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Time For A Mexican “Procuración” To Litigate Its Arbitrations?

Victor Ruiz (Von Wobeser y Sierra, S.C.) · Wednesday, May 23rd, 2012

For almost 20 years, Mexico has been at the forefront of Latin-American arbitration practice. It has been widely recognized both in terms of the quality and sophistication of its practitioners, its modern legal framework (since 1993 based on the UNCITRAL Model Law on International Commercial Arbitration) and for its arbitration friendly judiciary.

According to statistics published every year by the International Chamber of Commerce, Mexico (alongside Brazil) is one of the most frequent Latin-American nationalities present in ICC arbitration proceedings. Just in 2010, there were a total of 62 Mexican parties (business entities or individuals), in a total of 23 arbitrations, Mexico City was the place of arbitration in 13 cases and a total of 24 Mexican arbitrators were either confirmed or appointed by the ICC Court. The statistics for 2011 are equally surprising.

More surprising however, is that over the last four years, more than 14 ICC arbitrations involving Mexican parties, involved a Mexican state entity either as Claimant or as Respondent. It is well known that the state owned oil & gas company PEMEX (Petróleos Mexicanos) and power giant CFE (Comisión Federal de Electricidad) are Mexico’s most recurrent users of arbitration, ICC arbitration in particular.

While the CFE and PEMEX are not the only state entities to include arbitration provisions in their contracts with private parties, the involvement of other state entities in arbitral proceedings has been less significant than that of the CFE and PEMEX. The reason behind this is that their “organic laws” were the only laws that provided for the possibility of arbitrating their disputes with private parties. This will, however, change in the short term in light of recent reforms to the Mexican Public Works Law and Public Procurement Law as well as the January 2012 enactment of the Public-Private Partnerships Law. The reforms and the new law now expressly open arbitration to all public works contracts and to all long term service contracts with the federal government.

The move confirms Mexico’s clear policy in favor of arbitration and promises to increase its use for resolving disputes arising out of public contracts. There is no doubt it will. The question is whether the Mexican government and its state owned entities will be prepared, well trained and organized to deal with arbitration proceedings under their respective contracts.

Both the CFE and PEMEX have their own legal departments, composed of lawyers specializing in public procurement, energy, oil & gas, construction and administrative law, all of which have

gained experience in arbitration practice, in light of their frequent involvement in such proceedings. In reality, almost all of the arbitrations are handled solely by their staff attorneys, rarely employing outside counsel to assist them. However, due to the particularities of Mexican politics, it is not uncommon to see a particular government office or state entity change heads in brief periods of time (sometimes in less than a year, sometimes every presidential term), thereby affecting the composition of the legal teams, their continuity and strategy.

While the CFE has been able to maintain the permanence of its legal department for the past ten years or so and has thus assured continuity in its representation and defense, each division of PEMEX (at least three) has its own separate legal department that independently deals with the arbitrations filed by the division or against it. These legal departments have high turnover rates as team leaders change more often than not and there is no uniform approach and strategy in their arbitrations. Moreover, the interaction between the legal departments is scarce, leading to deficient coordination and affecting the appropriate representation of the state entity.

The range of activities in which CFE & PEMEX are involved and the overwhelmingly complex disputes that arise out of their contracts with private parties, require a high level of specialization from state attorneys. Moreover, the amount of arbitrations filed in a year, the reforms and laws expressly opening the road for arbitration of state contracts, the existence of several legal departments working independently from one another and the fact that such work generally overlaps because of the similarities among the factual and legal scenarios present in state contract disputes, begs the question of whether Mexico should consider establishing a specific, self-contained unit for the representation of its government and state owned entities.

In the same way as Argentina has its *Procuración del Tesoro de la Nación*, which is mostly known for its highly specialized group of lawyers representing the government and its state owned entities in arbitrations filed before ICSID and the ICC Court, Mexican policy makers and legislators should consider the benefits of creating a Mexican *Procuración*, especially now in the wake of the upcoming presidential and legislative elections.

The achievements of Argentina's *Procuración del Tesoro de la Nación* can be measured by the consolidation of a team of lawyers vastly specialized in handling complex disputes involving issues of public and private international law, construction law, energy law and that are dedicated to serving their country by defending it in high-profile cases. The coordination among Argentina's lawyers and their sophistication in tackling the most complex legal issues is impressive.

Although Mexico has had its share of investment disputes and has been remarkably represented by a group of lawyers within the Ministry of Economy, its docket is mostly composed of a significant number of international arbitrations that involve its most important state owned entities. The amounts in dispute in these cases frequently exceed seven and, sometimes, even eight figures. While the need for a self-contained unit for the representation of the Mexican government and its state owned entities such as Argentina's *Procuración* may not seem obvious, considering the unquestionable benefits of coordination and specialization amongst legal staff and the efficiency that such coordination promotes, a harmonized team for the defense of the Mexican government would be more efficient, less costly and would potentially increase its success rate.

With 2012 being an election year in Mexico, some of the candidates running for the presidential office have mentioned their intentions to create a Ministry of Justice. Whether a unit for the representation of the Mexican government and state entities is clinged to a future Ministry of

Justice or whether it is incorporated within an existing structure, is something to be carefully considered and evaluated. What is certain is that in order to avoid the idiosyncrasies of Mexican politics and to assure its independence from political maneuvers, internal liability matters and budgetary restraints, a specific, self-contained unit for the representation of Mexico and its state entities would ideally have financial independence and autonomy from the central government in its decision making process. Such independence and autonomy would assure the continuity of the strategies employed in Mexico's defense, would guarantee the specialization and permanence of its members and would undoubtedly lead to significant savings.

The representation and defense of Mexico and its state owned entities is a question of public interest. Considering Mexico's clear policy in favor of arbitration, the number of arbitrations filed and the stakes involved (the Mexican people's assets and property), isn't time we start contemplating the advantages of a Mexican *Procuración*? A *prima facie* evaluation of the benefits illustrates its promise; the question is whether government will foster the idea.

**Victor M. Ruiz is a member of Von Wobeser & Sierra, S.C.'s litigation and arbitration practice in Mexico City. Prior to joining Von Wobeser y Sierra, S.C., Victor was a Deputy Counsel at the ICC International Court of Arbitration (A lengthier version of this note co-authored with Marco Tulio Venegas will be published shortly)*

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