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The "humanrightsizing"of arbitration under the Mexican Constitution

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I. Introduction

In the 80´s, the question of the interaction of human rights and arbitration arose out of the case law of the European Court of Human Rights in regard to the question if an arbitral panel was an "independent and impartial tribunal" under article 6 of the European Convention of Human Rights and hence mandated to apply its provisions, especially those concerning due process. Today there is no doubt that the answer is affirmative.[1]However, never was there any suggestion that the right to arbitration was in itself a Human Right.

This might have changed in Mexico with the constitutional reform of 2008,[2] which sets forth:

> […]The laws shall provide alternative mechanisms to resolve controversies. Regarding to criminal matter, the laws shall regulate application of such mechanisms, ensure redress and establish the cases in which judicial supervision is required[…]."[3]

The quoted amendment is to be read with the 2011 reform of the Constitution[4] that establishes:

[1] *Case of RegentCompany c/Ukraine*, *Rev. arb.* 2009.797; Alessandra CambiFavre-Bulle et al., *L'arbitrage et la Conventioneuropéenne des droits de l'Homme*, Bruylant, 2001; Lambert, *L'arbitrage et la conventioneuropéenne des droits de l'homme*, Anthemis, 2001.

[2]*Diario Oficial de la Federación*, 18/6/2008.
[3]Art. 17 of theConstitution.

> In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties to which the Mexican State is a party, as well as to the guarantees for the protection of these rights, which exercise shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.
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> The provisions relating to human rights shall be interpreted according to this Constitution and the related international treaties, giving the persons the greatest possible protection at all times.
>
> All authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee the human rights, in accordance with the principles of universality, interdependence, indivisibility and progressiveness. As a consequence, the State must prevent, investigate, penalize and redress violations to the human rights, according to the law[…]."[5]

Before analyzing the meaning of the all above-mentioned, it is important to explain some antecedents, in order to understand the why of the 2008 reform and its consequent interpretation in the light of the 2011 reform.

Since its implementation, the arbitration legislation based on the UNCITRAL Model Law has been qualified by many Mexican lawyers as unconstitutional.[6] Basically, it has sustained that arbitral panels are state-wise tribunals that violate the principle of legality. In a dispute set forth[7], claimant invoked the Federal Code of Civil Proceedings to allege that according to Mexican procedural rules, the judge [or the arbitrator] must adhere to the text of the law and only has those powers that such law establishes. Therefore, to give an arbitral tribunal total discretional powers regarding the evaluation of evidence had to be declared unconstitutional. In response, the Supreme Court ruled that an arbitral tribunal does not have an absolute discretion since its actions are governed by Article 1435 of the Commercial Code, corresponding to article 19 of the Model Law, which provides that:

[4] *Diario Oficial de la Federación*,10/6/2011.
[5] Art. 1 of theConstitution.
[6] SeePereznieto& Graham, *Tratado de Arbitraje Comercial Internacional Mexicano*, 2nd ed., Limusa, Google Book, 2013, # 33 sq.
[7] Amparo en Revisión 759/2003.

> "if no stipulation was made, the Arbitral Tribunal may, subject to the provisions of this Title [Title Four of Book Five of the Commerce Code], direct the arbitration in the manner it considers appropriate. This power conferred to the Arbitral Tribunal includes that of determining the admissibility, relevance and value of the evidence."

Hence, there is a defined legal frame that obliges the arbitral tribunal to conduct arbitrations according to clear rules and in which fundamental procedural rights are granted to claimant and respondent, such as equal treatment of the parties and the right to a hearing. Another significant aspect of this decision is that it has rejected the argument developed by certain practioners (and by claimant) that Title IV of the Code of Commerce must be completed by supplemental rules like the Federal Code of Civil Proceedings. In a legal system such as that of Mexico which adheres to an extreme procedural formalism, the large mentioned powers of the arbitrator have been considered by certain lawyers -who obviously are unfamiliar to arbitration-, as an "excessive authority" that should be meant unconstitutional - not understanding that what the parties are looking for is exactly to avoid detailed formalities. In the same manner, in the *Loret de Mola* case, plaintiff sustained before the Supreme Court that article 1445 of the Code of Commerce, corresponding to article 28.3 of the Model Law, contradicts the constitutional principle of legality, which foresees that decisions that deprive a citizen of his assets must be substantiated in regard to the Law.[8] However, the justices' position consists in underlying that it is the proper Law, namely article 1445 of the above-mentioned Code that gives the parties the right to resolve their disputes in *amiable composition*, exonerating the arbitration panel to substantiate their decision in regard to legal dispositions.

Thus, the *a priori* reason for the 2008 reform was to put an end to constitutional challenges of the arbitration law or any other ADR law, like the many local mediation statutes. However, the fact that the reform put the constitutionalizationof the ADR mechanism in the "fundamental rights" part of the Constitution has as consequence that there exists a "fundamental right" to mediation or arbitration. Staking to arbitration, would this mean that if one party wants arbitration, and that there is no arbitration clause,the counterpart has to accept against its willthe arbitration, because claimant has a fundamental right to arbitration? Until now, no decision has been handed down on the topic. But in our opinion it is clear that such right does not exist. The right to arbitration implies the will of the parties to arbitrate their future conflicts. What is protected constitutionally is that the parties have the right to celebrate arbitration agreements; but not to force someone into arbitration if he never has had

[8] Amparo en revisión 237/2004. *Emilio Francisco Casares Loret de Mola*. 28 Abril 2004.

expressed his will to do so. Federal courts already established through a binding precedent[9]that in Mexico "arbitration without privity", following the expression of Jan Paulsson,[10] does not exist.

The conclusion that must be draft is that there exist a fundamental right of the citizens to have laws that permit to resolve conflicts through ADR. Hence the Law sets forth the conditions in which parties may use ADR. And the Law requires that for arbitration, but also for mediation and conciliation, all the parties in conflict must accept it. It is not to forget that the right of access to judicial justice is also a fundamental guarantee under article 17 of the Constitution.

Now, the fact that arbitration has been constitutionalized implies that it has to be read and applied jointly with article 1 of the *Magna Carta,* which foresees the protection of Human Rights.In a very interesting case, the bylaws of a company established that all disputes between the partners and the company should be decided by an arbitration panel composed, among else, by a member of the board of directors. Instead of considering that the arbitration clause is valid, but the composition of the tribunal biased - as the conflict between a partner and the company automatically implies the interests of the board of directors -, and henceforth simply allowing to challenge the designated director of the board, the Circuit Court ruled that such clause is void because it violates the basic human right toan impartial tribunal, right which is protected under article17of the Constitution:

> This is crucial, because it can not go unnoticed that as part of human rights, which are provided under the constitutional article 17, articles 14 of the International Covenant on Civil and Political Rights, and 8, paragraph 1, of the American Convention on Human Rights, which set forth that the governed can access just and fair solutions to their differences, what represents the obtaining of an impartial resolution by courts outside the interests of the parties, resolving the contest without inclinations and preferences,

[9] "The aforementioned provision, stating that forthe resolution of sugar disputes that arise, caterers cane and the industrials shall submit to the jurisdiction of the Permanent Arbitration Board of the Cane Sugar Agribusiness, and must comply with its resolutions, once causing res judicata, violates the guarantees of legality and legal certainty under Articles 14 and 16 of the Political Constitution of the Mexican United States, since the obligation to submit to the jurisdiction of the Board distorts the nature of arbitration, whose essential element is the arbitration clause in which the parties agree to resolve their differences through this procedure, without being to be compelled to do so without their consent. Moreover, the obligation of the aforementioned subjects to submit their disputes to the jurisdiction of the Permanent Board necessarily leadsto conform with its resolutions, which implicitly means that they are made to renounce to the immediate access to the jurisdiction of the federal or local courts, which are administering justice in terms of Article 17 of the Constitution."(Tesis de jurisprudencia 47/2008. Amparo en revisión 1122/2006, 12/3/2008).

[10]*ICSID Review*, 1995.232.

> which should apply, by a majority of reason, to any person who judges the conduct of another, in order to obtain a fair resolution.
>
> Hence, arbitration outcomingsshould be decided always by a third person, and therefore, in application of the general principle of law that says *nemoiudex in causes sua* (nobody can be a judge in his own cause), which is basedon the principle that the human being tends to auto-justification, as a means of redeeming himself from his mistakes (which implies a situation of conscience, by itself, that is inconsistent with the fact that human beings live in society),disputes between peoplecannot be resolved based only on the justification that they held themselves and, therefore, the covenant of wills in study, does not have the effect of granting to a corporate entity, which integrates one of the parties in conflict, the faculty to solve the corresponding dispute.[11]

This ruling can be put together with a decision of the Court of Appeals of Paris dated 17 November 2011[12] that established that the ICC Rules which do not proceed with the reconvention if the provision

[11]Amparo en revisión 278/2012.*Alfonso Ponce Rodríguez y otros*. 13 de septiembre de 2012: "*Si bienesciertoque el artículo 17 de la ConstituciónPolítica de los EstadosUnidosMexicanos, en sucuartopárrafo, reconocecomoformas de resolver un diferendo, a los mecanismosalternativos de solución de controversias, que se hacenconsistir en diversosprocedimientos, mediante los cualeslas personas pueden resolver susdiferencias sin necesidad de unaintervenciónjurisdiccional, y consisten en la negociación (auto composición), mediación, conciliación y el arbitraje (heterocomposición), también lo esque la cláusula por la cual se pretendeconstreñir a los gobernados, a sometersusconflictosrespecto a la administración de una persona moral de la cual son miembros, a un organismocorporativoquepertenece a estamisma, no puedeconsiderarseunacláusulacompromisoria de arbitraje, puescontraríauno de los principiosbásicos en que se sustentatalmedioalterno de solución de controversias, consistente en que el diferendo sea resueltopor un terceroimparcial; lo anterior tieneunaimportancia capital, pues no puedepasardesapercibidoquecomo parte de los derechoshumanos, queprevén los artículos 17 constitucional, 14 del PactoInternacional de DerechosCiviles y Políticos y 8, numeral 1, de la Convención Americana sobreDerechosHumanos, se encuentra el que los gobernadospuedanacceder a solucionesjustas a susdiferencias, lo querepresenta la obtención de unaresoluciónimparcialportribunalesajenos a los intereses de laspartes, resolviendo la contienda sin inclinaciones o preferencias, lo cualdebeaplicarse, pormayoría de razón, a cualquier persona quejuzgue la conducta de otra, con el fin de obtenerunaresoluciónjusta; de ahíque el arbitrajedebaserdecididosiempreporunatercera persona, por lo tanto, en aplicación del principio general de derechoquerezanemoiudex in causasua (nadiepuedeserJuez en supropiacausa), que parte del principio de que el serhumanotiende a la autojustificación, comomedio de redimirse de suserrores (lo queimplicaqueesasituación de conciencia, porsímisma, sea incompatible con el hecho de que los sereshumanosviven en sociedad), no podríanresolverselasdiferencias entre las personas, con base sólo en la justificaciónquerealizaran de símismas y, por lo tanto, el pacto de voluntades en estudio, no tiene el efecto de otorgar a unaentidadcorporativaqueintegra a una de laspartes en el conflicto, la facultadpara resolver el correspondientediferendo"*.

[12]#09-24.158.

is not paid is contrary to the human right principle of the right to access to justice.[13]

Thus, today under the present Constitution, the Mexican State cannot prohibit ADR mechanisms as dispute resolution; on the contrary, it must promote laws that foresee such possibilities. This is the novelty in regard to Comparative Law. In regard to the fact that ADR processes must, as judicial tribunals, observe all the Human Rights concerning the process of administration of justiceand their decisions having to be respectful to all the human rights criteria joins the international movement of "humanrightizing" arbitration. However, as Gary Born very rightfully underlines,[14] it is a paradox that arbitration tribunals are assimilated to judicial tribunals when the very essence of arbitration is to waive the right to a judicial forum!And the mentioned ruling of the Court of Appeals of Paris is a good illustration. The ICC foresees that there is no reconvention if the corresponding fee is not paid. There is no reason to see such provision contrary to the right to the access to justice. Parties are free to not choose an ICC arbitration; instead they can chose another arbitration institution that has no such rule; or they can chose to resolve their dispute before a judicial court where such requisite does not exist. But when they freely chose the ICC Rules, there is no reason that they have not to live with the consequences. Now, being as things are, there is no doubt that the judicial courts are more than willing to apply all the human rights standards to arbitration proceedings. Mexico will not be an exception. And the following case may be illustrative. In 2005, a federal court considered that an arbitration clause is not inoperative just because one party cannot assume the financial costs of the arbitration.[15] Now the fact that on one hand there is a valid clause, it is impossible to access judicial tribunals; on the other hand, the party cannot undertake the necessary advance payments to initiate the arbitration proceeding. It is clear that in such situation, there is a clear violation of the right to access justice. Today, the federal court would have ruled otherwise? Maybe forcing the arbitration center, like in the mentioned French case, to proceed with the arbitration even if there is no payment? Or simply considering the clause as inoperative and thus granting the party the right to seek justice before judicial tribunals?In one or the other case, the intervention of human rights will surely affect the outcoming of future cases and substantially modify past rulings. And it will also force the arbitrators to change their way of doing if it pleases them or not.

[13] Thus the 2012 version of the ICC Rules can still be considered contrary to the mentioned principle as it establishes: "When a request for an advance on costs has not been complied with, and after consultation with the arbitral tribunal, the Secretary General may direct the arbitral tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims at a later date in another proceeding" (art.36.6).

[14] *International CommercialArbitration*, Kluwer, 2009.576.

[15] Tercer Tribunal Colegiado en Materia Civil del Primer Circuito. Amparo directo 465/2005. Servicios Administrativos de Emergencia, 2/9/2005. SeePereznieto& Graham, *op.cit.*, #194.

Of course, the last lines should be those of conclusions and obviously with an answer to the principal question: is it positive or not the application of human rights to arbitration matters. Sorrowfully, there will be no answer. It is not the point; the point being that there is no longer no choice, as human rights must be applied in arbitration matters. No contrary opinion will change this trend. Up to the practitioners and arbitrators to live with it. At least in Mexico.