

**Arbitration Law: Latest Developments**  
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Much has already been published about Mexican Law on International Arbitration<sup>1</sup>. However, in the last three years important judicial decisions have been rendered that precise the practical application of the legislative dispositions issued without any major modification from the 1993 adoption of the UNCITRAL Model Law on Arbitration.

First of all, however, it is necessary to explain the meaning of “case law” in the Mexican legal system.<sup>2</sup> In a formal sense, there are very few cases in which a ruling is mandatory for inferior courts. Nonetheless, there is a real judicial practice that consists to follow prior rulings of other courts in order to insure some kind of security and certainty. In regard to what one may call mandatory precedents, there exists only two cases: First, when the highest court resolve in appeals contradictory rulings of inferior courts; and second, when a court applies, interprets or rules upon a point of law the same way in a series of cases without interruption by any contrary ruling on that point of law. However, as said before, there is a natural tendency to follow even isolated rulings of the superior courts and in this sense, the decisions of the Mexican Supreme Court always have always some kind of influence, even if they are not technically bindings precedents.

In this sense, there is no doubt that in the last years the federal superior courts, especially the Supreme Court, adopted an in-favor approach to arbitration, rejecting most of the alleged constitutional objections.<sup>3</sup> In order to adopt a practical approach, the decisions we would like to comment are presented in regard to the substantial problem they resolve, without adopting a strict scientifically conceptualization.

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### ***The Mexican Arbitration Law must be interpreted in the light of the Model Law***

In an isolated ruling, the First Circuit established the necessity to interpret the dispositions of the Mexican law in the light of the UNCITRAL Model Law and to refer to the Explanatory Note issued by

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<sup>1</sup> Von Wobeser, Mexico, *Arbitration World* (London: European Lawyer Reference, 2004) 231; Siqueiros & Hoagland, Mexico, in: Paulsson, *International Handbook on Commercial Arbitration* (The Hague: Kluwer, 2003); Von Wobeser, Mexico, in Blackaby & Lindsey, *International Arbitration in Latin America*, (The Hague: Kluwer, 2003). Graham, Leal-Isla & Tijerina, *Guía Práctica para el Arbitraje Internacional* (Monterrey: Lazcano, 2005); Pereznieto Castro, *Arbitraje comercial internacional*, (Mexico: DJC, 2000).

<sup>2</sup> For a detailed overview, see: Zamora, Cossío, Pereznieto et alii, *Mexican Law* (New York: Oxford, 2004), 83 sq. (cited as “Mexican Law”).

<sup>3</sup> Pereznieto Castro & Graham, Chronique de jurisprudence mexicaine, 3 *Revue de l'arbitrage* 2005, 775; Pereznieto Castro & Graham, Mexico: International Arbitration Review 2003-2004, 24 *ABA's Mexico Update* 2005, 2; Graham, La figura mexicana del amparo en materia de ejecución de laudos arbitrales, 4 *Revista Brasileira de Arbitragem* 2004, 100.

the Organization in order to resolve inconsistencies.<sup>4</sup> The decision is remarkable as Mexican courts have a natural tendency to be reluctant to international and comparative law.

#### ***Time Limits for Judicial Review***

Title IV of the Fifth Book of Mexico's Commercial Code not only governs arbitration proceedings taking place in Mexico, but also the judicial reviews for setting aside and executing international commercial arbitration awards. Article 1419 provides that for any time-limits previewed in Title IV, the counting starts 24 hours after having been served. However, the 4<sup>th</sup> Circuit's ruling dated January 24, 2003,<sup>5</sup> establishes that for review of a judge's decision to refuse to execute the award, it is not to be referred to article 1419 but instead to the general rule contained in article 1075, which provides that deadlines start to run the day after notification is given. It is logical to think that the same reasoning would apply with respect to the review of a judicial decision to vacate an award.

#### ***Amiable Composition does not violate the Principle of Legality***

In the case *Loret de Mola*, plaintiff sustained before the Supreme Court that article 1445 of the Commercial Code, that retakes article 28.3 of the Model Law, contradicts the constitutional principle of legality, which foresees that decisions that deprive a citizen of his goods must be motivated in regard to the Law.<sup>6</sup> However, the justices' position consists in underlying that it is the proper Law, namely article 1445 of the above-mentioned Code that gives the parties the right to resolve their disputes in *amiable composition*, exonerating the arbitration panel to motivate their decision in regard to legal dispositions.

#### ***Autonomy of the arbitration agreement***

Article 1432 of the Commercial Code establishes *expressis verbis* the principle of autonomy of the arbitration agreement. Recently, it has been ruled that the said agreement is not only autonomous but has to be considered as a totally separated contract, which is not subordinated to the main contract. However, it is true that the mentioned disposition does not provide anything in regard to the hypothesis of the inexistence of the main contract; thus it could be logical to think that if there is no principal contract there can be no agreement to arbitrate. However, such a view is wrong because as said before the arbitration agreement is a different contract that has its own existence – or inexistence-independently of the inexistence of the principal contract. And it is worth to underline that one issue of an arbitration clause could be precisely to declare the existence or inexistence of the main agreement.

#### ***Inoperative arbitral agreements***

Like Article 8 of the UNCITRAL Model Law, Mexican Law foresees that a court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

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<sup>4</sup> Tercer Tribunal Colegiado en Materia Civil del Primer Circuito. Amparo en revisión. RC 14/2005. *ADT Security Services*. 5/19/05.

<sup>5</sup> Tercer Tribunal Colegiado en Materia Civil del Cuarto Circuito. Clave: IV.3o.C. , Núm.: 23 C. Amparo en revisión 670/2002. *Javier Mario Elizondo González*. 24 de enero de 2003. Unanimidad de votos. Ponente: Pedro Pablo Hernández Lobato. Secretario: Jacobo López Cenicerros.

<sup>6</sup> Amparo en revisión 237/2004. *Emilio Francisco Casares Loret de Mola*. 4/28/04.

In this context, national tribunals have had the opportunity to define what one should understand by an “inoperative” arbitration agreement. The following causes have been established that renders an arbitral agreement inoperative:

- renunciation of both parties to the arbitral proceeding;
- novation of the arbitration agreement in favor of a State jurisdiction clause;
- resolution of the matter by a State tribunal without any opposition of the parties;
- out of the convened time period in which the arbitration should have been organized;
- incapacity or death of the namely designated arbitrator without any foreseen mechanism to substitute him.<sup>7</sup>

In another tried case, it has been established that financial difficulties neither do render an arbitration agreement inoperative. The decision is interesting because of the increasing costs of arbitration. One of the parties sustained that the arbitral agreement should be considered as inoperative because the company’s financial situation could not allow to pay the costs of an arbitration proceeding. The court first of all underlined that the arbitral agreement is a voluntarily convened contract and it has to be assumed that the parties made their counts before signing it. Secondly, an arbitration agreement is only inoperative for reasons intrinsic to itself and not for exterior causes like the financial situation of the parties.<sup>8</sup> In itself the decision is right; nevertheless, one might suggest that the solution could be different if plaintiff would have alleged the notion of *cas fortuit*, the civilian equivalent to the Common law doctrine of impracticability, meaning that the arbitration is still operative, however the circumstances under which the party expected to fulfill the agreement prove to be entirely different from those that were foreseen by the parties when they entered into agreement<sup>9</sup>. Even if the Federal Civil Code does not state expressly the *cas fortuit* for contracts, there is no doubt that it constitutes a General Principle of Law under the Mexican Legal System.

### ***Transfer of an arbitral agreement***

Following a ruling of the First Circuit<sup>10</sup>, an arbitration agreement can be transmitted and the operation has to be considered as a “transfer of rights” in the meaning of the Federal Civil Code.<sup>11</sup> It is noteworthy to mention that the court didn’t consider the “right to arbitrate” as a procedural right but as a substantial right to “legal certainty”, meaning a right to know how future disputes will be handled, and particularly how the controversies over the **transferred** rights will be resolved. In other words, the debtor has a vested right to go to arbitration because so it has been agreed in the initial contract.

### ***Kompetenz-Kompetenz***

Mexican Arbitration Law gives the Arbitral Tribunal not only a mandatory jurisdiction over the parties, but also the power known as *kompetenz-kompetenz*, meaning the competence to rule over its own

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<sup>7</sup> Tercer Tribunal Colegiado en Materia Civil del Primer Circuito. Amparo directo 465/2005. *Servicios Administrativos de Emergencia*. 9/2/05.

<sup>8</sup> Tercer Tribunal Colegiado en Materia Civil del Primer Circuito. Amparo directo 465/2005. *Servicios Administrativos de Emergencia*. 9/2/05. It is interesting to note that the German Supreme Court adopted a contrary solution in a matter where claimant were forced to fill a bankruptcy proceeding and respondent too was unable to support the costs, situation that lead the Justices to consider the arbitration clause as inoperative (BGH, 9/14/2000, NJW 2000, 3720; see also: KG, 8/13/2001, SchiedsZ, 2003.239). However, the decision has been very criticized (see the references in: Niggemann, *Chronique de jurisprudence étrangère – Allemagne*, 1 *Rev. arb.* 2006, 225, 236).

<sup>9</sup> *Mexican Law*, p. 516

<sup>10</sup> Amparo en revisión 442/2004 – Tesis I.30.C.475 C. *Conproca*. 12/1404.

<sup>11</sup> Art. 2029 sq.

jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement<sup>12</sup>. However, a late decision by the First Circuit<sup>13</sup> may provoke some doubts about the existence of a general principle of kompetenz-kompetenz. In effect, the ruling underlines that the arbitral tribunal has the competence to decide over its own competence “when the arbitral agreement foresees the power of the arbitrators to decide over the voidance of the arbitral agreement”. Should this mean that if the arbitration clause does not establish such specification, the arbitral tribunal has no jurisdiction over such a question, embracing thus the American approach set out in *First Options*?<sup>14</sup> In our view, such a conclusion cannot be drawn as the UNCITRAL Model Law expressly foresees the competence of the arbitral tribunal to resolve any question in regard to its jurisdiction, without conditioning such a power to the fact that the arbitration agreement foresaw it or not. The same observation can be made in relation to the Convention of New York and most modern arbitration laws.<sup>15</sup>

Another problem in regard to the kompetenz-kompetenz principle is the fact that if a party brings an action before a court in a matter which is the subject of an arbitration agreement the said court has not to refer the parties to arbitration if it finds that the agreement is null and void, inoperative or incapable of being performed.<sup>16</sup> In one case<sup>17</sup>, the aforesaid rule posed a very serious problem as one party did not present before the court the substantial dispute but only argued that the arbitration agreement were void. In other words, whereas article 1424 of the Commercial Code foresees the hypothesis where a party that ignores the arbitration clause requires from the judge a substantial solution; in the present case, the court only was solicited to pronounce itself on the voidance of the agreement to arbitrate. The ruling judge considered that he was empowered to solve the question even if he was not required to rule over the

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<sup>12</sup> Art 1432 Commercial Code.

<sup>13</sup> Tercer Tribunal Colegiado en Materia Civil del Primer Circuito. Amparo en revisión 14/2005. *Servicios Administrativos de Emergencia, S.A. de C.V.* 5/19/05.

<sup>14</sup> *First Options of Chicago, Inc. v. Kaplan* (94-560), 514 U.S. 938 (1995): “[..] We believe the answer to the “who” question (*i.e.*, the standard of review question) is fairly simple. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, see, *e.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U. S. \_\_\_, \_\_\_ (1995) (slip op., at 5); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, [473 U.S. 614](#), 626 (1985), so the question “who has the primary power to decide arbitrability” turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court’s standard for reviewing the arbitrator’s decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. See *AT&T Technologies, Inc. v. Communications Workers*, [475 U.S. 643](#), 649 (1986) (parties may agree to arbitrate arbitrability); *Steelworkers v. Warrior & Gulf Navigation Co.*, [363 U.S. 574](#), 583, n. 7 (1960) (same). That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. See, *e.g.*, [9 U.S.C. § 10](#). If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes--but only those disputes--that the parties have agreed to submit to arbitration. See, *e.g.*, *AT&T Technologies, supra*, at 649; *Mastrobuono, supra*, at \_\_\_, and n. 9 (slip op., at 5-6); *Allied Bruce Terminix Cos. v. Dobson*, 513 U. S. \_\_\_, \_\_\_ (1995) (slip op., at 4); *Mitsubishi Motors Corp., supra*, at 625-626.”. See also: Wyss, *First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to kompetenz-kompetenz*, 72 *Tulane L. Rev.* 351 (1997).

<sup>15</sup> Fouchard-Gaillard-Goldman, *Traité de l’arbitrage commercial international* (Paris: Litec, 1996), 655; Dimolitsa, *Autonomie et kompetenz-kompetenz*, 2 *Revue de l’arbitrage* 1998, 305.

<sup>16</sup> Art 1424 of the Comercial Code..

<sup>17</sup> Juez Segundo de Distrito en Materia Civil en el DF. Amparo 556/2004-I, /8/11/04.

matter of the case. Following the decision, the court could not refer the parties to arbitration as long as the validity of the arbitration agreement was not resolved. However, the true problem is not to know if article 1424 of the Commercial Code empowers the judge to resolve the question of the validity of the arbitration agreement without ruling over the whole matter, but how to coordinate article 1424 with article 1432 that set forth the kompetenz-kompetenz principle.

Two different solutions have been given by the same First Circuit. In the first case, an exclusive competence had been given to the arbitral tribunal<sup>18</sup>, whereas in the second case, another ruling provided the basis for a concurrent jurisdiction finding that State courts have jurisdiction to decide if the arbitration agreement is void or not without depriving the arbitral tribunal from its competence to pursue meanwhile with its proceedings.<sup>19</sup> In our view, one has to distinguish between article 1424 that gives State courts a *prima facie* control and article 1432 that gives the arbitral panel full jurisdiction to decide over the validity of the arbitral agreement. In other words, if a party requests the judge to remit to arbitration, the latter must refer the case to arbitration unless the arbitral agreement is *prima facie* void.<sup>20</sup>

However, in a mandatory precedent, which we consider more than unfortunate, the Supreme Court set forth that it is for State courts to establish the validity or not of the agreement to arbitrate<sup>21</sup>. The reasoning is the following one. First of all, the Justices affirm that there has to be a judicial control over arbitration as it is a private proceeding. Secondly, the court underlines that arbitration is only possible if such is the will of the parties. However, if for instance the alleged voidance consists affirming that there has never been any consent to arbitration, it would be illogical that an arbitral tribunal could decide such an issue. It is only when it is established that the arbitration agreement is valid that State courts can refer the parties to the arbitration proceeding.

Once again, state judges did not understand that the competence-competence principle is not to be interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. As Fouchard & Gaillard state, “that would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award. Nevertheless, the competence-competence rule ties in with the idea that there are no grounds for the *prima facie* suspicion that the arbitrators themselves will not be able to reach decisions which are fair and protect the interests of society as well as those of the parties to the dispute.”<sup>22</sup> “However, it is important to recognize that the competence-competence rule has a dual function. Like the arbitration agreement, it has or may have both positive and negative effects, even if the latter have not yet been fully accepted in a number of jurisdictions. The positive effect of the competence-competence principle is to enable the arbitrators to rule on their own jurisdiction, as is widely recognized by international conventions and by recent statutes on international arbitration. However, the negative effect is equally important. It is to allow the arbitrators to be not the sole judges, but the first judges of their jurisdiction. In other words, it is to allow them to come to a decision on their jurisdiction prior to any court or other judicial authority, and thereby to limit the role of the courts to the review of the award. The principle of competence-competence thus obliges any court hearing a claim concerning the jurisdiction of an arbitral tribunal—regarding, for example, the constitution of the tribunal or the validity of the arbitration

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<sup>18</sup> Recurso en revisión, RC 3836/2004, 11/11/04.

<sup>19</sup> Amparo en revisión 31/2005. *Servicio Electrónico Digital*. 3/1/05.

<sup>20</sup> Pereznieto, La remisión de las partes al arbitraje, 50 *Pauta ICC Mexico* 2006, 61.

<sup>21</sup> TESIS JURISPRUDENCIAL 25/2006. Contradicción de tesis 51/2005-PS. Entre las sustentadas por los Tribunales Colegiados Sexto y Décimo, ambos en Materia Civil del Primer Circuito. 11 de enero de 2006.

<sup>22</sup> *Fouchard Gaillard Goldman on International Commercial Arbitration*, E. Gaillard and J. Savage (eds.)(1999), # 659.

agreement—to refrain from hearing substantive argument as to the arbitrators' jurisdiction until such time as the arbitrators themselves have had the opportunity to do so. In that sense, the competence-competence principle is a rule of chronological priority. Taking both of its facets into account, the competence-competence principle can be defined as the rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, subject to subsequent review by the courts.”<sup>23</sup>

***Only the dispositions of the Arbitration Law, and not common proceedings rules, apply to the organization of an arbitration.***

In the dispute set forth<sup>24</sup>, claimant invoked the Federal Code of Civil Proceedings to allege that according to Mexican procedural rules, the judge [or the arbitrator] must adhere to the text of the law and only has those powers that such law establishes. Therefore to give an arbitral tribunal total discretionary powers regarding the evaluation of evidence has to be declared unconstitutional. In response, the Supreme Court ruled that an arbitral tribunal does not have an absolute discretion since its actions are governed by Article 1435 of the Commercial Code, corresponding to article 19 of the Model Law, that provides that "if no stipulation was made, the Arbitral Tribunal may, subject to the provisions of this Title [Title Four of Book Five of the Commerce Code], direct the arbitration in the manner it considers appropriate. This power conferred to the Arbitral Tribunal includes that of determining the admissibility, relevance and value of the evidence". There is thus a defined legal frame that obliges the arbitral tribunal to conduct arbitrations according to clear rules and in which fundamental procedural rights are granted to the parties, such as equal treatment of the parties and the right to a hearing. Another significant aspect of this decision is that it has rejected the argument developed by certain authors (and by claimant) that Title IV must be completed by supplemental rules like the Federal Code of Civil Proceedings. In a legal system such as that of Mexico that adheres to an extreme procedural formalism, the large cited powers of the arbitrator have been considered by a certain doctrine, which obviously is unfamiliar to arbitration, as an “excessive authority” that should be meant unconstitutional - not understanding that what the parties are looking for is exactly to avoid detailed formalities<sup>25</sup> – the latter being one of the causes of the dysfunction of the judicial system.

***The sole fact of an existing friendship between an arbitrator and a party's lawyer cannot constitute per se a bias***

In a case judged August 9, 2004, in first instance<sup>26</sup>, party X claimed that the arbitration agreement contained in the contract should be vacated because the legal representative Y of the counterpart Z is also the director of the arbitration center that has been chosen in the mentioned agreement – and that this fact had never been disclosed to party X. Thus there would be a violation of the equality principle between parties, as Y could influence the choice of arbitrators and eventually their final decision on the merits. Furthermore, according to claimant, the previewed arbitrators had friendship relations with Y. However, the judge considered first of all that there is no judicial competence in presence of an arbitration clause, and, second, the chosen arbitration center's rules establish proceedings to challenge the appointment of arbitrators which independence or neutrality could be compromised. As the first Circuit already ruled<sup>27</sup>,

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<sup>23</sup> *Idem*, # 660.

<sup>24</sup> Amparo en Revisión 759/2003.

<sup>25</sup> For a very liberal approach, see: Pereznieta Castro, *Derecho internacional privado*, 8<sup>th</sup> ed. (Mexico: Oxford, 2003), 267; Graham, *El derecho internacional privado del comercio electrónico* (Mexico: Themis, 2003), 29 (*plaidoyer* in favor of the so-called formless “cyber-arbitration”).

<sup>27</sup> Segundo Tribunal Colegiado en Materia Civil del Primero Circuito, 3782/2002, 5/3/2002.

the sole fact of an existing friendship between an arbitrator and a party's lawyer cannot constitute *per se* a bias.

### **Conclusion**

Generally speaking there is no doubt that Mexican courts, especially the Supreme Court, want to favor arbitration. However, inferior courts still perceive their role in a very orthodox way considering that "justice" has first of all to be administered by the State and its tribunals and that private persons – arbitrators - have no such legitimacy. In this sense, the Supreme Court's ruling on kompetenz-kompetenz is a real set back as it will give raise to new parallel litigations that will endanger the arbitration proceeding. Thus, the Mexican situation is far away from the very liberal approach adopted by the French courts for instance. However, there is no doubt that the case law evolution has to be seen as globally positive; even though much remains to be done.