MEXICAN SUPREME COURT DECISION IN RE *COMPÉTENCE-COMPÉTENCE*

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I. INTRODUCTION

The Mexican Supreme Court of Justice recently issued a landmark decision putting an end to a Circuit (appellate) Court contradiction involving one of the most venerable and important principles of arbitration law: *Compétence-Compétence*.

This note summarizes the background of the cases of the conflicting Circuit Courts (§II), and the view taken by the Court (§III), to conclude with some final remarks (§IV).

II. THE (CONFLICTING) CRITERIA OF THE CIRCUIT COURTS

Two Circuit Courts stood in conflict. Whereas the Sixth Civil Court for the First Circuit (*Sexto Tribunal Colegiado en Materia Civil del Primer Circuito*) ("Sixth Circuit Court") held that the decision on the validity of the arbitration agreement fell under the jurisdiction of the arbitration tribunal;[1] the Tenth Civil Court for the First Circuit (*Décimo Tribunal Colegiado en Materia Civil del Primer Circuito*) ("Tenth Circuit Court") held otherwise: said decision belongs to the national court.[2]

Although the (complex) procedural details of the decisions will not be discussed, it is noteworthy that both appellate level decisions displayed a procedural zig-zag: all the lower courts involved took different views.

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1 *Amparo en revisión* 3836/2004.

2 *Amparo en revisión* 31/2005.

The first case[3] began with an ordinary commercial suit before a Mexican Federal Court of first instance by L.D.C., S.A. de C.V. ("LDC") against ADT Security Services, S.A. de C.V. ("ADT") and the National Chamber of Commerce of Mexico City (*Cámara Nacional de Comercio de la Ciudad de México* — "CANACO"). Respondents challenged the jurisdiction of the court. In response, the Court[4] referred parties to arbitration.[5] The referral decision was challenged through a constitutional (*amparo*) suit and the District Court revoked holding that the referral could not take place when the suit involved the nullity of the arbitration agreement.[6] The Sixth Circuit Court on appeal revoked the determination of the lower court holding that the said decision fell within the authority of the arbitration tribunal.

In the second case Servicio Electrónico Digital, S.A. de C.V. ("SED") filed an ordinary commercial suit against ADT and the CANACO.[7] The court referred the parties to arbitration. SED appealed and succeeded in having the referral revoked.[8] The appeal decision was challenged through amparo. The District Court[9] revoked the challenged decision and, on appeal, the Tenth Circuit Court held that referral to arbitration should not take place when a question as to the

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3 *Amparo en revisión* 3836/2004

4 Fiftieth Civil Court for the Federal District (*Juez Quincuagésimo de lo Civil del Distrito Federal*).

5 To be precise, the incompetence was decided by the Third Civil Chamber of the Superior Court of Mexico City (*Tercera Sala Civil del Tribunal Superior de Justicia del Distrito Federal*), ordering the lower court to refer the parties to arbitration.

6 Reasoning that if referral took place it would implicitly decide the validity of the arbitration agreement and submit the parties to the jurisdiction of a tribunal created by an agreement considered invalid by one of them.

7 *Amparo en revisión* 31/2005.

8 By the Tenth Civil Chamber of the Superior Court for the Federal District (*Décima Sala Civil del Tribunal Superior de Justicia del Distrito Federal*).

9 Eighth District Court for Civil Matters of the Federal District (*Juzgado Octavo de Distrito en Materia Civil del Distrito Federal*).

validity of the arbitration agreement is raised, given that said authority lies with the court of origin (not the arbitrator).

The contradiction was escalated to the Mexican Supreme Court.[10]

III. THE MEXICAN SUPREME COURT SOLUTION

The Mexican Supreme Court took the view that the authority to rule on the validity of the arbitration agreement fell within the purview of the court, not the arbitrator. In so doing, it issued the following jurisprudence:[11]

> COMMERCIAL ARBITRATION. THE JURISDICTION TO TAKE COGNIZANCE OF THE NULLITY SUIT OF AN ARBITRATION AGREEMENT FORESEEN IN THE FIRST PARAGRAPH OF ARTICLE 1,424 OF THE COMMERCE CODE IS WITHIN THE JURISDICTION OF THE COURT AND NOT THE ARBITRATION TRIBUNAL. The possibility of opting out of state intervention in a dispute so as to submit it to commercial arbitration is a manifestation of the rights of parties to waive their subjective rights and establish legal provisions to which they wish to bind themselves; hence, an arbitration agreement may be included in an agreement as an arbitration clause which, as a general rule, and pursuant to article 1432 of the Commerce Code, grants jurisdiction to the arbitrators to intervene, take cognizance and decide as to the existence and validity of the agreement as well as the arbitration clause. The contrary would breach the will of the parties. However, an exception to said rule exists. When, pursuant to article 1424 of the cited Code, a dispute is submitted before a jurisdictional organ, involving a contract which includes an arbitration clause and at the same time a suit to have the same declared as null, inoperative or incapable of being performed is initiated, in which case a prior judicial decision as to the said nullity action would be necessary. The foregoing because, on the one hand, the judicial control over the arbitration must not be forgotten, and, on the other, the jurisdiction of the arbitrators stems from the autonomy of the parties. Therefore, if, for example, the existence of a defect in the intent of the parties is alleged, it must be previously solved by the judicial authority, and the parties' rights under article 1424 to arbitrate the

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10 In Mexico, contradictions between Circuit Courts may be brought before the Supreme Court in a manner similar to the *certiorari* authority of the US Supreme Court. Technically, the issue is 'denounced' (*denunciada*) before the Court.

11 Contradiction 51/2005, First Chamber of the Supreme Court, 11 January 2006. (Jurisprudential Thesis 25/2006, Contradiction Thesis 51/2005-PS between the Sixth and Tenth Circuit Courts for Civil Matters of the First Circuit. Majority of three votes. Opposing votes cast by Olga Sánchez Cordero de García Villegas and José Ramón Cossío Díaz. Juan N. Silva Meza delivered the opinion of the court.)

> matters involving the existence and validity of the contract, which are of the sole jurisdiction of the arbitration tribunal, remain intact.[12]

The reasoning is based on the following premises: (1) through an arbitration agreement parties submit their disputes to arbitration, waiving the right to have them solved by State courts; (2) as a rule said agreement implies that the arbitrator decides upon the existence and validity of the agreement; (3) the rule has an exception: should the nullity claim relate to the arbitration agreement —not the contract as a whole— it is for the national court to rule on the matter.

IV. FINAL COMMENT

The wisdom of the new *compétence à la mexicaine* theory is debated. Some believe it to be a healthy balance between domestic courts and arbitrators. Others believe it to be the product of a misconception of the true meaning, purposes and mechanics *compétence-compétence*.

The author emphatically joins the latter view.

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12 The Spanish version reads as follows:

ARBITRAJE COMERCIAL. COMPETENCIA PARA CONOCER DE LA ACCIÓN DE NULIDAD DEL ACUERDO DE ARBITRAJE PREVISTA EN EL PRIMER PÁRRAFO DEL ARTÍCULO 1,424 DEL CÓDIGO DE COMERCIO, CORRESPONDE AL JUEZ Y NO AL TRIBUNAL ARBITRAL. La posibilidad de apartar la intervención de la justicia estatal en un conflicto, a fin de someterlo al arbitraje comercial, es una manifestación de la potestad de los particulares para renunciar a sus derechos subjetivos y establecer los dispositivos legales a los cuales desean someterse; de ahí, que un acuerdo de arbitraje pueda estar incluido en un contrato como cláusula compromisoria, lo que por regla general y en términos del artículo 1,432 del Código de Comercio, otorga su competencia a los árbitros para intervenir, conocer y decidir aún sobre la existencia o validez del propio contrato, así como de dicha cláusula compromisoria, lo contrario violaría la voluntad de las partes. Sin embargo, existe una excepción a dicha regla, cuando en términos del artículo 1,424 del citado Código, ante un órgano jurisdiccional se somete el diferendo, sobre un contrato que contenga una cláusula compromisoria, y se ejerza al mismo tiempo la acción para que la misma se declare nula, ineficaz o de ejecución imposible, la que en dicho supuesto haría necesaria una decisión judicial previa, sobre la acción de nulidad. Lo anterior porque, por un lado, no debe soslayarse la existencia del debido control judicial sobre el arbitraje y, por el otro, la competencia de los árbitros proviene de la autonomía de la voluntad de las partes, de manera que si se alega, por ejemplo, la existencia de algún vicio de la voluntad en el acto que otorga competencia al árbitro, la acción de nulidad debe resolverse previamente por el órgano jurisdiccional, quedando a salvo los derechos de las partes para que en términos del segundo párrafo del referido artículo 1,424 puedan iniciarse las actuaciones arbitrales relativas a la disputa sobre el cumplimiento e inclusive la existencia o validez del propio contrato que contiene la cláusula compromisoria, ya que a ese respecto el tribunal arbitral conserva su competencia exclusiva.