

NAFTA 2022 ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES

Minutes of the 23rd Meeting Committee
September 26 – 28, 2013
Westin Bonaventure Hotel and Suites
Los Angeles, CA

Friday, September 27, 2013

The U.S. Co-Chair convened the meeting by welcoming participants and outlining the agenda as well as the materials provided. The Co-Chairs from Canada and Mexico made welcoming remarks.

The Legal subcommittee and Outreach subcommittee convened separately in order to prepare their reports.

At the appointed time the meetings of the subcommittees adjourned and the members departed for Southwestern Law School and the afternoon Outreach Program, which consisted of two panels.

Southwestern Law School Outreach Program

The first panel, Entertainment and Media Industries and Their Uses in ADR, started by examining the current structures available for sector-specific ADR through a description presented by Dixon Dern of Independent Film & Television alliance (IFTA) and other arbitrator organizations. Jack Freedman, an International Centre Dispute Resolution arbitrator with a record of involvement as an executive in major film studios, etc., discussed the role and availability of mediation for entertainment disputes generally (but also with respect to transnational aspects). Maidie Oliveau, who focuses on sports-related transactions, explained the unique aspects of ADR in sports disputes. Alexandra Darraby, an art expert and lawyer, reflected upon the issues of the new media and content innovation, especially with respect to issues arising from media technology, proprietary rights, and IP protection of innovation having transnational implications. The discussion was moderated and commented upon by Biederman Institute Director, Steven Krone, and NAFTA 2022 Committee member and Professor of Law, Bob Lutz.

The second panel consisted of committee members William Horton, Arbitrator and Mediator of Canadian and International Business Disputes; Carlos Loperena Ruiz, Partner at Loperena, Lerch y Martin Del Campo; and Philip Robbins, Arbitrator and Mediator of U.S. and International Disputes. All three gave an overview on Arbitration and Mediation in the NAFTA Countries: Legal, Judicial and Practical Considerations and covered topics such as Canada and the UNCITRAL Model Law on International Commercial Arbitration, judicial attitudes towards commercial arbitration in Canada; judicial assistance in Mexico with regard to domestic and international arbitration; arbitration formats in Canada; mediation practices in commercial cases in both Canada and Mexico and how the practices in Canada and Mexico compare with the U.S. practices.

Saturday, September 28, 2013

The Subcommittees gave their reports.

All Action Items are restated at end of report.

Outreach Committee Report:

General Report: Cristina Castaneda presented the Outreach Report. A written report was submitted for the notebook and website.

It was mentioned that there were no outreach events during the time between meetings but that the subcommittee was working up setting up events for 2013-2014 year.

One upcoming outreach event was identified: June 11, 2014 – Arizona State Bar Convention and explained. The event is described below and action is needed on this item:

- 2 x 45min sessions or 1 x 90 min session
- “Best Practices in International Arbitration”
- Must submit preliminary information on panelists by Oct 22nd, with final information due by Dec 30th
- ACTION ITEM: Cristina Castaneda will email all information out to Co-Chairs to forward to Members so that they can determine if they can attend. Preference is for one representative from each country to attend – if unable to find Committee Member representative, alternative option is for one industry expert from each country.

Cristina Castaneda gave Jim Nelson’s report, which was submitted for the notebook - Colorado Judicial Institute Event (no specific date yet):

- Curriculum Materials includes a Hypothetical Case, which currently only has U.S. law being applied and Jim would appreciate a review by the committee and any commentary, suggestions and sample answer to hypothetical case applying Canadian and Mexican law
- Currently looking at American Laws from – Colorado, Arizona, California, Florida
 - *Explore which other states should be added, possibly only border states*
- ACTION ITEM: Cristina Castaneda will email electronic version of hypothetical to everyone to provide commentary and suggestions, and specifically to seek sample answers regarding Mexican and Canadian Law

Discussion on the Possibility of Creating Guide/Handbook for State Level Judges and Possibly Creating “Best Hits” collection of Judicial Quotes supporting Arbitration

Discussion of Recommendation to FTC to adopt Resolution endorsing International Commercial Arbitration in Judicial Training

- The recommendation could ask for statement from FTC that encourages judicial training institutes to include commercial arbitration agreements within their training topics
 - Statement would allow the Committee to approach these institutes and show overall government support for the inclusion of this topic
- ACTION ITEM: Outreach Committee will draft text of FTC resolution, and provide the text to Co-Chairs to approve text and take it to the FTC

Approval of Minutes from Last Meeting – 2012 Puebla

- There was discussion that minutes should be in a more skeletal form – less “he said/she said” and more summarized with action items highlighted so Committee can review and know how to proceed.

- Legal Development Reports will be included as reference documents instead of in their entirety
- Canadian legal developments report from 2012 will be provided to National Law Center for Inter-American Free Trade (NLCIFT) and Co-Chairs for inclusion as a reference
- ACTION ITEMS:
 - Minutes will be completed moving forward in skeletal form
 - Legal Development Reports will be included as reference documents
 - Amendment to 2012 meeting Minutes: Canada/U.S./Mexican Legal Reports incorporate by reference instead of having detailed representation
 - Add Language referring to Task Force on the Form of Arbitration Agreements – Add to 2012 meeting Minutes Subsection D
 - D. Independent Task Force on Development of Arbitration Agreement
 - The Legal Issues Subcommittee reported on the development of a Task Force to produce for publication by the committee guidance on the development of Arbitration Clauses. The work is to include examination of the feasibility of providing a “clause building” functionality on the Committee’s Website to allow a user to make selections that will result in creation of a customized Arbitration Clause that can then be downloaded from the website for use.
 - With the addition of the 2 items above – minutes approved

Organization and Work Plan:

- 1 – Change name of “Task Force on Form of Arbitration Agreements” to “Task Force on ADR Agreements.”
- Would be helpful for Task Force/Subcommittees to create mission statements – Describe committees and outline goals
- ACTION ITEM: All committees/task forces will provide mission statements and update current membership lists to Co-Chairs

Legal Issues Subcommittee

Task Force on Forms of Arbitration Agreements

- Change to Task Force on ADR Agreements to broaden the scope of the task force
- Deliverable 1 – Report on language that should be included in ADR Agreements
- Deliverable 2 – Template for the Creation of an online tool to create forms
- First drafts have been created, in the next week comments from other Task Force members – send to Task Force Co-Chairs to send to country Task Force members
- If co-chairs approve, take documents to ICA - Session on either side of ICA to discuss two draft documents – bring back to committee as a whole at next meeting in Canada to determine how to move forward

Task Force on Enforcement of Arbitral Awards

- No work completed this year
- Discussion as to whether Task Force is still needed – determined it is still needed, that issues come up from time to time and is helpful to have that if needed

Legal Development Reports:

- Mexican Report
 1. Arbitration Agreements
 - Formal – NY Convention, the agreement must be in writing
 - Case related to sophisticated contractual scheme
 - When have a case involving more than 2 parties, Court must analyze the Contractual Chain of the original arbitration agreement and the intent of the original parties and whether the 3rd party was involved in this original agreement
 2. Arbitration Awards
 - Definition of what Public Policy means – uses very high threshold adjectives
 - Comisa Case – Rescission of Government Contract and disputes resulting therefrom are not subject to arbitral agreements
 - Government contract different from private contracts, can terminate/rescind or change contract unilaterally (Can send list of countries that also have this theory)
 3. Amparo and Arbitration
 - Disrupter that needs to be handled – Amparo law has been changed to expand those things that can be brought under Amparo
 - Might include Arbitration Awards – will find out if Arbitrator is now included as an authority that can be challenged under Amparo
- ACTION ITEM: Francisco Gonzalez de Cossio will provide report for next year, and will provide summary of legal development report of this year to be included as a reference with the minutes (Mexico Co-Chair to follow up on providing this report)
- Canadian Report – (include as Reference Documents)
 - Bill Horton – Brief review of cases in Canada over the last year (case review)
 - Jim Redmond – Uniform Law Conference preparing new uniform arbitration statute for CanadaACTION ITEM: Bill Horton and Jim Redmond should provide committee with written summary of their legal development update presentations so they can be included as reference to the minutes (Reuben East will follow up on this)
- U.S. Report – Bob Lutz prepared and submitted a written report on “Significant U.S. ADR and Litigation Developments for 2012-2013.” A written version of the report is available on the website.

Working Lunch – Speaker Professor Jack Coe – Associate Reporter on ALI – Restatement 3rd – Law of International Commercial Arbitration.

Website Subcommittee

- Committee approved adding biographical information for all members – Limited to 100 words, education and work experience relevant to International Commercial Arbitration
- Principal Arbitration Institutions – Remove entire page – Create statement in lieu of list
 - Website Committee will decide if we are going to send letters, etc. and then approach Co-Chairs
- Ask for input on textual language changes from Committee

- Ask Cecilia Azar, Jeff Tapas for input on Conciliation
 - Ask Bob Lutz and Bill Horton – Language for Legal Developments
 - Need volunteer for Enforcement of Arbitral Award
- LinkedIn Group – Needs to be approved at Government Level first
- ACTION ITEMS:
 - Website Committee will circulate textual changes to Co-Chair to pass to members for input (will identify specific members outlined above)
 - Website Comm. will also circulate request for biographical information in the approved format
 - Website Comm. will remove Principal Arbitration Page and create text to put in its place, will also determine how to move forward in contacting existing organizations listed on the page
 - Co-Chairs will determine if LinkedIn may be used as a forum

Task Force on the Energy Sector – Jim Redmond

- Written report and survey submitted
- Will create mission statement
- RISA – Resource Industry Supply Agency post on website

Task Force on the Transportation Industry

- Written report and survey submitted
- Goal moving forward to contact industry organizations

Michael Coffee concluded the meeting by restating all the Action Items (listed below) and thanking everyone for a good meeting.

Action List Moving Forward:

- Website Committee will circulate textual changes that were recommended during meeting to Co-Chairs to pass to members for input (will identify specific members outlined above)
- Website Comm. will also circulate request for biographical information in the approved format
- Website Comm. will remove Principal Arbitration Page and create text to put in its place, will also determine how to move forward in contacting existing organizations listed on the page
- Co-Chairs will determine if LinkedIn may be used as a forum for discussing ADR issues
- Bill Horton and Jim Redmond should provide committee with written summary of their legal development update presentations so they can be included as reference to the minutes (Reuben East will follow up on this)
- Francisco Gonzalez de Cossio will provide report for next year, and will provide summary of legal development report of this year to be included as a reference with the minutes (Mexico Co-Chair to follow up on providing this report)
- All committees/task forces will provide mission statements and update current membership lists to Co-Chairs

- Minutes will be completed moving forward in skeletal form
- Legal Development Reports will be included as reference documents
- Outreach Committee Members on the Judicial training will draft text of FTC resolution, circulate to Co-Chairs to approve text and take it to the FTC
- Cristina Castaneda will email all information regarding June 2014 outreach event to Co-Chairs to forward to Members so that they can determine if they can attend.
- Cristina Castaneda will email electronic version of hypothetical to everyone to provide commentary and suggestions, add to sample answers Mexican and Canadian Law
- Circulate Outreach FTC resolution what will be sent to the FTC – also resend the Report that was sent last year