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Arbitration, Alternative Dispute Resolution and Public Procurement in Mexico - The 2009 reforms, analysis and their impact by H. Wöss

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Arbitration, Alternative Dispute Resolution and Public Procurement in Mexico

The 2009 reforms, analysis and their impact

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1. Introduction

On May 28, 2009 the reforms of the Law for Public Works and Services ("Public Works Law 2009") and the Law for Acquisitions, Leases and Services of the Public Sector ("Public Acquisitions Law 2009") were published in the Official Gazette of the Federation (the "Reforms") and entered into force 30 days from the date of the publication, save some provisions related to the electronic government procurement system ("CompraNet"). Through the reforms both laws have been modified significantly. The reforms were passed in congress without significant debate [1] due to the urgent need to facilitate infrastructure projects [2]. The Public Acquisitions Law 2009 also refers to model contracts that might have a significant impact on the reduction of litigation risks, and, in the end, on the performance cost [3].

Both laws contain important changes with regard to arbitration and alternative dispute resolution and these will be analysed in this article. Alternative dispute resolution is understood as dispute resolution alternative to judicial litigation and arbitration in the sense of amicable dispute resolution as defined, among others, by the ICC [4]. Such changes are still subject to refinement by the Regulations to both laws and the issuance of the general provisions on alternative dispute resolution to be published by the Ministry of Public Function.

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1 See: Gaceta Parlamentaria, Cámara de Diputados, número 2748-IV, jueves 30 de abril de 2009.

2 CNNExpansión.com: Reformas agilizarán contratación pública, http://cnnexpansion.com/obras/2009/05/2008/reformas-agilizaran-contratacion-pulica, last visited September 2009.

3 See, in general, *Wöss, Herfried:* The ICC Model Turnkey Contract for Major Projects, Construction Law International, 3 (2008) 2, IBA International Construction Projects Committee, p. 6-11, at 6.

4 See: ICC Rules on Amicable Dispute Resolution.

The reforms open arbitration to *all federal public works contracts* and to *all long-term services contracts such as Public-Private Partnerships in the form of services projects* [5]. However, there are some issues that need to be examined and understood in order to provide for a smooth dispute resolution procedure and the proper recognition and execution of an arbitral award. Prior to the reforms, arbitration had only been seen with state companies such as Petróleos Mexicanos ("PEMEX") and its sub-entities and the Comisión Federal de Electricidad ("CFE") whose "organic laws" expressly provide for arbitration.

Before the reforms, alternative dispute resolution was, apparently, only limited to conciliation before the Ministry of Public Function and the "independent expert procedure" for disputes of a technical and administrative nature to be found in the large public works contracts of PEMEX and CFE.

Apart from that, dispute resolution committees in the form of dispute review boards have been used in Public-Private Partnerships such as the Bajío hospital project [6].

2. General Federal Procurement Regime

Alternative means of dispute resolution such as arbitration are foreseen in Article 17, paragraph 3, of the Political Constitution of the United Mexican States. Dispute resolution involving state entities including majority owned state companies is a federal competence according to Article 104, section III, of the Constitution. Provisions contained in international treaties prevail over federal legislation [7].

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5 "Proyectos para Prestación de Servicios (PPS)"; Ministry of Finance and Public Credit, http://ww.ppp.sse.gob.mx/, last visited October 2009.

6 *Wöss, Herfried:* Dispute Boards in Mexico, Forum, Dispute Resolution Board Foundation, May 2007, p. 2; see also the Law for Public-Private Partnerships currently under debate in the Mexican congress.

7 See article 5 and article 15, paragraph 2, of the Public Works Law 2009 and article 4 and article 15, paragraph 2, of the Public Acquisitions Law 2009.

2.1 Public Works Law 2000

The general rule before the reforms of the Public Works Law was that disputes arising with respect to the interpretation and application of the Public Works Law and public works contracts had to be solved by federal tribunals [8].

2.1.1 Arbitration

Arbitration was permitted for disputes expressly authorized by the Control Ministry through general rules, subject to the prior opinion of the Ministry of Commerce and Industrial Development [9]. However such general rules had never been issued. Therefore and until the reforms, arbitration has been limited to PEMEX and CFE based on their so-called "organic" laws [10].

2.1.2 Alternative Dispute Resolution

As regards alternative dispute resolution, article 45, section XIII, of the Public Works Law 2000 established that public works contracts should contain procedures for the solution of disputes of a technical or administrative character. Such provision lead to the inclusion of so-called *"independent expert"* procedures in public works contracts whereby an independent expert, usually an engineer, had to resolve, among others, questions of force majeure including its legal application, which sometimes produced fairly surprising results. The determinations of the independent expert were not only obligatory, but the jurisdiction of the independent expert was absolute, thereby, limiting the jurisdiction of the arbitral tribunal. If the arbitral tribunal found that there were irregularities in the designation of the independent expert, excess of jurisdiction, manifest error, fraud or bad faith, it could annul the determination of the independent expert. Even then, it was not clear if the arbitral tribunal could hear the "technical dispute" or had to remand it to another independent expert [11]. An arbitral tribunal hearing the technical dispute risked the nullity or non-enforceability of the arbitral award because of the lack of jurisdiction.

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[8] The term "federal tribunal" is understood as "federal judicial tribunal" herein as distinguished from local or state judicial tribunals; see: Article 15, paragraph 1, of the Public Works Law 2000.

[9] Now: Ministry of Economy.

[10] See title 3 below.

[11] See *Wöss, Herfried:* Cláusulas escalonadas en contratos de obra pública en México - ¿sistema o patología? (Multi-tier clauses in public works contracts in Mexico – system or pathology?), in: Dispute Resolution in Infrastructure Projects, Wöss & Partners, S.C., Newsletter June 2007, p. 1-5.

2.2 Public Works Law 2009

Title Seven of the new public works law reads "Of the Resolution of Disputes" and contains provisions about the so-called "unconformity" procedure, conciliation before the Ministry for Public Function, arbitration and other alternative dispute resolution mechanisms, as well as judicial procedures. Chapter III ("Of Arbitration, Other Mechanisms of Disputes Resolution and Judicial Competence") contains the relevant provisions.

Article 98, paragraph 1, of the Public Works Law 2009 provides that an *arbitration agreement* may be entered into with respect to disputes between the parties *"for the interpretation of contractual clauses or questions derived from their execution, under the terms of Title Four of the Fifth Book of the Commercial Code."* [12]

According to paragraph 2 of article 98 of the Public Works Law 2009, *the administrative rescission* and the *anticipated termination* of the contracts as well as any other matter reserved by the Regulations shall not be subject to arbitration [13].

This raises several questions with regard to the law applicable to the arbitration procedure, the jurisdiction of the arbitral tribunal and arbitrability:

2.2.1 Law applicable to the arbitration procedure

Whereas in practice even under the former law, the arbitration procedure was governed by the Mexican Commercial Code, there was no clear provision to that respect in the Public Works Laws. In fact, the commercial code was not applicable to federal government contracts as those are subject to the federal civil code, among others, which, however, is meant to refer to the substantive law. Since the reform, Title Four of Book Five of the Commercial Code governing the arbitration procedure and the recognition and execution of arbitral awards is now expressly applicable to federal government

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[12] *"Se podrá convenir compromiso arbitral respecto de aquellas controversias que surjan entre las partes por interpretación de las cláusulas de los contratos o por cuestiones derivadas de su ejecución, en términos de los dispuesto en el Título Cuarto del Libro Quinto del Código de Comercio."*

[13] *"No será materia de arbitraje la rescisión administrativa, la terminación anticipada de los contratos, así como aquellos casos que disponga el Reglamento de esta Ley."*

contracts in accordance with article 98, paragraph 1, of the Public Works Law, provided there is an arbitration agreement.

2.2.2 Scope of Arbitration

Article 98, paragraph 1, of the Public Works Law 2009 seems to limit arbitration to the interpretation of the contract and its performance, thereby apparently excluding questions related to (1) the interpretation of the Public Works Law, its Regulations and any other applicable legal rules, (2) the validity of the contract, and (3) the validity of the arbitration agreement. Therefore, the question arises whether the legislator wanted to limit the jurisdiction and competence of the arbitral tribunal.

2.2.2.1 Interpretation and execution of contracts

It appears that the limitation of the jurisdiction of the arbitral tribunal to the interpretation and execution of contracts is merely incidental and due to legislative tradition. This can be inferred from article 103 of the Public Works Law governing the jurisdiction of judicial tribunals, which reads as follows:

"The disputes arising with respect to the interpretation or application of the contracts entered into on the grounds of this Law, shall be resolved by federal tribunals, in case no arbitration or alternative means of dispute resolution clause has been agreed, or such clause is not applicable". [14]

A comparison between article 98, paragraph 1, and article 103 of the Public Works Law shows that the wording is identical. The only difference is that the term "execution" has been replaced by the term "application" which does not appear to add normative content. Therefore, the wording establishing the jurisdiction of the federal tribunal is not different from that of the arbitral tribunal. The federal tribunal has full jurisdiction over the subject matter as mandated by the Constitution. This indicates that the usage of the terms "interpretation" and "application" did not have the intention of limiting the scope of jurisdiction of the arbitral or the federal tribunal. Therefore, both the federal and the arbitral tribunal have the authority to interpret the applicable law and to determine the validity of the contract and the validity of the arbitration clause.

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14 *"Las controversias que se susciten con motivo de la interpretación o aplicación de los contratos celebrados con base de esta Ley, serán resueltas por los tribunales federales, en los casos en que no se haya pactado cláusula arbitral o medio alterno de solución de controversias, o éstas no resulten aplicables."*

What is important is that the jurisdiction of the federal tribunals is subordinated to any agreement to arbitrate or to apply other means of alternative dispute resolution. From a systematic interpretation it is, therefore, clear that the jurisdiction of the arbitral tribunal is unrestricted. This is without prejudice to the questions of non-arbitrability which will be discussed in relation to the rescission and anticipated termination of the contract below.

2.2.2.2 Arbitrability, rescission and anticipated termination of the contract

The adjudication procedure in a public tender is considered as an act of state (acta iure imperii) [15]. Once a contract is adjudicated, the state is considered an equal and acts like a private party [16], save for certain exceptions such as the rescission by the authority and the anticipated termination of the contract which are not arbitrable as established in article 98, paragraph 2, of the Public Works Law.

The rescission by the authority or the contractor due to non-performance by the other party is governed by article 62, sections I and II, of the Public Works Law. Anticipated termination may be due to an agreement, circumstances of general interest, which may cause severe injury to the authority [17], impossibility to determine the duration of a suspension of the works by the authority [18], or force majeure [19]. According to article 60, paragraph 2, of the Public Works Law, such termination may also be the consequence of the declaration of nullity of the public tender procedure by the Ministry of Public Function or the federal tribunal as the consequence of an unconformity procedure or an intervention *ex oficio* in accordance with article 94 of the Public Works Law.

Rescission and anticipated termination require an administrative resolution by the authority and are, therefore, not arbitrable. In case of unconformity, such an act is subject to an administrative revision procedure and litigation before the federal courts such as the Federal Tribunal for Fiscal and

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15 López-Elías, José Pedro: Aspectos jurídicos de la licitación pública en México, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, Doctrina Jurídica, Núm. 4, México, 1999, p. 60 ss.

16 See: Andrade-Max, Diego A.: Las Personas Morales de Derecho Público como Partes en el Arbitraje Comercial Internacional, Jurídica. Anuario del Departamento de Derecho de la Universidad Iberoamericana, Número 22, Año 1993, p. 431-450, at 433.

17 Article 60, paragraph 2, of the Public Works Law.

18 Idem.

19 Article 62, section 4, of the Public Works Law.

Administrative Justice, the District Court in Administrative Matters, the Federal Collegiate Courts or the Supreme Court of the Nation.

The question arises whether the non-arbitrability of the exclusion of rescission and anticipated termination includes the consequences of such unlawful rescission or anticipated termination such as *claims for damages* [20] *and loss of income* [21].

As the non-arbitrability is limited to matters of rescission and anticipated termination, the arbitral tribunal remains competent to rule on damages and loss of income. Nevertheless, the arbitral tribunal is bound to the decision made by the court with regard to the legality of the rescission and anticipated termination.

The federal law on administrative litigation provides for the award of damages and loss of income in the case of severe faults of the administrative resolution that are listed in article 6 of such law if sought by a party. Such damages and loss of income have to be taken into consideration in the arbitration, if applicable.

The splitting up of jurisdiction is likely to lead the arbitral tribunal to suspend the arbitration and wait for a final resolution of the federal tax and administrative court in order to have certainty about the unlawfulness of the rescission or termination, which might significantly delay the whole arbitration.

This means that the claim for damages and loss of income for unlawful rescission or termination is arbitrable and may be decided by the arbitral tribunal once such unlawfulness has been determined by the tax and administrative court. However, practical issues such as the delay caused by the administrative litigation in order to obtain a decision on the lawfulness of the rescission or termination may hinder claims for damages and loss of income in the arbitration procedure.

2.2.2.3 Nullity of the contract and nullity of the arbitration clause

According to Article 15, paragraph 1, of the Public Works Law, the acts, contracts and agreements entered into by public entities executed in violation of this law *"shall be null and void subject to the*

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20 As defined in article 2008 of the Federal Civil Code.

21 As defined in article 2009 of the Federal Civil Code.

prior determination by the competent authority." Therefore, the question arises who is the competent authority to rule on the nullity of such acts, contracts and agreements, including the nullity of the arbitration agreement, the arbitral tribunal or the federal court?

In the light of the clear preference for arbitration and alternative dispute resolution established in article 103 of the Public Works Law, provided there is an arbitration agreement, there is no doubt that the competent authority for the resolution of nullity issues is with the arbitral tribunal. This includes the jurisdiction of the arbitral tribunal to resolve questions concerned with the nullity of the arbitration agreement in the light of the *"competence-competence"* established in Article 1432, paragraph 1, of the Mexican Commercial Code, in particular, issues arising from pathology, lack of legal representation and capacity of the parties, lack of consent, and any other violation of the public works law.

In case an arbitral tribunal confirms its jurisdiction in any matter affecting the validity of the arbitration clause, such resolution may only be submitted to a federal judge under the terms of article 103 of the Public Works Law and article 1432, third paragraph, of the Mexican Commercial Code. The choice between the local and the federal court as established in article 1422 of the Mexican Commercial Court does not appear to be applicable in matters subject to the Public Works Law.

2.3 Public Acquisitions Law 2009

The Public Acquisitions Law 2009 refers to the acquisition of services. The reforms in the new law as regards dispute resolution are identical to the ones in the Public Works Law 2009 and, therefore, will not be repeated. Arbitration and alternative dispute resolution under the Public Acquisitions Law 2009 is, however, limited to *long term services contracts* such as *Public-Private Partnerships* as defined by article 3, section VI, of the Public Acquisitions Law which reads:

"The rendering of long-term services which imply financial resources of several fiscal years, through an investor supplier, who obliges himself to provide them with his own assets or those of a third party, in conformity with a project for the provision of such services." [22]

[22] *"La prestación de servicios de largo plazo que involucren recursos de varios ejercicios fiscales, a cargo de un inversionista proveedor, el cual se obliga a proporcionarlos con los activos que provea por sí o a través de un tercero, de conformidad con un proyecto para la prestación de dichos servicios."*

Public-Private Partnerships or “Proyectos de Prestación” have been successfully used for a while in Mexico on a federal and state level and are very likely to increase in the future due to the law on Public-Private Partnerships which has recently been submitted to congress. Mexico has adopted a series of legislative changes as regards its budgetary laws and administrative regulations [23] in line with the UNIDO Guidelines for Infrastructure Development through Build-Operate-Transfer (BOT) Projects 1996 [24] and the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects 2001 [25]. Some states even have their own PPP-laws which also apply on a municipal level. The State of Tabasco’s expressly provides for arbitration in its article 56 [26]. Public-Private Partnerships are likely to grow significantly during the next few years, in particular in line with the current infrastructure program of the Mexican government [27].

Article 45, section XXI, of the new Public Acquisitions Law provides that dispute resolution procedures, distinct from the conciliation procedure provided in the Law, have to be included in public acquisition contracts. Arbitration clauses limited to long-term service contracts are authorized in article 80 of the Law with the same restrictions as mentioned before for public works contracts.

2.4 Place of arbitration

Both laws are silent with regard to the place of arbitration. However, articles 16 of the Public Works Law 2009 and the Public Acquisitions Law 2009 referring to the law applicable to the contracts seem to provide guidelines regarding this. Paragraphs 1 and 2 of the said provisions contain rules establishing minimum contacts with the place of performance of the contracts. Foreign law applies if the place of performance and the signing of the contract take place abroad. Even if the goods and services come from abroad but the performance takes place in Mexico, the contracts are subject to national law. This seems to indicate that when the performance is in Mexico, the place of arbitration should be in Mexico. In practice, arbitrations take place in Mexico where the performance of the contracts has been established in Mexico.

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23 See: http://www.pps.sse.gob.mx/html/marco.html, last visited in October 2009.

24 See: http://www.unido.org/index.php?id=o3426, last visited October 2009.

25 See: http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2001Guide_PFIP.html, last visited October 2009.

26 See: http://www.ordenjuridico.gob.mx/Estatal/TABASCO/Leyes/TABLEY74.pdf, last visited October 2009.

27 See http://wwww.infraestructura.gob.mx/pdf/ProgramaNacional/Infraestructura2007-2012.pdf

2.5 Arbitration under old contracts according to the new provisions?

The question arises whether arbitration may be agreed also for contracts signed under the former law which did not provide for arbitration because of the lack of general rules that were never issued. In this respect, article 99 of the Public Works Law and article 81 of the Public Acquisitions Law rule that an arbitration agreement may be made after the effective date of the public contract.

This seems to allow arbitration even for contracts which provide for federal court litigation under the old law. However, transitional article eight of the Public Works Law 2009 and the Public Acquisitions Law 2009 provide that the contracts entered into before the entry into force of the new laws are governed by the old law. This is with the exception of the *"procedures of conciliation, unconformities and sanctions shall be treated and resolved according to the provisions in force at the moment of their commencement"*, as established in transitional articles nine of both laws. [28] Unfortunately, these articles do not mention the application of the arbitration provisions under the new law to old contracts.

As a general rule any rules of court procedures apply from the moment they enter into force. An arbitration agreement made under the new laws for disputes arising from contracts entered into before the entry into force of the new laws should be valid *de lege ferenda*. It might be possible to have an express rule in the Regulations to provide for arbitration under the new rules for old contracts. Such a rule, nevertheless, might be examined in regard to a possible unconstitutionality.

2.6 Alternative Dispute Resolution

Article 102 of the Public Works Law 2009 and article 84 of the Public Acquisitions Law 2009 allow for the agreement of the parties of "other dispute resolution mechanisms", provided such mechanisms are recognized through *general provisions* issued by the Ministry of Public Function. Such general provisions have not yet been issued but are likely to refer to dispute resolution procedures of recognized national and international institutions related to dispute boards, expert procedures, conciliation and mediation, among others.

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[28] *"Los procedimientos de conciliación, de inconformidad y de sanción que se encuentren en trámite o pendientes de resolución a la fecha de entrada en vigor del presente Decreto, deberán sustanciarse y concluirse de conformidad con las disposiciones vigentes al momento de haberse iniciado tales procedimientos."*

A contract may provide for means of alternative dispute resolution but not for arbitration as it was in the case of the Public-Private Partnership of the "Hospital Bajío" under the Public Acquisitions Law 2000 which provides for a dispute review board and litigation before a federal tribunal thereafter [29]. This combination is also possible under the new law, provided the general provisions have been issued by the Ministry of Public Function.

In this respect, it is necessary to take into consideration, that alternative dispute resolution procedures do not necessarily trigger final payment obligations of the authority or Mexican state company according to its internal financial procedures, which inevitably leads to further litigation before arbitral tribunal or federal courts, unless the general rules take care of the budgetary effects of determinations made in alternative dispute resolution procedures.

3. PEMEX and CFE

Any restriction with respect to arbitration did not and does not apply to the so-called decentralized organizations such as the CFE and the PEMEX which provide for arbitration in their so-called "organic" laws. This has been clearly established in article 15, paragraph 4, of the Public Works Law 2000 and article 104 of the Public Works Law 2009, as well as article 15, paragraph 5, of the Public Acquisitions Law and article 86 of the Public Acquisitions Law 2009.

According to article 22, section VI of the Federal Law for State Entities [30], the directors general of decentralized organizations (i.e. state companies) are competent to submit to arbitration, if the applicable laws provide for arbitration.

3.1 PEMEX

3.1.1 Arbitration

Article 14 of the Organic Law of Petróleos Mexicanos and its Subsidiaries expressly provided for arbitration. This article was replaced by article 6, paragraph 2, of the Regulatory Law of Article 27 of the Constitution in the Petroleum Sector (the "Regulatory Law") [31] and article 72 of the new Law of

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29 *Wöss, Herfried:* Dispute Boards in Mexico, Forum, Dispute Resolution Board Foundation, May 2007, p. 2.

30 Ley Federal de las Entidades Paraestatales

31 Official Gazette of the Federation on 28 November 2008.

Petróleos Mexicanos [32]. Whereas article 72 of the Law of Petróleos Mexicanos repeats the wording of former article 14 of the Organic Law of Petróleos Mexicanos [33], article 6 of the Regulatory Law contains a slightly different wording.

3.1.2 Place of arbitration

According to article 6, paragraph 2, of the Regulatory Law, PEMEX *"shall not submit, in any case, to foreign jurisdiction as regards disputes referred to in works or services contracts performed in the national territory or in the zones where the Nation exercises sovereignty, jurisdiction or competence. Such contracts may include arbitration agreements in conformity with the Mexican laws or international treaties of which Mexico forms a part."* [34]

This article provides that the place of arbitration has to be in Mexico in case of works and services to be performed in Mexico. This indicates that the place of arbitration may be abroad if the works and services are to be performed abroad. The point of connection is, therefore, the place of performance of the works and services.

Article 72, paragraph 1, of the Law of Petróleos Mexicanos states that *"national disputes"* be resolved by federal tribunals unless there is an arbitration agreement. In case of *"juridical acts of an international character"*, PEMEX and its subsidiaries may opt for the jurisdiction of foreign tribunals in mercantile matters and enter into arbitration agreements if that is convenient for the purpose of such juridical acts.

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[32] Official Gazette of the Federation on 28 November 2008.

[33] *"Los actos jurídicos que celebren Petróleos Mexicanos y sus organismos subsidiarios se regirán por las leyes federales aplicables y las controversias nacionales en que sea parte, cualquiera que sea su naturaleza, serán de la competencia de los tribunales de la Federación, salvo acuerdo arbitral, ...*

Tratándose de actos jurídicos de carácter internacional, Petróleos Mexicanos y sus organismos subsidiarios podrán convenir la aplicación de derecho extranjero, la jurisdicción de tribunales extranjeros en asuntos mercantiles y celebrar acuerdos arbitrales cuando así convenga al mejor cumplimiento de su objeto."

[34] *"Petróleos Mexicanos no se someterá, en ningún caso a jurisdicciones extranjeras tratándose de controversias referidas a contratos de obra y prestación de servicio en territorio nacional y en las zonas donde la Nación ejerce soberanía, jurisdicción o competencia. Los contratos podrán incluir acuerdos arbitrales conforme a las leyes mexicanas y los tratados internacionales de los que México sea parte."*

The term *"juridical acts of an international character"* has not been defined and may be interpreted in line with the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters 2005 [35] as any juridical act where a foreign party intervenes. In the light of Mexican government procurement practice the domicile of the contractor is not relevant. In conformity with article 6, paragraph 2, of the Regulatory Law, *"juridical acts of an international character"* should be understood as juridical acts referring to works and services performed outside the national territory, which seems to be the right interpretation.

3.1.3 PEMEX public procurement regime

In this respect, it is important to note that Articles 51 and 52 of the new Law of Petróleos Mexicanos, distinguish between (1) substantive activities of a productive character referred to in articles 3 and 4 of the Regulatory Law and the non-basic petrochemical industry, and (2) other activities [36]. The Public Works Law and the Public Acquisitions Law apply to such other activities which are outside the PEMEX public procurement regime which is relevant for services contracts that are not Public-Private Partnerships and, therefore, not arbitrable under the general federal public procurement regime. On the other hand, article 6, paragraph 1, of the Regulatory Law does not make such a distinction and refers to all kind of services contracts of PEMEX which means that even non PPP services contracts would be arbitrable [37]. As both laws are regulatory laws of the constitutions, it is not clear which rule prevails.

Article 35, paragraph 2, of the Law of Petróleos Mexicanos refers to the conciliation procedures administered by the Ministry of Public Function under the Public Works Law and the Public Acquisition Law applies to any matters covered under the PEMEX public procurement regime and the general regime as established in article 67 of the Regulations to the Law of Petroleos Mexicanos [38].

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[35] See: http://cptech.org./ecom/jurisdiction/text06302005.pdf, last visited September 2009. According to Article 1, ("Scope"), paragraph 2, *"a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State"*.

[36] Articles 3 and 4 of the Regulatory Law define the scope of the petroleum industry as reserved to the State, save certain exceptions.

[37] *"Petróleos Mexicanos y sus organismos subsidiarios podrán celebrar con personas físicas y morales los contratos de obras y de prestación de servicios que la mejor realización de sus actividades requiere."*

[38] Official Journal of the Federation as of September 4, 2009.

Therefore, it will be necessary to examine which law applies to public tenders for the acquisition of services by PEMEX and its subsidiaries in order to determine the corresponding regime for arbitration, in particular, in case of services contracts.

3.1.4 Distribution of gas

The Regulatory Law provides for conciliation and arbitration in its Article 14, section V, regarding the regulation of the activities referred to in article 4, paragraph 2, and the sale of gas *"from first hand"*. The second paragraph of article 4 allows for the transport, storage and distribution of gas by private entities, subject to the corresponding authorizations. It is interesting to note that conciliation and arbitration refers to the "interpretation" and the "performance" of contracts, confirming that the use of those terms corresponds to legislative tradition without the legislator being aware of their possible limitative effects. It is important to underline that such contracts do not relate to public procurement as such but rather to the permission of certain activities by private entities that were prior reserved for the State and the sale of gas.

3.1.5 Termination of contracts

Neither the Regulatory Law nor the Law of Petróleos Mexicanos appear to restrict the jurisdiction of the arbitral tribunal and the arbitrability of the rescission and anticipated termination of the contract. The final paragraph of article 52 of the Regulatory Law clearly establishes that in the case of services provided by the State exclusively through Decentralised Organizations and contracts through that third parties may only enter with them, the administrative recourse for revision may only be filed against acts and resolutions which put an end to the administrative procedures, unless the parties have submitted to arbitration as foreseen under the Reglamentary Law [39]. Though such a clause is limited to services provided by the State through PEMEX and its sub-entities, in the absence of an express prohibition, it appears that any acts of contract termination by PEMEX are subject to arbitration, provided that there is an arbitration clause.

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[39] *"En los casos de los servicios que el Estado presta de manera exclusiva a través de los Organismos Descentralizados y de los contratos que los terceros sólo puedan celebrar con aquéllos, el recurso de revisión sólo podrá interponerse en contra de actos y resoluciones que pongan fin al procedimientos administrativo, a una instancia o resuelvan el expediente, siempre y cuando no se haya optado por el arbitraje previsto en la Ley Reglamentaria."*

3.2 CFE

According to article 45 of the Law of the Public Service of Electric Energy national disputes arising from juridical acts where the CFE forms part are subject to federal tribunals, unless there is an arbitral agreement. The CFE may apply foreign law, submit to the jurisdiction of foreign tribunals in commercial matters and enter into arbitration agreements if this is convenient for the purpose[40]. The wording of this provision clearly provides for national and international arbitration in commercial matters.

3.3 PEMEX and CFE Alternative Dispute Resolution

Though alternative dispute resolution is mentioned neither in the Reglamentary Law, the Law of Petróleos Mexicanos, nor in the Law of the Public Service of Electric Energy, this does not appear to exclude alternative dispute resolution procedures in public works contracts and public acquisition contracts entered into by PEMEX and its subsidiaries or CFE. Dispute boards, expert procedures, conciliation and mediation are, therefore, admitted, as the practice of the aforementioned "independent expert" procedure shows. The law is silent with regard to the place of arbitration.

4. Conclusions

The new regime under the Public Works Law 2009 and the Public Acquisitions Law 2009 undoubtedly represents a huge step ahead with respect to the opening of federal government contracts to alternative dispute resolution and arbitration in order to significantly reduce the cost of conflict in public contracts in Mexico. In case of the Public Acquisitions Law 2009 such openness is limited to Public-Private Partnerships. In this respect, it will be interesting to analyze the draft federal law on Public-Private Partnerships which has recently been submitted to the Mexican Congress. Exception from the current rules may be made through the- yet to be published- Regulations.

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40 *"Los actos jurídicos que celebre la Comisión Federal de Electricidad se regirán por las Leyes Federales aplicables y las controversias nacionales en que sea parte, cualquiera que sea su naturaleza, serán de la competencia de los Tribunales de la Federación, salvo acuerdo arbitral, quedando exceptuada de otorgar las garantías que los ordenamientos legales exijan a las partes, aun en los casos de controversias judiciales.*

La Comisión podrá convenir la aplicación del derecho extranjero, la jurisdicción de tribunales extranjeros en asuntos mercantiles y celebrar acuerdos arbitrales cuando así convenga al mejor cumplimiento de su objeto."

Some notorious shortcomings of the wording of the principal provisions are due to legislative tradition and may be remedied by interpretation.

Alternative dispute resolution, as different from arbitration and court litigation, is subject to the general provisions to be issued by the Ministry of Public Function.

One must hope that the Regulations and general provisions will not be further delayed and that both will be in line with the progress achieved, which is necessary for the further reduction of litigation risks and a more cost efficient government procurement required for execution of the ambitious infrastructure programme 2006-2012 of the Mexican government.

As regards PEMEX, the PEMEX Regulatory Law and the Law of Petróleos Mexicanos do not always seem to be perfectly synchronized with each other, however, this may only be relevant in a very limited number of cases.

Without a doubt the reforms of the federal laws regarding arbitration will have an effect on the Federal Law on Public-Private Partnerships. On a state and municipal level the PPP law of the State of Tabasco [41] already contains arbitration provisions.

[41] Article 55 of the "Ley de Proyectos para Prestación de Servicios del Estado de Tabasco y sus Municipios"; see footnote 26.