# The Impact Of Uniform Law On National Law: Limits And Possibilities

**James A. Graham**[*]

RESPONSE BY THE NATIONAL REPORTER OF MEXICO

The fact that the *1st Intermediate Congress of the International Academy of International Law* in Mexico dealt, among others, with international arbitration, was a very welcome surprise, as Mexico more and more becomes a "pro-arbitration" country. For many decades, tribunals and lawyers had a very antagonistic relation with this particular ADR method, especially in relation to a supposed constitutional problem, however,[1] over the last five years the panorama has changed. The 2008 reform of the Constitution expressly establishes ADR as a constitutional right;[2] the Supreme Court and the Circuits maintain a constant line of case law in favor of arbitration, consecrating a *quasi* general principle of expeditiousness that has resulted in the judicial system having an obligation to do everything possible to enforce awards as fast as possible.[3] It is in this context that the following answers have been given to the questions addressed by our colleague Horacio A. Grigera Naón.[4]

The first question is related to the content of the notion of "Uniform Law", and more precisely if, from a national law perspective, it would be proper to include usages of the trade or "customs", general principles of law, general principles of contract law or of the law of obligations, transnational law, *lex mercatoria*, general rules of procedure. In the Mexican language, the term "law" can have two different meanings.[5] In a first acceptance, law means a legislative text voted by Congress and in a second acceptance, law is a general term for "legal system" (Mexican Law, English Law, etc..). Hence, the term "Uniform Law" means; a legislative text voted by the federal Congress in order to uniform local statutes[6] or the designation of Model Laws of UNCITRAL or UNIDROIT for instance. In other words, a Uniform Law is "an unofficial law proposed as legislation for all the states to adopt exactly as

[1] Pereznieto & Graham, *Tratado de Arbitraje Comercial Internacional Mexicano*, Limusa, 2009. 8 sq; Pereznieto & Graham, Mexican Supreme Court clarifies procedure for constitutional challenges to arbitration awards, 13 *IBA Newsletter* 31 (2008).
[2] *DOF*, 18/6/08.
[3] See our Blog at: http://adi-udem.blogspot.com.
[4] The present paper addresses the issues raised by the General Reporter Horacio Grigera Naón in his *Questionnaire addressed to the National Reports*. For pedagogical and stylistic reasons, the order and the form of the questions have been changed by the author.
[5] For a more detailed presentation of the notion "law" in the Mexican legal system, see: Zamora, Cossío, Pereznieto *et alii*, *Mexican Law*, New York, Oxford, 2004.80.

[6] See for example the "Ley General de Acceso de las Mujeres a una Vida Libre de Violencia", *DOF* 20/1/09.

written, the purpose being to promote greater consistency among the states".[7] Consequently, usages, customs, principles and so on, are not part of a Uniform Law.[8] Maybe one could introduce one exception to the before mentioned statement: the UNIDROIT Principles. In effect, even if there is no judicial or legislative reference to the Principles, it seems to us that one might consider them as being part of the notion of "Uniform Law".

In regard to *lex mercatoria*, there is wide-spread rejection of the notion in the Mexican community of practitioners, as no one really seems to feel comfortable with such a "undefined" notion, taking into account that Mexico is a highly positivist country. However, the notion is known to the doctrine,[9] even if there is no national definition of *lex mercatoria*. In our personal opinion, we adopt the functional definition proposed by E. Gaillard, who defines the *lex mercatoria* as a method to identify common solutions that correspond to the parties' expectations.[10] Thus, being a method, it should not be considered as Uniform Law.

In regard to the question of the extent to which Mexican law should be considered as including Uniform Law when designated as applicable law of the contract, the answer consists of affirming that Uniform Law is only part of Mexican Law if incorporated in national legislation. On one hand, article 133 of the national Constitution foresees that ratified treaties are part of the Supreme Law of the country. On the other hand, if the Uniform Law text is not a convention but a proposal (e.g. UNCITRAL), the Federal Congress has to adopt it through a national law. Consequently, if the applicable law is the Mexican Law, all the ratified conventions on Uniform Law and all the adopted Model Laws are part of the chosen law.

In this sense, one may point out that Mexico adopted the following texts: 1985 Model Law on International Commercial Arbitration, 1974 Convention on the Limitation Period in the International Sale of Goods, 1997 Model Law on Cross-border Insolvency, 2001 Model Law on Electronic Signatures, 1980 United Nations Convention on Contracts for the International Sale of Goods, and 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes.[11]

---

[7] Black's Law Dictionnary, 7th ed.
[8] In this sense for example, a leading Mexican scholar distinguishes between Uniform Law and *Lex mercatoria* (the latter including customs, principles, etc..): Perezieto Castro, *Derecho internacional privado – Parte general*, 8va ed., Oxford, 2003. 227.
[9] Pereznieto, Consideraciones en torno a la *lex mercatoria*: el caso de Mexico, in: Silva Silva (coord.) *Estudios sobre Lex mercatoria. Una realidad internacional*, Instituto de Investigaciones Jurídicas, UNAM, 2006.
[10] Gaillard, Trente ans de lex mercatoria, JDI, 1995.5, 8. Graham, El derecho internacional privado del comercio electrónico, Themis, 2003, #128 sq.; Pereznieto & Graham, Tratado de Arbitraje comercial internacional mexicano, Limusa, 2009, #473.
[11] Mexico also ratified the 1958 Convention of New York – however, it seems to us that this treaty does not constitute "Uniform Law".

In the present context, one might also quote a judicial ruling in which the First Circuit has established the necessity of interpreting Mexican arbitration law in light of the UNCITRAL Model Law and the explanatory note issued by the organization.[12] This decision is remarkable as Mexican courts have a natural tendency to be reluctant to embrace international and comparative law.

In regard to the question of the extent to which a foreign law should be considered as including Uniform Law when designated as applicable by Mexican courts or arbitrators seated in Mexico, one has to distinguish. In regard to court practice, the judge has to apply the foreign law as the foreign court would do[13]. In other words, the answer to the question of whether a Mexican tribunal would apply Uniform Law as part of the foreign law lies within the case law of that foreign country. If the latter considers that Uniform Law is part of the legal system, then the Mexican judge will also have to apply it.

With regard to arbitration practice, it is not certain that a Mexican arbitrator would look that far; he would probably apply the law as the parties presented it to him, without any further questioning.

To what extent are arbitral awards officially published or informally disseminated in business and legal circles in Mexico? The two main Mexican arbitration institutions refuse to publish awards. Insiders may know about these awards because of hearsay, but they do not have access to the awards (with some very rare exceptions).

Is Mexico a *stare decisis* country? If so, to what extent does *stare decisis* apply to awards? Mexico has some kind of judicial *stare decisis*. In a formal sense, there are very few cases in which a ruling by a superior court is mandatory for all inferior courts. Nonetheless, there is a real judicial practice that consists of following prior rulings of other courts in order to insure some kind of legal certainty. In regard to what one may call mandatory precedents, there exists only two cases: First, when the highest court resolves in appeal contradictory rulings of inferior courts; and second, when a court applies, interprets or rules upon a point of law in the same way in a series of cases without interruption by any contrary ruling on that particular point of law. However, as said before, there is a natural tendency to follow even isolated rulings of the

[12] Tercer Tribunal Colegiado en Materia Civil del Primer Circuito. Amparo en revisión. RC 14/2005. *ADT Security Services*. 5/19/05.
[13] Art. 14.I, Federal Civil Code.

superior courts and therefore, the decisions of the Mexican Supreme Court always have some kind of influence, even if they are not, most of the time, technically binding precedents.

No one has ever sustained in Mexico that there would be such a thing as a *stare decisis* doctrine in regard to arbitration. Worse, it is very seldom that Mexican arbitrators refer to other decisions.

To what extent are issues preclusion or collateral estoppels? In the Mexican system, collateral estoppels are unknown. However, we do have claim preclusion under the doctrine of *res judicata*. In theory, no arbitral tribunal can decide *de novo* over claims already decided by a judicial court; no judicial court can rehear an issue decided by arbitrators. However, in practice, some local laws foresee the possibility to review the award *de novo*[14], and some federal courts, notwithstanding the prohibiting to of reviewing awards, "re-judge" the case. There is no known case in Mexico about a conflict of decisions between arbitral tribunals.

To what extent are national laws and state courts in Mexico "arbitration friendly"? Does the answer change depending on whether a state party or a state interest are directly involved in or affected by the resolution of the dispute or the contract may be labeled as "a public" or as an "administrative" contract under your legal system? Whether the arbitration is "international or domestic"? Whether its seat/place is within/outside the country?

Mexican law is very arbitration friendly.[15] There is no doubt that in recent years the national Supreme Court has favored arbitration. In this sense, one may quote two very important points established in a recent decision.[16] The first point favors the enforcement of international – and national – arbitration awards by establishing that no appeals are permitted in *exequatur* proceedings. Article 1463 of the Mexican Commercial Code indicates that the applicable judicial procedure to enforce awards is the one established by Article 360 of the Mexican Federal Civil Procedure Code and that final judicial decrees cannot be appealed. However, in practice, there is not typically a single, final decision in the enforcement procedure, but rather many interlocutory decrees. Thus, litigators are used to appeal each decree with each of these appeals being subject to the constitutional recourse known as "*amparo*." Now, with this most recent, binding decision, the Justices have ruled that no decision of any kind rendered by a judge in such an enforcement procedure may be appealed. In a second point , the Mexican Supreme Court

[14] For exemple Art. 461.IV of the Procedural Code of Nuevo Leon.
[15] See the various decisions in: Graham & Pereznieto, *Crónica de jurisprudencia arbitral mexicana*, Blog de la Academia de Derecho internacional de la UDEM, http://adi-udem.blogspot.com.
[16] Decision 105/2007, dated 13 June 2007.

established, in an *obiter dictum* in the aforementioned decision, that procedural rules regarding arbitration must be interpreted in light of the principle of "expeditiousness." This action highlights the "special" nature of arbitration within the Mexican legal system. Such a principle will surely help to correct the bad habits developed by practitioners without having to pass new legislation.

The afore-mentioned decision is indicative of a settled trend in favor of arbitration in Mexico. What remains to be seen is whether there is any chance that the Mexican Supreme Court will one day allow arbitrators to rule on their own competence. In a binding decision for all inferior courts, the Justices of the Mexican Supreme Court established that there must be a judicial review of the validity of arbitration agreements. This is, in the view of the Court, because it is illogical to send parties to arbitration if the parties have not consented to arbitration; only when it is established that an arbitration agreement is valid, may state courts refer the parties to arbitration proceedings. However, such judicial review contradicts the *Kompetenz-Kompetenz* principle and in this sense it is a very unfortunate decision.[17]

To what extent are arbitral awards subject to control on the merits? From a legal point of view, there is no control on the merits. However, it is true that sometimes some federal courts try to review the award *de novo*. As mentioned before, some local arbitration laws foresee the possibility to control the merits. However, in regard to this point, two observations must be made. On the one hand, local statutes only apply to civil matters - as commercial cases are ruled by Federal Law -; on the other hand, in our opinion, such a local legislation is unconstitutional, as article 133 of the Federal Constitution foresees the superiority of internationals treaties over local laws. In this sense, as Mexico did not make the "commerciality" reservation to the New York Convention, it seems to us that the mentioned international instrument invalidates any local legislation that establishes any kind of review on the merits.

Where the role played by public policy in the recognition or enforcement of arbitral awards rendered abroad is concerned, first of all one has to observe that there is no legislative definition of the notion. The doctrine in general considers that one has to adopt the "international"

[17] Pereznieto & Graham. Some recent decisions on Kompetenz-Kompetenz and related issues, *Revista Latinoamericana de Mediación y Arbitraje*, 2006.131, www.med-arb.net; Pereznieto & Graham, Mexican Supreme Court Rejects the Principle of *Kompetenz-Kompetenz, Arbitration, 2006*.388; Graham & Leal-Isla, Commentaire sous Cour Suprême du Mexique, 30/3/2006, *Revue de l'arbitrage*, 2006.1039.

approach of the *ordre public*.[18] There has not been any known case that implied public policies[19]. For special cases involving public entities, the enforcement of awards has been rejected for lack of arbitrability. Today, there no longer exists any prohibition for public entities on agreeing on arbitration proceedings. In regard to the *lois de police*, there is no known case.

To what extent do arbitral awards or determinations influence, or may be considered as possibly influencing state court decisions or legislative change in Mexico?There are no sufficient arbitration cases (and consequently awards) which influence any judicial or legislative decision. Judicial decisions do not refer to determinations made by international arbitral institutions. However, the courts recognize the leading role of the ICC and the AAA in the international merchant society.[20] There is little chance that one day a judicial court may quote an arbitration decision as reference. One of the reasons is that most judges consider the award as a private act without any legal "value".[21]

To what extent are arbitral awards rendered or enforced in Mexico based on Uniform Law? If the CISG is considered as uniform law, one can say that a certain amount of awards are based on uniform law. There is no public known case of an award based on the UNIDROIT Principles. Neither is there any known award based on *lex mercatoria*.[22]

In regard to *lex mercatoria*, most Mexican lawyers (and arbitrators) reject the idea of applying it as, on the one hand, they do not know what the content might be, and, on the other hand, they fear being sued by the losing party for not having given a "legal" solution. Furthermore, it is thought that no judicial court would consider *lex mercatoria* as applicable "law". However in our personal opinion, such fears should not exist, because there is no legal control on the applicable law and if there is a legal reasoning, there is no confusion with *amiable composition*. Consequently, there should be no reason not to apply *lex mercatoria*.

What has been the impact on the fashioning of Mexican national legislation on arbitration – domestic or international – or on arbitral awards rendered in the country or concerning nationals of or residents in the country of: (a) the action and rules of international arbitral institutions; (b)

[18] Pereznieto & Graham, *Tratado…, op.cit.,* , # 576. Siqueiros, El orden público como motivo para denegar el reconocimiento y la ejecución de laudos arbitrales internacionales, *Jurídica*, 2002.45.
[19] The *Magaluf* case used a "national" definition of the Public Order in an enforcement proceeding. However, the award has been rendered in a purely domestic arbitration proceeding (Pereznieto & Graham, *Tratado…, op.cit.,* , # 576.).
[20] Decision 1225/2006, *Grupo Radio Centro*,S.A. de C.V. y otros, 30 de enero de 2007.
[21] Cf Dissenting Opinion by Justice José Ramon Cossio in the *Radio Centro* ruling.
[22] However, there is one unpublished award known to the author, and rendered in Mexico by a Mexican arbitrator under the auspicious of a Mexican Arbitration Center that refers expressly to the CISG, the Unidroit Principles and the Lex mercatoria.

the works of international organizations; and (c) foreign court decisions or legislation reflecting the influence of the action or works of institutions or organizations like the ones mentioned in subparagraphs (a) or (b) above? If no experience at hand, what would be the prospective answers to these questions? There is no experience at hand. However, it is worth mentioning that the pre-Nafta negotiations provoked a change of legislation. During these negotiations between United States and Mexico, the American government required Mexico to modernize its arbitration legislation. It was only due to this "pressure" that Mexico adopted the UNCITRAL Model Law.

The mentioned question allows us to form some kind of conclusion. If Mexican tribunals are hermetic to the influence of foreign judicial decisions, there is no doubt that they take more and more into account the "international" – commercial – reality, which is reflected in the works of the international organizations. As we have seen, UNCITRAL and ICC are already given weight by federal judges. However, in our mind there is no doubt that scholarly work also encourages both the legislative and the judicial body to be aware of what happens in other countries. In this sense, there might be an indirect influence of the action and rules of international arbitration institutions, international organizations and foreign legislation.

Hence, Mexico is no longer an isolated island; on the contrary, the trend is to be part of the globalization, which finds its most important expression in international arbitration. And works, like the one undertaken by the International Academy for Comparative Law certainly contribute in a very important and decisive way.

Monterrey, 31st of January, 2009.