the inclusion of entities as arbitrators, although examples of this are difficult to find in private arbitration.

On the other hand, the First Chamber concludes that there are three different kinds of arbitration: the voluntary<sup>9</sup>, the compulsory<sup>10</sup> and the intermediate<sup>11</sup>. Even though it states that voluntary arbitration is the one where the parties freely submit to arbitration, we should point out that this judicial extract contains delicate statements such as the parties "reach an agreement" by the resolution they adopt through a "representative" who is the arbitrator. In our opinion these statements may result in confusion as to the role of the arbitrator. As we mentioned above, the arbitrator is a third party appointed by the parties to resolve their dispute. He is not a representative of them, nor he/she acts in their representation; this situation would imply protecting the interests of his/her principal (the parties). The arbitrator's job is to comply with the task that the parties have jointly conferred on him/her by requesting the resolution of their conflict.

With respect to compulsory arbitration, the First Chamber establishes that in this kind of arbitration, the arbitrators' jurisdiction derives from the State, not from the parties. We generally agree with the content of this judicial extract. Yet, we believe that it would have been useful if the First Chamber included in its description of what constitutes an arbitration derived from a legal provision, other characteristic elements such as: the fact that the arbitrator is an State official, the absence of the requirement of an arbitration agreement, and the fact that the award rendered is considered an act of authority for purposes of the amparo (*constitutional control*).

<sup>7</sup> **ARBITRATION. ITS GENERIC CONCEPT AND PURPOSE.** No. Registro: 166,504. Tesis aislada. Materia: Civil. Novena Época. Instancia: Primera Sala. Fuente: *Semanario Judicial de la Federación y su Gaceta*. Torno: XXX, Septiembre de 2009. Tesis: 1a. CLXVI/2009. Página: 432.

<sup>8</sup> **COMMERCIAL ARBITRATION. RELEVANT ASPECTS AND PRINCIPLES THAT RULE TITLE FOURTH OF BOOK FIFTH OF THE COMMERCE CODE.** No. Registro: 166,510. Tesis aislada. Materia: Civil. Novena Época. Instancia: Primera Sala. Fuente: *Semanario Judicial de la Federación y su Gaceta*. Torno: XXX, Septiembre de 2009. Tesis: 1a. CLXX/2009. Página: 427.

<sup>9</sup> **VOLUNTARY ARBITRATION. ITS LEGAL CONCEPT.** No. Registro: 166,501. Tesis aislada. Materia: Civil. Novena Época. Instancia: Primera Sala. Fuente: *Semanario Judicial de la Federación y su Gaceta*. Torno: XXX, Septiembre de 2009. Tesis: 1a. CLXVI/2009. Página: 435.

<sup>10</sup> **COMPULSORY ARBITRATION. ITS LEGAL CONCEPT.** No. Registro: 166,506. Tesis aislada. Materia: Civil. Novena Época. Instancia: Primera Sala. Fuente: *Semanario Judicial de la Federación*. Torno: XXX, Septiembre de 2009. Tesis: 1a. CLXVI/2009. Página: 432.

<sup>11</sup> **INTERMEDIATE ARBITRATION. ITS LEGAL CONCEPT.** No. Registro: 166,505. Tesis aislada. Materia: Civil. Novena Época. Instancia: Primera Sala. Fuente: *Semanario Judicial de la Federación y su Gaceta*. Torno: XXX, Septiembre de 2009. Tesis: 1a. CLXX/2009. Página: 432.

Finally, the First Chamber defines intermediate arbitration as the one that has characteristics of both. In our opinion, this judicial extract is very confusing and difficult to understand. It refers unclearly as to procedural and substantive aspects on the one hand, and other aspects related to the arbitrator on the other. Was the Chamber referring to arbitrations of bodies such as the CONAMED (Comisión Nacional de Arbitraje Médico) and CONDUSEF (Comisión Nacional para la Protección y Defensa de los Usuarios de Servicios Financieros) in which voluntary submission of the parties is necessary (*voluntary arbitration element*), but its procedure is regulated by law and its award in the end is an act of authority for purposes of the amparo (*compulsory arbitration elements*)?

Taking as a starting point the aforementioned classifications, the First Chamber performs a sub-classification of arbitration: (i) legal or in fact; (ii) in equity or *ex aequo et bono*; (iii) formal or not formal (*ad hoc*); (iv) national or domestic; and (v) foreign or international<sup>12</sup>, in some cases, alienating in a distressing manner from the provisions of Title Fourth of Book Fifth of the Commerce Code. For example, it defines international arbitration ignoring completely the definition of such term expressly contained in article 1416 of the Commerce Code (inspired in article 7 of the UNCITRAL Model Law on International Commercial Arbitration). Furthermore, when studying equity or *ex aequo et bono* arbitration, it unfortunately confuses it with conciliation, describing it as an autocompositive method<sup>13</sup>, since in the opinion of the First Chamber of the Court, the job of the arbitral tribunal is to make the parties reach an agreement (*avenit*) with suggestions proposed for the solution of the conflict.<sup>14</sup> In our opinion, an arbitration, either in equity (*amigable composición*) or strictly legal (*estricto derecho*) is always heterocompositive.

## Equity arbitration

In its judicial extract COMMERCIAL ARBITRATION, ARBITRATION AGREEMENT AND CHARACTERISTICS OF THE AWARD RENDERED BY THE ARBITRAL TRIBUNAL WHEN EXPRESSLY AUTHORIZED TO DECIDE IN *EX AEQUO ET BONO* OR EQUITY<sup>15</sup>, the First Chamber states that if the parties give their express authorization<sup>16</sup>, the arbitrator or the arbitral tribunal may decide the conflict in *ex aequo et bono* or equity. In the opinion of the Chamber, by establishing Title Fourth of Book Fifth of the Commerce Code the need of an express agreement for this kind of arbitration, this proceeding is eminently contractual and therefore the solution of the dispute is more fair and just than legal, this as a result of the transfer of will of the parties. Therefore, the First Chamber considers this kind of arbitration concludes with an agreement that has the effects of a settlement, which does not have to include reference to legal provisions or any motivation. In accordance to the statements in other judicial extracts mentioned above, the Chamber considers this mechanism as autocompositive even though it implies a third party's intervention, since the involvement of the arbitral tribunal "merely signifies a decision self imposed by the parties". In the opinion of the First Chamber, the arbitral tribunal's decision affects the parties as if they had made such decision by their own free will by submitting themselves to the rendered *agreed* decision. Moreover, the First Chamber considers that in this kind of decisions, the value of evidence, as well as the arguments, motives and legal provisions relevant in the award do not have to be in writing, but may be skipped, stating only the decision itself.

<sup>12</sup> **ARBITRATION. SUB-CLASSIFICATIONS UNDER VALUATION CRITERIA.** No. Registro: 166,503. Tesis aislada. Materia: Civil. Novena Época. Instancia: Primera Sala. Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo: XXX, Septiembre de 2009. Tesis: 1a. CLXVIII/2009. Página: 433.

<sup>13</sup> **ARBITRATION. ITS GENERIC CHARACTERISTICS.** NNo. Registro: 166,502. Tesis aislada. Materia: Civil. Novena Época. Instancia: Primera Sala. Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo: XXX, Septiembre de 2009. Tesis: 1ª. CLXVI/2009. Página: 434.

<sup>14</sup> Even though the expression *ex aequo et bono* (*amigable composición*) invites to certain confusions, domestic and international doctrine have clearly and repeatedly explained that it refers to an equity arbitration, that is different from a strictly-legal arbitration only in the manner in which the arbitrator must decide the dispute by applying equity principles and not necessarily legal provisions. This distinction has an impact in the manner of resolving the conflict not in the manner of conducting the arbitration or the level of efforts performed or not performed by the arbitrator to make the parties reach an agreement (*avenit*).

<sup>15</sup> **COMMERCIAL ARBITRATION. ARBITRATION AGREEMENT AND CHARACTERISTICS OF THE AWARD RENDERED BY THE ARBITRAL TRIBUNAL WHEN EXPRESSLY AUTHORIZED TO DECIDE IN EX AEQUO ET BONO OR EQUITY (INTERPRETATION OF ARTICLES 1416, SECTION I, 1423, 1435, 1436, 1437, 1445 AND 1448 OF THE COMMERCE CODE).** No. Registro: 166,511. Tesis aislada. Materia: Civil, Constitucional. Novena Época. Instancia: Primera Sala. Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo: XXX, Septiembre de 2009. Tesis: 1a. CLXIII/2009. Página: 426

<sup>16</sup> Article 1445, third paragraph of the Commerce Code.

In our opinion, this judicial extract poses several problems. On the first hand, it confuses the origin of the arbitral proceeding (arbitration agreement) with the result (award). It is true that in equity arbitration the arbitral proceeding originates from the will of the parties, but it is also the will of the parties that gives origin to a strictly legal arbitration. In both cases, the result is an award that contains the decisions of the arbitrator with respect to the dispute. Notwithstanding that an arbitrator in an equity arbitration may rule on the dispute without taking into consideration any specific legal framework, his/her decision is imposed on the parties and is compulsory on them, whether they agree with it or not. Likewise, both in equity arbitration and strictly legal arbitration, there is the possibility for the parties to reach an agreement that may terminate their dispute, in which case they may execute a settlement agreement that is susceptible of formalization as an award rendered by the arbitral tribunal. Therefore, regardless of what this judicial extract states, the authors of this report believe that equity arbitration is an heterocompositive mechanism where a third party is appointed by the parties to a conflict, not to make them agree or suggest solutions, but to study the dispute and render a final solution compulsory on them, even though they may not agree with its content.

On the other hand, it is true that awards rendered in equity arbitration do not have to include reference to a certain legal framework, but they do have to include motivation, motivation in equity principles. Moreover, the possibility of the parties to agree that an award does not include motivation (second paragraph of article 1448 of the Commerce Code) is not exclusive of equity arbitration, but applies both to *ex aequo et bono* arbitration and strictly legal arbitrations.

Finally, we believe it is important to mention that in our opinion, an equity arbitral proceeding is not for this only reason, more flexible with respect to the value of evidence or presentation of arguments.

### Motivation of awards

Within the detailed study performed by the First Chamber of the Supreme Court on the concept of arbitration, it included the analysis of the constitutionality of article 1448 of the Commerce Code in reference to the possibility of an award not being motivated<sup>17</sup>.

The Court, correctly and according to an obligatory judicial decision (*jurisprudencia*)<sup>18</sup>, established that jurisdictional constitutional rights of inclusion of legal framework (*fundamentación*) and motivation are public rights to which authorities with jurisdictional power are accountable, but may not be demanded in a private arbitration, since it takes place among private parties. Therefore, if the parties agree that an award not be motivated, their will must prevail, since it does not conflict with any obligation of the arbitral tribunal<sup>19</sup>. Hence, it concludes that article 1448 of the Commerce Code does not violate the constitutional right of legal security provided in the Constitution.

In words of the First Chamber "the Commerce Code departs from the general obligation of motivating the awards, although this does not mean that the reason for arbitral motivation are articles 14 and 16 of the Constitution or their equivalent in judicial application." This criterion is helpful in determining the difference between an award and a judicial decision, in particular with respect to the inapplicability of the *amparo* trial against the first. Indeed, the judicial extract points out that said motivation (except when the parties have agreed to waive such motivation) is the result of a practical need in case an ulterior forced execution (*ejecución forzosa*) of the award is necessary. In this case the knowledge of the debate and limits of the decision rendered by the arbitrator will be useful to the judge. We believe that this judicial extract is useful in clarifying the debate as to the possibility of an award not including motivation, notwithstanding that in practice the description of the

<sup>17</sup> COMMERCIAL ARBITRATION. ARTICLES 1415 TO 1463 OF THE COMMERCE CODE DO NOT VIOLATE THE CONSTITUTIONAL RIGHT OF LEGAL CERTAINTY. No. Registro: 166,509. Tesis aislada. Materias: Civil y Constitucional. Novena Época. Instancia: Primera Sala. Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo: XXX, Septiembre de 2009. Tesis: 1a. CLXXXI/2009. Página: 428

<sup>18</sup> Jurisprudencia 1a./I. 139/2005. INCLUSION OF LEGAL PROVISIONS (FUNDAMENTACIÓN) AND MOTIVATION OF JUDICIAL DECISIONS, THEY MUST BE ANALYZED ACCORDING TO ARTICLES 14 AND 16 OF THE MEXICAN CONSTITUTION, RESPECTIVELY. Contradicción de tesis 133/2004-PS.

<sup>19</sup> This statement by the Court reinforces the enforcement of awards rendered pursuant to the ABC Rules of CANACO. These rules, in order to press celerity in arbitral proceedings of small claims, establish that the award shall not be motivated.

reasons that drove the arbitrator to his/her decision are convenient in case of a contingent effort to annul the award or request its recognition and enforcement.

Mention should be made that in this judicial extract, the First Chamber again declares the arbitral tribunal to be a representative and substitute of the will of the parties of the arbitration, and points out that the representation and trust that the parties deposit in the tribunal is the "basis" for its resolution. In this respect, we repeat that the role of the arbitrator is different from the one of a representative and we think it is delicate to talk about a substitution of will of the parties. The foregoing, because the resolution by the arbitrator may not necessarily comply with the wish of the parties in the arbitration, this is, to be proven right.

## Recognition of awards

The First Chamber of the Court, in an interpretation of article 1461 of the Commerce Code<sup>20</sup> establishes that "[t]he recognition of an arbitral award is a formal act performed by a judicial authority that declares it as final and binding on the matters in dispute between the parties; the effects of this judicial proceeding is to grant legal effects to the decisions of an award..."

Even though we identify that the intention of the author of this judicial extract is to define the purpose of the recognition of awards procedure and we salute that this occasion was not used to speak of *homologation*, we believe that it is important to establish that judicial recognition does not reward an award with its quality of final and compulsory; said characteristics are inherent to an arbitral award. Moreover, an award is considered final and compulsory *a priori*; it is the party interested in opposing its execution who will have to prove its nullity or unenforceability; in other words, the burden of proof is on the person opposing recognition.

## Additional award

The Seventh Collegiate Court in Civil Matters of the First Circuit recognized that even though the possibility exists that errors on calculus, copy, typographical or of similar nature in an award be corrected, or a certain subject be interpreted or even that a petition that was not addressed in the award be resolved, under the principle of immutability of the act of decision in non of said cases may the decisions contained in the definitive award be revoked<sup>21</sup>.

Likewise, the court resolved that the Commerce Code provides for the rendering of an additional award with respect to claims that were omitted in the definitive award, and its legality for purposes of its enforcement or nullity depends whether it adjusts to the rules establishing the possibility of such additional award, without comprising a study of the merits contained in such resolution.<sup>22</sup>

Finally, the same court established that in opposition to corrections or interpretations that may be done to a definitive award and that are a part of the same, should an additional award be rendered there is no legal provision stating that said additional award is part of the definitive award. Hence, the nullity of an additional award does not imply the annulment of a definitive award since both documents are not one, pursuant to article 1457 section I, paragraph c) of the Commerce Code.<sup>23</sup>

<sup>20</sup> **COMMERCIAL ARBITRATION, NULLITY, RECOGNITION AND ENFORCEMENT ARE JUDICIAL PROCEEDINGS RELATED TO ARBITRAL AWARDS (INTERPRETATION OF ARTICLES 1422, 1457 TO 1462 OF THE COMMERCE CODE).** No. Registro: 166,508. Testis aislada. Materia: Civil, Novena Época. Instancia: Primera Sala. Fuente: Semanario Judicial de la Federación y su Gaceta. Torno: XXX, Septiembre de 2009, Testis: 1º. CU088/2009. Página: 430.

<sup>21</sup> **DEFINITIVE AWARD, CORRECTION, INTERPRETATION AND ADDITIONAL ARE DIFFERENT AND MAY NOT REVOKE THE DECISIONS OF THE FIRST.** No. Registro: 167,458. Testis aislada. Materia: Civil, Novena Época. Instancia: Tribunales Colegiados de Circuito. Fuente: Semanario Judicial de la Federación y su Gaceta. Torno: XXX, Abril de 2009, Testis: 1º. C.128 C. Página: 1923.

<sup>22</sup> **ADDITIONAL AWARD, ITS LEGALITY DEPENDS ON WHETHER IT WAS RENDERED ACCORDING TO ITS RULES, WITH RESPECT TO CLAIMS OMITTED IN THE DEFINITIVE AWARD AND TO THAT EFFECT, IT IS NECESSARY TO LEARN ITS CONTENT, BUT THIS DOES NOT MEAN A REVISION ON THE MERITS.** No. Registro: 167,460. Testis aislada. Materia: Civil, Novena Época. Instancia: Tribunales Colegiados de Circuito. Fuente: Semanario Judicial de la Federación y su Gaceta. Torno: XXX, Abril de 2009, Testis: 1º. C.127 C. Página: 1924.

<sup>23</sup> **NULLITY OF AN ADDITIONAL AWARD, IT DOES NOT IMPLY THE NULLITY OF THE DEFINITIVE SINCE THEY ARE NOT ONE AND THE SAME.** No. Registro: 167,441. Testis aislada. Materia: Civil, Novena Época. Instancia: Tribunales Colegiados de Circuito. Fuente: Semanario Judicial de la Federación y su Gaceta. Torno: XXX, Abril de 2009, Testis: 1º. C.126 C. Página: 1930.

## Admission of a request of enforcement of an award or annulment of same as a counterclaim in the opposed ancillary judicial proceeding (incidente)

The Third Collegiate Court in Civil Matters of the First Circuit<sup>24</sup> considered that notwithstanding the fact that there is a provision stating that an annulment proceeding will be carried out in an ancillary judicial proceeding, and that there is no express mention of the possibility of counterclaiming in said proceeding, the meaning and scope of said provision must be interpreted within the arbitration framework contained in Title Fourth of Book Fifth of the Commerce Code. Here, the possibility of a counterclaim being admitted exists and there is no prohibition on its admission once the arbitration has ended, either for obtaining the nullity or the recognition and enforcement of same. The admission of both in the same ancillary judicial proceeding does not hinder the solution and enforcement of the decision because it refers to opposed claims that through the counterclaim may be resolved in the same ancillary judicial proceeding that retains the stages of an expedited procedure as intended by the legislator.

We believe that these decisions are useful since they support the possibility that simultaneously the same judge studies the nullity, and recognition and enforcement of an arbitral award. As it is well known, the causes for such nullity, and denial of recognition and enforcement are practically identical and it is common for a party that has won in the arbitration to have to, in face of the lack of voluntary compliance of the other party, go through both proceedings before obtaining the final enforcement of the award.

As an only comment to this judicial extract, we think it is useful to clarify that the possibility of counterclaiming in the opposed ancillary judicial proceeding, may present itself only if the judge studying the nullity is of the same jurisdiction of the judge of the recognition and enforcement of the award, this is, if the place of arbitration was Mexico.

## Interpretation of the provisions of Title Fourth of Book Fifth of the Commerce Code

In a judicial extract intended to comment the relevant aspects and principles that rule Title Fourth<sup>25</sup>, the First Chamber points out that "the most important general principles of this piece of legislation are the application of the will of the parties over the legal provision and judicial intervention only in exceptional circumstances, therefore understanding this law as a supplementary regulation in case of a lack of agreement from the parties stating otherwise, since in domestic and international arbitration proceedings, public or private, the agreement of the parties will prevail over the established regulation of the law (articles 1415, 1416, section III, 1417, section II, and 1418 of said Code)".

Briefly we would like to comment on two aspects that are evident from the foregoing statement. First, we believe that the role of Title Fourth of Book Fifth of the Commerce Code is not only supplementary to the will of the parties. It also contains legal provisions that are not subject to an agreement of the parties stating otherwise, among them: (i) article 1423 on the form that an arbitration agreement executed in Mexico or to be recognized by a Mexican judge, must comply with, this is, in writing, or (ii) article 1434 on the non renounceable obligation to give the parties equal treatment and full opportunity to present their case, as backbone principles of the arbitral proceeding.

Second, we point out in this judicial extract what seems to be another classification to be taken into account: public arbitration. In our opinion, if we should understand this concept to refer to the arbitration performed

<sup>24</sup> COUNTERCLAIM OF RECOGNITION AND ENFORCEMENT IN THE ANCILLARY JUDICIAL PROCEEDING OF NULLITY OF ARBITRAL AWARD. ITS ADMISSION IS NOT PROHIBITED IN THE COMMERCE CODE AND IS ACCORDING TO THE PURPOSE OF ARBITRATION. No. Registro: 167,398. Tesis aislada. Materia: Civil. Novena Época. Instancia: Tribunales Colegiados de Circuito. Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo: XXX, Abril de 2009. Tesis: L3a.C.729 C. Página: 1955.

ARBITRAL AWARD. ITS RECOGNITION, ENFORCEMENT AND NULLITY ARE SUBJECT MATTER OF THE REQUEST OF ARBITRATION AND COUNTERCLAIM IN THE SAME ANCILLARY JUDICIAL PROCEEDING. No. Registro: 167,459. Tesis aislada. Materia: Civil. Novena Época. Instancia: Tribunales Colegiados de Circuito. Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo: XXX, Abril de 2009. Tesis: L3a.C.732 C. Página: 1921.

<sup>25</sup> COMMERCIAL ARBITRATION. RELEVANT ASPECTS AND PRINCIPLES THAT RULE TITLE FOURTH OF BOOK FIFTH OF THE COMMERCE CODE. No. Registro: 166,510. Tesis aislada. Materia: Civil. Novena Época. Instancia: Primera Sala. Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo: XXX, Septiembre de 2009. Tesis: 1a. CLXXI/2009. Página: 427.

between States based on an international treaty, then it is difficult to justify that its regulation is contained in the Commerce Code.

In addition to the criteria mentioned above, the following judicial extract was also published:

**COMMERCIAL ARBITRATION. REGULATION ON THE RENDERING OF AN AWARD BY THE ARBITRAL TRIBUNAL (INTERPRETATION OF ARTICLES 1445, 1448 AND 1450 OF THE COMMERCE CODE).**

Materia: Civil. Novena Época. Instancia: Primera Sala. Fuente: Semanario Judicial de la Federación. Tomo: XXX, Septiembre de 2009. Tesis: 1a. CLXXII/2009. Página: 431.

ACGR