

## Advisory Committee on Enforcement

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#### ALTERNATIVE COPYRIGHT DISPUTE-RESOLUTION MECHANISMS IN MEXICO

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#### 1. INTRODUCTION

1. Given that recent trends in terms of the development of alternative dispute-resolution (ADR) mechanisms mainly originating from countries with legal systems based on Common Law, such as the United States of America and the United Kingdom, the Spanish name for systems developed for dispute-resolution through extrajudicial means is a translation of the English term.

2. The growing importance of ADR mechanisms is fuelled by the significant advantages such mechanisms offer compared to the courts, such as speed, confidentiality, low cost, the possibility of defining the dispute and the procedure, as well as the resolution of the procedure by an expert in the matter concerned.

3. ADR mechanisms are also a way of generating greater understanding and awareness among the parties involved in the search for a resolution to a given dispute or problem, be it contractual or non-contractual in nature. The mechanisms make it possible to reach agreements based on common interests, resulting in an outcome that, as far as possible, allows the parties to put aside their differences.

4. These mechanisms can be defined as legal instruments designed to build agreements concerning any type of dispute involving transactions between the parties, through means other

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than litigation. Such means may involve the intervention of a third party, brought in to facilitate, in a neutral manner, the negotiation of a solution to the problem.

5. Despite the regulations contained in the Federal Copyright Law and the flexible manner in which the relevant rules are set forth, these mechanisms are based on the goodwill of the parties, that is to say, a statement to the effect that the parties involved in the dispute agree that there is no subordinate relationship between them. It is the interests or needs of the parties that drive them to resolve a given dispute freely through the use of these tools, on the basis of mutual agreement and free of any coercion whatsoever.

6. Under the Mexican legal system, these instruments are means that shall be governed by legal provisions, in accordance with Article 17(3) of the Political Constitution of the United Mexican States:

“Article 17. (...)

The laws shall provide for alternative dispute-resolution mechanisms, governing their application in criminal matters, ensuring the provision of compensation and setting forth those cases in which judicial supervision is required. (...)”

7. It is important to recognize that certain matters cannot be dealt with through the use of ADRs, such as offences subject to ex officio prosecution, disputes arising with regard to family matters, and issues of public order and social interest.

8. Examples of regulation contained in the Mexican legal system include the mechanisms employed before the Office of the Federal Attorney for Consumers (PROFECO), the National Banking and Securities Commission (CNBV) and the National Commission for Medical Arbitration (CONAMED), as well as the provisions of the Federal Copyright Law: the administrative settlement procedure and arbitration.

## **2. ALTERNATIVE DISPUTE-RESOLUTION MECHANISMS IN THE MEXICAN LEGAL SYSTEM**

9. Various mechanisms have been implemented as part of national legislation, thanks to the implementation of experiences developed in this field, with some schools of thought referring to five types of mechanisms: mediation, conciliation, arbitration, expertise and dispute boards. However, the three mechanisms that have gained the widest acceptance in practice in Mexico are conciliation, mediation and arbitration. These mechanisms will be referred to in greater detail below.

### **2.1 CONCILIATION**

10. The alternative mechanism known as ‘conciliation’ involves active or passive moderation of the discussions of the parties to a given dispute by a third party, the aim being to assist with legal and technical aspects of the matter in question and to invite the parties to reach an arrangement that is satisfactory in terms of their interests. This exercise is referred to as ‘reconciling’ the parties in order that they may seek common ground resulting in an agreement.

11. In general, the neutral third party or conciliator simply acts as a facilitator: in principle in order to enable the parties to reach an agreement through their own proposals and on the basis of a negotiating process.

## 2.2 MEDIATION

12. Mediation is an extrajudicial procedure which also involves a third party with relevant technical knowledge listening in an impartial manner to the views of the parties to a given dispute, guiding them towards a de-escalation of the dispute and promoting communication with a view to seeking an arrangement. Said third party has the power to put forward solutions to a given dispute.

13. Accordingly, the mediator can invite the parties to take part in a “brainstorming” session and thus to collect as many proposals as possible in order to find possible solutions of benefit to both parties.

14. Thus, the mediator puts forward one or more solutions to the dispute that the parties are free to adopt or reject. Should the parties decide on a particular solution, then that solution will serve as an agreement.

## 2.3 ARBITRATION

15. Arbitration is probably the most-commonly used alternative dispute-resolution mechanism, constituting an attempt to resolve, in an extrajudicial fashion, disputes arising within the framework of the relations between two or more parties. Arbitration occurs when the participants submit their dispute and procedure to a neutral third party.

16. Arbitration can be public, that is to say institutional, or private, and may be carried out by a single arbitrator or an arbitration panel (always made up of an odd number of arbitrators).

17. In either of those cases, the third neutral party shall hear the case and the *ad hoc* procedure agreed on by the parties, and shall issue a ruling known as an award that is binding on the parties, and that can be confirmed by a judge with the aim of ordering that it be enforced. In such cases the judge shall study the content of the arbitration procedure and, should no irregularities exist in terms of its consideration, shall proceed to confirm the award. Once the arbitration award has been confirmed, in case of non-compliance, it may be enforced by the judicial authority.

18. There are two commonly-recognized forms of arbitration to which parties can have recourse in cases where a dispute has arisen:

(a) arbitration agreement: this approach may be employed where a dispute has arisen and the parties agree to submit to arbitration; and,

(b) arbitration clause: this option is included in contracts and states that, should a dispute arise, it shall be resolved through an arbitration procedure.

## 3. ALTERNATIVE COPYRIGHT DISPUTE-RESOLUTION MECHANISMS IN MEXICO

19. The Mexican legal system has a history of making provision for alternative copyright dispute-resolution mechanisms that goes back to the first specific law drawn up in this regard: the Federal Copyright Law of 1948. Under this Law, parties to a given dispute had recourse to the then Department of Copyright in order to resolve disputes related to the exploitation of their works, independently of any other private legal action that they might have brought (Article 111 of the Federal Copyright Law of 1948).

20. By 1956, with the new Federal Copyright Law, the parties could have recourse to mediation before the Directorate General for Copyright, with the aim of resolving disputes related to their works (Article 128 of the Federal Copyright Law of 1956).

21. Subsequently, as a result of the reforms to this Law that were introduced in 1963, the Directorate General was made responsible for intervening in disputes concerning copyright and related rights and, if need be, for reservations concerning rights to exclusive use. That is to say, the parties had recourse to a settlement conference and if, 30 days from the date of the first settlement conference, no conciliatory agreement had been reached, the Directorate would urge the parties to appoint him as arbitrator (Article 133 of the Federal Copyright Law of 1963).

22. In such cases, the Directorate General for Copyright would issue an arbitration award concluding the procedure, and it was for that reason that provision was made for both conciliation and public arbitration.

23. The current Federal Copyright Law, in force since March 24, 1997, specifically governs the procedures of two alternative dispute-resolution mechanisms: (a) the settlement procedure, and (b) arbitration.

### 3.1 ADMINISTRATIVE SETTLEMENT PROCEDURE

24. The administrative settlement procedure is governed by Articles 217 and 218 of the Federal Copyright Law (LFDA), as well as by Articles 139 to 142 of its Regulations (RLFDA).

25. The administrative settlement procedure is a self-applied dispute-resolution mechanism, the aim of which is to ensure that the parties achieve conciliation concerning a given dispute related to the rights protected by the LFDA.

26. The procedure takes place before the Department of Conciliation of the Legal Directorate of the National Institute of Copyright (INDAUTOR). As a part of this process, conciliation lawyers undertake to promote or facilitate communication between the parties, actively participating in the conciliation process but without making any determination concerning the substance of the case.

27. It should be pointed out that this procedure does not in any way suspend the 'injured' party's power to launch any other civil, administrative or criminal action in order to defend its rights. The settlement procedure is independent in nature and is not subject to the principle of "*definitividad de instancia*", according to which the dispute settlement procedure must be exhausted before the 'injured' party can launch a civil, administrative or criminal action.

#### 3.1.1 Settlement conferences

28. The settlement procedure is initiated at the request of a given party through a written complaint that must meet the requirements set forth in Article 139 of the RLFDA, *i.e.*, the names and domiciles of the parties to be cited in the case, an account of the events that gave rise to the dispute, any documents that might be of use to the parties in terms of conciliation, etc. The parties concerned are then summoned to appear at the offices of the Institute in order to enable the settlement conference to be held (Article 218(I) and (II) of the LFDA).

29. Once the written complaint has been accepted, it shall be made available to the counter party in order to enable that party to respond to said complaint and to assert its rights within ten days from notification (Article 218(III) of the LFDA).

30. Said summons is issued under penalty of a fine 100 to 150 times greater than the daily minimum general wage in force in the Federal District, currently amounting to 6,476.00 to 9,714.00 Mexican pesos (US\$501.00 to US\$751.00) (Article 218(III)), should the parties fail to appear before the settlement conference.
31. The INDAUTOR conciliation lawyers facilitate communication between the parties, acting as intermediaries, highlighting the concepts governed by the LFDA and inviting the parties to put forward opinions, positions or proposals that may lead to an agreement.
32. The settlement procedure can be terminated in the following ways:
- (a) the parties reach a conciliation settlement that ends the dispute, a settlement that may be stipulated in an agreement, approved by INDAUTOR at the request of one or more of the parties, that shall have the force of *res judicata* and an enforceable right (Article 218(IV));
  - (b) should the parties fail to reach an agreement, their rights are safeguarded and can be exercised in the way and form that best meet the interests of the parties (Article 218(V)); or,
  - (c) the parties can submit to arbitration or launch the appropriate civil, administrative or criminal actions.
33. The settlement procedure is short and, by its very nature, makes it possible to deal with the dispute in a flexible and impartial manner, in line with the principle of good faith. Thus, this procedure is an attractive, low cost, clear and robust approach for parties involved in disputes. Consequently, the 14 Mexican collective management societies and the bodies linked to the exploitation of literary content, computer software programs, music, etc., frequently use this procedure in order to resolve disputes in an amicable fashion.
34. Despite these advantages, INDAUTOR has developed the Conciliation Lawyer's Handbook, with a view to improving service and professional standards in the field of conciliation. The Handbook contains the procedure to be followed by lawyers during settlement conferences and covers the activities and documents that must be prepared, from the acceptance of the complaint to the various ways in which the procedure may be terminated.
35. The Conciliation Lawyer's Handbook is a graphic, detailed and simple tool that is used by conciliation lawyers when determining what course of action to take in the full range of scenarios that can arise during dispute-resolution procedures in order to increase the likelihood of reaching agreements during settlement conferences.

### 3.1.2 On-line procedures

36. In order to maximize the impact of the settlement conferences, INDAUTOR is seeking to establish on-line settlement conferences by 2014. Such conferences would increase territorial scope, given that the wider coverage that they could offer would be of benefit to users located outside of the Federal District. Such a development would reduce the transport costs incurred by parties located in other parts of the Republic of Mexico when attending settlement conferences.

### 3.2 CONCILIATION

37. As a part of the project to develop the field of conciliation in INDAUTOR by 2014, provision has been made for the implementation of an alternative mechanism in the form of active intervention by the Institute to decide on proposals to be put forward to parties concerning the resolution of disputes, resulting in assisted conciliation.

38. By focusing on relevant technical knowledge and the skills of the conciliation lawyers, it is possible to bring about circumstances under which the neutral third party, in this case INDAUTOR, may present the parties concerned with various solutions to a given dispute.

39. Any proposals made by the conciliation lawyers must be based mainly on the interests of the parties, those interests being set out by the participants during the meetings of the conciliation boards.

### 3.3 MEDIATION

40. The current LFDA is in line with the mandate provided by the Mexican Constitution in that it sets forth alternative mechanisms for the resolution of disputes arising from the application and interpretation of its provisions. Thus, the projects currently being developed by INDAUTOR directly benefit the owners of rights and users by providing them with a range of options in terms of the extrajudicial resolution of their disputes.

41. In order to strengthen the alternative dispute-resolution mechanisms provided for in the LFDA, we identified a need for the introduction, in 2014, of a new mechanism enabling INDAUTOR not merely to guide discussions or put forward possible solutions but to intervene effectively.

42. Mediation shall be adopted as a fourth alternative copyright dispute-resolution mechanism, in order to give INDAUTOR mediation lawyers the power to propose solutions focusing on the substance of cases that shall be accepted with the consent of the parties.

43. Under this procedure, in a case where no agreement has been reached, the authority shall issue a recommendation that may be taken into account by the parties, as well as by the administrative or judicial authority ruling on one of the procedures set forth in the relevant Law.

44. In order for the mediation procedure to be implemented, appropriate provision must be made in both the LFDA and its Regulations for the status and powers of the staff assigned to INDAUTOR.

### 3.4 ARBITRATION

45. Arbitration is governed by Articles 219 to 228 of the LFDA and 143 to 155 of its Regulations, the Code on Trade also being applied as a means of private arbitration.

46. The LFDA specifically states that the parties can submit to arbitration:

“Article 220. The parties may agree to submit to an arbitration procedure through:

I. An arbitration clause: an agreement to arbitrate included in contracts concluded concerning works protected by this Law or in independent agreements referring to all or certain disputes which may arise in the future between them, and

II. An arbitration submission agreement: an agreement to submit to the arbitration procedure when all or certain disputes have already arisen between the parties at the time of the signing of the agreement.

Both the arbitration clause and the arbitration submission agreement shall, without exception, be set out in writing.”

47. Once the parties have expressed their willingness to submit to arbitration, they shall select two arbitrators from the list published and authorized by INDAUTOR, with those arbitrators in turn appointing a third member from the same list to serve as the Chair of the arbitration panel, such panels always being made up of an odd number of members (Article 222 of the LFDA).

48. Arbitration procedures shall be resolved within no more than 60 days, and may be ended by an agreement between the parties or by the issuing of an award. In cases resulting in the issuing of an award, said award must be reasoned and motivated, and based on the vote of a majority of the arbitrators; INDAUTOR shall then be informed of the issuing of the award and shall, in turn, notify the parties of this development (Article 224 of the LFDA).

49. INDAUTOR is responsible for the preparation, authorization and annual publication, in the Official Bulletin of the Mexican Federation, of a list of INDAUTOR-approved arbitrators and the amount of the fees that the parties must pay to each of the arbitrators.

50. INDAUTOR is empowered to provide the arbitration panel with assistance concerning: notifications, the monitoring of the arbitration procedure and any related procedural issues (Articles 221 and 228 of the LFDA).

#### **4. STATISTICS**

51. Since the implementation of the administrative settlement procedure in 1997, there have been an encouraging number of successful outcomes in terms of the work of the settlement conferences, as well as an increase in the number of complaints filed.

52. In 1998, 396 complaints were accepted, of which 44.94 per cent resulted in conciliation. In 2000, 535 complaints were filed, of which 50.28 per cent resulted in conciliation. In 2011, 782 complaints were accepted, with that figure reaching 759 in 2012, giving an average of over 700 complaints.

53. The year 2013 was encouraging in terms of settlement conferences, in that it was the year in which the greatest number of complaints was filed, 1,150 in total.

54. Finally, between 1998 and 2013, around 24,386 settlement conferences were convened, demonstrating just how useful alternative dispute-resolution mechanisms are for the various sectors, rights owners and private individuals.

#### **5. CONCLUSIONS**

55. INDAUTOR believes that, as a result of their rapid, dynamic, flexible and cost-effective nature, alternative dispute-resolution mechanisms offer parties to disputes greater benefits.

56. The appropriate regulation of these alternatives shall grant security and legal certainty to those parties who make use of them owing to their swift and flexible nature.

57. The parties have the option of turning to an expert in the field, with that expert then proposing solutions to the dispute in an objective fashion.

58. The advantages offered by these mechanisms mean that the parties do not need to pay fees for legal representation and can avoid the long periods of waiting associated with legal procedures.

59. As a part of efforts to improve the settlement procedure through the use of new technologies, INDAUTOR is setting up an on-line settlement conference system.

60. Once a regulated conciliation procedure is in place, INDAUTOR will have an extrajudicial procedure that will enable it to put forward possible solutions to parties concerning the substance of the disputes.

61. The implementation of mediation as the fourth alternative dispute-resolution mechanism will enable INDAUTOR to decide on the substance of a given dispute through a recommendation.

62. In Mexico, it has been proven that alternative dispute-resolution mechanisms are extremely useful in terms of resolving copyright disputes.

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