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Arbitration of Commercial Disputes in Mexico and the United States: A Panel Discusstion

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ARBITRATION OF COMMERCIAL DISPUTES IN MEXICO AND THE UNITED STATES: A PANEL DISCUSSION

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THE HYPOTHETICAL PROBLEM

Using the same facts as discussed in the first session on the enforcement of foreign judgments, consider that in the contract for sale of insulation there was the following clause:

This agreement shall be subject to arbitration.

QUESTIONS FOR DISCUSSION

A. Arbitration

1. An arbitration clause is essentially a unique kind of forum selection clause. Forum selection clauses which designate a particular court are usually upheld. Do arbitration clauses differ?
2. Is this provision adequate? If not, what would you recommend be included if you represent National? If you represent Jalapa?
3. Were a location to be included, which location would you prefer and why?
4. Assuming your preferred location to be acceptable to the other side, under what rules do you wish the arbitration to take place?
5. The UNCITRAL rules for commercial arbitration have existed since 1976. Their most notable use was as a basis for the Iran-U.S. Claims Tribunal. Have any of you ever used them?
6. What law will apply if the rules do not address the issue?
7. Would a court in your country uphold the above brief provision as a valid forum selection clause and stay or dismiss the matter?

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8. If the provision had included a choice of law clause, would it be followed? No choice of law having been included, what law would be chosen?

a. Law of place of arbitration.

b. Conflict of laws rules of place of arbitration used to determine applicable law.

c. Arbitrators attempt to determine the expectations of the parties.

d. Some form of *lex mercatoria* or international law of merchants, i.e., rules not based on the law of one nation.

e. Achieve a fair and just conclusion without the application of any specific rules of law.

9. How would the arbitrators be selected? Defer to the rules adopted or include names or selection processes in the arbitration clause?

a. If a party fails to appoint an arbitrator as provided, will the court appoint an arbitrator?

10. Considering the process of the actual arbitration, is it reasonable to suggest that where the arbitration is held, and who the arbitrations are, will affect such procedures as the importance of documents versus oral arguments, the extent of cross examination, the amount of discovery, and the participation of the arbitrators in questioning witnesses?

11. Would a court in your nation allow interim measures such as attachment, recognizing that arbitrators do not have the authority to grant such measures?

12. Could a court, upon application by the losing party, set aside the arbitral award before enforcement is commenced? How would jurisdiction be obtained over the foreign party who had received the award?

13. What disputes would be subject to arbitration under the above clause? All disputes or only certain specified disputes? If the latter, what would not be included?

In the suit by National against Jalapa for defamation, could the parties agree to arbitrate the issue of defamation?

Could the parties agree to arbitrate in currency in which any award must be rendered? Would this be a public law issue because it relates to the limitations in the Mexican Monetary Law which requires judgments to be rendered in Mexican pesos?

What if either government imposed exchange controls because of balance of payments problems. Could the applicability of the exchange control laws be a subject of arbitration?

The United States Supreme Court, in the *Scherk* and *Mitsubishi* decisions, allowed arbitration provisions to prevail in international transactions, in cases involving securities and antitrust, where notwithstanding that earlier decisions involving solely domestic disputes rejected arbitration provisions as inappropriate. How might Mexican courts approach these issues of arbitrability?

Were arbitration to be conducted in Mexico but under United States law to include consideration of antitrust issues, should the Mexican arbitrators be able to award treble damages as provided for in U.S. antitrust law? Would they be likely to even if they were allowed to?

14. What would a court of your nation do if one of the parties simply fails to proceed with arbitration?
15. Arbitration clauses negotiated between persons experienced in international business, such as those in the *Scherk* and *Mitsubishi*, tend to be upheld. What about arbitration clauses in form contracts where the arbitration clause is not the subject of bargaining? Would it make any difference whether the contract was among merchants or involved a consumer as one party?
16. If one party is a government, does an agreement to arbitrate constitute a waiver of the defense of sovereign immunity?

B. Enforcement of Arbitral Awards

1. Is enforcement of an arbitration award more easily accomplished in your country than enforcement of a judicial judgment?
2. What are the principal sources of law in your country for enforcement of arbitral awards?

Do you have any comments on the NAFTA proposals regarding arbitration? What needs to be done if NAFTA is enacted?
3. Both the United States and Mexico are parties to the Inter-American Arbitration Convention, as well as the United Nations Convention on Recognition and Enforcement of Arbitral Awards (New York Convention).
4. There have been quite different interpretations of what constitutes an agreement to arbitrate under the New York convention Article II(2). In a draft proposed by the Netherlands, confirmation in writing "without contestation by the other party" was suggested, but Article II(2) as adopted seems based on an exchange and agreement. How would a court treat a clause providing for arbitration in a letter of confirmation of a contract?
5. One defense to enforcement (Article V(2)(b)) is the illusive concept of violations of public policy. The United States seems to take the view that the Convention drafters intended to encourage courts to adopt a very narrow definition of public policy, the words of one United States circuit court case being "where enforcement would violate the forum state's most basic notions of morality and justice." Is there any indication in Mexican law how public policy is to be interpreted?
6. What is your nation's view of the meaning of non-arbitrability, a defense to enforcement in Article V(2)(a)?

Is arbitration burdened by the potential broadness of interpretation of this provision by courts attempting to protect its citizens in such areas as termination of distributorships, security transactions, antitrust laws, etc?

Is there a distinction between domestic and international transactions as in the United States *Scherk* and *Mitsubishi* decisions?

How would a court deal with enforcement where national foreign policy interest were involved (i.e., would the court be concerned that the foreign arbitrators might have different political loyalties)?
7. Article V(1)(b) provides a defense of being "unable to present his case." This seems to allow an unsuccessful party to argue that if the procedure of arbitration provides less opportunity (such as discovery,

obtaining witnesses) "to present his case" than a judicial action would permit, the decree should not be enforced. What is the meaning of this defense? Does not agreeing to arbitrate include foregoing formal judicial procedural rules?

8. What if domestic law (true of Swiss law) required two signatures to bind parties to arbitration. The New York Convention states only that the agreement be in writing and signed by both parties. Would a court refer to the Convention or domestic law, the latter on the ground that domestic law would prevail to determine whether there was an agreement to arbitrate?

THE DISCUSSION

Professor Michael Gordon: The hypothetical is the same that we used in Part I, except for a provision that says: "This agreement shall be subject to arbitration." Is this provision adequate?

Lic. José Luis Siqueiros: It is adequate. In fact, it is very much used, particularly in the case of international contracts. My advice to any legal counsel or private companies entering into international arrangements in Mexico, or anywhere in the world, would be to include an arbitration agreement if possible.

Lic. Sergio Garcia-Rodriguez: I think the proposed clause is adequate in terms of enforceability, in terms of reflecting the parties' desire to arbitrate. However, I would not stop there. I think that an arbitration clause is an opportunity to determine a whole set of agreements regarding the applicable rules of decision and choice of law. I would caution any practitioner to think about other issues that should be included in this clause in the agreement. In fact, I think there is a lot of ambiguity to what might be subject to arbitration here. For example, there are questions regarding defamation that may be an issue that should be subject to arbitration under the general arbitration clause. A lot of questions arise regarding what is and what is not subject to arbitration. I think that it is still common to see something like this, in part, because the parties and counsel for the parties leave the arbitration clause to one of the last matters to be negotiated and agreed upon. By the time the clause is considered, the parties are not really thinking about all the implications of what should be covered by the clause. In fact, I have heard remarks like: "Well, we will do it in Cancun, or if the dispute is in the United States, we will do it in Hawaii." The arbitration clause is not taken all that seriously, at least not as seriously as other provisions in the contract like price and delivery dates. At the same time, the time at which one discusses dispute resolution, one tends to hear a lot of off-the-cuff remarks about legal systems. My firm does a lot of business with Asian clients and we hear about the expense associated with anything related to dispute resolution in the United States, not just litigation. I just read an article about an arbitration between Advanced Micro Devices and Intel in San Francisco.[1] The arbitration stretched over five years—from 1987 to 1992,

1. Don Clark, *Behind the Great Chip Feud*, SAN FRANCISCO CHRON., Feb. 26, 1992, at B1.

involved 45,000 pages of reporter's transcripts, and thousands of pages of documents. This type of process is outrageous, turning into a multi-million dollar dispute resolution procedure. In Mexico, I also hear a lot about costs. Attorneys in Mexico are reluctant to subject their clients to arbitration in the United States when it is just as expensive, if not more so, as litigation in some instances. On the other hand, I have heard from Asian clients about problems that they have encountered in the legal system in Mexico. The problems arise not only in the context of litigation, but also in arbitration.

In framing an arbitration agreement, counsel has the opportunity to get beyond the stereotypes of legal systems and dispute resolution mechanisms, and the pitfalls in each of them, to provide for a dispute settlement measure appropriate for the parties and the particular nature of the transaction. The parties' best interests would probably not be served by framing the arbitration agreement in such generalized terms as are proposed in the hypothetical. If the parties want to frame the clause as broadly as possible, they might be better served with something that is more indicative of their intent. The Asia Pacific Model Clause is the broadest possible clause that comes to mind. It provides for arbitration of any controversial claim arising out of or relating to a contract, or breach of the contract. This type of general clause would be appropriate in this situation only if the United States party considered and thought about defamation and whether defamation is something the company does not want to arbitrate because they want to maintain the right to a jury trial.

Prof. Michael Gordon: We should not forget that the parties could go to arbitration without having any arbitration clause at all. The parties could simply decide to arbitrate after their dispute arose. In this case, however, the hypothetical provision provides that once we do go to arbitration, we will to have to raise the questions to be presented shortly. Those questions could be addressed at the time of the agreement. One of the questions that certainly should be raised is what location one would prefer for an arbitration as an American or as a Mexican, and what choices are available?

Lic. Siqueiros: The location where the arbitral procedures would take place is very important for two reasons. First, the supplementary or procedural law, to be applicable in arbitration will be the domestic, local law of the place where arbitration is being held. It is very desirable to choose a place that has modern, updated arbitration laws. I am very happy to state that Mexico has just recently adopted and incorporated into its law the Commercial Code the United Nations Commission on International Trade Law (UNCITRAL) on commercial arbitration.[2] Secondly, if the losing party in the final award has property in the place where the arbitration was held, then the winning party would have a

2. Adopted by the United Nations Commission on International Trade Law at the close of the XVIIIth Session in Vienna, June 21, 1985.

better chance to enforce the actual award. For instance, any city in Mexico would be appropriate. Mexico has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[3] the Inter-American Convention on Foreign Arbitral Awards,[4] and the Montevideo Convention on Enforcement of Foreign Arbitral Awards and Judicial Judgments.[5] Mexico also has very modern arbitration laws. Thus, if the losing party does not comply with a binding arbitral award so that the winning party has to go to the courts of the place where the losing party is domiciled to enforce it, this affords the winning party a much better chance to obtain enforcement.

Prof. Gordon: Few things are more important than assuring that an arbitral award will be enforced. Even if an appropriate location is specified with what seem to be fair rules and fair arbitrators, it does not do much good if the enforcing agency does not deem the location to provide a fair and proper arbitral forum. Besides Mexico, what other locations might you choose, and how do you feel about the proliferation of states and cities creating their own arbitration centers, for example, Miami?

Lic. Siqueiros: First, I want to make an important distinction. There are two kinds of international arbitration. There is so-called *ad hoc* arbitration in which the proceedings are not being administered by any center, such as an association or chamber of commerce. Alternatively, there may be arbitration in which the procedures are supervised, controlled and approved by one of these centers. The centers for commercial arbitration include: The International Chamber of Commerce in Paris, specifically, the Court of Arbitration; The American Arbitration Association (AAA) which has 54 districts that may apply the International Arbitration Rules adopted in 1991; and the Inter-American Commission of Commercial Arbitration (IACCA, or in Spanish, CIAC), which has offices in Washington, and which is primarily concerned with disputes in this hemisphere. The IACCA actually operates through the National Sections. For instance, the National Section of Mexico is the National Chamber of Commerce (CANACO). Much depends on the amount in dispute and on the origin of the parties. Each one of these centers has its own rules which do not differ substantially. They follow the pattern of the Uniform Procedural Law for Arbitration, approved by the United Nations in 1976.[6]

Prof. Gordon: If you were representing a Texas company in our hypothetical, would Paris be appropriate for an arbitration, or would you prefer somewhere in the United States using international rules?

Lic. Garcia-Rodriguez: Paris sounds inappropriate. I think the costs associated with arbitrating in Paris would not justify the arbitration.

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3. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 [hereinafter the New York Convention]. The New York Convention has been implemented in the United States in 9 U.S.C. §§ 201-208 (1988).

4. Commonly referred to as the "Pan American Convention," *see* 21 U.N.T.S. 45.

5. OAS/Ser.A/28(SEPF) No. 51, Montevideo, Uruguay, 1979.

6. United Nations Comm'n on Int'l Trade Law, Arbitration Rules, U.N. GAOR, 9th Sess., Supp. No. 17, U.N. Doc. A/31/1/7 (1976) [hereinafter UNCITRAL Arbitration Rules].

There is a proliferation of state arbitration sites in the United States. One that is fast developing as a major site is Hawaii. It is considered by many Asian clients as a neutral location, as the next best thing to arbitrating in Japan or Singapore, or another Asian country because it is geographically convenient. This is a very positive development in the United States. I think that when one is choosing a site the implications of the site can be minimized by the choice of law and by the rules that are decided upon to govern the dispute. If the AAA International Commercial Arbitration or the ICC rules are adopted in the arbitration clause, the applicability of the internal rules of the site that has been chosen are minimized.

Prof. Gordon: That is an interesting comment about Hawaii and the Far East. Do you see a parallel with Miami and South America?

Lic. Siqueiros: Hawaii, after all, is just one of the sections of the AAA. You have to be practical. You have to not only look at the technicalities, but also at the cost of transporting witnesses and experts and the residence of the arbitrators. Miami is becoming a favorite spot because it is a port of entry for South American countries. Every traveller, every executive, every legal counsel from South America will come to Miami. Miami would be an ideal site for the arbitration of international contract disputes.

Lic. Garcia-Rodriguez: One important consideration when thinking about which rules to adopt for the arbitration clause is the role of the arbitrators. The ICC arbitrators have a tendency to micro manage. They want to be involved with every step of the process. This style has implications as to the award itself. The ICC has to review or approve any award made by an arbitrator under the ICC rules. Furthermore, the ICC will only apply its own rules. Therefore, if you have chosen the ICC, you must use the ICC rules.

Prof. Gordon: In our hypothetical provision, we have not said anything about what law could be chosen. It has been noted that there are a number of alternatives. If an arbitral panel has been formed but the governing law has not already been selected, what will the governing law be—the law of the place of the arbitration? Would the arbitrators or a local court use the conflict of laws rules of the place of arbitration to determine the applicable law? Would the arbitrators or a local court attempt to determine the law based upon the expectations of the parties? Would there be some kind of *lex mercatoria* or international law, not necessarily based on the law of one nation? Would the arbitrators choose some fair and just conclusion (*ex aequo et bono*) without the application of any specific rules of law? What do you think would happen in the United States and Mexico?

Lic. Siqueiros: First, let us understand the principle that the choice of law in arbitration is always left to the autonomy of the parties. Thus, the arbitral panel or a local court will only have a chance to select the governing law in case the selection was not made by the parties. Only in those cases would the local court of the place of arbitration have any opportunity to participate. Furthermore, the local court will not usually

participate in arbitration cases because the arbitrators themselves usually have the power to determine the law applicable to the merits. If the parties have not chosen the substantive law, the rules which are governing the arbitration will tell the arbitrators what to do. For example, if they are following the International Chamber of Commerce Paris rules, Article 13 will tell them to look at the conflict of laws rules of the place of arbitration, which will presumably guide them as to the proper law. The Mexican arbitration law, which is modeled after the UNCITRAL[7] has an even more modern, updated provision. It says that if the parties were silent in the original transaction, the arbitrators will apply the law which, in their own criteria, will be the proper law taking into account the elements involved in the particular transaction. In other words, it leaves a good range of alternatives for the arbitrators to choose. The arbitrators will take into account the place where the contract was signed, the language in which it was written, the place where the negotiation of a contract took place, the country or countries where the contract is going to take effect, and the nationality of the parties. Taking all those contract factors into account, the parties will be able to make up their minds as to which substantive law governs the dispute.

Lic. Garcia-Rodriguez: The answer to the question will depend on what the legal issue is, or at what stage of the proceedings the question is raised. If the parties have not chosen any law as the governing law of the agreement, and the issue is the validity of the arbitration agreement itself, the procedure to be followed, or the enforcement of the award will come from the law of the site. If the law of the site does not address the particular question that is at issue, then apply the conflict of laws rules from a court in that particular jurisdiction. If that does not answer the question, then the arbitrators should go to the rules, if any, that the parties have adopted. If the ICC rules have been adopted, then Article 13 would apply, or could apply. The arbitrators may interpret this to mean that they can look at jurisdictional factors such as which site has the most contacts or the most interest in the particular dispute.

Prof. Gordon: Because we can talk about the types of decisions arbitrators will make, we must first know how the arbitrators will be selected. We are given an opportunity to select the arbitrators or, I assume, we could defer to the rules of an arbitration location. It concerns me that if three arbitrators are necessary, one is appointed by each of the disputing parties and the third one is then appointed to really do the job. Is there a better way? How would you suggest we select these arbitrators?

Lic. Siqueiros: You are raising a sensitive point because we have, as Mexicans, a different mentality from the American arbitration process. In United States domestic arbitration, arbitrators take the side of the party that appointed them. They actually become a second legal counsel.

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7. *See* 5 Cód. Com. tit. 4, arts. 1415-1416 (1993) (Mex.), *as amended by* Act of July 22, 1993 [hereinafter Mexican Arbitration Law].

In the rest of the world, in order to be an arbitrator, you have to be neutral. You are sent a letter, for instance in ICC arbitration, requiring you to swear and sign, that you are independent, i.e., that you have no connections, no relationship, no interest at all in the case, and only when such an affirmation of independence has been received and approved, are you appointed an arbitrator. The other party, at any time, knowing that you were previously counsel to the first party, or that you are related to the first party's family, may challenge you. The important issue in international arbitration, is that any arbitrator, whether party-appointed or not, must be completely neutral and independent.

Prof. Gordon: I am intrigued with the Canada-United States Free Trade Agreement in light of your comments. Only representatives from each side—Canada and the United States—sit on the dispute panels. I wonder if having a third party on an arbitration panel allows either side to feel that they can be closely related to the interests of their particular party. The Canadian-United States panelists know there is no third party to resolve the dispute. There is evidence that the Americans who have been on the Canadian-United States panels have been truly independent and neutral. Does having a third party who is neutral allow the other two panel members to feel less neutral in the arbitration process?

Lic. Siqueiros: There was an intelligent and ingenious response to that particular concern in Chapter XX of NAFTA.[8] There are several chapters in NAFTA that have to do with arbitration or, rather, the mechanism of dispute settlement. Chapter XI, for instance, concerns arbitration of disputes between an investor and the host state.[9] Chapter XIX deals with settlement of disputes among the contracting parties involving the imposition of anti-dumping and countervailing duties.[10] Chapter XX is the general, generic chapter on resolution of disputes involving additional problems that arise under NAFTA.[11] If a dispute has been referred to the Free Trade Commission of NAFTA and is not resolved within 30 days, a party to the dispute can request establishment of an arbitral panel. They will consist of five members selected from a roster of experienced experts in the field of law, trade or other matters covered under the Agreement. The first to be elected to the arbitral panel is the chairman. If the disputing parties cannot agree, the chairman is selected by lot. Next, each party selects two arbitrators by so-called reverse selection. The United States government selects two arbitrators from a Mexican roster, and the Mexican government selects two arbitrators from a United States roster. This process is considered reverse selection; it was written into the agreement in order to guarantee the independence of the arbitral panels. Mexican and American experts, having been chosen by

8. North American Free Trade Agreement Dec. 17, 1992, U.S.-Can.-Mex., H.R. Doc. No. 103-159, ch. XX, arts. 2001-2022 (effective Jan. 1, 1994) [hereinafter NAFTA].

9. *Id.* ch. XI, § B.

10. *Id.* ch. XIX, arts. 1901-1911.

11. *Id.* art. 2004.

governments to which they have no obligation, will be completely independent, free and unbiased.

Lic. Garcia-Rodriguez: The reverse selection process is similar to the AAA's suggestions regarding the selection process of arbitrators. Each party submits a list of arbitrators, and on that list are also those individuals who are unacceptable as arbitrators. An officer of the AAA chooses from the list three arbitrators. Another difference between the AAA and the ICC arbitration selection process is that the AAA does permit selection of party-appointed, party-biased arbitrators (but only in the case of arbitration which is not subject to the AAA international arbitration rules). Party-nominated arbitrators, under the domestic arbitration rules, may consult with the parties, at least prior to the time that the tribunal is formed. The arbitrator may even consult with the party on how the third, neutral, arbitrator shall be selected.

Prof. Gordon: Is it reasonable for us to suggest that where the arbitration is held, and who the arbitrators are, will affect such matters as the importance of documents versus oral arguments, the extent of cross-examination, the amount of discovery permitted, and the participation of the arbitrators in questioning witnesses, all, of course, within the framework of the rules?

Lic. Siqueiros: Yes. Having been an arbitrator quite a few times, I have observed that there are frequently problems when one of the counsel is an American lawyer. American lawyers always seek discovery and sometimes this is clearly a fishing expedition. Arbitration is a flexible, informal way to settle disputes. In Mexico, arbitration is privatization of justice. We are trying to do things without formal restraints. We may sit in a hotel room or a legal counsel's office and try to be as flexible as possible. As you know, the arbitration panel does not have authority to subpoena witnesses. Thus if a litigious American counsel wants to call senior officers of a corporate opposing party before the arbitration panel, and they do not want to come, he may ask the arbitral tribunal to request a court, on behalf of the tribunal, to subpoena those officers to appear before the arbitration panel. Alternatively, the American counsel may seek private, extremely confidential documents that sometimes are kept classified and ask that they be exhibited in the arbitration proceedings. Such discovery is perfectly acceptable in judicial proceedings, but when you are in an arbitration procedure, the context is different. Arbitrators try to make matters more simple and to adopt flexible rules of procedure. For instance, in the case of witnesses, sometimes an arbitrator may allow a witness to be cross-examined by the other party and re-examined by his own counsel. All of this is based on the consensus of the two parties. If they do not demand a cross-examination, an affidavit probably will be sufficient. It is always a matter of mutual consent.

Prof. Gordon: Is it acceptable to an American counsel for the arbitration proceeding to be fashioned so as to prohibit fishing expeditions and insure the silence of counsel at the hearing?

Lic. Garcia-Rodriguez: It would be desirable to take care of this problem in the arbitration clause itself. The arbitration clause could specify the

type of discovery that will be available. Certain procedures that appear to be fishing expeditions could be excluded. Oftentimes, even the search for identifying documents seems to be burdensome to non-U.S. parties. Nonetheless, the parties can, in the arbitration clause, control the discretion of the arbitrators to choose what discovery procedures may be appropriate.

Prof. Gordon: Of course, selecting the site of arbitration could help, by selecting a site in an area that traditionally is not going to accept fishing expeditions, such as Paris versus New York.

Lic. Garcia-Rodriguez: Absolutely. If you are representing a company like our hypothetical National you should maintain your right to get the documents of the hypothetical Jalapa and to identify and question their executives by putting these rights in the agreement. A typical clause could provide that: "Discovery shall consist of identifying witnesses, and cross-examining witnesses, and identifying all pertinent documents."

Prof. Gordon: While all this is going on, are we worried about assets being moved out of the jurisdiction? After all, this is arbitration and not a court. Is there any way of getting interim measures imposed upon the United States or Mexico by way of attachment in order to prevent the removal of assets?

Lic. Siqueiros: Yes, there are several stages within the arbitral procedure where provisional measures or interim measures could be taken. Let me just remind you that arbitrators do not have the power to enforce their own decisions, and if any interim measure is requested by the parties then that measure request is allowed. This policy is found in the new Mexican legislation,[12] but you will always have to go to court unless the parties agree otherwise. In the case of perishable commodities that may be destroyed if they are not put into a freezer, the parties may agree in some way to protect them. The winning party may also try to take interim measures before the final award is enforced if it appears likely that the charged party may expend all of its assets or flee. In any case, the party seeking protection must go to court.

Lic. Garcia-Rodriguez: In the United States, the New York Convention[13] does not expressly address the question of interim relief. Therefore, this issue revolves around how a United States court will interpret Congressional silence. Traditionally, interim relief has been obtained in the United States by demonstrating that the relief provides the only way to obtain a meaningful award because the assets in the dispute are movable or are about to leave the country. Generally, one does not seek interim relief because it goes against the concept of arbitration; to avoid litigation and going to court to ask for relief.

Prof. Gordon: The issue of defamation in our hypothetical case is different than a commercial damages contract case. Could the issue of defamation go to arbitration, assuming the parties want it arbitrated?

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12. Mexican Arbitration Law, *supra* note 7, art. 1425.
13. The New York Convention, *supra* note 3.

Lic. Siqueiros: No. Defamation in certain instances may be a crime. In other jurisdictions, it may be a tort or wrong providing the basis for a civil action and a claim for proper compensation. But, at least in Mexico, a claim of defamation will not be arbitrable.

Prof. Gordon: In that case, I suppose it would be important to choose a site for arbitration where defamation would be an arbitrable issue. Suppose that the parties chose a country where defamation is not a crime, but is a civil wrong and monetary remedies are available. If an arbitral award of $100,000 were entered, and enforcement of the arbitral award in Mexico were attempted, would Mexico enforce that award?

Lic. Siqueiros: No. One advantage of arbitration is that the arbitration agreement is severable. Different issues arising under the contract may be separated from other issues. If one of the disputes arising out of the contract is a claim for slander against one of the parties, the arbitrators may only arbitrate those contractual commercial issues of the disputes. Anything to do with slander, libel or defamation must go to court. Once in court, a party may request the proper relief, what we call in Mexico, "moral damages," or indemnization of a monetary nature.

Lic. Garcia-Rodriguez: What if the parties agreed to arbitrate the issue of defamation and chose New York law to govern the dispute. Assume further that they chose, while unlikely, the site to be Mexico. What would the Mexican arbitrators, or the arbitrators in Mexico do in that situation? Could they apply New York defamation law to the issue?

Lic. Siqueiros: First, we should not forget that there are two parties to the hypothetical dispute. The defendant, who is being sued for defamation will refute the jurisdiction of the arbitration and competence of the arbitrators. One power granted to arbitrators that is found in most of the rules of arbitration, and in the Mexican new law, is what the Austrians and Germans call the *Kompetenz-Kompetenz*; the power of arbitrators to define their own adjudication. In the case of defamation, arbitrators would say that they have no jurisdiction to decide such a matter.

Prof. Gordon: What if the parties had stated that all matters related to a contract are subject to arbitration, and that either the Mexican or U.S. government imposed exchange controls to prevent the movement of the money out of the country. Is this a matter subject to arbitration?

Lic. Siqueiros: Yes. This type of matter is governed by monetary law. If the contract has stipulated that payment be in a foreign currency—dollars, yen, deutschmarks, Spanish pesetas—the party that loses has to pay in that currency, but with the proviso that under Mexican monetary law he may pay the equivalent amount in pesos.

Prof. Gordon: If the arbitration were to be conducted in Mexico, but under United States law, and in particular antitrust law, would the Mexican arbitrators be able to award treble damages, as provided for in the United States?

Lic. Siqueiros: No. United States law may be applied, but only within the context of what we consider Mexican public policy. Therefore, treble

damages under RICO,[14] antitrust laws such as the Sherman Act,[15] and other punitive damages are merely concepts and are nonexistent laws in Mexico. Awarding treble damages would violate the fundamental local policy towards damages. Instead, we should revert to what we call mandatory law.[16] In Mexico, there is a very great affinity for mandatory law and public policy. Moreover, autonomy of the parties is fine and will be binding in Mexican courts and on arbitrators insofar as the autonomy does not violate mandatory rules.

Lic. Garcia-Rodriguez: That is a very interesting response because in *Mitsubishi*,[17] the United States Supreme Court held that there is no reason to believe that arbitrators in Japan can not apply U.S. antitrust laws properly and, therefore, claims under the antitrust laws of the United States are, indeed, arbitrable. United States antitrust laws are not mandatory law that requires severance from the arbitration. And you are suggesting that, in Mexico, there is no way that these types of claims can be arbitrated.

Lic. Siqueiros: We should not forget that the arbitrators cannot go beyond the legal framework in which they are acting: their mandate by the parties. This is to be included in what we call the terms of reference. The terms of reference are made at the beginning of the arbitral procedure which is the time when the arbitrators and the parties consider if one of the issues to be determined by the tribunal is the payment of treble damages. This is also the time, if the arbitration is being conducted in Mexico, that the local counsel for the party affected by the possible punishment will raise the issue of damages. If the claimant party is an American company and the defendant party is a subsidiary of another American company, both of which are conscious of their responsibilities and liabilities under the antitrust laws, they can probably empower the arbitrators to decide that issue. The problem will be that the party that loses may not comply voluntarily with the award. In order to enforce the damage award, the winning party must seek a court order what we call the *exequatur* by the local court. The losing party will raise the issue that the treble damages, punitive damages, do not exist in this particular situation because they are contrary to public policy.

Prof. Gordon: Arbitration is supposedly a consensual arrangement and, in our hypothetical, it seems that both the parties agreed to the brief provision for arbitration. As arbitration is used more, however, we find arbitration clauses being used as a standard or adhesion contract provision where one of the parties has little choice but to accept arbitration. This seems to conflict with the idea that arbitration is a consensual arrangement.

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14. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 (1988).

15. Commerce and Trade Monopolies and Combinations in Restraint of Trade Act (Sherman Act), 15 U.S.C. § 1 (1988).

16. "Mandatory laws," or *lois de peliez*, are rules which, while not actually being *ordre publique*, are still imperative, such as exchange controls and antitrust laws. They have to be applied by the local court.

17. Mitsubishi Motor Corp. v. Soler Chrysler Plymouth, 473 U.S. 614 (1985).

Would the treatment of parties and matters found in an arbitration proceeding be different from what we might find in a judicial proceeding?

Lic. Siqueiros: If a transnational company such as McDonald's sells a franchise to operate a restaurant in Mexico, the franchise owners and McDonald's are not going to discuss the terms. McDonald's dictates its standard contract to the franchisee. There should, however, always be a balance of power in a negotiation otherwise the arbitrators (or the court) would decide that the arbitration clause was not properly negotiated and discussed.

Lic. Garcia-Rodriguez: Under United States law, a party must bear a heavy burden to avoid enforcement of a forum selection clause. This is especially true after *Carnival Cruise Line*,[18] where the Court enforced a boiler plate forum selection clause on a passenger's ticket. It is unlikely that a court in the United States will not uphold a forum selection clause based solely on the fact that the clause was not freely negotiated between the parties. This is a powerful reaffirmation that the United States Supreme Court will impose a heavy burden to upset any kind of a forum selection clause, whether or not it is found in an arbitration clause.

Prof. Gordon: In Mexico, is enforcement of an arbitration award more easily accomplished than enforcement of a judicial judgment?

Lic. Siqueiros: Enforcement of an arbitral award is ten times faster and cheaper. I am probably a little biased in favor of arbitration. Mexico does not have a treaty for the enforcement of foreign judgments, with the exception of Spain. Spain and Mexico have a bilateral Treaty for the Recognition and Enforcement of Judgments and Arbitral Awards in Civil and Commercial Matters. We are also members of the Montevideo Treaty and Montevideo Convention for the Recognition and Execution of Civil Judgments, Money Judgments and Arbitral Awards of 1979.[19] The United States is not party to this treaty or to any other bilateral or multilateral treaty for the enforcement of foreign judgments. On the other hand, Mexico and the United States participated and are parties to the New York and the Pan American Conventions.[20] Mexico has a very modern internal law on commercial arbitration, and NAFTA allows Mexico to continue to apply its laws related to arbitration.[21] Arbitration is the chosen mechanism for the settlement of disputes under NAFTA and the Treaty encourages the ratification of the two conventions mentioned above. Canada is only a party to the New York Convention. If you would like to enforce an arbitral award in Mexico, I would be happy to do it in less than three months. Give me a money judgment rendered by a United States court and I may not be able to enforce that judgment in ten years.

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18. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1981).
19. *Supra* note 5.
20. *Supra* notes 3, 4.
21. NAFTA encourages the settlement of private disputes arising out of the Treaty by commercial arbitration, urging the three partners to ratify or accede to the New York and Pan American Conventions. NAFTA, *supra* note 8, art. 2022.

Lic. Garcia-Rodriguez: Under United States law, enforcement of an arbitral award also is much easier than enforcing a judicial judgement. It is a question of federal law. The Federal Arbitration Act[22] has codified the New York Convention and the Pan American Convention. Although States have adopted their own arbitration statutes, the Federal Arbitration Act preempts any state statute that is contrary to the terms of the Act. Therefore, it is not necessary to rely on state law to enforce an arbitral award unless the parties have designated a state arbitration act as the law that will govern.

QUESTIONS AND COMMENTS

QUESTION, *Frederick Hill, Los Angeles*: As practitioners in California, we often represent United States companies and Asian companies that contract with Mexican companies. Based on your discussion, it seems that we could have a case arbitrated by the AAA in the United States and receive a judgment that would probably be enforced in Mexico. As counsel representing clients that contract with Mexican companies in which the assets of the Mexican company are mostly in Mexico, would you recommend an arbitration clause under AAA rules such as the type that you discussed, or an arbitration clause with Mexico as the site and according to Mexican arbitration rules?

ANSWER, *Lic. Siqueiros*: There is some technical confusion raised by your question. If you are choosing the AAA rules, those rules prevail wherever the arbitration takes place, either in Mexico or the United States and they will govern the entire procedure. Your only option is to the substantive law in the case. If you negotiated by mutual consent that the substantive law of the case will be arbitrated under California law, then California law governs, regardless of the place of arbitration. When drafting your arbitration clause it is important to follow the model clause inserted in the Rules of International Commercial Arbitration.[23] The AAA consists of the normal commercial arbitration rules as well as special rules for construction and labor contracts. In you case, follow the International Rules for Commercial Arbitration and add, if possible, a clause for the selection of arbitrators, the number of arbitrators, the place of arbitration, the applicable substantive law as to the merits, and the non-applicability of such law to any subjects that you want excluded. Also include a provision that does not allow the final award to be appealed, so that if one of the parties refuses to arbitrate, you can go ahead with the arbitration after giving proper notice. The arbitral award will be enforced even if you obtain a judgment in default.

QUESTION, *Jack Burton, Santa Fe*: You mentioned the UNCITRAL. In the United States there are about half a dozen or so states that have

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22. United States Arbitration Act, 9 U.S.C.S. § 1-2-8 (Law. Co-op 1987 & 1993 Supp.).

23. AMERICAN ARBITRATION ASS'N, INT'L ARBITRATION RULES (1991) *reprinted in* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION, SELECTED TREATIES, STATUTES AND RULES (1993).

adopted that model law. Some of them feel that the UNCITRAL rules provide additional procedures that would be helpful in the international context even though, as you correctly state, the federal law is going to preempt them to the extent of any conflict. I would be interested in the opinion of the panelists about this movement to adopt the model law by the states.

ANSWER, *Lic. Garcia-Rodriguez*: It is a very positive development because the UNCITRAL model law was adopted with the participation of Third World countries. If there is a dispute between a United States company and a company in the Third World, like Mexico, Colombia, or Chile, UNCITRAL rules provide a good model for *ad hoc* arbitration.

ANSWER, *Lic. Siqueiros*: We should be careful with our terminology because there are two types of UNCITRAL arbitration rules. The 1976 UNCITRAL rules concern procedure only. The 1985 model law, which Mexico adopted and incorporated is the model law that contains both substantive and procedural law. Florida, Texas, California, Connecticut, and Oregon, have tried to improve their image as good sites for arbitration by adopting the 1989 model law. In international cases, however, the Federal Arbitration Act prevails.

ANSWER, *Prof. Gordon*: It may well be that in the attempt to improve the states' image, we have created a race to want to be the site. Fortunately, I suppose, there is an enforcement mechanism developing to provide for a control system.

QUESTION, *Mr. Burton*: Perhaps I was unclear. My question went to the adoption by the states of the model law, not the rules. Do you feel that it is important that those of us who have not adopted the model law go out and do so?

ANSWER, *Lic. Siqueiros*: It will improve the image of the country's arbitration laws, which is the case in Canada. There are ten provinces and two territories in Canada that have adopted the model law. Likewise, Mexico, Peru, Singapore, Australia, and New Zealand have also adopted the law.

QUESTION: We represent a lot of companies who own franchises, and a lot of companies who distribute products in Mexico. We always include rather detailed arbitration clauses in our contracts. Usually, opposing counsel in other countries questions the arbitration clause. We have been puzzled, however, in our contract negotiations with Mexico because Mexican counsel is always in full agreement with our documents that include an arbitration clause. In fact, in one case, opposing counsel called and told us to include an arbitration clause, the location of the arbitration in the United States and the law that should apply in the arbitration process. This made our job a lot easier. After listening to the panel this morning, I think I am beginning to understand why I had such an interaction with the Mexican opposing counsel. One of the reasons we like arbitration is because it could be a faster and cheaper way of handling business disputes. In the area of international business we need certainty and rapid resolution of disputes. My question concerns amparo. Is it possible that after a party gets an arbitration award, whether here or in

Mexico, the losing party could seek an amparo, thereby avoiding enforcement forever?

ANSWER, *Lic. Siqueiros*: According to the new legislation, all the winning party has to do to enforce an arbitration award is to take it to the proper Mexican court and demonstrate that none of the grounds for non-enforcement under the New York Convention applied to the case.[24] The statute says that the decision given by the court to enforce an award will not be appealable. Thus, the only possibility is that the losing party may invoke amparo. Amparo is not frivolous, nor is it an easy remedy or injunction to obtain. You have to prove first to the district judge and then to the court of appeals that there is a constitutional issue involved in the dispute. For instance, that the defendant was never given proper notice of the arbitration proceedings, that he had no due process of law, or that issues such as those arising under Articles 14 and 16 of the Mexican Constitution violated his rights.[25] If the losing party can not prove one of these claims then amparo will not apply and the defendant will most likely be fined by the court.

QUESTION, *John Leibman, Los Angeles*: If the objective of the United States party is specific relief, for example, recovery of certain assets that had been provided to the other party pursuant to a commercial contract, would you still recommend arbitration, or would it be simpler to go to a Mexican court in the first instance to obtain the specific relief that I have described?

ANSWER, *Lic. Siqueiros*: Assuming that we are talking about an arbitration award and not a court judgment, arbitration is much simpler. There are very few ways to stop an arbitration award from being enforced; one can set it aside because the award was null and void, or the award was fraudulently obtained, or one of the arbitrators was corrupt. These grounds are described, of course, in the Mexican legislation and in the New York Convention. If the arbitral award was not set aside, it is conclusive; it is *res judicata*. The only chance that the opposing party has in Mexico, or elsewhere in a country which is a signatory of the New York Convention, is to use any of the very restricted defenses in Article 5 of the New York Convention.

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24. Articles 1461, 1462 and 1463 of the Mexican Arbitration Law, *supra* note 7, follow almost verbatim arts. 35 and 36 of the UNCITRAL Arbitration Rules, *supra* note 6, and arts. 5 and 6 of the New York Convention, *supra* note 3.

25. These provisions guarantee to Mexican citizens due notice and due process of law. MEX. CONST. arts. 14, 16.