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The New Regime Of Contracts With Mexican Oil & Electricity State Entities *By Marco Tulio Venegas*

Currently, in Mexico, there is a legal system collision between public law and private law. Global free market economic trends have put many activities previously jealously reserved by law to the Mexican state into private investor hands; thus generating an apparent private versus public law conflict. With this dynamic, contracts that allow investors to invest in vital areas of infrastructure development—such as oil and energy—from which they were excluded 15 to 20 years ago, have increased exponentially.

In fact, the Mexican government has formulated a strong policy in favour of development through infrastructure works has been economically successful under this legal regime, and public works now include the building of dams, off shore oil rigs, oil refineries, gas pipelines, wind energy parks, hydroelectric plants, electricity generation agreements, fuel supply agreements, among others. In this context, a much publi-

cised legal reform in the oil & gas and electric energy sectors which will eliminate all the prior restrictions for private investment (either national or foreign) is on the way in the Mexican Congress.

Arbitration has been caught in the middle of this private v. public law struggle. Arbitration with public entities raises the issue of the so-called “double personality” of public entities. In this respect, Mexican administrative law is ambivalent with respect to the role of governmental agencies during the contracting, execution and termination of a public works contract. Such ambivalence manifests itself in different ways, but without a doubt the most complex consists on the state entities’ power to transform the legal nature in which they participate in a contract: Mexican public entities and companies are legally capable of transforming themselves from a private entity into an authority and unilaterally modifying the rights, obligation



and legal status of a public contract, under the administrative rescission.

Mexico’s laws have only recently allowed arbitration agreements to be incorporated into public contracts. Traditionally, Mexican laws did not provide the possibility of public contracts arbitration agreements. Mexico has gradually changed its economic landscape towards a free market orientation. This has affected the dispute resolution regulations concerning public contracts laws, thus opening the door—albeit not completely—for arbitration.

Prior to the recent reform in the electricity, oil & gas sectors, any contract between the governmental bodies in charge of those areas (Petróleos Mexicanos – PEMEX- and the Federal Commission of Electricity –CFE-) could be subjected to arbitration, but any dispute concerning the administrative rescission of that particular contract would be excluded from it. The above restriction adopted the position that the administrative rescission of a public contract or its early termination by PEMEX or the

CFE was an administrative resolution which should be deemed as a governmental decision and not merely as a contractual decision. Therefore, in the event that a private party was not satisfied with the rescission or early termination of the contract, it must have challenged the resolution through an administrative procedure before the relevant governmental entity, or before the federal administrative courts and tribunals, or even before a federal court in an amparo procedure. The interaction of this judicial or administrative procedure before a state court with an arbitration clause resulted in several cases in the undesired scenario of parallel litigation.

Taking into account the above problems, the initiative that is being discussed in the Mexican Congress considers PEMEX and CFE as “productive entities of the State”. The new characterisation of these public entities has the practical effect of eliminating the existing dilemma about the nature of the contracts they execute with private parties. Indeed, the reform estab-





lishes that these contracts will be considered of private nature and will be subjected to the Commerce Code, and not to the existing laws of public procurement.

Consistent with the above, the reform also establishes that the referenced contracts could be subjected not only to arbitration, but to any alternative dispute resolution method that the parties may agree to.

Although this reform to the energy sector of Mexico is still pending to be approved in the Mexican Congress the political forecast is that it will be approved, leading the way to the opening of private investors. We consider that the man-

ner in which the reform regulates the contracts that CFE and PEMEX will execute with private parties finally resolves the existing contradiction about their public v. private nature. Now, it is undisputable that said agreements will be deemed as private and commercial contracts, eliminating any uncertainty and confusion about the rights and obligations of the parties, and eliminating as well any doubt about the arbitrability of the disputes arising from them. Moreover, it is also worth noting that the Mexican State has taken the conscious decision of allowing not only the arbitration of these type of contracts, but also the possibility of submitting it to dispute boards, mediations and any other ADR's.

Marco Tulio Venegas is a Member of the Mexican Bar Association and the Young Arbitrators Forum of the Mexican Chapter of the ICC. He is also Vice-Chair of the Mexican ICC Committee of Dispute Resolutions in Construction Disputes.

Currently, Mr. Venegas is the partner in charge of the litigation and arbitration area of the firm Von Wobeser y Sierra, S.C. and is in charge of the International Commercial Arbitration and Investment Arbitration cases, as well as of the Administrative and Intellectual Property Litigation, Civil and Commercial Litigation; Constitutional Litigation.

Mr. Venegas' experience includes the participation in the largest commercial arbitration (considering the amount claimed) in Mexican history as representative of the party who prevailed in the case. In addition, Mr. Venegas has participated as counsel in five arbitrations related to construction disputes involving private parties and governmental entities.