TDM OGEMID

ISSN : 1875-4120
Issue : Vol. 13, issue 2
Published : June 2016

This article is part of the TDM Latin America special edited by:

Dr. Ignacio Torterola
GST LLP
View profile

Quinn Smith
GST LLP
View profile

Terms & Conditions

Registered TDM users are authorised to download and print one copy of the articles in the TDM Website for personal, non-commercial use provided all printouts clearly include the name of the author and of TDM. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of TDM is strictly prohibited. Should the user contravene these conditions TDM reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit www.transnational-dispute-management.com

© Copyright TDM 2016
TDM Cover v5.0

Transational Dispute Management
www.transnational-dispute-management.com

Bestiary of Mexican State Contracts: Treatise on Various Real and Mythical Kinds of Arbitration

by O.F. Cabrera Colorado and A. Orta González Sicilia

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Bestiary of Mexican State Contracts: Treatise on Various Real and Mythical Kinds of Arbitration

Orlando Federico Cabrera Colorado and Andrea Orta González Sicilia

1. Introduction

Oxford dictionary defines 'bestiary' as 'a descriptive or anecdotal treatise on various real or mythical kinds of animals, especially a medieval work with a moralizing tone.' The present endeavour puts in detail the quintessential characteristics of Mexican public contracts and the laws that allow arbitration. Certainly, the complexity and the risks of the current legal framework surrounding public arbitrations in Mexico invite us to evoke mythical creatures and assimilate them with the legal regime.

The relationship of state contracts and arbitration has not undertaken a straightforward path. The possibility to keep aside matters from arbitration endangers the survivability of the system. Although alternative means of dispute resolution have only appeared two decades ago, major infrastructure projects are marked by the presence of these real and mythical kinds of arbitration. The most mythical arbitration of all, in Mexico to this date, is the *COMMISA vs PEMEX* case that lasted more than a decade. The odyssey continues to write battles with the Mexican State as respondent in many different fora, and it embodies the red dragon indicated in the Book of Revelation.

The boundaries of these public arbitrations are not always easy to set up. Thus, the practical need to address the issue represents stimuli to advance this effort. Moreover, the importance of the effort is accentuated by the fact that no scholar has committed to the analysis of the issue. Some practitioners, conversely, have examined specific pieces of the laws. However, this work, as a bestiary, presents a descriptive treatise on the major principles governing state contracts and all the laws dealing with the legendary relationship of Mexican state contracts and arbitration.

Although the issues to be analysed can be manifold, this bestiary is restrained to explore the Federal Laws due to the fact that major infrastructure projects are prepared and tendered by the Federal Government under such regulations. In addition, the most important arbitrations are derived from federal projects.

The new legal framework calls experts to postulate theories on how arbitrations shall work. The lack of experience in state courts domesticating mythological creatures, as COMMISA, and the possibility to interpret the new laws to develop unknown doctrines of administrative contracts, comes with haste as a major concern for investors.

The work will initiate with a brief description of the relevance of infrastructure and investment issues for the Mexican State. Thereafter, the main topic of state contracts will be introduced. These contractual bonds intermingle private entities with the government to carry out infrastructure projects. As arbitration is in the crux we will briefly explore the state of the art of commercial and investment arbitration. In this manner, we will be ready to land on the laws that address the possibility to agree arbitration in state contracts. Finally, the *COMMISA* case will be briefly commented to explore the horizon of possibilities that may appear with new similar specimens in the near future.

2. The Relevance of Infrastructure and Foreign Investment in Mexico

President Enrique Peña Nieto has acknowledged that infrastructure is essential for the economic growth and improves the quality of people's life. The development of infrastructure is an essential condition to advance competitiveness, increase productivity and create better jobs as well as achieve higher levels of social welfare. However, further joint ventures between the public and private sectors are required.[1]

The *Programa Nacional de Infraestructura* 2014-2018 (National Infrastructure Programme) estimates that public and private investment in infrastructure will reach 7.7 trillion pesos (USD$590 billion). With this Programme and certain structural reforms, the government aims at raising the economic growth to 1.8 and 2.0 percentage points above its inertial level, which involves the creation of 350,000 additional jobs per year. [2]

As we may see, investment in infrastructure is a strategic issue and a priority for Mexico because it represents an opportunity to generate economic growth and development. The Programme contains 743 specific projects in the energy, communications, transportation, tourism, water, health, and housing sectors. Certainly, many of the projects will be carried out through the execution of State contracts with the Mexican State.

Foreign investment may be helpful to develop the above projects, but also it is interesting to note that these projects in turn appeal more to foreign investment. Determinants of foreign direct investment may include the market attractiveness; the availability of low-cost labour and skills; the presence of natural resources and enabling infrastructure.

The last determinant is composed of transportation infrastructure (road density, the percentage of paved roads, rail lines, liner shipping connectivity), energy infrastructure, particularly electric power consumption and telecommunications.[3] Thus, infrastructure is beneficial as it attracts more foreign investment. However, it requires certainty, as well as independent and efficient fora to resolve eventual claims, particularly because political risk looms large in these projects.

3. The Doctrine of State Contracts

3.1. Introduction

States of continental Europe, Latin America and the Arab-Muslim world constitute the brotherhood of '*contratos administrativos*' or '*contrat administratif*' (state contracts). The legal systems of these countries know full well the concept of state contract, a category of contract subject to a specific branch of law: administrative law (public law) distinct from contracts executed between private individuals (private law either civil or commercial law). On certain occasions, specific jurisdictions, i.e. administrative courts, have authority to hear disputes arising out of these contracts.[4] Mexico as one of the heirs of the civil law tradition,

---

[1] Estados Unidos Mexicanos, *Programa Nacional de Infraestructura 2014-2018,* 7.
[2] *Id,* 9
[3] UNCTAD, *World Investment Report 2012,* (United Nations) 30
[4] Mathias Audit, 'Présentation Générale : Les contrats publics sont-ils solubles dans l'arbitrage international ?' in Mathias Audit, *Contrats publics et arbitrage international* (Bruylant, 2011) XI

instituted by the Spanish Kingdom, and thereafter procured by the scholars of the free nation, forms part of this brotherhood of '*contratos administrativos'*.

In other legal systems, particularly in the common law tradition or in Russia[5] the concept of '*contrat administratif*' is unknown. Traditionally, English law has been characterized by the rejection of administrative law, considered as incompatible with the 'Rule of Law', but after a century the system has evolved and a special system of rules and procedures has appeared. Nonetheless, when the State executes a contract, it acts as a private person. The contract is thus governed by the 'Common Law', although copious modifications emerge in the application of contract law of state entities. Governmental contracts may be assimilated to contracts of civil law, but with limitations. The limits are imposed by the rules of public law, and they may include in regards to the formation of the contract the *ultra vires* principle and the theory of apparent authority. English jurisdictions have rarely resolved disputes arising out of Crown contracts due to the *importance of arbitration*. In addition, 'standard conditions' applicable to plentiful State contracts enshrine particular powers, such as unilateral modification or unilateral termination. The decision of contract termination is subject to judicial review.[6]

In the United States, the Supreme Court has resolved that 'when the United States enters into contract relations, its right and duties therein are governed generally by the law applicable to contracts between private individuals.'[7] But certain special features prevail. The Federal Acquisitions Regulation comprised in the Code of Federal Regulations states model clauses applicable to unilateral modification of contracts. Dispute settlement is managed by the United States Court of Federal Claims. There are also Boards of Contract Appeals governed by the Contract Dispute Act of 1978.[8]

3.2. State Contracts in Mexico

In Mexico, this subject has been usually studied by the Administrative Law scholars and they have been able to identify certain distinctive characteristics of this type of contracts. Firstly, they constitute the agreement of a state entity and a private or public person. Secondly, there is certain inequality among the parties. This inequality is twofold. On the one hand, the will of the private person is restrained by a body of law (administrative law) that shall be observed at all times. When the governmental agency prepares the bidding guidelines and the contract, the bidders cannot negotiate the terms of the guidelines or the contract.[9] On the other hand, different purposes call parties to contract. The private contractor is enticed by economic aspects; the government instead, seeks the public order or the satisfaction of a collective public necessity.

Thirdly, administrative contracts lack the stiffness of the private regime. A third party may finish the execution of the contract in the event that the contractor did not fulfil its obligations on time. Fourthly, *cláusulas exorbitantes* (exorbitant clauses) that may be considered as abusive under the private regime can be frequently found in these contracts. An example

[5] Elvira Talapina, 'Arbitrage international et contrats publics en Russie' in Mathias Audit (n 4) 215
[6] Laurent Richer, *Droit des contrats administratifs,* (9th edn, LGDJ Lextenso éditions, 2014) 37
[7] *United States v Winstar Corp* [1996] US S.Ct. [1996] 518 US 839
[8] *Id.*
[9] *Ley de Adquisiciones Arrendamientos y Servicios del Sector Público* (Acquisitions Law), art 26

would be the administrative rescission[10] or early termination of a contract on the basis of public policy. Lastly, the authority can only act and agree to contract in accordance with the express provisions of the concerning law.[11] That is why the will of the parties is restrained. This subject will be later addressed.

Some of these principles and the differences between state contracts and civil or commercial contracts have been identified by the Third Collegiate Court in Administrative Matters of the Sixth Circuit.[12] According to this Court, the will of the parties in private contracts constitutes the supreme law and they directly aim at private interests; in administrative contracts, social interest is above and its object is the public service. In private contracts, equality among parties prevails; by contrast, in administrative contracts, the State and the contracting party are placed in different levels. In private contracts, clauses are those that naturally correspond to the type of contract; concerning administrative contracts, exorbitant clauses prevail.

The Court stresses and concludes that the distinguishing features of an administrative contract are as follows: 1) the social interest and the public service; 2) the inequality of the parties, where the State must necessarily be present; 3) the existence of exorbitant clauses; and 4) the special jurisdiction.[13]

A school of reasoning considers that Mexican state contracts dive into a pond of private law after the contract has been adjudicated to a specific contractor. This school of reasoning is true only in regards to *Petróleos Mexicanos* (PEMEX, the Oil State Company) and *Comisión Federal de Electricidad* (CFE, the Electric Power State Company) contracts under the current new regime in force. Here we identify the *selkies*, creatures found in the Irish and Scottish mythology. They have the ability to transform themselves from seal to human form. In an equal manner, PEMEX and CFE administrative contracts transform into private contracts after the adjudication.

Another school of thought considers that the Mexican state acts in a sea of private law with exceptions.[14] This rationale would be limited to the Public Private Partnerships agreements.

---

[10] Under civil and commercial law, 'the breach of obligations by one party entitles the other to seek the resolution or rescission of the contract.' Federal Civil Code, art 1949. Thus, rescission or resolution of a contract under Mexican law represents the right of one party to terminate the contract due to the non-fulfilment of obligations by the other party. A judicial resolution is needed except that parties have agreed *lex commisoria expresa* in the contract. In the realm of administrative law, a governmental agency or entity of the Public Administration may rescind administratively the contracts that it had executed. This administrative rescission is carried out by means of an administrative procedure that initiates with a notification to the contractor stating the non-fulfilment of obligations. During a 15 working day period, the contractor may present arguments and evidence supporting his case. Thereafter, the agency or entity shall render its decision within 15 working days. This decision shall state the legal grounds and provide a justification. If it is not issued within that time frame, the procedure is barred or lapsed by the state of limitations ('*caduca'*) and if it the legal grounds or justification are not provided or defective, the decision could be set aside by the competent court. Federal Law on Administrative Procedure, arts 60, 3.V, 5-6.

[11] Acquisitions Law, art 15; *Ley de Obras Púbicas y Servicios Relacionados con las Mismas* (Works Law) art 15; Laura Ruiz García, *Contratos Administrativos* (Flores Editor y Distribuidor, México D.F. 2010) 266-272.

[12] Administrativo y Contrato Civil o Mercantil. Diferencias. [2001] TCC, Amparo en revisión 196/2001, SJFG XIV (188644).

[13] Traditionally administrative courts constitute the natural competent courts to hear and resolve administrative matters. See Organic Law of the Federal Judicial Power, art 52 sec I and Organic Law of the Tax and Administrative Federal Court of Justice, art 14 sec VII. Nevertheless, arbitration has been recently introduced to resolve these matters.

[14] Herfried Wöss 'Arbitraje, Medios Alternativos de Solución de Controversias y Compras del Sector Público en México' [2009] RLMA 128 'Una vez que se adjudica un contrato, el Estado es considerado como un igual y

This type of dual nature recalls the myth of Janus. We will explore this myth in detail below. Lastly, in the most orthodox view, the Mexican State is Sovereign at all times, before and after the award of the contract and during its execution. This view is observed in contracts governed by the Acquisitions, Lease, and Services of the Public Sector Law (Acquisitions Law), as well as the Public Works and Related Services Law (Works Law).[15]

3.4. Legal Framework

The governing law of state contracts is scattered across the broad spectrum of public procurement provisions. This spectrum goes from the constitution, international treaties and the statutory laws to regulations, guidelines and many other bodies of law.[16]

Mexico has entered into several free trade agreements that include a comprehensive chapter on government procurement with the USA and Canada (NAFTA), Chile, Costa Rica, Guatemala, Honduras, Colombia, the European Union, Israel, Japan, Nicaragua, Iceland, Lichtenstein, Norway and Switzerland (EFTA).

As Mexico is a Federation composed of 32 States, there are municipal, state and federal rules governing public procurement. The complex system nevertheless, is duly harmonized with the principles enshrined in the constitution and the treaties. In this regard, some important provisions of the Federal Regime, governing the majority of the most important projects, will be commented to illustrate the principles girding the realm of administrative contracts.

The Federal Constitution is laid as the cornerstone setting up the principles under which the Mexican state carries out public procurement. As such, article 134 establishes that the economic resources of the Federation, states, municipalities and the Federal District and other entities shall be managed with efficiency, effectiveness, economy, transparency and honesty. Moreover, public procurement shall be carried out through public biddings in order to secure the best conditions in regards to price, quality, financing, timing and other relevant circumstances.

In addition, the Federal Constitution regulates the exploitation of certain industries. In this sense, a concession is required for the exploitation of mines, water resources, broadcasting and telecommunications. Nonetheless, regarding oil and hydrocarbons no concession shall be

---

actúa como un ente privado, salvo por ciertas excepciones, como la rescisión por parte de la autoridad y la terminación anticipada del contrato… '; Herfried Wöss, 'Arbitration, Alternative Dispute Resolution and Public Procurement in Mexico' [2007] RCEA 23 'Once a contract is adjudicated, the state is considered an equal and acts like a private party, save for certain exception such as the rescission by the authority and the anticipated termination of the contract…'

[15] Likewise, courts' decisions bolster the view that state contracts remain stagnant. For instance, the administrative rescission of a contract issued by a state entity shall be accompanied by legal grounds with a justification. Moreover, the Law provides with a specific procedure to secure the guarantee to hearing the contractor in case of rescission. The State entity can only pay the concepts provided by law and regulation derived from the early termination or rescission of the contract. Public officers would be held responsible if they act flouting the law. As the character of the Sovereign is relentless, it shall pay strict adherence to the principle of legality always.

[16] These bodies of law include the following: National Development Plan, Sector Development Plans, Policies, Basis and Guidelines (POBALINES, by its acronym in Spanish), Application Handbooks (*Manuales de Aplicación*), Acquisitions or Works Annual Programmes (*Programa Anual de Adquisiciones y Servicios o de Obras*).

granted, but services agreements, license agreements, production sharing agreements may be executed. The terms and forms of consideration are also regulated.[17]

The above principles and the special conditions to exploit these industries represent blatant differences between the public and private means of contracting. The special features of the system are further stressed in the statutory and special laws. Consequently, laws and regulations governing the sectors of telecommunications, energy, roads, ports, airports, water, mining, and railways seep deeply in the layers of the system. Moreover, the two ponderous state companies PEMEX and CFE are governed by a special regime.

The Acquisitions Law and the Works Law are the most commonly availed instruments by the Public Administration to secure the day to day needs, and other significant projects. Acquisitions Law and Works Law in tandem with their respective regulations and guidelines fully control from the initial phase of the contracting procedure and its exceptions[18] to the execution of the contract and its termination.[19] Any act or contract flouting the law is considered void.[20] Laws and regulations set forth the minimal requirements of contracts;[21] regulate liquidated damages;[22] establish the advance payment conditions[23] as well as payment procedures;[24] determine the cases to execute amendments to the contract,[25] portray with detail suspensions, administrative rescissions, and early terminations procedures.[26]

All the above excessive regulation is not observed either in the Mexican civil or commercial codes governing private contracts. Private law bestows on parties sufficient leeway to elect the clauses more convenient to their interests provided such accords do not breach mandatory laws of public policy.[27]

4. The Principle of Legality concerning Acts of Authority

Acts of authority may be defined as those unilateral acts made by public officers that on the basis of law create, modify or extinguish legal conditions affecting the sphere of rights of the governed person, without the need to resort to the judiciary branch and devoid of the will of the affected person. It is a superior power, and the exercise of such power may not be resigned.[28] Administrative rescission, early termination, the requirement to pay a penalty clause or liquidated damages arising out of an administrative contract under the Acquisitions and Works Law are considered acts of authority. Thus, the principle of legality shall be observed in these acts. The new laws of PEMEX and CFE hint that no acts of authority will exist after the adjudication of the contract.

Article 16 of the Constitution enshrines a quintessential principle setting up boundaries for the acts of authority. This article states as follows: 'No one shall be molested in his person,

[17] Federal Constitution, art 27
[18] Acquisitions Law, arts 26-43; Works Law, arts 27-44
[19] Acquisitions Law, arts 44-55 Bis; Works Law, arts 45-69
[20] Acquisitions Law, art 15; Works Law, art 15
[21] Acquisitions Law, art 45; Works Law, art 46
[22] Acquisitions Law, art 53; Works Law, art 46 bis
[23] Acquisitions Law, art 13, 47; Works Law, art 46
[24] Acquisitions Law, art 51; Works Law, art 54
[25] Acquisitions Law, art 52; Works Law, art 59
[26] Acquisitions Law, art 54; Works Law, art 62
[27] Federal Civil Code, art 8
[28] Contradicción de Tesis 422/2009 [2010] SJFG (22066)

family, domicile, papers or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken'. As such, 'no one' refers to any person, either individual or incorporated group, having a relationship with the State, and this notably applies for the Sovereign acting as party in a contractual relationship. These acts of disturbance are in connection with the preservation of liberty, property, possession, or rights and shall be issued by a competent authority.

Commentators have postulated that article 16 is composed of various rights that provide legal security. According to the principle of legality contained in the above article, 'authorities can only do what it is allowed by law'. This principle has been acknowledged by the Supreme Court in several cases.[29] Therefore, in the absence of a specific article in the law, regulations, or decree bestowing on the authority with the capacity to give, do or not to do something, then it must be understood that it is forbidden.[30] Moreover, it is void any act of the government that is not expressly authorized by law.[31]

All administrative, legislative or judicial authorities shall respect and comply with the rights contained in this article particularly any act of authority shall be (1) issued by a competent authority, (2) in writing and (3) stating precisely the legal grounds and provisions with sufficient detail and providing a justification with the special circumstances, the particular reasons or immediate causes that led to issue the act. A connection between the legal provisions and the justification provided is needed,[32] otherwise the act is void.[33] The absence of any of the foregoing requirements violates article 16.

In harmony with the principle of legality, the authority may only agree arbitration, determine administrative rescission, claim liquidated damages, or execute the contract, provided that certain law allows doing so and bestows with the capacity to act accordingly. Therefore, the authority shall only be competent to act not by the clauses of the contract but rather by the explicit terms of law[34] otherwise it would flout the law. This traditional conception may be challenged by the new laws of PEMEX and CFE, as contracts after adjudication will be governed by private law.

---

[29] Autoridades [1924] SCJN (810781); Autoridades, Facultades de las [1934] SCJN (336190)

[30] José Ríos Martínez, 'Interpretación en la Dogmática Jurídica como Posibilidad de Ciencia del Derecho', (2007) 3(5) Revista del Posgrado en Derecho de la UNAM 1 <http://www.juridicas.unam.mx/publica/librev/rev/posder/cont/5/cnt/cnt8.pdf> accessed 27 April 2015.

[31] Autoridades Administrativas, Facultades De Las. Limite [1988] TCC (231059); Karla Pérez Portilla, *Principio de igualdad: alcances y perspectivas (* UNAM, Instituto de Investigaciones Jurídicas, 2005) 55 quoted by Roberto Islas Montes 'Sobre el principio de legalidad' in *Anuario de Derecho Constitucional Latinoamericano* (2009) XV 101 <http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/2009/pr/pr7.pdf> accessed 27 April 2015.

[32] Raúl Pérez Johnston, 'Artículo 16. Actos de molestia' in Eduardo Ferrer Mac-Gregor Poisot, José Luis Caballero et al. (coords.) *Derechos Humanos en la Constitución: Comentarios de Jurisprudencia Constitucional e Interamericana* (SCJN, UNAM, Fundación Konrad Adenauer 2013) 1538-1539

[33] *Ley Federal de Procedimiento Adiministrativo* (Federal Law on Administrative Procedure), arts 3(I) and (V); 51 (I) and (II)

[34] Competencia. Solo Deriva de la Ley no de un Contrato [1989] TCC (229439); Competencia.- Deriva de la Ley no de un Contrato de Obra Pública [2008] RTFJFA (378/08-03-01-2) 576.

5. Commercial and Investment Arbitration

5.1. Commercial Arbitration in Mexico

Mexico's private law is divided into civil (non-commercial) law and commercial law. The power to legislate civil matters was bestowed on every congress of the 31 states and the Federal District. The power to regulate commercial matters was conferred to the Federal Congress. Arbitrations in connection with federal state contracts are conducted according to rules of the Commerce Code; [35] thus, this section will be restricted to it putting aside civil arbitration. Civil, non-commercial arbitration remains uncommon, and due to the manifold local jurisdictions, diverse and fragmented.

Mexican law and its judiciary have been traditionally favourable to arbitration. In 1971, Mexico entered into the United Nations Convention on the Recognition and enforcement of foreign arbitral awards (the New York Convention),[36] and later, in 1993, the Fourth Title of the Fifth Book of the Commerce Code was amended in order to adopt the Model Law on International Commercial Arbitration (1985) of the United Nations Commission on International Trade Law (UNCITRAL). Therefore, the Mexican *lex arbitri* is aligned with the Model Law and the New York Convention with slight modifications. Nevertheless, in regards to the recourse against award and for refusing recognition the provisions of the Commerce Code are identical to the Model Law.[37] In 2011, Mexican *lex arbitri* was further amended to ameliorate certain provisions in connection with judicial assistance and cooperation to arbitration.

The provisions of the Commerce Code are applicable to both national and international arbitrations, when the place of arbitration is located in Mexico, except for the provisions of the international treaties in which Mexico is a party or other laws that establish a different procedure or determine that certain laws are not subject to arbitration. Likewise, it applies when the place of arbitration is located outside of the Mexican territory.[38]

Even though arbitration throve in the Mexican field, the crust of alternative means of dispute resolution was fortified with constitutional provisions in 2008. Article 17 of the Federal Constitution was amended in order to expressly include alternative means of dispute resolution (ADR). This article states that ADR shall be foreseen and regulated by law. [39] Courts have taken a positive view of the provision and the Second Collegiate Circuit Court in Civil Matters of the Third Circuit considered ADR '…as a human right, the possibility that

[35] Acquisitions Law, art 80; Hydrocarbons Law, art 21; PPP Law, art 139; Works Law, art 98.
[36] Mexico is also party to the Inter-American Convention on International Commercial Arbitration since 1978, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards since 1987 and the Agreement between the United States of Mexico and the Kingdom of Spain on the Recognition and Enforcement of Court Judgments and arbitral Awards in Civil and Commercial Matters since 1992. However, the New York Convention constitutes the major relevant treaty in practice as reflected by the case law.
[37] The grounds of the Commerce Code to set aside an award (art 1457) and for refusing recognition (art 1462) are identical to the grounds Model Law (art 24 and 36).
[38] Commerce Code, art 1415
[39] Constitution, art 17

conflicts may also be settled by alternative mechanisms of dispute resolution, provided they are prescribed by law'.[40]

The Court noted the wording of constitutional reform's preamble of article 17. Alternative means of dispute resolution 'are a guarantee of the population for the access to a prompt and expeditious justice… they allow, first, to change the paradigm of restorative justice.' This led the Court to conclude that 'alternative means of dispute resolution are set at the same constitutional level and with the same dignity and they aim the same purpose, which is to resolve disputes between subjects that are under the rule of law in the Mexican State.'[41] This is in harmony with the fulfilment of international obligations of the Mexican State, in particular, the Free Trade Agreements. Mexico obligated in such treaties to encourage and facilitate the use of arbitration and other means of ADR.[42]

5.2. Investment Arbitration

Investment arbitration in Mexico is alive. The Mexican State has entered into 31 Agreements for the Reciprocal Promotion and Protection of Investments or Bilateral Investment Treaties (BITS)[43], as well as executed Free Trade Agreements comprising investment chapters with 12 countries[44]. Of all known cases in 2013, 21 were brought against Mexico,[45] and as of end of 2014, Mexico appeared as the sixth most frequent respondent State.[46]

An investment treaty signed by Mexico may include the umbrella clause[47] and can be directly applied to public contracts. A foreign investor affected by the decision of the Mexican Sovereign can avail all remedies at law, including the investment protection provided in these treaties. The main principles that may be damaged by the Sovereign include direct and indirect expropriation and fair and equitable treatment. Thus, investment arbitration remains as a second instance that foreign investors can benefit from, in case the exhaustion of local remedies does not provide the relief sought.

The most representative case for this purpose is *Gemplus S.A., SLP S.A., Gemplus Industrial, S.A. de C.V. and Talsud S.A. (Claimants) v The United Mexican States (Respondent).*[48] Four

---

[40] Acceso a los mecanismos alternativos de solución de controversias, como derecho humano. Goza de la misma dignidad que el acceso a la jurisdicción del estado [2013] TCC, SJFG, XXV, (1004630)

[41] *Idem.*

[42] Particularly, this spirit is observed in NAFTA art 2022 and art 17.22 of the Free Trade Agreement with Central America, among others.

[43] Argentina, Austria, Australia, Bahrain, Belarus, Belgium-Luxemburg Economic Union, Check Republic, China, Cuba, Denmark, Finland, France, Germany, Greece, Iceland, India, Italy, Korea, Kuwait, Netherlands, Panama, Portugal, Singapore, Slovak, Spain, Sweden, Switzerland, Trinidad y Tobago, United Kingdom, and Uruguay.

[44] NAFTA with the USA and Canada, chapter XI; Colombia, chapter XVII; Costa Rica, chapter XIII; Chile, chapter 9; El Salvador, chapter XIV; Guatemala, chapter XIV; Honduras, chapter XIV; Japan, chapter 7; Nicaragua, chapter XVI; Panama, chapter X; Peru, chapter XI and Uruguay, chapter XIII.

[45] UNCTAD 'Recent Developments in Investor State Dispute Settlement' [2014] *IIA Issues Note* No. 1, 7-8 http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf Accessed on 13 August 2014.

[46] The first five most frequent respondent States are Argentina, Venezuela, Czech Republic, Egypt, and Canada. UNCTAD 'Recent Trends in IIASS and ISDS' [2015] *IIA Issues Note,* No. 1, 6 http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf accessed on 29 May 2015.

[47] BIT Mexico-Switzerland, art 10(2); Francisco González de Cossío '¿Cuándo pacta es servanda? Las cláusulas paraguas en arbitraje de inversión' in Sonia Rodríguez and Herfried Wóss, *Foro de Arbitraje en Materia de Inversión Tendencias y Novedades* (UNAM, 2013) 327-329

[48] [2010] ICSID Cases Nos. ARB (AF)/04/3 & ARB (AF)/04/4 Award

claimants from France and Argentina in these two conjoined arbitration proceedings alleged against the Respondent unlawful expropriation and unfair, inequitable and arbitrary treatment among other issues, in regards to their investment in Renave, S.A. de C.V. (Concessionaire).

The Federal Government awarded a Concession for the National Vehicle Registry to the Concessionaire. Several vicissitudes concerning the Mexican Government, the Mexican citizens and the Concessionaire itself affected the development and performance of the Registry.[49]

The Arbitral Tribunal addressed the claims only as treaty claims under the Argentina and France BITS together with international law and not as contractual claims under the Concession Agreement or infringements of Mexican law.[50] The Tribunal considered that the groundwork of the new Public Administration aimed at revoking the Concession. A requisition and a revocation of the Concession were carried by the Federal Government. Such acts of authority inaccurately invoked imminent peril to national security, and no cogent factual evidence supported the imminent peril to Mexico's national security.

The requisition and the revocation were considered as manifestly irrational, arbitrary and perverse conducted in bad faith towards Claimants and their rights as investors under the BITS. Fair and Equitable Treatment claims were established. Furthermore, investments were unlawfully expropriated by Mexico, indirectly with the Requisition and directly with the Revocation of the Concession in violation of the BITs. Compensation was awarded for the losses caused by the breaches. This example illustrates full well how investment protection may be used for the sake of state contracts.

6. Arbitration and State Contracts

6.1. Introduction

Federal Courts are the competent courts having proper jurisdiction over disputes involving federal-state entities according to article 104 of the Constitution.[51] Such provisions, however, do not prohibit that state or public entities agree to solve disputes by means of arbitration or alternative dispute resolution (ADR) methods. As a result, arbitration may be foreseen by the corresponding laws.[52]

Even though disputes arising out state contracts have been solved by arbitration for more than a century in other countries, this mechanism has recently become visible in the Mexican scene. Irrespective of the late appearance, arbitration clauses loom largely in the major public infrastructure contracts, such as, oil projects, for instance, the contracts for the exploration and extraction of hydrocarbons or the construction oil platforms, the hydroelectric power plants *'El Cajón'* and *'La Yesca'*.

The latter is the second highest of its type in the world. It has the capacity to generate 750MW, the dam has a concrete-face embankment of 208.5 m high, the tallest in Mexico.

---

[49] Orlando F. Cabrera C., 'Gemplus vs Mexico' in *International Arbitration Case Law,* available at www.internationalarbitrationcaselaw.com

[50] *Ibid.*

[51] See (n 13)

[52] Orlando Cabrera y Eduardo Silva 'Law and Arbitration of Oil and Gas Disputes in Brazil and Mexico' [2011] *OGEL,* 9, 2, *http://www.ogel.org/article.asp?key=3115* accessed on 9 June 2015

The intake structure is located on the right bank of the river and consists of a reinforced concrete structure and metal grilles. Projects of this magnitude are overhauled by foreign investors, with special attention to arbitration clauses as these projects deal with political risk, infrastructure feats, and highly complex investments.[53] Arbitration is seen as positive mechanism to settle disputes.

Practitioners in the field of arbitration have devoted substantial attention to study and constantly analyse the intersection between state contracts and arbitration.[54] This juncture, however, has not deserved a single line written by scholars. This may be due to the fact that these arbitrations are not so frequent and most of the academics remain quite distant from the business field, although some have been designated as arbitrators or experts of law. The nature of the conundrum as part of the public or private law has not been academically theorized. Nonetheless, these matters possess a special nature.

Administrative laws are the ground supporting the arbitration agreement in tandem with the principle of contractual autonomy. The legal basis of arbitration relies on the contractual autonomy or freedom of contract. According to the principle of 'party autonomy', parties may waive their right of access to courts in favour of an arbitral tribunal.[55] Submission to arbitration by a State cannot harm its sovereignty.[56] The administrative contract doctrine and the principle of legality requiring the authority to act on the express text of the law hint the necessity of an express provision in the law to accord arbitration in a Mexican state contract. Contractual autonomy or freedom to contract is clearly restrained by law. Thus, Mexican authorities may not freely accord to submit disputes to arbitration if the law does not allow them to do so. Mexican authorities cannot on the basis of the party autonomy principle waive their right of access to the courts in favour of a decision of an arbitral tribunal. Acting or contracting against the law would be void.[57]

Irrespective from the above, arbitral proceedings arising out of state contracts are conducted as any other commercial arbitration, under the rules of the Mexican *lex arbitri* or the rules of an institution complemented by the Commerce Code, if needed. Mexican Government used to have a clear preference for the ICC Rules of Arbitration. Nevertheless, this tradition has

---

[53] Inadomi, cit. pos. Ivar Alvik, *Contracting with Sovereignty, State Contracts and International Arbitration,* (Hart Publishing 2011) 3; Orlando Cabrera y Eduardo Silva (n 52) 1

[54] Bernardo Cortés Araujo 'Nueva Ley de Petróleos Mexicanos – Implicaciones en el Arbitraje Comercial' [2014] Boletín CAIC; Diego A. Andrade-Max, 'Las personas morales de derecho público como partes en el arbitraje comercial internacional' (1993) 22 JADDUI <http://www.juridicas.unam.mx/publica/librev/rev/jurid/cont/22/pr/pr14.pdf> accessed 31 May 2015; Francisco González de Cossío 'Arbitraje y Contratación Gubernamental' [2012] 15/2012 *SAR* España 121; Francisco González de Cossío 'El arbitraje como solución al dilema de las obras de infraestructura' (2013) 4 RDP <http://biblio.juridicas.unam.mx/revista/pdf/DerechoPrivado/4/drj/drj16.pdf> accessed 3 June 2015; Francisco González de Cossío 'Quien no Conoce la historia, está obligado a repetirla: el arbitraje en la Ley de Hidrocarburos' [2014] Boletín CAIC; Julieta Ovalle Piedra 'Contratos Administrativos y Arbitraje en México' [2013] Boletín CAIC; Herfried Wöss (n 14); Herfried Wöss, 'Solución de Controversias al amparo de la Nueva Ley Mexicana de Asociaciones Público-Privadas' [2013] Lima Arbitration 185-194; Herfried Wöss, Dante Figueroa y Jennifer Cabrera 'El contrato administrativo, inarbitrabilidad y el reconocimeinto de laudos anulados en el país de origen. El Caso Commisa' [2014] Lima Arbitration 77-106; Herfried Wöss 'Arbitration under the Mexican Energy Reform: The Lessons of Commisa v. Pemex' (Kluwer arbitration blog, 7 November2015) <http://kluwerarbitrationblog.com/blog/2014/11/07/arbitration-under-the-mexican-energy-reform-the-lessons-of-commisa-v-pemex/> accessed 7 May 2015; Orlando F. Cabrera C. and Eduardo Silva (n 52); Rafael Martínez Rosas 'Arbitraje, contratación pública y juicio de amparo' [2013] El Mundo del Abogado.

[55] Ivar Alvik, (n 53) 26

[56] Diego A. Andrade Max (n 54) 434

[57] See n 20.

been broken by the arbitration clauses of the Round 1 oil contracts[58] and the Aqueduct Monterrey VI.[59] In both projects *ad hoc* proceedings on the basis of the UNICTRAL rules have been accorded.

6.2. Public Procurement

6.2.1. Background

Advantages of submitting to arbitration disputes arising out of state contracts have been acknowledged for two decades. However, the introduction of arbitration clauses in administrative contracts has been recently. This possibility coincided with the entry in force of the North America Free Trade Agreement (NAFTA). The Public Procurement Law published in the Federal Official Gazette of the Federation on 30 December 1993 opened the possibility to agree arbitration clauses. The Ministry of the Treasury had to determine the disputes that would be subject to arbitration, by means of certain general rules. In addition, the Ministry of Public Administration and the Ministry of Economy had to issue their respective opinions in advance.[60]

On 4 January 2000, the above law was divided into two bodies of laws. The Works Law and the Acquisitions Law both underpinned the opportunity to accord arbitration clauses. Nevertheless, the Ministry of Public Administration had to determine the disputes subject to arbitration by issuing certain general rules. The red tape was seen in this law, as it required the opinion of the Ministry of the Treasury and the Ministry of Economy in advance.[61] The rules were never issued.[62]

6.3. Works Law and Acquisitions Law and the Myth of Andromeda

On 28 May 2009, the text of the Works Law and Acquisitions Law were amended to introduce arbitration and boundaries in regards to the arbitrability of matters. Both laws engrave the same wording and the type of arbitration they foresee will certainly be mythical. Article 98 of the Works Law, which is identical to article 80 in force of the Acquisitions Law, states as follows:

> Article 98. Arbitration agreement may be entered into in connection with those disputes between the parties arising out of the interpretation of contracts' clauses or issues derived from the fulfilment of the contracts, in terms of the provision of the Fourth Title of the Fifth Book of the Commerce Code.
>
> Administrative rescission, early termination of contracts and the hypothesis provided by the Regulation of this Law will not be subject to arbitration.

This article deserves two comments. Firstly, the wording seems to limit the arbitrability to matters only in connection with the interpretation and the fulfilment of the contract.

---

[58] The so called Round 1 is the first ground-breaking bidding round in 2015 that is regulated by the new energy model. This new model ended the State monopoly and allowed private investors in the exploitation of oil with attractive revenues and payment schemes.
[59] See n 75
[60] Acquisitions and Works Law, art 15; Julieta Ovalle Piedra (n 54) 8
[61] See art 15 of both Works Law and Acquisitions Law
[62] See Julieta Ovalle Piedra (n 54) 8

Nonetheless, Wöss has noted that the same wording is observed in the articles bestowing jurisdiction on the federal judge.[63] Consequently, 'interpretation' and 'fulfilment' do not aim at restraining the scope of the arbitration or the litigation before the federal court.

The wording encrusted in the provisions belongs to the tradition of drafting jurisdiction clauses in Mexico. Thus, we may conclude that both the federal court and the arbitral tribunal hold sufficient powers to resolve the dispute. The arbitral tribunal is conferred with the powers: (i) to interpret the applicable law and the contract, (ii) to determine the validity of the contract and the validity of the arbitral clause and (iii) to determine its jurisdiction.

Secondly, the powers of the arbitral tribunal, however, were sadly crippled by the manacles of segregation in regards to administrative rescission[64] and early termination. As rescission is notably entrenched in the non-fulfilment of the contractual obligations, this hints that the arbitral tribunal may not analyse the non-fulfilment of obligations. Notwithstanding the above, damages and lost profits in connections with the rescission or early termination may be subject to arbitration. They are not expressly excluded from arbitration.[65] The decision of the arbitral Tribunal may be challenged before a federal judge.[66]

The above creates a complex problem and recalls the Greek mythology. On the one hand, the contractor may need to claim the annulment of administrative rescission before the Tax and Administrative Matters Court. On the other hand, the payment of the damages and lost profits would need to be claimed before the arbitral tribunal. As the same facts that initially gave rise to the administrative rescission or early termination would be discussed in the arbitration that the contractor may initiate against the government, parallel proceedings and incompatible resolutions may come into view.

Thus, the arbitration of damages and lost profits should wait for the decision of the Court if the contractor wishes to claim the validity of the administrative rescission. Conversely, if the contractor accepts the validity of the administrative rescission, he can go directly to claim damages and lost profits before the arbitral tribunal.

The complexity of this type of arbitration and the risks at issue call into mind the myth of Andromeda who is stripped and chained naked to a rock as a sacrifice to sate the monster. In the same form remains the investor in this arbitration chained naked to a rock as he cannot challenge the validity of the rescission or early termination before the arbitral tribunal. The contractor needs to wait chained for the decision of the Tax and Administrative Matters Court as a sacrifice to sate the administrative contract doctrine.

Both laws are silent in regards to the place of arbitration, but Wöss considers that article 16 of both laws enlightens this matter. Such article establishes that foreign law applies if the place of fulfilment and execution of the contract takes place abroad. On the contrary, if the fulfilment takes place in Mexico, the contract is subject to Mexican law. Normally, Mexico

[63] Herfried Wöss, (n 14) 126-7
[64] See n 10
[65] Herfried Wöss, (n 14) 131-2; José María Abascal, 'Mexico' in The International Arbitration Review, James H. Carter (ed.) (5th ed. Law Business Research Ltd UK 2014) 386
[66] Acquisitions Law, art 85; Works Law, art 103

City is agreed as the place of arbitration that coincides with the place of fulfilment of obligations.[67]

6.3.1. Public-Private Partnerships Law and the Myths of Janus

Federal Public Private Partnerships in Mexico have history, but a new law has been set in place. They used to be executed and governed by the Acquisitions Law and complex scaffolding. Although the framework, in general, was not suited for such projects, roads, aqueducts and other major infrastructure projects were conceived and materialized.

On 16 January 2012, a new law specifically suited to deal with these matters was published in the Federal Official Gazette. PPP projects covered by this law are those projects that under any scheme establish a long-term relationship between public and private sector for the provision of services to the public sector. They utilize infrastructure totally or partially provided by the private sector aiming at increasing the social welfare and investment levels in the country.[68] It should be noted that the Commerce Code[69] will be useful to complement the provisions of the law. This is an important change. An administrative law (public law) will be complemented by commercial provisions. Usually, civil laws fill the lacunae of administrative provisions.

Few contracts have been executed in the field, and uncertainty looms largely in regards to the mixed character of administrative provisions and commercial ones. This dual nature of an administrative contract complemented by a commercial law recalls the myth of Janus who was considered the master of transitions. He is usually depicted as having two faces since he looks to the future and to the past. In a similar vein, the PPP contract has two faces one marked by the nature of the administrative regulation of the PPP Law and the other complemented by the Commerce Code.

The PPP law foresees the possibility to solve disputes through four alternative means of dispute resolution. It includes negotiations, dispute review boards, conciliation before the Ministry of Public Administration and arbitration. The misfortunes of the PPP law frame in regards to ADR are manifold,[70] nevertheless the most discouraging to use arbitration are found in article 139 that states as follows:

> Article 139. The parties to a contract of public-private partnership may agree an arbitration procedure, in strict law, to resolve disputes arising out of the fulfilment of the contract itself in terms of the provisions of the Title IV of the Fifth Book of the Commerce Code.
>
> The arbitration proceeding may be agreed to in the contract or by separate agreement. In any case, it shall conform to the following:
>
> I. Mexican Federal Laws shall be the applicable law;
> II. It shall be conducted in the Spanish language;

---

[67] Ibid.

[68] Ley de Asociaciones Público Privadas (PPP Law), art 2. PPP projects may also include projects that under any scheme of partnership develop productive investment projects, applied research and/or technological innovation.

[69] PPP Law, art 9.

[70] Herfried Wöss ‘Solución de Controversias al amparo de la Nueva Ley Mexicana de Asociaciones Público Privadas’ (n 54) 187-194

III. The award shall be binding and firm for both parties. In any case, amparo action[71] will proceed.

> Neither the revocation of concessions, authorizations in general nor the acts of authority will be subject to arbitration.
>
> The dispute in connection with the legal validity of any administrative act can only be settled by the federal courts.

The misfortunes of Works Law and Acquisitions Law were magnified by the wording of this article. First, the exclusion of the 'acts of authority'[72] from the arbitration creates a vast ocean of incertitude in regards to the matters that may be deemed in arbitration. A penalty clause or liquidated damages imposed by the state entity could be comprised in the above definition. Furthermore, the judiciary branch can extend its interpretation and develop a new doctrine of 'acts of authority' hindering the matters of arbitration. Incertitude is at hand. This rationale is particularly supported by the decision of the Tenth Collegiate Circuit Court in Civil Matters for the Federal District that set aside ICC Award in the COMMISA case.

Second, excluding the revocation of concession and authorizations from the arbitration may be understood on the fact that not every law granting a concession foresee the possibility to enter into arbitration. Thus, if the PPP Law would allow something that the special law does not comprise, this may create a contradiction. Putting aside concessions from arbitration will create a major conflict. Frequently, two contracts are executed under this type of projects. On the one hand, the PPP Contract covers the construction and maintenance of roads for 10 years, for instance, and on the other hand, the concession grants the investor the right to exclusively exploit the toll road for the same period. As the obligations of both contracts are aligned, having the PPP contract with the arbitration and the concession submitting disputes to the federal court, the scenario for dispute resolution seems to be quite complicated even for the most skilful advocate or arbitrator.

Lastly, while under the Works Law and the Acquisitions Law arbitration concerning the validity of acts of authority seem to be quite obscure, the PPP Law clearly establishes that the validity of administrative acts shall be resolved by federal courts. Wöss considers that any other matter beyond the validity of administrative acts may be analysed by the arbitral tribunal. The reasoning is supported by article 122 of the PPP Law. He considers clear that 'non-fulfilments will be subject to the contract and any related dispute will be settled by federal courts or by means of the corresponding arbitration agreement.'[73] Practitioners[74] have considered that arbitration is a harsh risk in PPP projects.

The mild success of this PPP law, its regulations and other administrative guidelines has been confined to three tender projects, Tlatelolco Hospital, International Museum of Baroque Art and Aqueduct Monterrey VI. The last one is a colossal project and consists of the design, construction, operation and maintenance of a 372 km aqueduct to deliver 6m3/s of water

---

[71] Under the current Mexican law, an *amparo* action is a claim for relief under general constitutional guarantee against violation of one's civil rights by public authorities. The provision included an unfortunate wording regarding the *amparo* since it has been broadly accepted that arbitrators shall not be considered authorities for purposes of the *amparo* Law. Thus, *amparo* may not be directly filed against the acts of the arbitrators.

[72] See n 28

[73] Herfried Wöss, 'Solución de controversias al amparo' (n 14) 191.

[74] Ibid.

from the Pánuco River to the Cerro Prieto Monterrey Aqueduct system. It will increase by more than 40% the supply of potable water for the Monterrey metropolitan region – Mexico's third largest metropolis and industrial capital. The investment expected will be two billion of US Dollars.[75]

This project included an arbitration clause that shall be conducted under the terms of the Commerce Code. Mexican Federal Laws will be the applicable law. The arbitration proceedings will be conducted in Spanish. The revocation of authorizations will not be subject to arbitration. The legal validity of administrative acts may only be analysed by the competent Federal State Courts of the State of Nuevo Leon.[76] The full text of the clause states as follows:

> 40.3 Procedimiento Arbitral. En caso de que transcurridos los plazos señalados en el inciso anterior, las Partes no hubieren alcanzado un acuerdo conciliatorio respecto de las controversias, las Partes convienen que todas las controversias derivadas de la interpretación, cumplimiento o ejecución de este CAPP serán resueltas mediante arbitraje, de estricto derecho, para resolver las controversias que deriven sobre el cumplimiento del propio contrato en términos de lo dispuesto en el título cuarto del libro quinto del Código de Comercio, y ajustándose a lo siguiente:
>
> 40.3.1 Las leyes aplicables serán las Leyes Federales Mexicanas;
>
> 40.3.2 Se llevará en idioma Español; y 40.3.3 El laudo será obligatorio y firme para ambas Partes. En su caso, sólo procederá el juicio de amparo. 40.3.4 No podrá ser materia de arbitraje la revocación de las autorizaciones en general, ni los actos de autoridad. 40.3.5 La solución de controversias relacionadas con la validez legal de cualquier acto administrativo sólo podrá dirimirse por los tribunales federales del Estado de Nuevo León que resulten competentes en términos de las Leyes Aplicables.

The next mega PPP will be in the field of telecommunications. The Mexican constitutional reform in telecommunications mandates the creation of the 'Shared Network'. The Ministry of Communications and Transportation and the Federal Telecommunications Regulator (*Instituto Federal de Telecomunicaciones* 'IFT' by its acronym in Spanish) are the responsible bodies to implement this project that will consist of the installation of a wholesale shared public telecommunications network with national coverage. The network will utilize 4G technology and shall consider the use of 90 MHz of the frequency of the 700 MHz band.

This project aims at promoting an effective access of broadband communication and telecommunications services to the population. Further, it will increase the quality's coverage of the mobile services in Mexico, and create more competition in the telecommunications sector. The network will operate as a wholesaler and will provide services to other concessionaires or authorized entities as Mobile Network Operators (MNO), the Fixed Network Operators (FNW) that wish to venture into the mobile network market and the Mobile Virtual Network Operators (MVNO).

---

[75] Acquire Media, 'ICA-Led Consortium Signs Public Private Partnership Agreement for the Monterreey VI' (Empresas ICA, S.A.B. de C.V. 6 Oct 2014) < http://ir.ica.mx/releasedetail.cfm?releaseid=874691 > accessed 1 June 2015.

[76] http://www.sadm.gob.mx/PortalSadm/Docs/ModeloDeContratoBLicitacion.pdf accessed on 19 September 2015

The project will be developed by a means of a PPP Contract, prior bidding process. The PPP shall design, finance, build, operate and maintain the Shared Network, as well as to commercialize the services rendered. This project requires an investment of ten billion US Dollars for the following 10 years. It shall commence operation in 2018. The Ministry and the IFT have published the criterion to develop this Network, and they will soon publish a project of guidelines for interested bidders. It is very likely that arbitration will be included in the PPP Contract.

6.4. The Energy field

6.4.1. Background

At the same time that NAFTA entered into force, several laws were amended. Article 14 of the Organic Law of PEMEX and Subsidiary Entities was amended so that such company and its subsidiary entities may agree the application of foreign law, foreign jurisdictions in commercial matters and arbitration clauses, in international matters. The same powers were bestowed to CFE by the amendment of article 45 of the Public Energy Service Law. Nevertheless, the limitations to international matters did not appear in this law.[77] Statutory Law of the Constitutional Article 27 in the Oil Field allowed arbitration clauses. However, arbitration was restrained to works and services contracts.[78] Since then, PEMEX and its subsidiary companies have been part of several arbitration proceedings.

In 2008, a timid reform was passed aiming at solving the challenges of the oil sector in Mexico. The contracting framework with PEMEX varied depending on the subject matter of the activities.[79] Two sets of rules governed the contracts. On the one hand, non-substantive activities, i.e., acquisitions, leases and works that not be deemed in connection with a productive character such as the purchase of materials and equipment for PEMEX's offices, and construction of administrative buildings were governed by the Acquisitions Law and by the Works Law, respectively.

On the other hand, substantive activities, i.e. acquisitions, leases, services and works contracts with a productive character were governed by PEMEX Law, its regulations and Contracting Administrative Provisions. Within this framework, no provision precluded the arbitrability of administrative rescission or early termination. Thus, it seemed that all matters could be subject to arbitration.

Few contracts were executed under this regime as a major reform drastically changing the oil framework in the country was passed. In December 2013, the Mexican Congress approved a comprehensive energy reform that introduced a new panorama full of appealing opportunities for the private sector. Below we will refer to the new provisions in force in the energy field.

6.4.2. Upstream Activities and the Second Appearance of Janus

For public policy reasons the Mexican nation continues to hold the property of hydrocarbons. Nevertheless, according to the reform, the Mexican State may carry out the exploration and extraction of oil through assignment to State companies or through contracts with private

[77] Julieta Ovalle Piedra (n 54) 9
[78] Orlando F. Cabrera C. and Eduardo Silva (n 54) 20
[79] *Ibid.* 17

investors. As such, the reform breaks the monopoly of PEMEX and private investment will be allowed to develop the concerned activities. Additionally, the reform foresees the execution of services contracts, production-sharing contracts and licenses.

It should be noted that the Commerce Code will have a complementary character to the Hydrocarbons Law. Likewise, the acts of the Hydrocarbons Law will have a commercial nature; and consequently, governed by the Commerce Code.[80] This is an important change in the administrative tradition that recalls again the myth of Janus referred to in the PPP Law. Two faces, one looks to the administrative field and the other to the commercial arena.

The Hydrocarbons Law allows arbitration of exploration and extraction matters. Still, administrative rescission is not subject to arbitration. Thus, a judicial resolution will be needed in this regard. The causes of rescission can be clearly identified in article 20 and are in connection with gross non-performance by the contractor. Likewise, there is doubt if the damages and lost profits regarding the administrative rescission are subject to the arbitration. This is a clear drawback for investors. Exposure before judicial courts in these complex projects seems unsuitable. Moreover, the risk of parallel proceedings and incompatible resolutions becomes visible.

The arbitration shall be conducted in accordance with the Mexican *lex arbitri* (the Commerce Code). The Hydrocarbons Commission cannot accord foreign laws as applicable law. Instead, Mexican federal laws shall govern the contract. The arbitration shall be carried out in Spanish language and the award shall pay strict adherence to the law.[81] An arbitration clause is comprised in the Model Production-Sharing Contracts for Round One. The Model Contract for the second phase states as follows:

> 25.4 Arbitration. Subject to Article 25.3, any dispute arising from or relating to this Contract that has not been resolved within three (3) Months after the commencement of the consultation period described in Article 25.2 shall be resolved by arbitration pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) (the 'UNCITRAL Rules'). The Parties agree that the President of the International Court of Justice shall be the nominating authority for the arbitration proceeding. The applicable substantive law shall be as provided in Article 25.1, and disputes shall be resolved strictly according to law. The arbitral tribunal shall consist of three members, one named by CNH, another named by the Contractor and the third (who shall be the President of the tribunal) named in accordance with the UNCITRAL Rules, provided that: (i) the claimant shall name its arbitrator in the notice of arbitration and the respondent shall name its arbitrator within ninety (90) Days from the date that it personally receives the notice of arbitration, and (ii) the two arbitrators named by the Parties shall have a period of no less than sixty (60) Days from the date the arbitrator designated by the respondent accepts its designation as arbitrator, to select, in consultation with the Parties, the third arbitrator, who shall serve as the President of the tribunal. The arbitration proceeding will be conducted in Spanish and the seat of the arbitration shall be the City of The Hague in the Kingdom of the Netherlands.

[80] Hydrocarbons Law, arts 22, 97
[81] Hydrocarbons Law, art 21

6.4.3. Pemex, CFE and the Myth of Selkies

The ponderous Mexican State company PEMEX now appears as a 'Productive Company of the State', a new concept never seen before in the Mexican administrative tradition. The Federal Government still exclusively owns such company. The Commerce Code will complement the PEMEX Law. In case of doubt, interpretation shall aim at favouring the completion of the purposes and goals of PEMEX, taking due regard of its (bizarre) Productive Company of State character.[82] This Law will govern all the acts, agreements, securities, guarantees of PEMEX.

The administrative trend is clearly defined. The contracting process from the bidding to the award of the contract will have an administrative nature. 'Once the contract is signed, it and all the acts or aspects deriving from it will have a private nature and will be governed by the applicable commercial or civil legislation.'[83] As part of the new regime, Wöss observes that no reference to administrative rescission or early termination is made in this law which is consistent with the commercial nature of this law.[84] This is a feat. The lawmakers ably found a solution for the problem seen in COMMISA case and established in the foregoing laws. This is why we have assimilated the relationship with the selkies, creatures that transform into something different.

PEMEX Law contains express provisions allowing arbitration and other means of dispute resolution. Moreover, PEMEX and its subsidiaries may agree the application of foreign law when the contracts or acts have effects outside the Mexican territory, as well as the jurisdiction of foreign courts in commercial matters.[85]

The same approach was taken by the legislator regarding CFE Law. Commercial and civil law will complement CFE Law.[86] The contracting procedure until the award of the contract will have an administrative nature. 'Once signed the contract' it undergoes a complete metamorphosis as it transforms into a commercial matter.[87] In relation to arbitration, the exact same provisions are reproduced in CFE Law.[88]

With the metamorphosis experienced by the new 'Productive Companies of the State', the Mexican State has enlighten the horizon of investors, as they will not be attached to the risks of resolving disputes under a complex system full of technicality and incertitude. There is only one path: arbitration. However, the success of these provisions will need the support of the judiciary to avoid risk and secure a proper settlement of disputes.

7. COMMISA vs PEMEX and the Red Dragon

Manifold issues create the uniqueness of this case. The settlement of disputes initiated more than a decade ago. Laws and the judicial criteria have changed. The Tax and Administrative Matters Court has special jurisdiction to hear disputes arising out of state contracts. Now PEMEX is a Productive Company of the State.

---

[82] Pemex Law, art 3
[83] Pemex Law, art 80
[84] Herfried Wöss 'Arbitration under the Mexican Energy Reform' (n 54)
[85] Pemex Law, art 115
[86] CFE Law, art 3, 7
[87] CFE Law, art 82
[88] CFE Law, art 118

Proceedings in the COMMISA saga include commercial and investment arbitration, as well as, judicial proceedings before the courts of Mexico, Luxemburg and the US, some are pending. For the many fora, actions and power shown by COMMISA against the Mexican State, this case may be assimilated to the great red dragon depicted in the Book of Revelation. The dragon has seven heads and ten horns, and seven crowns upon its heads. Its tail drew the third part of the stars of heaven, and did cast them to the earth. COMMISA's actions in the US and Luxemburg have drawn international attention in regards to the decisions of the Mexican Judiciary. The reputation of the Mexican State may be cast down if these issues are not properly managed.

This section will constrain to analyse the Mexican and US proceedings. Notwithstanding the foregoing, this case spells out the complex technicality of a major state contract, judicial and arbitration proceedings and public policy. Some barriers currently appear in the above laws, thus, similar issues will arise in the near future, particularly in the Hydrocarbons Law, PPP Law, Works Law and Acquisitions Law. This is the relevance of the case for the future.

7.1. Introduction

In October 1997, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V.* ('COMMISA') and *Pemex-Exploración y Producción* ('PEP') entered into the Contract for Public Works No.PEP-0-129/97 (Contract), whereby COMMISA was obliged to execute engineering, procurement, manufacturing, transportation, installation, interconnection, testing and starting up of two offshore platforms located in Bahía de Campeche. The Contract for Public Works included in section 23.3 an arbitration agreement. Pursuant to the Contract, COMMISA posted a bond with *Afianzadora Insurgentes, S.A.*

In September 2002, COMMISA initiated conciliation before the former Comptroller General's Office. On 29 March 2004, PEP notified COMMISA the commencement of the administrative rescission process.[89] COMMISA asked the Comptroller General's Office to start a conciliation process whereby COMMISA requested PEP to differ the resolution of the rescission.

The rescission process was suspended. Given that the conciliation failed, in December 2004 COMMISA notified its decision to withdraw from the conciliation process with PEP. On 8 December 2004, COMMISA filed its claims before the Secretary of the International Chamber of Commerce.

On 10 December 2004, the Comptroller General's Office notified COMMISA and PEP that the agreement to suspend the administrative rescission was left without effect. On 16 December 2004, PEP resumed the administrative rescission process. A few days later PEP called the bonds based on the administrative rescission of the Contract, and claimed the amount of US$78,423,766.46 to *Afianzadora Insurgents* corresponding to the bonds posted by COMMISA.

COMMISA filed an indirect *amparo* proceeding before the district courts, in which it obtained the definitive suspension of the administrative rescission. PEP was ordered to refrain from calling the bonds. Unsatisfied, PEP filed a motion to review before the Sixth Collegiate Court on Administrative Matters of the Federal District ('Sixth Collegiate Court').

[89] See (n 10)

It dismissed the amparo without deciding on the merits of the case. Against the dismissal of the amparo, COMMISA filed a motion to review, as well as PEP. The Sixth Collegiate Court studied both motions to review, and regarding COMMISA's motion, the court revoked the dismissal of the amparo. It also ordered to send the file to the Supreme Court of Justice (Supreme Court), so that it would study COMMISA's arguments on the basis of unconstitutionality of the law. In connection to PEP's motion to review, it was ordered to confirm the definitive suspension granted to COMMISA.

On 23 June 2006, the Supreme Court denied the amparo to COMMISA and ordered the Sixth Collegiate Court to rule on arguments related to the administrative rescission. The Sixth Collegiate Court studied the case and denied the amparo to COMMISA.

After the Sixth Collegiate Court denied the *amparo* to COMMISA, PEP advanced in the arbitration the *res judicata* defence. Alongside the arbitration, PEP delivered a release to COMMISA. The release was challenged by COMMISA in the arbitration. PEP requested the Arbitral Tribunal to conclude definitely the arbitration, to condemn COMMISA to pay the arbitration costs and to leave the Parties' right to enforce their claims before courts.

On 20 November 2006, the Arbitral Tribunal rendered a preliminary award in which it determined it was competent to resolve the disputes. It should be noted that PEP could have challenged such Preliminary Award in terms of the *lex arbitri*,[90] but it decided not to do so. Instead, PEP advanced two new defences dealing with the competence of the Arbitral Tribunal.

Firstly, PEP filed a defence as a supervenient cause derived from the *amparo* ruling where the legality of the administrative rescission was declared. Secondly, PEP alleged that the Arbitral Tribunal should not have considered the validity of the administrative rescission as it had been the subject matter of the *amparo*'s final judgment. According to PEP the fact that the Arbitral Tribunal would study the grounds for the administrative rescission could create a contradiction between the award and the *amparo*'s final judgment, and as a consequence, a violation of legal certainty. Nevertheless, the Arbitral Tribunal decided that the final judgment of the *amparo* did not have *res judicata* effects.

The arbitration continued and once the Parties were heard, on 19 December 2009, the Arbitral Tribunal issued the final award. As a result, the majority ruled in favour of COMMISA on most counts, although it also granted some of PEP's counterclaims.

On 11 January 2010, COMMISA sought for recognition and enforcement of the award before the United States District Court for the Southern District of New York.[91] On 7 April 2010, PEP filed an annulment of the award before the Fifth District Court on Civil Matters in Mexico.[92]

7.2. Judicial proceedings in Mexico related to the annulment of the Final Award

On 24 June 2010, the Fifth District Court on Civil Matters ('Fifth District Court') *decided not to annul the award*. Displeased with the decision, on 14 July 2010 PEP filed an indirect

[90] Commerce Code, art 1432
[91] This proceeding received the case number 10-cv-00206 and was assigned to Judge Alvin. K. Hellerstein.
[92] The annulment of the award proceeding had the file number 207/2010-II.

amparo[93] before the Tenth District Court on Civil Matters. On 27 October 2010, the Tenth District Court *also rejected PEP's claim to annul the award.*

On 2 November 2010, PEP filed a motion to review before the Eleventh Collegiate Court on Civil Matters ('Eleventh Collegiate Court'),[94] which exercised the attraction power of the Supreme Court. The First Chamber of the Supreme Court decided not to exercise such attraction power. Accordingly, the Eleventh Collegiate Court had to rule on PEP's motion to review.

The Eleventh Collegiate Court resolved two aspects. Firstly, PEP is entitled *to act as an entity of private law*; that is, to act as a private entity without *imperium*, and it holds the power to agree rights and obligations with other parties. Secondly, PEP can also act as a public entity. In this case, its acts are based on the powers conferred by law without the need to go to a court.

Furthermore, the Eleventh Collegiate Court ruled that PEP filed the motion to review acting as a private entity and not as a public one. Despite the fact that the administrative rescission was issued by PEP as an act of authority, the administrative rescission was not the subject matter of the motion to review. The subject matter of such proceedings was the arbitral award that had been rendered according to an agreement entered into by PEP acting as a private entity.

In its ruling, the Eleventh Collegiate Court found that public policy shall be studied to determine its meaning in this case. This Court stated that PEP could have filed an amparo and a motion to review pursuant to Articule 9 of the Amparo Law, as public entities are entitled to file amparo whenever their assets are affected by a court decision. The Court considered that PEP's assets were affected as the judgment denied the annulment of the arbitral award in which PEP was ordered to make payments in favour of COMMISA.

The Eleventh Collegiate Court also established that it was necessary to study if in this case the public policy was affected. The Court stated that *an arbitrator can only decide matters that are not forbidden* and *matters of free disposal that aim at regulating the performance of private entities but not of authorities*. Thus, the Eleventh Collegiate Court held that *an award rendered upon acts of authorities is against public policy*. A dispute should not be submitted to arbitration whenever established by law, or if it refers to matters governed by mandatory or prohibitive laws since this constitutes a limit to exercise private autonomy.

When studying matters related to public policy, the Eleventh Collegiate Court stressed that the judicial system shall *provide certainty to the litigators,* so the judicial activity shall be performed only once and shall culminate with a final ruling. It is not permissible to challenge a matter that constitutes *res judicata*. *There cannot be a new procedural relation in connection to a legal matter that has already been judged and for which all stages are concluded definitively.* The principle of immutability of rulings is absolute and cannot be altered by private interests. Arbitrators shall respect what has been decided in a judicial proceeding that constitutes *res judicata*.

[93] The indirect *amparo* received the case number 604/2010.
[94] The motion to review received the case number 358/2010.

Likewise, the Eleventh Collegiate Court pointed out that arbitration shall only deal with matters available to private law.[95] There is a limit since only acts of private entities shall be addressed and *acts of authorities shall never be submitted to arbitration.*

The Eleventh Collegiate Court considered that the acts of authorities are the translation of powers granted by law. Authorities are thus entitled to extinguish unilaterally a legal or factual situation without going to court. These powers may not be waived; hence, they are not subject to arbitration. The submission of these matters to arbitration implies *an attack to public policy* and violates Article 6 of the Federal Civil Code that establishes that only private rights may be waived.

In its judgment, the Eleventh Collegiate Court also studied the notion of public policy linked to the reflected effectiveness of *res judicata*. PEP entered into an arbitration agreement in a coordination level (equal level, not as a Sovereign), but concerning the dispute that arose afterwards, PEP acted as an authority, so it can no longer be subject to arbitration. The acts of authority shall be subject to judicial authorities, otherwise the legal system would be transgressed, and public policy would be damaged.

This Collegiate Court considered that the Arbitral Tribunal did not annul or modified the administrative rescission, but its decision declared in 'parallel' that: (1) PEP breached the Contract, not COMMISA; (2) PEP did not act legally, (iii) the rescission did not proceed, and (iv) COMMISA shall not be ordered to pay liquidated damages. This matter implied that the act of authority was indirectly disrupted. It had already been the subject of the *amparo*'s judgment. COMMISA initiated such *amparo* and it was denied.

The Court insisted that PEP acted as an authority in the administrative rescission. Such act cannot be judged, modified or altered by an Arbitral Tribunal since that would disrupt the public policy. Moreover, an amendment to Public Works Law was carried out to precisely protect this situation. That is why, the amendment included an express prohibition in the sense that the administrative rescission cannot be subject to arbitration.

The Court stressed that it was not making *a retroactive application of a law.* The amendment to the law served more as a *guiding principle*. As we shall see below, Judge Hellerstein properly addressed this matter while not only analysing the retroactive application of the law but also the unfairness derived from such application.

The principle of *res judicata* is a matter of public policy as it provides certainty to the Parties in a proceeding. Then, an Arbitral Tribunal cannot modify the decision of a court (1) that is final and definitive, and (2) that established the validity of authority's act. This would be against public policy.

The Arbitral Tribunal was competent to hear disputes that were submitted to its consideration. Nonetheless, it lacked competence to decide the facts and motives that generated the rescission of the Contract, after PEP carried out the administrative rescission the Arbitral Tribunal. Administrative rescission is not subject to arbitration, it was determined by PEP and it implied that COMMISA breached the Contract.

[95] As regulated in Section II of Article 1416 of the Commercial Code.

Additionally, the *amparo* proceeding, which was the correct proceeding, was filed and the *amparo* was denied to COMMISA. Consequently, it was not feasible that the other claims were analysed even when in some parts they were related to the fulfilment of the Contract. The Collegiate Court established that in order to file a claim related to the fulfilment of the Contract or to examine which party breached such Contract, it was required, as a condition, the revocation of the administrative rescission. The works allegedly performed by COMMISA and not paid should have been analysed in the ordinary administrative proceedings, not in the arbitration.

The Eleventh Collegiate Court sustained that it was *res judicata* the decision of the Supreme Court in which it decided that administrative rescission shall be challenged through a federal administrative proceeding. The decision of the Supreme Court prevented the Arbitral Tribunal from rendering its award. The Arbitral Tribunal should have considered that disputes could not be solved without affecting the validity of the administrative rescission.

The Eleventh Collegiate Court found that the Fifth District Court (1) acted incorrectly, as it considered that the Arbitral Tribunal was competent to resolve the disputes, and (2) it confused the notion of competence and jurisdiction.

Accordingly, the Collegiate Court revoked the judgment issued by the Fifth District Court and granted the *amparo* requested by PEP to set aside such judgment. Lastly, the decision of the Eleventh Collegiate Court dated 21 September 2011 ordered the Fifth District Court to issue a new judgment in order to annul the award. On 25 October 2011, the Fifth District Court rendered a new decision declaring the annulment of the award.

7.3. The Confirmation of the Award in the US

On 11 January 2010, COMMISA filed a recognition and enforcement proceeding before the United States District Court for the Southern District of New York. On 5 April 2010, PEP filed a motion to dismiss COMMISA petition or, in the alternative PEP requested the stay of the proceedings until the Mexican Courts decide on the award's annulment proceedings. On 2 November 2010, Judge Alvin K. Hellerstein issued an order and final judgment confirming the arbitral award. PEP filed an appeal and for this purpose posted a guarantee in the amount of US$395,009,641.34

Once the annulment of the award was issued, PEP asked the Second Circuit Court of Appeal that was in charge of PEP's appeal to remand the case to the District Court to consider whether the Arbitral Award was still enforceable. The Second Circuit Court of Appeal asked Judge Hellerstein to address the effect that the decision setting aside the award should have in the decision enforcing the award. Accordingly, Judge Hellerstein held a three-day hearing in April 2013 to address the issue.

Judge Hellerstein found that a substantial part of the Eleventh Collegiate Court's decision was *based on a statute of law that was not in force on the date in which the parties entered into the Contract* and that apparently that had *affected* COMMISA's possibility to be heard on the merits of the case.

Judge Hellerstein maintained that the Eleventh Collegiate Court's decision *violated basic notions of justice* by applying a law that did not exist when the Contract was executed and affected COMMISA's possibility to litigate its case. The award was consequently confirmed.

In his decision, Judge Hellerstein made reference to the amendment to the Organic Law of the Federal Tax and Administrative Justice Court that entered into force in December 2007. Article 14 section VII of such Law bestows powers on the Federal Tax and Administrative Matters Court to decide resolutions or administrative acts related to the interpretation and fulfilment of the Contract.

Judge Hellerstein also mentioned that matters related to administrative rescissions, which are submitted to district courts on administrative matters have a 10 year statute of limitation whilst matters submitted to the Federal Tax and Administrative Justice Court have a 45 day statute of limitation. Pursuant to March 2010 Supreme Court's decision it was decided that the Federal Tax and Administrative Matters Court was the exclusive competent authority to hear disputes concerning the administrative rescission. Article 98 of the Public Works Law[96] expressly states that administrative rescission is not subject to arbitration.

Judge Hellerstein held that the Eleventh Collegiate Court based its decision in two sources. (1) Its conclusion related to the public policy and was strengthen by section 98 of the Public Works Law, without implying a retroactive application of the law, but it was a guiding principle. (2) The Supreme Court of Justice's decision stating that the administrative rescission is an act of authority.

In his decision, the judge referred to other proceedings that were followed after the annulment of the award. Thus, PEP filed proceedings to call the bond that was posted by COMMISA. On its part, COMMISA filed a damage claim against PEP before the Federal Tax and Administrative Justice Court but the aforementioned court established that the 45 day statute of limitation to file a claim had elapsed[97] and that the 10 year statute of limitation was not applicable. Additionally, it was resolved that COMMISA's claim was baseless since it was *res judicata* for the decision of the Sixth Collegiate Court dated 23 February 2007 determined the validity of the administrative rescission.

The analysis made by Judge Hellerstein addressed article 7 of the Panama Convention. The recognition and enforcement of an award may be denied if said award was annulled by a competent authority. The word 'may' provided freedom of choice to the judge but derived from the cases cited in the analysis (*Baker Marine and TermoRio),* such freedom of choice is narrow.

In 2004, COMMISA filed its claims in arbitration and in that time the company had reasons to consider that the disputes with PEP could be submitted to arbitration. PEP, in two occasions, had entered into contracts that foresaw an arbitration clause. Furthermore, PEP was entitled to agree arbitration pursuant to Article 14 of the Organic Law of Petróleos Mexicanos and Subsidiary Organisms,[98] and as per Article 1116 of NAFTA. Moreover, Judge Hellerstein noted that PEP's conduct showed that it was subject to arbitration.

[96] See Section 3.3 Works Law and Acquisition Law

[97] The 45 days started running from December 16, 2004 which was the date of the administrative rescission.

[98] Article 14. - The legal acts entered into by *Petróleos Mexicanos* or any of its subsidiary organisms shall be governed by the applicable Federal Law and national disputes to which they are a party, whatever its nature, will be heard in federal courts except in case of arbitration agreements, either way they will be exempt from granting guarantees as required by legal statutes even in judicial disputes.

In case if international legal acts, *Petróleos Mexicanos* or its subsidiary organisms may apply foreign law, be subject to foreign courts in commercial matters and entered into arbitration agreements whenever appropriate to best fulfil its purpose.

PEP's first arguments against the arbitration were not in connection with matters of public policy. PEP argued that COMMISA had waived its right to arbitration by filing the *amparo*. Even after the June 2006 Supreme Court's decision, PEP's arguments were based on *res judicata* but not on a violation of public policy. The public policy argument was raised by PEP until 2007, namely, three years after the arbitration started.

As well, Judge Hellerstein found that the Eleventh Collegiate Court supported its ruling in Section 98 of the Public Works Law and in the decision rendered by the Supreme Court on 1994 which did not refer to arbitration.

Judge Hellerstein held as the core part of this case not only the retroactive application of the law but the unfairness associated to such application. The law existing at the time of execution of the Contract granted COMMISA the reasonable expectation that its disputes would be settled in arbitration. The 1994 Supreme Court decision was not sufficient to warn COMMISA that the arbitration agreement entered into with PEP could have been ignored.

The retroactive application of Article 98 of the Public Works Law was undertaken t*o favour a public entity over a private entity*. The Eleventh Collegiate Court in its judgment pointed out *that the administrative rescission helped safeguard the financial resources of the State* and that as such, the State shall be granted suitable mechanisms to fulfil those objectives.

These reasons were considered against principles of justice since PEP had waived its immunity, entered into an agreement as a private party and a court hearing disputes derived from the Contract shall treat both parties equally. Judge Hellerstein stated that 'applying a law that came into effect after the parties entered into the Contract for Public Works was troubling, but the unfairness was exacerbated by the fact the Eleventh Collegiate Court's decision left COMMISA without a remedy to litigate the merits of the dispute that the arbitrators had resolved in COMMISA's favour'[99].

Judge Hellerstein held that the June 2006 Supreme Court decision established no obstacle for a private entity to file an administrative dispute proceeding in order to trigger the intervention of a court in case the private entity had been adversely affected by the cancellation of a contract for public works for which the private entity was a party. The fact of having a judicial recourse against a rescission of the Contract was essential for the decision of the Supreme Court. Thus, it held that the administrative rescission was constitutional.

However, when the Eleventh Collegiate Court determined that in this case the administrative rescission could have been challenged by filing a claim of administrative nature before a district judge, the 45 day statute of limitation to file the claim before the Federal Tax and Administrative Justice Court had elapsed. Hence, that option was no longer available for COMMISA.

It is worth noting that in 2010 it was decided that the competent authority to hear this type of claims was the Federal Tax and Administrative Matters Court and not a district judge, consequently the 10 year statute of limitation no longer applied. COMMISA filed its claims before the Federal Tax and Administrative Matters Court, but it dismissed its claims based on *res judicata* grounds. The lack of remedy for COMMISA is unfair, moreover considering that

---

[99] Judge Hellerstein's Opinion and Order granting Petitioner's motion to confirm arbitration award and denying Respondent's motion to dismiss petition, page 29.

it was deemed that COMMISA had to pay damages to PEP even when the parties have not been heard in another forum outside the arbitration and due to the fact that PEP carried out the administrative rescission.

As per the foregoing and clarifying that he was not applying Mexican Law, Judge Hellerstein based his ruling on the factual grounds of the case. On the date COMMISA filed its claim against PEP, there was no law or any source that could have reasonably led COMMISA to think that it had to file its claim before a court and not before an arbitral tribunal.

Given the factual ground of the case, the judge ruled that COMMISA had reasonable expectations to think that the disputes shall have been resolved through arbitration. The Eleventh Collegiate Court's decision broke COMMISA's reasonable expectation by applying a law and a policy that were not in force at the date in which the Contract was executed. The Eleventh Collegiate Court denied COMMISA the opportunity to be heard on the merits of the case. Accordingly, Judge Hellerstein ruled that the Eleventh Collegiate Court's decision violated basic notions of justice so it was decided to confirm the arbitral award. An appeal is pending.

The above summary only is a portion of several pending actions before different fora. It is becoming a nightmarish case for Mexico, not only for the high amounts claimed and due but for the bad reputation.

8. The Future Ahead

The doctrine of administrative contracts has created the most fantastic creatures in the Mexican bosom. We have seen the Selkies, Andromeda, Janus and the Red Dragon. Of this bestiary, the most desirable creature to be seen on the horizon of the Mexican State contracts is the Selkie. PEMEX and CFE contracts now have followed, by mandate of the law, a private fate after the adjudication process. Of course, the support of the judiciary will be needed to follow the same line of reasoning. The other creatures are detestable because they create incertitude and hurdles to efficiently conduct arbitral proceedings. The restrains of the Works and Acquisitions Laws, as well as the obstacles of the PPP Law will bring into being other mythical creatures as the red dragon that will be depicted in this bestiary.

In the Book of Revelation, the red dragon has seven heads and ten horns, and seven crowns upon its heads. This may be considered as the utmost representation of evil. However, we do not address here such consideration. We recall that mythical creature for the power shown by COMMISA in many different jurisdictions. COMMISA has demonstrated vast prowess and strategic skills to advance its defences in several fora. The power of this contractor should be taken into account, as investors frequently share the same level of strength to avail all remedies available at law.

The presence of the Red Dragon and other detestable creatures can be easily avoided by putting aside the doctrine of 'administrative contracts' and submitting those instruments to the regulation of private law, as it has been seen in PEMEX and CFE Laws. Notwithstanding the above, lawmakers need to put an end to such doctrine; meanwhile, the Mexican State will continue to deal with mythical creatures.