

NAFTA 2022 Committee

BEST PRACTICES IN INTERNATIONAL ARBITRATION

Summary of Contents

The NAFTA 2022 Committee	2
ADR in the NAFTA Region	2
Guide to Private Sector Dispute Resolution in the NAFTA Region	2
I. Methods/Forms of Private Dispute Resolution.....	4
A. Mediation	4
B. Arbitration	4
II. Creating an Arbitration Clause	6
A. Arbitration Rules	6
B. Place of Arbitration	6
C. Applicable Law/Choice of Legal Regime	7
D. Composition of the Arbitral Tribunal.....	7
E. Language	8
F. Other Matters to Consider for Inclusion in the Arbitration Clause	8
1. Discovery and Production of Documents	8
2. Interim Relief.....	8
3. Consolidation.....	9
4. Relief to be Granted.....	9
5. Time Limitations	9
6. Costs and Expenses	9
III. Model ADR Clauses	10
A. Mediation	10
B. Arbitration	10
IV. Arbitration Institution Selection Criteria	11
A. History and Experience	11
B. Method of Selecting Arbitrators.....	11
C. Conduct of the Arbitral Proceeding	11
D. Cost.....	11
E. Services Offered by the Institution.....	12

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

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?