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Commercial Arbitration in Mexico

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V. COMMERCIAL ARBITRATION IN MEXICO

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First of all, I would like to thank the University of Florida and the College of Law, for inviting me to participate in this Seminar on Legal and Policy Issues in the Americas.

I would like to also thank Professor Gordon, who is a well-known professor in Mexico. When I met Professor Gordon in Mexico City twenty years ago, he was the only person who promoted academic relations between Mexico and Florida. Professor Gordon invited me to discuss legal issues of NAFTA seven years ago, one year before NAFTA was enacted between Mexico and the United States. Today, I am very glad to come back again and see the increasing interest between Florida and Mexico, especially the increasing commercial relations.

My subject matter in this seminar is the basic trends of international commercial arbitration in Mexico. Doing so, I have to respond to some of the questions made by Professor Gordon about arbitration in Mexico, and to which extent Mexican arbitration is an important alternative dispute resolution alternative method.

On this respect, I could say that arbitration in Mexico today is an important dispute resolution alternative, and it will become a more extended method because international commerce is increasing in Mexico.

One of the reasons for the importance of the arbitration in Mexico is that various universities promote courses and knowledge of arbitration as an important alternative dispute resolution method. There is also an interest from judges and judiciary personnel who attend seminars that have been organized by the various institutions who promote the arbitration in Mexico. Those seminars have been organized frequently in the major cities in Mexico. There is interest also from the business people that see in this method of dispute resolution a modern and efficient alternative vis-á-vis the judicial system in Mexico.

The legal system in Mexico started to change in 1986 when Mexico joined the GATT. One of those changes was in commercial arbitration legislation.

International arbitration nowadays in Mexico is important since the Mexican judicial system is, in general terms, a non-reliable alternative to resolve disputes in commercial matters. It is slow, it is bureaucratic, it is non-specialized, and in some local cases, the Mexican judicial system is corrupt.

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In order to introduce arbitration in Mexico, the commercial code was amended to include the United Nations Commission for International Trade (UNCITRAL) Model Law. Doing so, Mexico today has modern arbitration system — a uniform arbitration system, which is in its rules, is very similar and close to the rules of arbitration in the United States, Canada and Europe, countries with which Mexico has commercial relations. The principles of Title IV of the Mexican Commercial Code are as follows:

1. The definition of the arbitration agreement. The arbitration agreement should be a written agreement, signed by the parties, no matter what form of exchange of letters, faxes, or any other means of telecommunications.
2. The rules of integration of the arbitration tribunal and the way to appoint the arbiters, are the standard rules that could be found in the AAA rules of ICC rules.
3. The jurisdiction of the arbitration tribunal, includes the rule by which the arbitration tribunal has the authority to determine its own jurisdiction and rule on any defenses regarding the validity of an agreement for arbitration.
4. The general rules that govern the arbitration procedure include those in which the parties shall be treated with fairness and each party shall be given a full opportunity to assert his rights. Also included is the rule stating that the arbitral tribunal has the discretion of determining the admissibility, relevancy and weight of the evidence.
5. The issuance of the award and conclusions of the proceeding.
6. The novelty and voidness of awards.
7. Finally, the rules of recognition and execution of awards that are not only from the UNCITRAL Model Law but, are the same rules of the New York Convention on Recognition and Execution of Foreign Arbitral Awards.

As you see, Title IV of the Mexican Commercial Code is ample and covers mostly the principle issues of arbitration.

Nevertheless, the Mexican Commercial Code has some differences that do not coincide with the dispositions of the UNCITRAL Model Law rules. I will point out briefly the most important.

The Commercial Code applies to both domestic and international commercial arbitration. The Model Law was primarily designed for international arbitration. This difference is very important because in the Commercial Code, some key decisions have to be made by the Mexican judges. By introducing the Mexican judicial system in those key issues, the arbitral procedure may be disrupted. Those are: If the parties lacked in selecting the arbitrator, any of the parties could request to the judge to select it. Or, if one of the parties does not agree with the jurisdiction of the

arbitral tribunal, this party could appeal to the judge for review. In both cases, the possibility exists of new appeals that could delay the procedure.

There are other more positive differences in the Commercial Code than in the Model Law. Those are: It is provided in the Model Law that in case of lack of the parties to choose the applicable law, the arbitrators should determine this applicable law by the conflict of law rules which the arbiters consider applicable.

In the Commercial Code the arbiters may provide the applicable law, taking into consideration "the characteristics and circumstances of the case." That means the "voie directe." In this case, the weight to select the applicable law is more flexible and more comprehensive.

Other differences are in case the parties do not decide in the arbitral clause about the number of arbiters, the Model Law provides for three arbiters — in the Commercial Code, there is just one. Other important difference is as follows: The Commercial Code in the last paragraph of Article 1445 establishes that the arbitral tribunal shall decide in accordance with the provisions contained in the agreement to arbitrate or, the arbitral clause. In doing so, it shall take into account "the commercial usage applicable to the case." That means that there is not necessarily the traditional way of determining the applicable law. There are specific rules that should be applied in every activity of the case. In other words, the Commercial Code has cleared the way for the arbitral tribunal to decide on "Lex Mercatoria," not only on a substantive national law. This method is international and it does not have some constraints that the national law has when resolving disputes of international nature.

Now let me move very briefly to mention the use of the dispute settlement panels under NAFTA. Mexico has participated in thirty-five dumping cases (Chapter 19), five cases on foreign investments (Chapter 11), and two cases in Chapter 20, which is institutional conflict resolution.

To Mexico, these kind of panels — dispute settlement system — have been the most effective system to resolve its commercial problems with the United States. Commercial problems that, before NAFTA, reached solution years after today are resolved in months.

To finalize, let me say a few words on how we see arbitration in Mexico and how we see NAFTA partners. In the international commercial transactions, arbitration is very well known. In Mexico, today there is an increasing number of arbitral procedures occurring. At the same time, those arbitration procedures are usually administered by ICC. This is the institution which administers more arbitrations in Mexico.

Arbitral activity in Mexico is increasing. The American Arbitration Association also participates in this activity. Moreover, there are a minor number of cases heard in the Interamerican Commission for International Commercial Arbitration (IACAC).

Domestic commercial arbitration began with four main organizations, Mexico's Arbitral Center in Mexico City, the Mexican Association on Mediation and International Commercial Arbitration in Guadalajara, the Arbitration and Mediation Center in Monterrey and the National Chamber of Commerce. All of these organizations promote seminars and administer domestic and international arbitration procedures.

Regarding the Mexican courts, because of the novelty of international arbitration in Mexico, there are a reduced number of judges that understand the nature of arbitration. That is why education is needed. The Mexican arbitral institutions and, in a very special way, the ICC, organize open courses in which the judges participate annually.

The misunderstanding of arbitration from the Mexican Courts, for example, occurred last month, January. The Fourth Circuit Court tribunals, which is one of the highest courts in Mexico, had a decision in which it interpreted an arbitral clause. This Court decided that the arbitral clause should be interpreted as part of the whole contract where this clause belongs. In other words, this High Court ignored the separability of the arbitral clause that is expressly provided in the Mexican Commercial Code. Errors like this may be corrected with time and practice but especially, with adequate education of judges.

To finalize, I should say that Mexico is a state party of the New York Convention on Enforcing of Arbitral Awards. It means that the Mexican tribunals should recognize foreign awards if they comply with the N.Y. Convention requirements.

In conclusion, it is important to count on different dispute settlement systems as arbitration in Mexico. More education on this issue is needed. We also need more culture in ADR's. It is time now to promote mediation in Mexico in order to resolve the heavy workload of Mexican courts, especially in the field of family matters. In commercial matters the culture of arbitration in Mexico is increasing and every foreign award could be recognized if it complies with the N.Y. Convention's requirement.