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International Arbitration on Oil Stock Purchase Agreements, Prepaid Oil Agreements and Gas Projects within Latin America

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The need to attract foreign oil & gas investment due to the current low price in Latin American countries is creating an environment were once non-friendly arbitration jurisdictions are increasingly accepting international arbitration clauses for complex landmark deals. This trend is being used within Stock Purchase Agreements of Mixed Oil Companies, Prepaid Oil Agreements when the financing comes from Chinese banks and on Agreements for the Development of Offshore Gas Projects.

First, in some countries private participation in upstream hydrocarbon activities as well as "primary activities", is only possible through joint ventures in which the State has more than 50% equity ownership (the "Mixed Company"), and therefore decision-making control. The rest of the shares can be acquired by private international oil companies. However, issues might arise with the closing of the transaction, if for example one of the parties does not complete the sale and purchase of the shares according to the Stock Purchase Agreement (the "SPA"); if the buyer does not pay the purchase price in accordance with the established installments to complete the full purchase price of the SPA, or if any of the post actions after signing the SPA are not completed, which can include the consent of the Ministry of Oil to the sale.

Disputes under the SPA are generally solved pursuant to the UNCITRAL Arbitration Rules. The Secretary General of the Permanent Court of Arbitration in The Hague has the appointing authority. In some cases, there are fork in the road clauses, if the buyer of the stocks begins court proceedings in the country were the stock purchase was made he is prevented to pursue an international arbitration claim.

If there is a common question of law or fact in connection with the SPA or any other acquisition document, the same arbitrators shall be appointed in relation to such disputes. Moreover, the Parties may add to the SPA the consolidation of disputes, were a related dispute and an existing dispute are consolidated through a "Consolidation Order" before the arbitral tribunal.

Second, state owned oil companies are increasingly using prepaid oil agreements in order to guarantee financing for oil projects. In this type of agreement, the trader prepays, the oil producer with a lump sum, and the oil producer then repays that sum with hydrocarbons. The prepaid amount bears interest at base rate plus a margin.

With respect to each delivery of oil, generally the national oil company shall irrevocably inform the purchaser in writing the payment currency, expected loading quantity, expected loading date and expected payment date. In the event that the oil company increases the barrels of oil delivered, the purchaser undertakes to purchase such additional barrels and to make payments in respect of the additional barrels delivered.

A dispute could arise if the state-owned oil company fails to meet the daily oil exports to the trader or if the national oil company assigns, transfers, novates and/or dispose of to any person any interest in or any rights and/or obligations under the prepaid oil agreement. Usually, the dispute resolution clause is subject to the UNCITRAL Arbitration Rules in effect at the time of termination of the agreement. The administrative center is the Singapore International Arbitration Centre ("SIAC") in accordance with its practice rules and regulations.

Finally, on major natural gas projects, for the exploitation and development of off-shore gas reservoirs, block licenses are granted by the Ministry of Oil & Gas. In order to ensure the economically viable development of such hydrocarbons, joint ventures are created in which private oil companies own the majority of the shares.

In this type of projects there is an evaluation of gas reservoirs, the terms of the license are negotiated with the Ministry of Oil & Gas, in many of these licenses there is a mandatory bono award which is negotiated between the Ministry and the private oil company, the term of the license is established, the program development of the blocks is set, the royalties required by the Ministry and the exoneration of windfall profit taxes. Usually, international private companies have the exclusive right to commercialize at its sole discretion their production quota in the international markets.

Controversies might arise if the Ministry requires the private oil company to commercialize its production quota in the national market, if the royalties required by the Ministry are not compliant with the agreements and if the tax authorities start charging windfall profit taxes in the case of a sudden rise of gas prices. On the other side, the Ministry could also prompt a dispute if it determines that the private oil company did not follow the program development of the blocks. Usually, the dispute resolution clauses for these projects are under the International Chamber of Commerce ("ICC") Rules of Arbitration, in which the parties also agree to waive their right to resort to other fora for dispute resolution.

Consequently, private oil companies investing in Latin America require international arbitration clauses to safeguard their investment on major projects and state-owned oil companies together with the Ministries of Oil are increasingly giving their consent to attract foreign investment.

**The views contained in this article only express a personal scenario on possible international arbitration trends.*

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