NAFTA 2022 COMMITTEE
2014 ANNUAL REPORT OF OUTREACH SUB-COMMITTEE

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1. Current Co-Chairs

Canada: Selma Lussenburg
Mexico: Cecilia Flores and José María Abascal
United States: Phil Robbins and Elizabeth Pocock
Assisting Members: Cecilia Azar, Steve Andersen, Harry Arkin, Bob Lutz and Jim Nelson

2. 2013-2014 Outreach Events

During the 2013-2014 year, the Outreach Sub-Committee organized two outreach events that occurred in conjunction with the 2013 Annual Meeting and two additional outreach events in June 2014. The events that occurred in conjunction with the 2013 Annual Meeting were conducted at the Southwestern Law School and the other two events occurred in Tucson, Arizona in collaboration with the National Law Center for Inter-American Free Trade (NLCIFT). A description of these outreach events is included below.

a. Southwestern Law School Outreach Events

Outreach Sub-Committee member Bob Lutz assisted in organizing two outreach events with the Southwestern Law School in conjunction with the 2013 Annual Meeting. The first panel was entitled "Entertainment and Media Industries and Their Uses in ADR" and examined the current structures available for sector-specific ADR. Presenters included: 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.; Maidie Oliveau, who focuses on sports-related transactions; Alexandra Darraby, an art expert and lawyer; and 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."

b. Tucson Business Event – "Making ADR Accessible to All"

On June 10, 2014 the Outreach Sub-Committee in collaboration with the NLCIFT hosted an event at the NLCIFT's offices in Tucson, Arizona for the business community of Southern Arizona. The event was entitled "Making ADR Accessible to All" and was attended by leaders of the Tucson business community so that they could learn more about the alternatives available to them outside of foreign courts and legal systems. Present from the NAFTA 2022 Committee were U.S. members Phil Robbins and Elizabeth Pocock and Mexico member Carlos McCadden and welcoming remarks were delivered by Tucson's Mayor Rothschild. Approximately thirty people attended the event including representatives from the City of Tucson, the Pima County Office of Economic Development, the University of Arizona Law School, the Tucson Chamber

of Commerce, the Mexican Consulate and the local Judiciary. Attendees interacted with NAFTA 2022 members and members spoke about the use of ADR when engaging in cross-border business. A handout was provided that included more information about *Best Practices in International Arbitration* as well as an article written by NAFTA 2022 member Phil Robbins on *Mediation: An Essential Tool in Cross-Border Commerce*. Both of these handouts were also used as materials for the second Tucson outreach event discussed below and are included, along with the event invitation, as Annexes to this report.

c. 2014 Arizona Bar Conference Panel – "Best Practices in International Arbitration"

Following the completion of the June 10th event, on June 11, 2014 NAFTA 2022 members Phil Robbins and Carlos McCadden gave a presentation at the 2014 Annual Arizona State Bar Convention in Tucson, Arizona. The panel was organized in collaboration with the NLCIFT and the Alternative Dispute Resolution Section of the State Bar. Phil and Carlos were joined by NLCIFT President and Founder Boris Kozolchyk, who offered welcome remarks. The Panel was attended by almost sixty Arizona attorneys and judges, many of whom asked for additional information upon the conclusion of the presentation. Phil and Carlos' presentation introduced attendees to the NAFTA 2022 Committee and methods of alternative dispute resolution, and also included a large section on considerations for drafting ADR clauses and how drafting differs if the case is international. The Alternative Dispute Resolution Section of the State Bar was very happy with the presentation and has expressed interest in collaborating again with the NAFTA 2022 Committee down the road. The State Bar brochure featuring the panel and Phil and Carlos' presentations are included as Annexes to this report. The NLCIFT also has photos of all outreach events on file should anyone like to see or use them for anything.

3. Other Updates

In addition to the two Outreach events outlined above, the members of the Outreach Sub-Committee continued work on the following projects.

a. Judicial Training Programs for the Colorado Judicial Institute

Outreach Sub-Committee member Jim Nelson has continued working with the Colorado Judicial Institute to create a training program for the judiciary of the state of Colorado. He has worked to continually foster this relationship and the Colorado Judicial Institute remains engaged and excited about the prospect of such programs. However at this time, the legislative branch of the state of Colorado is reviewing the UNCITRAL Model Law on International Commercial Arbitration to determine if it would like to enact legislation based on this model law within Colorado. Since the enactment of a new law would affect the courts and the materials presented in such a course, Jim and those he has been working with have put the development of the training program on hold until the legislature finishes considering the enactment of a new law. Legislation based on the UNCITRAL Model Law has been adopted by Canada and Mexico and has also been adopted by certain states in the U.S. A table outlining these enactments is included below.

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985), WITH AMENDMENTS AS ADOPTED IN 2006[1]

Legislation based on the UNCITRAL Model Law on International Commercial Arbitration as adopted in 1985 has been enacted in:

STATE	YEAR ENACTED
Canada	1986
Alberta	1986
British Colombia	1986
Manitoba	1986
New Brunswick	1986
Newfoundland and Labrador	1986
Northwest Territories	1986
Nova Scotia	1986
Nunavut	1999
Ontario	1987
Prince Edward Island	1986
Quebec	1986
Saskatchewan	1988
Yukon	1986
Mexico	1993
United States of America	
California	1988
Connecticut	1989
Florida	2010
Georgia	2012
Illinois	1998
Louisiana	2006
Oregon	1991
Texas	1989

[1] This information was obtained directly from the United Nations Commission on International Trade Law's website. It was noted that this page is updated whenever the UNCITRAL Secretariat is informed of changes in enactment of the Model Law. The full table including all enactments of the Model Law around the world is available here: http://www.uncitral.org/uncitral/uncitral_texts/arbitration/1985Model_arbitration_status.html

b. Language to Submit to the FTC

At the conclusion of the 2013 Annual Meeting, the Outreach Sub-Committee was tasked with creating language to submit to the FTC in hopes that they would adopt a Resolution endorsing International Commercial Arbitration in Judicial Training. This recommendation was to ask for statement from the FTC that encourages judicial training institutes to include commercial arbitration agreements within their training topics. It was anticipated that such a statement would allow the Committee to then approach these institutes and show overall government support for the inclusion of this topic. The Outreach Sub-Committee is currently working to draft such a statement with the Government Co-Chairs and plans to have something to email the larger Committee early in the 2014-2015 work year.

c. Future Possible Outreach

At this time, the Outreach Committee does not have any future Outreach events planned however all members are constantly looking for new opportunities and welcome any suggestions by the larger Committee for potential new events.

Making ADR Accessible to All: A Social Evening at the National Law Center

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Engaging in new cross-border business opportunities can be intimidating, especially when faced with the uncertainty associated with foreign courts and legal systems.

To discuss alternatives available for businesses in this situation,
PLEASE JOIN US FOR

MAKING ADR ACCESSIBLE TO ALL:

A Social Evening at the National Law Center

Date: Tuesday, June 10, 2014

Time: 4:30 - 6:30 pm

Cocktail and Networking Mixer
Short Presentation will begin at 5 pm

This Event is Free and Open to the Public

Location: National Law Center for Inter-American Free Trade
440 N. Bonita Ave, Tucson, AZ, 85745

For this event, NatLaw is pleased to welcome distinguished members of the NAFTA 2022 Committee. This Committee is engaged in the promotion of arbitration and mediation as alternative methods for resolving private cross-border commercial and business disputes outside of the traditional court system.

Their brief presentation is meant to facilitate conversations with and amongst leaders in our business community on the benefits of using ADR for those businesses engaged (or hoping to engage) in cross-border opportunities.

For any questions please email Elizabeth Pocock at epocock@natlaw.com or call NatLaw at 520-622-1200.

For Guest Bios and to RSVP, visit our Event Page Here

Facebook

NatLaw.com

Email

Our mailing address is:
National Law Center for Inter-American Free Trade
440 Bonita Ave
Tucson, AZ 85745

BEST PRACTICES IN INTERNATIONAL ARBITRATION

2014 State Bar of Arizona Annual Convention - June 11, 2014

PRESENTED BY:

THE NAFTA 2022 COMMITTEE

AND THE
NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE

National Law Center
for Inter-American Free Trade

PANELISTS:

Dr. Boris Kozolchyk
Executive Director and Founder of the
National Law Center for Inter-American Free Trade

Carlos McCadden
NAFTA 2022 Committee, Mexico Member

Philip A. Robbins
NAFTA 2022 Committee, U.S. Member

Bios for Best Practices in International Arbitration Panel

BORIS KOZOLCHYK – NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE, *President and Founder*

Dr. Boris Kozolchyk is one of the world's leading experts on the utilization of commercial law as a tool for economic development and has over 40 years of experience working in areas and issues related to international, banking and commercial law. He has extensive experience as an advisor and team leader to governments and international organizations and has represented the United States at the United Nations Commission on International Trade Law (UNCITRAL), at the International Chamber of Commerce and at the Organization of American States. Dr. Kozolchyk is an internationally recognized expert and scholar specializing in banking law and practices, secured transactions and registries, letters of credit, and other instruments of commerce including the use of alternative dispute resolutions. He is the founder and President and Executive Director of the National Law Center for Inter-American Free Trade and the Evo DeConcini Professor of Law at the University of Arizona's James E. Rogers College of Law, where he has taught courses on international and comparative commercial law and jurisprudence since 1969. Dr. Kozolchyk is the founder of the Arizona Journal of International and Comparative Law, now in its 31st year of publication, and of the Master of International Trade and Business Law program, one of the most respected in the country.

His many books and articles are among the most influential throughout the commercial world. He has been honored by commendations for extraordinary service by the University of Costa Rica; the United States Department of State, Legal Advisor's Office; and by the American Bar Association's Section of International Law and Practice which selected him as the recipient of the "Leonard J. Theberge Award for Private International Law," for his contributions. In 2009, the Universidad Privada Antonio Guillermo Urrelo (UPAGU) conferred upon him a doctorate Honoris Causa and the Universidad Mayor de Chile did the same in October of 2013. In 2009, the Technological Institute of Monterrey Mexico, Guadalajara campus named two research facilities after him; as did NatLaw's Board of Directors, with the Center's building. Additionally, he has received many more honors, including his selection as Man of the Year of Tucson's Hispanic Professional Action Committee; the Martin Luther King award for Contribution to Better Understanding of the Peoples of the Americas; and was selected as one of the 100 Most Influential Hispanics by Hispanic Business magazine.

CARLOS J. MCCADDEN – NAFTA 2022 - *Mexico Representative*

Carlos J. McCadden M. is a member of the arbitration and ADR section of the firm *Loperena, Lerch y Martín del Cam*po in Mexico City. He has been admitted to practice law throughout Mexico. Carlos has participated as counsel or as an arbitrator in arbitrations at the International Chamber of Commerce (ICC), the Arbitration Center of Mexico (CAM), the National Chamber of Commerce in Mexico City (CANACO) and in Ad Hoc arbitration. Mr. McCadden was a board member of the Mexican Bar Association (BMA) from 2011 to 2013 and has been on the board of the U.S.-Mexico Bar Association (USMBA) since 2009. Mr. McCadden was also appointed by the Mexican Ministry of Economy to the Advisory Committee on Private Commercial Disputes established under NAFTA Article 2022.

In related academic activities, Mr. McCadden is a Professor in the diploma program on commercial arbitration organized by the Mexican Chapter of the ICC with the *Escuela Libre de Derecho* in Mexico City, and in the diploma program on commercial arbitration organized by the Mexican Bar Association, the Mexican Arbitration Center and the *Tecnológico de Monterrey* (ITESM), also in Mexico City. He has served as arbitrator in the annual national moot arbitration contest organized by CAM, and is a frequent lecturer at seminars and symposia on arbitration and alternative dispute resolution. Mr. McCadden has published various articles on the topics of mediation and arbitration for specialized reviews and has co-authored two books on arbitration.

PHILIP A. ROBBINS – NAFTA 2022 – *U.S. Representative*

Philip A. Robbins has been engaged in civil litigation, arbitration and mediation in Phoenix, Arizona since 1958. Founder and senior partner of Robbins & Green from 1973 – 2006 and Special Counsel to the firm of Jennings, Strouss & Salmon until October 31, 2008, presently Phil is engaged in private practice in Phoenix as Philip A. Robbins, P.C. Phil's practice over the years has included jury and court trials in the state and federal courts in Arizona and California, as well as other states, arbitration and mediation of a wide variety of civil cases, including personal injury, wrongful death and property damage involving auto, premises, product liability, professional negligence, toxic torts and other environmental litigation; insurance law; commercial disputes including contract, securities, anti-trust, real property, pensions, dissolution of business and professional entities; class actions in a number of areas, including appointment as class counsel.

Phil has also served frequently as an arbitrator and mediator in a variety of civil cases, including personal injury, commercial and professional liability disputes and has served as expert witness in legal professional liability cases and insurance disputes. He is a fellow of the American College of Trial Lawyers (past state Chair and chair of International Committee) and Diplomate of the American Board of Trial Advocates. He is also listed in Best Lawyers in America, Super Lawyers of Southwest and Arizona's Finest Lawyers and was elected to the Maricopa County Bar Association Hall of Fame. Today Phil's practice includes representation of U.S. and Mexican clients with a variety of cross border issues arising in the U.S., Mexico and other parts of Latin America and he is the Chair of the Board of Directors of the National Law Center for Inter-American Free Trade in Tucson, Arizona. Finally Phil is currently a member of the NAFTA Advisory Committee on Private Commercial Disputes and the U.S. Chair of the U.S.-Mexico Bar Association. Phil received both his B.A. and his JD from the University of Arizona.

BEST PRACTICES IN INTERNATIONAL ARBITRATION

Summary of Contents

THE NAFTA 2022 COMMITTEE

The Advisory Committee on Private Commercial Disputes (NAFTA 2022 Committee) was created under Article 2022 of the North American Free Trade Agreement, to provide recommendations on the availability, use and efficiency of arbitration and other mechanisms (mediation) for the alternative resolution of private commercial disputes within the free trade area. It is a tri-national committee with government and non-government members from each country: Canada, Mexico and the United States. The NAFTA 2022 Committee members are renowned practicing attorneys, arbitrators, academics and researchers with vast experience in this area. The NAFTA 2022 Committee is subdivided into subcommittees and task forces in charge of fulfilling the committee's mandate each year. As part of such mandate, the NAFTA 2022 Committee, in collaboration with local entities and associations in each country, conducts outreach programs on arbitration and mediation from a national and international perspective.

For additional information visit: www.nafta-sec-alena.org

THE NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE

The National Law Center for Inter-American Free Trade is a 501(c)(3) non-profit research and educational institution located in Tucson, Arizona, and affiliated with the James E. Rogers College of Law at the University of Arizona. Since its inception in 1992, NatLaw and its consultants have worked and continue to collaborate with representatives from the public and private sectors on legal reform in the Americas and Africa. These projects include not only the drafting of statutory laws and the development of best practices, but also involve capacity building in a number of substantive areas such as: judicial reform, alternative dispute resolution, secured transactions law and the creation of electronic registry systems.

National Law Center
for Inter-American Free Trade

For additional information visit: www.natlaw.com

ADR IN THE NAFTA REGION

It is unfeasible to have ever-expanding international trade without a system for resolving disputes that inevitably will arise out of those transactions, and ADR is the method of choice in business today. The NAFTA identified the importance of facilitating private sector dispute resolution in international commercial contracts in the NAFTA area in support of business initiatives in part through the establishment of the 2022 Committee, which was asked to assess the availability and enforcement of private awards within the region.

The inclusion of appropriate provisions in international commercial contracts that address the resolution of private commercial disputes is an important first step in support of that objective. There are many matters to take into consideration in the drafting of a dispute resolution clause in an international commercial agreement.

GUIDE TO PRIVATE SECTOR DISPUTE RESOLUTION IN THE NAFTA REGION

To assist private investors and businesses with investments or operations within the NAFTA region in the consideration and, if appropriate, the inclusion of dispute resolution mechanisms in the commercial agreements that establish the business relationships between private parties from two or more NAFTA countries, the NAFTA 2022 Committee has prepared the following materials to guide the decision making with respect to existing methods of private dispute resolution.

I. METHODS/FORMS OR PRIVATE DISPUTE RESOLUTION

Parties entering into international business contracts should consider one of several alternative methods of resolving disputes that do not entail going to court. As neither party may wish to litigate in the courts of another country, these dispute resolution methods, which are generally known as Alternative Dispute Resolution ("ADR"), offer a neutral and private mechanism for dispute resolution.

At the outset of negotiations and consequent drafting of the contract, the parties should consider whether they wish to resort to the courts or one or more private dispute resolution methods in the event a dispute arises. A well-drafted ADR clause may not only result in a more effective resolution of disputes, but it may also deter breaches of the agreement by providing an effective mechanism for enforcing contractual rights. There are many forms of ADR. The two most commonly used are mediation and arbitration.

A. MEDIATION

Mediation usually provides a private and confidential forum in which an impartial third party -- the mediator -- facilitates communication between the parties in the hope of achieving a settlement of the dispute. The mediator acts as an intermediary with whom each party should feel comfortable discussing its view of the dispute. The mediator seeks to focus the parties on the critical issues in dispute and on the interests of each party to achieve a settlement. The mediator may propose settlement options for the parties to consider, but the recommendations of the mediator are not binding on the parties.

The mediator may or may not be an attorney. It is recommended that he or she be someone whom both parties trust. Mediation is often conducted without involvement of legal counsel representing the parties.

B. ARBITRATION

While mediation is designed to encourage the parties to find a mutually acceptable settlement, arbitration is an adversarial process that results in an award that is binding on the parties. Depending on the provisions of the arbitration clause, the decision may be rendered by one or three arbitrators.

The parties generally present arguments, witnesses and documentary evidence to the arbitrators. Judicial rules of procedure and evidence do not usually apply. The rules followed in arbitration are generally very flexible. Attorneys are frequently involved in representing the parties, but it is not always necessary to retain counsel. Arbitrators are often attorneys, but they may also be business people or other professionals with knowledge or skills relevant to the dispute.

Most arbitration awards are observed voluntarily by the losing party. However, if the losing party does not voluntarily comply with the award rendered by the arbitrators, it may be enforced by local courts with jurisdiction over the losing party. Canada, Mexico and the United States are parties to various international treaties that require their courts to enforce arbitration awards with very few exceptions (such as fraud or corruption). Thus, unlike a court judgment, there are very few grounds to appeal an adverse arbitration award.

II. CREATING AN ARBITRATION CLAUSE

The following points should be considered when drafting the arbitration clause.

A. ARBITRATION RULES

You should decide whether you wish to proceed under ad-hoc arbitration or institutional arbitration. As a general proposition, the arbitration clause used should be coordinated with and reflect the arbitral rules of the institution or ad-hoc procedure chosen.

Institutional arbitration are dispute settlement proceedings supervised by an organization or institution (such as the American Arbitration Association / International Centre for Dispute Resolution, the British Columbia International Commercial Arbitration Centre, CANACO [Mexico City Chamber of Commerce], the Commercial Arbitration and Mediation Center for the Americas or the International Chamber of Commerce), in accordance with the rules of arbitration established or approved by that institution. By choosing institutional arbitration, the parties rely on the expertise of the institution and its resources for selecting arbitrators and for administering or managing the arbitration.

Ad-hoc arbitration means there is no formal administration of the arbitration or dispute settlement process by any established arbitral organization. Instead, the parties create their own procedures for the arbitration. This can be accomplished, for example, either by: (i) drafting a set of ad-hoc procedures in a contract; (ii) referring to a set of generally accepted ad-hoc arbitration rules, such as the UNCITRAL Arbitration Rules, the ADR Institute of Canada, Inc., National Arbitration Rules, or the Center for Public Resources Rules for Non-Administered Arbitration of International Disputes; or (iii) allowing the arbitration tribunal to produce its own procedures after the dispute has arisen. Ad-hoc arbitration can sometimes be less expensive, but it places more of a burden on the parties to organize and administer the arbitration.

B. PLACE OF ARBITRATION

The parties should select a site for the arbitration that is convenient to them and to those who may eventually become witnesses in any proceeding. Arbitration can conveniently be held in any of the NAFTA countries as the laws of the three NAFTA countries all support international arbitration. If you select a place of arbitration outside the NAFTA countries, you should consider various aspects of national law that may affect the conduct of the arbitration, including the following:

- The likelihood and extent of involvement of the national courts in the conduct of the arbitration;
- Whether the country is party to either the New York Convention or the Panama Convention on enforcing arbitral awards (these international conventions make enforcement of the final award substantially easier);

- The extent of any mandatory procedural rules that must be adhered to in the conduct of the arbitration; and
- Restrictions on the ability of non-nationals to serve as arbitrators or as counsel.

If you adopt institutional arbitration, it is usually not necessary that the institution chosen be located in the place of arbitration. For example, most of the institutions listed below can administer arbitrations outside their home countries.

C. APPLICABLE LAW/CHOICE OF LEGAL REGIME

While not necessary, it is desirable to identify in the contract (or the agreement to arbitrate) the substantive or applicable law (or governing law) that will govern the resolution of the dispute. Failure to clarify this issue may increase the time and cost of an arbitration. If the decision as to which governing or substantive law is to apply is left to the arbitral tribunal, it may bring an unpleasant surprise to one of the parties.

Where an institution selects the chair or sole arbitrator, it is, as a practical matter, far easier to appoint the best possible person when it is known in what country's law the arbitrator should be most expert.

When deciding upon the applicable law, you should consider:

- A legal system that has developed a body of law relating to the specific issues likely to arise;
- Whether only the laws that regulate the subject-matter (substance) of the dispute should apply, or if the applicable law of a country also includes international law rules that may, in turn, refer the dispute to the law of another country (known as conflicts of law provisions); and
- Whether the chosen "governing law" considers the subject matter of the contract to be arbitrable (for example, copyright, patent and antitrust matters may not qualify as arbitrable matters in some countries).

Even if the parties wish to have the arbitrators apply general principles of law or usages of trade, it is important to reference a particular substantive or governing law.

D. COMPOSITION OF THE ARBITRAL TRIBUNAL

If the parties can agree on this issue, it is generally wise to indicate the number of arbitrators to be appointed. For complex arbitrations or those with a significant amount in dispute, three arbitrators are preferable. If the arbitration is likely to involve only a few straightforward issues and the amount in controversy is likely to be relatively small, one arbitrator may be chosen.

Having one arbitrator may be cheaper and more expedient. One the other hand, if the amount in dispute warrants it, three arbitrators increase the likelihood of a fair, well-reasoned result. While

a three-arbitrator panel also provides the parties with more control over the nature or composition of the tribunal (as each party will generally each select one arbitrator), it increases the cost and logistical difficulties of the arbitration. Where appropriate, the parties may also specify required qualifications for the arbitrators (education, occupation and/or expertise in a particular subject matter, etc.)

E. LANGUAGE

If the parties come from countries with a common language, it may not be necessary to include a provision regarding the language in which the arbitration will be conducted, based on the presumption that the language in which the contract is written will apply. If the language is not specified, the arbitral tribunal will decide the question of language. It is possible (but not recommended) to conduct an arbitration in two languages.

If the parties are from countries with different languages, it is important to specify the language of the arbitration. Simultaneous interpretation at hearings and translation of all documents into two or more languages are enormously expensive and time-consuming. If it is not possible to agree on a language in the arbitration clause, then it is desirable to agree that costs for interpretations and translation are either shared or borne by the party requiring the interpretation or translation.

F. OTHER MATTERS TO CONSIDER FOR INCLUSION IN THE ARBITRATION CLAUSE

An arbitration clause need not be lengthy nor complicated to be effective. A lengthy clause specifying too many procedures may limit the flexibility of the parties and the arbitrators in conducting the arbitration in the most efficient way possible. As arbitration is always based on an agreement to arbitrate, the parties should think about the nature of the disputes that might arise and consider whether some of the following matters should be included in the arbitration clause. Discussing the matters together, at the time of contract drafting and when relationships are cordial, may result in saving time trying to resolve these matters after a dispute has already arisen.

1. Discovery and Production of Documents

Usually, the arbitration rules chosen by the parties will state that the arbitral tribunal may establish the procedures for the discovery and production of documents. Depending on the circumstances of the case, it may be advantageous to create specific discovery rules.

2. Interim Relief

Some arbitration rules deal specifically with the question of interim relief, that is to say, whether the parties may apply to a court for a preliminary injunction, an order of attachment or other

order to preserve the status quo until the arbitrators can decide the case. The rules of most arbitration institutions state that resorting to a court in such circumstances is not incompatible with, or a waiver of, the right to arbitrate under those rules. Most arbitration rules provide that the arbitrators, once selected, may order interim relief. However, if the parties believe that it may be necessary to resort to interim relief to maintain the status quo, they should check the rules chosen and, if necessary, add a specific clause to ensure the availability of such interim relief.

3. Consolidation

If there are more than two parties to the contract, or if the parties are entering into several related contracts, they may wish to consider including a provision that any arbitrations among them or with respect to the related contracts will be consolidated into a single proceeding. The drafting of a consolidation clause is very difficult, and expert advice should be sought for assistance in its drafting.

4. Relief to be Granted

Ordinarily, the arbitral tribunal may grant any remedy or relief within the scope of the agreement of the parties that is permissible under the substantive law applicable to the dispute. If the parties wish the arbitrators to decide the case, not according to a specific law but to the common usages of trade or industry, or if there is a particular kind of relief that the parties want the arbitrators to be able to award, then the parties should include specific language in their arbitration clause to allow for such remedy or relief.

5. Time Limitations

Most national laws establish specific time limits (usually several years) within which claims must be initiated. The parties may also wish to consider whether a specific time limit should be placed on the conduct of the arbitration. If a time limit is chosen, it must be realistic. Again, it is recommended that interested parties check with the appropriate arbitration institution to determine what would be a reasonable timetable.

6. Costs and Expenses

Various arbitration institutions and ad-hoc rules vary with respect to who will pay for the costs of the arbitration, including the attorneys' fees. Usually, however, the rules provide that the question of who will bear these costs is within the discretion of the arbitral tribunal. The parties may wish to consider whether they want to include a provision specifying how costs and expenses, including attorneys' fees, shall be apportioned in any arbitration.

III. MODEL ADR CLAUSES

A. MEDIATION

A model mediation clause for international contracts is shown below.

> *If a dispute, controversy or claim arises out of or relates to this contract, or the breach, termination or validity thereof, and if either party decides that the dispute cannot be settled through direct discussions, the parties agree to endeavor to settle the dispute in an amicable manner by mediation pursuant to [identify rules]. If this mediation does not result in a settlement, then the dispute shall be resolved by arbitration pursuant to [clause (b) below]. [Alternatively, the parties may provide for litigation in a court specified by the parties.]*

B. ARBITRATION

A model arbitration clause for international contracts is stated below. This model clause, while offering a number of specific options, is not exhaustive and does not include all possible provisions that may need to be considered or may be desirable in particular contracts.

In short, this model clause should serve as the beginning, and not the end, of the process of drafting an arbitration clause.

> *(a) Any dispute, controversy or claim arising out of, relating to, or in connection with, this contract, or the breach, termination or validity thereof, shall be finally settled by arbitration. The arbitration shall be conducted in accordance with [identify rules] in effect at the time of the arbitration, except as they may be modified herein or by mutual agreement of the parties. The seat of the arbitration shall be [city, country], and it shall be conducted in the [specify] language. The arbitration shall be conducted by [one or three] arbitrators, who shall be selected in accordance with [the rules selected above].*
>
> *(b) The arbitral award shall be in writing and shall be final and binding on the parties. The award may include an award of costs, including reasonable attorneys' fees and disbursements. Judgment upon the award may be entered by any court having jurisdiction thereof or having jurisdiction over the parties or their assets.*

IV. ARBITRATION INSTITUTION SELECTION CRITERIA

Selecting an appropriate set of rules or arbitration institution is an important step in the arbitration process. The institutions listed above, plus others in the NAFTA countries and elsewhere, offer varying levels of experience and qualifications for particular disputes. Listed below are some criteria that parties may wish to consider in selecting an appropriate institution. The institutions previously listed and others will be happy to provide information on these matters to any parties considering selecting their rules.

A. HISTORY AND EXPERIENCE

1. When did the institution first begin to administer international arbitrations?
2. How many international disputes has the organization been involved in?
3. From what countries have the parties to those disputes come?
4. Has the institution handled disputes of a similar nature to the subject of the contract?

B. METHOD OF SELECTING ARBITRATORS

1. Do the parties have any involvement in selecting the arbitrators, or is it left entirely to the discretion of the institution?
2. Does the institution automatically select arbitrators from a neutral nationality, or do they do so only on request of one or both of the parties?
3. Who is on the roster of potential arbitrators? Do they come from a variety of countries and backgrounds?
4. Can the parties select arbitrators not on the institution's roster?
5. Does the institution have arbitrators with expertise in the type of matter that is expected to be disputed?

C. CONDUCT OF THE ARBITRAL PROCEEDING

1. Do the rules of the institution permit flexibility in the arbitration process?
2. Do the rules provide for specific time limits for some or all aspects of the arbitration process? If so, are these time limits observed or ignored?
3. Does the institution limit any procedural rules selected by the parties?
4. Are the institution's rules of procedure clear and neutral to both parties?

D. COST

1. What are the administrative fees charged by the arbitration institution? Are they fixed or do they vary based on the size of the dispute?
2. How are the arbitrators paid? Are their fees based on the amount of time spent or on the size of the dispute?
3. Are there a large number of locally available qualified arbitrators, to reduce travel and accommodation expenses?

E. SERVICES OFFERED BY THE INSTITUTION

1. How large is the staff of the institution?
2. Is the staff experienced in international disputes?
3. Does the staff possess language capabilities for the parties in the dispute?
4. Is the institution a for-profit institution or is it a non-profit institution?
5. Is the institution involved in alliances with other institutions within the NAFTA region or elsewhere, which may facilitate the administration of the arbitration?

MEDIATION: AN ESSENTIAL TOOL IN CROSS-BORDER COMMERCE

Consensual and less adversarial, mediation allows settlement approaches tailored to the needs and desires of cross-border parties using a blend of law and procedure from both countries

By Phil Robbins (phil@pcrobbins.com, 602-648-3215)

As trade and commerce between the U.S. and Mexico increase in scope and value, the business communities in both countries want and need an efficient, transparent, honest, predictable system for resolving cross-border legal disputes between business entities. The parties also want to retain control of their own destinies, fashion their own solutions and preserve the business relationship.

Increasingly, the parties are turning to mediation as the method of choice for resolving cross-border disputes. This article examines the factors leading to this development as well as providing a brief summary of how this works in practice, focusing on disputes between businesses in the U.S. and Mexico.

Mediation Advantages

Mediation is increasingly becoming the method of choice in resolving international commercial disputes. Having acted as a mediator in cross-border disputes, I have seen mediation's evolution from a seldom used procedure to one which has gained increasing acceptance as a dispute resolution mechanism. It responds to the needs of the business community, and I expect its use will increase in the future.

Experience has shown that an experienced, qualified mediator can assist parties from different countries in reaching settlements. The process, being consensual and less adversarial, allows settlement approaches tailored to the needs and desires of cross border parties using a blend of law and procedure from both countries. Even more than in domestic disputes, mediation in foreign disputes can hold down costs and reduce the time involved.

Qualities of the Cross-Border Mediator

The mediator may, but need not, be an expert in the business or industry involved and in the substantive law which governs. More important is the skill and experience of the mediator in bringing the antagonists together. An understanding of the cultures involved and their differences, including the language and business practices of the respective countries, is an asset.

Mediators need not be lawyers, although in most international disputes it is a distinct advantage. They may be appointed by the parties ad hoc or by an internationally based institution.

Litigation and Arbitration Drawbacks

Litigation in the courts of either country has significant drawbacks, starting with jurisdiction and service of process issues and running the gamut of choice of law, choice of tribunal, location, language, honesty, impartiality, delay, expense, intrusive discovery, enforcement of preliminary orders and final judgments, and lack of predictability of law and outcome.

In response to the problems associated with litigation, and prompted by business demands, courts, legislators and lawyers developed international arbitration, which became the norm for resolving international business disputes. Generally arising from an arbitration clause in the underlying contract, arbitration provided a more certain and predictable outcome. The parties could agree in advance on the forum, choice of law, method of selection and qualifications of the arbitrators, discovery, rules governing the hearing, confidentiality, time deadlines, preliminary orders, form and enforcement of judgments, and allocation of fees and costs. The New York Convention 1958 and Panama Convention 1975 facilitate the enforcement of agreements and

enforcement of judgments. Federal and state statutes and court decisions in both countries have generally favored the use of arbitration.

International arbitration continues to be an effective method of resolving cross-border disputes. However, arbitration has itself become increasingly expensive, complex, time consuming, discovery burdened and adversarial. It has acquired many of the disadvantages of the litigation system which it was designed to correct.

Agreeing to Mediate

Mediation still tends to be agreed upon more often after the dispute arises than being provided for in the original contract. Mediation agreements can be rather informal and straight forward. The agreement should spell out the general parameters of the mediation, the manner of presenting the law and facts, the place of any hearing, and general procedural details, plus the amount and allocation of fees and costs. There may be statutes or cases from various countries that regulate who can act as a mediator or counsel within the country in question, as well as governing the enforcement of agreements. Enforceability is obviously an important consideration.

Mediation may be included in the underlying contract as part of a multi-stage procedure, starting with meet-and-confer requirements, and proceeding to mediation, arbitration and ultimately litigation.

Interaction with the Parties

Any language issues must be addressed. To ensure meaningful participation, parties need to express themselves to the mediator, and perhaps to the other side, either in a common language or through a competent interpreter. Both sides and the mediator must be able to understand documents in different languages.

A clear explanation of the process for the parties is essential, since they may be from a culture in which a structured mediation is unfamiliar and seldom used. The mediator must gain the confidence of the parties in the fairness and impartiality of the procedure, often across a cultural divide. The parties need to understand that the mediator will meet separately with the parties, and why this is done.

The rules as to the confidentiality of the proceedings, what is said to the mediator, and what the mediator can reveal to the other side must be established. Confidentiality may also be governed by local law, which may differ among the countries involved.

For all the reasons set forth above, lawyers and their business clients who do business internationally should seriously consider adding mediation clauses to their agreements, and, even in the absence of such a clause, to consider agreeing to mediation even after the dispute arises.

Phil Robbins practices law in Phoenix, Arizona, as Philip A. Robbins, P.C. Phil has also served frequently as an arbitrator and mediator in a variety of civil cases, including personal injury, commercial and professional liability disputes. He is the Chairman of the Board of Directors for the National Law Center for Inter-American Free Trade, a delegate to the NAFTA Advisory Committee on Private Commercial Disputes and the U.S. Co-Chair of the U.S. Mexico Bar Association.

Wednesday Morning

W1

Wednesday, June 11
8:45 a.m. – Noon

An Update and Practice Tips for the Evolving Use of ADR in the Courts, International Trade, and Commercial Transactions

This morning program is designed for the legal practitioner who finds that ADR is an increasingly used process of resolving disputes in their practice area. The program will have three topic sessions: (1) Best Practices in International Arbitration; (2) Drafting Enforceable Arbitration Provisions; and (3) The Good, Bad and Ugly of Mandatory Arbitration Under the Arizona Rules of Civil Procedure.

Co-Presented by: Alternative Dispute Resolution Section
National Law Center for Inter-American Trade
NAFTA 2022 Committee

Chairs:
Hon. Ted B. Borek (Ret.), Pima County Superior Court
Steven M. Guttell, Steven M. Guttell PLC
John T. Jozwick, Rider Levett Bucknall Ltd.
Richard K. Mahrle, Gammage & Burnham PLC
Paula A. Williams, May Potenza Baran & Gillespie PC

Faculty:
Cecilia Flores, NAFTA 2022 Committee, Mexico Member
Renee B. Gerstman, Jaburg Wilk PC
Dr. Boris Kozolchyk, Executive Director and Founder of the National Law Center for Inter-American Trade
Richard K. Mahrle, Gammage & Burnham PLC
Hon. James E. Marner, Pima County Superior Court
Philip A. Robbins, NAFTA 2022 Committee, U.S. Member
NAFTA 2022 Committee, Canada Member, *to be confirmed*

3 CLE Ethics Credit Hours

W2

Wednesday, June 11
8:45 a.m. – Noon

The Reality of the Affordable Care Act: A Work in Progress

This program will look at different aspects and issues concerning the Affordable Care Act and its implementation. The Health Insurance Marketplace opened to the public for enrollment with a March 31, 2014, enrollment deadline. How does the Marketplace interact with Medicaid, AHCCCS and the recent expansion of Medicaid? What effect did the Marketplace have on insurance offered by private and public employers? What impact will enforcement of the Affordable Care Act have on civil rights?

Co-Presented by: Committee on Minorities and Women in the Law
Committee on Persons with Disabilities in the Legal Profession

Chairs:
Charity Collins, Goodyear City Prosecutor's Office
Emily Johnston, Public Member, State Bar Committee on Persons with Disabilities in the Legal Profession
Clarence Matherson Jr., Tempe City Attorney's Office
Edward L. Myers, III, Arizona Center for Disability Law
Maricela Meza, Karp & Weiss PC

Faculty:
Christine Corieri, Goldwater Institute
Monica Higuera Coury, AHCCCS
Tara McCollum Plese, Arizona Association of Community Health Centers
Peri Jude Radecic, Arizona Center for Disability Law
Douglas Northup, Fennemore Craig PC
Christina Sandertur, Goldwater Institute

3 CLE Credit Hours

Best Practices in International Arbitration

Presented By:

Carlos Mc Cadden, *NAFTA 2022 Committee,* Mexico Member
Phil Robbins, *NAFTA 2022 Committee,* U.S. Member

Arizona State Bar Convention, Tucson – June 11, 2014

The National Law Center for Inter-American Free Trade

- 501(c)(3) research and educational institution located in Tucson affiliated with the James E. Rogers College of Law
- Since 1992, NatLaw and its consultants have worked and continue to collaborate with representatives from the public and private sectors on legal reform in the Americas and Africa
- These projects include not only the drafting of statutory laws and the development of best practices, but also involve capacity building in a number of substantive areas such as:
  - Oral Trial Training Programs
  - The Promotion of Alternative Dispute Resolution
  - Access to Credit for Business of all sizes through the reform of secured transactions laws and the creation of electronic registry systems

NAFTA 2022 Committee: Tri-national Advisory Committee on Private Commercial Disputes

Created under Article 2022 of the North American Free Trade Agreement, to provide recommendations on the availability, use and efficiency of arbitration and other mechanisms (mediation) for the alternative resolution of private commercial disputes within the free trade area.

Importance

- NAFTA identified the importance of facilitating private sector dispute resolution in international commercial contracts in the NAFTA area in support of business initiatives in part through the establishment of the 2022 Committee, which was asked to assess the availability and enforcement of private awards within the region.

I. Methods / Forms of Private Dispute Resolution

First Step:

The drafting of a dispute resolution clause for an international commercial agreement.

Dispute Resolution Clause Drafting Considerations

- As neither party may wish to litigate in the courts of another country, these dispute resolution methods, which are generally known as Alternative Dispute Resolution ("ADR"), offer a neutral and private mechanism for dispute resolution.
- ADR clause results in a more effective resolution of disputes, deters breaches of the agreement and provides a mechanism for enforcing contractual rights.

Forms of ADR

Two Most Common:

- Mediation: an impartial third party (mediator) facilitates a mutually aceptable settlement.
- Arbitration: is an adversarial process that results in an award that is binding on the parties.

II. Creating an arbitration clause:

A. Arbitration Rules -

- The arbitration clause used should be coordinated with and reflect the arbitral rules of the institution or ad-hoc procedure chosen.
- By choosing institutional arbitration, the parties rely on the expertise of the institution and its resources for selecting arbitrators and for administering or managing the arbitration.

Institutional Arbitration Institutions within the NAFTA area:

- American Arbitration Association / International Centre for Dispute Resolution
- British Columbia International Commercial Arbitration Centre
- CANACO [Mexico City Chamber of Commerce]
- Commercial Arbitration and Mediation Center for the Americas or the International Chamber of Commerce

B. Place of Arbitration

- The arbitration clause used should select the site for the arbitration not only because it is convenient to the parties or to those who may eventually become witnesses in any proceeding but because of:
  1. The of involvement of the national courts in the conduct of the arbitration;
  2. Whether the country is party to either the New York Convention or the Panama Convention on enforcing arbitral award;
  3. The extent of any national mandatory procedural rules that must be adhered and any restrictions on the ability of non-nationals to serve as arbitrators or as counsel.

C. Applicable law / Choice of legal regime

- While not necessary, it is desirable to identify in the contract (or the agreement to arbitrate) the substantive or applicable law (or governing law) that will govern the resolution of the dispute.
- When deciding upon the substantive applicable law, you should consider:
  - A body of law relating to the specific issues likely to arise;
  - Whether the chosen "governing law" considers the subject matter of the contract to be arbitrable (for example, copyright, patent and antitrust matters may not qualify as arbitrable matters in some countries).

D. Composition of the Arbitral Tribunal

- It is wise to indicate the number of arbitrators to be appointed.
- For complex arbitrations or those with a significant amount in dispute, three arbitrators are preferable.
- If the arbitration is likely to involve only a few straightforward issues and the amount in controversy is likely to be relatively small, one arbitrator may be chosen.

E. Language

- If the parties are from countries with different languages, it is important to specify the language of the arbitration.
- If it is not possible to agree on a language in the arbitration clause, then it is desirable to agree that costs for interpretations and translation are either shared or borne by the party requiring the interpretation or translation.

F. Other Matters to Consider

1. Discovery and Production of Documents
2. Interim Relief
3. Consolidation (+ than 2 parties or contracts)
4. Relief to be Granted
5. Time Limitations
6. Costs and Expenses(apportioned)

Model ADR clauses

- For models of Mediation or Arbitration clauses that can be used for international contracts, examples can been found:
  - On the websites of the Institutions themselves
  - From the United Nations Commission on International Trade Law's Permanent Court of Arbitration here:
    - http://www.pca-cpa.org/showpage.asp?pag_id=1190

III. Arbitration Institution Selection Criteria

A. History and experience

B. Method of selecting arbitrators

C. Conduct of the arbitral proceeding

D. Cost

E. Services offered by the institution

Questions?

National Law Center
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NAFTA Secretariat
Secrétariat de l'ALÉNA
Secretariado del TLCAN

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