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DISPUTE RESOLUTION AND U.S. - MEXICO BUSINESS TRANSACTIONS

HOPE H. CAMP, JR*

I. INTRODUCTION

The increase of trade between the United States and Mexico will naturally lead to a greater number of private commercial disputes.¹ Resolving these disputes in the courts of either Mexico or the United States is generally not satisfactory to the parties involved as the differences between the two legal systems create uncertainty and suspicion. Conciliation, mediation, and other forms of alternative dispute resolution can alleviate much of the stress involved in U.S. - Mexico business transactions if a problem should arise. In my experience, binding arbitration provides the best opportunity for a fair process, an efficient ruling, and a just outcome.

II. DISPUTE SETTLEMENT MECHANISMS UNDER NAFTA

The dispute resolution mechanism is an integral part of the North American Free Trade Agreement² (NAFTA). There are three discrete dispute resolution mechanisms set forth in Chapters 20, 19 and 11. Chapter 20 provides the general dispute settlement mechanism for resolving disputes among Canada, the United States, and Mexico.³ Chapter 19 provides the method for settlement of disputes arising under the antidumping and countervailing duties laws.⁴ Chapter 11, on the other hand, permits individual investors to demand arbitration against a member country if its investment is prejudiced because a member country violated the undertakings pursuant to NAFTA.⁵ It is important to note that Chapter 20 does not apply to investment disputes between a member country and an investor. However, Subchapter B of Chapter 11 does provide mechanisms for arbitration between the host government and the investor when the latter believes that the former has breached its obligations under

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1. Jeffery P. Bialos & Deborah E. Siegel, *Dispute Resolution Under the NAFTA: The Newer and Improved Model*, 27 INT'L L. 603 (1993).

2. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex. (effective Jan. 1, 1994), 32 I.L.M. 605 (1993).

3. NAFTA, *supra* note 2, ch. 20, art. 2004, 32 I.L.M. at 694.

4. NAFTA, *supra* note 2, ch. 19, art. 1904, 32 I.L.M. at 683.

5. NAFTA, *supra* note 2, ch. 11, art. 1101, 32 I.L.M. at 639.

the Agreement.⁶ Consultative steps are required in order to ripen this Chapter 11 right to arbitration. None of these arbitration procedures establish a new procedural regime, rather, NAFTA allows investors to seek arbitration for violations of the Agreement under the United Nations Commission on International Trade Law Arbitration Rules (UNCITLAR) or the Convention on the International Center for Settlement of Investment Disputes (ICSID).⁷

Articles 1116 and 1117 set out the requirements to bring a claim against the host country both for an investor on behalf of itself as well as an investor on behalf of an enterprise.⁸ First, another member country must breach either a provision found in Subchapter A of Chapter 11, Article 1502(3)(a) regarding monopolies and state enterprises, or Article 1503(2) concerning state enterprises where the alleged breach pertains to the obligations of Subchapter A. Second, the investor must incur a loss or damage by reason of, or arising out of, that breach. Third, a limitation of three years exists between the date the investor acquired, or should have acquired, knowledge of the breach, and knowledge that the investor incurred a loss or damage. Fourth, when two or more claims are submitted to arbitration that arise out of the same events which gave rise to the claim, the claims should be heard together unless the interests of a disputing party are prejudiced.

Article 1118 requires the disputing investor send a notice of intent to submit an arbitration claim to the member country at least 90 days before the claim is submitted.⁹ The notice shall specify the name and address of the disputing investor, the provisions of NAFTA which are alleged to have been breached, the issues and factual basis for the claim, the relief sought, and the approximate amount of damages claimed. The disputing parties should first, however, attempt to settle the claim through consultation or negotiation.¹⁰ Moreover, subject to Annex 1120.1, investors may submit claims to be arbitrated under ICSID provided six months has elapsed since the events giving rise to the claim and both disputants are parties to ICSID.¹¹ Furthermore, the investor may also submit claims under the Additional Facility Rules of ICSID provided that either the investor's country or the host country is a party to ICSID. In addition, arbitration claims may also be submitted under the UNCITRAL Arbitration Rules.¹²

In order for either an investor under Article 1116 or an enterprise under Article 1117 to submit a claim to arbitration, certain conditions precedent must be met under Article 1121.¹³ First, the investor must

6. NAFTA, *supra* note 2, ch. 11, art. 1115, 32 I.L.M. at 642.

7. NAFTA, *supra* note 2, ch. 20, art. 1120, 32 I.L.M. at 643.

8. NAFTA, *supra* note 2, ch. 11, arts. 1116-17, 32 I.L.M. at 642-43.

9. NAFTA, *supra* note 2, ch. 11, art. 1118, 32 I.L.M. at 643.

10. *Id.*

11. NAFTA, *supra* note 2, ch. 11, art. 1120(1), 32 I.L.M. at 644.

12. *Id.*

13. NAFTA, *supra* note 2, ch. 11, art. 1121, 32 I.L.M. at 643.

consent to arbitration. Second, both the investor and the enterprise must waive the right to initiate or continue before any administrative tribunal or court under the domestic law of any member country. This includes proceedings relating to the alleged breach of NAFTA with the exception of injunctive, declaratory, or other extraordinary relief proceedings not involving the payment of monetary damages. Finally, the consent and waiver must be in writing, must be given to the host country, and must be included in the submission of a claim for arbitration.

The composition of the arbitration tribunal is addressed in Articles 1123 and 1124.¹⁴ Except as provided by consolidation Article 1125, and unless the disputing parties agree otherwise, the tribunal consists of 3 arbitrators. One arbitrator is submitted by each of the disputing parties and the presiding arbitrator shall be appointed by agreement of the disputing parties. However, when an arbitration panel is not constituted within 90 days from the date a claim is submitted for arbitration, the secretary-general of ICSID, at the request of either party, will appoint the required arbitrator(s). Similarly, when the disputing parties are unable to agree on the appointment of the presiding arbitrator, the secretary-general of ICSID, at the request of either party, will appoint an arbitrator so long as the arbitrator is not a national of either of the disputing parties. These arbitrators are selected from a roster of 45 persons appointed by a consensus of the NAFTA member countries, or when no roster is available, from the ICSID panel of arbitrators.¹⁵

Article 1125 provides that when claims submitted to arbitration have a question of law or fact in common, a party can petition for consolidation of claims.¹⁶ The tribunal may, in the interest of fair and efficient resolution of the claims, consolidate all or part of the claims. Sixty days after a request for consolidation is submitted by a disputing party, the secretary-general of ICSID must establish a tribunal of three arbitrators from the roster list, as provided in Article 1124, or from the ICSID Panel of Arbitrators, so long as an arbitrator is not a national of any of the parties to the dispute. In addition, there are various duties of the parties to a dispute which are laid out in Subchapter B.¹⁷ For example, Article 1126 provides that a disputing party shall deliver to the other parties written notice of a claim that has been submitted to arbitration within 30 days from the date that the claim is submitted. The disputing party shall deliver to the other parties copies of all pleadings filed in the arbitration. Moreover, on written notice to the disputing parties, a party may make submissions to a tribunal on a question of interpretation of NAFTA.¹⁸ A party shall, at their own expense, be entitled to receive from the disputing party a copy of evidence and a copy of the written argument of the disputing parties.

14. NAFTA, *supra* note 2, ch. 11, arts. 1123-24, 32 I.L.M. at 644.

15. *Id.*

16. NAFTA, *supra* note 2, ch. 11, art. 1125, 32 I.L.M. at 645.

17. NAFTA, *supra* note 2, ch. 11, art. 1126, 32 I.L.M. at 644-45.

18. NAFTA, *supra* note 2, ch. 11, art. 1127, 32 I.L.M. at 645.

Articles 1129 and 1130 of NAFTA address the location of the tribunal and the governing law.¹⁹ Unless decided otherwise by the disputing parties, the tribunal will be in the territory of a NAFTA country that is a party to the New York Convention. A tribunal established under NAFTA shall decide the issues in dispute in accordance with NAFTA and applicable rules of international law. In addition, a tribunal may take interim measures to preserve the respective rights of the disputing parties, or to ensure that the tribunal's jurisdiction is made fully effective. Such measures include orders to preserve evidence in the possession or control of a disputing party, or to protect the tribunal's jurisdiction. Measures not included are orders of attachment or an order to enjoin the application of the measure alleged to be the breach of Subchapter A of Chapter 11, Article 1502(3)(a), or Article 1503(2).

Article 1117 speaks to the form an arbitral award may take.²⁰ For instance, a tribunal's final award may only include restitution of property or monetary damages with applicable interest. Any awards of restitution or monetary damages shall be paid to the enterprise if the claim is made under Article 1117. It is important to note that an arbitration tribunal, as provided for in the NAFTA, may not award punitive damages.²¹

Article 1135 discusses the finality and the enforcement of an award.²² It states an award made by a tribunal is binding on the disputing parties but shall have no binding force except between the disputing parties and in respect to the particular case. In practice, however, a tribunal will take into account prior decisions of other tribunals.²³ An investor must seek enforcement of an award within 120 days from the date of judgment in the case of an ICSID award. In the case of the Additional Facility Rules of ICSID or a UNCITRAL award, an investor has 3 months to seek enforcement of an award from the date of judgment. If a host country fails to comply with the terms of a final award, the NAFTA Commission shall, as per Chapter 20 and upon the request of the home country of the investor, establish a panel in which the investor's country may seek both a determination that the failure to abide by and comply with the terms of the final award is inconsistent with the obligations of NAFTA, and a recommendation that the defaulting party abide by or comply with the terms of the final award.²⁴ Because Chapter 11 does not address challenges to investor panel decisions, the rules of the appropriate arbitral regime control.²⁵ Thus, a disputing investor may seek

19. NAFTA, *supra* note 2, ch. 11, arts. 1129-30, 32 I.L.M. at 645.

20. NAFTA, *supra* note 2, ch 11., art. 1117, 32 I.L.M. at 643.

21. NAFTA, *supra* note 2, ch. 11, art. 1135, 32 I.L.M. at 646.

22. *Id.*

23. Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727, 735 (1993).

24. NAFTA, *supra* note 2, ch. 11, art. 1135(6), 32 I.L.M. at 646.

25. F. Amanda Debusk & Gary N. Horlick, *NAFTA Dispute Resolution*, INT'L TRADE COMM. NEWSL., Winter 1993-94, at 2.

enforcement of an arbitral award regardless of whether a panel has been established as per Article 1135(6).²⁶

Exclusions to NAFTA are addressed in Article 1137.²⁷ For example, a NAFTA host country may prohibit or restrict the acquisition of an investment in its territory by an investor from a different NAFTA country on the grounds of national security. In such a case, the host country may refuse to participate in the investor-state dispute resolution under Chapter 11 or Chapter 20, and the refusal may not be challenged by the NAFTA Commission. In addition, the dispute settlement measures found in Chapters 11 and 20 are not applicable to decisions made by Canada or Mexico whether to permit an acquisition that is subject to an investment review.²⁸

III. ADVANTAGES OF BINDING ARBITRATION OVER OTHER FORMS OF COMMERCIAL DISPUTE RESOLUTION

Even if NAFTA's Chapter 11 provisions are not applicable to individual investors, there are significant advantages of binding arbitration over judicial and other non-judicial forms of commercial dispute resolution. Such advantages arise because the civil justice systems of Mexico and the United States are substantively different. As a result of these differences, confusion arises in the minds of foreign businesspersons. For example, the "Código Civil para el Distrito Federal" [Federal District Civil Code], limits damages that may be recovered in a civil action, whereas U.S. law creates opportunities for unlimited damages, including punitive damages.²⁹ In Mexico, an injunction is not available as a remedy in commercial disputes where damages are irreparable or cannot be measured in monetary terms. In the United States, an injunction is often the preferred remedy for resolving a commercial dispute. The jury is not a part of adjudication of civil disputes in Mexico, whereas it is an integral part of the system in the United States. In Mexico, trial evidence is mainly presented by documentation in front of judges who question the witnesses, and pre-trial discovery is not allowed on the same scale as in the United States. These differences and others reinforce a party's doubts that the legal system of his or her counterpart will lead to a definitive resolution of a commercial dispute that will be fair.

26. See NAFTA, *supra* note 2, ch. 11, art. 1135(6), 32 I.L.M. at 646. When a Party fails to abide by or comply with the terms of a final award, the Commission shall, by request of the investor's country, establish a panel. In such proceedings, the requesting Party may seek (a) a determination that a failure to comply with the award is inconsistent with the obligations set forth under NAFTA, and (b) a recommendation that the defaulting Party comply with the terms of the final award.

27. NAFTA, *supra* note 2, ch. 11, art. 1137, 32 I.L.M. at 646-47.

28. *Id.*

29. See *Hernandez v. Burger*, 162 Cal. Rptr. 564, 566 (1980) (in automobile accident, court applied "governmental interest analysis" to select Mexico's "law of limited damages" instead of California's "unlimited damages rule"); see generally Friedler, *Moral Damages in Mexican Law: A Comparative Approach*, 8 Loy. L.A. INT'L & COMP. L.J. 235 (1986).

With these differences in mind, the following five sections will outline reasons why arbitration is a preferred choice for resolution of commercial disputes between Mexican and U.S. businesspeople. By way of introduction, submission of disputes to the court systems of either country raises the following concerns:

- Unpredictability as to the enforcement of any judgment rendered;
- Fear of not being treated impartially in the other party's country;
- Distress that the details of the dispute will be aired in public;
- Worry that the lack of technical expertise in a jury will lead to an improper result; and,
- The well-founded belief that court proceedings are expensive and time consuming.

A. *Enforceability*

Enforceability as an element of predictability cannot be underestimated. The business community dislikes uncertainty above almost all other risks of doing business. Fortunately, the New York and Panama Conventions lessen uncertainty that an agreement to arbitrate will be enforced and adds assurance that support will be provided by the courts of either Mexico or the United States for the enforcement of an arbitration award.³⁰ Decisions of arbitrators, pursuant to the New York or Panamanian connections, may be appealed but only under very limited circumstances.³¹ In contrast, the businessperson relying on litigation can only hope that foreign judges will liberally apply notions of comity and be well educated in applying internationally acceptable standards when considering:

- Whether the choice of law made by the parties is acceptable to the court where a judgment is sought to be enforced;
- Whether the conflicts of law rules suggested by the parties or by the court rendering the judgment were either applicable or correctly interpreted and applied;
- Whether, in the court's view, the award violates some basic public policy consideration;
- Whether the court which heard the case based its findings upon sufficient evidence or evidence that was properly obtained; and,
- Whether judgments will be enforceable as there exists no treaty between the United States and Mexico with respect to the enforcement of judgments.

Mexican appellate courts have shown a willingness to enforce foreign arbitration awards. In *Presoffice S.A. vs. Centro Editorial Hoy, S.A.*,³² a French publishing company obtained an arbitral award against a Mexican publishing concern through the International Chamber of Commerce Court of Arbitration in Paris, France. The Fifth Chamber of the Higher Court

30. See NAFTA, *supra* note 2, ch. 11, art. 1136, 32 I.L.M. at 646.

31. *Id.*

32. *Judgment rendered by the Eighteenth Civil Court of Mexico City*, DOING BUS. IN MEXICO, Feb. 24, 1977, § 18.06-18.07.

of Appeals of the Federal District in Paris affirmed the decision of the lower court by unanimous decision.³³ In a similar case, *Malden Mills, Inc. vs. Hilaturas Lourdes, S.A.*,³⁴ the Mexican court upheld the enforcement of an award rendered by the American Arbitration Association (AAA) of New York in favor of a party in Massachusetts against a party domiciled in Mexico City. These rulings indicate enforceability of awards makes binding arbitration a more predictable way of resolving disputes than adjudication by courts of either country.

Moreover, binding arbitration has advantages over a mini-trial, mediation, or conciliation. In the case of mini-trials, which are becoming more popular in Texas, the parties would face the same concerns as in entering the foreign court. If the Mexican party is asked to submit to a mini-trial by agreement in the contract, he or she would find the entire procedure not only unfamiliar but non-binding. Thus, following such a proceeding, the Mexican party would always face the unpleasant prospect of trial in a U.S. court. If the same procedure were available in Mexico, it would not be appealing to the U.S. businessperson for the identical reasons.

Further, with respect to mediation and conciliation, once the parties have elected to either seek arbitration or go to court, they may be beyond the stage where non-binding measures can effectively resolve the problem. Given the authority to mediate and conciliate, the arbitrator can play a vital role because the parties know that the arbitrator has the authority to render a definitive decision which will finally resolve their dispute if mediation/conciliation fails.

B. Impartiality of the Decision Maker

One of the principal advantages of arbitration as a preferred method for settling international business disputes is that it offers a neutral tribunal which neither party may be able to find in the country of the other. The parties choose the judge and the jury, rather than being assigned finders of fact and law as in court proceedings. As will be discussed in more detail, a properly drafted arbitration clause will also allow the parties to designate the law to be applied, the location of the proceedings, and the language to be used. This ability to obtain impartiality fulfills the business manager's need for a potential dispute to be decided fairly.

C. Confidentiality

A peculiarity of both arbitration proceedings and awards is that they are normally carried out privately. Indeed, the rules of several arbitration institutions require that proceedings be confidential unless the parties to the dispute direct otherwise. On the other hand, both court proceedings

33. Docket No. 757/78 of the Fifth Chamber of the Superior Tribunal of Justice in the Federal District, *DOING BUS. IN MEXICO*, Mar. 12, 1979, § 18.06-18.07.

34. Docket No. 170/77, decision rendered by the Fifth Chamber of the Higher Court of Appeals of the Federal District, *DOING BUS. IN MEXICO*, Aug. 1, 1977, § 18.06-18.07.

and judgments are public. Because commercial relationships often involve confidential information such as trade secrets, neither party desires such confidential matters be available to third parties. In addition, because many international commercial relationships are of a long standing nature, it would hinder the ongoing relationship to have "dirty linen" aired in public.

D. Technical Expertise

Many commercial relationships involve products, services or technology that are technologically complex. For a tribunal to resolve such a dispute, the arbitrator or judge must have a considerable amount of technical knowledge concerning the subject matter in dispute. The parties, by choosing arbitrators who are technically knowledgeable, are more likely to have a 'judge' with the specialized competence needed to properly evaluate technical claims.

E. Expense and Expeditious Resolution

Arbitration can be a less expensive means of resolving a dispute than a court proceeding. If either of the parties to a dispute is a small company or the amount in controversy is small, litigation may be too expensive and, therefore, not practical for resolving disputes. If there is a sole arbitrator available who is known to the parties and has technical knowledge in the area, the dispute could be resolved inexpensively so that the parties can go on about their business without any significant rancor existing between them. Further, arbitration clauses may require only written proofs and arguments, thus avoiding the expense of presenting live witnesses. Arbitration can also be a faster and more expeditious means of resolving a dispute. Again, in contrast to litigation, arbitration allows the parties the flexibility to obtain an impartial arbitrator and quickly submit a dispute which cannot be resolved by negotiation. With a properly worded arbitration clause, the parties can establish a time frame within which a dispute must be resolved.

IV. INSTITUTIONAL AND AD HOC ARBITRATION

Ad hoc and institutional arbitration are the two principal mechanisms for binding arbitration of commercial disputes between Mexican and U.S. parties. Ad hoc arbitration in its purest sense is an agreement between the parties with respect to all aspects of the arbitration. This includes the law which will be applied, the rules under which the arbitration will be carried out, the method for the selection of the arbitrator, the place where the arbitration will be held, the language(s) to be used, and most importantly, the scope and issues to be resolved by means of arbitration. Ad hoc arbitration may, however, rely upon the rules of one of the arbitration institutions such as the International Chamber of Commerce Court of Arbitration (ICC), the Inter-American Commercial Arbitration Association (IACAC), or the American Arbitration Association (AAA).

Parties often choose to employ ad hoc arbitration because they believe they will be able to save money, accelerate the procedure, and structure their proceedings in a manner that suits their own needs. In addition, ad hoc arbitration is chosen over institutional arbitration because of a party's belief that there exists an inherent bias in favor of one of the parties in a particular institution. I have found that ad hoc arbitration is preferable to institutionalized arbitration in most cases. Usually, these relationships will be long-term and quite personal. Ad hoc arbitration offers an opportunity for crafting an arbitration agreement allowing for procedures that meet the wishes and needs of the parties in their particular commercial relationships.

Under institutional arbitration, on the other hand, the parties specify in the agreement that one of the above institutions, or some other institution, will administer the proceedings from the time of demand through the award. The institution chosen may or may not administer the arbitration according to its own rules. It is worth noting that the ICC will not administer an arbitration except under its own rules. Using an arbitration institution has several advantages including pre-established rules, administrative assistance, appointment of arbitrators, physical facilities in which to hold the arbitration, support services of secretaries and translators, assistance with technical advice, and review of the final award to ensure that it meets the basic requirements for enforcement. There are, however, important disadvantages to institutionalized arbitration which include inflated prices and delays. In addition to legal fees incurred under ad hoc or institutional arbitration, the institution will charge administrative fees for the use of its services and facilities, and for the arbitrator's services. The ICC is the most active of arbitral services and also receives most of the criticism regarding fees. Under the ICC rules, charges and fees are calculated as a percentage of the claim. Thus, the higher the amount of the claim, the higher the arbitration cost regardless of the nature of the matter under dispute. Other criticisms include the claim that the bureaucracies inherent with institutional arbitration often promote delays and add costs to the parties.

If the parties decide in favor of institutional arbitration, they must agree on a specific institution to arbitrate their disputes. The two institutions most commonly chosen for the resolution of disputes between Mexican and U.S. parties are the ICC and the AAA. The ICC and IACAC are oftentimes preferred by Mexican businesspersons over the AAA because they have more experience and are not perceived to be so directly linked to the United States. However, the AAA has formulated International Rules of Arbitration modeled after the UNCITRAL rules which are seen as even-handed among Latin lawyers. In addition, AAA proceedings are administered less expensively than the ICC because it has a lower fee structure.

V. DRAFTING THE ARBITRATION AGREEMENT

Drafting a solid arbitration agreement is the best method of ensuring a successful arbitration outcome. A well drafted agreement should be in

accordance with the needs of the particular situation and be expressed clearly and unambiguously. There must be close consultation between the Mexican businessperson, the U.S. counterpart, and their legal counsel to achieve these drafting objectives.

A. *Scope of Arbitration*

Drafting a list of all the possible issues that could be subject to a dispute in the course of a business relationship is unrealistic. Therefore, the arbitration clause should be as broad as possible. For example:

Any dispute or controversy or claim arising out of or in connection with or relating to this contract, or breach or termination or invalidity thereof, shall be finally settled by arbitration in accordance with the rules of (preferred rules) which are then in force.

Attaining clarity requires considerable attention since both Spanish and English will be used in writing the agreement. For example, words such as "claims", "differences", or "disputes" must be used carefully to ensure that there is a common understanding between the parties as to what is intended. The phrasing of the scope clause set out above is an amalgam of work done by lawyers from around the world in the course of drafting the UNCITRAL arbitration rules. However, while satisfactory for many situations, the terms may need further clarification to fit individual cases.

Other phrases requiring examination of limitations in the context in which they are used are 'in connection with,' 'in relation to,' 'in respect of,' 'with regard to,' 'under,' and 'arising out of.' English courts have given the widest meaning to the phrase 'arising out of,' and this wording will usually embrace all disputes capable of being submitted to arbitration except when the issue is whether or not the contract had any existence *ab initio*. Although it is important to draft the clause as broadly as possible, some matters are not subject to private arbitration. An arbitration clause cannot cover matters which are not capable of being submitted to arbitration because of public policy considerations. For example, arbitration of a dispute about the validity or infringement of a patent cannot be submitted to arbitration in either the United States or Mexico. The judicial or administrative authorities of each nation have been vested with the exclusive jurisdiction for resolving such disputes.

B. *Choice of Arbitrator*

The most important step in any arbitration is the selection of the arbitrator or panel of arbitrators. It is important, therefore, that the agreement to arbitrate be clear in regard to the method for selecting the arbitrator(s). If the parties have adopted the rules of one of the institutions, particularly the UNCITRAL rules, the ICC rules, or the AAA rules, then the method for choosing the panel is fixed. If the parties have agreed to an ad hoc form of arbitration, the arbitration clause should expressly state how the arbitrator(s) will be selected. The most important element of the selection criteria is whether the arbitrator must

have a special skill. If a technical, legal, or economic expertise is required, it should be specified in the arbitration agreement.

Normally, tribunals in international arbitrations consist of a panel in which each party to the agreement appoints one member and the two chosen then name the third who acts as the presiding arbitrator. The panel need not be selected in this way, but whatever method is utilized, it should be clearly written in the arbitration agreement. If the arbitration is to be conducted by a sole arbitrator, the method for choosing the arbitrator should be articulated including a clause stating what should happen if the parties cannot agree.

While a panel of arbitrators is the usual standard for international commercial arbitrations, a sole arbitrator is often preferable. This is especially true where the parties have a long-standing relationship and the issues to be resolved do not involve a large amount of money. With a sole arbitrator, overall costs are substantially less and the dispute will be resolved much more quickly than by a panel of arbitrators.

C. Choice of Law

Parties to a commercial transaction between Mexico and the United States may stipulate that the law of one or the other country governs the transaction. Indeed, if the transaction involves technology transfer contracts, the law of Mexico must be chosen in order to obtain approval for registration of the license agreement. In general, however, neither party will find the law of the other totally acceptable, and the parties should focus upon general international standards and the customs and usage of trade.

Insofar as it will not offend the laws of either country to the extent of preventing the arbitral award from being enforced, my preference is that the parties should attempt to avoid having a particular body of national law apply to the transaction. Rather, parties should specifically authorize the arbitrator to decide future disputes in accordance with general principles of international law relating to international trade or investment or customary rules of equity and commerce. Such a provision avoids the difficulties of applying laws of either nation. It also insulates the parties from unilateral changes in the law of either Mexico or the United States. Authorizing the arbitrator to decide the dispute by acting as an *amiable compositor*, or on the basis of *ex aequo et bono*, is growing in popularity. Under this type of provision the arbitrator is permitted to decide the dispute on the basis of justice and fairness rather than on the basis of specific rules of law. While this type of "choice of law" has been criticized and not permitted in countries such as England, it would probably not encounter difficulty in the United States or in Mexico.

D. Choice of Location

A well drafted arbitration clause must provide specifically for the location of the arbitration, naming both the city and the country. In

addition, the country selected should be stable, and have a judiciary which does not significantly interfere with arbitration.

E. Choice of Language

The arbitration clause or agreement should specify the language or languages to be used in the arbitration proceeding. The parties may designate one language as official and allow the option of having a simultaneous translation to the other language. The technology for simultaneous translation is well advanced and can be employed in all but the most complicated circumstances. The use of simultaneous translation would make arbitration of commercial disputes between Mexican and U.S. businesspersons even more attractive than other methods of dispute resolution.

F. Choice of Rules

Institutional rules must be either specifically referred to in an arbitration agreement. Similarly, the drafting of ad hoc rules must include at least these basic provisions: (1) the procedure to initiate arbitral proceedings; (2) the method for giving notice; (3) the means for dealing with the refusal of one party to proceed after the other party has properly invoked the arbitration procedure; and, (4) a reference to the scope and limitation of discoverable documents. Moreover, the hearing procedures, form of the award, and enforcement procedures must be spoken to.

VI. INTERPLAY OF MEXICO'S CIVIL AND PENAL LAW

Unlike U.S. law, Mexican law permits parties to a civil dispute to invoke criminal sanctions and use these sanctions as leverage for negotiating a resolution of the civil dispute. Avoiding this predicament is reason enough to consider arbitration as an alternative to litigation in international transactions. Articles 386 and 387 of the "Código Penal para el Distrito Federal" [Federal District Penal Code] are the ones most likely to be invoked in order to bring a civil dispute to conclusion.³⁵ These two provisions describe criminal fraud and what is called simulated fraud. They provide as follows:

ART. 386: A crime of fraud is committed by one who illicitly misleads a person or gains an advantage by inducing another in reliance upon it, and by doing so attains unlawful gains. The crime of fraud is punishable as follows:

I. With imprisonment of three days to six months and a fine of three to ten times the minimum daily salary (of the Federal District), when the value defrauded does not exceed the latter amount.

II. With imprisonment of six months to three years and a fine of

35. D.O., 22 de julio de 1993.

ten to one hundred times the minimum daily salary, if the value defrauded exceeded ten but not five hundred times the minimum daily salary (of the Federal District).

III. With imprisonment of three to twelve years and fines up to one hundred twenty times the minimum daily salary (of the Federal District), where the defrauded value exceeded five hundred times the salary.

ART. 387: The same penalties indicated in the previous Article shall be imposed upon:

X. One who simulates a contract, a judicial act or writing, in order to harm another or to obtain wrongful benefit.

A judgment against a judicial depository shall be presumed simulated when, by virtue of said judgment, action, judicial act or writing, the result is sequestration of something previously garnished or deposited, whomever the person may be against whom the action or lawsuit is filed.

My first experience with how criminal law provisions are invoked came as a result of a matter I handled in the United States. It involved the sale on open account of many hundreds of thousands of dollars of pantyhose. The seller was a Mexican manufacturer and the purchaser was a U.S. distributor. The Mexican manufacturer had not insisted upon payment in advance or upon delivery, nor required a letter of credit to ensure payment of the product delivered to the U.S. distributor. Over a period of months, a large quantity of the pantyhose was delivered to the U.S. distributor without payment rendered. The Mexican manufacturer attempted to collect his money through a series of meetings in the United States and Mexico with representatives of the distributor. I was consulted after the Mexican manufacturer began to realize that its informal efforts to obtain payment would not succeed. After reviewing the facts and circumstances of the case, I urged my clients to bring suit in the appropriate U.S. jurisdiction in order to collect the money. Over a period of months and many meetings, my Mexican client continued to be reluctant to bring a civil suit. Finally, in a meeting in which I had become quite exasperated, I asked them how did they expect to collect this money unless they brought suit. Their response was that they knew that under "the law", without referring to which law they had in mind, a criminal charge for fraud could be brought which can be used as leverage to force the distributor to pay.

My client explained to me that the leverage provided by such a criminal charge is not the charge itself, but the judicial order of detention. Because bail is completely within the discretion of a court in Mexico, the charging party litigates to prevent bail being granted. The charged party often stays in jail until the matter is resolved. This was my first encounter with how Mexicans view the relationship between penal law and civil law. I have since come to realize that filing a criminal charge in the context of a civil dispute is the weapon of choice utilized in a civil

dispute by the party who wants rapid and decisive results. I explained to my Mexican clients that U.S. law would not permit such a use of criminal statutes to resolve a civil dispute. They were dumbfounded.

The experience I just recounted was very early in my private practice. It was not until some time later that I began to appreciate the full dimensions of the relationship between the Mexican penal and civil law. My enlightenment in this regard came with respect to some bad checks that were issued by a Mexican businessperson to one of my U.S. clients. I consulted with a Mexican penal attorney who outlined the steps that should be taken to bring the bad check-writer to his senses. First, the U.S. client made a formal charge. That charge was presented to the *Ministerio Publico*, the investigative arm of the prosecutor's office. After several meetings with the representative of the *Ministerio Publico*, the charges were presented by him to a district judge in Mexico who issued an order of detention. Upon the Mexican party learning of the order of detention, the checks were paid in cash. This experience was the most satisfying among several others because the system worked in favor of my client.

More recent experiences with the relationship of the penal and civil systems have not been as gratifying. The one that stands out in my mind with greatest clarity involved my U.S. client who had inherited valuable Mexican properties and businesses and a Mexican individual who had worked in the businesses for many years and had gained the confidence of the now deceased founder. The Mexican party, with the assistance of excellent corporate and penal counsel in Mexico, had succeeded in establishing off-shore companies to which the shares of the Mexican companies that owned the businesses were transferred. By this maneuver, the Mexican citizen who had no actual ownership interest in the Mexican corporations but did own one-third of the off-shore corporations, now effectively owned one-third of the Mexican companies.

After the death of the founder, my client discovered this corporate structure and consulted with Mexican counsel who advised that the shares of the Mexican corporations could be returned to the ownership of the shareholders of the Mexican corporations by majority vote of the shareholders of the off-shore corporation. The proper method for carrying this out was formal notice in accordance with Mexican law given in newspapers. The argument of Mexican counsel was that the notices given were sufficient and that the Mexicans who owned an interest in the off-shore companies need not be told directly that the shareholder meeting was scheduled. My client took this advice from his Mexican attorney and no notice was given to the Mexican organizer. The meeting was held at which the off-shore corporations were stripped of any ownership in the Mexican corporations. The Mexican shareowner did not appear at the meeting. Upon learning that the value of the shares of the off-shore companies had been reduced to zero, the initial organizer commenced criminal and civil proceedings against my client. At this point, I was consulted and brought into the matter. The civil and criminal claims of the Mexican party were essentially that the founder had given a general

power of attorney permitting the establishment of the off-shore corporations and the transfer of shares of the Mexican corporations into those corporations. He further contended that my client had signed an acknowledgment of the existence of the power of attorney and had essentially approved of what the founder had done. Based upon the above facts, the criminal charge was *fraude por simulation*, or simulation of legitimate acts for the purpose of carrying out a fraudulent objective.

This 'so called' acknowledgment by my client was, in our view, a forgery. Notwithstanding our proofs by experts that the alleged acknowledgment was a forgery, an order of detention was issued against my client and he was arrested. During the seven months my client spent in jail, negotiations and civil court proceedings went on non-stop. The matter was concluded when an agreement was reached in which my client ceded an interest in one of the key properties in question. Based upon the agreement to transfer one of the properties to him, the Mexican party went before the penal judge and simply changed his testimony about the alleged acknowledgment by my client. His testimony was essentially that he could have been mistaken with respect to the acknowledgment actually having been signed by my client. The penal judge then issued an order of release. After tying up loose ends produced by civil proceedings in various states in the Republic of Mexico, the matter was resolved.

Threat of a criminal complaint or a promise to abstain from, discontinue, or delay the prosecution of another for an offense is a crime itself in Texas.³⁶ Formerly called compounding, the offense is now called obstruction or retaliation. The Texas Supreme Court addressed this issue in *Lewkowicz v. El Paso Apparel Corporation*.³⁷ In this case, one party to a civil dispute alleged fraud and had the other party thrown into a Mexican jail. Negotiations continued for approximately five months before the jailed party consented to signing an "agreement" favorable to the charging party. Once the agreement was signed, the charging party told the judge there had been a "misunderstanding." The jailed party was subsequently released. When the charging party attempted to enforce the "agreement" in the United States, the Texas Supreme Court declared it void because it was derived through "compounding." According to the Texas Supreme Court, "[a] contract made in consideration of compounding a criminal offense is void because it is made in contravention of the Penal Code and public policy."³⁸ Even though the agreement was validly derived under Mexican law, the Texas Supreme Court refused to enforce it as against the public policy of the state.

According to *Corbin on Contracts*,³⁹ the compounding of a felony is itself a common law crime, and any bargain involving such an offense is necessarily illegal. Corbin identifies such "bargains" as arising in several

36. Tex. Penal Code Ann. § 36.06 (West 1994).

37. 625 S.W.2d 301 (Tex. 1981).

38. *Id.* at 305.

39. 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1421, at 354 (1st ed. 1962).

forms including: (1) promises not to prosecute or not to give evidence to the prosecuting officers; (2) promises to conceal evidence; and, (3) promises to cause the dismissal of a prosecution already begun.⁴⁰ Citing *Corbin*, The U.S. Court of Appeals for the District of Columbia has stated that because bargains involving the forbearance of prosecution are contrary to public policy, such promises are *nudum pactum* concerning bargains for compounding crime or stifling a prosecution.⁴¹

VII. CONCLUSION

In my experience, commercial disputes between Mexican citizens and U.S. citizens will not be resolved satisfactorily in the civil justice systems of either country. The two systems are confusing and daunting to the parties of a transaction who are not accustomed to using them. Indeed it is my view that most Mexicans only resort to the courts when all possible opportunities for negotiating a resolution over dispute have been exhausted. After all, the most common saying in Mexico regarding litigation is, "A bad settlement is better than a good lawsuit." On the other hand, the U.S. perception of Mexican litigation is a system that is unpredictable, exceedingly slow, and very expensive when resolving commercial disputes.

When involved in a court proceeding in Mexico, the cost in terms of time, money and emotional distress will not stand up in the face of most cost-benefit analyses. It is worth noting that arbitration has been used successfully in Mexico for years as an effective method for the resolution of commercial disputes. In addition, I think you will find an increasing willingness on the part of U.S. parties to accept arbitration as a means of dispute resolution. In sum, my experiences with litigating in Mexico have made me an advocate of arbitration as a means of resolving commercial disputes in Mexico.

40. *Id.* at 356.

41. See *United States v. Gorham*, 523 F.2d 1088, 1097 (D.C. Cir. 1975) (this case involved a prison official's promise not to prosecute rebellious inmates).