

# Querétaro



Décimonovena Reunión  
del Comité Consultivo de  
Controversias Comerciales Privadas

## MINUTES

**SE**

SECRETARÍA  
DE ECONOMÍA

Juriquilla  
del 11 al 14  
de Septiembre  
del 2009



# **MINUTES**

## **Nineteenth Meeting of the NAFTA Advisory Committee on International Private Commercial Disputes Querétaro, México September 11-14, 2009**

On September 11-14, 2009, the following members of the NAFTA Advisory Committee on Private Commercial Disputes held a meeting in Querétaro, México, in order to discuss and exchange information regarding the resolution of private commercial disputes:

**Canada:  
Government Co-Chairs:**

Matthew Kronby  
Cecilia Delfino

**Committee Members:**

Frédéric Bachand  
Kevin Banks  
Glenn Sigurdson

**United States:  
Government Co-Chairs:**

Keith Loken  
Trish K Smeltzer

**Committee Members:**

Kevin O'Shea  
Dana G. Nahlen  
James E. Nelson  
Bob Lutz  
Philip A. Robbins  
Mariana Silveira  
Dana Haviland  
Lorraine M. Brennan

**Mexico:  
Government Co-Chair:**

Mariano Gomezperalta Casali  
Aristeo López Sánchez

**Committee Members:**

Julián Treviño  
Elsa Ortega  
Cecilia Azar  
Leonel Pereznieto  
Carlos McCadden  
Carlos Loperena  
Alejandro Ogarrio

### **I. Welcome & Introduction.**

Mariano Gomezperalta, Mexican Government Co-Chair, welcomed the twenty-three members set forth above and outlined the agenda for the meeting. Mr. Gomezperalta explained that the first and second days would be devoted to holding Subcommittee meetings and writing general reports, whereas the third day would consist mainly of activities organized by the *Asociación Nacional de Abogados de Empresa* (or "ANADE" by its initials in Spanish).

It was noted that, in order to provide more time for activities that the Members were interested in, the agenda excluded discussion of reports regarding dispute settlement mechanisms under the World Trade Organization, NAFTA, Bilateral Investment Treaties and Free Trade Agreements.

The Government Co-Chairs thanked Mexico for the organization of the meeting and set forth their confidence in obtaining positive results from it.

## **II. Report on the NAFTA Committee Website (See Annex 1).**

Several updates had been put forth in the Committee website. The updates included minutes and information concerning institutions on arbitration and mediation.<sup>1</sup> It was also noted that there would be new additions to the Committee website, such as information provided by the Subcommittee of Legal Issues.

The importance of increasing the visibility of the 2022 Committee was emphasized. Keith Loken (U.S. Co-Chair) suggested that each government should incorporate information about the Committee in its corresponding website.

Members drew attention to the importance of further increasing the awareness and understanding of ADR by judges in the NAFTA region.

## **III. Reorganization of the Subcommittees.**

Members introduced themselves and were organized in different Subcommittees.

It was noted that all members should be aware of the functions and structure of each Subcommittee.

## **III. Updates on Current Legal Developments in Each Country (the full reports of the following presentations are available at the NAFTA 2022 website, <http://www.nafta-adr.org/> – Member Reports).**

### ***a. By Mexico: Cecilia Azar. (See Annex 2).***

It has been sixteen years since the incorporation in the Mexican Commercial Code of the UNCITRAL Model Law on International Commercial Arbitration. In Mexico, the most prestigious institutions in charge of administration of arbitral proceedings are the National

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<sup>1</sup> <http://www.nafta-adr.org/>

Chamber of Commerce in Mexico City (*Cámara Nacional de Comercio de la Ciudad de México* or “CANACO”), the Arbitration Center of Mexico (*Centro de Arbitraje de México* or “CAM”) and the Mexican Institute of Arbitration (*Instituto Mexicano del Arbitraje* or “IMA”).

The knowledge and practice of mediation has been increasing on a regular basis. In Mexico, there are 20 local laws on court-annexed mediation (*leyes de justicia alternativa*) and there are court-annexed mediation centers (*centros de justicia alternativa*) adjoined to High Judicial Courts in 22 states of Mexico. Although there is no federal legislation on mediation, a bill based on the UNICTRAL Model Law on International Commercial Conciliation has been submitted to the Mexican Federal Congress.

Ms. Azar also provided an update on legal developments on arbitration in Mexico. The Law on the Public Sector Acquisitions, Leases and Services (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*) and the Law on Public Works and Related Services (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*) were amended so that arbitration may be only used to solve disputes derived from the execution of the contract or from the interpretation of clauses included in it. Further amendments to such laws provide that, upon issuance of certain provisions by the Public Function Ministry, other alternative dispute mechanisms may be resorted to.

Pursuant to amendments to the Law on Enterprise Chambers and their Confederations (*Ley de Cámaras Empresariales y sus Confederaciones*), Chambers and Confederations are now required to include alternative dispute mechanisms in their by-laws.

Ms. Azar also set forth recent developments to Mexican case law, mainly with regards to the following topics:

- Limitation of the arbitral jurisdiction;
- Nullity of arbitral awards;
- Substitute compliance of arbitral awards;
- Recognition and enforcement of arbitral awards; and
- Assistance from courts in the taking of evidence.

Remarkably, the Supreme Court of Justice in Mexico in an *erga omnes* decision ruled that the *amparo indirecto* is applicable against decisions that terminate an arbitral award nullity suit.

***b. By United States: Prof. Robert E. Lutz.***

Professor Robert Lutz discussed U.S. developments of a domestic law nature and those that are transnational or may have an impact on cross-border dispute resolution in the following categories:

- (1) Significant Federal and State Legislative Developments;
- (2) State and Federal Judicial Developments; and
- (3) Activities of Organizations and Institutions

**Significant Legislative Developments**

**Federal-**

*Arbitration Fairness Act of 2009.*

This proposed legislation (not yet enacted) would apply to consumer disputes with mandatory ("forced") arbitration clauses that are included in a contract (e.g., employment, cell phone, credit card, retirement account, nursing home contracts). It would ban provisions requiring arbitration in employment, franchise, or consumer disputes and disputes arising under any statute intended to protect civil rights and would amend the Federal Arbitration Act (FAA) by amending Section 2 of Chapter 1 of the FAA.

*Related Developments*

Minnesota's Attorney-General sued NAF (one of the U.S.'s largest arbitration and mediation service providers) alleging that it fraudulently misrepresented its neutrality by not disclosing its ties to the debt-collection industry. The American Arbitration Association (AAA) quickly announced that it would stop accepting consumer debt collection cases, and the Bank of America ceased its practice of requiring customers to resolve disputes by "forced" arbitration.

**State-**

*Birbrower and Cal. CCP 1282.4*

In response to the famous California Supreme Court decision, California Rules of Court and the state's Code of Civil Procedure were amended, but the amendments did not extend out-of-state lawyer access to include "foreign" (non-U.S.) lawyers. Efforts to revise the applicable provisions to do so is being led by the San Francisco Bar Association's International Law Section.

*Hague Choice of Court Convention*

Work has been undertaken by the Uniform Law Commission to propose a uniform law for state adoption, which would be used to implement this non-self-executing convention in the U.S. states.

## **Federal and State Judicial Developments**

### **U.S. Supreme Court-**

*14 Penn Plaza LLC, et al. v. Steven Pyett, et al.*

The Supreme court held that provisions in a collective bargaining agreement that clearly and unmistakably required union members to arbitrate claims arising under the Age Discrimination in employment Act of 1967 were enforceable as a matter of federal law. It reasoned that the clause was freely negotiated in good faith by the union and labor relations advisory board and the agreement's language was clear.

### **Certiorari Granted-**

*Union Pacific R.R. v. Brotherhood of Locomotive (7<sup>th</sup> Cir.)*

This case involves the National Railroad Adjustment Board's denial of employee grievance claims for failure to comply with its rules governing proof that had been submitted to a "conference" between the parties. The Seventh Circuit held that the award must be set aside because the Board violated due process through retroactive recognition of a supposedly "new rule."

*Stolt-Nielson*

The USSC will consider whether, consistent with the FAA, parties can be sent to arbitration when the arbitration clause is silent on the issue. The Court of Appeal's decision also kept alive the "manifest disregard" defense/

### **Other Courts-**

*The First and Fifth Circuits*

Recently acknowledging the existence of "manifest disregard" as a standard for *vacatur*, these Circuits are still torn as to whether it is an extra-statutory ground for review or whether it refers collectively to grounds set forth in the FAA Art. 10.

### **Discovery Matters-**

*Non-Party Discovery*

Courts have split as to whether pre-hearing discovery can be obtained, despite what appears to be fairly clear language requiring some kind of hearing to do so: "Arbitrators may summon in writing any person to attend before them or as a witness and...to bring any documents." 9 U.S.C. Section 7.

*28 U.S.C. Section 1782*

With respect to this section, a U.S. federal district court is authorized to compel persons in their districts to provide testimony or produce documents “for use in a proceeding in a foreign or international tribunal.” In dicta, a 2004 USSC decision approvingly stated that “tribunal” includes “arbitral tribunals”, but district courts that have recently been asked to apply this law have not necessarily accepted that interpretation.

### **Organizational/Institutional Activities**

The report reviewed developments of interest involving the International Chamber of Commerce (Task Force on Production of Electronically-Stored Information), the American Law Institute (project on the law of international arbitration), the American Bar Association (ABA Commission on Ethics 20/20, ABA Section of Legal Education’s International Legal Education Committee work, ABA Section of International Law on Outsourcing), and the Asia-Pacific Economic Cooperation (“Legal Services Initiative”).

#### ***c. By Canada: Frédéric Bachand.***

Professor Frédéric Bachand discussed several issues and Canadian case law regarding arbitration, mainly with regards to the following topics:

- Enforcement of arbitration agreements;
- Recognition and enforcement of arbitration awards;
- Court intervention during arbitral proceedings;
- Judicial review of arbitrator’s jurisdictional rulings; and
- Confidentiality.

Professor Bachand pointed out that when Canadian courts hear a dispute, the information pertaining the dispute at issue becomes public (except for the information that is not disclosed per a confidentiality order).

### **V. Possible Mechanisms for On-line Dispute Resolution for Consumer Transactions on the Internet (Kevin O’Shea, Dana Haviland and Mariana Silveira).**

Access to internet and new technologies has been increasing all around the world. Likewise, replacement of paper documents by electronic documents and communications is becoming significantly more common. Consequently, resolution of disputes on-line has become more important.



In Latin America the online resolution of disputes has been developing, particularly in the sectors of consumer transactions and information technology. For example, in Argentina and Chile the submission of complaints or requests for information can be made by e-mail. Likewise, submission of electronic forms for filing requests for arbitration or conciliation is a possibility in Bolivia, Brazil, Jamaica and Panama, while in Costa Rica negotiations and conciliations are sometimes held by telephone. In Peru, conciliation and arbitration proceedings can be conducted online. In Mexico, online conciliations are possible and CAM has several on-line dispute resolution projects.

The following are characteristics of on-line dispute resolution:

- Costs are lower than in traditional proceedings.
- Websites are usually confidential and secure.
- Parties in the proceeding have access to relevant documents on-line (including evidence).
- Judgments tend to be more brief and concise than traditional proceedings.

## **VI. Reports from Subcommittees.**

The Legal Issues Subcommittee reported that it had drafted for adoption by the 2022 Committee a resolution to be presented to the Free Trade Commission at its upcoming meeting. The resolution was:

### **“NAFTA 2022 ADVISORY COMMITTEE ON INTERNATIONAL PRIVATE COMMERCIAL DISPUTES**

#### **RESOLUTION AND BACKGROUNDER**

**Recognizing that the availability of effective private commercial dispute resolution procedures play an important role in furthering the liberalization of trade in goods, services and capital;**

**and**

**Further recognizing that the judiciaries of each country are essential to ensuring the effectiveness of private commercial dispute resolution procedures;**

**BE IT RESOLVED THAT the Free Trade Commission encourages and endorses efforts by the NAFTA 2022 Advisory Committee on Private Commercial Disputes to cooperate with the judiciaries of each country to discuss best practices in implementing alternative dispute resolution mechanisms in the Free Trade Area.”**

The Committee supported submitting the draft resolution to the FTC through the government co-chairs.

The Legal Issues Subcommittee further indicated it would take on the following additional projects for the coming year:

- 1) Prepare a 15-year Retrospective on the Work of the 2022 Committee for submission to the FTC in 2011.
- 2) Continue to present an Annual Report of Developments in ADR in each of the NAFTA countries and submit the report for publication on the 2022 website.
- 3) Work with the Outreach Subcommittee to produce judicial educational programs (specifically design curriculum and materials) in each of the NAFTA countries addressing the special roles the judiciaries have in promoting and supervising ADR.
- 4) Other projects as requested or determined by the Committee.

The Outreach Subcommittee reported on its two principal activities: 1) ongoing development of the 2022 Committee website; and 2) the organization and delivery of targeted outreach programs, particularly to the small and medium-sized business communities (and to a lesser extent the legal communities) in the NAFTA region.

The Outreach Subcommittee will continue to update information contained on the website and upload new materials — including cases, laws, regulations, conventions and model laws – and will publish the country reports on “Annual Legal Developments” produced by the Legal Issues Subcommittee. It will also coordinate with the Legal Issues Subcommittee to develop protocols/guidelines for the evaluation of future additional articles for potential inclusion on the website from members of the Committee and sources outside of the Committee.

The Outreach Subcommittee will also continue to prepare and deliver outreach programs, which could include either panel presentations to the business/legal communities or judicial workshops. The goal is to have a minimum of three outreach workshops a year,

with at least one workshop in each country. In coordination with the Legal Issues Subcommittee, the Outreach Subcommittee will also plan an outreach program for the next Committee meeting in Houston.

## **VII. Round Table with ANADE.**

This round table was chaired by Lorraine M. Brennan (U.S. member), Glenn Sigurdson (Canadian member), Elsa Ortega (Mexican member), James Graham (ANADE), and Carlos McCadden (ANADE).

Lorraine M. Brennan addressed topics regarding alternative methods of dispute resolution. Among other issues, Ms. Brennan compared the advantages and disadvantages of litigation, arbitration and mediation, and also highlighted the differences between institutional and *ad hoc* arbitration.

Glenn Sigurdson likewise discussed ADR mechanisms and related principles, and compared mediation *vis-à-vis* adjudication.

Elsa Ortega drew a distinction between alternative methods of dispute resolution that are *autocompositivos* from those that are *heterocompositivos*. Ms. Ortega also set forth the legal framework for mediation and arbitration in Mexico.

## **VIII. Local ADR: an Example, by Mario Reyes Retana Popovich.**

Mr. Mario Reyes Retana Popovich, a lawyer who renders professional services in the city of Querétaro, put forth a presentation regarding the use of ADR in Querétaro.

In relevant part, Mr. Reyes Retana informed that under the Code of Civil Procedure of Querétaro parties can enter into an arbitration agreement and consequently submit their disputes to arbitration. However, he pointed out that in Querétaro not all matters (such as those related to marital status) can be settled by means of arbitration.

Mr. Reyes Retana further noted that arbitrators are always obliged to accept and duly take into consideration evidence and arguments put forth by the parties. The award shall be signed by the majority of arbitrators. The binding character and validity of an award will not be affected if one arbitrator refuses to sign the award.

## **VIII. Closing Remarks.**

Mexican Co-Chair, Mariano Gomezperalta, thanked the members for their attendance and participation. The U.S. Co-Chairs announced that the next meeting will take place in Houston, Texas.