

REPORT OF TASK FORCE ON SECTORAL ADR FOR THE ENERGY SECTOR

At the meeting of the Committee held in Ottawa on September 26 and 27, 2011, it was decided to set up task forces to look at sectoral ADR. One of the business areas discussed as a possible area for investigation was the energy industry. It was considered that major oil and gas companies and their advisors were well-informed and experienced in the use of ADR and were probably not in need of help from our Committee, but that there was a wide variety of businesses providing services and supplies to the energy industry which may not have the same level of ADR experience or expertise. The task force on ADR mechanisms in the energy sector was therefore directed to investigate whether the Committee might be able to provide useful advice or assistance with respect to ADR to the supply and services sector of the oil and gas industry.

James Nelson of the US delegation, James Redmond of the Canadian delegation, and Alejandro Ogarrío of the Mexican delegation were named as co-chairs of this task force. The co-chairs felt that it would be useful to have one member of the task force serve as a *de facto* or acting chair to coordinate the work of the task force, and Jim Redmond agreed to assume this task.

The task force concluded that its first job was to make inquiries to try to identify organizations representing businesses in the service and supply sector of the energy industry that might be approached to help determine whether their members have a need for assistance with ADR.

Initial inquiries revealed that there are a substantial number of organizations in both the United States and Canada whose members carry on business in the oil and gas supply and services sector, whereas in Mexico many of the functions carried out by these companies come within the scope of major state-owned energy enterprises. It was decided that the US and Canadian members of the task force would continue efforts to identify which of the organizations whose members functioned in this sector might be the best ones to approach to determine the extent of the knowledge and experience of their members concerning private commercial arbitration and the possible creation of a sector-wide mechanism for arbitrating disputes among businesses in this sector.

Alejandro Ogarrío advised the task force that in Mexico the energy sector is represented mainly by two state-owned companies: Pemex, the oil and gas production company, and Comisión Federal de Electricidad, in charge of the production and distribution of electricity. Both companies are familiar with and regularly use arbitration in their contracts. Their corresponding laws allow them to do so, and it is a well-known fact that they include in their

agreements ICC arbitration clauses. As happen in every arbitration, their satisfaction or dissatisfaction with arbitration depends on many occasions on the outcome a particular case, but in any event, they have been frequent users of arbitration.

With regard to its investigations in Canada and the US, the task force developed a draft form of letter to be sent to organizations in the energy supply and services sector which were identified as targets to be approached, and also prepared a form of questionnaire which could be sent with the initial letters to the targeted organizations. A copy of the questionnaire is attached.

With regard to Canada, after making inquiries and reviewing websites and other information relating to a number of organizations, three were identified as potential candidates, and it was decided initially to send letters and copies of the questionnaire to two of them, the Resource Industry Suppliers Association of Canada and the Petroleum Services Association of Canada. No replies were received to these two initial inquiries. However, we were eventually able to reach an executive officer of RISA on the telephone. He had not reviewed the initial letter but requested some further information, which was sent to him. It was contemplated that we would be approaching him to set up a meeting to discuss the matter further once he had had an opportunity to review the further information. We haven't yet been able to arrange a meeting.

We also received no response to the initial letter to the PSAC. A further email was sent to this organization, which has not yet produced any response. The task force will be following up both of these organizations but our initial impression is that the recipients of our communications tend to regard them as just another nuisance solicitation and the subject of dispute resolution is not high on their interest list. We are hopeful that if we are successful in eventually convincing them to sit down to discuss with them face-to-face how the Committee might be able to assist them with regard to dispute resolution, we might be able to provoke some interest.

In the US, we were able to identify some organizations to be approached and letters were sent to several organizations, but no responses were received. Efforts will continue to make personal contact with the targeted organizations, but the attitude so far seems to be similar to that encountered in Canada.

Dated October 8, 2012

James Redmond

Alejandro Ogarrio

James Nelson.

QUESTIONNAIRE – NAFTA 2022 COMMITTEE

This questionnaire is submitted by the Task Force set up by the NAFTA 2022 Committee to look into the use of private international arbitration or other methods of alternative dispute resolution (“ADR”) in the supply and services sector of the energy industry in the NAFTA countries (Mexico, United States and Canada). The NAFTA 2022 Committee was established under Article 2022 of the North American Free Trade Agreement to encourage and facilitate the use of private international arbitration and other ADR mechanisms for the resolution of international commercial disputes in the NAFTA region.

The concept of arbitration is that any two or more parties may agree that disputes arising between them in the future, or an existing dispute, will be heard and decided by an arbitrator or a panel of arbitrators appointed under the parties’ agreement rather than by a Court. By international treaty, the decision of an arbitral tribunal in an international arbitration may be registered and enforced in most countries around the world as if it were a judgment of the Court. The decision of the arbitrators is not subject to appeal on the merits, although there are some limited grounds on which it can be overturned by a Court, for example that the arbitrators acted beyond the scope of the matters referred to them by the arbitration agreement. The object of the laws and treaties relating to international arbitration is to encourage the development of international trade by providing a means for the resolution of cross-border disputes in an efficient and predictable manner, rather than to have them determined by the national courts of one of the parties.

ADR is a term covering a variety of ways for resolving disputes by assisting the parties to reach an agreement to settle their differences.

The purpose of this questionnaire is to assist the Task Force in determining whether the NAFTA 2022 Committee can be of assistance to RISA and its members by providing them with information about international arbitration and ADR, and whether it might be beneficial to RISA and its members to consider the establishment of a formal mechanism for arbitrating or

mediating disputes in the supply and services sector of the energy industry in the NAFTA countries.

Questions

1. Have you been involved in the past in an international dispute or legal controversy, arising in the course of your business, with customers, suppliers or others?
2. Did you file suit in the Courts or initiate an arbitration or alternate dispute resolution process? If yes, where?
3. If you did initiate legal proceedings did you obtain a favourable result according to your expectations? In what way or ways did the proceedings meet or fail to meet your expectations?
4. If you did not initiate legal proceedings, why not?
5. Are you familiar with arbitration or other ADR processes such as mediation?
6. Have you submitted any international dispute or legal controversy to arbitration or any other ADR process?
7. If yes, was the process administered by an institution such as the International Chamber of Commerce Court of International Arbitration or the American Arbitration Association?
8. Would you consider the creation of an arbitration/ADR process and rules created specifically for international disputes in the NAFTA Region in your sector of the energy industry beneficial for you? Why or why not?
9. Would you be willing to agree in your contracts to follow the arbitration/ADR process instead of litigation in the courts as your first dispute resolution option?

JER:jb
