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“The Historical Roots of Mediation”

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In today’s business environment, corporations with global operations must know how mediation works on foreign jurisdictions with a civil tradition like Mexico, especially since cross border business disputes are increasing. Global corporations expect a certain level of legal certainty and clear rules when they decide to conduct mediation proceedings in foreign jurisdictions. Furthermore, they expect mediation centers and mediators to respond with professionalism.

The purpose of this presentation is to provide the historical roots of mediation in Mexico. In doing so, reference will be made to the legal framework and how such process is conducted, including 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.

In addition, the importance of a notarized settlement agreement will be emphasized, including a special mention about how authority and powers of attorney are granted within a Mexican corporation to sign agreements such as a mediation agreement or a settlement agreement. Finally, and in order to round up the mediation topic from an enforceability standpoint, the recognition and enforcement of foreign awards and judicial resolutions regarding settlement agreements in Mexico will also be addressed.

I. Mediation in Mexico

Mexico was influenced by local and foreign scholars and leaders regarding the use of ADRs, including mediation, where discussions took place regarding the efficiency and fairness of the court systems and the challenges that the judicial branch faced 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

¹ North American Free Trade Agreement. See Article 2022..

Mediation was also promoted by the Mexico City National Chamber of Commerce 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.

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

Mediation in Mexico has recent historical roots. However, mediation is an evolving area where legislation at a federal and state level has passed, and mediation centers have been created to promote the use of mediation.

II. Legal framework of mediation in Mexico

The fourth paragraph of Article 17 of the Mexican Constitution provides for alternative dispute resolution mechanisms; Furthermore, State courts have created their own regulations. It is also important to note that 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

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 complied with. In other words, it is valid for the parties to freely agree the terms and conditions of their agreements.³

III. Mediation model clauses

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

² Canada, United States and Mexico Agreement. See (i) Chapter 10 – Trade remedies Section D; (ii) Chapter 14 – Investment. Article 14.D.2: Consultation and Negotiation; (iii) Chapter 23 – Labor. Article 23.5: Enforcement of Labor Laws and Article 23.17: Labor Consultations; and (iv) Chapter 31 – Dispute Settlement. Article 31.5: Good Offices, Conciliation, and Mediation.

³ Código Civil Federal [C.C.F.] (Mx.). This Civil Code has federal application for all Mexican States. See Articles 1796 and 1797.

Código de Comercio [CÓD. COM.] (Mx.). See Article 78.

“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 case that the parties have not agreed to a mediation clause, they may still submit an existing dispute to mediation, through an agreement that states as follows:

“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 establish a mediation agreement before a legal dispute arises or afterward. Once the mediation agreement is reached, the parties have the right to demand the initiation of a mediation process.

IV. Mediation process

From a Mexican legal perspective, mediation can be defined as 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.

In general, 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, 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. Confidentiality provisions in such settlement agreements are highly recommended. Settlement agreements must be in writing, and have the same effect between the parties as

res iudicata 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*), it is essential that such settlement agreement be recorded under a public instrument issued by a Notary Public or judicial authority. Therefore, a settlement agreement granted as a private document would not be legally sufficient for enforcement purposes.

Before signing any agreement, a word of advice for corporations and their Mexican subsidiaries: confirm that their 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 within a Mexican corporation is based on the general principles for granting authority in Mexico. Such principles are provided in the Federal Civil Code and the Business Corporations Act, and rule any type of granting 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 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 in the granting of legal certainty to all legal acts, including but not limited to, settlement agreements which require official acknowledgment for their legal effect and validity. 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 addition, a Notary is required to inquire and verify the identity and legal authority and powers of attorney of the parties who sign a settlement agreement.

The Public Registry of Commerce (the "Registry") gives publicity to all commercial acts performed by, or in connection with, corporations, which acts are subject of registration.

All registered acts become public records available to anyone interested. With regards to business corporations, the Commercial Code requires that all acts related thereto be registered in the Registry. For instance, the granting and

⁴ Código Civil Federal [C.C.F.] (Mx.). Article 2953.

⁵ Código Civil Federal [C.C.F.] (Mx.). Article 2961.I

revocation of powers of attorney, as well as public instruments containing settlement agreements.

All acts duly recorded in the Registry shall produce legal effects 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; and the debtor's assets are located in Mexico, such judgment must be recognized and enforced in Mexico 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 would be enforced by the courts of Mexico, without further review of the merits, provided however, that:⁶

1. such judgment is obtained in compliance with the legal requirements of the jurisdiction of the court rendering such judgment;
2. such judgment is rendered in an *in personam* action (as opposed to an *in rem* action);
3. process in the action has been 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, is duly complied with (including 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 iudicata*; 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.

⁶ Código Federal de Procedimientos Civiles [C.F.P.C.] (Mx.). See Articles 569 and 571.

Código de Comercio [CÓD. COM.] (Mx.). See Article 1347 A.

VIII. Closing Remarks

1. In Mexico, mediation is evolving and has proved to be an effective way to resolve business disputes in Mexico.
2. A successful mediation process must be finalized by means of a settlement agreement legalized before a notary public, registered and ratified before competent judge.
3. The Mexican system for granting authority to bind a corporation, specifically by means of the granting of general powers of attorney, is a strictly formal system that bases itself in the characteristic of requiring all acts surrounding such granting of powers to be in writing, notarized and registered.
4. Confidentiality provisions must be included in the mediation agreement and the settlement agreement. Any party who breaches the confidentiality terms 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 have criminal consequences under the Federal Criminal Code.
5. Foreign judgments and awards on settlement agreements can be recognized and enforced by the courts of Mexico.

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This document is for educational purposes only and should not be regarded as legal advice. If you like to discuss the topic further, please contact Manuel Moctezuma at mmoctezuma@moctezumacastro.com.

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