

The Historical Roots of Mediation in Mexico

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I N today's business environment, with increasing cross-border disputes, corporations with global operations must know how mediation works in foreign jurisdictions with a civil tradition like Mexico. Global corporations expect a certain level of legal certainty and clear rules when they decide to conduct mediation proceedings in foreign jurisdictions. They also expect mediation centers and mediators to respond with professionalism.

This article provides a review of the historical roots of mediation in Mexico. In doing so, I will also refer

to the legal framework that underlies mediation and how parties conduct the mediation process. This includes the significance of the role of the Mexican notary public and the importance of registration of public instruments derived from a mediation proceeding before the Public Registry of Commerce.

This article emphasizes the importance of a notarized settlement agreement, including a special mention about how authority and powers of attorney are granted within a Mexican corporation to sign agreements like

a mediation agreement or a settlement agreement. Finally, this article concludes the topic of mediation by considering enforceability, addressing the recognition and enforcement of foreign awards and judicial resolutions of settlement agreements in Mexico.

I. Mediation in Mexico

Local and foreign scholars and leaders influenced the development of ADR, including mediation, in Mexico. Discussions focused on the efficiency and fairness of the court systems and the challenges that the judicial branch face in connection with the administration of justice.

The development of mediation in Mexico began in the 1990s. The North American Free Trade Agreement included specific provisions regarding mediation.¹ The Mexico City National Chamber of Commerce also promoted mediation through its Mediation and Arbitration Center. Another effort to support mediation happened through the Mexican Mediation Institute, where, by the way, I had the opportunity to participate as part of the legal group who drafted the code of ethics for mediators.

Today, at the local level, Mexican courts in most states have created ADR centers. For example, Mexico City in 2003 created the Alternative Justice Center (*Centro de Justicia Alternativa*) as an autonomous entity of the Mexico City court system in charge of administering alternative dispute resolution mechanisms, particularly mediation, on civil, commercial, family and criminal matters.

Although mediation in Mexico has recent historical roots, it is evolving. Federal and state legislation has passed, and mediation centers have been created to promote the use of mediation. This article discusses the legal evolution of mediation below.

II. Legal Framework of Mediation in Mexico

The fourth paragraph of Article 17 of the Mexican Constitution expressly provides for alternative dispute resolution mechanisms. State courts have also created their own regulations. Some federal laws in Mexico, including the Federal Labor Act and international trade treaties such as the Canada, United States and Mexico Agreement (CUSMA) include mediation provisions as well.²

¹ See North American Free Trade Agreement, art. 2022, 32 I.L.M. 289 and 605 (1993).

² Canada, United States and Mexico Agreement, H.R. 5430 (2020) ["CUSMA"]; See CUSMA, Ch. 10 – Trade remedies, sec. D; (ii) CUSMA, Ch. 14 – Investment, art. 14.D.2; (iii) CUSMA, Ch. 23 – Labor, arts. 23.5 and

With respect to the mediation clause, the mediation agreement and the settlement agreement, Mexican contract law follows the *pacta sunt servanda* principle providing that whatever has been agreed between the parties must be enforced. In other words, it is valid for the parties to freely agree on the terms and conditions of their agreements.³

III. Model Mediation Clauses

Under Mexican law, when entering into an agreement, the parties may agree that future disputes will be resolved through mediation. For such purposes, the parties should include the following clause, which is recommended by the Mexico City National Chamber of Commerce:

"Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute through mediation, the mediation shall take place in accordance with the Mexico City National Chamber of Commerce Mediation Rules, in effect at the time of its commencement."

In the event that the parties have not agreed to a mediation clause but wish to mediate a dispute, they may still submit an existing dispute to mediation through an agreement that includes the following provision:

"The parties of an agreement [describe agreement] agree to submit any litigation, dispute or claim resulting from or related to this agreement, for its settlement through mediation administered in accordance with the Mediation Rules of the Mexico City National Chamber of Commerce. The requirement regarding the filing of a notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation process."

The parties may reach a mediation agreement before a legal dispute arises or afterward. Once the parties execute a mediation agreement, the parties have the right to demand the initiation of a mediation process.

23.17: Labor Consultations; and (iv) CUSMA, Ch. 31 – Dispute Settlement, art. 31.5.

³ CÓDIGO CIVIL FEDERAL [C.C.F.] (Mx.). The Civil Code has federal application for all Mexican

States. See C.C.F., arts. 1796 and 1797; CÓDIGO DE COMERCIO [CÓD. COM.] (Mx.); see CÓD. COM., art. 78.

IV. The Mediation Process

From a Mexican legal perspective, mediation is a dispute resolution mechanism in which the parties or their respective representatives decide voluntarily on matters that are allowed to be settled through a procedure conducted by a mediator who facilitates communication between such parties to reach a settlement.

Mediation centers provide clear and standard rules to conduct mediation processes, from selecting the mediation center and the mediator to the mediation hearings towards the settlement agreement. A successful mediation must be documented by means of a settlement agreement, which must be recorded in a public instrument and ratified before a competent court.

V. The Importance of the Settlement Agreement

Settlement agreements represent a crucial part of a mediation process. Under Mexican law, a settlement agreement (*contrato de transacción*) is an agreement whereby the parties extend to each other mutual rights and obligations and thereby terminate an existing dispute or avoid a future case. Settlement agreements must be in writing and

have the same effect between the parties as *res judicata* once such agreements are notarized and ratified before a court.⁴ By virtue of a settlement, the rights involved in a dispute are not transferred, they are solely declared or recognized.⁵

Case law in Mexico provides that in order for the enforcement of a settlement agreement to take place through judicial means (*via de apremio*), the settlement agreement must be recorded under a public instrument issued by a Notary Public or judicial authority. A settlement agreement granted as a private document will not be legally sufficient for enforcement purposes.

Before signing any agreement, a word of advice for corporations and their Mexican subsidiaries: confirm that your representatives have sufficient powers to be represented in a mediation process and to sign documents on behalf of the parties in Mexico.

The system of granting authority by a Mexican corporation is based on the general principles for granting authority in Mexico. These principles are provided in the Federal Civil Code and the Business Corporations Act, and govern any grant of authority, whether it involves an individual or a corporation. The most common way to grant a power of attorney is by means of an agency agreement (*contrato de mandato*), which must

⁴ C.C.F., art. 2953.

⁵ *Id.* at art. 2961.

be granted in writing before a Notary Public. Usually, grantees require powers for administrative acts and powers to pursue litigation and collection matters to represent corporations in mediation.

VI. The Role of the Notary Public and the Public Registry of Commerce

The Mexican Notary Public is a legal professional of crucial importance for the grant of legal certainty to all legal acts. The Notary is vested with public faith to formalize legal acts and give faith on facts that take place within its jurisdiction. Moreover, a deed issued by a Notary is a public instrument that has the seal and signature of the Notary. In the mediation context, settlement agreements require official acknowledgment for their legal effect and validity. As part of the notarization process, a Notary is required to inquire and verify the identity, legal authority, and powers of attorney of the signatories to a settlement agreement.

The Public Registry of Commerce (the "Registry") makes public all commercial acts performed by, or in connection with, corporations, which acts are subject of registration. As a result, unless deemed confidential all registered acts become public records available to anyone interested. The Commercial Code requires that all

acts related to business corporations be registered in the Registry. This includes both the granting and revocation of powers of attorney, as well as public instruments containing settlement agreements. For this reason, confidentiality provisions in settlement agreements are highly recommended.

All acts duly recorded in the Registry are effective as of the date of their registration, which means that any prior unregistered acts or any acts that are subsequently registered may not invalidate the registered act.

In the event a settlement agreement is reached outside of Mexico, a favorable judgment from a foreign court or arbitral award is issued. If the debtor's assets are located in Mexico, such judgment must be recognized and enforced in Mexico according to the following strict rules.

VII. Recognition and Enforcement of Judgments and Awards in Mexico

A final judgment of any foreign court or arbitral award for the performance of a settlement agreement will be enforced by the

courts of Mexico without further review of the merits as long as:⁶

1. such judgment was obtained in compliance with the legal requirements of the jurisdiction of the court rendering such judgment;

2. such judgment was rendered in an *in personam* action (as opposed to an *in rem* action);

3. process in the action was served personally to the defendant or a duly appointed agent;

4. such judgment does not contravene public policy of Mexico, international treaties or agreements binding upon Mexico, or generally accepted principles of international law;

5. the applicable procedure under the laws of Mexico with respect to the enforcement of foreign judgments have been met. This includes the issuance of a letter rogatory by the competent authority of such jurisdiction requesting enforcement of such

judgment, and the certification thereof as authentic by the corresponding authorities of such jurisdiction, and in accordance with the laws thereof;

6. the foreign judgment was issued by a competent judge and such foreign judgment is considered as *res judicata*; and

7. the action in respect of which such foreign judgment is not the subject matter of a pending lawsuit before a Mexican court among the same parties.

VIII. Closing Remarks

In Mexico, mediation is evolving, but has already proven to be an effective way to resolve business disputes in Mexico. Foreign judgments and awards on settlement agreements can be recognized and enforced by the courts of Mexico. However, resolution of a mediation is only the first step; numerous formal steps must be taken to finalize the agreement and make it enforceable.

A successful mediation process must be finalized by means of a settlement agreement legalized

⁶ Código Federal de Procedimientos Civiles [C.F.P.C.] (Mx.), arts. 569 and 571.; CÓD. COM., art. 1347-A.

before a notary public, registered and ratified before competent judge. Because the Mexican system for granting authority to bind a corporation is a strictly formal system, one must ensure all parties follow the appropriate formalities for the granting of general powers of attorney; this involves requiring all acts surrounding such granting of powers be in writing, notarized and registered.

The mediation agreement and settlement agreement also should include confidentiality provisions. Any party who breaches their contractual duty of confidentiality is subject to the provisions and penalties of the Industrial Property Act and any other applicable provisions of the Federal Copyrights Act and its regulations. The breach of the confidentiality and non-disclosure obligation may even have criminal consequences under the Federal Criminal Code.