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Winter January, 2017

Alternative dispute resolution as a tool to overcome access to justice impediments and institutional dysfunction in Mexico

Edgardo Muñoz

Available at: https://works.bepress.com/edgardo_munoz/24/

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YEAR 6 | Ed. 24

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YOUNG ARBITRATION REVIEW

EDITION 24 • JANUARY 2017

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Annual subscription: € 200

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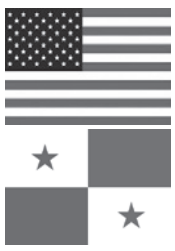
FOREWORD

By John Fellas and Rebeca E. Mosquera



To be great, be whole; exclude
Nothing, exaggerate nothing that is you.
Be whole in everything. Put all you are
Into the smallest thing you do.
The whole moon gleams in every pool,
It rides so high.
Ricardo Reis (Fernando Pessoa) (1933)

In the West of mainland Europe, facing the Atlantic Ocean, there is a city of pearly sidewalks, breathtaking architecture that is both rich in history and culture. The city is the capital of a country that was one of the first global empires — with bold pioneers who dared to cross dangerous seas for the sake of exploration, to reach places far from and beyond what the eye could see. During these navigations, these dauntless people accumulated a wealth of knowledge about new routes, adventure and the navigation of treacherous waters.

The city is Lisbon. The country is Portugal, – or *Portus Cale* from the Latinized version for "Port of Cale." Lisbon has one of the most vibrant international arbitration communities, with some of the most distinguished international arbitration practitioners from Portugal. When one of the founders and directors of Young Arbitration Review (YAR) asked that we write the foreword to the 24th edition of the YAR, we were both honored and humbled, because this journal is a testament to that pioneering, daring, and bold gene that characterizes this community. Whether you practice investment or commercial international arbitration in Europe, Asia, Africa or the Americas, this is a wonderful journal.

First, this publication is **unique**. It is the first under-40 Portuguese international arbitration review; it has opened unexplored paths to new generations of arbitration practitioners in Portugal and beyond. Its main goal is to inform the vast arbitration community of new developments in alternative dispute resolution, not only in Portugal, but across the world.

Second, this journal is **thorough**. Just like Fernando Pessoa stated in his Odes, "[t]o be great, be whole … in everything … you do …" and YAR has, and continues to, live up to the challenge. The last editions covered an array of hot topics in international arbitration: investment arbitration and guidelines to *third-party funding*, the duties of *independence and impartiality*

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ALTERNATIVE DISPUTE RESOLUTION AS A TOOL TO OVERCOME ACCESS TO JUSTICE IMPEDIMENTS AND INSTITUTIONAL DYSFUNCTION IN MEXICO

By Edgardo Muñoz[1]

I. Introduction

In recent years, Mexico has undergone a series of legal reforms purported to address the internal deficiencies of its judicial system. Along these reforms, the States and the Federation have enacted new laws that create Alternative Dispute Resolution ("ADR") centers for the resolution of civil and business complaints.

In line with other international examples, ADR mechanisms are helping to overcome the obstacles to access justice in Mexico. ADR has provided Mexico with a venue for conflict settlement that is free from the institutional dysfunction that characterizes its judicial system. Some of the ADR centers administered by State courts have reported remarkable results in the resolution of family disputes and small civil claims. However, there is still important progress to be made. Mexico's legal and the business community do not always promote or believe in this alternative system. This leaves many medium and big claims out of the realm of ADR.

In section II, we revisit some of the widely known obstacles to access justice and institutional dysfunctions of Mexico's judicial system. Section III discusses the most important efforts made by the government and private institutions in order to address Mexico's delicate situation in terms of access to justice and its low quality judiciary. Section IV provides a brief account and further prediction of the benefits that ADR promises to provide with to Mexican and foreign parties. Section V reflects the author's opinion about the work that still needs to be done to increase the use of ADR beyond the State courts' alternative justice centers.

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II. Obstacles to access Justice and Institutional Dysfunctions of Mexico's Judicial System

It is no news that Mexico's judicial system has been struggling to reach the level of fairness and efficiency attained by other developed nations. Mexican courts are still overloaded of cases and understaffed, which characterizes México as a low-quality judiciary country.[2] The issuance of Court decisions takes quite some time, and after a decision is delivered to the parties, it is inevitably subject to a number of money and time-consuming appeals,[3] which are based on procedural flaws or constitutional infringements not always grounded.[4] As a country with lengthy judicial proceedings, justice in México is less accessible than in other countries with similar economic characteristics.[5]

The structural deficiencies of Mexico's judicial system of justice are coupled with a grounded distrust of its citizens towards State courts.[6] It has been reported that Mexico ranks among the top 5 OECD countries whose population perceives its government as highly corrupt, only below Russia, Venezuela and Paraguay.[7] While this is partially due to the inefficiency of the criminal system of justice that prosecutes few crimes,[8] civil and commercial proceedings, mainly at first instance courts, are also affected by corruption or negligent practices. In terms of Civil Justice, which regards how much a justice system is accessible and affordable, free of discrimination, corruption and improper influence by public officials, Mexico ranks 82 out of 102 countries in the World Justice Project's Rule of Law Index 2015.[9]

Corruption at the lower levels of justice creates important barriers to access to justice.[10] This specifically affects Mexico because before a matter reaches an appeal level court, parties in Mexican courts often have undue dealings with the first instance judge or his/her administrative staff.[11] As it has been point out, citizens that have experienced unjust outcomes from the justice system may choose not to rely upon formal legal procedures for the solution of their justice problems.[12]

Overall, there is considerable space for improving the quality of Mexico's judiciary. Despite the recent legislative efforts to overcome the situation, adherence to the rule of law in Mexico is still one of the weakest in OECD countries.[13] Mexico's low-quality judiciary for civil or business claims makes contract enforcement problematic. This has a direct impact in the economy of the country and the way of doing business in Mexico. It was been reported that a weak judiciary reduces the size of companies and their capital intensity, thus decreasing aggregate productivity in the whole country substantially[14]. It causes economic and social instability that puts pressure on low-income communities to find work outside Mexico, most often in countries with stronger currencies like the Untied States.[15]

III. Efforts made to overcome the current situation

In order to overcome the above obstacles to access justice, Mexico has endeavored to strengthen its judicial institutions in order to enforce law and adjudicate disputes in a fair and effective manner. With that in mind, in 2008 the Mexican Constitution was reformed in order to make the criminal trials faster with an adversarial oral system,[16] which is reported has reduced the average time of proceedings from 343 days to 132 days.[17] To this date, the new oral criminal judicial system fully operates in 9 out of 31 States for State law offences, and in 28 out of 31 States for Federal law offences.[18]

With regard to business law proceedings,[19] in 2012 amendments to Mexico's Code of Commerce establish the use of oral trials for claims below MXN 539,756.58 which is also forecasted to save time and money up to 50% in the resolution of business disputes.[20] Until now, twenty six Federal District Courts carry out oral trials for business claims, while four States offer them for civil claims.[21]

In 2013 a different reform to Mexico's *Amparo* Act was passed to limit amparo petitions which in the past allowed parties to suspend the government's and courts' legitimate actions while decisions were under appeal.[22] Following this change, Courts may give more consideration to the legitimacy of a constitutional complaint and the negative effects of a suspension of the courts' or the government's decisions.[23]

But efforts have not been made only to redress the internal deficiencies of Mexico's judicial system. Following article 17 of Mexico's Constitution, States and the Federal governments have enacted ADR laws to help State courts in the adjudication of disputes.[24] Since the turn of the new century, almost all State courts and State-level government agencies have created court-annexed mediation and conciliation centers for the resolution of civil claims.[25] These centers are usually called "alternative dispute centers" or "mediation" centers. They offer mediation and conciliation (but not arbitration). Their services are for both, parties in litigation proceedings who are referred by the State courts to mediate or conciliate and also for parties who agree from the outset to conciliate or mediate their disputes in the State sponsored ADR centers.[26] The settlements reached in mediation or conciliation proceedings at public or private ADR centers, are enforceable as a judicial decision would be.[27]

Private institutions and chambers of commerce, such as CANACO,[28] the Mexico City Arbitration Center and International Chamber of Commerce in Paris have also widely promote and administer private mediation, conciliation and arbitration proceedings in Mexico.[29] However, private mediation and conciliation proceedings are still few when compared with the numbers of mediation cases administrated by the States' centers.[30] On the other hand, international investment and commercial arbitration have flourished in the past two decades, while the number of domestic arbitration remains low.

The Mexican Arbitration Law dates from 1993 and is found in articles 1415 – 1480 of Mexico's code of commerce. The Mexican Arbitration Law incorporates the 1985 version of the UNCITRAL Model Law on International Commercial Arbitration in full, with few modifications and adaptations made in 2011, which were deemed necessary to fit with the Mexican procedural law matters of judicial assistance to arbitration.[31] Mexico is also a Contracting State of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

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of 1958 and the Inter-American Convention on Commercial Arbitration of 1975.

IV. Benefits expected from ADR

As research points out, promotion and recourse to ADR is increasingly identified as a principal strategy in reducing obstacles to access justice.[32] In particular, government legal recognition and private parties' use of ADR methods are among the policies and strategies that address institutional judicial dysfunction.[33]

As further developed in the next subsections, ADR provides a potential venue for conflict settlement that is free from the institutional dysfunction in low-quality judicial systems characterized by under-staffed and over-loaded courts, corruption and lengthy proceedings, and thus constitutes a tool to overcome Mexico's barriers to access justice.

In Mexico, ADR may be used in disputes over rights that a person may freely dispose of such as contractual or tort law rights and obligations. Pursuant to article 6 of Mexico's Federal Civil Code ("FCC"), people may waive their private rights when such does not affect directly the public order or third parties' rights.[34] This principle is the basis of articles 2946-2951 Mexico FCC that list the matters that shall not be resolved by settlement such as divorce,[35] disputes over incapacitated persons' or minors' rights, except where settlement is in their interest with prior judicial authorization,[36] tort liability arising from crimes,[37] the legal status of people and the validity of marriage agreements,[38] future claims based on crime, fraud or intentional harm,[39] the right to alimony,[40] future inheritance rights,[41] inheritance rights before a last testament or will is disclosed.[42]. Rights that traditionally have been considered as inalienable by private parties are also excluded from the realm of ADR. These may include matters such as parental custody, adoption, political rights, employment disputes over salaries, leave and pensions, tax disputes against the State, the absolute right to inheritance by minors, widows etc., despite any testament or will stipulation to the contrary.[43] In addition, article 1415 Mexico's code of commerce provides that all matters are susceptible to be solved by arbitration unless other laws stipulate the contrary or provide for special procedures [44]

Additionally, ADR has been promoted for new areas of business such as oil exploration. For example, articles 106 (II) and 107 of the 2014 Hydrocarbons Act establishes that assignees or contractors may request that the Ministry of Agricultural, Land and Urban Development conduct a mediation proceedings which focuses on forms or strategies of acquisition, use, enjoyment, and impact on land, property or rights, as well as the appropriate compensation the sale and purchase of such rights or property.[45]

a. Mediation and conciliation

Mediation is an ADR mechanisms whereby a third party called mediator leads the discussions between the disputing parties so they can reach a solution to their dispute. At the end of the process, the parties may sign a settlement which can be later on enforced as judgment. [46] In Mexico, scholars understand that the mediator cannot propose any solutions to the parties but that his or her role is limited to helping the parties to communicate.[47]

On the other hand, conciliation mirrors the technics and process of mediation but with elements that distinguishes from the latter. Besides listening to the conflicted parties and helping as a channel of communications among them, the conciliator proposes a non-binding solution to the parties.[48] The proposal is not binding on the parties but a simple recommendation that can eventually be accepted by the parties and incorporated into a settlement agreement that is enforceable as a judicial judgment.[49]

Mediation and conciliation are mechanisms highly appreciated by parties as they allow them to directly communicate with the mediator and conciliator who will be behind the solution eventually reached by them. In State courts adjudication, the parties do not get to meet or talk to the judge. Until recently, neither lawyers would have direct access to the judge.[50] The possibility that mediation and conciliation gives the parties to tailor the solution that puts an end to their disputes has an important sociological and psychological element that brings satisfaction about the process and the result.[51] Since parties are the architects of their settlement, corruption by adjudicators as a barrier to access justice is overcome.

In view of the fact that mediation and conciliation both favor finding the solution of a problem over determining which party is right as is the case in strict litigation in courts or arbitration, the parties are in most instances willing to continue an amicable or business relationship with their opposing party.[52] The adversarial nature of litigation or arbitration proceedings who often dissuades Mexican parties to sue, is eliminated.

Despite the fact that mediators and conciliators probably allocated much more time to solve a single dispute than a judge, mediation and conciliation processes are cheaper and faster than most court proceedings.[53] Parties are therefore able to turn the page on that matter faster and continue businesses or lives as usual.

b. Arbitration

Arbitration constitutes an alternative to adjudication in State courts whereby the parties to a legal relationship agree that any existing or future dispute between them be finally decided by an independent panel in accordance with the rules of an arbitration institution or under ad-hoc rules.[54]

One of the main advantages of arbitration is that proceedings substantially take less time than litigation.[55] This benefit is especially appealing to parties in business disputes. A business purpose could be completely lost if a dispute were to last for years in litigation. Arbitral proceedings are put to an end by the issuance of an arbitral award, which is final and binding up on the parties.[56] This feature of the award has a direct impact on the time that is invested in the resolution of a dispute simply because it is not subject to any appeal mechanisms.[57] Furthermore, arbitral tribunals do not depend on the courts' calendar. Arbitration meetings are easily coordinated and the dispute is solved in a considerably faster fashion.[58]

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Moreover, most litigation in State courts follows a very formalistic approach in the conduct of the proceedings. This results in formalities that are often given higher importance than the substance of the dispute. Arbitration proceedings are tailored to meet the specific requirements of the parties.[59] This benefit can be particularly valued by all parties but in particular for businesses. Most business deals are made in the spot and under flexible rules on contract formation. In this regard, business parties prefer flexibility in their dispute resolution mechanism as well.

Many disputes arising out of businesses can be complex. State judges may lack the expertise needed in a dispute of this particular kind. An arbitration panel versed in the specificities of modern business law and practice is thus advisable. Parties can appoint arbitrators that are qualified for the dispute at stake, select the rules under which the proceedings shall be carried out, determine which law will be applicable to the substantive issues of the dispute, among other things.[60] If an arbitral tribunal is experienced enough, it should be able to grasp the decisive issues of fact and law in the dispute and adapt the procedure in order to ensure that such issues are properly dealt with.[61]

Moreover, parties to disputes will also value the personalized and high-end service performed by most arbitral tribunals. As opposed to State courts, arbitrators are appointed to handle one specific case from the beginning to the end. Accordingly, arbitrators get to know the parties and their counsel better than State judges do. Most importantly, as the case develops through the documents filed by the parties, the pleadings, the taking of evidence, etc., arbitral tribunals perform a thorough analysis of the case and get a proper understanding of it.[62] As a result, arbitral tribunals are fully qualified to issue sensible awards that will be suitable for the dispute at hand.

In addition, arbitration offers a private means of resolving legal controversies. This, in principle, makes arbitration confidential to the outside world.[63] While parties to all kinds of contracts appreciate the privacy and confidentiality that surrounds the arbitral proceedings, parties in business relationship particularly value this feature. This holds true since public mechanisms of dispute resolution can damage a business reputation. Likewise, business parties may have an interest in protecting valuable information such as trade secrets, ownership of assets, credit-lines, competitive practices or any delicate detail that could be subject to adverse publicity.[64] On the other hand, many ordinary civil disputes will probably appreciate that the dispute is kept private. Family disputes are by nature private matters where all parties seek for discretion. In State courts, issues that may be embarrassing to the parties are publically discussed during the probate process.[65]

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V. What is missing?

Against the above background, most observers would bet that ADR mechanisms have a promising future in Mexico. ADR mechanisms are helping to overcome the obstacles to access justice in Mexico. However, there is still important progress to be made. In the past, some have argued that Mexico government's control and management of alternative dispute resolution centers for labor disputes has undermined the success of and confidence in the ADR mechanisms in Mexico.[66] Indeed, the vicious cycle at the origin of the institutional dysfunction of Mexico's judicial legal system often permeates many of the projects controlled, administered or sponsored by the State.

But the government alone should not be blame for the slow pace at which the use of ADR mechanisms augments in Mexico. Many legal practitioners in the country still endorse a legal culture that encourages litigation and disfavors ADR.[67] The business community has also failed to see the advantages of ADR.[68]

Domestic arbitration remains small when compared to the big amount of international arbitration cases with seat in Mexico or involving Mexican parties. One can wonder about the reasons why domestic arbitration matters are still much less than the international ones: the cost of arbitration proceedings (in a country where litigation before State courts is "free"), the deep-rooted court litigation culture, the lawyers' unsound suspicion about the one-instance process offered by arbitration, insufficient education and training on arbitration, etc.[69]

In the case of commercial arbitration however, these assumptions should not be valid. The business lawyers' community in México is a sophisticated one. Many lawyers are usually members of middle size or big law firms accustomed to deal with complex contractual, financial and corporate matters. Price of arbitration proceedings is not therefore a concerned. In the same line of thought, the one instance nature of arbitration will always make sense for business who allocated more value to financial and legal cost predictability.

The ultimate answer may lie on the fact that little has been taught about the specific advantages offered by arbitration and other ADR for the business community.

VI. Conclusion

Promotion and use of ADR is one of the various public policies that the Government of Mexico is currently attempting to apply to tackle the current barriers to access justice that are mainly due to the institutional dysfunction of its judicial system. ADR mechanisms offer parties the possibility to obtain a solution to their dispute that is enforceable in considerable less time than in traditional State court proceedings. Even arbitration is by far faster than litigation in light of its one instance nature of arbitral proceedings without the possibility to appeal an award.[70] The speediness of ADR allows parties to access justice without having to bear the high legal cost and uncertainty of lengthy court proceedings.

In lieu of fearing that the judge may be unduly influenced or bribed by the opposing party, mediation and conciliation offers the parties a mechanism to be authors of the solution to its dispute, which leaves in the parties a feeling of satisfaction about the outcome of the proceedings and that overcomes the obstacle of distrust in a judicial system impose on parties seeking to access justice. Also in arbitration, where a fair decision making process requires awards to be made by a majority of the arbitrators or by a sole arbitrator chosen between the parties or appointed by an institution, corruption is not an issue.

In addition, flexibility is key for obtaining the high-quality level proceedings offered by ADR methods. Parties may not only choose the most appropriate method according to the nature of the issue and the peculiarities of its dispute, *i.e.* mediation, conciliation or arbitration, it also offers the possibility to tailor made their proceedings by agreeing on certain rules, choosing the right mediator, conciliator or arbitrators for their dispute, etc. Likewise, the settlements or solutions that can be achieved through mediation, conciliation or *ex aequo et bono* arbitration are not limited to the catalogue of legal remedies provided by the otherwise applicable law. Parties may arrive, conciliators may propose and e*x aequo et bono* arbitrators may render a wide variety of solutions not limited by law that may increase the chances of having an amicable and satisfactory solution to the conflict.

Likewise, the public nature of State courts adjudication exacerbates adversarial and inflexible positions. Usually, parties in dispute will not make concessions that it the eyes of the public or even the adjudicating judge could look like weakness. Some parties may also get injured by the public exposure of their dispute. ADR allows more control over confidentiality. This can be an important factor to take into account in sensitive areas such as intellectual property, delicate business transactions or family matters.

Finally, this chapter has intended to furnish a brief analysis about the benefits of ADR to overcome barriers to access justice and institutional dysfunction in Mexico. However, additional discussion and promotion is necessary in Mexico in order to make ADR an effective tool to tackle those problems. Empirical research about the perception and use of ADR among the general public may be still needed. The results of such empirical research would clear out any wrong assumptions regarding the effectiveness of ADR as tool overcome Mexico´s obstacles to access justice and its judicial system's institutional dysfunction.

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Bibliography

OECD, Economic Surveys - Mexico (OECD ed., January 2015).
World Justice Project, Rule of Law Index (2015).
OECD, Judicial performance and its determinants: a cross-country perspective - A Going for Growth Report (OECD June 2013).
Miguel Carbonell, *Corrupción judicial e impunidad: el caso de México*, *in* Lo que todos sabemos sobre la corrupción y algo más (Ricardo Méndez-Silva ed. 2010).
Mariana Hernandez-Crespo, *A systemic perspective of ADR in Latin America: enhancing the shadow of the law through citizen participation*, 10 Cardozo Journal of Dispute Resolution 91(2008).
Julinda Beqiraj & Lawrence McNamara, International Access to Justice: Barriers and Solutions (International Bar Association ed., October 2014).
Gustavo Castillo-García, *Acumula secretario de juzgado más de $432 millones en siete años*, La Jornada, 28 May 2011.
Óscar Vázquez-Marín, *La Implementación De Los Juicios Orales En El Sistema De Justicia Penal Mexicano: ¿Qué Sigue Después De La Reforma Constitucional?*, Revista Mexicana de Justicia (2008).
Secretaría de Economía, et al., Diagnóstico de Cumplimiento de Contratos (2014).
Benjamin Rubio, *Reflexiones en torno a la suspensión del acto reclamado en la nueva Ley de Amparo*(September 2015), *available at* http://revistajurista.com/reflexiones-en-torno-a-la-suspension-del-acto-reclamado-en-la-nueva-ley-de-amparo/.
Rosalía Buenrostro Báez, Justicia Alternativa y el Sistema Acusatorio (Secretaría Técnica Del Consejo De Coordinación Para La Implementación Del Sistema De Justicia Penal 2014).
Nuria González-Martín, *El ABC de la mediación en México (Capítulo X)*, *in* Temas Selectos de Derecho Internacional Privado y de Derechos Humanos. Estudios En Homenaje A Sonia Rodríguez Jiménez (Juan Vega ed. 2014).
IBA Arbitration Committee International Bar Association, Arbitration Guide - Mexico (Claus Von- Wobeser ed., 2013).
Nuria Gonzalez Martin, *Mexico and Civil, Family and Commercial Mediation: A Search for Complementary Routes to the State Courts*, *in* New Developments in Civil and Commercial Mediation: Global Comparative Perspectives (C.E. Mota & L. Marquis eds., 2015).
Francisco Gonzalez-De-Cossio, *Amendments to the Mexican Arbitration Statute*, 1 International Commercial Arbitration Brief (2011).
Jean Francois Poudret & Sebastien Besson, Comparative Law of International Arbitration (Thomson 2nd ed. 2007).
Alan Redfern, et al., Redfern and Hunter on International Arbitration (Oxford University Press Fifth ed. 2009).
Gerardo J. Bosques-Hernández, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, Revista para el Análisis del Derecho (INDRET) (2008).
Julian D. M. Lew, et al., Comparative International Commercial Arbitration (Kluwer Law International. 2003).
Brown Scott, et al., Alternative Dispute Resolution Practitioners Guide (Conflict Management Group ed., Conflict Management Group 1998).
Carlos Rodriguez-Gonzalez-Valadez, ADR At The International Oil & Gas Industry - The Pemex Case (A Legal And Socio-Legal Analysis) (2012) Università degli Studi di Milano).

Endnotes

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2 Cf. OECD, Economic Surveys - Mexico 22, para. 32 (OECD ed., January 2015). document available at http://www.oecd.org/eco/surveys/Mexico-Overview-2015.pdf. Also see World Justice Project, Rule of Law Index 30 (2015). document available at http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf: Mexico ranks 82 out of 102 countries in Factor 7: Civil Justice of the World Justice Project's Rule of Law Index 2015 which examines whether court proceedings are conducted without unreasonable delays, and if decisions are enforced effectively. It also measures the accessibility, impartiality, and effectiveness of alternative dispute resolution mechanisms.
3 In the OECD area, the average length of civil proceedings is around 240 days in first instance, but in countries like Mexico it takes 342 days to be resolved. Final disposition of cases may involve a long process of appeal before the higher courts, which in some cases can average more than 7 years. Cf. OECD, Judicial performance and its determinants: a cross-country perspective - A Going for Growth Report 38 (OECD June 2013). Document available at http://www.oecd.org/eco/growth/FINAL%20Civil%20Justice%20Policy%20Paper.pdf
4 Cf. OECD, Economic Surveys - Mexico 33, para. 23. January 2015.
5 Cf. OECD, Judicial performance and its determinants: a cross-country perspective - A Going for Growth Report 13. June 2013.
6 Miguel Carbonell, *Corrupción judicial e impunidad: el caso de México*, *in* Lo que todos sabemos sobre la corrupción y algo más 4, 5, (Ricardo Méndez-Silva ed. 2010). stating than in 2010 surveys reported that only 10 per cent of the population had trust in Mexico's Supreme Court that enjoys more reputation than lower courts. Mariana Hernandez-Crespo, *A systemic perspective of ADR in Latin America: enhancing the shadow of the law through citizen participation*, 10 Cardozo Journal of Dispute Resolution 91, 98, fn 22 (2008).
7 Cf. OECD, Economic Surveys - Mexico 23, para. 24, Figure 11. January 2015.
8 Mexico ranks 93 out of 102 in the Factor 8 Criminal Justice of the World Justice Project's Rule of Law Index 2015 which measures whether the criminal investigation, adjudication, and correctional systems are effective, and whether the criminal justice system is impartial, free of corruption, free of improper influence, and protective of due process and the rights of the accused. Cf. Project, Rule of Law Index 30. 2015.
9 Cf. Id. at.
10 Julinda Beqiraj & Lawrence McNamara, International Access to Justice: Barriers and Solutions 29 (International Bar Association ed., October 2014).
11 There are numerous examples of corruption practices by Court clerks and other admistrative staff. In one occasion one court clerk was investigated for holding around USD 30 million on its bank account, Cf. Gustavo Castillo-García, *Acumula secretario de juzgado más de $432 millones en siete años*, La Jornada, 28 May 2011.
12 Beqiraj & McNamara, International Access to Justice: Barriers and Solutions 29. October 2014.
13 Cf. OECD, Economic Surveys - Mexico 22. January 2015.
14 Cf. Id. at, 22, para. 31.
15 Hernandez-Crespo, Cardozo Journal of Dispute Resolution, 102, 103 (2008).
16 This reform was published on 18 June 2008 in the Official Gazette. The changes concerned articles 16, 17, 18, 19, 20, 21, 22, 73 (XXI) (XXIII), 115 and 123 (XIII) of the Mexican Constitution. Cf. Generally, Óscar Vázquez-Marín, *La Implementación De Los Juicios Orales En El Sistema De Justicia Penal Mexicano: ¿Qué Sigue Después De La Reforma Constitucional?*, Revista Mexicana de Justicia (2008). available at http://www.juridicas.unam.mx/publica/rev/refjud/cont/12/rjf/rjf10.htm
17 Cf. OECD, Economic Surveys - Mexico 22, para. 32. January 2015.
18 Cf. The status presented by Mexico's government branch on May 13, 2016 available at http://www.setec.gob.mx/es/SETEC/Mapa_de_Gradualidad
19 Mexico still makes a distinction between business transactions (mercantiles) and personal (civil) transactions. The former are governed by the code of commerce, while the latter are governed by the civil code and the code of civil proceedings. Generally, a business transaction pursues a goal of economic speculation or a profit purpose (cf. Arts. 75 (XIV), (XXIV) Mexico Code of Commerce), which does not need to be expressed in the contract but which is rather assessed on a case by case basis.
20 Cf. Secretaría de Economía, et al., Diagnóstico de Cumplimiento de Contratos Resumen Ejecutivo (2014). based on oral trials implemented in Mexico City, document available at http://www.cofemer.gob.mx/imagenesUpload/20156231349Diagn%C3%B3stico%20Cumplimiento%20de%20Contratos%20DF.pdf
21 OECD, Economic Surveys - Mexico 23, para.33. January 2015.
22 Published in Mexico's Official Gazette on 2 April 2013 and last change on 14 July 2014. Cf. Complete text available at http://www.diputados.gob.mx/LeyesBiblio/pdf/LAmp_181215.pdf
23 Cf. Benjamin Rubio, *Reflexiones en torno a la suspensión del acto reclamado en la nueva Ley de Amparo*(September 2015), *available at* http://revistajurista.com/reflexiones-en-torno-a-la-suspension-del-acto-reclamado-en-la-nueva-ley-de-amparo/.
24 Since 2008, article 17 of Mexico Constitution requires the States and the Federation to legislate on alternative dispute resolution. Twenty Five Mexican States have enacted ADR laws to adjudicate civil disputes. Cf. Rosalía Buenrostro Báez, Justicia Alternativa y el Sistema Acusatorio 230 (Secretaría

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Técnica Del Consejo De Coordinación Para La Implementación Del Sistema De Justicia Penal 2014)., document available at http://setecc.egobierno.gob.mx/files/2013/03/Justicia-alternativa-y-el-sistema-acusatorio.-Buenrostro-Baez-Pesqueira-Leal-Soto-Lamadrid.pdf

25 Id. at, 210.

26 Nuria González-Martín, *El ABC de la mediación en México (Capítulo X)*, *in* Temas Selectos de Derecho Internacional Privado y de Derechos Humanos. Estudios En Homenaje A Sonia Rodríguez Jiménez 229, 232, (Juan Vega ed. 2014).

27 Id. at, 217, 218, 236. available at http://biblio.juridicas.unam.mx/libros/8/3647/15.pdf

28 CANACO stands for Mexico's National Chamber of Commerce with offices in the main business centers of the country.

29 IBA Arbitration Committee International Bar Association, Arbitration Guide - Mexico 1 (Claus Von- Wobeser ed., 2013). available at http://www.ibanet.org/Document/Default.aspx?DocumentUid=8A7876EB-EBB9-4D5F-B073-24618471E911

30 Nuria Gonzalez Martin, *Mexico and Civil, Family and Commercial Mediation: A Search for Complementary Routes to the State Courts*, *in* New Developments in Civil and Commercial Mediation: Global Comparative Perspectives 483, 484, (C.E. Mota & L. Marquis eds., 2015). reporting that the Mexico City's Alternative Dispute Resolution Centre controlled by the Superior Tribunal had 2013 6,812 meditations ended in an enforceable settlement.

31 Francisco Gonzalez-De-Cossio, *Amendments to the Mexican Arbitration Statute*, 1 International Commercial Arbitration Brief, 1, 2 (2011).

32 Beqiraj & McNamara, International Access to Justice: Barriers and Solutions 6. October 2014.

33 Id. at, 22, 27.

34 The authors' translation. The original in Spanish reads: "La voluntad de los particulares no puede eximir de la observancia de la ley, ni alterarla o modificarla. Sólo pueden renunciarse los derechos privados que no afecten directamente al interés público, cuando la renuncia no perjudique derechos de tercero".

35 In particular, the jurisdiction to decide a divorce is not arbitrable. However, the decision as to the quantum of alimony or allowance due by a former spouse may be arbitrable.

36 Art. 2946 FCC Mexico.

37 Art. 2947 FCC Mexico.

38 Art. 2948 FCC Mexico.

39 Art. 2950 (I) (II) FCC Mexico.

40 Art. 2950 (V) FCC Mexico. However, the determination of the amount of alimony may be arbitrable according to the Art. 2949 FCC Mexico.

41 Art. 2950 (III) FCC Mexico.

42 Art. 2950 (IV) FCC Mexico.

43 Arts. 1368 and 1372 FCC Mexico.

44 Art. 1415 Mexico Code of Commerce reads Mexican arbitration law applies "unless […] other acts provide for a different procedure or that certain disputes are not arbitrable".

45 The Mexican Hydrocarbons Act of 2014 available at http://www.diputados.gob.mx/LeyesBiblio/pdf/LHidro_110814.pdf

46 González-Martín, El ABC de la mediación en México (Capítulo X) 217, 218, 236. 2014.

47 Báez, Justicia Alternativa y el Sistema Acusatorio 60, 61. 2014. González-Martín, El ABC de la mediación en México (Capítulo X) 215. 2014.

48 Báez, Justicia Alternativa y el Sistema Acusatorio 46, 47. 2014.

49 González-Martín, El ABC de la mediación en México (Capítulo X) 217, 218, 236. 2014.

50 In Mexico the usual practice is to talk to the court clerks about the proceedings not to the judge.

51 Báez, Justicia Alternativa y el Sistema Acusatorio 56, 57. 2014.

52 González-Martín, El ABC de la mediación en México (Capítulo X) 216. 2014.

53 Id. at, 223.

54 Jean Francois Poudret & Sebastien Besson, Comparative Law of International Arbitration 1-3 (Thomson 2nd ed. 2007).

55 It has been reported that arbitration proceedings in Mexico normally last a year, plus the enforcement stage. Cf. International Bar Association, Arbitration Guide - Mexico 2, 21. 2013.

56 Poudret & Besson, Comparative Law of International Arbitration 631. 2007.

57 Alan Redfern, et al., Redfern and Hunter on International Arbitration 34 (Oxford University Press Fifth ed. 2009).: "Although the initial cost is not likely to be less than that of proceedings in court, the award of the arbitrators is unlikely to be followed by a series of costly appeals to superior local courts."

58 Gerardo J. Bosques-Hernández, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, Revista para el Análisis del Derecho (INDRET), 8 (2008).

59 Julian D. M. Lew, et al., Comparative International Commercial Arbitration 522 (Kluwer Law International. 2003).

60 Id. at, 4.

61 Redfern, et al., Redfern and Hunter on International Arbitration 32. 2009.

62 Id. at, 33.

63 Lew, et al., Comparative International Commercial Arbitration 8. 2003.

64 Redfern, et al., Redfern and Hunter on International Arbitration 32. 2009.

65 Bosques-Hernández, Revista para el Análisis del Derecho (INDRET), 5 (2008).

66 Brown Scott, et al., Alternative Dispute Resolution Practitioners Guide 38 (Conflict Management Group ed., Conflict Management Group 1998). document available at https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf

67 Carlos Rodriguez-Gonzalez-Valadez, ADR At The International Oil & Gas Industry - The Pemex Case (A Legal And Socio-Legal Analysis) (2012) Università degli Studi di Milano). PHD thesis available at https://air.unimi.it/retrieve/handle/2434/214753/241550/phd_unimi_R07956.pdf

68 Id. at, 280, 281., reporting that big State companies like PEMEX do not have a positive view about ADR.

69 Id. at, 311, 312.

70 However, parties may start setting aside proceedings under the limited grounds set out in Arts. 1457 and 1462 CCom Mexico, which includes evidence of lack of arbitration agreement among the parties, non arbitrability of the claims at stake, incapacity of one of the parties to submit to arbitration, improper constitution of the arbitral tribunal, ultra petita or infra petita decisions, failure to provide proper notice of the proceedings infringement of public policy and application of mandatory rules.

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