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Five Take-Aways From Bracewell Seminar on the Strategic Use of International Arbitration and Mexico

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International arbitration, when available and used strategically, adds leverage, especially in dealing with a government. Qualifying foreign investors in Mexico affected by the changes in the regulatory environment promoted by President Andrés Manuel López Obrador (AMLO) for subcontracting/outsourcing and the electricity & power industry are well advised to consider their options. The hydrocarbons and fuels sectors are expected to be similarly affected.

On February 11, 2022, Bracewell hosted a seminar on the "Strategic Use of International Arbitration and Mexico." Moderated by **Martin F. Gusy**, who heads the firm's international arbitration practice, the panel included Bracewell partners **John Gilbert** and **Manuel Vera**; **Steven K. Anderson**, vice president of the American Arbitration Association's International Centre for Dispute Resolution (AAA-ICDR); and **Manuel Cervantes**, managing director of MCM Abogados in Mexico.

Here are five key takeaways on international arbitration as well as the situation in Mexico:

1. **Disputants who prioritize specialized decision-makers and confidentiality may wish to pursue arbitration.** Arbitration may be an optimal choice, particularly in sectors that require specialized knowledge and expertise. While parties cannot choose their court judges, they can choose their arbitrators. When expertise is essential in resolving disputes, such as in the energy and IP fields, parties may wish to consider arbitration. The confidentiality of the proceedings is another advantage of arbitration, especially for parties wishing to preserve their business secrets and relationships. While litigation may be made private as well, its existence may still be discovered. Courts may be reluctant to seal records or close off the proceedings. That said, even in arbitration, parties should specifically agree to confidentiality and note that institutional rules may differ in this regard.

2. **Arbitration may complement other dispute resolution mechanisms, such as litigation and mediation.** Parties should consider the strategic use of arbitration in conjunction with other dispute resolution mechanisms. For instance, mediation may be used early on, as this is usually when parties are keen to resolve their disputes. In addition, US-style litigation may allow for the unearthing of evidence of fraud or fraudulent intent that

would not otherwise be accessible. On this note, however, there are cases where litigation and arbitration may be mutually exclusive. Where that is the case, the parties' strategic choice of one over the other dispute resolution mechanism becomes even more important.

3. **Foreign investors in Mexico should be vigilant in protecting their rights.** While the subcontracting and outsourcing regulatory changes appear to have resulted in companies' acceptance and implementation compliance without much push back, foreign investors in Mexico in the electricity and power sectors vigilantly observe AMLO's every move, especially if the next election will result in AMLO's Senate majority rising to the power of constitutional changes. While the hydrocarbons and fuels industry is not expected to remain untouched, new regulatory frameworks need to be closely monitored. Aimed at reducing the participation of independent public producers and reestablishing State control over the energy sector, the proposed reforms, if adopted and once implemented, would revolutionize the energy sector and severely impact foreign investors' rights. Nevertheless, foreign investors in Mexico could already start undertaking protective measures – such as tracking data and safekeeping evidence, keeping key potential witnesses as employees and monitoring the relevant deadlines – in order to preserve their rights and increase their leverage through legal action.

4. **Recourse of Canadian and US investors in Mexico to the USMCA and NAFTA may be time sensitive.** Canadian and US investors in Mexico may be able to resort to international arbitration under the USMCA and NAFTA for the vindication of their rights. While NAFTA is now terminated, Chapter 11 of NAFTA (which contains the treaty's investor-State dispute resolution procedures) remains accessible for so-called "legacy investments" until July 2023. This is especially important for Canadian investors, as Canada has not signed on to the investor-State dispute settlement (ISDS) procedures of the USMCA. The ISDS regime of NAFTA is more favorable than the USMCA to investors without so-called "covered government contracts" in the five covered sectors of oil and gas, power generation, telecommunications, transportation, and infrastructure. Under the USMCA, foreign investors holding "covered government contracts" are able to pursue claims based on a wider array of substantive rights and are also exempt from certain requirements as a prerequisite to initiating arbitration. The foreign investors concerned should keep abreast of all rights available to them under the USMCA.

5. **Restructuring of foreign direct investment in Mexico may open alternative pathways and additional substantive rights.** Investment promotion and protection treaties Mexico is a party to other than NAFTA and the USMCA, once accessible due to corporate restructuring, may provide additional pathways for foreign investors' vindication and enlargement of enforceable substantive rights. Foreign investors in Mexico in particular that do not have a "covered government contract" under the USMCA may need to explore alternatives to pursue claims and protect their rights against Mexico. Obtaining access to other international investment agreements to which Mexico is a party, however, must not result in treaty shopping.