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Recent Mexican Arbitration Reform: The Continued Influence of the "Publicistas"

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I. INTRODUCTION

During the past two decades, Mexico has reformed its antiquated arbitration machinery. The country signed and ratified the United

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Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹ (the "New York Convention") and the Inter-American Convention on International Commercial Arbitration² (the "Panama Convention"), which together bind Mexico to the prevailing international framework for enforcing arbitral clauses and awards. The Mexican court system has, in turn, enforced Convention principles in three publicized court decisions—the only such decisions in all of Latin America.³ Recently, the national legislature overhauled century-old arbitration law in the Code of Civil Procedure for the Federal District (the "procedural code") and the Federal Commercial Code (the "commercial code") in order to implement the principles of the two Conventions.⁴

These developments, especially the recent modifications to the commercial code and the procedural code, deserve close examination. Mexico plays an increasingly important role in the international economy, and foreign companies will increasingly enter into relationships with Mexican companies.⁵ Many such companies will conclude, how-

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Oct. 1, 1958, 21 U.S.T. 2518 [hereinafter New York Convention].

2. Convention on International Conventional Arbitration, Jan. 30, 1975, 14 I.L.M. 336 [hereinafter Panama Convention].

3. See *infra* part II.C.2.

4. Each Mexican state and the federal district has its own code of civil procedure. This article only examines the Code of Civil Procedure for the Federal District because 40% of the people live in the Federal District and because it serves as the model for all other states. Thus, all "procedural code" references herein are to the Code of Civil Procedure for the Federal District. Código de Procedimientos Civiles para el Distrito Federal [C.P.C.D.F.]. Mexico has only one commercial code, effective as of January 1, 1890, because the Constitution grants the federal government the right to control commercial matters. CONST. art. 73(X) (amended 1942 and 1947). Originally, the commercial code dealt with all commercial matters. Now separate statutory schemes address all substantive matters such as banking and insurance.

These codes have undergone gradual reform. The 1988 and 1989 reforms analyzed *infra* part II.C.3 comprise the only significant reforms related to international commercial arbitration. I generally have chosen, therefore, when referring to the pre-reform arbitral law, to generally cite only to the 1985 commercial code and 1978 procedural code, although I discuss other years when appropriate.

The Mexican State civil codes, which set forth substantive Mexican law, do not bear on the procedural issues raised by arbitration. The Federal Code of Civil Procedure addresses arbitration in one provision that incorporates the local codes of civil procedure. Código Federal de Procedimientos Civiles [C.F.P.C.] (referring to enforcement of foreign judgments). It is, therefore, not addressed in this article.

5. The Salinas government has privatized much of the previously sluggish socialist economy, entered into liberalized trade pacts with other countries, actively sought formation of a North American trading block, and generally improved its image among countries of the world. The government has geared these steps toward increasing both foreign investment in the country and exportation of goods to the United States and other industrialized countries. See Alexander C. Hoagland, *Modification of Mexican Arbitration Law*, 7 J. INT'L ARB. 91 (1990) (noting that Mexico is undergoing a radical opening to international trade and private investment, privatization of some state-owned enterprises, a major commitment to private- and

ever, that Mexico's legal system does not provide a hospitable forum for the resolution of any resulting disputes. Indeed, the North American Free Trade Agreement ("NAFTA") expressly encourages the use of private dispute resolution.⁶

Mexican arbitration principles differ significantly from prevailing international norms. For over a century, the "publicista" school of arbitration theory has guided Mexican arbitration law. The proponents of the "publicista" theory consider arbitration as a private act, inseparable from its public consequences and properly subject to extensive governmental control.⁷ Under prevailing international norms exemplified by the Conventions, however, parties may agree to broad arbitration clauses and flexible arbitration procedures that delegate expansive powers to arbitrators. These principles are designed to lead to "speedy enforcement of arbitration agreements and awards, limited but effective judicial intervention to safeguard the integrity of the proceedings and advance the arbitral process, support for party autonomy in fashioning the arbitral forum, and the liberation of international arbitration from parochial concepts of domestic law."⁸ Although Mexico now appears to endorse these norms, both through the Conventions and the recent reforms, any lingering notion of arbitration as a public act would undercut the effectiveness of that endorsement.

export-led growth, and significant political changes). See generally Rodolfo C. Miramontes, Present Legal Framework of International Trade Between Mexico and the U.S.A.: The Need for a Change, Remarks at Mexico-United States Arbitration Conference (Oct. 18, 1990) (transcript on file with American Arbitration Association) (describing Mexican interest in free trade with the United States and other industrial powers).

6. North American Free Trade Agreement, Oct. 7, 1992, U.S.-Mex.-Can., § 2022, — U.S.T. —; see POTENTIAL IMPACT ON THE U.S. ECONOMY AND SELECTED INDUSTRIES OF THE NORTH AMERICAN FREE-TRADE AGREEMENT, USITC pub. 2596, Inv. No. 332-337 (Jan. 1993) (summarizing and analyzing the proposed NAFTA).

7. E.g., Ignacio M. Lima, *El Arbitraje Privado en Nuestro Derecho*, 38 REVISTA DE LA FACULTAD DE DERECHO DE MEXICO 163 (1988) (explaining that the publicista theory does not view the arbitral contract as a private agreement, but as a transfer of the state's adjudicatory powers to the arbitrators and noting that Mexican law exhibits qualities of both currents—the "privatista" and "jurisdiccionalista"); Julio C. Trevino, *El Arbitraje Comerical Internaccional: Un Recurso para America Latina*, 1988 REVISTA DE INVESTIGACIONES JURIDICAS 323, 329 (explaining that arbitration consists of a private element, the agreement, and a public element, the procedural law to which the agreement, arbitration, and award must comply). Consider, by contrast, views espoused in the United States after liberalization of its arbitration clauses. In a famous quotation from *The Bremen v. Zapata Off-Shore Co.*, the U.S. Supreme Court stated that the United States "cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." 407 U.S. 1, 9 (1972).

8. Michael F. Hoellering, *International Commercial Arbitration in the United States*, 1 AM. REV. INT'L ARB. 14, 17 (1990) (espousing goals of commercial arbitration law as delineated by the General Counsel of the American Arbitration Association).

Whether Mexico now has discarded the publicista structure is important because the availability of private dispute resolution is critical to increasing international trade with Mexican companies. Mexico is a civil law country with many code provisions that differ from the laws of common-law regimes, particularly those of the United States.⁹ Unlike many centralized civil law countries, Mexico has a federal system with decentralized power.¹⁰ Mexico has federal laws and federal courts, while each of the Mexican states and the *Distrito Federal* (the federal district that includes Mexico City) has its own civil code, procedural laws, and courts.¹¹ Mexico's legal system thus differs significantly from both common law and civil law countries. Moreover, even if a potential investor were familiar with the Mexican

9. See Hope H. Camp, Jr., *Binding Arbitration: A Preferred Alternative for Resolving Commercial Disputes Between Mexican and U.S. Businessmen*, 22 ST. MARY'S L.J. 717, 720-21 (1991) (including as important distinctions: civil code of Mexico limits damages whereas laws of the United States create opportunities for unlimited damages; in Mexico, trial evidence mainly is presented by documentation in front of the judges who question the witnesses; and Mexican law provides for a more limited pre-trial discovery).

10. Mexico is properly known as the United States of Mexico.

11. For a good discussion of the sources of Mexican law, see Edward H. Kurth, *Adjudicative Resolution of Commercial Disputes Between Nationals of the United States and Mexico*, 14 ST. MARY'S L.J. 597 (1983). According to Kurth,

The principal sources of Mexican law which bear upon the resolution of international commercial conflicts are the Constitution of the United Mexican States, Civil Code for the Federal District and Territories of Mexico, Commercial Code of Mexico, and Code of Civil Procedure for the Federal District and Territories of Mexico The Civil Code forms the heart of the Mexican legal system. It is divided into four books covering persons, property, succession, and obligations. The obligations section includes the subject of contracts. The Civil Code does not, however, broadly encompass commercial law, a subject separately treated by the Commercial Code. The Mexican Commercial Code generally deals with commercial acts and transactions which are for pecuniary profit. Thus, contracts for transportation by land, drafts, bills of exchange, and other banking activities are governed by the Commercial Code to the substantial exclusion of the Civil Code. . . . Because there are some matters which are dealt with in both the Commercial and Civil Codes, some only in the Civil Code, and some in neither Code, rules have been established for determining whether a contract or an issue arising under a contract will be controlled by the Commercial or Civil Code. The principal guidelines seem to be: (1) the Civil Code provisions which detail the legal requirements respecting capacity of the parties and exceptions and causes which rescind or invalidate agreements apply to commercial contracts; (2) if the Commercial Code is applicable to a transaction or an issue derived from the transaction, its pronouncements prevail over any contrary provisions in the Civil Code; (3) the Civil Code will be invoked to cover "gaps" in the Commercial Code . . . ; and (4) when no specific Commercial or Civil Code article is decisive, then "[j]udicial controversies of a civil nature shall be decided in accordance with the letter of the law or its juridical interpretation. In the absence of a law, they shall be decided in accordance with general legal principles."

Id. at 598 n.5.

legal system, she still would have to consider issues of corruption and delay that, sadly, are still common to Mexico, including, to some extent, its court system.¹²

This article analyzes the recent changes in Mexican arbitration law, with particular emphasis on the 1988 and 1989 reforms to the commercial code and the procedural code, in order to determine whether Mexican arbitration law is consistent with the prevailing international theory of arbitration. Part II describes traditional Mexican treatment of arbitration, including an explanation of the traditional pre-reform arbitral mechanisms. Part II asserts that the traditionally low level of commercial arbitration in Mexico did not arise exclusively from ignorance of or hostility to private dispute resolution—the conventional explanations—but from extensive governmental control over arbitration procedure. Part III describes recent reforms and developments and argues that, in substance, the reformed Mexican arbitration law still draws upon the publicista model of arbitration. Part IV addresses the consequences of the reforms and concludes that Mexican arbitration is now a quirky and ill-defined procedure in transition to a modern arbitration regime. Part IV further offers some practical strategies for overcoming the entrenched procedural hurdles.

II. TRADITIONAL UNDERSTANDING OF ARBITRATION IN MEXICO

Commercial arbitration rarely settles international commercial disputes in Mexico and other Latin American countries.¹³ The conventional wisdom is that Latin Americans are uncomfortable with

12. The prevalence of "La Mordida," the bite, in Mexico is legendary. Patrick Oster, a lawyer turned journalist, offers a "biting" description of corruption in Mexican courts:

Even the Mexican courts are up to their gavels in bribery. Leaders of local bar associations openly complain that many judges are on the take, handing out justice to the highest bidder. Trial lawyers regularly bitch that they have to pay "tips" to court clerks and judges just to get routine papers filed. Defense attorney Hector Montoya Fernandez got so riled up about the need to pay people off in the Mexico City court system that he held a press conference in 1985 to charge that the courts were "teeming with rats, filth and corruption, with only a few honorable exceptions." He said court officials "were nothing but booty hunters who keep lawyers on both sides of a case running around uselessly until they [the lawyers] decide to accept the corrupt system and pay.

PATRICK OSTER, *THE MEXICANS: A PERSONAL PORTRAIT OF A PEOPLE* 182 (1989).

13. As of 1988, the Permanent Commission on Arbitration of the National Chamber of Commerce of Mexico City had handled very few matters. Trevino, *supra* note 7, at 343. Similarly, the Mexican Center for Commercial Arbitration, founded by leading businessmen, has had little business and success. *Id.* at 343; see also Hoagland, *supra* note 5, at 92 ("For a century, the [commercial code] has provided principally for judicial arbitration according to agreed rules before a court, a procedure noteworthy for its desuetude."); Frank E. Nattier, *International Commercial Arbitration in Latin America: Enforcement of Arbitration*

arbitration and, as a result, Latin American people engaged in business and law commonly refer private commercial disputes to the courts.¹⁴ These observations, made by sophisticated and knowledgeable observers, undoubtedly have some validity. Nevertheless, the observations are misleading because they suggest that hostility causes the low level of arbitration where any hostility more likely results, at least in part, from the character of the arbitration laws.¹⁵

A. *The History of Arbitration in Mexico*

Latin American legal culture long has favored the resolution of conflict through negotiation and mediation rather than through litigation.¹⁶ Accordingly, the political and academic establishment in Latin America has promoted arbitration since the 19th century.

Agreements and Awards, 21 TEX. INT'L L.J. 397, 399 (1986) (exploring why arbitration is used so infrequently in Latin America as compared to Western Europe).

14. Raphael E. Echeverria & José L. Siqueiros, *Arbitration In Latin American Countries*, in *ARBITRATION IN SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING THE FAR EAST AND ARBITRATION IN COMBINED TRANSPORTATION* 81, 82 (Pieter Sanders ed., 1989) (International Council for Commercial Arbitration Congress Series No. 4, 1989) [hereinafter *ICCA Series 4*] (finding that because commercial arbitration has been part of the Latin American commercial and civil codes since the 19th century, its failure to take root "may only be explained as a consequence of the traditional view that international arbitration was a surrogate for diplomatic intervention by the great powers."); Alden F. Abbot, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L.J. 131, 136-37 (1976) (explaining regional distrust of foreign private arbitrations with Latin American states); Donald B. Straus, *Why International Commercial Arbitration is Lagging in Latin America*, 33 ARB. J. 21, 21-22 (1978) (noting that Latin Americans show reluctance to participate in private arbitration as a result of lack of familiarity and circulating horror stories); Bruce G. Rinker, Note, *The Future of Arbitration in Latin America: A Study of its Regional Development*, 8 CASE W. RES. J. INT'L L. 480, 485 (1976) (noting the low level of arbitration reflects inherent distrust of foreign intervention and control).

15. For example, in *El Arbitraje Comercial en Mexico*, Professor Siqueiros stated that Mexican businessmen were unfamiliar with the Inter-American Commercial Arbitration Commission [IACAC] rules and were reluctant to submit their differences to foreign arbitrators. He did not suggest, however, that Mexican businessmen and lawyers did not know the Mexican law pertaining to arbitration nor did he claim that Mexicans were wary of submitting commercial disputes to Mexican arbitrators. José L. Siqueiros, *El Arbitraje Comercial en Mexico*, 15 REVISTA DE LA FACULTAD DE DERECHO DE MEXICO 703, 719 (1965).

16. See *ICCA Series 4*, *supra* note 14, at 81-2 ("[a]long with the old Spanish rules the Latin American legislatures imported from Europe the concept of peaceful settlement of disputes by third party arbitrators"); Hector M. Gonzalez, *Breve Resena Historica del Arbitraje*, 38 REVISTA DE LA FACULTAD DE DERECHO DE MEXICO 216, 225 (1988) (virtually all civil matters were theoretically susceptible to arbitration from 1870 forward); Lionel M. Summers, *Arbitration and Latin America*, 3 CAL. W. INT'L L.J. 1, 5 (1972) (explaining that arbitration had a bright future in the early history of Latin America); Trevino, *supra* note 7, at 338 (arguing that Latin America has had a tradition favorable to arbitration but has not produced hoped-for results); Carlos Villareal, *Culture in Lawmaking: A Chicano Perspective*, 24 U.C. DAVIS L. REV. 1193 (1991) (examining difference between Mexican and American

Cooperation on arbitration between Latin American governments has persisted for over a century—far longer, in fact, than the United States' efforts to modernize its arbitration law.¹⁷ From the late 19th century until the relatively recent ratification of the New York and Panama Conventions, Latin American countries, including Mexico, have engaged in a continuing dialogue regarding the reciprocal recognition and enforcement of arbitration awards.¹⁸

Since the 19th century, detailed provisions in the procedural code have governed Mexican arbitration.¹⁹ The 1884 procedural code contained detailed procedures permitting merchants to resolve disputes outside of trial, as well as similar, less detailed procedures for non-merchants.²⁰ When the commercial code was first promulgated in 1890, it adopted the procedural code provisions governing dispute

procedures and concluding that Mexican and American legal cultures conflicted because Mexico emphasized mediation and other forms of informal dispute resolution).

17. The first federal arbitration act in the United States was adopted in 1925. United States Arbitration Act of 1925, Pub. L. No. 401, 43 Stat. 883 (1925).

18. Latin American countries first addressed international commercial arbitration and the enforcement of foreign arbitral awards with the Montevideo Treaty of 1889. Charles R. Norberg, *Recent Developments in Inter-American Commercial Arbitration*, 12 NW. J. INT'L L. & BUS. 86, 87 (1991). Additionally, the 1928 Bustamonte Code regarding private international law provided for the reciprocal enforcement of arbitral awards among signatory countries. *Id.* at 88. In 1933, the Seventh International Conference of American States promulgated resolution XLI providing that "an Inter-American commercial agency be appointed in order . . . to assume, as one of its most important functions, the responsibility of establishing an inter-American system of arbitration." *Id.* (citing Resolution of December 23, 1933, Seventh International Conference of American States, Montevideo, Uruguay).

This resolution led to the 1934 formation, under the auspices of both the Pan American Union and the American Arbitration Association, of the Inter-American Commercial Arbitration Association. *Id.* In 1940, the second Montevideo Treaty sought again to modernize the international commercial arbitration and the enforcement of foreign arbitral awards. *Id.* at 87.

In 1956, under the urging of the Organization of American States (OAS), the Inter-American Council of Jurists met in Mexico City and drafted a model law that was never adopted. *Id.* at 88 (citing Draft Uniform Law on Inter-American Commercial Arbitration, Resolution VIII of the Third Meeting of the Inter-American Council of Jurists, Mexico City, Mexico, at 55 (1956)). In 1967, the Inter-American Judicial Committee met in Rio de Janeiro and prepared a draft Inter-American Convention on International Commercial Arbitration. *Id.* (citing Report of the Inter-American Juridical Committee on International Commercial Arbitration, February 19, 1968, OAS Doc. SER i/vi (1968)). This proposal was considered in Panama in 1975 at the First Specialized Inter-American Conference on Private International Law and was adopted as an OAS convention and eventually signed as the Panama Convention. *Id.* at 88 (citing Organization of American States, Inter-American Specialized Conference on Private International Law (CIDIP 1) held in Panama City, Republic of Panama, Jan. 14-29, 1975).

19. See ICCA Series 4, *supra* note 14, at 82 (explaining that most of the Latin American countries enacted codes in the second half of the 19th century regulating arbitration).

20. The Code of Civil Procedure of the Federal District became effective on August 13, 1872 and displaced all prior procedural provisions. Gonzalez, *supra* note 16, at 224; C.P.C.D.F. art. 1240 (1884) (the parties have right to submit their differences to arbitral suit).

resolution between merchants and denominated such procedures "Mercantile Suits." The procedural code continued to provide for arbitral suits for non-merchants.

During the 20th century, Mexico developed numerous, although underutilized, arbitral institutions. A resolution at the 1934 Montevideo Conference founded the Permanent Arbitration Commission of the National Chamber of Commerce. Under the 1953 Law of Chambers of Commerce and Industry, special Chamber of Commerce commissions were to act as arbitrators for commercial disputes.²¹ Also, as of the mid-1960s, the National Committee of the Inter-American Commercial Arbitration Commission (IACAC) began to provide arbitration facilities.²² In the mid-1980s, with support from the business and legal community, Mexico established the *Centro Mexicano de Arbitraje Comercial* (Mexican Center for Commercial Arbitration) to provide facilities and information for arbitration.²³

The Mexican academic community also has paid close attention to the theory and actual practice of arbitration.²⁴ Dr. José Luis Siqueiros, perhaps the foremost authority on Mexican arbitration, recognized in 1965 that provisions for mercantile suits "had become a dead letter or at most they existed only as conventional trials in front of arbitrators."²⁵ Since then, he and other commentators have encouraged change and reform. Some commentators, however, have taken issue with his interpretation of Mexican law and proposals for reform.

Thus, the legal culture of Mexico, its laws, and its political and academic powers have shown strong interest and familiarity with arbitration. Any discussion of Mexico's arbitration laws must begin with the premise that Mexican arbitration is a well-established, sophisticated component of Mexican law. The "dead letter" status of arbitration must then lie, at least in part, in the character of the arbitration procedure itself.

21. Siqueiros, *supra* note 15, at 718-19.

22. *Id.* at 719.

23. Nattier, *supra* note 13, at 422.

24. E.g., Fernando A.V. Pando, *New Trends in Mexican Private International Law*, 23 INT'L LAW. 995, 996 (1989) (explaining that for several years the Academia de Arbitraje Comercial Internacional and the Academia Mexicana de Derecho Internacional Privado have been promoting the improvement of Mexican law on international arbitration); Trevino, *supra* note 7, at 323 (academic commentator promotes international commercial arbitration as preferable alternative to litigation); see also Niceto Alcalá-Zamora y Castillo, *La Ejecución de las Sentencias Arbitrales en México*, BOLETIN DEL INSTITUTO DE DERECHO COMPARADO EN MEXICO, May-Aug. 1958 at 45. For a bibliography of academic commentary, see Lima, *supra* note 7, at 166-67.

25. Siqueiros, *supra* note 15, at 705.

B. *The Influence of the Publicista School*

A leading Mexican law professor, Dr. Ignacio Medina Lima, defined Mexican arbitration as "una forma hetero-compositiva de litigios en lo que un tercero imparcial, elegido por las partes o por el organo que la ley determina, se encarga de resolver la cuestion planteada, mediante un laudo que aquellos han de cumplir."²⁶ This definition of arbitration as a "composite heterogeneous form of litigation," rather than as a private consensual method of dispute resolution, is an accurate summary of the publicista theory.²⁷ The arbitral contract is not considered a voluntary relinquishment of the state's jurisdiction, but rather a partial transfer of the state's jurisdiction to arbitrators.²⁸

The strength of the publicista theory lies in its connection to fundamental Mexican public policy. Article 14 of the Mexican Constitution enshrines regularity and fairness of procedure as a fundamental guarantee of dispute resolution. Article 14 mandates that all dispute resolution must be accomplished through formal trial: "No person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed in accordance with laws in effect prior to the act."²⁹ The procedural code implemented these guarantees by prescribing non-waivable procedural formalities for all trials.³⁰ Among other requirements, a tribunal must consider all pleadings and proof submitted by the parties and deliver a clear, reasoned judgment on such submissions, and individuals must be summoned to court via personal service.³¹ Private consensual arbitration appears to violate

26. Lima, *supra* note 7, at 158. This translates as "a composite heterogenous form of litigation in which a neutral third party, chosen by the parties or by an organ that the law determines, is charged with resolving the matter at hand, mediating an award with which the parties must comply."

27. *Id.*

28. *Id.* at 163; see also Trevino, *supra* note 7, at 329 (arbitration consists of a private element, the agreement, and a public element, procedural law, to which the agreement, arbitration and award must comply). The earliest arbitral mechanisms envisaged the courts and the arbitrators working together on a case. See C.P.C.D.F. arts. 1298-1316 (1884).

29. CONST. art. 14.

30. See also CONST. art. 1 ("Every person in the United Mexican States shall enjoy the guarantees granted by this Constitution, which cannot be restricted or suspended except in such cases and under such conditions as are herein provided."); *id.* at art. 16 ("No one shall be disturbed in his . . . possessions except by virtue of a written order by the competent authority stating the legal grounds and justification for the actions taken."); *id.* at art. 17 ("Every person is entitled to the administration of justice by courts . . .").

31. Article 55 of the procedural code provides, for example, that the parties may not by agreement alter the specified procedure. Article 114(I) of the procedural code provides that the first notice of any proceeding must be given via personal service. Article 81 of the procedural code requires that "[j]udgments must be clear, precise and in conformity with the

these fundamental guarantees.³² Accordingly, traditional Mexican arbitral mechanisms incorporated procedural guarantees that minimized the conflict with this fundamental Mexican public policy.³³

The provisions in the commercial code providing for "Mercantile Suits" provided the primary source of pre-reform arbitration law.³⁴ These provisions were extraordinarily restrictive and did not permit the parties to significantly shape the dispute resolution procedure or delegate power to the arbitrators.³⁵

The commercial code bound a tribunal to follow the parties' agreed procedure only if:

1. The Agreement was made in a public instrument or before the judge trying the case;
2. The essential features of a lawsuit were preserved by the chosen procedure;
3. Proof not admissible according to law was not agreed to be admitted;
4. The jurisdiction of the court is preserved;

pleadings . . . deciding all contested issues. When there are more than one contested issue, the judgment must address each one." Article 283 of the procedural code provides that legally-established methods of proof may not be renounced. Article 285 of the procedural code provides that judges are always obligated to hear proofs presented by the parties.

32. One of the two leading Mexican arbitration scholars, Dr. Humberto Briseno Sierra, the General Director of the Academia de Arbitraje Comercial Internacional, Mexico D.F., recognized the inherent barriers in the Mexican Constitution to arbitration:

Although the Mexican Constitution does not regard domestic [sic] arbitration favorably, in practice both the Supreme Court and legal doctrine have never put any obstacles in the way of recognition and enforcement of awards by judicial authorities. The reason for the unfavorable treatment by the Constitution can be found in the argument that the ordinary courts are appropriate to administer justice and that special jurisdictions—other than in time of war—are forbidden.

1978 Y.B. COM. ARB., VOL. III. at 94; see also Lima, *supra* note 7, at 161 (describing long-standing criticism of arbitration by Mexican legal experts in light of the fundamental guarantees of the constitution); *supra* note 30.

33. For a thorough discussion of the origin of applicable Mexican laws, in particular the laws pertaining to mercantile and arbitral suits, see generally Siqueiros, *supra* note 15. For a complete pre-reform analysis of the Mexican arbitration law, see Humberto B. Sierra, *El Arbitraje Mercantil en Mexico*, REVISTA DE LA FACULTAD DE DERECHO DE MEXICO, July-Sept. 1977, at 499-567.

34. According to the commercial code: "Where pursuant to commercial law, one of the parties . . . deems the transaction as one of mercantile nature and the other party deems it as one of civil nature, the dispute arising therefrom shall be governed by commercial laws." Cód.Com. art. 1050.

35. The commercial code refers to "procedimiento convencional" and some translations refer to a "conventional mercantile procedure," implying that the provisions referred to some type of customary merchant law. See, e.g., JOSEPH WHELESS, COMPENDIUM OF THE LAWS OF MEXICO 434 (1938) (referring to mercantile suits as "conventional procedure"). The straightforward translation of "convencional" is simply "agreed." This translation is used here because no section of the commercial code otherwise suggests that the mercantile suits provisions have a connection with customary merchant law.

5. The terms provided for law by decisions are not shortened; and
6. Other and different recourses than allowed by law for decisions are not shortened.³⁶

Additionally, the public document establishing the agreed procedures had to identify the means of proof to be followed and the methods of proof and legal recourses waived.³⁷

These extensive restrictions bound mercantile suits closely to court procedure and related procedural guarantees. The thrust of the provisions modified court procedure but not private dispute resolution. The commercial code only applied to pending lawsuits arising from a pre-existing dispute.³⁸ The submission specifically had to preserve the essential formalities of trial and the list of procedural items that the parties could not waive—rules of evidence, time periods for decisions, and methods of appeal or review. This left little room for private agreement. The commercial code also had a “bootstrap” provision that imported procedural rules into a mercantile suit. Under these provisions, in the absence of agreed procedure, relevant provisions of the commercial code or the local procedural code would control.³⁹ In fact, other than one contradictory reference to an “arbitrator” in a sub-clause describing the necessary components of the submission, all pertinent provisions refer to judges and courts.⁴⁰

These provisions effectively eliminated the differences between regular and mercantile suits. Moreover, even if a party chose to employ a mercantile suit, reaching agreement on the appropriate procedure within the circumscribed guidelines at the time of a dispute would have been difficult. Any advantage of this procedure over a traditional trial would have been slight.

The arbitral suit provisions of the procedural code were less restrictive than the provisions of the commercial code. The procedural code declared that the parties had the right to submit their differences to arbitration through an arbitral clause in a private

36. Cód.Com. art. 1052 (1985).

37. Cód.Com. art. 1053 (1985).

38. The phrase “*clausula compromisaria*” refers to a private arbitration clause while the word “*compromiso*” refers to an arbitral submission. See Siqueiros, *supra* note 15, at 707; see also ICCA Series 4, *supra* note 14, at 84 n.9 and accompanying text (explaining the difference between a submission, “*compromiso*,” and an arbitration clause, “*clausula compromisaria*”). The mercantile suit provisions refer only to *compromisos*. Additionally, article 1052 of the commercial code states that the submission may be made at any point during the lawsuit, thereby implying that parties cannot use a prior agreement to subject a dispute to the mercantile suit provisions. Cód.Com. art. 1052.

39. Cód.Com. art. 1051 (1985).

40. Compare Cód.Com. art. 1053(IX) (1985) (referring to judge or arbitrator) with Cód.Com. art. 1049 (1985) (referring only to trials and not arbitration) and Cód.Com. art. 1052 (1985) (stating that judges must follow agreed procedure).

contract.⁴¹ Moreover, the procedural code did not require the agreement to be in a public document or to specify the procedures to be followed and the guarantees to be relinquished.

Nevertheless, arbitral suit provisions in the procedural code had much in common with the mercantile suit provisions of the commercial code. For example, the arbitral suit provisions did not establish definitively the right to settle future disputes through private arbitration.⁴² A "bootstrap" provision that imported court rules to govern matters not agreed by the parties also governed arbitral suits.⁴³ Moreover, the procedural code established a laundry list of mandatory and default procedures—such as the hearing of proofs and pleadings, the length of the arbitration and the grounds for challenging arbitrators—that controlled arbitral procedure.⁴⁴

The view that, for merchants, the arbitral suit provisions of the procedural code merely complemented the right to a mercantile suit under the commercial code compromised the limited freedom of the procedural code. Dr. Humberto Briseno Sierra, a well-known adherent to the publicista school,⁴⁵ reasoned that any existing commercial dispute—even if subject to a procedurally valid private agreement to

41. C.P.C.D.F. arts. 609 and 611 (1978). The earliest versions of the procedural code provided for a burdensome procedure similar to the separate provisions for merchants later adopted by the commercial code. For example, in the 1884 procedural code, an arbitral trial required an agreement in a public notarial document or in a private document witnessed by three persons containing the names and legal capacities of the parties; the names and addresses of the arbitrators; the method of substitution for the arbitrators, including the name of the individual to name the substitute; the matter or matters to be submitted to arbitration; the length of the arbitration; the methods of proof; specification of those legal procedures relinquished through the arbitration; and where the arbitration would be held and the sentence delivered. C.P.C.D.F. arts. 1243-44 (1884).

42. The procedural code referred to both "compromisos" and "clausula compromisarias" without indicating the significance of the references. Compare C.P.C.D.F. art. 611 (1978) with *id.* art. 622 (1978).

43. *Id.* art. 619 (1978) ("[U]nless otherwise agreed the parties and the arbitrators will follow in the proceedings the terms and forms prescribed for the courts.").

44. See *id.* art. 617 (fixing the length of the arbitration at 60 days in the absence of a contrary agreement); *id.* art. 622 (outlining complex procedures for arbitrator substitution); and *id.* art. 623 (limiting the grounds for arbitrator challenge).

The 1884 procedural code established these restrictive provisions which were subsequently imported into the commercial code. Article 1354, for example, placed severe limitations on the parties' ability to agree on applicable procedure:

It is not permitted for the parties to:

- I. Agree to admit proofs not in conformity with law.
- II. Shorten the terms allowed by law for judges and tribunals to rule.
- III. Agree that they shall have more or different legal recourses than permitted by law.

Id. art. 1354 (1884).

45. Lima, *supra* note 7, at 165 (Dr. Sierra is an advocate of the publicista school of arbitration).

arbitrate future disputes—could not be adjudicated by arbitrators absent compliance with the provisions governing mercantile suits.⁴⁶ Dr. José L. Siqueiros, the leading Mexican advocate of arbitration reform, considered the mercantile suit and arbitral suit provisions as alternatives to a private agreement. Under his view, parties could agree in a private document under the procedural code to settle future disputes before an arbitrator *or* submit an existing dispute to a court pursuant to a public document under the commercial code. Nevertheless, even parties with a valid agreement to arbitrate future disputes faced the prospect of preparing a burdensome submission once a dispute arose.

The emphasis on procedural regularity also affected the enforcement of foreign arbitral awards. The procedural code, which governed enforcement, required that:

1. The plaintiff comply with the formalities prescribed by the Federal Code of Civil Procedure for transmission of foreign judgments;
2. The foreign judgment be rendered as part of a personal action;
3. The underlying obligation be enforceable under substantive Mexican law;
4. The defendant be personally summoned to appear in the suit;
5. The judgment could be executed under the laws of the nation where it was rendered; and
6. The judgment be duly authenticated.⁴⁷

Enforcement of arbitration awards also imposed procedural hurdles derived from fundamental Mexican public policy. Most importantly, if the requirements are taken at face value, even an international arbitration was required to commence with personal service on the defendant.

The history of arbitration in Mexico thus reflects a divergence between desire and method. The culture and government have openly embraced private dispute resolution.⁴⁸ The actual arbitration mecha-

46. See ICCA Series 4, *supra* note 14, at 84 n.9 (despite the fact that courts have construed the reference to arbitral submission in the commercial code as extending to arbitral clauses, "[e]xperts recommend that a submission . . . be signed (in a notarial document) to avoid difficulties").

47. C.P.C.D.F. art. 605 (1978).

48. None of the enumerated restrictions reflect an aversion to arbitration. Long-standing procedural code provisions grant arbitrators tremendous freedom where such provisions would not undermine procedural fairness. See C.P.C.D.F. art. 608 (1978) (court prohibited from re-examining merits of arbitrators' decision); Cód.Com. art. 1426 (1989) (granting arbitrators freedom to select the applicable substantive law in the absence of agreement); Cód.Com. art. 1423 (V) (1989) ("In the arbitration agreement the parties may agree to: . . . applicable laws as to the merits of the dispute . . .").

nism, however, did not easily allow people engaged in business to enter into arbitrations or, even if they used arbitral procedures, to control the flow of those procedures.

C. *Changes in Mexican Arbitration Law*

In recent years, various steps have been taken to modernize Mexican arbitration law in order to allow parties privately to resolve disputes. Each of these changes has constituted at least a partial step away from the publicista model of arbitration.

1. THE CONVENTIONS

Mexico signed the New York Convention in 1971 and the Panama Convention in 1978.⁴⁹ These two Conventions reflect the basic tenets of consensual international commercial arbitration. The Conventions require a signatory's courts to enforce agreements to arbitrate future disputes regardless of the form of the agreement and set severe limits on the courts' rights to refuse to enforce an arbitration award.⁵⁰ Furthermore, the Panama Convention, in its only significant difference with the New York Convention, provides in article 3: "In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission."⁵¹ The IACAC utilizes the United Nations Commission on International Trade Law (UNCITRAL) rules, which are a result of intense international effort and consultation and are designed to honor the parties' agreement to arbitrate and further the procedural flexibility that is integral to efficient dispute resolution.⁵²

The Conventions cannot be squared easily with article 14 of the Mexican Constitution. The freedom to agree to arbitrate private disputes allows parties to dispense with the procedural guarantees delineated by the Constitution. The enforcement obligations require Mexican courts to endorse awards which may have been obtained in violation of the guarantees.⁵³ Accordingly, the procedural guarantees

49. José L. Siqueiros, *Mexico*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, app. II-2 (Albert J. Van Den Berg ed., 1984).

50. Article 5 of the Panama Convention provides that enforcement of an arbitration award may be refused on grounds of incapacity of the parties, inadequate notice, violation of jurisdiction, or violation of the procedure established by agreement. Panama Convention, *supra* note 2, at art. 5. The New York Convention has virtually identical provisions. See New York Convention, *supra* note 1, at art. V.

51. Panama Convention, *supra* note 2, at art. 3.

52. See Norberg, *supra* note 18, at 90.

53. Although the Mexican Constitution provides that treaties constitute the supreme law

of Mexican law even hobble the Conventions.

2. JUDICIAL RECOGNITION OF CONVENTION OBLIGATIONS

To date neither Mexican courts nor commentators have suggested that courts will fully honor the provisions of the Conventions. Three cases decided since Mexico first ratified the New York Convention, however, evidence Mexican courts' willingness to relax the traditional strictures on arbitration procedures and fully enforce the Conventions.⁵⁴

In 1977, in *Presse Office S.A. v. Centro Editorial Hoy S.A.*⁵⁵ and *Malden Mills, Inc. v. Hilaturas Lourdes S.A.*,⁵⁶ Mexican courts enforced arbitration awards over objections that the arbitrators ignored constitutionally-mandated procedural formalities. In each case, Mexican companies had participated freely in overseas arbitrations pursuant to broad arbitration clauses—in the United States in *Malden Mills* and in France in *Presse Office*—and resisted enforcement after losing on the merits. In each case, the respondent claimed neither that the award was manifestly unjust on the merits nor obtained in violation of the parties' agreement. Instead, the respondents claimed that discrepancies between the conduct of the arbitration and Mexican procedural guarantees precluded enforcement.

In *Presse Office*, the respondent stressed that a cardinal principle

of the land, the New York and Panama Conventions cannot override conflicting constitutional provisions. Article 133 of the Constitution provides:

This Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law throughout the Union. The judges of each state shall conform to the said Constitution, the laws, and treaties, notwithstanding any contradictory provisions that may appear in the constitutions or laws of the States.

CONST. art. 133.

54. Professor Kurth offers a summary of the role of case law in the Mexican system:

It should be mentioned here that the common law rule of *stare decisis* has no application in the civil law according to legal "folklore." Professors Bayitch and Siqueiros have stated:

Legal rules applied by the Mexican courts in the process of disposing of individual litigation (*jurisprudencia*) have, as a matter of principle, no authority as rules of law (precedents). According to an express provision in the federal Civil Code (art. 19), the principle of *stare decisis* does not obtain since civil controversies "shall be decided in accordance with the text of the law (*letra de la ley*) or with its juristic interpretation (*interpretacion juridica*).

The authors go on to say that this does not preclude courts from being impressed by references to earlier decisions, but they are not bound by precedents.

Kurth, *supra* note 11, at 613-14 n.55 (citation omitted) (footnote omitted).

55. See 1979 Y.B. COM. ARB., VOL. IV, at 301.

56. See *id.* at 302.

of Mexican public policy is that first notice of summons be personally served on defendant.⁵⁷ The respondent claimed that failure to do so, despite his knowledge of and participation in the arbitration, rendered the award unenforceable under Mexican law.⁵⁸ The Court of First Instance rejected this argument:

The arbitral procedure which resulted in the award . . . complies with the formal requirements imposed by Arts. 14 and 16 of the Mexican Constitution and Article 619 of the [procedural code]. The summons, to which petitioner objects, was actually served in a correct manner, because by inserting the arbitral clause in the contract, the parties tacitly waived the formalities established by Mexican procedural legislation, especially those required by Art. 605, No. IV of the [procedural code] in respect of summons in personam⁵⁹

The Court of First Instance further rejected arguments that the award had not been presented to the court with proper formality. The Court noted that the New York Convention provided that the court in the enforcing nation was empowered to examine the legality and authenticity of the award.⁶⁰

In *Malden Mills*, the defendant also argued that the court should not enforce the award because the defendant had not received personal service notifying him of the arbitration proceeding.⁶¹ The Court of First Instance accepted this argument and held in the defendant's favor.⁶² The Court of Appeals, however, reversed, concluding that the Court of First Instance erred in failing to apply the New York Convention, and dismissed claims by the defendant that the commercial code should apply.⁶³ The Court of Appeals also held that the defendant waived procedural protections provided by Mexican law and that the award did not have to be delivered through formal diplomatic channels.⁶⁴

Although article 14 of the Mexican Constitution and the publicista theory of arbitration control the supporting reasoning, the decisions ultimately vindicate the principles underlying the New York Convention. Under the New York Convention, a party cannot resist enforcement on the basis of lack of personal service where the party

57. *Id.* at 301.

58. *Id.*

59. *Id.* at 301-02 (footnotes omitted).

60. *Id.* at 302.

61. *Id.*

62. *Id.* at 303 (holding notice ineffective because service by mail was contrary to Mexican public policy).

63. *Id.*

64. *Id.*

did receive notice and fully participated in the arbitration.⁶⁵ Even though both courts recognized that the New York Convention controlled, the courts buttressed their conclusion by reasoning that the parties waived the procedural requirements of the Mexican Constitution, which were satisfied nonetheless. This reasoning preserves—albeit in a roundabout way—the vestiges of the supposedly superseded procedural protections. If parties waived or satisfied the procedural protections, then it remains possible that in some circumstances the protections apply.

A 1986 decision, *Mitsui de Mexico S.A. and Mitsui & Co. Ltd. v. Alkon Textil S.A.*,⁶⁶ enforced the New York Convention without the equivocation of *Malden Mills* or *Presse Office*. In *Mitsui*, the Court of Appeals vacated a lower court's decision to take jurisdiction of a dispute between two Japanese companies (collectively "Mitsui") and a Mexican company ("Alkon").⁶⁷ Mitsui and Alkon had entered into seven contracts for the sale of machinery by Mitsui to Alkon.⁶⁸ Each contract included typical broad arbitration clauses providing substantially that any dispute or disagreement which arises out of this contract, or is related to this contract or the breach of this contract, and which cannot be amicably settled without causing unnecessary delay to the parties, will be referred to arbitration in Japan, under the law of Japan and according to the rules of procedure of the Japan Commercial Arbitration Association.⁶⁹

In spite of this clause, Alkon instituted court proceedings against Mitsui in which it sought restitution and damages for receipt of machinery allegedly below an acceptable level of quality.⁷⁰ Mitsui invoked the arbitration clause, but the judge in the Court of First Instance held that it had jurisdiction and refused to refer the dispute to arbitration in Japan.⁷¹

The reasoning of the Court of First Instance ran directly counter to the New York Convention and the plain meaning of the arbitration clauses. The court first held that only the rendering of an arbitration award divested a court of jurisdiction.⁷² It next stunningly concluded that Mitsui waived objections to its assumption of jurisdiction because a dispute over the quality of the machinery did not fall within the

65. See *supra* note 50.

66. See 1991 Y.B. COM. ARB., VOL. XVI, at 594.

67. *Id.* at 598.

68. *Id.* at 594.

69. *Id.* at 595.

70. *Id.* at 595.

71. *Id.*

72. *Id.* at 596.

meaning of the arbitration clauses.⁷³ The Court of First Instance also concluded that Mitsui waived objections to its assumption of jurisdiction by participating in the proceedings.⁷⁴

The Court of Appeals reversed and sent the parties to Japan for arbitration before the Japanese Commercial Arbitration Association (JCAA).⁷⁵ In a straight-forward manner, the Court of Appeals applied the principles of the New York Convention. According to the Court of Appeals, because the parties did not dispute authenticity of the agreements, permitting the Court of First Instance to assume jurisdiction would disserve the parties intentions:

Contracts validly concluded must be complied with faithfully (*pacta sunt servanda*) and their execution cannot be left to the will of only one of the parties Since these contracts contain an arbitration agreement, the [JCAA] has sole and exclusive jurisdiction to decide the dispute, to the exclusion of any other jurisdictional means and irrespective of the place of residence of the defendants.⁷⁶

As to the Court of First Instance's conclusion that the dispute did not fall within the scope of the clauses, the Court of Appeals noted that the dispute concerned defective machinery and reasoned:

The nature of the claims leaves no doubt that [Alkon] cannot validly maintain—as was held in the decision a quo that the dispute does not fall within the scope of the arbitration clauses . . . because the action is allegedly for damages. Further, claims 1 to 6,—although [Alkon] does not mention this—concern the rescission of the contracts for lack of performance, and only the last two claims concern damages. Hence, [Alkon's] claim is related to or actually derives from a typical contractual non-performance and it is not extra contractual or independent from the contract, as the [lower court judge] erroneously held.⁷⁷

Mitsui provides a powerful and important decision that reflects a real commitment to consensual commercial arbitration. The Court of Appeals strongly affirmed the necessity for courts to enforce the parties' expressed intentions even though the result, commanding a Mexican company to go to Japan to fight a large Japanese company, militated against strict enforcement of Convention obligations.

Additionally, the Court of Appeals lent important insight into the treatment of arbitration clauses in Mexico. By holding that the

73. *Id.* at 597.

74. *Id.* at 597-98.

75. *Id.* at 598.

76. *Id.*

77. *Id.* at 597.

broad arbitration clause covered "typical contractual non-performance," the Court of Appeals explicitly endorsed the validity of private agreements to arbitrate future disputes. Finally, the Court of Appeals approved of substantial arbitrator power when it concluded that the arbitrators could address requests for contractual rescission. That conclusion implied that the arbitral clause could be separated from the remainder of the contract. This view of arbitral clauses, which prevents excessive judicial interference in arbitrations, comprises part of most modern arbitration regimes.⁷⁸

3. REFORM OF THE FEDERAL COMMERCIAL CODE AND THE CODE OF CIVIL PROCEDURE FOR THE FEDERAL DISTRICT

The recent modifications to the commercial code and the procedural code also sought to bring Mexican arbitration law in conformity with the principles of the Conventions.⁷⁹ The reforms bifurcated the commercial code provisions that address mercantile suits and, while the old mercantile suit provisions remain, a separate section entitled Arbitral Procedure now addresses private agreements to arbitrate future disputes.⁸⁰

The arbitral procedure section, a mix of new provisions and provisions borrowed from the pre-reform procedural code, removed some of the most troubling and burdensome provisions from the commercial code. Article 1415 of the commercial code now recognizes the right of the parties to submit future disputes to arbitration through a private arbitration clause:

When the parties are merchants, they may agree to submit the controversies arising from their commercial relationship to an arbitral decision. The arbitral agreement may adopt the form of an arbitration clause to be included in a contract or in the form of a separate agreement.

The arbitration agreement shall be in writing and may be evidenced by an exchange of letters, telex, telegrams or by any other similar means.⁸¹

78. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (holding that arbitrator may address challenges to jurisdiction).

79. According to Dr. Siqueiros, title IV of the commercial code as amended "incorporates principles embodied in the UNCITRAL Model Law on International Commercial Arbitration, the 1958 New York Convention and the 1975 Inter-American (Panama) Convention." José L. Siqueiros, *Mexican National Update*, 1990 Y.B. COM. ARB. 307.

80. Cód.Com. arts. 1415-1437 (the new commercial code provisions on arbitration).

81. Cód.Com. art. 1415. This is substantially the same language employed in the Conventions. See Panama Convention, *supra* note 2, at art. 1 ("The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications."); New York Convention, *supra* note 1, art. II(2) ("The term

Article 1421 of the commercial code provides that the agreed arbitration "may be domestic or international" and that "conventions and international treaties" control over provisions of the commercial code.⁸²

The reforms in the commercial code extend to the enforcement of arbitration awards. Article 1347-A(I) of the commercial code exempts arbitration awards from foreign transmittal requirements and removes personal service of the defendant during the arbitration as a prerequisite to enforcement. The defendant simply must have "been summoned or subpoenaed in due legal form in order to guarantee him due process of law and the opportunity to present his defenses."⁸³

The procedural code's provisions regarding arbitral suits remain largely unchanged. The procedural code still does not make any direct reference to international arbitration or arbitral institutions. Furthermore, the provisions do not clearly establish either the possibility of submitting future disputes to arbitration or the relative freedom of the parties to establish their own procedure. Moreover, the laundry list of procedural controls remains in place.⁸⁴ Thus, the current procedural code preserves the pre-existing preference for procedural formality.

D. *Mexico Has a Complete Arbitration Framework*

Reforms of the commercial and procedural codes represent a significant advance. A company contemplating commercial transactions in Mexico or with a Mexican company now may enter into an arbitral agreement in reliance upon an established body of law.

The commercial code now recognizes informal agreements to arbitrate future disputes, a recognition found formerly, if at all, in the procedural code.⁸⁵ The reformed commercial code expressly recognizes international arbitration and Mexican courts' obligation to enforce the New York and Panama Conventions. *Mitsui, Presse*

'agreement in writing' shall include an arbitral clause . . . or . . . an exchange of letters and telegrams.").

82. See Cód.Com. art. 1421 (The arbitration may be domestic or international; the provisions of the Code shall apply to both sides, with the exception of what has been provided for by the conventions and international treaties to which Mexico is a party.).

83. Cód.Com. art. 1347-A(IV).

84. As discussed *infra* part III.D., an entirely new procedure for the confirmation of foreign awards was added to a section of the procedural code.

85. Cód.Com. art. 1050 (establishing the primacy of the commercial code: "When pursuant to commercial law, one of the parties . . . deems the transaction as one of mercantile nature and the other party deems it as one of civil nature, the dispute arising therefrom shall be governed by commercial laws.").

Office, and *Malden Mill* indicate that Mexican courts will enforce those obligations. Additionally, some of the most onerous provisions of the commercial code have been eliminated, thereby removing some potential conflicts between Mexico's obligations arising under the Conventions and the procedural restrictions that arguably rest on constitutional guarantees.

III. THE CONTINUING LINK BETWEEN MEXICAN ARBITRATION LAW AND THE PUBLICISTA THEORY OF ARBITRATION

Despite these tangible advances, rightly praised by commentators,⁸⁶ a careful analysis of the reforms reveals that the pre-existing publicista framework limits them. All facets of arbitration in Mexico, including recognition of the arbitral clause and arbitral procedure and enforcement of arbitration awards, remain subject to heavy government control. Mexican arbitration law is not as cumbersome as before, but the remaining procedural controls seriously retard the utility of international arbitration in Mexico or with Mexican companies.⁸⁷

86. *E.g.*, Hoagland, *supra* note 5, at 91 ("These domestic reforms continue Mexico's role as a Latin American leader, begun in a major way by acceptance of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards of New York (New York Convention) in 1971—and in the movement of systematization of private international law.").

87. The provisions of the new commercial code may not be dismissed as simply the result of poor drafting or sheer thoughtlessness. While many provisions of the 1988 commercial code were simply borrowed from the pre-reform procedural code, other provisions of the reformed commercial code are entirely new. Even the borrowed provisions have been re-drafted in part, although the procedural controls remain unchanged or even enhanced.

For example, article 619 of the current procedural code provides that unless the parties expressly disclaim procedural formalities, established judicial formalities guide the arbitration. C.P.C.D.F. art. 619. Article 1422 of the current commercial code provides that the parties may enter into any stipulation regarding arbitration procedure that does not impinge upon the due process minimum. C.P.C.D.F. art. 1422. Article 1338 of the procedural code, by contrast, required the arbitrators to hear all offered proofs and allegations *except* what was otherwise stipulated by the parties. C.P.C.D.F. art. 1338 (1884).

The drafters also directly granted the arbitrators discretion when such control did not affect arbitration procedure, but the substantive law applied during arbitration. Article 1426 of the commercial code, for example, provides:

The parties may choose the law applicable to the merits of the dispute, unless such choice would not be valid on grounds of public policy. In the absence of such choice or when the latter is not legally valid, *the arbitrator or the arbitral tribunal, having regard to the characteristics and connections of the case*, will determine the applicable laws as to the merits.

Cód.Com. art. 1426 (emphasis added). *See also* C.P.C.D.F. art. 608 (court enforcing arbitration award may not examine the merits of the judgment).

Moreover, the reformers clearly had at their disposal alternative, less restrictive, provisions. In the 1960s, for example, the Internal Rules for the Permanent Commission on Arbitration of the National Chamber of Commerce of Mexico City provided that the Commission had the discretionary power to control arbitration procedure in the absence of a contrary

A. *The Arbitration Clause*

Although the commercial code now recognizes agreements to arbitrate future disputes and *Mitsui* gave typical arbitration clauses a broad interpretation, the reforms imported from the procedural code limit the utility of those advances.⁸⁸ Article 1417 of the commercial code provides:

The arbitral agreement *should designate the matters which shall be submitted to the arbitral proceedings* as well as the name of the arbitrator or arbitrators; otherwise the procedure to be followed for their designation. *If there is no mention regarding the subject matter of the arbitration agreement the latter should be considered null and void without [judicial intervention].*⁸⁹

A general agreement to arbitrate future disputes, the touchstone of arbitration, may not sufficiently specify the matters to be submitted to arbitration. Because a violation of this provision renders an agreement "null and void without judicial intervention," a party resisting arbitration has colorable grounds for a flat refusal to arbitrate.⁹⁰ Thus, the reforms leave unsettled possibly the most basic issue concerning an arbitration scheme—the enforceability of the arbitration clause.⁹¹

Just as important, article 1417 of the commercial code reflects the code's aversion to granting arbitrators power even with the concurrence of the parties. Accepted arbitration norms, reflected in the seminal U.S. case *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁹² hold that the arbitration clause can be separated from the remainder of the contract. Pursuant to this separability doctrine, arbitrators may address challenges to their own jurisdiction, even where the parties dispute the formation of the underlying contract.

In contrast, article 1417 of the commercial code provides that an

agreement and that parties waived all rights to challenge those decisions. Siqueiros, *supra* note 15, at 721-22, app. a.

88. See *supra* notes 41-44.

89. Cód.Com. art. 1417 (emphasis added).

90. The procedural code may not be used to avoid this limiting provision because article 616 of the procedural code retains the prior command that "[t]he submission shall indicate the matter or matters to be arbitrated If the first element is lacking, the submission shall be null and void without the need of previous judicial declaration." Note that the phrasing of this older provision slightly differs from the provision included in the revised commercial code. This change suggests that the drafters tried to improve this provision and that its inclusion in the new commercial code was not a mistake or an oversight.

91. Cf. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES, U.N. Sales No. E.77.V.6 (1976) [hereinafter UNCITRAL RULES] ("Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration . . . then such disputes shall be settled [by arbitration].") (footnote omitted).

92. 388 U.S. 395, 402-04 (1967).

arbitration clause is automatically null and void where there is no mention of the subject matter of the arbitration in the arbitral agreement. Thus, by definition, jurisdictional issues centering on the specificity of the clause may not be addressed by the arbitrators. Article 1051 of the commercial code indicates that courts should address challenges to the arbitrability of a dispute by delineating the method of bringing jurisdictional challenges before the court. "The illegality of the agreement or its non-observance when the agreement is made in accordance to law may be claimed at any time previous to the rendering of the award or judgment through a summary motion without stay of proceedings."⁹³ Article 1051 thus prevents an arbitrator from considering jurisdictional claims when the claim is based upon fraud or other type of illegality.

Article 1434 of the commercial code and article 630 of the procedural code arguably grant power to the arbitrators to address other jurisdictional issues, such as whether a dispute falls within the ambit of a sufficiently specific, admittedly valid, arbitration clause. Articles 1434 of the commercial code provides that "[i]n the course of the proceedings the arbitrators may resolve any incidental issues that must be decided prior to the principal subject matter."⁹⁴ However, when this provision was first drafted in the 19th century, separate provisions dealt with the power of arbitrators to address jurisdictional issues.⁹⁵ Thus, the historical context does not permit an expansive interpretation that would bring the commercial code in line with modern arbitration schemes.

Of course, a court could sweep away these questions. The Conventions arguably override any barriers to the enforcement of an arbitration clause.⁹⁶ Moreover, *Mitsui* apparently recognized the separability of the arbitration clause and the power of arbitrators to

93. Cód.Com. art. 1051.

94. Cód.Com. art. 1434; *see also* C.P.C.D.F. art. 630 (similar language).

95. *See* Trevino, *supra* note 7, at 332 (in pre-reform arbitration scheme the court may address the competence of arbitrators, the validity of the agreement, or the arbitrability of the dispute). Additionally, the ancient provisions outlining the power of arbitrators to rule on their own jurisdiction were confusing and contradictory. *Compare* C.P.C.D.F. ch. V, § 1, art. 1245 (1884) (the nullity of the arbitration clause may only be presented to the arbitrators before answering the initial demand) *and* C.P.C.D.F. ch. V, § 4, art. 1300 (1884) (the arbitrators may not address validity of their appointment or the arbitral submission) *with* C.P.C.D.F. ch. V, § 4, art. 1249 (1884) (the arbitrators may address incidental matters without resolution of which they could not decide the principal dispute).

96. New York Convention, *supra* note 1, at art. II, § 1 ("Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."); Panama Convention, *supra* note 2, at art. 1 (similar language).

rule on their own jurisdiction when it held that arbitrators could address claims of contractual rescission. However, these reforms to the commercial code were made after *Mitsui*, and thus they could be understood as rejecting the separability of arbitration clauses and the power of arbitrators to rule on their own jurisdiction.

B. *Formality of Arbitration Procedure*

Even assuming that an arbitration clause is honored, the commercial code's commitment to honoring the parties' agreement to arbitrate disputes pursuant to agreement may be illusory. Each of the provisions in the commercial code that honor the agreement—articles 1051, 1421-23—maintains the role of procedural regularity that characterizes prior Mexican arbitration law.

Article 1051 of the commercial code establishes that the parties lack absolute freedom to agree on procedural issues: "*Within the limitations established by this Book, the overall preferred procedure shall be that freely agreed by the parties . . .*"⁹⁷ Article 1422 of the commercial code sets out the critical limitation on arbitration procedure drawn from the fundamental guarantees in the Constitution: "In the arbitration agreement the parties may freely agree as to the rules of procedure to be followed *provided due process requirements are complied with.*"⁹⁸ These provisions unambiguously mean that arbitrations must contain a minimum "due process" level of procedural protection, despite any contrary agreement by the parties.⁹⁹ The commercial and procedural codes do not define the basic elements of the prescribed due process, but these elements may reasonably include

97. Cód.Com. art 1051 (emphasis added).

98. Cód.Com. art 1422 (emphasis added). Through a public document merchants may still engage in a mercantile suit that preserves the essential element of court procedure. These provisions do not directly apply to arbitral suits. Article 1051 of the commercial code provides that title IV of Book V, Arbitral Procedure, articles 1415-1437 in the commercial code, expressly controls agreements to arbitrate future disputes. Cód.Com. art. 1051. The continued existence of these arguably useless provisions, however, illustrates continued emphasis on procedural regularity.

99. I use the phrase "due process" because Dr. Siqueiros used this phrase in his presentation of the commercial code. See Siqueiros, *supra* note 15. The Spanish phrase "las formalidades esenciales del procedimiento" may be translated literally as "the essential formalities of procedure" and has a different technical meaning than United States' due process. See also Cód.Com. art. 1421 (reaffirming limitations set out in article 1051 by stating "lacking an express agreement of the parties . . . in accordance with the provisions of the following articles, the rules of this Code shall be governing; in their absence, those rules established by the [local] Code of Civil Procedure . . . shall govern.") (emphasis added); Cód.Com. art. 1423 ("In the arbitration agreement the parties may agree as to: . . . V. *Any other stipulation which they may deem convenient, . . . without prejudice to the provisions established by the previous article [requiring due process in arbitration procedures.]*") (emphasis added).

personal service, formal pleadings, a reasoned opinion addressing all matter submitted, and other guarantees of the procedural code traditionally incorporated into Mexican arbitration procedure.¹⁰⁰

The procedural controls over commercial arbitration extend beyond the requirement that a minimum level of due process be preserved. Commercial code article 1421 retains the "bootstrap" provision:

If the arbitration proceedings are to take place in Mexico, lacking an express agreement of the parties or an express provision of the rules of procedure agreed to by such parties in accordance with the provisions of the following articles, the rules of this Code shall be governing; in their absence, those rules established by the [local] Code of Civil Procedure.

Not only does this provision import all the procedural formalities of Mexican courts not addressed by the agreed procedure, it also imports article 619 of the procedural code, another "bootstrap" provision, which places the burden on the parties to disclaim particular formal procedures:

During the proceedings the parties and the arbitrators shall follow the terms and formalities established by the courts, *unless the parties have agreed otherwise*. However, regardless of what the parties have agreed to, the arbitrators shall always be obliged to receive evidence and hear pleadings if so required by any of the parties.

Through article 1421 of the commercial code the challenging party may invoke article 619 of the procedural code and claim that normal rules of procedure control the arbitration if not specifically disclaimed.¹⁰¹ Perhaps, if article 133 of the Constitution permits, the New York and Panama Conventions override these requirements. Although the Conventions do not expressly prohibit a host country from exerting control over arbitral procedure, article III(3) of the New York Convention commands a court to refer a dispute within the scope of an arbitration clause to arbitration unless it finds that the agreement is "null and void, inoperative or incapable of being performed."¹⁰² Similarly, article V(1)(d) of the New York Convention suggests that the parties' agreed procedure always prevails over pre-

100. See also C.P.C.D.F. art. 619 (emphasis added):

During the proceedings the parties and arbitrators *shall follow the terms and formalities established by the courts*, unless the parties have agreed otherwise. However, regardless of what the parties have agreed to, the arbitrators *shall always be obliged to receive evidence and hear pleadings if so required by any of the parties*.

101. This argument may appear strained, but trial courts accepted weaker arguments in *Mitsui and Malden Mills*. See *supra* part II.C.2.

102. New York Convention, *supra* note 1, at art. III(3).

scribed domestic procedure and allows for refusing enforcement only if "the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place"¹⁰³ On the other hand, the Conventions cannot prevail over the contrary dictates of article 14 of the Mexican Constitution.

C. *Non-Due Process Procedural Controls*

The commercial and procedural codes control arbitral procedure, apart from the due process requirements, with a list of mandatory and default procedural rules that apply to all arbitrations. While these provisions are arguably subject to nullification under the Conventions if the parties attempt to contract otherwise, they were included in the commercial code after Mexico ratified the Conventions and thus, at least, raise the possibility that a Mexican court would enforce them. Moreover, if the parties do not explicitly disclaim these procedures, even a generous interpretation of the Conventions might not prevent their application. Accordingly, the provisions create a substantial risk that parties to an arbitration will struggle through unanticipated procedural hurdles.

1. APPROVAL OF SETTLEMENT

Tucked away at the end of article 1428 of the commercial code is a new provision governing control of settlement.¹⁰⁴ That article delineates the circumstances terminating an arbitration:

If the parties reach a settlement as to the merits of the dispute the arbitrator shall proceed to close the proceedings; *if the arbitrator finds that the terms of the settlement are not contrary to public policy [orden publico]*, the arbitrator should approve the settlement and record it in the form of a final award.¹⁰⁵

By definition, this control over settlement cannot be waived. It

103. Panama Convention, *supra* note 2, at art. 5(1)(d); *see also id.* at arts. 1, 3, 5(2)(b). In any event, a Mexican court could resist enforcement of an award on the grounds that it was contrary to public policy under the authority of article 5(2)(e) of the New York Convention. While the public policy exception to mandatory enforcement is normally narrowly construed, it could readily encompass the fundamental guarantees of Mexican procedure found in the Constitution. *See also* Panama Convention, *supra* note 2, at art. 5(d).

104. Commercial code article 1428 closely copies the long-standing provision in article 622 of the procedural code that describes the conditions upon which the submission to arbitrate terminates. Cód.Com. art. 1428; C.P.C.D.F. art. 622. No prior version of this clause addresses settlement issues. The reformers, therefore, made a deliberate decision to limit the parties' ability to settle their own cases.

105. Cód.Com. art. 1428 (emphasis added).

addresses precisely those situations in which the parties have reached agreement contrary to the arbitrator's judgment.

This clause potentially constitutes an unheard of intrusion into the freedom of parties to arbitrate commercial disputes. A Mexican tribunal might find a way to control such an intrusive arbitrator because the results run counter to dictates of the Conventions and because the Constitution nowhere endorses shifting power from litigants to arbitrators. Nevertheless, because this provision apparently represents such a sharp and unprecedented intrusion into arbitral freedom, its presence alone is a serious hindrance to the arbitration process.¹⁰⁶

2. CHALLENGE TO ARBITRATORS

The revised commercial code limits the parties' power to challenge arbitrators. The commercial code reforms imported ancient provisions from the procedural code that limited the grounds for arbitrator challenge and removed the power of the arbitrators to consider such challenges.¹⁰⁷ Articles 1420 and 1428(III) of the commercial code, copies of present procedural code articles 618 and 622(III), establish that once the parties consent to an arbitrator, that arbitrator has immunity from challenge.¹⁰⁸ Because commercial code article 1418 provides for court-appointed arbitrators when the agreement does not name the arbitrators or identify the procedure for appointing the arbitrator, arbitrators arguably have immunity from challenge if the parties have agreed to their appointment or the procedure for their appointment.¹⁰⁹

Even if this argument failed, the grounds for challenge remain extraordinarily limited. According to commercial code article 1433

106. The arbitrator's interference could upset a settlement, even if ultimately unenforceable. If one of the parties settles reluctantly, the initial refusal to endorse a settlement could encourage withdrawal from the settlement.

107. Consistent with this provision, the arbitrators may be without legal capacity to disqualify themselves. Commercial code article 1433 provides that challenges regarding arbitrators be decided by the court of common jurisdiction. Cód.Com. art. 1433. Procedural code article 633 generally confirms that authority. C.P.C.D.F. art. 633. Article 1428 of the commercial code, in turn, grants arbitrators the power to withdraw only for reasons of personal incapacity: "II. By the withdrawal of the designated arbitrator or arbitrators, *which may only be with justified cause making them unable to perform their duties . . .*" Cód.Com. art. 1428 (emphasis added).

Together, the provisions on challenge and withdrawal suggest a startling result. In any arbitration other than one with a court-appointed arbitrator, both the parties and the arbitrators may lack capacity to respond to even blatant and newly-discovered arbitrator bias.

108. Cód.Com. arts. 1420, 1428 (III); C.P.C.D.F. arts. 618, 622 (III).

109. See C.P.C.D.F. art. 622 (limiting personal disqualification only to cases of *verified* illness).

and procedural code article 623, "the arbitrators may only be challenged [in court] on the same grounds applicable to judges."¹¹⁰

Titulo Cuarto, De Los Impedimientos, Recusaciones y Excusas sets out in six chapters and twenty-three articles the basis and procedure for judicial challenge and removal.¹¹¹ Not only is this body of law too complex to serve as a ready guide for foreign businesspersons as to the appropriateness of an arbitrator, its standards are inappropriate for an arbitration. Procedural code article 170 provides, for example, that judges may not serve:

I. On cases in which [the judge] has a direct or indirect interest;

....

V. When the judge, his/her spouse, or their children is an heir, legatee, donor, donee, partner, creditor, debtor, guarantor, recipient of a guarantee, landlord, lessor, principal, agent, or social acquaintance of one of the parties . . . ;

VI. If the judge has made promises or threats, or has shown in any other way his/her hatred or affection for one of the litigants

....¹¹²

These standards are both too broad and too narrow. They may well mandate the recusal of persons within a particular industry, even though such persons are best suited for resolving the particular dispute. On the other hand, the recusal provisions treat arbitrators as professional decisionmakers who are presumptively impartial absent an outward display of bias. These mandated standards also falter because they do not provide for disclosure and do not classify failure to disclose as an additional reason for recusal.

3. LIMITATIONS ON PROOF AND PROCEDURE

Article 1424 of the procedural code provides that the "arbitrators shall always be obliged to receive evidence and hear pleadings if so required by any of the parties; any agreement to the contrary will be null and void."¹¹³ Commercial code article 1423 prevents parties from agreeing on the methods of presenting evidence outside of the due process framework.¹¹⁴ These two provisions arguably return Mexican law to the now-expunged requirement of the pre-reform codes that the parties could not relinquish methods of proof. Moreover, an arbitrator who seeks to control a seemingly endless flow of pleadings and evidence, used solely to burden the opposing party,

110. Cód.Com. art. 1433; C.P.C.D.F. art. 623.

111. C.P.C.D.F. arts. 170-90.

112. C.P.C.D.F. art. 170.

113. C.P.C.D.F. art. 1424.

114. Cód.Com. art. 1423.

may have no legal power to do so. Of course, a host of legal fictions—for example, that the evidence is duplicative and thus not covered by commercial code article 1423—might support a contrary result. Nevertheless, these provisions produce needless uncertainty.

4. TIME LIMITS

Article 1419 of the commercial code provides: “The arbitration agreement will be valid although no time limit has been fixed for the conclusion of the arbitral proceedings; such being the case the arbitrator’s mission shall last sixty working days. The term is to be reckoned as of the start of the arbitration proceedings.”¹¹⁵ This small provision could fatally wound arbitration rights. According to its terms, unless the parties specify a time-period, the arbitration ends in sixty days.

Accordingly, in a complex matter where the parties did not specify a time period the defendant could extract a favorable settlement by refusing to agree to an extension of this limited period. A plaintiff would then have to choose between: (1) agreeing to the unfavorable settlement; (2) completing presentation of the case within sixty days; or (3) attempting to continue the case past sixty days with the hope that Mexican courts would not strictly enforce the limit.¹¹⁶ This default provision serves no public policy, other than a generalized reluctance to permit arbitrators to control arbitrations.¹¹⁷

5. SUBSTITUTION OF ARBITRATORS

Commercial code article 1428(I)-(III) places limits on the replacement of arbitrators depending upon the reason for replacement—death, justified withdrawal, or justified challenge. Commercial code article 1428(I) provides that if the “arbitrator”¹¹⁸ dies, the arbitration ends unless the parties designated a substitute or procedure for replacement beforehand or the parties agree to a new arbitrator within thirty days.¹¹⁹ If the court appointed the arbitrator, the court is to follow the same procedure originally used. According to commercial code article 1428(II), if the “arbitrator” withdraws for a per-

115. Cód.Com. art. 1419; *see also id.* art. 1428 (V) (arbitration expires without express agreement to extend time limits); C.P.C.D.F. art. 617 (1988) (identical to Cód.Com. art. 1419).

116. Cód.Com. art. 1419. This provision is even susceptible to the assertion that the opinion must be issued within sixty days.

117. Interestingly, the 1884 procedural code did not appear to require that the passage of the set term for an arbitration preclude an award. Procedural code article 1296 allowed the arbitrators to ask the parties for additional time, and procedural code article 1297 held them responsible for any damages if they did not ask for permission in time. These provisions imply that any such delayed award still would have been valid.

118. *See infra* note 144.

119. Cód.Com. art. 1428(I).

missible reason, illness for example, the parties must agree on a new arbitrator within thirty days or the arbitration ends.¹²⁰ If a court-appointed arbitrator withdraws for a justified cause, the court must make a second appointment. If the court-appointed substitute arbitrator resigns for a justified cause, the arbitration then ends. Additionally, under 1428(III), the arbitration ends when a court-appointed arbitrator has been successfully challenged for a second time.¹²¹

These complex procedures, the result of tremendous distrust shown toward litigants and arbitrators, produce enormous confusion in those areas not directly addressed by the agreement. If an arbitrator's resignation is not justified, when does the arbitration end? May the parties address the replacement of a court-appointed arbitrator in their arbitration clause? Do these procedures apply when one of three arbitrators resigns, withdraws, or is challenged? May two arbitrators continue with or without a replacement when a third arbitrator withdraws or is challenged? Do circumstances exist in which the arbitrators should start over? The commercial code and procedural codes do not provide answers to these questions.

D. *Enforcement of Foreign Awards*

The new procedures for enforcement of foreign awards appear to de-emphasize procedural regularity. Article 1347-A(I) of the commercial code specifically exempts arbitral awards from the requirement that foreign judgments be formally transmitted to the Mexican court and that the defendant receive personal service, thus apparently eliminating the previously existing barriers to rapid enforcement of arbitration awards.¹²²

Commercial code article 1437 also provides, however, that enforcement is governed by the local code of procedure. Article 606 of the procedural code maintains the same restrictions that previously existed including: the judgment satisfies the necessary formalities for transmission;¹²³ the arbitration is not an action concerning real property; the judge or arbitrator was competent to address the matter under accepted international principles compatible with the principles of Mexican Civil Procedure; the defendant received personal service in order to ensure the guarantees of a hearing and an opportunity to

120. *Id.* at art. 1428(II).

121. *Id.* at art. 1428(III).

122. *Id.* at art. 1347-A(I).

123. Pursuant to revised article 1347 of the commercial code, no such formalities are required. Cód.Com. art. 1347.

present his defenses;¹²⁴ the matter is not pending in Mexico; the award has the character of *res judicata* in the country in which it was issued, and no right to ordinary appeal exists; the underlying obligation is not contrary to Mexican public policy; and the judgment is authentic.¹²⁵

The reformed procedural code also includes new reasons to deny enforcement. The judge has the discretion to deny enforcement if the country from which the award arose does not recognize foreign arbitral awards.¹²⁶ Procedural code article 605 also prohibits enforcement of awards contrary to the "public policy" of the Federal Code of Civil Procedure and other applicable laws, except to the extent a treaty controls.¹²⁷

Article 608 of the procedural code establishes a procedure, *homologación*, to determine whether the award may be enforced. Article 608 provides that *homologación* starts with personal service upon the defendant. The defendant subsequently has nine working days to respond and present appropriate defenses. If the defendant has appropriate proof, a date will be set for admission of this proof. Further, the Public Ministry always has the right to intervene to exercise its rights. In all cases, the judge's resolution of the defendant's proof is subject to appeal.¹²⁸

The *homologación* procedure presents problems. Most troubling is the requirement that the defendant receive personal service to start the procedure. A defendant who has already lost an arbitration and knows that enforcement will be stayed until personal service may seek to avoid service. Moreover, the public policy exception, the reference to "proof," and the potential intervention of the Public Minister suggest an extremely wide-ranging hearing.

Not surprisingly, the two leading commentators on Mexican arbitration again sharply disagree over the nature of this hearing. Dr. Siqueiros argues that *homologación* should be understood as the internationally-recognized procedure of *exequatur*, a simple process devoted largely to determining the authenticity of the award. Dr. Sierra, by contrast, believes that the *homologación* hearing potentially provides a forum for re-examination of the merits of the award as well

124. Arguably, the personal service requirement is softened because it exists to promote the desired result, a fair hearing, rather than being an end in itself.

125. C.P.C.D.F. art. 606.

126. Mexico did not take this reservation in either the New York or Panama conventions, and thus the Mexican courts should ignore this provision pursuant to the supremacy provisions of article 133 of the Constitution.

127. C.P.C.D.F. art. 605.

128. *Id.* at art. 608.

as an opportunity for delay and chicanery.¹²⁹

The unknown scope of other methods of challenging arbitration awards adds to the confusion concerning the nature of *homologación*. Article 1423(IV) of the commercial code provides that parties may waive the right of "appeal," and article 635 of the procedural code provides for an appeal pursuant to the "applicable procedural laws."¹³⁰ By contrast, procedural code article 608(IV) absolutely forbids a re-examination of the merits of an arbitration award.¹³¹ Thus, Dr. Siqueiros argues that the "appeal" referred to in the codes is simply the right to resist enforcement.¹³² However, a party cannot waive the right to resist enforcement, and Dr. Siqueiros' explanation cannot fully account for the various references to the right of appeal in the commercial and procedural codes.

Amparo, the great writ of Mexico, affords relief from violations of constitutional protections and may also be used to resist enforcement of arbitration awards.¹³³ The commercial and procedural codes leave undefined how *amparo* should apply and how it differs from the right of a court to refuse enforcement of a foreign award contrary to Mexican public policy under the procedural code.

Mexican courts might override any right to challenge enforcement of an arbitration award on procedural grounds pursuant to the Conventions. The Conventions, however, allow a signatory to refuse enforcement on the grounds that the award violates public policy.¹³⁴ While this exception normally is construed narrowly, the inclusion of the various procedural and public policy protections in the commercial and procedural codes after Mexico signed the Conventions might well persuade a court to accept an argument that it should broadly construe the public policy exception.

129. Hoagland, *supra* note 5, at 98 (citations omitted).

130. Cód.Com. art. 1423(IV); C.P.C.D.F. art. 635.

131. C.P.C.D.F. art. 608.

132. In his annotated translation of the commercial code reforms, Dr. Siqueiros argues that the references to an appeal are best "understood as a recourse filed by either party against the enforcement of the award" Siqueiros, *supra* note 49, at app. II-5.

133. Articles 105 and 107 of the Mexican Constitution provide that the Federal Courts may remedy violation of "individual guarantees" through a trial in *amparo*. Article 635 of the commercial code directly applies *amparo* to "an arbitrator appointed by the court." Cód.Com. art. 635. It may apply in other circumstances as well. The nature and application of *amparo* is an enormously complicated topic outside the scope and expertise of this article.

134. New York Convention, *supra* note 1, at art. V(2)(b); Panama Convention, *supra* note 2, at art. 5.

E. *The Arbitration Reforms Are Not Harmonized with the UNCITRAL Rules*

The easy response to the litany of problems described above is that while the codes raise serious potential issues, the structure of Mexico's international obligations makes such outcomes unlikely for arbitrations that involve residents of countries such as the United States. The well-drafted UNCITRAL rules apply by default to arbitrations between residents of signatories to the Panama Convention, such as the United States.¹³⁵ Unfortunately, the UNCITRAL rules conflict with the procedural controls of the commercial code and do not find an easy conceptual resting place along side the "bootstrap" and "due process" provisions. As such, the default application of these rules only highlights the problems created by the procedural controls on Mexican arbitration.

The commercial code specifically recognizes the utility of arbitral institutions and their rules. Article 1422 provides:

In the arbitration agreement the parties may freely agree as to the rules of procedure to be followed provided due process requirements are complied with. Likewise, they may agree that the arbitration will be governed by the rules approved of or used by professional institutions which administer arbitral proceedings.¹³⁶

The commercial code does not, however, explain the relationship between the UNCITRAL rules and the mandatory provisions of the two codes.

Under article 133 of the Mexican Constitution, the UNCITRAL rules arguably trump the commercial code because they are provided for in the Panama Convention. The UNCITRAL Rules, however, expressly defer to mandatory local procedural provisions.¹³⁷ Thus, the relevant texts leave undefined the power of the UNCITRAL rules to control over contrary commercial code and procedural code provisions. Moreover, if the UNCITRAL rules cannot completely override contrary code procedures, the extent of the conflict is unclear. The UNCITRAL rules grant the arbitrators power to address unanticipated disputes, but the "bootstrap" provisions of the two codes provide that such disputes be resolved with reference to court rules. The commercial and procedural codes do not state whether the

135. Panama Convention, *supra* note 2, at art. 3.

136. Cód.Com. art. 1422.

137. UNCITRAL RULES, *supra* note 91, at art. 1(2) ("These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.").

UNCITRAL rules preempt the field and displace the "bootstrap" provisions.¹³⁸

Furthermore, many provisions of the UNCITRAL rules actually conflict with the commercial and procedural codes. Article 1 of the rules places no specific limitation on the arbitration clause, and article 21 clearly spells out the power of the arbitration panel to rule on its own jurisdiction. The two codes, however, place restrictions on the content of the arbitration clause and the power of the arbitrators to address its meaning.¹³⁹

The UNCITRAL rules also grant to the parties and the arbitrators procedural freedom that conflicts with the due process requirements of the commercial code. Article 15 allows the arbitral tribunal, within the framework of the rules, to "conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage in the proceedings each party is given a full opportunity of presenting his case." In that vein, the arbitrators, the parties, or both can limit the procedural framework. Article 22, for example, allows the parties to decide what pleadings, other than the statement of claim and defense, "shall be required." Further, the parties are entitled, under article 30, to waive their right to object to any procedure simply by proceeding in spite of a known irregularity.

The UNCITRAL rules also conflict with mandatory commercial and procedural code provisions that address matters such as settlement and arbitral challenge. Under the rules, the arbitrators have no authority to refuse to enter a settlement as a judgment.¹⁴⁰ Arbitral challenge is based upon a flexible standard that permits challenges under "circumstances . . . that give rise to justifiable doubts as to the arbitrator's impartiality or independence," and a challenge is first a matter for the arbitrators.¹⁴¹ Moreover, simply because a party agreed to the appointment of an arbitrator does not bar a challenge if the party did not initially realize the reason for the challenge. Those procedures cannot be reconciled with the controls over these same

138. Commercial code article 1422 may be read as exempting organizational rules from due process requirements—the first sentence refers to due process and the second sentence endorses arbitral institutions. *Cód.Com.* art. 1442. However, the reference to the rules of professional arbitral institutions is not contained in a separate section, nor do the references to mandatory procedures exempt the rules of arbitral institutions. Moreover, such an exemption, without further definition, makes no sense. While it might be rational to conclude that established arbitral institutions will preserve litigants' rights in the absence of due process mandates, such an assumption is irrational unless the type of organization is further defined.

139. *See, e.g.*, *Cód.Com.* arts. 1417, 1434; *supra* notes 88-98 and accompanying text.

140. UNCITRAL RULES, *supra* note 91, at art. 10.

141. *Id.*

matters in the commercial code and the procedural code.¹⁴²

Application of the UNCITRAL rules prevents some potential problems. For example, UNCITRAL article 23 gives the arbitral tribunal the power to fix time limits. A fair, although not the sole, reading of this article indicates that such a delegation is proper and avoids automatic termination at the end of a sixty-day period. Similarly, the procedures that apply when arbitrators are not appointed by consent of the parties have little significance in light of UNCITRAL articles 6-8 and 13-14 which provide for the appointment of arbitrators. Even the application of the UNCITRAL rules, however, cannot remove the risk and uncertainty arising from Mexican arbitration law.

IV. THE STATE OF MEXICAN ARBITRATION

This Article's careful parsing of the commercial code and procedural code may unfairly paint Mexican arbitration reform as a failure. Many commercial code and procedural code provisions comport with modern arbitration theory, such as the procedural code's absolute bar of the evaluation of the merits of an award, and other provisions are subject to interpretation consistent with those norms.¹⁴³ The three published cases show that Mexican courts will, in fact, use the Conventions as a tool to smooth out rough edges in the two codes. Additionally, the drafters may have believed that any additional changes in the Mexican arbitration regime would have led courts to nullify all reform or the business community to reject private dispute resolution.

Nevertheless, the presence of potential problems may destroy any possibility of real growth in international arbitration with Mexican companies because successful arbitration regimes limit uncertainty and risk. Moreover, the Mexican courts' hesitancy to reject frivolous arguments, revealed in the published cases, and the deliberate decision of the reformers to preserve procedural restrictions in the

142. This article does not fully explore potential conflicts between the UNCITRAL Rules and Mexican law. For example, the procedural controls in the Mexican arbitration procedure extend to the form of the award. The procedural code requires that tribunals address all matters before them and provide reasons for their decisions. While neither the commercial code nor the procedural code require such reasoning, the guarantees of article 14 of the Mexican Constitution, reflected in the Civil Code, support an argument that the due process minimum in the commercial code mandates such reasoning.

The form of the award permitted under the UNCITRAL rules thus may also conflict with the two codes. UNCITRAL article 32(4) permits the parties to agree that the award may be granted without reasons. Because the non-waivable "due process" guarantees of the codes arguably encompass reasoned opinions, such an agreement would be unenforceable.

143. For example, commercial code article 1434 granting arbitrators the right to resolve "any incidental issues that must be decided prior to the principal subject matter" may permit arbitrators to address their own jurisdiction to adjudicate a dispute. Cód.Com. art. 1434.

codes maintain the possibility that arbitrations actually will be subject to unfavorable readings of the commercial and procedural codes. These problems are set against a backdrop of other technical problems with the arbitration law, such as poor definitions and confusing references.¹⁴⁴

In addition, Mexican law retains pitfalls for the unwary due to an outgrowth of North-South tensions.¹⁴⁵ Accordingly, the foreign company seeking to arbitrate matters with its Mexican counterpart would rightfully fear that its contractual intention to resolve disputes pursuant to agreed procedures will not be honored.

Mexican arbitration law has advanced sufficiently to allow foreign businesspeople to structure acceptable arbitration clauses with Mexican companies. Any such arbitration clause must be more specific than typical arbitration clauses. Procedures should be specified carefully and the default use of formal Mexican court procedures expressly disclaimed.¹⁴⁶ Substantive Mexican law also should be examined to determine whether the subject matter is somehow exempted from resolution by a specific law or policy. These steps will not eliminate conflict—parties will not and should not agree, for example, to allow arbitrators to control settlement—but will make it likely that Mexican courts will enforce arbitration awards and clauses. Additionally, setting the arbitration outside Mexico will limit conflict to the enforcement provisions. However, enforcement may raise identical procedural issues if Mexican courts conclude that the public policy exceptions to enforcement in the Conventions and the

144. Commercial code articles refer to both "arbitrator or arbitrators," Cód.Com. art. 1417, and "arbitrator," Cód.Com. art. 1428(I). Thus, when article 1428(I) of the commercial code states that the arbitration ends upon the death of the "arbitrator," the procedure when one of three arbitrators dies is unclear.

Commercial code article 1435 states that "when issuing the award, the arbitrators may charge the parties with payment of legal fees, damages and losses. However, in order to use coercive measures they must resort to court assistance." Cód.Com. art. 1435. The relationship between the court and the arbitrators remains obscure. Arbitrators never may enforce awards; thus, the inclusion of this phrase is simply a puzzle.

145. Examples of such North-South tensions are set out in Kurth, *supra* note 11, at 600 n.6 (only Mexican businesses, approved foreign companies, or persons born or naturalized as Mexican citizens may own land; certain acts must be reported to the National Technology Transfer Registry; foreign investors restricted to 49% ownership of business entity absent other relevant ceiling); see also Gretchen A. Pemberton & Mariano Soni, Jr., *Mexico's 1991 Industrial Property Law*, 25 CORNELL INT'L L.J. 103 (1992) (industrial property law potentially confusing).

146. See Julio Trevino, Outline of Presentation, Mexico-United States Arbitration Conference (Oct. 18, 1990) (unpublished collection available from American Arbitration Association) (recommending that parties refer to rules of an arbitral institution to counteract restrictive provisions of the amended commercial code).

procedural code encompass the due process guarantees in the Constitution.

Even these problems well may disappear in the years to come. Every development during the last twenty years, including adherence to the Conventions, judicial enforcement of arbitration awards and clauses and commercial code reform, has constituted a significant advance.¹⁴⁷ Unless these advances are somehow repealed, the publicista elements of the arbitration scheme must fall to court decisions, additional legislative reform, or both.¹⁴⁸ Ultimately, however, the difficulties surrounding arbitration in Mexico or with Mexican companies will not be eliminated until Mexican law finally jettisons the century-old publicista approach to arbitration. Until then, arbitration with Mexican companies always will be somewhat of a gamble, with the hope that the principles of international commercial arbitration codified in the New York and Panama Conventions will trump the remaining cumbersome strictures of Mexican law.¹⁴⁹

147. Hoagland, *supra* note 5, at 99 (arbitration an increasingly viable alternative to litigation in Mexico).

148. *Id.* at 91 ("International commercial arbitration in the United Mexican States proceeds on a firmer legal footing following major amendments of the Code of Commerce in January, 1989.") Such praise, however, should be considered critically. Advocates of Mexican arbitration appear to have made a subtle effort to minimize the procedural requirements remaining in Mexican arbitration law. Dr. Siqueiros, the foremost authority on Mexican arbitration law, reproduced commercial code article 1347-A which describes the conditions precedent for enforcement of foreign awards in his contribution to the 1991 Yearbook of Commercial Arbitration. That provision, as noted above, did not require notification of the defendant in the arbitration via personal service. Dr. Siqueiros did not, however, reproduce the new provisions on *homologación* incorporated in commercial code article 1347-A. These provisions maintain the personal service requirement and impose new burdens on a litigant who seeks to enforce arbitration awards. Cód.Com. art. 1347-A; C.P.C.D.F. art. 606.

149. See Hoagland, *supra* note 5, at 99 ("Absent additional legislation, the future of arbitration in Mexico will largely depend on how the judiciary applies the law."); Lima, *supra* note 7, at 157.