



COELUM

COELUM Pronunciation: 'che-läm, is Latin for air space or sky. The Romans began questioning the rights they had in the space above the land they owned and to how high above did that right extended to. Ad coelum et ad inferos, they discussed, meaning that their right of property would extend as high up to the heavens and down to hell.

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Expedited Arbitration Procedures in Mexico. | Viridiana Barquín.*

To continue with the analysis of alternative methods to solve disputes in Mexico, as detailed in the past edition of COELUM; this article will provide a description of the more relevant aspects that it is advisable to consider, before choosing arbitration as a mechanism for dispute resolution.

Since the early 20th century, international commercial arbitration has continuously had a growing development with changes determined by the entry into force of the International Convention for the Recognition and Enforcement of Foreign Arbitral Awards, executed in New York on June 10th, 1958, and by other international treaties such as the American Convention on International Commercial Arbitration which was executed in Panama on January 30th, 1975, along with other related conventions¹. The current law on commercial arbitration in Mexico is included in the Commercial Code² which incorporates the UNCITRAL "Model Law"³ of 1985 and its regulation; this Model Law was adopted by UNCITRAL to assist States in reforming their laws on arbitration so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through the recognition and enforcement of the arbitral award.⁴ Notwithstanding, the most commonly used rules are those of the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), and the American Convention on International Commercial Arbitration (ACICA) among others. It should be emphasized that, as in other countries that have adopted the Model Law, international arbitration in Mexico is governed by the rules agreed by the parties, whether it is an ad-hoc arbitration (that in which the parties establish their own rules) or an institutional arbitration (that in which the parties decide to submit to the rules of an arbitral institution) and only in the absence of such agreement or due to the omission of the selected institutional rules at one point, the arbitral court may conduct the arbitration in the manner it deems appropriate. The party interested in solving a dispute by arbitration pursuant, for example, to the ICC Rules of Arbitration, has to submit the demand for arbitration to the International Court of Arbitration through the General Secretariat, who shall notify accordingly the plaintiff and defendant. The arbitration shall then be conducted by (i) one, or (ii) three arbitrators, in the first case, appointed by mutual agreement of the parties or otherwise, directly appointed by the court. In the second, each party shall appoint an arbitrator and the third one who shall be appointed by the Court acting as the president of the arbitral tribunal. In the event of multiple parties, both plaintiffs and defendants shall each appoint one arbitrator.

* IN COLABORATION WITH JESSI SABA.

1.- Bernardo María Cremades, *Panorámica Española del Arbitraje Comercial Internacional*, Madrid 1975.

2.- *Código de Comercio* by its expression in Spanish.

3.- "Ley Modelo" by its expression in Spanish.

4.- www.uncitral.org

When an arbitration procedure is conducted and no arbitration clause was included in the contract, all the parties involved, must execute a separate arbitration agreement. The parties may freely choose the governing law that should apply to the merits of the dispute, and if there is no mutual agreement, the arbitrators shall determine the applicable law taking into consideration in any case, the stipulations of the contract and the relevant trade usages.⁵ Article 27 of the ICC Rules of Arbitration requires all awards to be submitted to the ICC Court for approval before being signed and notified to the parties. After such approval, the award must be brought within six months; it is therefore clear that the arbitration process could take more time than might be convenient for the parties. Notwithstanding, Article 32 of the ICC Rules of Arbitration affords parties the possibility of shortening the time limits with an expedited arbitration procedure, however, this possibility is subject to certain restrictions; first, parties may only shorten time limits set out in the Rules and not impose time limits upon the ICC International Court of Arbitration; second, once the arbitral tribunal has been constituted, any agreement between the parties to shorten time limits is subject to the tribunal's approval, third, the Court may at any time extend a shortened time limit if it considers this to be necessary.⁶ In addition, if the arbitration was conducted abroad and for purposes that the arbitral award shall be enforced in Mexico, the execution procedure described in Article 571 of the Federal Civil Procedure Code⁷ and 1457 of the Commercial Code must be observed in order to confirm that the award is valid and fulfils all the legal requirements for its execution, provided that, to order such execution, the competent court shall determine the place in which the plaintiff or the relevant assets are located.

“...Article 32 of the ICC Rules of Arbitration affords parties the possibility of shortening the time limits with an expedited arbitration procedure, however, this possibility is subject to certain restrictions.”

On the other hand, if we look at the arbitration costs, it is important to note that the demand for arbitration must be accompanied by a non refundable advance payment, as part of the administrative expenses and shall be credited to the arbitration costs.⁸ Thereafter, the court shall fix the fees of the arbitrators under the “scale of fees”⁹ established or at its sole discretion, if the

5.- Article 1445 of the Mexican Commercial Code and Article 17 of the ICC Rules of Arbitration.

6.- ICC International Court of Arbitration Bulletin Vol. 13/No. 1-Spring 2002.

7.- Código Federal de Procedimientos Civiles by its expression in Spanish.

8.- Article 1, Appendix III of the ICC Rules of Arbitration.

9.- “Arancel” by its expression in Spanish.

disputed amount is not determined. The fees of the arbitrator and the administrative costs will be settled in accordance with the disputed amount and shall be calculated pursuant the scale of fees previously established by the ICC Rules of Arbitration as it is exemplified as follows:¹⁰

Disputed amount in US Dollars	Administrative costs in US Dollars	Arbitral Fees in US Dollars	
		least	up to
Up to 50.000	2.500	2.500	17.00% of the disputed amount
From 50.001 to 100.000	2.500 + 3.50% of h.a.* to 50.000	2.500 + 2.00% of h.a. to 50.000	8.500 + 11.00% of h.a. to 50.000
From 100.001 to 500.000	4.250 + 1.70% of h.a. to 10.000	3.500 + 1.00% of h.a. to 100.000	14.000 + 5.50% of h.a. to 100.000
From 500.001 to 1.000.000	11.050 + 1.15% of h.a. to 500.000	7.500 + 0.75% of h.a. to 500.000	36.000 + 3.50% of h.a. to 500.000
From 1.000.001 to 2.000.000	16.800 + 0.60% of h.a. to 1.000.000	11.250 + 0.50% of h.a. to 1.000.000	53.500 + 2.50% of h.a. to 1.000.000
From 2.000.001 to 5.000.000	22.800 + 0.20% of h.a. to 2.000.000	16.250 + 0.25% of h.a. to 2.000.000	78.500 + 1.00% of h.a. to 2.000.000
From 5.000.001 to 10.000.000	28.800 + 0.10% of h.a. to 5.000.000	23.750 + 0.10% of h.a. to 5.000.000	108.500 + 0.55% of h.a. to 5.000.000
From 10.000.001 to 50.000.000	33.800 + 0.06% of h.a. to 10.000.000	28.750 + 0.05% of h.a. to 10.000.000	136.000 + 0.17% of h.a. to 10.000.000
From 50.000.001 to 80.000.000	57.800 + 0.06% of h.a. to 50.000.000	48.750 + 0.03% of h.a. to 50.000.000	204.000 + 0.12% of h.a. to 50.000.000
From 80.000.001 to 100.000.000	75.800	57.750 + 0.02% of h.a. to 80.000.000	240.000 + 0.10% of h.a. to 80.000.000
Up to 100.000.000	75.800	61.750 + 0.01% of h.a. to 100.000.000	260.000 + 0.05% of h.a. to 100.000.000

* *h.a.* = higher amount

For the above considerations we can conclude that not necessarily the more sophisticated and expensive mechanisms are the best or the most practicable for dispute resolution in Mexico, in addition, and as it has been explained, the foreign awards will only be enforceable by a court of the United Mexican States, as long as, the court determines that notice of the legal action has been properly served and that such award (i) is final, (ii) is not contrary to the laws or the international treaties, or (iii) had not been obtained in violation of due process of law, therefore, all the specifications of Article 571 of the Federal Civil Procedure Code and Article 1347A of the Commercial Code, as applicable, have to be met. For that reason, nowadays, is the mediation the more practicable alternative mechanism to solve disputes in Mexico, although, the arbitration in its origins was formulated to better conform the international contract practices, it is truth as well, that the administrative costs, the arbitral fees, plus the extensive time frames resulting from the same, have become the international commercial arbitration an overly complex method.

10.- Article 4, Appendix III of the ICC Rules of Arbitration.

Brief Analysis Regarding Insolvency Proceedings in Mexico and Bankruptcy Proceedings in the United States. | Alejandra Llopis.*

I) Mexican Law of Insolvency Proceedings.

The main objective of this article is to identify relevant similarities and differences of bankruptcy proceedings between Mexico and the United States.

Bankruptcy is the legal process in which a person or company states that it does not have the financial means to pay its creditors; creditors may file a bankruptcy petition against a debtor in order to recover a part of what they are owed or initiate a restructuring process. In the most cases, the bankruptcy process is initiated by the debtor voluntarily.¹

The Law of Insolvency Proceedings “(Ley de Concursos Mercantiles)” establishes that an insolvency proceeding must be requested through a written application addressed to a competent district judge², by the debtor, the creditor or by a district attorney “(Ministerio Público” appointed to file a claim of insolvency proceeding, in which the interested party will have to establish at which stage the proceeding it intends to be eligible for, which can be either conciliation or bankruptcy and it needs to demonstrate the inability of the debtor to pay off its creditors.³

After the application has been received by the corresponding district judge, he will issue a request for the Federal Institute of Specialists on Insolvency Proceedings “(Instituto Federal de Especialistas de Concursos Mercantiles)” (IFECOM) to name a visitor who will have to verify the financial situation the company. After the inspection is concluded the visitor will have to deliver a detailed report that will determine if the company needs to start insolvency proceedings to restructure its debt or needs to be declared bankrupt.

If the judge declares the insolvency proceeding to be applicable for restructure purposes, it will immediately initiate the conciliation stage which purpose is to achieve an agreement between the debtor and its creditors in order to avoid bankruptcy.

If the judge declares bankruptcy due to the inability of the debtor to pay the creditors, a procedure will be initiated for the dissolution of the company through liquidation, which consists in the distribution of the assets of the company among the creditors to pay the debts of the company.⁴

* IN COLABORATION WITH JESSI SABA.

1.- Balleisen, Edward (2001). *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America*. Chapel Hill: University of North Carolina Press.

2.- *Law of Insolvency Proceedings (Article 9)*

3.- Bucio Estrada Rodolfo, Casasa Araujo Aldo, *Procesos y Procedimientos en México, Concursos Mercantiles*, Ed. Porrúa, México 2009.

4.- <http://www.juridicas.unam.mx/publica/rev/boletín/cont/105/el/el12.htm>

“If the judge declares the insolvency proceeding to be applicable for restructure purposes, it will immediately initiate the conciliation stage which purpose is to achieve an agreement between the debtor and its creditors in order to avoid bankruptcy.”

II) United States Bankruptcy Law.

On the other hand, the Bankruptcy Law of the United States establishes that a bankruptcy proceeding could be filed voluntarily by the debtor or by the creditors. The Law establishes a plan in which debtor is allowed to pay off his debts through the distribution of the company's assets among its creditors. The debtor is not allowed to transfer property that has been declared part of the estate subject to such proceedings.⁵

There are different types of bankruptcy under the Bankruptcy Code, located at Title 11 of the United States Code, the most common types of personal bankruptcy for individuals are outlined in the following Chapters:

Chapter 7: Covers liquidation of the debtor's assets. It is the simplest and quickest form of bankruptcy available.

Chapter 11: The court allows the debtor in possession to reject and cancel contracts. Debtors are also protected from other litigation against the business through the imposition of an automatic stay, which means that while the automatic stay is in place, most litigation proceedings against the debtor are stayed, until the matter can be resolved in bankruptcy court. A debtor in possession can acquire financing and on favorable terms.

Subchapter 11.10: In particular is denominated as “Aircraft Equipment and Vessels” of the chapter 11 mentioned above, and contemplates a bankruptcy proceeding which concerns aircraft equipment. The subchapter establishes the right of securing equipment (such as aircraft, aircraft engine, propeller, appliance, or spare part), for the interested party or of a lessor or conditional vendor of such equipment. Therefore, it grants the ability to take possession of the equipment mentioned within 60 days after the bankruptcy filing, unless the operator cures all defaults in compliance with a security agreement, lease, or conditional sale contract, to sell, lease, or otherwise retain or dispose of such equipment.⁶

Chapter 13: Allows individuals with regular income to develop a plan to repay all or part of their debts.⁷

5.- <http://topics.law.cornell.edu/wex/bankruptcy>

6.- http://www.law.cornell.edu/uscode/usc_sec_11_00001110---000-.html

7.- http://www.teachmefinance.com/Financial_Terms/bankruptcy.html

“If the judge declares bankruptcy due to the inability of the debtor to pay the creditors, a procedure will be initiated for the dissolution of the company through liquidation...”

III) The Cape Town Protocol.

The distinctions outlined above between the above referred Mexican and US insolvency laws, are clearly reflected in the form in which the “Protocol to the Convention on International Interests in Mobile Equipment” (Protocol) (Cape Town, 2001) contains two separate alternatives for the exercise of remedies by creditors in case of insolvency or bankruptcy proceedings, which are established in Article XI (**Remedies on insolvency**), and which applicability would depend on how the Protocol has been adopted by each contracting state.

Alternative A

Upon the occurrence of an insolvency-related event, the insolvency administrator⁸ or the debtor, as applicable, shall, give possession of the aircraft object to the creditor no later than the earlier of:

- (a) the end of the waiting period;⁹ and
- (b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified above, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. It is important to mention that no obligations of the debtor under the agreement may be modified without the consent of the creditor.

Unless and until creditors are given the opportunity to take possession under the paragraph b) established above, the insolvency administrator or the debtor, shall preserve the aircraft object and maintain it and its value in accordance with the agreement, this shall not preclude the use of the aircraft object; and the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

This Alternative A establishes remedies in order to protect the creditors in case of bankruptcy, which are similar to what Chapter 11.10 of the Bankruptcy Code of the United States establishes regarding the corresponding payment to the creditors and the protection of their rights in order to recover what they owed after the 60 days of the bankruptcy filing.

8.- Insolvency administrator shall be to that person in its official, not in its personal, capacity.

9.- Waiting period shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction.

““Protocol to the Convention on International Interests in Mobile Equipment” (Protocol) (Cape Town, 2001) contains two separate alternatives for the exercise of remedies by creditors in case of insolvency or bankruptcy proceedings, which are established in Article XI (Remedies on insolvency)..”

Alternative B

In this alternative, upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State whether it will:

- (a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or
- (b) give the creditor the opportunity to take possession of the aircraft object, in accordance with the applicable law. If the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the aircraft object but fails to do so, the court may permit the creditor to take possession of the aircraft object upon such terms as the court may order and may require the taking of any additional steps or the provision of any additional guarantee.

We can conclude that both, Mexican and United States Regulations on the matter, require the application for insolvency proceedings or bankruptcy procedures to be filed by the debtor or by the creditor; being so, the main difference relies in the fact that the Bankruptcy Law of the United States allows certain debtors to free themselves of the financial obligations which they have accumulated, after their assets were distributed, even if their debts have not been paid in full. Also we can find that Chapter 11 of Bankruptcy Code of the United States, provides mechanisms to restructure the company in order to avoid its liquidation while the Mexican Law of Insolvency Proceedings has the main objective to rescue the company in order to avoid company's bankruptcy. Mexican Law however, does not protect creditors' rights as efficiently as the mechanism provided in Section 11.10 -for instance- does in regards to the ability of such creditors to recover their assets, as Mexican Law provides unnecessary protection to the bankrupted debtors instead of providing an automatic right to the creditors to recover part of their rights.

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Extract of Mexican Aviation News

México requires a “Flag Carrier”.

The Secretariat of Communications and Transport (SCT) expressed before Congress the need of a flag airline in order to compete internationally. The Federal Government however is neither promoting nor opposing a merger between Mexicana and AeroMéxico. The merger would allow a greater level of competitiveness in both the domestic and international markets while offering much more efficient services and a significant reduction in costs. The SCT argues that the right way of competing is through a new business model, not through tariffs. Milenio. 01/March/2010.

Airlines lower their debts with Mexico City International Airport (AICM).

Last year three airlines were in debt to Mexico City International Airport for an amount exceeding \$500 million pesos, yet this sum has had an amazing reduction this year to \$119 million pesos, of which only \$71 million pesos is due from Aviacsa, a company suspended by the SCT last year. Also, in 2009 the AICM saw an income reduction of \$300 million pesos, caused by a reduction of operations in Terminal Two, a decrease in operations of about 4% compared to last year, and a 7% reduction in the number of passengers. AICM is confident that this year will see an increase in passenger operations. Milenio. 03/March/2010.

ASUR’s passenger traffic falls around 7%.

Grupo Aeroportuario del Sureste (ASUR) confirmed that passenger traffic fell 7% because of a decrease in national travelers. National passenger traffic decreased 11.6% while international passenger traffic decreased 4.6%, both because of the economic crisis in 2009 and the H1N1 virus. ASUR operates many important touristic airports, and they are hoping this year to be better than last year. El Economista. 04/March/2010.

Interjet plans to grow in Toluca.

Toluca International Airport is Interjet’s main center of operations and it estimates a 50 million dollar investment on different projects that relate to this airport. Disregarding the transfer of 65% of their flights to Mexico City Airport, Interjet has an aggressive expansion plan at Toluca airport. They plan to double their maintenance center and gradually grow by expanding their aircraft maintenance coverage and training programs. They are looking for Toluca to become one of Latin America’s most important maintenance sites. Reforma. 09/March/2010.

Airlines increasing their tariffs up to 38%.

Disregarding the fact that the airlines lost 4.4% of their passengers last year, ticket prices are still going up. On common routes such as MTY – MEX the tariffs have gone up from 5.3% to 38.3% and even though some airlines offer discount rates, these tariffs are still higher than last year prices. Reforma. 10/March/2010.

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Extract of Mexican Aviation News

[IATA foresees fewer losses in worldwide air markets.](#)

The International Air Transporting Association (IATA) estimates that for 2010, passenger traffic will grow as much as 5.6%, cutting losses almost in a half. People are starting to fly again, mostly in Latin America and in the Asia-Pacific region. The President of the IATA is confident that this will be a better year, although the industry as a whole is still going to be in the red. Airline income for 2009 will be up about 43 thousand million dollars but still yet 42 thousand million dollars less than 2008. The rise in fuel prices will mean increased costs for the airlines. *Excélsior*. 11/March/2010.

[Airline ticket prices hit the roof over the holiday season.](#)

The increase in airline ticket demand for this holiday season have caused an increase in the price of these tickets by up to three times their regular cost. Popular Mexican destinations such as Cancun, Los Cabos, Puerto Vallarta and Mazatlan have doubled in cost, sometimes overtaking the flight cost to New York and Los Angeles. The “Low Cost” airlines have also increased their tariffs taking advantage of the high demand and lower availability for certain destinations. *Milenio*. 16/March/2010.

[Calderon inaugurates an aviation plant in Querétaro.](#)

President Felipe Calderón inaugurated two aeronautic production plants in Querétaro, which represent an investment of more than 2 billion pesos. The plants produce aircraft engine parts and landing gear for brands such as Airbus and Boeing. Sales of \$350 million are anticipated this year as a result of their operations in Mexico. There are also plants in Chihuahua, Tamaulipas, Queretaro and Mexico State. *Milenio*. 18/March/2010.

[The new terminal in the Mayan Riviera can wait, according to Banamex’s specialists.](#)

The airport system in Mexico is being under-used, so improving the usage of the infrastructure of AICM should be a priority, instead of the construction of the new terminal in the Mayan Riviera, as planed by the Federal Government. According to an analysis made by Banamex, the company is “surprised by the fact that the Ministry of Transport and Communication considers the airport in the Mayan Riviera as a priority, instead of an expansion of the infrastructure of the AICM. *Milenio*. 29/March/2010.

[Vacations: Meal on the Plane.](#)

It looks like if the highway transport industry and the air transport industry have switched places. The first offers commodities such as music and movies and other services and the seats are getting more comfortable every day, making bus travel a much more pleasant experience. The air transport industry has taken the opposite route. Air passengers have seen their options reduced with less space between seats, longer waiting times and nuisance security controls. All of this has been done to reduce costs. The food department is the one that has suffered the most. Food on board can be one of the most important areas that if addressed correctly can help the airlines return to what they used to be. *La Crónica*. 30/March/2010.

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