PUBLIC POLICY AND ARBITRABILITY IN MEXICO

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Public policy and arbitrability are the two *ex officio* grounds for setting aside awards or refusing their enforcement. This means that, in contrast to all other grounds, they need be considered by courts irrespective of whether parties raise them. In and of itself, this is telling: that arbitration law asks that courts *always* evaluate these grounds necessarily means that there is something not only special, but important, about these concepts. In this chapter, I shall canvass the Mexican experience with these grounds. To do so, I shall begin with public policy (§I) and then tackle arbitrability (§II). I will thereafter conclude with a comment which includes how Mexican arbitration law on point compares to internationally-accepted paradigms (§III)

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I. PUBLIC POLICY

Public policy is the most interesting, problematic, and sought-after ground for setting aside and not enforcing arbitration awards. To describe the current black-letter rule on the matter I shall first start with an understanding as to how the concept is understood in Mexico. Thereafter I shall address how Mexican juridical actors have grappled with this (difficult and problem-prone) legal concept.

The conclusion is advanced: the Mexican experience with the concept is in line with internationally-accepted standards. Albeit the experience rich but is not free from vicissitudes, the outcome is both interesting and laudable.

A. PUBLIC POLICY IN THE *LEX SCRIPTA*

In line with modern arbitration regimes, the Mexican Arbitration statute envisages public policy as a ground for setting aside[1] and not enforcing arbitration awards.[2] Both provisions read as follows:

Setting aside:

> if the court finds that … the recognition or enforcement of the award would be contrary to public policy.

Enforcement:

> if the court finds that, under Mexican law, …the recognition or enforcement of the award would be contrary to public policy.

As may be observed, no definition of the concept exists, only its enunciation. Given that it is an open texture, delving into what the courts have said on the matter is in order. To do so, I shall divide the presentation into the early cases (§B), to then address the sensitive (§C) and seminal cases (§D), so as to then distill the black-letter law (§E).

B. EARLY CASES

In a 2010 case an appellate court conceived public policy thus:[3]

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1 Commerce Code Article 1457.II which in Spanish reads as follows: "*El juez compruebe que según la legislación mexicana … el laudo es contrario al orden público*".

2 Commerce Code Article 1462.II. "*El juez compruebe que, según la legislación mexicana … el reconocimiento o la ejecución del laudo son contrarios al orden público*".

3 Judgment of the Third District Court in Civil Matters of the First Circuit in *Amparo en revisión* 195/2010, p. 151 which Spanish original reads as follows: "*conjunto de reglas que según una determinada visión histórica de la*

set of rules that according to a certain historical vision of society and relationships between people, are deemed necessary for the existence of the State and the individual's growth in harmony, balance and peace, concerning the defense of fundamental freedoms, rights or goods of human beings and the principles of their legal organization in order to fulfill their potential as members of a society.

In a 2011 case a court of first instance defined public policy as follows:[4]

set of rules on which the common good is based and before which individual rights cease to exist because it is in the interest of society as a whole rather than of individual rights to consider them in isolation.

Two other judgments defined public policy in the following manner:[5]

> Public order determines a state of peaceful coexistence among the members of a community; this idea is associated with the notion of public peace, a specific objective of government measures.
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> In a technical sense it refers to the set of legal institutions that identify or distinguish the law of a community; principles, norms and institutions that cannot be altered either by the will of individuals, (they are outside party autonomy) or by the application of foreign law.
>
> It follows that public policy laws do not necessarily refer to public law as opposed to private law. There are laws of public order that regulate institutions of private law which are fundamental social institutions such as kinship and marriage.

A 2010 thesis[6] is emblematic of this initial phase.[7] "PUBLIC POLICY. THE PRO-ARBITRATION PRINCIPLE AND RECOGNITION OF THE FREEDOM OF CONTRACT IN

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vida social y de las relaciones entre los individuos, resulta necesaria para la existencia del Estado y el desarrollo del individuo en equilibrio, armonía y paz, lo que atañe a la defensa de las libertades, derechos o bienes fundamentales del hombre y de los principios de su organización jurídica para realizarse como miembro de una sociedad".

4 Judgment of the 56th District Court for Civil Matters for Mexico City (*Juez Quincuagésimo Sexto* de lo Civil del *Distrito Federal*) of 7 November 2011 in File 596/2011 which in Spanish reads as follows: "*conjunto de reglas en que reposa el bien común y ante los cuales ceden los derechos particulares porque interesan a la sociedad colectivamente más que a los ciudadanos aisladamente considerarlas*". (Id. pp. 8-9).

5 Both Judgments had the following identical language: "*El orden público determina un estado de coexistencia pacífica entre los miembros de una comunidad; esta idea esta asociada con la noción de paz pública, objetivo específico de las medidas de gobierno. En sentido técnico se refiere al conjunto de instituciones jurídicas que identifican o distinguen el derecho de una comunidad; principios, normas e instituciones que no pueden ser alteradas ni por la voluntad de los individuos, (no está bajo el imperio de la autonomía de la voluntad) ni por la aplicación del derecho extranjero. De lo anterior se sigue que las leyes de orden público no se refieren necesariamente al derecho público como opuesto al derecho privado. Existen leyes de orden público que regulan instituciones del derecho privado la cuales son instituciones sociales fundamentales como el parentesco y el matrimonio.*" (Cited in *Arbitraje*, González de Cossío, Ed Porrúa, 2018, 5th Ed., 2018, p. 1040.)

6 "Thesis" (*Tesis*) are summaries of the rule and rationale stemming from a judgment performed by the court itself. They distill the thought of Mexican courts. When a certain number of cases are found to exist with the same holding, they become binding precedents. Also when they hail from higher courts (such as appellate (Collegiate) courts or the Supreme Court). Their *ratio* is often cited as *criterio* (literally, "*criteria*").

7 Registry 162053. Apellate Courts for the First Circuit (Mexico City).

ASSESSING THE ANNULMENT OF AN AWARD".[8] The thrust of the *criterio* is found in the last sentence, which reads as follows:[9]

> the notion of public policy has as domestic and international backdrop, that arbitration may no frustrate, alter or obstacle in its mission. It requires precision as to its definition, scope and content since only by doing so can it be established under what cases and further to which conditions its application is apposite.

The thesis may be criticized and applauded at the same time. *Criticism* would be warranted in that the description is vague. It lacks precision. It is therefore a definition that does not define. More granularity was both needed and desired.

It may nonetheless be praised in that, albeit abstract, what is noteworthy of the cited sentence is that it premises the understanding of the concept not only in a national but an international understanding. It thereafter advances that said conception may not frustrate, alter or obstacle the goals of arbitration. A useful *dictum* given that often the vagueness of the legal concept lends itself to disruptive decisions —of the sort that hamper the purposes of arbitration. Hence, albeit vague, the *criterio* is teleologically commendable.

The same can be said of the observable experience for the first years of arbitration in Mexico. Albeit the descriptions in case law were nebulous, no mistaken or nefarious decisions existed. Therefore, even though they are abstract, the concepts were headed in the right direction. And as arbitration was fairly new (the statute embodying the modern Mexican law was adopted in December 1993), it stands to reason that both courts and practitioners were still grappling with its concepts. And public policy is unquestionably its most problematic.

Hence, a generalization that can be made of the first years of arbitration is that they displayed a good start.

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8 The Spanish original reads "**ORDEN PÚBLICO. PRINCIPIO PROARBITRAJE Y RECONOCIMIENTO DE LA AUTONOMÍA DE LA VOLUNTAD PARA PONDERAR LA NULIDAD DEL LAUDO ARBITRAL (INTERPRETACIÓN DEL ARTÍCULO V, PUNTO 2, INCISO B), DE LA CONVENCIÓN SOBRE EL RECONOCIMIENTO Y EJECUCIÓN DE SENTENCIAS ARBITRALES EXTRANJERAS)**".

9 Translation of: "*La noción de orden público tiene como marco de referencia, nacional e internacional, la institución de arbitraje a la que no puede frustrar, alterar u obstaculizar en su misión y exige una precisión en cuanto a su definición, alcance y contenido, porque sólo de esa manera puede establecerse en qué casos y bajo qué condiciones resulta pertinente su aplicación*".

C. A SENSITIVE CASE

In *Commisa v PEP*[10] a public contract was administratively rescinded. Said act was concurrently challenged both by arbitration and constitutional (*amparo*) proceedings leading to an appellate court decision annulling the award on two independent grounds:[11] public policy and arbitrability.[12] The analytical route followed assessed whether the fact that the applicable law included a *public* law regime qualified as "public policy" for annulment purposes. It concluded that it did:[13] the award was found to be null as contrary to public policy given that administrative contracts: (*i*) are governed by administrative statutes and Article 134 of the Federal Constitution; and (*ii*) involve sensitive governmental needs that may not be adjudicated by a private tribunal.

The matter was highly controversial and contentious. Nothing less than a great case that made (very) bad law.[14]

D. SEMINAL CASES

A trilogy of cases are seminal on the matter. They shall be summarized.

1. *Amparo en Revisión* 755/2011

In *Amparo en Revisión 755/2011* the First Chamber of the Mexican Supreme Court exercised *certiorari*[15] to take cognizance of a case hinging on the notion of "public policy". The Supreme Court elaborated a comprehensive definition of the concept. The outcome was noteworthy, both in method and outcome.

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10 ICC arbitration number 13613 between Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. y Pemex-Exploración y Producción ("*COMMISA v PEP*") leading to a December 2009 award ordering Pemex to pay COMMISA more than 300 million US dollars.

11 *Amparo en Revisión* 358/2010. Eleventh Collegiate Court for Civil Matters for the First Circuit (*Décimo Primer Tribunal Colegiado en Materia Civil del Primer Circuito*). Judgment of 25 August 2011.

12 The analysis in this section focuses on the public policy prong of the decision. The arbitrability premise is discussed in §II *infra*.

13 This rationale summarizes a judgment of almost 500 pages.

14 As I posited in *Mexico's fantastic three: a pro-arbitration trilogy*, Arbitration International, vol. 33, No. 1, 2017, p. 164-165.

15 Technically the Court 'attracted' the case. *Atracción* is a procedural device having an equivalent outcome as the US-*certiorary:* further to the same, the Supreme Court exercises its jurisdiction either to interpret a constitutional proviso or decide an important matter. It however differs in origin and function in that it constitutes the exercise of original jurisdiction vested upon the Mexican Supreme Court by the Constitution, and which was bestowed upon appellate courts for caseload expediency reasons.

As to method, the Justice (*Ministro*) who penned the decision[16] guided his thinking by arbitration literature. The journal of the *Club Español del Arbitraje*, Spain Arbitration Review, was quoted to anchor the notion that, as with other legal concepts, "public policy" is an undetermined legal concept (*concepto jurídico indeterminado*) with a hard core and furry edges. It explained the concept thus:[17]

> The legal institutions of the State, principles, norms and institutions which conform it and transcend the community given how offensive and serious the mistake made in the decision is. The mechanism further to which the State avoids that certain acts of private individuals affect fundamental interests of the society.

After characterizing "public policy" as an open texture with furry edges, the Court determined that public policy is a legal concept having a hard core which should be understood as follows:[18]

> The legal principles, norms and institutions forming part of the State, which transcend to the legal community given the offensive and serious nature of the mistake committed in the award. It is the mechanism by which the State ensures that certain acts of private individuals do not impinge upon fundamental interests of society[19]

The decision was outstanding. To begin with, albeit couched in different words, its essence, in this author's opinion, comes very close to the most internationally-accepted definition of the concept, such as *Parsons & Whittemore's* "the most fundamental notions of morality and justice".[20]

Three aspects of the Supreme Court's analytical endeavor deserve underscoring:

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16 A highly respected academic, judge and intellectual who has since left the bench upon expiry of his term, only to become a public intellectual, author and activist: Dr. José Ramón Cossío Díaz.

17 Paragraphs 69 and 70 of *Amparo en Revisión* 755/2011. Paragraph 81 reasons as follows: "… *un laudo arbitral es contrario al orden público y que, por ende, constituye una causa de nulidad, cuando la cuestión dilucidada se coloque más allá de los límites de dicho orden, es decir, más allá de las instituciones jurídicas del Estado, de los principios, normas e instituciones que lo conforman y que trasciende a la comunidad por lo ofensivo y grave del yerro cometido en la decisión. Un laudo de ese tipo estaría alterando el límite que marca el orden público, a saber, el mecanismo a través del cual el Estado impide que ciertos actos particulares afecten intereses fundamentales de la sociedad.*"

18 Judgment in *amparo* e*n revision* 755/2011, ¶¶ 69-70.

19 My translation of "*las instituciones jurídicas del Estado, principios, normas e instituciones que lo conforman que trascienden a la comunidad por lo ofensivo y grave del yerro cometido en la decisión. El mecanismo a través del cual el Estado impide que ciertos actos particulares afecten intereses fundamentales de la sociedad*". The context is the following *dicta*: *"….un laudo arbitral es contrario al orden público y que, por ende, constituye una causa de nulidad, cuando la cuestión dilucidada se coloque más allá de los límites de dicho orden, es decir, más allá de las instituciones jurídicas del Estado, de los principios, normas e instituciones que lo conforman y que trasciende a la comunidad por lo ofensivo y grave del yerro cometido en la decisión. Un laudo de ese tipo estaría alterando el límite que marca el orden público, a saber, el mecanismo a través del cual el Estado impide que ciertos actos particulares afecten intereses fundamentales de la sociedad.*" Judgment in *amparo en revisión* 755/2011, ¶81.

20 *Parsons & Whittemore Overseas Company, Inc. v. Societe Generale de l'Industrie du Papier* (RAKTA), Court of Appeals for the Second Circuit, United States of America (508 F.2d 969, 974 (2d Cir. 1974)).

1. It adopted the 'minimalist' approach of public policy. The Court's rationale is such that, put in the jargon of foreign and international the international law, particularly the debate on the minimalist/maximalist approach to public policy, Mexican courts have adopted the 'minimalist' view of public policy.

2. *Dicta* galore is provided which seeks to ensure that not just any mistake contained in the award deserves to be considered as "public policy". The mistake must be 'offensive' and 'serious'. And it must impact *fundamental* interests of society.

3. That these adjectives were used shed the view that the Court considered that not just anything deserved to qualify as *public policy* for award setting aside or enforcement purposes; it must be serious in extreme.

The definition advanced by the decision was premised on salient international arbitration literature.[21] Hence, the decision is praiseworthy both for substantive and methodological reasons: it nurtured itself from the most internationally-accepted paradigms. Its progeny has followed closely said notion as we shall see.

2. *Conproca*

One of Mexico's biggest and longest-standing cases involved the disputes stemming from the Cadereyta Project: the *Conproca* case.[22]

The appellate-court judgment stemming from the award-challenge procedures addressed arbitration topics galore.[23] And it did so in a praiseworthy manner. I shall confine my comments to public policy.

The *Conproca* Judgment adopted a plausible definition of 'public policy'; not only because of the (high) standard it used but also because of the method employed. It articulated the definition as follows:[24]

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21 The court cited an article contained in the *Spain Arbitration* journal of the Spanish Arbitration Club *(Club Español del Arbitraje)*. The said article addressed what should be understood as "public policy" further to internationally-accepted arbitration literature.

22 ICC case 11760/KGA, award of 23 December 2011.

23 Judgment of Fourth Civil Collegiate Court for Mexico City, Exp. D.C. 4/2014 ("*Conproca* Judgment").

24 My translation of "*la violación a los principios esenciales del Estado, que trasciende a la comunidad por lo ofensivo y grave del yerro cometido en la decisión. … el orden público se afecta cuando con motivo de la decisión se priva a la colectividad de un beneficio que le otorgan las leyes …*" (*Conproca* Judgment, pp. 65-66.) *Dicta* existed which was somewhat more nebulous. For instance, the appellate court also said: "An award will be contrary to public policy and therefore annullable when the decision exceeds the limits of the principles, norms and legal institutions composing the State in a manner that impacts the community given the offensive and serious mistake made in the decision. Such an award would alter the limits delineated by public policy, that is to say the mechanism by which the State impedes that certain acts of individuals affect fundamental interests of society." My translation of "*un laudo arbitral es contrario al orden público y … por ende constituye una causal de nulidad, cuando la cuestión dilucidada se coloque más allá de los límites del dicho orden, es decir, más allá de las instituciones*

> The breach of the essential principles of the State that impacts the community given the offensive and serious mistake made in the decision. Public policy is affected when the reason for the decision deprives the collectivity of a benefit granted by law.

As with the definition adopted in *amparo in revisión* 755/2011, this definition deserves applause in that, to be successful, a challenge to an award need be contrary to 'essential' principles of the State. Also praiseworthy was that it plugged adjectives qualifying the type of mistake that the award need incur so as to warrant public policy concerns: they must be 'offensive' and 'serious'. Said adjectives had the effect of *elevating* the standard and *narrowing* its scope. For instance, it said:

> Upon adopting a notion of public policy, it should be stressed that the violation must be *evident*. In other words, when said ground of annulment is invoked, the court must perform a *restrictive analysis* of the alleged violation and only if it is *patent* it may it order the annulment of the award.[25]
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> The breach of public policy *must be evident*. The substance of the case must not be addressed in a manner similar to an appeal, where the legality of the reasons advanced by the tribunal is assessed.[26]
>
> (my emphasis)

The following words were employed to characterize the type of violations that must exist in order to determine the existence of a breach of public policy: 'manifest',[27] 'patent',[28] 'notorious',[29] and 'truly serious'.[30] Following the steps of the Supreme Court in *amparo en revisión* 755/2011,[31] the appellate court reasoned that:[32]

> An award is contrary to public policy and therefore may be annulled when the issue addressed exceeds the limits imposed by the principles, norms and institutions of the

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jurídicas del Estado, de los principios, normas e instituciones que lo conforman y que trasciende a la comunidad por lo ofensivo y grave del yerro cometido en la decisión. Un laudo de este tipo estaría alterando el límite que marca el orden público, a saber, el mecanismo a través del cual el Estado impide que ciertos actos particulares afecten intereses fundamentales de la sociedad."

25 *Conproca* Judgment p. 66. My translation of "*Una vez sentado lo que … debe entenderse por orden público, conviene decir además que la violación … debe ser evidente, es decir, cuando se invoque dicha causal, el tribunal deberá llevar a cabo un análisis restrictivo de la supuesta violación y sólo ante una patente violación podrá ordenar la nulidad.*".

26 *Conproca* Judgment, p. 80. My translation of "… *la violación al orden público debe ser evidente, no pueden analizarse las cuestiones de fondo como si se tratara de una apelación en la que se revisa la legalidad de los razonamientos del tribunal*".

27 *Conproca* Judgment, p. 92.

28 Idem.

29 Id. p. 248.

30 Idem. In its words: "*verdaderamente grave*".

31 Cited in §I.D.1 , *supra.*

32 *Conproca* Judgment, , p. 298. My translation of "…*un laudo arbitral es contrario al orden público y por ende constituye causa de nulidad cuando la cuestión dilucidada se coloque más allá de los límites de dicho orden, es decir, más allá de las instituciones jurídicas del Estado, de los principios, normas e instituciones que lo conforman y que transciende a la comunidad por lo ofensivo y grave del yerro cometido en la decisión*".

> State and impacts the community given the offensive and serious mistake committed in the decision.

In doing so the appellate court stressed that the fact must be 'evident' to justify the finding that a breach of public policy exists.[33] In its words:[34]

> Albeit the text of the law does not say so, the breach of public policy must be *evident*, *patent, serious* and *notorious* for the arbitral award to be considered as against public policy. And to do so, private acts must affect *fundamental interests of society*.
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> (Emphasis added)

Premised in said high standard, the court concluded that:[35]

> The annulment of an award grounded on public policy must involve the *serious offense* impacting the domestic legal order of the country of issuance.
>
> An award will be contrary to public policy when the decision it adopts is so serious that it frontally collides with the respective legal order.[36]
>
> (Emphasis added)

The outcome was nothing less than outstanding.

The method followed by the appellate court is also noteworthy. It analyzed the text and *trabaux preparatoires* of the UNCITRAL Model Law on international commercial arbitration, its implementation guide, and digest of cases. Three international arbitration authors were cited (Dyalá Jimenez, Jan Paulsson and Francisco González de Cossío[37]). The fact that a Mexican appellate court nurtured its understanding of arbitration topics and premised its views on salient international literature is infrequent, plausible and noteworthy. But above all, is displays a pro-arbitration attitude.

As a final comment, something else was added to this decision, however: the notion that public policy is affected when 'the collectivity is deprived of a benefit granted

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33 *Conproca* Judgment, p. 343.

34 Idem. My translation of "*Aunque el [texto legal] no lo dice la violación al orden público debe ser evidente, patente, grave y notoria … para considerar que un laudo arbitral es contrario al orden público … tiene que actualizarse una violación más allá de las instituciones jurídicas del Estado, de los principios, normas e instituciones que lo conforman y que trascienda a la comunidad por lo ofensivo y grave de la equivocación en lo decidido, por lo que un laudo de ese tipo estaría alterando el límite que marca el orden público, esto es, el mecanismo a través del cual el Estado impide que ciertos actos particulares afecten intereses fundamentales de la sociedad*.".

35 *Conproca* Judgment, p. 347. My translation of "…*para que se actualice la nulidad de laudo por una violación al orden público, dicha trasgresión debe ser de tal manera grave y trascendente que constituya una verdadera ofensa al orden jurídico interno del país en que se resuelve* …".

36 *Conproca* Judgment, p. 348. My translation of "…*un laudo será contrario al orden público cuando la decisión adoptada, como unidad, sea de tal manera grave y trascendente que choque frontalmente con el orden jurídico respectivo.* …".

37 *Conproca* Judgment, pp. 295, 343 and y 345. The last author was cited on the topic of public policy (essay titled *Hacia una Definición Mexicana de orden público* in *El Arbitraje Comercial Internacional*, Guido S. Tawil y Eduardo Zuleta, (Eds.), Adeledo Perrot).

by law'. What exactly was meant by this was unclear. Definition eventually came from *AES Merida v CFE*, to which I now turn to.

3. *AES Mérida v CFE*

On August 2016 the Mexican Supreme Court issued a decision involving a challenge to an award flowing from an important energy case ("*AES Judgment*"). The case dealt with an award involving an electricity generation plant in the Yucatan Peninsula. It hailed from problems stemming from events that the contractor alleged constituted fortuitous events releasing it from liability *vis-à-vis* the Mexican Electricity utility (*Comisión Federal de Electricidad – "CFE"*[38]). The tribunal sided with the contractor. CFE challenged the award alleging public policy concerns.[39] The court of first instance rejected the setting aside request. Upon appeal, the Supreme Court exercised *certiorari*. The result was a judgment which made interesting contributions *inter alia* to the concept of public policy. To understand why, I shall briefly summarize what was argued, what was decided, and how it relates to the existing jurisprudential backdrop.

In the arbitration AES Mérida sued CFE asking that it recognize three force majeure events which it claimed impinged upon the generation of electricity in the Yucatan plant, further to an electricity purchase power agreement.[40] Upon receipt of the award, CFE sought to set it aside arguing that the award contained a restriction to the alternative dispatch which generated problems resulting in additional costs (unnecessary reserves) which jeopardized the functioning of the national electricity system. More importantly, it compromised the reliability of the electricity system in the Yucatan peninsula. In CFE's opinion, the award frustrated the public policy goals of the bid for the electricity plant which were to secure a generation plant with an alternative operation capacity of 484 MW when operating with gas, and 440 MW when operating with diesel. By failing to allow the achievement of said goal, the award diminished, CFE advanced, the reliability and security of the regional electric system of the Yucatan peninsula inasmuch as it resulted in a diminished operation in normal conditions. This impacted the collectivity, in CFE's view. It therefore actualized the public policy ground of annulment since it jeopardized the continuity, security and reliability of the electricity public service in the Yucatan peninsula.

The Supreme Court rejected the argument. In its view, accepting it would be an unwelcome invasion of the merits of the award, which is not legally possible. In so doing, it cited precedents (including *Amparo en revisión* 755/2011) which defined public policy as

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38 The CFE has been a constant and sophisticated user of arbitration. It habitually includes arbitration agreements in most all its dealings (and in all contracts having medium and higher importance). And it litigates them adroitly, making apposite use of arbitration law generally, and its remedies specifically. It is the poster child of adequate use of arbitration by public entities.

39 Namely, excess in mandate and jurisdictional questions.

40 A *"Contrato de compromiso de capacidad de generación de energía eléctrica y compraventa de energía eléctrica asociada y el contrato para el suministro de gas natural"*.

a "violation of the essential principles of the state which transcend to the community given the seriousness and offensiveness of the mistaken decision".[41] In discarding the argument the Court reasoned that:

i) Public policy may be substantive or procedural.

ii) For public policy to exist the violation must be "evident". Public policy may be determined to exist only in "truly serious and notorious circumstances".[42]

iii) That a statute says it is a "public policy" statute is not a sufficient premise to conclude that *public policy* for award setting aside and enforcement purposes is actualized. Most all Mexican laws use these words in one way or another. That the electricity law says so does not mean that disputes having to do with it involve 'public policy' for award annulment or enforcement purposes.

Premised on the above, the Court rejected that the "weakening of the reliability and security of the electric system" arose to a violation of public policy for award-setting aside purposes.

The Court explained that *public policy* properly understood pertains to the legal principles that protect the essence of legal institutions. These include serious breaches of fundamental principles of procedural justice. It found that these were not extant in the case at hand. This determination is particularly interesting given CFE's (intelligently-posited) argument that the "weakening of the reliability and security of the electric system" triggered a public policy violation. As framed, the argument *could* have mustered acceptance; it *could* be interpreted as within the contours of the existing jurisprudence. That it nonetheless was found to *not* meet the public policy threshold is as telling as it is salutary. It meant that the Court, when faced with an intelligently-advanced argument which could arguably be accepted as falling within the scope of the thus far impressionistic notions shed by existing case law —and which would inure to the benefit of a public utility *vis-á-vis* a foreign investor— nonetheless stuck to the apposite construction and application of arbitration law: a higher standard. The case stands as testimony of the Mexican judiciary comprehension of the subject, as it is of its respect for awards. In a phrase, its pro-arbitration stance.

An additional aspect of the decision worth underscoring is that it addressed the loose end of *Amparo en Revisión 755/2011*[43] in an adroit manner. The Court held that the fact that the reliability and security of an electricity system affected an entire region of the country does not actualize the "collectivity deprived of a benefit granted by law" limb of the public policy definition adopted by the Court in *amparo en revisión* 755/2011. This

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41 In its words "*violación a los principios esenciales del estado que trascienda a la comunidad por lo ofensivo y grave de la equivocación en lo decidido*".

42 "*Circunstancias verdaderamente graves y notorias*" were its exact words.

43 See §II D. 1 *in fine*.

puts to rest any concern that the amplitude of language used in *amparo in revision* 755/2011 could result in unjustifiably ample conceptions of public policy.

E. *BILAN*

French doctrine uses a concept I avow to be fond of: a '*bilan*'.[44] I offer a *bilan* on Mexican law on public policy as a ground to set aside or not enforce arbitration awards which considers not only the seminal cases described above, but lower level decisions worth echoing, to provide a thorough picture of the topic. The judiciary has distilled the following black-letter rules:

- Public policy involves collective, not individual, interests.[45]
- Public goods (*bienes públicos*) are not 'public policy'.[46]
- Public interest (*interés público*) is not 'public policy'.[47]
- Public law (*derecho público*) is not 'public policy'.[48]
- Public procurement (*contratación pública*) is not 'public policy'.
- Public document (*documento público*) is not 'public policy'.[49]
- Public funds (*recursos públicos*) do not actualize *public policy*.[50]
- *Caducidad* is not 'public policy'.[51]

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44 Literally 'balance'. French doctrine often uses the concept "*bilan*" so as to perform a summary of the status of the subject.

45 Judgment of 7 November 2011 in File 596/2011, 56th Judge for Civil Matters for Mexico City (*Juez Quincuagésimo Sexto de lo Civil del Distrito Federal*). Amparo en Revisión 195/2010, Third Collegiate Court for Civil Matters, First Circuit (*Tercer Tribunal Colegiado en Materia Civil*).

46 Judgment of 28 March 2006 in Award setting aside in case 213/2005-V, 12th Court for Civil Matters for the First Circuit (*Juzgado duodécimo de Distrito en materia Civil en el Distrito Federal*).

47 Third Chamber of the Supreme Court, judgment of 27 November 1989, *Contradicción de tesis* 2/89 (between the second and Third Collegiate Courts for Civil matters of the First Circuit) (*Segundo y Tercer Tribunales Colegiados en Materia Civil del Primer Circuito*).

48 Amparo en Revisión 195/2010. Amparo en Revisión 358/2010. Exp. 596/2011. 46th Court for Civil Matters for the First District (*Juez Cuadragésimo Sexto de lo Civil del Distrito Federal).* Third Collegiate Court on Civil Matters for the First Circuit (*Tercer Tribunal Colegiado en Materia Civil del Primer Circuito*).

49 In an (unreported) sports case an arbitral tribunal rejected evidence involving a notarial affidavit (*fe de hechos)* finding that it was untruthful, even apocryphal. In the annulment discussion, it was found that said finding by an arbitral tribunal did not actualize 'public policy' for award setting aside proceedings further to Mexican law.

50 *Conproca* Judgment, p. 197.

51 Amparo en revisión 527/2011.

All of these conclusions are both praiseworthy and a step in the right direction.

II. ARBITRABILITY

Arbitrability, properly understood, refers to the possibility that a dispute involving a certain subject-matter may be solved through arbitration. It necessarily implies that certain subjects may *not* be solved by arbitration.

In this section I canvass the Mexican experience with arbitrability. To do so, I shall begin with the applicable legal provisions (§A), so as to then address what courts have had to say on the matter (§B) and offer a comment (§C).

A. LEGAL TEXT AND DOCTRINE EXTANT

Mexican arbitration law addresses the matter both as a ground to set aside an award and a reason to refuse enforcement of the award, thus:

Setting aside:[52]

> if the court finds that the subject-matter of the dispute is *not capable of settlement by arbitration* under Mexican law

Non-enforcement:[53]

> if the court finds that, under Mexican law, the subject-matter of the dispute is *not capable of settlement by arbitration*

Establishing when a matter may be solved by arbitration is often less than clear. A frequently-cited litmus test is that the matter (1) is not expressly excluded by law, (2) not involve rights which may not be freely disposed of, (3) does not affect a public interest, or (4) does not involve third parties.[54]

As to (1), provisions impacting arbitrability are sprinkled all over the legal Mexican system. For instance, Article 615 of the Code of Civil Procedure for Mexico City provides that the following topics are not arbitrable: the right to alimony, divorce (except with regards to the separation of assets and monetary differences), matrimony annulment

52 Commerce Code Article 1457.II which provides: "*El juez compruebe que según la legislación mexicana, el objeto de la controversia no es susceptible de arbitraje*".

53 Commerce Code Article 1462.II which reads: "*El juez compruebe que, según la legislación mexicana, el objeto de la controversia no es susceptible de arbitraje*".

54 González de Cossío, *Arbitraje*, Porrúa, 5th edition, 2018, p. 354. Graham Luis Enrique, *La Remisión Judicial de un Litigio al Arbitraj*e, p. 1611.

actions, the patrimonial regime of a marriage, and disputes involving the civil state of persons.

Article 568 of the Federal Code of Civil Procedure provides that the following subject-matters are within the exclusive jurisdiction of Mexican courts: matters involving land and water rights located in national territory, resources found in the maritime Economic Exclusive Zone, acts of authority, acts involving the internal regime of the State and instrumentalities both of the Federal Government and States, as well as the internal regime of Mexican embassies and consulates in foreign territory.

A treaty exists between Mexico and Spain involving the Recognition and Enforcement of Judgments and Arbitral Awards[55] which includes a list of non-arbitrable matters. The said list is question-begging. It is in fact quite bad. Whilst some matters are mainstream,[56] others are outright mistakes.[57] The list is so odd, and (fortunately) ignored in practice, that I have proposed denouncing the Treaty lest it cause mischief.[58]

To understand how courts have understood and applied the concept as reflected in the cited regime, looking at what courts have said on the matter is of use.

B. CASE LAW

Case law on the matter has been scarce. Jurisprudence exists establishing general guidance (§1) as well as case law on the arbitrability of public contracts (§2), from which rules of thumb may be distilled (§3).

1. General case law

Mexican jurisprudence has issued thesis embodying legal criteria (*criterios*) shedding light as to how arbitrability matters will be conceived. The most salient will be cited and commented.

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55 *Convenio entre los Estados Unidos Mexicanos y el Reino de España sobre el Reconocimiento y Ejecución de Sentencias Judiciales y Laudos Arbitrales en Materia Civil y Mercantil* of 3 May de 1992.

56 Matters involving tax, customs, civil state and capacity of persons, divorce, marriage annulment, bankruptcies, labor matter, social security, nuclear damages.

57 For instance, administrative matters (even though plenty of administrative laws expressly provide for arbitration), patrimonial regime of marriages (which Article 615 of the Code of Civil Procedure for Mexico City adroitly and expressly authorizes it), wills (even though the matter may in fact be arbitrated), liquidation of companies (albeit some disagree), liability for tort (a matter of accepted arbitrability), and maritime and air disputes (topics often arbitrated).

58 González de Cossío, *Arbitraje*, Porrúa, 5th edition, 2018, p. 414.

(1) Thesis "MATTERS FOR ARBITRATION. INTRINSIC AND EXTRINSIC LIMITS TO CONTRACTUAL FREEDOM" provides as follows: [59]

> Freedom of contract and its relation to matters of free disposition which may be subject to arbitration confined within certain intrinsic and extrinsic limits.
>
> The extrinsic limits come from the outside the will of the individual and are usually embodied in a legal rule, such as those relating to morality, good customs and public order. The latter include mandatory rules and prohibitions.
>
> the subject matter of the dispute is not subject to arbitration when the law stipulates it or when it concerns matters regulated by mandatory rules or prohibitions, because it constitutes a limitation to contractual freedom.
>
> … the award as an expression of the power of disposition of the parties … the expression of the intangibility of private rights. It is subject to the respect of the public order of the Mexican State, as provided in Article 1457, section II, of the Commercial Code.

The decision is plausible in that it explains that arbitration is a by-product of contractual liberty. And contractual freedom is limited by what said Thesis called 'intrinsic' and 'extrinsic' limitations. The latter include limitations on contractual freedom further to the applicable law, namely, limitations found in mandatory provisions.

(2) A similar view is echoed in the following thesis: "SUBJECT MATTER OF ARBITRATION. FIXED BY CONTRACTUAL FREEDOM WHEN NOT CONTRARY TO THE LAW" where the Court said that:[60]

> Individuals are recognized as being free to contract. …
>
> … the nature of the arbitration clause or independent agreement.

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[59] "**MATERIA DE ARBITRAJE. LÍMITES INTRÍNSECOS Y EXTRÍNSECOS A LA AUTONOMÍA PRIVADA PARA ESTABLECERLA**". Registro 162087. (The pertinent parts reads as follows: "*La autonomía privada de los particulares y su relación con las materias de libre disposición susceptibles de arbitraje se encuentra supeditada a ciertos límites intrínsecos y extrínsecos. …Los límites extrínsecos provienen del exterior, actúan fuera de la voluntad del individuo y se plasman, por regla general, en una norma jurídica, como las que se refieren a la moralidad, como las buenas costumbres y el orden público, por ejemplo, y las atinentes a la legalidad, como son las normas imperativas y prohibitivas. … el objeto de la controversia no es susceptible de arbitraje cuando así lo dispone la ley o se trata de cuestiones reguladas por normas imperativas o prohibitivas, porque constituye un límite al ejercicio de la autonomía privada. … el laudo como expresión de la potestad de disposición de las partes … es la expresión de la intangibilidad de los derechos privados pero sujeta al respeto del orden público del Estado Mexicano, como lo previene el artículo 1457, fracción II, del Código de Comercio.*" (Complete text annexed to this essay.)

[60] "**MATERIA DE ARBITRAJE. ES FIJADA POR LIBRE VOLUNTAD DE LAS PARTES CUANDO NO ES CONTRARIA A LA LEY**". Registro 162088. The cited relevant portions of the Thesis read as follows "*Se les reconoce a los particulares la libertad de contratar … la naturaleza de la cláusula arbitral o convenio independiente … el bien jurídico que se tutela atañe a que el arbitraje sólo puede versar sobre materias disponibles con arreglo a derecho y que en el caso de que se trate tengan, por regla general, una connotación mercantil derivada del ordenamiento en que se regula la cuestión del arbitraje … licitud del objeto del convenio arbitral; que los árbitros tengan competencia objetiva y que no excedan esos límites así como que el laudo verse sobre una materia arbitrable.*" (Complete text annexed to this essay.)

> … the protected legal interest concerns the fact that arbitration may only deal with matters which, as a general rule, have a commercial connotation deriving from the law governing the subject matter of the arbitration.
>
> … the lawfulness of the subject matter of the arbitration agreement; … the arbitrators jurisdiction does not exceed these limits and that the award deals with a subject matter that is arbitrable.

This precedent echoes the principle that freedom of contract is the lodestar of arbitrability. It exemplifies the assertion by citing commercial law matters.

(3) The same rationale is voiced in the following thesis "PUBLIC POLICY AS A LIMIT ON FREEDOM OF CONTRACT AND THE SETTING ASIDE GROUND". Albeit its heading (*rubro*) refers to "public policy", the reasoning relates to arbitrability. It said:[61]

> only matters that are freely disposable by the parties may be submitted to arbitration.
>
> legitimacy to dispose of the right subject to arbitration, as an expression of their general capacity to undertake legal transactions.
>
> right of disposition ... the matter of free disposition subject to arbitration must be understood as that regulated by the legal system that can be substituted by the power of party autonomy because it does not have an absolute imperative character but authorizes individuals to exercise their freedom to do or omit what is not prohibited or commanded.
>
> the power to create individualized rules which discipline private actions is recognized as well as arbitration as the ideal procedure or alternative mechanism resolve disputes that may arise, provided it is lawful and recognized by the law as worthy of protection.

In said Thesis, the concept free disposition (*cuestiones de libre disposición*) was hailed as the lodestar of what are the matters may be subject to arbitration.

(4) A recent (unreported[62]) 370+ page judgment issued an explanation on arbitrability which is worthy of citation *ad extenso*:

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61 "**ORDEN PÚBLICO COMO LÍMITE A LA AUTONOMÍA DE LA VOLUNTAD Y CAUSA DE NULIDAD DEL LAUDO ARBITRAL**". Registro 162055. Relevant translated text reads in Spanish as follows: "*sólo pueden ser sometidas al arbitraje las cuestiones que sean de libre disposición para las partes … legitimación para disponer del derecho sujeto al arbitraje, como una expresión de su capacidad general para emprender negocios jurídicos. … poder de disposición … la materia de libre disposición susceptible de arbitraje debe ser entendida como aquella regulada por el ordenamiento jurídico que puede ser sustituida por el poder de la autonomía de la voluntad de las partes porque no tiene un carácter imperativo absoluto sino que se autoriza a los particulares a ejercer su libertad para hacer u omitir lo que no está prohibido ni mandado. … Se reconoce a favor de los particulares el poder creador de las normas individualizadas que deben disciplinar su actuación y al arbitraje como procedimiento idóneo o mecanismo alternativo por el que pueden solucionar las posibles controversias que surjan, siempre y cuando sea lícito y reconocido por el ordenamiento como digno de protección.*" (Complete text annexed to this essay.)

62 Judgment in (accumulated) cases 242/2015-II, 302/2017-II and 317/2017-II of 4 October 2022, issued by the Twelfth District Court Judge for Civil Matters for Mexico City, declared *res indicata* on 18 May 2023. Its description of arbitration in Spanish is the following *"… cuando la materia resuelta en el laudo correspondiente, no es susceptible de arbitraje, lo que en realidad se cuestiona es la licitud del objeto del convenio arbitral, porque la materia*

... when the matter resolved in the corresponding award is not subject to arbitration, the lawfulness of the arbitration agreement is in question. The subject matter of the arbitration has already been decided in a final and definitive decision or its subject matter is inseparably linked to others over which the parties have no power of disposition revealing that the arbitrator lacks objective jurisdiction.

Therefore, the matter of free disposition susceptible of arbitration must be understood as that which the legal system allows freedom of contract to regulate matters not prohibited not mandated.

That is to say, the power to create individualized norms that discipline their actions is recognized in favor of individuals, and arbitration is recognized as the ideal procedure or alternative mechanism by which they can resolve any disputes that may arise, provided that the subject matter is lawful and recognized by the law as worthy of protection.

The protected legal interest ... arbitration may only deal with matters within the freedom to contract. Its relationship with matters of free disposition which may be resolved through arbitration is subject to intrinsic and extrinsic limits. The intrinsic limits refer to the recognition that private autonomy in the measure of the interest that is intended to be exercised or realized through the rules that individuals set to obtain a specific objective; it is the limitation of conduct to make it compatible with others.

Extrinsic limits, on the other hand, come from the outside, the will of the individual and are generally embodied in a legal rule.

Thus, the extrinsic limits refer to morality, such as good morals and public order, for example, and to legality, i.e., imperative and prohibitive norms. The subject matter of the dispute is therefore not subject to arbitration when the law so provides or when it concerns matters regulated by mandatory or prohibitive rules, because it constitutes a

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de ese arbitraje, por vía ejemplificativa, ya haya sido decidida en resolución definitiva y firme o se encuentre su materia inseparablemente unida a otras sobre las que las partes no tienen poder de disposición y revela que existe una falta de competencia objetiva del árbitro. … Entonces, la materia de libre disposición susceptible de arbitraje, debe ser entendida como aquella regulada por el ordenamiento jurídico que pueden ser sustituida por el poder de la autonomía de la voluntad de las partes porque no tienen un carácter imperativo absoluto, sino que se autoriza a los particulares a ejercer su libertad para hacer u omitir lo que no está prohibido ni mandado. … Es decir, se reconoce a favor de los particulares el poder creador de las normas individualizadas que deben disciplinar su actuación, y al arbitraje como procedimiento idóneo o mecanismo alternativo por el que pueden solucionar las posibles controversias que surjan, siempre y cuando sea lícito y reconocido por el ordenamiento como digno de protección. … El bien jurídico que se tutela … el arbitraje sólo puede versar sobre materias disponibles la autonomía privada de los particulares y su relación con las materias de libre disposición susceptibles de arbitraje se encuentra supeditada a ciertos límites intrínsecos y extrínsecos. Los límites intrínsecos se refieren al reconocimiento de que la autonomía privada en la medida del interés que pretende ejercerse o realizarse a través de las normas que los particulares fijan para obtener un objetivo concreto; es la limitación de la conducta para hacerla compatible con las demás. … En tanto que los límites extrínsecos provienen del exterior, actúan fuera de la voluntad del individuo y se plasman, por regla general, en una norma jurídica. … Así, encontramos aquellos que se refieren a la moralidad, como las buenas costumbres y el orden público, por ejemplo, y las atinentes a la legalidad, como son las normas imperativas y prohibitivas. De esa manera, el objeto de la controversia no es susceptible de arbitraje cuando así lo dispone la ley o se trata de cuestiones reguladas por normas imperativas o prohibitivas, porque constituye un límite al ejercicio de la autonomía privada. Entonces, no debe desconocerse que el laudo como expresión de la potestad de disposición de las partes sobre un derecho y la forma en que cualquier controversia relacionada con el mismo se resuelve por voluntad de aquellas, es la expresión de la intangibilidad de los derechos privados pero sujeta al respeto del orden público del Estado Mexicano, como lo previene el artículo 1457, fracción II, del Código de Comercio.".

> limit to the exercise of private autonomy. Consequently, it should not be ignored that the award as an expression of the power of disposition of the parties over a right and the way in which any controversy related to the same is resolved by the will of the parties, is the expression of the intangibility of private rights but subject to the respect of the public order of the Mexican State, as provided in Article 1457, section II, of the Code of Commerce.

2. Arbitrability of public contracts

The amplest judicial discussion on arbitrability flowed from public contracts. In *Commisa*, an appellate court held that the award was null as it involved non-arbitrable topics. Three premises supported said conclusion:[63]

(1) *Acts of authority*: although the arbitration agreement was broad, the appellate court determined that it could not include disputes involving administrative rescissions given that these were considered acts of authority.[64]

(2) *Exclusive jurisdiction* was found to exist on administrative tribunals to take cognizance of challenges to acts of authority (including administrative rescissions).

(3) *Res iudicata* (*Cosa juzgada refleja)*: inasmuch as a decision by a competent court existed which had upheld the rescission, the court reasoned that said determination was 'reflective *res iudicata*' ('*cosa juzgada refleja*') *vis-à-vis* the arbitral tribunal. To the extent the arbitral tribunal made determinations involving the rescission which act had already been adjudicated by a Mexican *amparo* court, the appellate court concluded that the arbitral tribunal exceeded its mandate when it took cognizance of the issue, as the matter had become non-arbitrable.

The said conclusions are worthy of criticism, both in premise and in conclusion. I shall succinctly address each.

(a) *Acts of authority*: The characterization of a contractual rescission as an act of authority is eyebrow-raising. A contractual termination is an often-seen *private* act which can scarcely be found to have a public component in its legal-DNA. That the appellate court so found is questionable —but admittedly not without support. It is *questionable* as Mexican law includes in its corpus the *iure gestionis v iure imperii* distinction of governmental action. Case law however does exist qualifying certain administrative law cases as *acta iure imperi*. And the decision cited

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63 *Amparo en Revisión* 358/2010. Judgment by the Eleventh Collegiate Tribunal for Civil Matters for the First Circuit (*Décimo Primer Tribunal Colegiado en Materia Civil del Primer Circuito)* of 25 August 2011.

64 The conclusion was anchored in a 1995 binding precedent of the Supreme Court. Some have read the decision to find that an *ex post facto* application of a public procurement statute existed. Said reading is mistaken.

a 1995 Supreme Court ruling supporting said rationale.[65] Hence, the criticism could (should) not only be directed at the decision but at the status of the matter under Mexican administrative law.

(b) *Exclusive jurisdiction*: At the time when the contract was entered into, no provision existed which established that the matter is not subject to arbitration or that exclusive jurisdiction existed. The law changed in May 2009 to provide that administrative rescissions and early terminations are not arbitrable. Hence, the finding of exclusive jurisdiction is questionable both substantively and temporally. Substantively, given that the finding that the subject-matter was entrusted exclusively on courts lacked source of authority. Temporally, the source of authority which eventually came to exist, came after. (And the theory is in itself questionable: a wrinkle in Mexican law in need of ironing-out.)

(c) *Res indicata*: The notion that once an *in casu* subject has been decided by one court should bind one arbitral tribunal seems questionable. It runs afoul of the simple notion that, should jurisdiction exist, the tribunal vested with it can and should decide all aspects of said case. The record or mission of one should not be amputated because of overlap with another. The fact that other tribunals or courts exist with overlapping jurisdiction should not diminish jurisdiction. It only means that *both* will be vested with jurisdiction in performing *their* respective task. Should an issue (factual or legal) be comprehended by both, this means that *each* organ will need to come up with *their* respective view as to the matter, which admittedly may or may not coincide. Should different outcomes hail from two or more tribunals or courts, it will be the result of the simple fact that *parties have so contracted*. Taking the view that consistency dictates attaching more weight to one opinion simply because it came to be at an earlier time is not the best view of the matter: *ex hypothesi*, if two organs exist with jurisdiction to take cognizance of the matter, it means that something is occurring that lends itself to lack of consistency. And this is not as serious as some posit. It is a fact of life that different laws and tribunals exist further to different regimes. Admittedly, this could trigger overlap. But the outcome however need not be one taking precedence over another. Rather, if parties (purposefully or inadvertently) choose to have plurality, they are entitled (or should be held) to what they bargained for, including the possibility of different results. And calls to arms because of the existence of different results are both exaggerated and insufficient to justify some sort of correction: plurality

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[65] Said binding precedent provided as follows: "**CONTRATO DE OBRA PÚBLICA. LA COMPETENCIA PARA CONOCER DEL CONFLICTO SUSCITADO POR SU RESCISIÓN, PROVENIENTE DE UN ACTO ADMINISTRATIVO DE AUTORIDAD, CORRESPONDE A UN JUZGADO DE DISTRITO EN MATERIA ADMINISTRATIVA"** (Octava Época, junio 1995, tomo 78, p. 18) cited in the judgment in *amparo en revisión* 358/2010 (decision of 25 de agosto 2011, p. 349).

exists for the simple reason that we live in a plural and complex world. And parties often bring about such outcomes in their contracting.

The matter has never come up again. And the theory is contradicted by practice galore: not only do public contracts, works and infrastructure projects habitually envisage arbitration as the method of resolution of disputes, but Mexican arbitration practice often sees disputes stemming from public contracts as being subject to arbitration. The theories evinced in *Commisa* have never been echoed again. *Commisa* is therefore best understood as more of an *anomaly* than reflective of a trend or the current status of the law.

3. *Bilan*

The black-letter rules to be distilled from the above cited case law are the following:

(1) **Rule:** Arbitration is understood to be the product of contractual freedom. Parties are vested with the right to choose which problems they wish to channel through arbitration as a result of their liberty to contract. Matters of "free disposition" are therefore the core realm within which arbitration may be used.

(2) **Exception:** Arbitration is limited by 'extrinsic' limits. That is to say, limitations provided by the legal system in norms of mandatory application.

(3) **Public contracts**: Agreements with public entities are a specialized field with specialized rules, which may not be generalized. A case by case analysis is required.

III. CONCLUSION

The Mexican experience with the concepts of public policy and arbitrability has been interesting. Sensitive cases involving these topics triggered the risk that the outcome would be affected by idiosyncratic views or stances convenient to powerful parties (particularly public entities), instead of good law stemming from cool-headed intelligent reflection. In contrast, what one observes is good law. Decisions displaying arbitration acumen, independence of the Judiciary and a favorable disposition *vis-à-vis* arbitration.

In contrast to other jurisdictions where **public policy** has been the *enfant terrible* engendering much mischief, in Mexico, albeit sensitive cases have existed with implications of such magnitude that the fear of bad law was a real and present danger, the aggregate outcome has been good law. Put under the lens of the most accepted international arbitration theory, Mexican law, and practice is consistent with internationally-accepted arbitration law concepts. The current blackletter definition of public policy is, in its content, if not in its words, coincidental with what this author considers to be the definition of the concept: that of *Parsons & Whittemore*: the "most basic notions of morality and justice".[66] The difficult scenarios that have been addressed are also in line with international experience. In and of itself, this is noteworthy, as given their difficulty, they could have easily provoked a mistake —after all, as the commonly cited proverb warns, *great cases make bad law*.

Something similar, but with a caveat, can be said about **arbitrability**. The law extant is by and large adroit. Mexican law on arbitrability follows the internationally accepted canons of what may or may not be subject to arbitration. The exception is the administrative law concepts of administrative rescissions and early terminations in public procurement contracts —by-products of the French *droit administratif* tradition which Mexico (and a good part of Latin America) follows. This is a wrinkle in need to ironing out. It however is not the rule of the matter, but rather more aptly understood as an exception.

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[66] *Parsons & Whittemore Overseas Company, Inc. v. Societe Generale de l'Industrie du Papier* (RAKTA), Court of Appeals for the Second Circuit, United States of America (508 F.2d 969, 974 (2d Cir. 1974)).

ANNEX:

FULL TEXT OF CITED THESIS

PUBLIC POLICY

ORDEN PÚBLICO. PRINCIPIO PROARBITRAJE Y RECONOCIMIENTO DE LA AUTONOMÍA DE LA VOLUNTAD PARA PONDERAR LA NULIDAD DEL LAUDO ARBITRAL (INTERPRETACIÓN DEL ARTÍCULO V, PUNTO 2, INCISO B), DE LA CONVENCIÓN SOBRE EL RECONOCIMIENTO Y EJECUCIÓN DE SENTENCIAS ARBITRALES EXTRANJERAS). La noción de orden público de que trata la institución de nulidad de laudo arbitral está determinada en el contexto de la reforma al Código de Comercio que reguló aquélla. Con arreglo a lo previsto en el artículo V, punto 2, inciso b), de la Convención sobre el Reconocimiento y Ejecución de Sentencias Arbitrales Extranjeras, celebrada en Nueva York, de mil novecientos cincuenta y ocho, publicada en el Diario Oficial de la Federación, el veintidós de junio de mil novecientos setenta y uno, se puede denegar el reconocimiento y la ejecución de una sentencia arbitral si la autoridad competente del país en que se pide el reconocimiento y la ejecución, comprueba que el reconocimiento o la ejecución de la sentencia serían contrarios al orden público de ese país, en razón de las leyes y convenios y tratados celebrados por el Estado Mexicano. La noción de orden público tiene como marco de referencia, nacional e internacional, la institución de arbitraje a la que no puede frustrar, alterar u obstaculizar en su misión y exige una precisión en cuanto a su definición, alcance y contenido, porque sólo de esa manera puede establecerse en qué casos y bajo qué condiciones resulta pertinente su aplicación. [67]

[PUBLIC POLICY. PRO-ARBITRATION PRINCIPLE AND RECOGNITION OF THE INDIVIDUAL'S AUTONOMY TO CONSIDER THE NULLITY OF THE ARBITRAL AWARD (INTERPRETATION OF ARTICLE V, POINT 2, PARAGRAPH B), OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS). The notion of public policy that deals with the institution of nullity of the arbitral award is determined in the context of the reform of the Commercial Code that regulated it. Pursuant to the provisions of Article V, point 2, paragraph b), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, celebrated in New York, nineteen hundred and fifty-eight, published in the Official Gazette of the Federation, on June twenty-second, nineteen hundred and seventy-one, the recognition and enforcement of an arbitral award may be denied if the competent authority of the country where the recognition and enforcement is requested, proves that the recognition or enforcement of the award would be contrary to the public order of such country, by reason of the laws and conventions and treaties entered into by the Mexican State. The notion of public policy has as its frame of reference, national and international, the institution of arbitration which cannot be frustrated, altered or hindered in its mission and requires precision as to its definition, scope and content, because only in this way can it be established in which cases and under what conditions its application is pertinent.]

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[67] Registro 162053, Tesis: I.30.C.953 C. Tercer Tribunal Colegiado en Materia Civil del Primer Circuito, Novena Época. Semanario Judicial de la Federación y su Gaceta, tomo XXXIII, mayo 2011, p. 1241.

ARBITRABILITY

MATERIA DE ARBITRAJE. LÍMITES INTRÍNSECOS Y EXTRÍNSECOS A LA AUTONOMÍA PRIVADA PARA ESTABLECERLA. La autonomía privada de los particulares y su relación con las materias de libre disposición susceptibles de arbitraje se encuentra supeditada a ciertos límites intrínsecos y extrínsecos. Los intrínsecos se refieren al reconocimiento de que la autonomía privada en la medida del interés que pretende ejercerse o realizarse a través de las normas que los particulares fijan para obtener un objetivo concreto se limita para hacerla compatible con las demás. Los límites extrínsecos provienen del exterior, actúan fuera de la voluntad del individuo y se plasman, por regla general, en una norma jurídica, como las que se refieren a la moralidad, como las buenas costumbres y el orden público, por ejemplo, y las atinentes a la legalidad, como son las normas imperativas y prohibitivas. Además, debe destacarse que el legislador de modo ordinario establece las normas con arreglo a las cuales los individuos crean y disciplinan las relaciones y situaciones jurídicas que les interesan, a fin de garantizar certeza jurídica y paz social. Estas normas pueden tener el carácter de derogables o supletorias o bien, son inderogables. Las normas derogables o supletorias sirven y auxilian a los particulares para que un determinado negocio sea efectivo y estén conscientes de que una vez realizados los supuestos que las mismas prevén sus consecuencias se apliquen, como lo prevé el mismo ordenamiento. Las normas inderogables se refieren a aquellas que tienen la naturaleza de imperativas y las prohibitivas, que se establecen por el legislador para tutelar intereses públicos y son un límite a la autonomía privada y, cuando se inobservan, con arreglo a lo dispuesto por el artículo 8o. del Código Civil Federal, de aplicación supletoria al Código de Comercio, son nulas, salvo cuando la ley ordene lo contrario. De esa manera el objeto de la controversia no es susceptible de arbitraje cuando así lo dispone la ley o se trata de cuestiones reguladas por normas imperativas o prohibitivas, porque constituye un límite al ejercicio de la autonomía privada. Entonces, no debe desconocerse que el laudo como expresión de la potestad de disposición de las partes sobre un derecho y la forma en que cualquier controversia relacionada con el mismo se resuelve por voluntad de aquéllas, es la expresión de la intangibilidad de los derechos privados pero sujeta al respeto del orden público del Estado Mexicano, como lo previene el artículo 1457, fracción II, del Código de Comercio."[68]

[**ARBITRATION. INTRINSIC AND EXTRINSIC LIMITS FOR THE ESTABLISHMENT OF PRIVATE AUTONOMY.** The private autonomy of individuals and their relationship with matters of free disposition susceptible to arbitration is subject to certain intrinsic and extrinsic limits. The intrinsic limits refer to the recognition that private autonomy, to the extent of the interest to be exercised or realized through the rules that individuals set to obtain a specific objective, is limited in order to make it compatible with the others. The extrinsic limits come from outside, they act outside the will of the individual and are embodied, as a general rule, in a legal rule, such as those referring to morality, such as good customs and public order, for example, and those relating to legality, such as the imperative and prohibitive rules. In addition, it should be noted that the legislator ordinarily establishes the rules according to which individuals create and discipline the legal relationships and situations that interest them, in order to ensure legal certainty and social peace. These rules may have the character of derogable or supplementary, or they may be non-derogable. The repealable or supplementary rules serve and assist the individuals so that a certain business is effective and they are aware that once the assumptions that they foresee are made, their consequences will be applied, as provided by the same ordinance. The non-derogable rules refer to those that are imperative in nature and the prohibitive ones, which are established by the legislator to protect public interests and are a limit to private autonomy and, when they are not observed, in accordance with the provisions of article 8 of the Federal Civil Code, of supplementary application to the Code of Commerce, they are null and void, except when the law orders otherwise. Thus, the subject matter of the controversy is not subject to arbitration when so provided by law or

[68] Registro 162087. Tesis sustentada por el Tercer Tribunal Colegiado en Materia Civil del Primer Circuito, Semanario Judicial de la Federación y su Gaceta, Novena Época, p. 1217, Tomo XXXIII, Mayo de 2011.

when it concerns matters regulated by mandatory or prohibitive rules, because it constitutes a limit to the exercise of private autonomy. Therefore, it should not be ignored that the award as an expression of the power of disposition of the parties over a right and the way in which any controversy related thereto is resolved by the will of the parties, is the expression of the intangibility of private rights but subject to the respect of the public order of the Mexican State, as provided in Article 1457, section II, of the Code of Commerce."]

MATERIA DE ARBITRAJE. ES FIJADA POR LIBRE VOLUNTAD DE LAS PARTES CUANDO NO ES CONTRARIA A LA LEY. Se les reconoce a los particulares la libertad de contratar como facultad que tienen para decidir si se vinculan o no con otras personas en una relación jurídica y la libertad contractual, con arreglo a la cual pueden trazar el alcance y contenido del negocio jurídico que se crea, de modo que se regula no sólo el nacimiento de la relación jurídica sino los efectos de la misma. El artículo 1416, fracción II, del Código de Comercio es el que establece de modo expreso qué materias son susceptibles de arbitraje y a la vez reconoce el derecho subjetivo de los particulares de actualizar o dar existencia al supuesto de hecho que refiere esa norma, porque sólo la autonomía de la voluntad puede dar lugar a la cláusula arbitral o al convenio, pero que puede ser configurada libremente en sus efectos por aquéllos limitada únicamente por el propio ordenamiento jurídico. Esto último también tiene una consecuencia jurídica práctica fundamental porque atendiendo a la naturaleza de la cláusula arbitral o convenio independiente, ésta conserva su eficacia aunque uno de los sujetos que intervino en ella ya no la quiera o acepte, pues una vez que ha nacido adquiere una existencia propia y separada de los sujetos y de su voluntad conforme a lo cual sus efectos no son atribuidos a los sujetos mismos sino a la voluntad que aquéllos plasmaron en esa cláusula arbitral o convenio independiente. Es decir, el bien jurídico que se tutela atañe a que el arbitraje sólo puede versar sobre materias disponibles con arreglo a derecho y que en el caso de que se trate tengan, por regla general, una connotación mercantil derivada del ordenamiento en que se regula la cuestión del arbitraje, según se advierte de la norma citada y los convenios que el Estado Mexicano ha suscrito sobre ese tema, pero colmando siempre la licitud del objeto del convenio arbitral; que los árbitros tengan competencia objetiva y que no excedan esos límites así como que el laudo verse sobre una materia arbitrable. [69]

[ARBITRATION. IS FIXED BY THE WILL OF THE PARTIES WHEN IT IS NOT CONTRARY TO THE LAW. Individuals are recognized the freedom to contract as the power they have to decide whether or not to enter into a legal relationship with other persons and the freedom of contract, under which they can determine the scope and content of the legal business that is created, so that not only the birth of the legal relationship is regulated, but also its effects. Article 1416, section II, of the Code of Commerce expressly establishes which matters are subject to arbitration and at the same time recognizes the subjective right of individuals to actualize or give existence to the factual assumption referred to in that provision, because only the autonomy of the will can give rise to the arbitration clause or the agreement, but it can be freely configured in its effects by the former, limited only by the legal system itself. The latter also has a fundamental practical legal consequence because, in view of the nature of the independent arbitration clause or agreement, it retains its effectiveness even if one of the parties that intervened in it no longer wants or accepts it, since once it has come into being it acquires an existence of its own and separate from the parties and their will, according to which its effects are not attributed to the parties themselves but to the will that they expressed in that independent arbitration clause or agreement. In other words, the legal right that is protected is that the arbitration may only deal with matters available under the law and that in the case in question have, as a general rule, a commercial connotation derived from the law regulating the arbitration matter, as can be seen in the aforementioned rule and the agreements that the Mexican State has signed on this subject, but always fulfilling the

[69] Registro 162088, Tesis: I.3º.C.947 C. Tercer Tribunal Colegiado en Materia Civil del Primer Circuito. Novena Época. Semanario Judicial de la Federación y su Gaceta, tomo XXXIII, mayo de 2011, p. 1216.

lawfulness of the object of the arbitration agreement; that the arbitrators have objective competence and that they do not exceed those limits, as well as that the award be on an arbitrable matter.]

ORDEN PÚBLICO COMO LÍMITE A LA AUTONOMÍA DE LA VOLUNTAD Y CAUSA DE NULIDAD DEL LAUDO ARBITRAL. El artículo 1457, fracción II, del Código de Comercio, señala que es nulo el laudo cuando el Juez compruebe que el objeto de la controversia no es susceptible de arbitraje, según la ley mexicana. Los supuestos de anulabilidad deben enmarcarse dentro de la pretensión del legislador de hacer operativa la institución arbitral y los resultados que se esperan de ella, ya sea que se trate de una controversia que no es susceptible de arbitraje o bien que el laudo sea contrario al orden público. Se trata de una regulación implícita de que sólo pueden ser sometidas al arbitraje las cuestiones que sean de libre disposición para las partes, como reflejo del principio proveniente del artículo 1798 del Código Civil Federal, de aplicación supletoria al Código de Comercio, relativo a que "Son hábiles para contratar todas las personas no exceptuadas por la ley.", y que en tratándose de la materia de arbitraje, implica que tienen la legitimación para disponer del derecho sujeto al arbitraje, como una expresión de su capacidad general para emprender negocios jurídicos. Cuando la materia resuelta en el laudo correspondiente no es susceptible de arbitraje, lo que en realidad se cuestiona es la licitud del objeto del convenio arbitral, porque la materia de ese arbitraje, por vía ejemplificativa, ya haya sido decidida en resolución definitiva y firme o se encuentre su materia inseparablemente unida a otras sobre las que las partes no tienen poder de disposición y revela que existe una falta de competencia objetiva del árbitro. Entonces, la materia de libre disposición susceptible de arbitraje debe ser entendida como aquella regulada por el ordenamiento jurídico que puede ser sustituida por el poder de la autonomía de la voluntad de las partes porque no tiene un carácter imperativo absoluto, sino que se autoriza a los particulares a ejercer su libertad para hacer u omitir lo que no está prohibido ni mandado. Se reconoce a favor de los particulares el poder creador de las normas individualizadas que deben disciplinar su actuación y al arbitraje como procedimiento idóneo o mecanismo alternativo por el que pueden solucionar las posibles controversias que surjan, siempre y cuando sea lícito y reconocido por el ordenamiento como digno de protección.[70]

[PUBLIC POLICY AS A LIMIT TO PARTY AUTONOMY AND CAUSE FOR ANNULMENT OF THE ARBITRATION AWARD. Article 1457, section II, of the Code of Commerce, states that the award is null and void when the judge finds that the subject matter of the dispute is not susceptible to arbitration, according to Mexican law. The assumptions of nullity must be framed within the legislator's intention to make the arbitration institution and the results expected from it operative, whether it is a dispute that is not susceptible to arbitration or the award is contrary to public order. This is an implicit regulation that only matters that are freely disposable by the parties may be submitted to arbitration, as a reflection of the principle derived from Article 1798 of the Federal Civil Code, of supplementary application to the Code of Commerce, which states that "All persons are capable of contracting, unless otherwise exempted by law", and that in the case of arbitration, this implies that they have the legal standing to dispose of the right subject to arbitration, as an expression of their general capacity to undertake legal business. When the matter resolved in the corresponding award is not subject to arbitration, what is really in question is the lawfulness of the subject matter of the arbitration agreement, because the subject matter of such arbitration, by way of example, has already been decided in a final and firm resolution or its subject matter is inseparably linked to others over which the parties have no power of disposition and reveals that there is a lack of objective competence of the arbitrator. Therefore, the matter of free disposition susceptible of arbitration must be understood as that regulated by the legal system that can be substituted by the power of the autonomy of the will of the parties because it does not have an absolute imperative character, but it authorizes individuals to exercise their freedom to do or omit what is not forbidden or commanded. It is recognized in favor of individuals the power to

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70 Registro 162055, Tesis I.3º.C.948 C. Tercer Tribunal Colegiado en Materia Civil del Primer Circuito, Novena Época. Semanario Judicial de la Federación y su Gaceta, tomo XXXIII, mayo de 2011, p. 1239.

create individualized rules that should discipline their actions and arbitration as a suitable procedure or alternative mechanism by which they can resolve any disputes that may arise, provided it is lawful and recognized by the law as worthy of protection.]

ÁRBITROS, NULIDAD Y CADUCIDAD DEL COMPROMISO EN. El artículo 620 del Código de Procedimientos Civiles vigente en el Distrito Federal, dispone que el compromiso arbitral produce la excepción de incompetencia, y aun cuando en rigor podría decirse que incumbe, en términos generales, al Juez que está conociendo de la materia sometida al compromiso, el resolver sobre su nulidad, sino en todo caso, a los árbitros, de acuerdo con el artículo 630 del propio ordenamiento, interpretado en sus alcances por el tenor del 1245 del anterior Código de Procedimientos Civiles, o a la autoridad judicial ante quien se proponga un juicio especial para alcanzar tal declaración de nulidad, también debe tenerse en cuenta que esta regla no es absoluta, sino que requiere determinadas excepciones aconsejadas por una recta interpretación. Así por ejemplo, cuando se hubiese sometido al compromiso arbitral una materia no compromisoria, como la relativa al divorcio o a la nulidad del matrimonio, sería contrario a una recta interpretación y a la eficacia de una cumplida administración de justicia, el que el tribunal que estuviese conociendo del juicio de divorcio, declarara su incompetencia, por el solo hecho de existir el compromiso, alegando tener incapacidad absoluta para declarar la nulidad del mismo, o más bien su inexistencia, por contraerse a materia prohibida por la ley, siendo más lógico considerar que el tribunal está capacitado para estudiar el punto de incompetencia, con el objeto de declarar si la misma existe, o no, y estudiar si en realidad existe el compromiso que verse sobre materia permitida por la ley; por lo que cuando se alega que el compromiso ya no puede tener eficacia jurídica o ser imposible de realizarse, por haber caducado la relación jurídica, como consecuencia de la imposibilidad del nombramiento de árbitro, es notorio que ésta cuestión tiene que analizarla la autoridad estimada incompetente, para el efecto de resolver si las cosas son realmente como se afirman, pues si el compromiso es imposible de llevarse a término, no existe causa que obligue a declarar la incompetencia, a pesar del compromiso pactado, porque por la imposibilidad del nombramiento de árbitros puede llegar a considerarse aquél como borrado o inexistente, puesto que a tal cosa equivale la imposibilidad de su ejecución.[71]

[**ARBITRATORS, NULLITY AND EXPIRATION OF THE ARBITRATION AGREEMENT.** Article 620 of the Code of Civil Procedures in force in the Federal District, provides that the arbitration agreement produces the exception of incompetence, and even though strictly speaking it could be said that it is incumbent, in general terms, on the Judge who is hearing the matter subject to the agreement, to decide on its nullity, but in any case, on the arbitrators, in accordance with Article 630 of the same law, interpreted in its scope by the wording of 1245 of the former Code of Civil Procedures, or to the judicial authority before whom a special trial is proposed to reach such declaration of nullity, it must also be taken into account that this rule is not absolute, but requires certain exceptions advised by a correct interpretation. Thus, for example, when a non-compulsory matter, such as divorce or nullity of marriage, has been submitted to arbitration, it would be contrary to a correct interpretation and to the efficiency of the administration of justice if the court hearing the divorce proceeding were to declare its incompetence, by the mere fact of the existence of the arbitration agreement, claiming to have absolute incapacity to declare the nullity of the same, or rather its non-existence, for contracting a matter prohibited by law, being more logical to consider that the court is qualified to study the point of incompetence, with the purpose of declaring if the same exists, or not, and to study if in reality the commitment exists that deals with a matter permitted by law; Therefore, when it is alleged that the commitment can no longer have legal effectiveness or be impossible to be carried out, because the legal relationship has expired, as a consequence of the impossibility of appointing an arbitrator, it is notorious that this issue must be analyzed by the authority deemed incompetent, for the purpose of resolving whether things are really as alleged, because if the commitment is impossible to be carried to term, there

[71] Registro 356622, Suprema Corte de Justicia de la Nación, Semanario Judicial de la Federación. 10 de septiembre de 1938.

is no cause to declare the incompetence, in spite of the agreed commitment, because due to the impossibility of the appointment of arbitrators, it can be considered as erased or non-existent, since the impossibility of its execution is equivalent to such a thing.]