

# 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 acceptable 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)

### **III. Model ADR clauses: Mediation**

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.]

### III. Model ADR clauses: Arbitration

- (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.

# Other Model ADR clauses

- For other model of Mediation or Arbitration clauses that can be used for international contracts, more examples can be 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](http://www.pca-cpa.org/showpage.asp?pag_id=1190)

## IV. 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