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The Rise of a New Law to promote ADR Mechanisms in Mexico: Challenges and Opportunities

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As a result of a reform of Mexico's Constitution, on 25 February 2017 a Presidential Decree was enacted, whereby the Congress received the mandate to pass a new law on Alternative Dispute Resolution mechanisms ("ADR Law") in August 2017.[1] For the first time, the right to "access to ADR mechanisms" was recognised at constitutional level, setting an important precedent for the country and perhaps for Latin America.

The ADR Law will establish the rules for the amicable settlement of domestic disputes (i.e. civil and family law disputes) excluding criminal matters and any other regulated by a *lex specialis.* The reform has also triggered an initiative to introduce a new title (Title V) on "Commercial Conciliation" in the Commerce Code ("CC"), applicable to both national and international conciliation, under a "monist" approach.

Both instruments have adopted the UNCITRAL Model Law on International Commercial Conciliation 2002 ("UNCITRAL Model Law"). There are currently only 16 countries that have followed it, two of which are from Latin America (Honduras and Nicaragua).[2]

The reform has attracted the attention of institutions (such as the ICC) and experts in the field that have participated in working sessions with public authorities.[3] As discussed below, some of the rules on commercial conciliation involve: A) international nature criterion; B) party autonomy; C) nomination of conciliators; D) confidentiality; and E) enforceability.

I. Title V on Commercial Conciliation

The initiative to include a new Title V at the CC would regulate both national and international conciliations seated in Mexico. As a result, Mexico could become an important forum for ADR in Latin America.

Other jurisdictions in Asia (i.e. Vietnam) have recently promulgated similar laws based on the UNCITRAL Model Law as a step forward towards an international trend.[4]

A) International nature criterion

Following a similar approach of the UNCITRAL Model Law,[5] conciliation would be "international" if: (i) the parties have their *places of businesses* in different States; or (ii) when either the place of performance of a substantial part of the commercial obligation, or the place with which the subject matter of the dispute is most closely connected, is different from the parties' places of business.

1. Party autonomy

The proposed reform has embodied the supremacy of party autonomy as a guiding principle considering that (1) the parties would have ample freedom to opt-out or modify any statutory provision; and (2) the procedural rules would be applicable by the sole agreement of the parties as a stand-alone criteria.

The latter may resemble the French approach to international arbitration –and its potential difficulties– under which parties may choose a procedural law from a country different from the arbitral seat, under the "delocalisation" principle developed in the *Gotaverken* case.[6]

2. Nomination of conciliators

Parties would be free to nominate one or more conciliator(s). They may chose institutional rules, and/or request the assistance of institutions to appoint conciliators. The new rules would establish impartiality and independency criterion, with a system of administrative sanctions for conciliators.

Institutions assisting in the nomination may appoint conciliators of a nationality other than that of the parties whenever suitable, as envisaged by the reform. The certification of conciliators would not be mandatory, in contrast to domestic conciliations for civil and family law disputes under the ADR Law.

3. Confidentiality

All information relating to conciliation would remain confidential, unless the parties agree otherwise or disclosure is required by law. Conciliators may disclose information received from one party to the other, unless such party requests otherwise.

Parties and facilitators would be prevented to disclose any information used in conciliation proceedings to any other arbitral, judicial or administrative tribunal. This includes: (i) conciliation agreement; (ii) views as to a possible settlement; (iii) declarations or facts; (iv) proposals for solutions; and (v) declarations of either party willing to accept any solution.

However, courts in other jurisdictions have had access to the parties conduct in ADR; for example when deciding on the allocation of cost of a judicial trial. As illustrated in *Halsey v Milton Keynes*, English courts have considered that a departure of the rule that "cost follow the event" is justified when the successful party acted unreasonably in refusing to agree to ADR.[7] In that case one party made a settlement offer, but the other rejected it.[8]

B) Enforceability

For an ADR system to operate effectively, there are two equally important components that may require enforceability: (1) a Conciliation Agreement; and (2) a Settlement Agreement.

1. Conciliation Agreement

Under the draft reform, when parties agree to conciliate and "expressly" agree not to commence arbitral or judicial proceedings *vis-à-vis* the same dispute, either (1) within a certain time or (2) pending a certain event, courts and arbitral tribunals are compelled to give effect to such agreement (negative effect of the *competence-competence*).[9] By the same token, the initiation of judicial or arbitral proceedings would not be deemed as an abandonment or termination of a Conciliations Agreement.

Indeed, this rule aims to ensure that conciliation may not be obstructed by either party's refusal. However, careful attention should be given when drafting ADR clauses, as they may be subject to interpretation by domestic courts.

A supportive practice has been developed by the English Commercial Courts, under which "*reference to ADR is analogous to an agreement to arbitrate*", capable of enforcement.[10] However, a more recent decision refused ADR to avoid a delay and additional costs, being the exception rather than the rule.[11]

Furthermore, in *Health Service Executive v Keogh Software,* following the parties' application for interlocutory relief (performance and payment, respectively) an Irish Court stayed the proceedings pending the completion of ADR proceedings.[12]

2. Settlement Agreement

Settlement agreements arising from commercial conciliation would be as enforceable as final court judgments and arbitral awards having also a *res judicata* effect. However, there is no special mechanism for their enforcement before the courts.

Up until now, hardly any settlement agreement enjoys such legal force, save for those arising from conciliation before the *Federal Consumer Protection Agency* (PROFECO) and the *National Commission for the Protection and Defence of Users of Financial Services* (CONDUSEF).[13]

Beyond the domestic sphere, the European Union has advanced a Directive on Mediation, under which Member States shall establish mechanism by which agreements resulting from mediation can be rendered enforceable, unless it is contrary to the law of the Member State.[14]

II. Conclusion

One of the main challenges for the rise of ADR mechanisms is indeed a cultural one.

While some consider ADR mechanisms as an unnecessary layer, others believe they could reach the same results by themselves. Thus, some may still prefer a "winner vs.

loser" decision by an adjudicator. However, ADR mechanisms may offer wider options to find a reasonable solution for both parties.[15]

Indeed, not all disputes are suitable to conciliation, for example cases involving allegations of fraud, uncertainty in the law, or binding precedents being necessary. Although some disputes may be best resolved via ADR. For example property or commercial disputes where (i) reputation and long-term relationships are most valued; or (ii) where the remedies sought are not always available under an adversarial system (i.e. flexibility in financial repayments or continuation of the business relationship).[16]

Mexico is taking the lead in Latin America by venturing in the development of ADR, and most importantly, of international commercial conciliation including an on-line facility. A new legislation may be a step in the right direction, but not the only one needed. The right identification of disputes suitable for ADR, with adequate judicial support and the enforcement of settlement agreements, would facilitate the rise of ADR to complement both judicial and arbitral procedures.

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[1] Decree promulgated on 25 February 2017 whereby diverse provisions on ADR mechanisms were reformed and added (i.e. Articles 25 and 73, new section XXIX-A).

[2] UNCITRAL Texts & Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html

[3] Roundtable held on 31 May 2017 with the Ministry of Economy, ICC Mexico, Arbitration Centre of Mexico, Lawyer's Mexican Bar, Mexican Institute of Arbitration, etc.

[4] Nguyen Manh Dzung, 'Enforcement of Mediated Settlement Agreements in Vietnam: A Step Forward the International Trend?', Kluwer Arbitration Blog, 2 July 2017, http://kluwerarbitrationblog.com/2017 /07/02/deposition-japan-u-s-based-international-arbitration/

[5] Article 1(4)(5)(6).

[6] *General National Maritime Transport Company v Société Gotaverken Arendal A.B.*, Cour d'appel de Paris (21 February 1980) 20 ILM 884.

[7] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 (11 May 2004), §§13,16.

[8] *Id*. §20.

[9] Draft Article 1515 (10 march 2017).

[10] *Cable and Wireless* case [2002] EWHC 2059 Comm, [2002] C.L.C. 1319.

[11] *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd & Ors* [2014] EWHC 3546.

[12] *Health Service Executive v Keogh, trading as Keogh Software* [2009] IEHC 419.

[13] Article 1391(VII) of the Code of Commerce (subject to reform).

[14] Directive 2008/52/EC of The European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters (21 May 2008), Article 6, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF

[15] Antonio M. Prida, 'La Mediación como Alternativa a los Tribunales', El Semanario (7 July 2017) https://elsemanario.com/colaboradores/antonio-m-prida/212353/la-mediacion-alternativa-los-tribunales/

[16] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 (11 May 2004), §17.

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[1] Decree promulgated on 25 February 2017 whereby diverse provisions on ADR mechanisms were reformed and added (i.e. Articles 25 and 73, new section XXIX-A).
[2] UNCITRAL Texts & Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html
[3] Roundtable held on 31 May 2017 with the Ministry of Economy, ICC Mexico, Arbitration Centre of Mexico, Lawyer's Mexican Bar, Mexican Institute of Arbitration, etc.
[4] Nguyen Manh Dzung, 'Enforcement of Mediated Settlement Agreements in Vietnam: A Step Forward the International Trend?', Kluwer Arbitration Blog, 2 July 2017, http://kluwerarbitrationblog.com/2017 /07/02/deposition-japan-u-s-based-international-arbitration/
[5] Article 1(4)(5)(6).
[6] *General National Maritime Transport Company v Société Gotaverken Arendal A.B.*, Cour d'appel de Paris (21 February 1980) 20 ILM 884.
↑1 [7] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 (11 May 2004), §§13,16.
[8] *Id*. §20.
[9] Draft Article 1515 (10 march 2017).
[10] *Cable and Wireless* case [2002] EWHC 2059 Comm, [2002] C.L.C. 1319.
[11] *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd & Ors* [2014] EWHC 3546.
[12] *Health Service Executive v Keogh, trading as Keogh Software* [2009] IEHC 419.
[13] Article 1391(VII) of the Code of Commerce (subject to reform).
[14] Directive 2008/52/EC of The European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters (21 May 2008), Article 6, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF
[15] Antonio M. Prida, 'La Mediación como Alternativa a los Tribunales', El Semanario (7 July 2017) https://elsemanario.com/colaboradores/antonio-m-prida/212353/la-mediacion-alternativa-los-tribunales/
[16] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 (11 May 2004), §17.

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