[…]

The federal judge based his "legal incompetence", substantially on the fact that the benefits demanded by the claimant had to be resolved through arbitration, since the parties had submitted, in the contract itself basis of the action, to the arbitration conducted in accordance with the Arbitration Rules of the Chamber of Commerce, for the settlement of disagreements, discrepancies, differences or controversies arising from its interpretation or execution.

Both parties, the claimant and defendant, filed appeals against this decision.

Thus, the reasons for dissent summarized at the beginning of this resolution are well-founded.

In this regard, it is considered feasible to waive the right to arbitrate a dispute, by arguing that this derives from the filing of the claim and its defense, without reserving the right to arbitrate, before a jurisdictional instance to hear and resolve to hear and resolve an inter partes dispute.

As stated in the preceding paragraphs, arbitration is an adversarial method of dispute resolution as an alternative to state courts, to which the parties submit themselves voluntarily (as a general rule), i.e., it is essentially conventional in nature, based on the freedom of the parties, since for a dispute to be submitted to the decision of arbitrators it is necessary that the parties agree to it (except in exceptional cases of compulsory arbitration in order for the dispute to be submitted to arbitration), and that the parties submit themselves voluntarily (as a general rule), i.e., it is essentially conventional in nature, based on the freedom of the parties, since in order for a dispute to be submitted to the decision of arbitrators it is necessary that the parties agree to it (except in exceptional cases of compulsory arbitration, which must be established by law).

Arbitration, without prejudice to its mediate origin in the provision of the law permitting it, arises, like any other legal action, from the will of the parties, who, in this case, decide to exclude the judicial jurisdiction by referring certain litigation to the decision of private individuals.

Therefore, the arbitration agreement constitutes a contract or, at least, a convention (agreement), a genre to which the contract belongs.

Thus, if the arbitration agreement derives from the manifestation of the contractual will and contractual freedom of the parties, under the same principles, as well as the principle of party autonomy, they are in a position to waive the rights conferred by that, provided that, as in the formation of the commitment, they do so by mutual agreement, that is to say, expressing their will in that sense, free of vices, with full capacity of exercise and under the form established by law in this respect.

In other words, just as one has the right to arbitrate, one has the right (jointly) to waive that prerogative, given that, being a convention, the commitment in arbitrators is regulated by the principles of autonomy of will and freedom of contract, which authorize the parties by mutual agreement, to extinguish or modify the original agreement.

It cannot therefore be said that the arbitration clause is incompatible with the figure of the waiver of rights since, certainly, as inferred by the amparo petitioner, the will of the parties, who committed themselves in the first moment, can extinguish the agreement given their freedom to contract have and the autonomy of the will that governs in this matter.

Now, in relation to the form that must be satisfied by the expression of the will to waive arbitration, it is not possible to assert that unfailingly it must be express and in writing and, therefore, that tacit consent is excluded.

The foregoing, in view of the fact that a similar reason underlies tacit consent for the formation of the commitment: the possibility that both parties, through the elaboration and presentation of the respective briefs of claim and defense, but in this case promoted by one hand, to exercise a judicial action and, on the other hand, to raise defenses against that action tacitly consent tacitly to the prosecution of the respective controversy; as is the case in the reverse the other way around when through the arbitration claim and its answer it is understood that notwithstanding the absence of an express arbitration commitment, the parties tacitly consent to the arbitration of the dispute in question.

In the aforementioned context, it was incorrect the manner in which the appealed decision dealt with the appellants' argument, related to the tacit waiver of the parties to the arbitration agreement contained in the contract on which the action was based, since, contrary to this, it should be recognized that derived from the conventional nature of the agreement, the freedom to contract, as well as the autonomy of will, the parties are at all times entitled to voluntarily waive this alternative means of dispute resolution, and, consequently, to annul or extinguish the respective arbitration agreement.

It should also be recognized that the willingness of the parties to waive arbitration may be tacit, i.e., pursuant to Article 1803 of the Federal Civil Code, it can result from facts or acts that presuppose it or authorize to presume it, such as the statements of claim and counterclaim in a jurisdictional proceeding that reveal the clear intention of the parties not to make use of the alternative dispute resolution -arbitration- to which they had previously submitted.

Therefore, the challenged act should not have concluded in the referral to the parties to the arbitration clause as a way of evidencing the lack of incompetence to hear the controversy submitted to the power of the District Judge, the parties' will to extinguish the effects of the arbitration agreement was thereby overlooked; this is sufficient to render incorrect the conclusion that the controversy should be processed by this alternative means of dispute resolution.

Based on the foregoing, the minimum amount homologated to dollars is $168'911,201.10 (One hundred and sixty-eight million, nine hundred and eleven thousand, two hundred and sixty-eight million nine hundred and eleven thousand two hundred and one dollars 10/100 USD), without including the IVA, while the maximum amount homologated to dollars is a $418'303,621.55 (Four hundred and eighteen million, three hundred and three thousand, six hundred and twenty-one six hundred twenty-one thousand six hundred twenty-one dollars 551100 USD.)"

From the above transcription, it is clear that a minimum and a maximum budget was agreed to be exercised, and that Pemex Exploration and Production **was not obliged to exercise the maximum amount of the contract,** without prejudice that it could be increased in terms of clause 13; for this purpose, it was established the exchange rate to be considered was set at $12.9889 pesos

per dollar, which corresponded to the exchange rate on the date of the presentation and opening of the bids.

And it was concluded that the minimum amount homologated to dollars was $168'911,201 .10 (one hundred and sixty-eight million nine hundred and eleven thousand two hundred and one dollars 10/100 USD) excluding VAT, while the maximum amount homologated to dollars is $418'303,621.55 (Four hundred and eighteen million, three hundred and three thousand, six hundred and twenty-one dollars 55/100 USD).

Now, **the fact that a minimum and a maximum budget had been agreed upon did not mean that if the minimum amount was not exercised, the contractor had to be paid the difference, as this was not so agreed in the basic covenant of the action.**

In this case, this benefit is considered a principal claim, not some fruit~, interest, damage, or injury. because doctrinally, the fruits have been defined, as those goods produced regularly and periodically by things, according to their economic destiny without altering their substance, thus, natural fruits, which are the spontaneous fruits of the earth and the breeding of animals; industrial fruits, those obtained from man's work, and civil fruits, those coming from contracts.

Ordinary interest, on the other hand, is the interest that derives from the interest are those that derive from a simple loan and imply the obtaining of an amount as profit by the mere fact that someone granted to another an amount of money that the latter needed to satisfy his own needs; and default interest, derive from the failure to deliver the loaned amount and consist of the penalty imposed for the late delivery of the money according to what was agreed in the contract.

Furthermore, damages imply the loss or impairment suffered in the patrimony, due to the non-fulfillment of an obligation, and the prejudice is the deprivation of any lawful gain, which should have been obtained with the fulfillment of the obligation.

Therefore, the non-conforming party had to establish in a precise manner what she was claiming, without being able to make a generic condemnation, so that

through an incident the amount claimed could be shown, since this option is limited to the cases in which fruits, interests, damages or losses are claimed, according to article 353, of the Federal Code of Civil Procedures, without in this case, any of the aforementioned concepts are claimed.

In addition, the efficient cause on which his petition rested was not accredited, since the petitioner did not provide any means of proof for that purpose, nor did he provide the basis for determining that item in the execution of the sentence.

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Therefore, the aforementioned means of evidence do not prove **the concepts and amounts for which the conviction for non-recoverable the sentence for non-recoverable expenses for the work suspensions that occurred during the contract.**

Now, with respect to the inherent benefit that he suffered damages patrimony because he had to face several lawsuits with his suppliers, it is worth mentioning that in the contract, specifically in clause 25, sixth paragraph of the contract, it was of the contract states the following:

> **“Clause 25 Subcontracting.**
>
> Notwithstanding any subcontracting, the CONTRACTOR is and shall be solely responsible for the obligations of the Contract. The Subcontractors shall not have any action or right to be asserted against PEP, therefore the CONTRACTOR is obligated to hold PEP harmless from any lawsuit or claim of any type, including those of a labor nature, that may be filed by the Subcontractors for the performance of the Works related to the contract.”

From the above transcription, it is obtained, in what is of interest, that the parties agreed in the aforementioned clause that notwithstanding any subcontracting, the CONTRACTOR would be the sole responsible for the obligations of the Contract; therefore, since according to Article 1832 of the Federal Civil Code, each one is obligated in the manner and terms that they it appears that they intended to bind themselves, i.e., the parties must be bound by what they agreed to, therefore, this clause must be observed.

In view of the foregoing, having failed to prove the main claims that were claimed from the claimant, neither can the claims for the accessory benefits consisting of the financial expenses and the legal expenses and costs, since they have the same fate.

Therefore, it is concluded that the claimant did not prove its action and the defendant proved its exception consisting in the lack of a cause of action to sue, therefore, the defendant must be acquitted of all claims.

EIGHTH: The following resolutions are issued:

FIRST: The way in which the matter was processed is appropriate.

SECOND: The Claimant did not prove its action and the Respondent proved its exception, therefore, the defendant is acquitted of the claimed pretensions.

THIRD: The payment of costs is absolved.

NINTH: Finally, since the present matter does not fall within the circumstances regulated by Articles 7 and 8 of the Federal Code of Civil Procedures, no special condemnation in costs is made in this instance.

TENTH: It is ordered to send a copy of this resolution to the Tenth Collegiate Court in Civil Matters of the First Circuit, in order to prove that it complied in its terms with the amparo judgments issued on February eighth, two thousand nineteen, in the trials of direct amparo 425/2018 and 426/2018.