

## Report on Current Legal Developments on Mediation in Mexico<sup>1</sup>

### Introduction

In the middle of 2008, a constitutional amendment was passed, whereby the following phrase was added to the text of article 17:

*“The laws will provide alternative dispute resolution mechanisms.”*

The purpose of this amendment was to facilitate the inclusion of Mexican laws of different proceedings to solve disputes, besides the judicial one, not only in civil or commercial matters, but also in criminal matters. To a great extent, this amendment put to rest a constitutional discussion that, from years ago, was still thinking over in the classrooms, colleges and, in certain cases, in courts and tribunals, and promoted the enactment of several laws in alternative dispute mechanisms.

In this report and as a consequence of the constitutional amendment of article 17 referred above, a general overview of the advances that mediation has had in Mexico during 2010, 2011 and 2012 shall be presented, both in judicial and administrative seats and in the private sector.

### **I. The initiative of the Federal Law on Alternative Dispute Resolution (“ADR”) Mechanisms**

On April 6, 2010, the initiative with a decree project to issue a Federal Law on ADR Mechanisms was published in the *Official Gazette of the Chamber of Deputies* on behalf of Deputy Ezequiel Rétiz Gutiérrez from Partido Acción Nacional (PAN) political party. Even those who believe in these alternative dispute mechanisms are grateful that there exist initiatives focused on increasing its disclosure and use, the text of this project had important errors, with no precedents in other foreign or local regulations. Furthermore, the current status of this initiative is pending and has not been approved or published in the *Official Gazette of the Federation*.

### **II. Conclusion of the Project AMIJ/Fund Jurica for the Design and Implementation of an Effective Model of a Center of Alternative Justice in Colima and Guerrero**

On August 2010, the Project of Design and Implementation of an Effective Model of a Center of Alternative Justice for the States of Colima and Guerrero, sponsored by the Mexican Association of Providers of Justice and Jurica was finished with the delivery of the following documents to the benefited States:

- Diagnosis of the Current Situation of Mediation in Mexico

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<sup>1</sup> This Report is based on the information contained in the Mediation and Commercial Arbitration in Mexico Annual Reports for 2010 and 2011 prepared by Sofia Gómez Ruano, Elsa Ortega and Cecilia Azar, with the assistance of Mariana Vargas.

- Model of Center of Alternative Justice
- Operating Handbook of a Center of Alternative Justice
- Handbook of Proceedings and Profiles of a Center of Alternative Justice
- Handbook of Mediation
- Handbook of Statistics and Registry of Data for a Center of Alternative Justice

Currently, the Judicial Power of the State of Colima is developing a highly ambitious program of improvement and strengthening of the mediation service that includes the opening of offices in other municipalities of the State, the training of new mediators and the amendment of legal provisions, including the Law of Local Alternative Justice.

With regards to Guerrero State that began the Project, being one of the few locations in the Mexican Republic without a Center of Alternative Justice nor law applicable to the matter, today it has an initiative of law in its local Congress and a program of development of mediation that covers the opening of 5 different centers in all the State.

### **III. Amendments to the Law of Alternative Justice of the Superior Court of Justice of the Federal District (TSJDF)**

On December 7, 2010, the Legislative Assembly of the Federal District approved the amendment to several articles of the Law of Alternative Justice of the Superior Court of Justice of the Federal District. The amendments were published in the *Official Gazette of the Federal District* on February 8, 2011.

Among the most relevant amendments are the following:

- Regulatory Law of article 17 of the Constitution: It is said that this law regulates the third paragraph of article 17 of the Constitution, such paragraph was incorporated in the year 2008 and that states that the laws will provide dispute resolution mechanisms.
- The Pre-mediation: Adds the figure of pre-mediation like an informative and orientation session for the interested parties to get to know this dispute resolution mechanism (we consider it is rightful to foresee it since, to a great extent, the participation of mediators rests on an adequate initial orientation for the parties).

- Remission to mediation by the judge: Article 4 states the power of the Judge to “order individuals to go to the Center [of Mediation of the Superior Court of Justice] to try to solve their disputes through mediation.”
- Mediation for criminal justice and justice for teenagers: The amendment includes mediation in cases: (i) criminal for crimes that are followed by accusation on behalf of the aggrieved party and in any case considered serious followed by operation of law, regarding the restitution and (ii) of justice for teenagers (older than 12 years and younger than 18 years) always when it is not about conducts that are considered serious crimes.
- Regulation of private mediator: The requirements to act as public mediator ascribed by the Center and private mediator were specified. In both cases, the Center still considers that the mediator must be attorney to act as such, same that we totally reject. In both cases, it also establishes the requirement of approving exams and training courses. Even in the case of private mediators, they must have a certification and a registry on behalf of the Center with duration of two renewable years with the filing and approval of the corresponding exam. The certification of the Center of a private mediator authorizes him/her to request that an agreement reached in a mediation conducted by him/her has the enforcement of those agreements reached in mediations before the Center.

Additionally, the amendment provides specific regulations regarding the exercise of mediation by private mediators, to the extent of listing in its new article 22 a series of obligations, among which the following can be highlighted: (i) maintain in professional secret the information received by the parties during mediation; (ii) excuse from providing the service in case of conflict of interest; (iii) assure that agreements that were reached are in accordance to legality and were reached under the base of good faith; (iv) execution and agreement of payment of fees; and (v) allow the Center to perform its duties of supervision and monitoring, among others.

The amendment insists in complicating matters and adds obstacles to the performance of a private mediator when stating that he/she would be subject to infractions and consequently administrative sanctions (alter a process of complaint attention that attempts completely against any principle of confidentiality of mediation) in case of non compliance of any of the obligations stated in article 22. Even that, the purpose, we suppose, is to promote a professional exercise, ethic and adhered to legal principles, these types of provisions will only inhibit the formation and consolidation of private mediators. The amendment confuses the service of private mediators labeling it as service administratively regulated instead of considering it a professional service like any other.

Will the Center really look forward to promoting the formation of private mediators or, even more, is its true intention to inhibit it and obtain a monopoly in the service of mediation? <sup>2</sup>

On the other hand, it is important to mention the work that the Alternative Justice Center of the TSJDF and the Arbitration Center of Mexico are performing in the training and formation of mediators. At present, the Alternative Justice Center has more than 80 certified private mediators.

#### IV. The new Internal Rules of the Alternative Justice Center of the TSJDF

On April 7, 2011, the new Internal Rules of the Alternative Justice Center of the TSJDF were published (hereinafter the “Rules”). Some provisions worth of commenting are the following:

<b>Justice for adolescents:</b>	The Rules provide that the Alternative Justice Center shall have as purpose, among others, to operate as specialized organ of justice for adolescents; this provision may generate a competence conflict with that provided in the Alternative Justice Law in the Procurement of Justice for the Federal District <sup>3</sup> .
<b>Cases that may be mediated in criminal matters:</b>	In accordance to section IV of article 5, in criminal matters, mediation in the Alternative Justice Center is admissible when dealing with “disputes between individuals caused by the commission of a behavior considered a felony by the criminal laws of the Federal District, always when it is pursued by criminal accusation of the offended party and in any case not considered severe pursued ex officio, in regards to the repair of the damage”. In a strict comparison with that provided by the Alternative Justice Law in the Procurement of Justice for the Federal District, the Rules seem to extend the disputes susceptible of mediation to some crimes that may be pursued ex officio, while in the Procurement of Justice field, shall only be admitted to mediation cases that are pursued by criminal accusation.
<b>Itinerant units:</b>	A wise decision of the Rules is the provision of decentralized and itinerant mediation units of the Alternative Justice Center, which allows a higher offer of the service considering the size of the Federal District <sup>4</sup> .
<b>Private</b>	Third Section of Chapter VI regulates in detail the action and

<sup>2</sup> For further comments and information regarding the practice of private mediation in Mexico we invite you to read “An overview of Mediation in Mexico: Its past, present and future” written by Cecilia Azar and published in the Alternative Dispute Resolution magazine of 2011 of the Bar of Texas.

<sup>3</sup> Article 4, section II of the Rules.

<sup>4</sup> Second Section of Chapter III of the Rules.

<b>Mediation:</b>	performance of private mediators. It is important to highlight that this regulation is applicable only to those professionals that had been certified by the Alternative Justice Center and whose mediations must be conducted in accordance to the Alternative Justice Law of the TSJDF.
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## **V. Amendments to the Law of Alternative Justice in Jalisco State**

On December 7, 2010, the Congress of the State of Jalisco approved amendments to the Law of Alternative Justice of such entity.

Among the main modifications we can mention the following:

- The agreements may be claimed through the support of a judge of first instance through the specific performance of the agreement, always if the agreement is reached within the Institute of Alternative Justice of the State of Jalisco;
- The functions of mediation and conciliation may be performed by the Secretary General of Government, the Attorney General of the Federal District, the Attorney General on Social Matters and other authorities that by legal disposition have attribution for this without requiring certification and validations to which the law refers to;
- The Institute of Alternative Justice is ruled by this amendment providing powers to it to register and sanction the agreements made before the Mediation Centers of the State;
- Its organization is composed of: (i) a General Director appointed by the local Congress; (ii) two representatives of the Executive Power appointed by the Governor, two representatives of the Judicial Power, one of them chosen by the President of the Supreme Court of Justice and the second one a judge of first instance appointed by the Judicature Council; and (iii) two representatives of the Legislative Power who will be the presidents of the commissions of Justice and Constitutional Points, Legislative Studies and Regulations; and
- The General Director of the Institute must meet the same requirements of a Justice of the Supreme Court of Justice which reflects the importance that is being given in this State to such position.

## **VI. The Mediation Unit of the Office of the Attorney General of the Federal District**

On January 2, 2011, the Mediation Unit of the Office of the Attorney General of the Federal District opened its facilities and with a cost of more than 6 million, 900 thousand pesos.

For its operation, the Attorney General of civil, family and financial business matters will collaborate.

As it was informed by the authority, with this Unit it is pursued to generate a space that allows the early solution of disputes generated by minor felonies and by criminal complaints; like robbery or personal injuries, based on the mediation and conciliation proceedings. In the opening event, at that time the Attorney General Mancera<sup>5</sup> expressed:

“We will be working on all the crimes related to criminal complaints filed by aggrieved party, which shall have the possibility of forgiveness”<sup>6</sup>.

The purpose of the creation of this Unit announced by the Attorney General's office is, on one hand, to depressurize 17% of the criminal investigations in matter of adolescents<sup>7</sup> and 10% in case of adults and, by the other one, favor the integration and strengthening of the accusatory oral system, a result of the 2008 constitutional amendment. It is worth to highlight, in this respect, the second objective stated by the Attorney General, that is, to “favor the integration and strengthening of the oral accusatory system”, mission that besides to looking forward to a constitutional amendment, it is focused on the improvement of the service and satisfaction of the governed.

At present, this Unit works only based on the Agreement A/024/2011 published in the Official Gazette on January 4, 2012. It does not have a list of mediators, yet. Unlike the Center for Alternative Justice of the Superior Court of Justice of the Federal District (“Alternative Justice Center for the TSJDF”), for now it only deals with criminal cases that are remitted by the Attorney General with the requirements before mentioned. From the visit made to the facilities, we confirmed that the Unit has adequate spaces, well conditioned, offices for psychological attention and care of minors. Since its opening in January 2012, the Unit has provided attention to more than 130 cases, in its majority, related to crimes like robbery, threatens and interfamily violence.

It would be of great interest to know the development and evolution of this organism. A subject to comment would be the possible duplicity of services in criminal and justice matters for adolescents between this Unit and the Alternative Justice Center of the TSJDF when the Unit starts to receive cases that arrive spontaneously from individuals, and not only by reference of the Attorney General. Although, having both services will increase the offer and consequently the promotion of the figure, which may only be looked at

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5 Currently, elected mayor of the Federal District.

6 Source: Portal of El Universal, January 2, 2012. Phone of attention of the Mediation Unit: (55) 5345-5339. Location: Fourth floor of the PGJDF.

7 It is worth to mention that when the commented laws and regulations in this section refer to adolescents, we are considering a range of 12 to 18 years old (article 50 of the Regulation of the Center of Alternative Justice of the TSJDF).

sympathetically. There are certain differences in the regulation and conduction of one and the other that are worthy of evaluation<sup>8</sup>.

## VII. The Report of the Administration and Procurement of Justice Commission

On December 15, 2011, the *Administration and Procurement of Justice Commission* of the Legislative Assembly of the Federal District presented the Report with respect to the Initiative of Decree, whereby the Alternative Justice Law is created in the Procurement of Justice in the Federal District (hereinafter the “Law”). The statement of legislative intent of the initiative makes reference to the amendment of the constitutional article 17 in June 2008, which purpose was to incorporate the mediation and conciliation figures in the stage of investigation of the crime, including the corresponding stage to the System of Justice for Adolescents. Additionally, it is mentioned that these mechanisms shall be applicable to crimes pursued by criminal complaint and that are not considered as severe seeking the repair of the damage.

Some relevant topics to consider in this Alternative Justice Law for the Procurement of Justice are the following:

<b>Purpose of the Law:</b>	The law is of public order, general interest and mandatory observance in the Federal District. Its purpose is to establish and regulate the alternative dispute resolution methods in crime investigation and its proceedings <sup>9</sup> .
<b>Regulated Concepts:</b>	The Law provides both conciliation and mediation, but distinguishes one concept from the other specifying that the first one consists in proposing the parties a solution for its dispute, while the second one implies to facilitate the communication between the parties with the purpose of reaching voluntarily the solution of the dispute. This difference has been widely commented in the doctrine and in judicial criteria. All indicates that in legislation and Mexican practice of the alternative mechanisms, this distinction will prevail every day more and the challenge would be to have the necessary training methods to have good conciliators and good mediators that clearly understand the difference between both methods <sup>10</sup> .
<b>Mediator:</b>	Even the Law makes the distinction mentioned in the foregoing section, hereinafter states that it will be named <i>Mediator</i> to the third party that shall conduct the mediation or conciliation proceeding

<sup>8</sup>V.gr. the maximum of sessions foreseen on each one of the ordinances; 3 in provision of justice and 5 in judicial seat. Likewise, in the case of the Alternative Justice Center, the criminal mediations shall necessarily commence with individual sessions while the Alternative Justice Law for the Procurement of Justice in the Federal District does not request it. See subsection A.1.a. of this Report.

<sup>9</sup> Article 1 of the Law.

<sup>10</sup> Article 44 of the Law, sections I and II.

<p><b>Information obligation and spontaneous remedy:</b></p>	<p>and that he or she must be a lawyer. This requisite is also included in the Alternative Justice Law of the Superior Court of Justice of the Federal District (hereinafter the “Alternative Justice Law of the TSJDF”) and has caused interesting polemic<sup>11</sup>.</p> <p>Article 6 of the Law sets forth the obligation of the Attorney General to inform the criminal accuser, victim, offended or accused on the possibility of solving its conflict by mediation or conciliation and if they so agree to refer them to the mediation Unit. A big part of the success of these mechanisms, understanding these as a frequent resort to them, shall depend on the information that the officer of the Attorney General in turn, performs.</p>
<p><b>Reserved information:</b></p>	<p>The information generated from these proceedings shall be considered as reserved in terms of the Transparency and Access to Public Information Law of the Federal District<sup>12</sup>.</p>
<p><b>Rights and obligations of the parties:</b></p>	<p>Articles 10 and 11 of the Law provide respectively the rights and obligations of the parties in mediation. When dealing with an alternative proceeding, self-resolved and conventional, the content of these articles would rather be somewhat formal. For example, one of the rights of the parties is to personally intervene in the sessions; while at the same time is one of their obligations. Likewise, it is stated as obligation to comply with the obligations to give, to perform or not to perform, established in the agreement that resulted from mediation. What consequence would there be for failure to comply with this obligation provided by the Law? It is not indicated.</p>
<p><b>Ruling Principles of mediation</b></p>	<p>Chapter IV of the Law establishes a series of principles; in their majority coincident with those regulated by the Alternative Justice Law of the TSJDF, inspired in the Principles of the Project ABA/USAID for Mediation in Mexico. The neutrality principles had been excluded from the list of article 12 (for sure for considering them similar to that one of impartiality) and that one of economy.</p>
<p><b>Assumptions of termination of mediation:</b></p>	<p>The Law provides the following assumptions of termination of the mediation<sup>13</sup>:</p> <ul style="list-style-type: none"> <li>• By the remission of 3 orders, to appear at the mediation Unit, without obtaining response from the noticed party;</li> <li>• By the request of the party that commenced due to the lack of attention of the noticed party to the first order to appear, by express manifestation of one or both parties or by resistance of one or both parties to sign the agreement;</li> <li>• By the execution of an agreement between the parties;</li> </ul>

11 Article 4 of the Law, section III.

12 Article 7 of the Law.

13 Articles 17 and 26 of the Law.



	<ul style="list-style-type: none"> <li>• By decision of the mediator when detecting a disrespectful or aggressive behavior of one of the parties;</li> <li>• By absence of one of the parties to 2 sessions with no justified cause;</li> <li>• By death of one of the parties; and</li> <li>• By elapsing of 30 calendar days.</li> </ul>
<b>Interruption of the statute of limitation:</b>	In accordance with article 23 of the Law, the commencement of the mediation or conciliation proceedings interrupts the statute of limitation of the criminal action. The calculation is restarted as of the conclusion of the proceeding without the dispute being resolved.
<b>The agreement:</b>	The Law regulates the agreement that resulted from the mediation in regards to the requirements and its content, and the possibility to restart mediation in case of total or partial breach. It is interesting to highlight that the Law neither recognizes expressly enforcement value to the agreement nor provides by which means the enforcement may be requested <sup>14</sup> .

### VIII. Alternative Mechanisms and Protection of Personal Data

The Regulation of the Federal Law of Protection of Personal Data in Possession of Individuals published in the *Official Gazette of the Federation* on December 21, 2011, provides that individuals or legal entities may convene between them or with civil or governmental organizations schemes of binding self regulation regarding the protection of personal data matters.

Within the purposes of such self regulation, alternative dispute resolution methods is provided to solve disputes between those responsible of handling personal data, the title holders of the same and third parties, (article 80 section IX of the Regulation). Mediation and conciliation are specifically mentioned, however, it would be equally feasible to agree arbitration in this respect. We consider it to be very fortunate that the Regulation had foreseen this alternative to solve disputes in personal data protection matters. At present, the Ministry of Economy is working in a self regulation guide. The chambers and civil or governmental organizations must definitely take advantage of this opportunity that the law provides to self regulate and promote the use of alternative methods.

### IX. Conciliation in the Ministry of Public Office

With the amendments to the Law of Works and Related Services and the Law of Acquisitions, Leasing and Services of the Public Sector of 2009, conciliation was incorporated as a proceeding that the contractor or the agency may start before the

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<sup>14</sup> Article 28 and the following. The Rules of the Alternative Justice Center of the TSJDF provide indeed that in case of breach of the agreement in criminal matters, the rights of the aggrieved party shall remain safe to exercise them by the corresponding means and form (article 40 of the Rules).

Ministry of Public Office. Even if the first articles of these two laws that rule this subject set out the possibility that either of the parties be the ones requesting the conciliation before the Ministry, the subsequent provisions seem to foresee as the most common assumption that the contractor be the one that presents the request of conciliation and the agency or entity the one invited to conciliate<sup>15</sup>. That is, the more similar model to a proceeding of attention of claims against the agencies or entities that hire a service or acquire goods than conciliation, strictly speaking. To that respect, it is important to mention that, to a great extent, the success of conciliation or mediation relies on the perception of impartiality and neutrality that, all the involved parties have of the third party.

It is important to mention this subject due to the recent promulgation on January 16, 2012, of the Law of Public Private Associations that also foresees this conciliatory instance in its clauses.

#### **X. The initiative with a decree project to issue the Law of General Victims**

On March 28, 2012, the President, Felipe Calderon, send to the Senate an expected initiative with a decree project to issue the Law of General Victims, which embraces in its article 20 the right of the victims to seek an informed solution through institutions specialized in conciliation and mediation with the purpose of facilitating the reparation of damages, the reconciliation of the parties and the warranty of no repetition. Furthermore, the current status of this initiative is pending and has not been approved or published in the Official Gazette of the Federation.

#### **Conclusion**

The efforts related to extend the mediation services in the country have developed in a considerably uniform manner. In the last years, diverse projects had been consolidated both in judicial and administrative seats, and also promulgated a relevant number of laws and regulations. It seemed to be that the advance in the sphere of provision of justice has caught all the attention; such movement pertains to, of course, the phenomenon of the transformation of the criminal system, the adoption of oral trials and the establishment of the processes of restorative justice. However, this does not mean that in judicial seat the efforts have diminished. Some news in this regard is the following:

- Opening of mediation centers in the General Attorney of Justice of the State of Tamaulipas in August, 2011;
- Establishment of the Alternative Justice Institute of Jalisco, July 13, 2011;
- Opening of the Alternative Justice Center of the State of Chiapas in October 2011;
- Start up of the Regional Center of Alternative Justice of Zacatecas, with seat in the Attorney's College (Colegio de Abogados); November 2011.

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<sup>15</sup> Thus, it is provided for example the obligation of the agency or entity to submit reports on the compliance of the agreement, etc.

Finally, in spite of all the information that circulated throughout 2010, 2011 and 2012 about this subject, private mediation still requires a greater diffusion to increase its use and be able to speak about a real development of its benefits in the field of alternative dispute resolution.

## **Report on Current Legal Developments on Arbitration in Mexico<sup>1</sup>**

### **A. Amendments to the Commerce Code in matters of court assistance to commercial arbitration**

On January 27, 2011 in the Federal Official Gazette a decree by which provisions of the Commerce Code are amended, added and derogated was published, directed to establishing oral proceedings in commercial matters, and adding a new chapter to Title Fourth Book Fifth of the Commerce Code named "Of Judicial Intervention in Commercial Transactions and Arbitration" (articles 1464 to 1480) dedicated to regulating judicial intervention in arbitration. The corresponding initiative had been filed on April 2009 before the House of Representatives (*Cámara de Diputados*) and once approved, had been turned on April 2010 to the Senate for its study, being finally approved by this body on November 3, 2010.

Pursuant to article 1421 of the Commerce Code, judicial intervention in arbitration may only occur in the cases expressly established by Title Fourth Book Fifth of the Commerce Code. These cases are:

#### **1. Referral to arbitration**

Article 1464 of the Commerce Code establishes the proceeding that will be followed upon a request of referral to arbitration as provided in article 1424 of the Commerce Code, expressly stating the non admissibility of an appeal against the corresponding judicial resolution.

#### **2. Appointment of arbitrators**

The new set of provisions of the Commerce Code establishes that the request for the judge to appoint arbitrators in terms of article 1427 will be followed in a voluntary jurisdiction proceeding pursuant to articles 530 to 532 and 534 to 537 of the Federal Code of Civil Procedure.

Likewise, it details the manner in which the appointment will take place, incorporating for such effect to the Commerce Code a system of lists known and used by different national and international arbitration institutions. This system is applicable except if the judge considers in a certain case that the use of the list is not adequate.

Additionally, it states the non admissibility of an appeal against the resolution of the judge, except for the right of the parties to challenge the arbitrators in terms of article 1429.

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<sup>1</sup> This Report is based on the information contained in the *Mediation and Commercial Arbitration in Mexico Annual Reports* for 2010 and 2011 prepared by Cecilia Azar, Sofía Gómez Ruano and Elsa Ortega.

### **3. Taking of evidence**

The request for assistance in the taking of evidence provided in article 1444 of the Commerce Code will be filed by voluntary jurisdiction pursuant to articles 530 to 532 and 534 to 537 of the Federal Code of Civil Procedure. In addition, under article 1469 such support will be granted once all parties of the arbitration have had the chance to be heard.

### **4. Fixation of fees of the Arbitral Tribunal**

With respect to the judicial consultation on the fees of the Arbitral Tribunal established in article 1454 of the Commerce Code, these request shall be made also in a voluntary jurisdiction proceeding according to articles 530 to 532 and 534 to 537 of the Federal Code of Civil Procedure.

### **5. Setting aside and recognition and enforcement of awards**

Article 1460 and the second paragraph of article 1463 of the Commerce Code previously stating that both the setting aside of awards and the recognition and enforcement of awards were substantiated in an ancillary proceeding under article 360 of the Federal Code of Civil Procedure, were derogated. In substitution, a special proceeding is established in articles 1472 to 1476 for the nullity of commercial transactions and arbitral awards, as well as the recognition and enforcement of awards. This special proceeding foresees a time period of fifteen days to answer the request, considerably longer than the one previously used. Moreover, the fact that it is no longer considered an ancillary proceeding within a principal proceeding, clarifies all doubts about the admissibility of the constitutional remedy (*amparo*) against the final ruling that resolves the setting aside or enforcement of an arbitral award.

Mention should be made that for the case of recognition and enforcement of awards, the new provisions expressly state that homologation is not required except when it is requested as defense in a case. This statement is important since it clarifies doubts in regards to the mandatory and enforceable qualities of the award.

The provisions rightfully establish that the special proceedings related to the setting aside and recognition and enforcement of awards may be joined, and includes the new requirements for the admissibility of such consolidation. It further states the fact that the corresponding resolution shall be subject to no appeal. This is consistent with the practice that some courts have begun to establish of joining proceedings of nullity and enforcement with the purpose of ruling in a more agile and efficient manner.

This same special proceeding will be used also to request a ruling on the challenging of arbitrators (article 1429 third paragraph); on the jurisdiction of the Arbitral Tribunal (article 1432 third paragraph); on the granting of provisional interim measures (article 1425); as well as for the recognition and enforcement of interim measures ordered by the Arbitral Tribunal.

## 6. Interim measures

The amendment dedicates several articles to interim measures, providing clarity to those who request measures before judicial or arbitral tribunals. Within the topics that are contained in these new provisions is the recognition that the judge has full discretion on the granting of interim measures pursuant to article 1425, the proceeding for the recognition and enforcement of an interim measure ordered by the Arbitral Tribunal, the causes for which such recognition and enforcement may be denied, as well as the obligation of the petitioner of the enforcement of an interim measure of informing the judge without delay of all revocation, suspension or modification of the measure. It additionally states that both the petitioner and the Arbitral Tribunal shall be responsible for all damages and lost profits caused by the interim measures that have been ordered. This last inclusion is unfortunate and has been widely commented on since it is anticipated that it may cause a party wishing to oppose to the granting of interim measures against him or her to threaten the other party and the Arbitral Tribunal of liability for such granting.

### B. Amendment of article 1424 of the Commerce Code

On June 6, 2011 an amendment adding a third paragraph to article 1424 of the Commerce Code was published in the Federal Official Gazette in order for the whole article to be read as follows:

**"Article 1424.-** The judge before which a case submitted to arbitration is filed, shall refer the parties to arbitration in the moment in which any of them requests so, unless it is proven that such agreement is null, void or of impossible enforcement.

Notwithstanding that the filing mentioned in the foregoing paragraph has been made, the arbitration proceedings may be initiated or continued with, and the rendering of the award in such case, while the judicial proceeding is pending before the judge.

*Without prejudice of that provided by the first paragraph of this article, when a resident abroad expressly submitted to arbitration and has tried an individual or collective action, the judge shall refer the parties to arbitration. If the judge denies the recognition of the arbitral award in the terms of article 1462 of this Code, the plaintiff shall maintain its right to file the corresponding action."*

Even though at first sight it seems that this last amendment is favorable to parties that are resident abroad over national parties, the truth is that the referral to arbitration for national parties had already been established in the first paragraph of this article. In fact, since the text of the article did not make a distinction between nationals and foreigners, the first paragraph included the referral to arbitration in cases in which the plaintiff was resident abroad.

On the other hand, the last sentence of the new paragraph of the article is surprising since it refers to the request of enforcement of an arbitration award, a matter totally different from the one of article 1424 which is referral to arbitration. This last sentence, without being very clear, seems to confirm what actually operated before the amendment, that is, in cases where the successful party of an arbitration had requested the enforcement of an award in Mexico and such action had been denied, such party maintained the right to initiate a new action of enforcement of the award in other jurisdictions where the defeated party had goods against which such award could be enforced.

### **C. Public Private Associations Law (*Ley de Asociaciones Público Privadas*)**

On January 16, 2012 the Public Private Associations Law was published in the Federal Official Gazette, effective as of the following day to its publication. The purpose of the law is to establish a legal framework for the development of public-private associations' projects. These projects formalize a long term contractual relationship between government agencies or entities and the private sector with the purpose of rendering services to the public sector or to the final user, including the construction of new infrastructure, with the aim of increasing the social welfare and the level of investments in the country. Under these projects, the Public Administration and the contractor will equally assume the risks of the project, in accordance to its characteristics and with the necessary flexibility to favor its execution.

For purposes of this report, mention should be made that this law provides in its Twelfth Chapter different mechanisms of dispute resolution, both alternative and traditional, in accordance to the nature of the dispute. A brief description of each of them and its scope of application is below:

<b>Negotiation:</b>	For disputes of technical or economical nature. The parties shall attempt to solve them by mutual agreement and in accordance to the good faith principle <sup>2</sup> .
<b>Expert Committee</b>	In absence of agreement between the parties in the period of time agreed by them, they shall submit their dispute to an expert committee formed by 3 members, experts in the subject matter in question. Each party shall appoint one expert and both appointed experts shall appoint the third expert <sup>3</sup> . The Law

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<sup>2</sup> Article 134 of the Public Private Associations Law.

<sup>3</sup> *Ibidem*.

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expressly excludes the possibility that this committee deals with legal matters<sup>4</sup>. A provision relating this Expert Committee that will surely give rise to great discussions on applicable cases is the one that provides that the report of the Committee shall only be mandatory if it is rendered unanimously; otherwise, the parties will keep the right to seek another solution.

**Conciliation  
before the  
Ministry of the  
Public Office:**

The only modality foreseen by the law of assisted negotiation for the solution of disputes that arise from the agreements executed between the government agencies or entities, and the contractor is the conciliation before the Ministry of Public Office. Hence, it seems that there is no place for private mediation, even if it is not expressly excluded in the law. However, the resort to such instance, provides article 138, must be established in the contract of the public private association and shall be conducted in accordance to the provisions of the laws of Public Works or Acquisitions, Leases and Services, as applicable.

**Arbitration:**

On the other hand, Article 139 provides the possibility that the parties agree to submit to arbitration, and establishes the following guidelines:

- Arbitration shall be in strict law and the applicable law shall be the Mexican Federal Laws;
- The supplementary legislation in arbitration matters is Title Fourth of Book Fifth of the Commerce Code;
- The arbitration shall be carried out in Spanish; and
- The award shall be binding and final for both parties.

In regards to the award, the provision recognizes its binding character. However it also states, on a very unfortunate and inexplicable manner considering the legislative and judicial advances that Mexico has had in the last years that an *amparo lawsuit* would be admissible. Does the legislator refer to the judicial ruling related to the enforcement or nullity of the award or the award itself?

The matters excluded from arbitration are the following:

- Revocation of concessions;
- Authorizations in general;
- Acts of authority; and
- Disputes related with the legal validity of any administrative act.

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<sup>4</sup>In other similar experiences (*v.gr.* disputes on the energetic sector), practice has shown that frequently the analysis separated from technical aspects and its legal effects is very complicated.



#### **D. Jurisprudence and Court Precedents**

Recently, numerous court precedents were published in connection with commercial arbitration matters. Judge Néofito Lopez Ramos was in charge of drafting many of them.

Following are brief comments on the court precedents we consider important to highlight.

1. The court precedent **TERMS OF REFERENCE. SET FORTH THE LITIS AND THE RULES OF THE ARBITRATION PROCEEDING** establishes a definition of what Terms of Reference means in arbitrations conducted under the rules of certain institutions that provide for the issuance of such document. In this regard, it is worth noting that the summaries of claims and defenses contained in the Terms of References are usually drafted by each party upon the request of the Arbitral Tribunal. As a result of this, such summary often reflects a trend towards the position of the drafting party. It is therefore important to note that the inclusion by the Arbitral Tribunal of the exact wording of such summaries does not imply a prejudgment on the merits of the dispute. By contrast, the list of issues to be determined, which is also included in the Terms of Reference, is a clear and conclusive indication of the rulings to be made in the award by the Arbitral Tribunal. Therefore, the parties when reviewing the draft of the Terms of Reference must carefully consider such list of issues to be determined to make sure that all their claims and/or exceptions are included.
2. The court precedent **ARBITRATION AGREEMENT. IT IS BASED ON A CONTRACTUAL OR TORT LEGAL RELATIONSHIP (INTERPRETATION OF SECTION I OF ARTICLE 1416 OF THE COMMERCE CODE)** refers to the provision contained in section I of article 1416 of the Commerce Code in the sense that any arbitration agreement (a) must result of an agreement of wills, (b) can have the form of an arbitration clause (entered into before the rising of a dispute) or an arbitration contract (entered into once a dispute has arisen), and (c) may refer to a dispute derived from a contract or tort. Although neither the court precedent nor the aforementioned article mentions it, it is natural to assume that all arbitrations relating to tort disputes shall have as origin an arbitration contract, since by definition an agreement between the parties containing the arbitration clause shall not exist.
3. The court precedent **ARBITRATION. FUNCTIONAL EQUIVALENCE AND WRITTEN FORM** mentions the requirement that all arbitration agreements must be in writing, or failing that, under the principle of functional equivalence, must derive from an exchange of documents by the parties such as the claim and counterclaim, letters or other means of telecommunication which provide written record thereof. The above, in the understanding that Mexican law still does contain the latest international developments in this area, reflected in the

2006 amendments to the UNCINTRAL Model Law on International Commercial Arbitration, by admitting the possibility that the arbitration agreement not necessarily be issued in a written form (Article 7, option 2 of the Model Law).

4. As regards the court precedent **ARBITRATION LITIS. CLAIM, COUNTERCLAIM, EXTENSION AND MAIN ELEMENTS**, such court precedent should not be read as an allegation that in commercial arbitration, the *litis* is only fixed by the exchange of claim and counterclaim. On the contrary, arbitration allows for the possibility that, after the complaint and its reply, the parties submit additional briefs detailing or strengthening their initial claims or exceptions; those briefs being relevant to the determination of the issues in dispute to be resolved in the proceeding.
5. The court precedent **PARTIAL NULLITY OF THE ARBITRATION AWARD. THE PARTY AGAINST WHICH THE APPEAL IS FILED CAN CHALLENGE THE RULING THAT DISMISSES OTHER CLAIMS FILED BY THE PARTY IN TRIAL** raises an important topic, namely the fact that some causes of nullity may result in the partial annulment of the award, while others may result in its total annulment. This distinction should be carefully reviewed by lawyers in each specific case in order to discern the effects that would result from a possible nullity of one kind or the other.
6. On the other hand, the Third Court on Civil Matters of the First Circuit is the author of four court precedents relating to the concept of public order in the context of arbitration. From those court precedents, mentioned should be made of the one entitled **PUBLIC ORDER. PRO-ARBITRATION AND RECOGNITION OF THE WILL EMPOWERMENT PRINCIPLE TO WEIGHT THE NULLITY OF THE ARBITRATION AWARD (INTERPRETATION OF ARTICLE V, POINT 2, SECTION B) OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS)** which states that the notion of public order with respect to nullity of the arbitration award should be interpreted in the context of the amendment to the Commerce Code whereby Title Fourth Book Fifth was introduced and of the New York Convention ratified by Mexico. Therefore, it states:

“[T]he concept of public order has as a national and international frame of reference, the institution of arbitration, which it cannot thwart, alter or obstruct in its mission and requires a precision on its definition, scope and content, because only in that way can we establish in which cases and under what conditions its application is adequate.”
7. In this same topic, the court precedent **PUBLIC ORDER. ITS CONTRAVENTION CAUSES THE NULLITY OF THE AWARD. HISTORICAL**

**AND DOCTRINE INTERPRETATION** offers a concept of public order which states:

“the idea of public order is based on the citizen’s obligation not to interfere with its actions with the purposes of the community or the society and the powers conferred on State agencies to ensure its respect.”

It also states that there are two conceptions of public order that are complementary. On the one hand, the set of written and unwritten rules that are central to social life made up of a diversity of individual interests; and on the other, a set of ethical principles, ideas or social constructs that form the legal culture of a country.

8. Similarly, the court precedent **PUBLIC ORDER. ITS NOTION AND CONTENT IN CIVIL MATTERS** makes a distinction between mandatory provisions and rules of public order. The first are laws that by their nature cannot be overruled by individuals since they defend their interests and the interest of the State. The latter are part of a legal mechanism for judicial enforcement concerned with ensuring the public interest by limiting any private activity that threatens it. The rules of public order are always mandatory, while not all mandatory provisions are of public order.
9. The court precedent **COMMERCIAL ARBITRATION. JUDICIAL CONTROL OF THE JURISDICTION TO STUDY THE VALIDITY OF THE ARBITRATION AGREEMENT MAY BE EXERCISED ONLY ON ONE OF THE OPPORTUNITIES** clarifies that for the sake of complying with the *res judicata* principle in competence matters, as well as not to obstruct the voluntary compliance or enforcement of an arbitration award, once a decision has been made to challenge the jurisdiction of the arbitration tribunal under article 1432 of the Commerce Code, and the final decision was that the arbitration tribunal is competent to resolve the arbitration, no request for nullity of the award or opposition to enforcement of the same for lack of competence shall be admitted.
10. On the other hand, the court precedent **COMMERCIAL ARBITRATION. THE RULING THAT ENDS THE TRIAL IN WHICH A NULLITY REQUEST IS FILED MAY NOT BE SUBJECT TO APPEAL** specifies that a judge’s decision on the claim of nullity, or ineffectiveness or unenforceability of an arbitration agreement is final and not subject to appeal, because ultimately it is an issue that questions the jurisdiction of the Arbitral Tribunal and falls within the third paragraph of Article 1432 of the Commerce Code, which already indicates that the judge’s decisions on this matter are final and not subject to appeal. The characteristic that these decisions are not subject to appeal was reinforced by the new article 1476 of the Commerce Code.

11. The court precedent **COMMERCIAL ARBITRATION, THE REQUEST OF NULLITY OF THE ARBITRATION PROCEDURE IS NOT ADMISSIBLE SINCE IT IS NOT ESTABLISHED IN MEXICAN LAW** provides that only the award is likely to be contested by an action of nullity, and not the arbitration proceeding itself, since there is no provision in the Commerce Code referring to a request of nullity of the arbitration proceeding. In this regard, it is worth mentioning that sometimes the annulment of the award, depending on the cause giving rise to such repeal, may cause the arbitration, whether a part of it or in whole, to be replaced, bringing similar results as an annulment of the arbitration proceeding.
  
12. Finally, the court precedent **COMMERCIAL ARBITRATION. IT IS AN SPECIALIZED LEGISLATION AND THUS, EXCLUSIVE OF GENERAL NORMS** is very fortunate by returning to the view of Mexican authors that Title Fourth Book Fifth of the Commerce Code is autonomous and self-contained, therefore not admitting the supplementary application of other rules. Very clearly, this court precedent states:

“arbitration rules were chosen tight, restrictive, self-contained and constitute a body that contains all its parts without needing to rely on other laws through their supplementary application, because within its provisions are the elements that are needed to meet any eventuality arising from an arbitration proceeding.”