

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

### **Minutes of the 21<sup>st</sup> Meeting of the Committee Ottawa, Ontario -September 26-27<sup>th</sup>, 2011**

Sheraton Hotel – Ottawa, Ontario

The meeting was preceded by an evening reception on Sunday, September 25<sup>th</sup> hosted by Canada at the Department of Foreign Affairs and International Trade. In advance of the meeting, attendees received a notebook including background materials.

#### **I. Welcome and Introduction by Canadian Chair (Matthew Kronby)**

Canadian government co-Chair Matthew Kronby welcomed the Committee members to Ottawa for the 21<sup>st</sup> meeting and introduced a new government member of the Canadian delegation, Reuben East. Members attending the meeting included three representatives from the Mexican delegation, seven members from the U.S. delegation and seven members from the Canadian delegation (the list of attendees is attached at Annex I). In outlining the agenda, Mr. Kronby noted that the meeting's intention was to discuss the continuing mandate of the Committee and to consider the possibility of a future work plan. As such, Canada decided to invite a facilitator (Alain Rabeau, Intersol) to assist the Committee in this process.

#### **II. Reports from the Sub-Committees**

##### **A. Outreach Sub-Committee (Philip Robbins)(US)**

Philip Robbins (US) reported on the Outreach Sub-Committee's behalf and began by reflecting on its role. Small & Medium-Sized Enterprises ("SME") remains a focus and is one of the Committee's three target audiences (the others being the judiciary and students). When the Outreach Sub-Committee contemplates an activity in the past it has asked itself the following questions: Is there a need? Is someone else already doing it? With no budget or administrative assistance, Outreach cannot put on conferences by itself. Instead, the subcommittee looks to an event that has already been planned and, along with assistance from the National Law Center (Tucson, Arizona), Outreach works with the hosts to provide a program to one or more of its target audiences. If the sub-committee had a budget and more people, it could offer programs virtually every week. The problem is implementation, given the resources available.

With respect to programs offered to the judiciary, the Outreach Sub-Committee has provided information to judges who are not generally accustomed to dealing with such issues as the enforcement of an arbitration award. Outreach has provided helpful information in this regard, particularly to new judges.

The most recent outreach activity related to the judiciary was a conference in Mexico City on May 12, 2011 in conjunction with the National Law Center and a judicial institute associated with the Mexican federal courts. The focus was Mexico's reforms on mediation

and arbitration and the role of judges in those instances where judicial assistance is required by law. The audience of fifty included members of Mexico's Federal District as well as in-house counsel and representatives of Mexico's bar associations. Panellists included members of the Committee from Mexico and the United States on a program focussed on cross-border arbitration. Members of the Mexican delegation organized the event and Mr. Robbins served as moderator. Going forward, Outreach plans to offer a program next year at the National Judicial Center in Reno, Nevada for new state court judges.

Mr. Robbins also reported on the status of the sub-committee's questionnaire submitted to the Committee in respect of the future direction of the Outreach Sub-Committee. Of the twelve responses received, there was unanimity that the outreach sub-committee should offer 1-3 programs in each country annually.

Barrett Avigdor (U.S.) suggested that sectoral arbitration initiatives could be developed by the Outreach Sub-Committee. As she noted, there are pressing problems in a number of sectors (e.g. trucking, banking and agriculture) that need to be addressed efficiently with limited expense. If ADR can be tailored to the needs of an industry, it can be that much more successful.

Members discussed the precedent of the NAFTA 707 Committee and the work NAFTA 2022 did to assist it in drafting ADR rules with respect to perishable goods. Selma Lussenburg (Canada) noted that the work of NAFTA 707 resulted in the establishment of the Fruit and Vegetable Dispute Resolution Corporation which is now self-sustaining. Keith Loken (US) noted that the terms of reference of the Committee allow NAFTA 2022 to work with other NAFTA committees, but that NAFTA 707 is no longer operating. Members discussed whether there would be support for a sub-committee to work with a particular sector — for example, trucking — to establish a work plan, assuming there is industry support for an initiative. Trucking was identified as a possibility as the National Law Center had already started some work in this regard. However, further study would be required to determine whether the basis of disputes is regulatory, or business-to-business. Members agreed to discuss sectoral ADR as a possible focus of the Outreach Sub-Committee going forward, following the presentation of the remaining reports.

## **B. Legal Issues Sub-Committee**

Since none of the members present were also members of the Legal Issues Sub-Committee, no report was delivered. However, members suggested that, based on last year's meeting in Houston, the Legal Issues Sub-Committee was to have worked with Outreach on a course outline for judicial training with a view to establishing a template for outreach programs going forward.

## **C. Additional Discussion: Minutes**

Members expressed a general concern about the timing of receipt of the Minutes as an impediment to sub-committee work in between the annual meetings of the Committee. Members agreed that the host government should prepare draft minutes and send to the other two delegations for circulation for comment as early as possible after the meeting. Carlos Véjar (Mexico) suggested that a list of tasks should be circulated in advance of the Minutes to assist the sub-committees in developing their work plans as early as possible.

### **III. Updates on Legal Developments in each NAFTA country**

#### **A. Report on ADR developments in Mexico (Carlos Véjar Borrego)**

Carlos Véjar (Mexico) reported on various developments on behalf of Cecilia Azar and Sofía Gómez Ruano who were unable to attend.

Mr. Véjar referenced a 2008 amendment to the Mexican Constitution requiring laws with dispute settlement provisions to include ADR procedures before he turned to an analysis of various ADR initiatives. The first initiative discussed was mandatory mediation. This initiative was unsuccessful because it was viewed as inappropriate by critics who argued that mediation is voluntary by nature, so that making it mandatory renders it ineffective. Another criticism of the initiative is the requirement for mediators to be licensed lawyers which has been criticized as unduly limiting the pool of candidates otherwise qualified for appointment. From the Mexican government's perspective however, licensed lawyers' familiarity with applicable statutes and regulations ensures that the process conforms to legislative requirements. The second initiative noted was a series of amendments made to the laws on "alternative justice" to move certain cases out of the courts to conciliation and mediation centres. This initiative was made by the High Tribunal of Justice in Mexico City. Centres of alternative justice are now widespread across Mexico, but their presence is not well-known. The third initiative discussed was an attempt to move criminal offences of adolescents out of the courts and into mediation. Again, the mediator must be a licensed lawyer, for similar reasons as previously noted.

Mr. Véjar then reported on several other developments, including the UNCITRAL Model Law of Conciliation, which has not yet been adopted. It is unlikely to be adopted in Mexico next year either, since the current government is in the final year of its mandate. Finally, there has been a consolidation of several procedures regarding the designation of arbitrators by the courts.

Jeffrey Talpis (Canada) asked what would happen under Mexican law if the parties required themselves to go to mediation (by a mediation clause in a contract) and then one of the parties attempted to use the courts. Would the court recognize the mediation clause? What are the chances of the clause being accepted in Mexico? Arbitration clauses are generally accepted in Mexico, but the same may not be the case for mediation clauses. The question generated a discussion of the practices in Canada and the United States. Mr. Véjar offered to take the question back to Mexico for further reflection. Members engaged in further discussion regarding the use of mediation to resolve commercial disputes in the NAFTA countries. Mr. Véjar also noted that private mediation is not well known in Mexico, and that reporting mediation data is a recent phenomenon. Ms. Lussenburg

(Canada) pointed out that, from her experience, mediation often takes place outside of a centre that keeps statistics. As such, use of mediation may be more widespread than the numbers suggest. William Horton (Canada) noted that the overall rate at which court cases settle seems to have remained virtually the same and many common law jurisdictions report that approximately 5% of all cases actually go to trial.

## **B. Report on ADR developments in Canada (Jim Redmond)**

Jim Redmond (Canada) reported on behalf of the Canadian delegation, focussing on the development of the principle of *kompetenz-kompetenz* in the Canadian courts since the Supreme Court of Canada decision, *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 (“Dell Computers”).

The first case noted was *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, a case originating in the British Columbia courts and dealing with consumer protection. The dispute involved an arbitration clause in a standard form consumer contract, which also required the Claimant (Seidel) to opt out of any class action against Telus. Seidel had initiated a class action regarding the meaning of “air time” and whether or not it included “ring time”. Telus applied for a stay of proceedings before the British Columbia courts, requiring the dispute to go to arbitration pursuant to the British Columbia *Commercial Arbitration Act*, which is based on the Model Law. In a 5-4 decision, the Supreme Court of Canada ordered that the stay of proceedings should be refused for all complaints arising out of the *British Columbia Business Practices and Consumer Protection Act*. In its reasons, the Court explained that absent the legislative exceptions that appear in this case, whether or not the arbitrator has jurisdiction over a matter should be a matter to be decided by the arbitrator (not the courts) and a stay of proceedings should be ordered. However, the courts may also decide if the matter before them is a pure question of law or a question of mixed fact and law with only a superficial consideration of the facts. Here, there was a pure question of law, as the nature of the legislation contemplated significant public interest. As a result, the Court refused to stay the part of the action relating to breaches of the consumer protection legislation. The Court held that the arbitration clause and the mandatory waiver of class action clause were ineffective, with regard to that part of the action thereby allowing Seidel to proceed with the class action to that extent.

The second case to consider *Dell Computers* and the principle of *kompetenz-kompetenz* noted was *Ontario v. Imperial Tobacco Canada Limited*, 2011 ONCA 525. The issue before the Ontario Court of Appeal was whether the motions judge erred by staying an application brought by the Government of Ontario in favour of concluding the arbitration process. The appeal raised the *kompetenz-kompetenz* issue and its application in light of the Supreme Court of Canada’s decision in *Dell Computers*. The Government of Ontario had brought an application before the Ontario Superior Court in light of a settlement of litigation between Imperial Tobacco and the government of Canada and the provinces. The settlement concerned an action brought against Imperial Tobacco and its subsidiaries for smuggling tobacco across the Canada-US border. Under the settlement agreement, Imperial Tobacco agreed to pay up to \$350 million to governments in annual payments over 15 years in exchange for a release from future actions.

Subsequently the Ontario Tobacco Growers' Marketing Board commenced a class action against Imperial Tobacco due to the effect of smuggling on the price of Tobacco for the relevant period. Claiming to rely on the provisions of the settlement, Imperial Tobacco gave notice that it would pay the settlement funds into an escrow account pending the resolution of the class action. The Government of Ontario brought an application to declare that Imperial Tobacco was not entitled to withhold payments. That application was dismissed by the motions judge so that the arbitration process in the Agreement could be followed. Ontario appealed the motion judge's decision on the basis that the dispute between Ontario and Imperial Tobacco doesn't fall within the arbitration clause. The Court of Appeal dismissed Ontario's appeal and upheld the motion judge's stay of Ontario's application and confirm the motion judge's referral of the parties to arbitration. It is noteworthy that the arbitration clause in the settlement agreement referred to the federal *Commercial Arbitration Act* which is based on the Model Law, rather than the provincial equivalent. In its decision, the Court of Appeal referred to *Dell Computers* for the proposition that a court may depart from the rule of systematic referral to arbitration if the challenge to the arbitrator's jurisdiction is based solely on a question of law, or on a question of mixed law and fact where the question of fact requires only superficial consideration of the documentary evidence in the record. The Court also referred to *Seidel v. Telus*, but unlike that case, it found no such legislative exception. Since there were no questions of pure law or mixed fact and law requiring only a superficial consideration of the documentary evidence, the Court of Appeal held that Ontario's challenge to the arbitrator's jurisdiction must fail.

### **C. Report on ADR developments in the United States (Keith Loken & Carolyn Lamm)**

#### **1. Case Law Developments in the United States (Keith Loken)**

Keith Loken (US) noted the United States' intention to submit a detailed written report to be placed on the Committee's website and that he would be grateful if other delegations could do the same.

The first case addressed was *AT&T Mobility vs. Concepcion*, a 5-4 decision of the U.S. Supreme Court concerning charges in the form of sales tax on what were ostensibly free phones. The action arose in the U.S. District Court for the Southern District of California pursuant to the state's "Discover Bank Rule" wherein certain kinds of contracts are prohibited from disallowing class actions. An example of the application of the rule is that waivers found in arbitration clauses in standard form consumer contracts are deemed unconscionable and will not be upheld. At first instance, the relevant provision in the contract (i.e the class action waiver) was held to be unenforceable pursuant to the Discover Bank Rule. The district court declined to dismiss the suit, ruling that California law prohibits contracts that unfairly exculpate one party from its wrongdoing, such as clauses that do not allow class action lawsuits in consumer adhesion contracts. The Court of Appeals for the 9<sup>th</sup> Circuit affirmed that decision. The Supreme Court reversed, holding that the *Federal Arbitration Act* ("FAA") pre-empts the California rule which was held to be an impediment to FAA, insofar as it interferes with the fundamental attributes of arbitration.

The second case addressed was *Rent-A-Center v. Jackson*, another 5-4 decision of the U.S. Supreme Court. The case concerned an employment discrimination suit brought against Rent-A-Center in the Nevada Federal District Court. The employer filed a motion under the FAA to dismiss or stay the proceedings and to compel arbitration based on an arbitration agreement. Ms. Jackson opposed the motion on the ground that the Agreement was unenforceable in that it was unconscionable under Nevada law. The District Court granted Rent-A-Center's motion and the Ninth Circuit reversed. The Supreme Court upheld the employer's motion. In this case, there was a double layer of agreements: first, there was an agreement to arbitrate any dispute arising out of Jackson's employment; second there was a subsidiary agreement that an arbitrator would determine any dispute relating to the enforceability of the agreement to arbitrate. The key issue was *kompetenz-kompetenz*. For the Supreme Court there are two types of challenges with respect to the doctrine of severability. One can challenge an agreement to arbitrate or one can challenge the contract as a whole. The Court found that employee had challenged the validity of contract as a whole, so it was a matter for the arbitrator, and not for the courts.

## 2. Online Dispute Resolution Developments in UNCITRAL (Keith Loken)

Mr. Loken (US) noted that UNCITRAL's focus in its working group on Online Dispute Resolution (ODR) is low-value, high volume transactions; both consumer and business-to-business. The working group was established in response to the observation that disputes arising from cross-border internet purchases are ineffective when brought before courts. There are concerns about enforceability of judgements, for example. As a result, the goal of the working group is to try to find a more expedient means of resolving such disputes but there remains many open questions, including: Who is a consumer? What is low value? What is high volume? Where there are contracts of adhesion in the form of consumer contracts, and how can it be clear that the consumer has a choice? Should there be a choice available of going to courts instead of ODR? Should a party be able to reserve its rights to go to court? These questions and others will have to be answered by the working group before the appropriate ODR instrument can be designed.

## 3. American Law Institute (Carolyn Lamm)

Before introducing the American Law Institute initiative, Carolyn Lamm (US) noted an important development with respect to discovery in arbitral proceedings. Section 1782 of Title 28 of the United States Code is a federal statute that allows a party to a legal proceeding *outside* the United States to apply to an American court to obtain evidence for use in the non-US proceeding. It was noted that there are cases involving international arbitration with divergent interpretations, for example in the 2<sup>nd</sup> and 5<sup>th</sup> Circuit courts. Members discussed the implications.

Ms. Lamm then turned to the American Law Institute's development of the Restatement on the Law of International Commercial Arbitration, which will include both commercial and investor-state arbitration (the latter will be a separate chapter). Chaired by Professor George Berman at Columbia, there are four reporters working on discussion drafts. At the moment, the focus is on enforcement for commercial arbitration.

Ms. Lamm is on the advisory committee. She pointed out that there is also now a members consultative group, which is open to virtually anyone provided one is an ALI member. Developments can be accessed via the ALI website. The first draft for post- award relief remedies is available and may be up for further debate in May 2012. After commercial arbitration, the attention will turn to investor-state arbitration.

#### **IV. Facilitated Session (Alain Rabeau, Intersol)**

##### **A. Introduction: Purpose of the Facilitated Discussion**

Matthew Kronby introduced the facilitator Alain Rabeau and noted that Canada is open to all possibilities on the future of the Committee and that it would be helpful if the facilitated session allows us the opportunity to find a new sense of purpose and organizational structure. Alternatively, we may decide that the Committee has served its purpose. Mr. Véjar (Mexico) thanked Canada for organizing the session and offered to leave comments to the end. Mr. Loken (US) also offered thanks and noted that the US delegation's view is that the Committee still has value and there is still a role and hoped that we can make that happen in a more concrete way. Mr. Rabeau also provided a brief introduction, reviewed the agenda and turned to the goal of the session: "let's determine *quo vadis*?"

Mr. Rabeau explained that the purpose of the first step of the session was to identify some of the achievements and some of the problems with the Committee.

Mr. Véjar (Mexico) suggested that an appropriate starting point might be look back at the Committee's activities and whether it has accomplished its objectives. Are we the most adequate forum to accomplish any remaining objectives, in light of evolving nature of ADR in the region?

##### **B. Identifying Existing Challenges and Issues Facing the Committee**

Mr. Rabeau briefly explained that the purpose of this part of the discussion was to allow Committee members to share their perspectives on the current issues and challenges facing the Committee.

Mr. Talpis (Canada) suggested that to determine whether the Committee has accomplished all of its objectives requires an examination of its mandate. Members discussed the objectives –which are set out in NAFTA Article 2022(4)– sequentially, noting which points had been achieved and which points offered more potential for the Committee's work. Ms. Lamm (US) noted that 1.2.5 ("opportunities for expanded cooperation between institutions with an interest or involvement in ADR in the NAFTA region") suggests unique attributes of the Committee that private ADR centres cannot offer; that is, a comparative law approach in a comparative cultural framework. Mr. Talpis (Canada) noted that, in the past, the Committee had made recommendations to the Free Trade Commission and doing so again can offer valuable input. Ms. Lussenburg (Canada) noted that facilitating trade in investment in the region was the reason why the Committee was set up and suggested that we need to be mindful of this objective.

Some Members offered that the Committee is an enriching experience for its membership and the issues are important, but what has been lacking recently and what the mandate anticipated is a broad, far-reaching impact on dispute resolution in the region. Unless we have that kind of impact, the Committee will be isolated. Mr. Loken (US) noted that there is little proactivity within the US government to operate in a top-down manner. Instead, for the Committee to be noticed, it must send something up to the Ministerial level for attention. As a Committee, we are not noticeable unless we make ourselves noticed.

The Committee's challenges appear to be participation, resources, and structure. Mr. Kronby (Canada) noted that there is an inherent challenge also in the mandate of the Committee. The three NAFTA governments are not involved in private ADR. We share an interest in promoting trade and investment in the region, but it is hard to tell the Ministers, who make up the Free Trade Commission, that they should focus on the work of this Committee and provide more resources when the government is not involved in the subject-matter of the Committee. Furthermore, some members noted that there are several other organizations addressing some of the very same issues as the NAFTA 2022 Committee. This led some members to question whether the Committee could be doing more useful work under the scope of its mandate.

Some members suggested that one of the Committee's key challenges is organization in carrying out our ideas. Others stressed a lack of leadership as a key problem. One solution proposed was to revert to the past practice of several sub-committees with work-plans and a clear leadership structure, as opposed to the current two sub-committees: outreach and legal issues. One member suggested that this Committee has become about the meetings and that maybe this is part of the existential crisis. Instead, the annual meeting should be about what is going to happen in between meetings.

At this point, Mr. Rabeau summarized the challenges facing the Committee; notably, the structure and participation in sub-committees, lack of resources, a lack of organization and unresolved questions concerning the Committee's mandate.

### **C. Outlining a Potential Strategy and Direction for the Committee**

Mr. Rabeau explained that the purpose of this part of the facilitated discussion was to provide members with an opportunity to discuss a potential direction and work plan. Alain then turned to tasking the Committee with listing possible future initiatives. Members developed the following list of potential initiatives:

1. Sectoral ADR: transport, textiles, seafood, software and others;
2. Outreach: online education (business, law students, judiciary);
3. UNCITRAL: deeper inter-face with those engaged in UNCITRAL initiatives;
4. Recommendations to the FTC regarding enforcement of awards, enforcement of ADR agreements, and the form of ADR agreements;
5. Website development;
6. Assisting DR-CAFTA's Committee with a similar mandate to NAFTA 2022.



#### **D. Ensuring Coherence: Establishing Criteria to Review Potential Initiatives**

Having established the list, the Committee outlined criteria upon which to evaluate whether each option would be appropriate. The following criteria were identified:

1. Our planning must be commensurate with our resources, which are human resources, as opposed to financial resources;
2. There must be a fit with our mandate;
3. There must be a significant “return on investment;”
4. Whether the Committee is best positioned in light of other organizations;
5. Audience reach;
6. Is it measurable?

#### **E. Future of the Committee: Four Areas of Concentration and a New Structure**

The Committee then examined the possible initiatives discussed previously against the above set of criteria and arrived at four initiatives for 2011-2012: (1) sectoral ADR; (2) outreach; (3) website renewal; (4) recommendations to the Free Trade Commission, e.g. enforcement of awards. In addition, members decided on a new structure for the Committee which would include a series of sub-committees to reflect the four priority areas, along with task forces under the direction of a sub-committee, where applicable. Each task force would report periodically on its activities.

##### **1. Sectoral ADR Sub-Committee**

Members discussed the merits of identifying possible sectors for an ADR needs assessment vs. consulting chambers of commerce to determine which industry groups might benefit from the Committee’s expertise. Members identified energy and trucking as sectors for which a needs assessment would be undertaken. There will be task forces for both, who will themselves decide on a spokesperson to report to the full Committee and who will provide progress reports to the government co-Chairs.

##### **2. Outreach Sub-Committee**

There was a consensus that the highest priority target group should be the judiciary. In addition, some of the work previously undertaken by the Legal Issues Sub-Committee would become part of the Outreach Sub-Committee’s approach to the judiciary, including curriculum development. Each NAFTA country delegation should discuss the relevant issues for their respective judiciaries and undertake a needs assessment, enlisting others outside the Committee to assist in determining if there is a need and if so, where there are opportunities for outreach. The goal would be for each NAFTA country to have 1-2 events before the next annual meeting, with advance notice given to all Committee members. In addition, a task force was established to prepare the curriculum for the judiciary and would liaise with the sub-committee undertaking the needs assessment.

### 3. Legal Issues Sub-Committee

The focus of the Legal Issues Sub-Committee would now be the study of specific issues with a view to making recommendations, as appropriate, to the Free Trade Commission. Members noted that there should be coordination with the judicial curriculum task force, on an as needed basis. Four task forces were established to address these issues: (1) enforcement of arbitral awards; (2) enforcement of arbitration agreements; (3) form of arbitration agreements; and (4) preparation of annual reports on national legal developments concerning ADR, to be circulated to all Committee members at least four weeks before the next annual meeting.

### 4. Website Renewal Sub-Committee

Members agreed that the role of this Sub-Committee would be to identify the elements of the website requiring an update, determining appropriate content and developing a process for approval of content and posting on the site. The Sub-Committee should also evaluate whether the website is doing what the Committee would like it to do and whether it is a useful tool in general.

## **V. Date for next year's meeting in Mexico**

Members discussed the best time of year to host the annual meeting. Several participants identified May or June as the best time of year to meet. In addition, it was recommended that timing and location should coincide with another prominent conference in order to maximize attendance.

Mr. Véjar (Mexico) noted that Mexico is looking forward to hosting the event next year and will update the members as soon as there are details available.

## **VI. Concluding remarks**

Mr. Kronby thanked the participants for attending and noted that the facilitated session was necessary and useful. Mr. Loken (US) noted that several members were initially sceptical of the utility of a facilitated session, but the resulting new initiative and structure of the Committee demonstrate that it was a success.

# Annex I

## Twenty-First Meeting of the NAFTA 2022 Committee

### List of Attendees

<b>Canada</b>	<b>United States</b>	<b>Mexico</b>
Matthew Kronby	Keith Loken	Carlos Véjar Borrego
Reuben East	Tricia Smeltzer	Carlos Piñera
Jody Blauvelt	Barrett Avigdor	Adriana Gonzalez
William Horton	Dana Nahlen	
Selma Lussenburg	Jim Nelson	
James Redmond	Phil Robbins	
Jeffrey Talpis	Carolyn Lamm	

