Amendments to the Mexican arbitration statute

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This Note comments the recent (27 January 2011) revision of Mexican arbitration law.[2] The development is significant. Not only is it the first since the adoption of the modern (1993) Mexican arbitration regime, but its goal and content are noteworthy: it addresses issues stemming from Mexican practice, removing questions and solving problems thus far extant. This Note comments on them briefly.

I. Generalities

The Revision adds a new Chapter (Chapter X) to the Mexican arbitration portion of the Commerce Code named "Court Assistance in Commercial Settlements and Arbitration," adding articles 1464 to 1480 to the Commerce Code.

In essence, the Revision establishes new rules involving the following:

1. Referral to arbitration;
2. Procedural clarifications involving judicial assistance in arbitration, including setting aside and enforcement proceedings, and consolidation;
3. Enforcement of commercial settlements;
4. Interim measures.

By and large, the Revision clarifies questions, plugs holes and irons-out wrinkles that stemmed from the practice extant. And — as seen from the lens of international arbitration — it does so in a superb fashion.

II. Referral to Arbitration

Questions existed involving the proper interpretation of the referral to arbitration regime, particularly given a Mexican Supreme Court decision involving *competence-competence* which distinguished between challenges to arbitration agreements and challenges to contracts as a whole.[3] Whilst the latter were held to fall within the jurisdiction of arbitral tribunals, the former were held to fall within the purview of courts. The story has been set straight by the Revision. Henceforth, *all challenges* — be it solely to arbitration agreements or contracts *as a whole* — are encompassed by the duty upon courts to refer to arbitration, and hence are within the jurisdiction of arbitral tribunals.[4]

Additional steps are noteworthy. The Revision clarifies that the request to refer to arbitration must take place *at the outset* — a useful clarification, given that the current language of the domestic statute was the only regrettable departure by the Mexican *lex arbitri* from the UNCITRAL Model Law text.[5]

Importantly, the judicial standard of review for the validity of arbitration agreements when referral to arbitration is requested has been clarified to be *prima facie*: only "notorious" cases of arbitration agreements claimed to be null and void, inoperative or incapable of being performed will merit non-referral by courts.[6]

Finally, stay of the judicial proceedings and *immediate* referral has been textually established — a step in the right direction to expedite the enforcement of arbitration agreements.[7]

III. Procedural Clarifications

Difference of opinion existed as to the applicable procedural regime when seeking:

i) Court assistance in the constitution of the arbitral tribunal (for instance, absent designation by a party or failure to agree to the Chair);

ii) Court assistance in taking evidence;

iii) Court guidance for arbitral tribunal fee-determination in *ad hoc* cases.

The Revision clarifies that an expedited non-contentious proceeding known as *jurisdicción voluntaria* shall apply as the procedural route to follow.[8] In doing so, the Revision requires that views from all parties and arbitration institutions be secured.[9] *Inter alia*, it envisages the list-method of choosing arbitrators for purposes of assisting in the constitution of the arbitral tribunal.[10]

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[2] Código de Comercio [Cód.Com.][Commercial Code], *as amended*, Diario Oficial de la Federación [D.O.], 27 de Enero de 2011 (Mex.) (Articles 1415 — 1480 of the Commercial Code; Daily Official Gazette, 27 January 2011 — the "Revision".)

[3] Contradiction 51/2005, First Chamber of the Mexican Supreme Court, 11 January 2006.

[4] Cód.Com. Art.1464.V.

[5] Article 1424 of the Commercial Code, the domestic equivalent of Article 8.1 of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law").

[6] Article 1465(b) of the Commercial Code.

[7] Article 1465 of the Commercial Code.

[8] Article 1466 of the Commercial Code.

[9] Article 1467.1 of the Commercial Code.

[10] Article 1467.III of the Commercial Code.

As to award setting aside and enforcement proceedings, the Revision makes worthwhile clarifications. To begin with, a textual blemish that caused some mischief was removed.[11] Importantly, the Revision provides that awards are *directly* enforced without need of *exequatur*.[12] The utility of said proviso stems from existing confusion and some (lower court) case law that had missed the mark on the matter.

IV. Enforcement of Commercial Transactions

Although Mexico has yet to adopt the UNCITRAL Model Law on International Commercial Conciliation — a step envisaged to take place in the near future —, the ground has been honed to provide for the expedite enforcement of commercial settlements. A special and quick procedure has been canvassed for purposes of seeking enforcement of commercial settlements,[13] which also applies to:[14]

1. Arbitrator challenges (in *ad hoc* cases);
2. Challenges to positive jurisdictional awards;
3. Court-issued interim measure requests and their enforcement;
4. Setting aside of awards or commercial settlements.

The new regime expedites the steps when judicial assistance is sought thereto.

V. Interim Measures

The most exciting changes occurred in the field of interim measures. To begin with, interim measures issued by arbitral tribunals are now *judicially* enforceable,[15] irrespective of where issued.[16] The only exceptions to this rule are:[17]

1. Where the party opposing enforcement proves that:
   a) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the interim measure was made;
   b) the party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
   c) the deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the measure which contains decisions on matters submitted to arbitration may be recognized and enforced;
   d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
   e) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with;
   f) the interim measure has been terminated or suspended by the arbitral tribunal.
2. The Court finds that:
   a) The subject-matter of the dispute is not capable of settlement by arbitration;
   b) The recognition or enforcement of the interim measure would be contrary to public policy;
   c) The interim measure is incompatible with the powers conferred upon the court under its *lex fori*, in which case the Court may reformulate the measure so as to procure its enforceability (without altering its substance).

In any event, the Revision gives the Court discretion to enforce measures unavailable under its *lex fori*; yet another area where uncertainty remained.[18]

VI. Final Comment

The recent amendments to Mexican arbitration law constitute an enthusiastic legislative endorsement of arbitration. The summarized regulatory overhaul fosters the efficiency and expediency of judicial proceedings involving arbitrations seated in Mexico. Coupled with the (positive) judicial approach to arbitration and plausible experience extant, the Revision pushes Mexico up the scale of seats of preference to follow arbitration proceedings.

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[11] Articles 1460 and 1463 of the Commercial Code.
[12] Article 1471 of the Commercial Code.
[13] Articles 1472-1477 of the Commercial Code.
[14] Article 1470 of the Commercial Code.
[15] Following the UNCITRAL 2006 amendment of the Model Law.
[16] Article 1479 of the Commercial Code.
[17] The following regime mimics the UNCITRAL 2006 amendments to the Model Law (art. 17.I).
[18] Article 1479 of the Commercial Code.