



PRIVATE COMMERCIAL DISPUTES WITHIN THE NAFTA AREA Practical Outreach on Alternative Dispute Resolution

In June 2010 and in connection with the 20th meeting of the NAFTA Advisory Committee on Private Commercial Disputes (the "NAFTA 2022 Committee") in Houston, Texas, the National Law Center for Inter-American Free Trade (NLCIFT) and the NAFTA 2022 Committee organized two outreach sessions:

- 1) an outreach session for the judiciary; and
- 2) an outreach session for lawyers, businesspersons, and members of the academic community.

The NLCIFT's board chair Philip A. Robbins, deputy director, Kevin J. O'Shea, Esq., and research director, Dra. Mariana Silveira, participated in the Committee's Houston meetings. Robbins and O'Shea are both U.S. members of the NAFTA 2022 Committee. The Committee is co-chaired by representatives from each of the NAFTA partners. Keith Loken, Esq., of the U.S. Department of State's Office of Private International Law serves as the U.S. co-chair. The name of the 2022 Committee derives from the article of the NAFTA agreement, i.e., Article 2022, which concerns the availability, use and effectiveness of arbitration and other procedures for resolution of private international commercial disputes in the NAFTA area.

In the first outreach session in Houston, the NAFTA 2022 Committee delivered an outreach program to the Houston-based judiciary, including members of both the federal and state benches. The program covered the fundamentals of international and domestic alternative dispute resolution (ADR) in each of the three NAFTA countries, including the legal framework (at both the federal and state/province levels) as well as an overlay of international law via the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards,

which is known as the New York Convention. The program highlighted judicial restraint vis-à-vis ADR, focusing on two major areas:

- 1) *enforcement of contracts* to resolve disputes, when the contracts call for arbitration and other types of ADR; and
- 2) *enforcement of awards* and other types of settlement agreements.

The role of the judge as one of supervision was emphasized.

In the second outreach session in Houston, the NAFTA 2022 Committee delivered a program to lawyers, businesspersons, and the academic community (professors and students) at the South Texas College of Law. Lawyers included members of law firms as well as in-house counsel. Panels for this second outreach session were as follows:

- 1) Introduction to ADR in the NAFTA Region – background on the activities of the NAFTA 2022 Committee in promoting the use of ADR in the NAFTA countries;
- 2) Drafting of a Bullet-Proof ADR Clause: Lessons Learned – experienced practitioners' advice on essential elements to include and pitfalls to avoid in preparing effective ADR clauses; also, the legal ethics aspects of the use and availability of ADR; and
- 3) Enforcing Arbitration Awards – what one needs to know about the *amparo* system in Mexico as well as other matters that can affect the enforcement of arbitral awards in the NAFTA countries; and challenges in collecting awards.

The previous meeting of the 2022 Committee was in September 2009 in Querétaro, Mexico. The next meeting, the Committee's 21st, is planned for 2011 in Canada.

GRADUATE LEVEL PROGRAM IN INTERNATIONAL TRADE LAW Attorneys for Today's Business & Commerce

The unique International Trade and Business Law program offered by the University of Arizona's James E. Rogers College of Law continues into its sixteenth year with a strong and diverse group in the 2010-2011 academic year. Implementing today's complex web of international agreements, rules, regulations and international arbitral decisions indicates a clear need for the program's rigorous graduate-level legal education in the area of international trade law, international commercial law and international investment. As

in previous years, the National Law Center for Inter-American Free Trade (NLCIFT) will be cooperating with this well-designed program that prepares attorneys for future careers in private practice, law teaching, and/or government or international organization service.

This year's participants include eight candidates for the degree of Master of Laws in International Trade Law (LL.M.), two candidates for the Doctor of Juridical Science (S.J.D.) degree, and three Canadian

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ARIZONA BAR VIEWS SECURED LENDING IN THE HEMISPHERE

The State Bar of Arizona convened more than 1,500 attorneys and judges from across the state at its 2010 Annual Convention in June. As part of the event, the International Law Section chaired by D. Michael Mandig of the law firm Waterfall Economides Caldwell Hanshaw & Villamana PC and National Law Center for Inter-American Free Trade (NLCIFT) Board Chairman Philip A. Robbins organized a continuing legal education session on “Modernizing Secured Lending in Latin America,” with presentations and discussions by present and former NLCIFT attorneys. Robbins began by introducing Mandig, who served as moderator.

NLCIFT Founder and President Dr. Boris Kozolchyk provided an overview of the current state of secured transactions in Latin America. The secured transactions legal reform process in the Americas began with the Organization of American States (OAS) Model Inter-American Law on Secured Transactions. Since then, Guatemala and Honduras have adopted the laws most faithful to the OAS Model Law. Others like Mexico have followed it in part; others like El Salvador have one in the drafting stages; and others like Costa Rica, Colombia and Chile are contemplating its adoption. Kozolchyk stated that “despite everything that has occurred in the U.S. economy and in many economies around the world, the law of secured transactions is one of the best indicators of what should be the direction of commercial law, commercial practice and economic policies around the world.” According to Kozolchyk, it will not be too long until anyone in the Hemisphere will be able to search or file in registries throughout the Americas, creating the basis for a regional credit market.

NLCIFT Research Attorney Dr. Marek Dubovec then spoke about the work he and registry expert Thomas Ose have been doing to prepare the new Honduran secured transactions registry to be hosted by the Tegucigalpa Chamber of Commerce and Industry. The registry is in English and Spanish, is designed to allow submission of a financing statement either electronically or on paper, and will identify the borrower with the unique permanent number that is assigned to individuals and entities. Dubovec noted that access to the registry for searches would be without charge and registration would be subject to a nominal filing fee, perhaps \$12. In Guatemala, the value of that country’s new secured transactions law is diminished by the remarkable filing fee of up to \$1,200, which limits use to larger firms and larger transactions, where otherwise credit to small and medium-size business could have been encouraged. (Because Honduras has a vehicle registry for tax purposes but not for registering security interests, an early effect of the new secured transactions registry is expected to be an increase in credit available for vehicle purchases.)

John M. Wilson, Senior Legal Officer in the OAS Department of International Law and former NLCIFT project coordinator, described the OAS in general as well as the extensive work of his Department at the OAS in serving as the depository for 28 conventions and instruments, covering subjects from adoption of minors to taking of evidence, to conflicts of laws regarding bills/notes/invoices to extraterritorial validity of foreign judgments and arbitral awards and more. He then focused on the work of the OAS Specialized Conferences on Private International Law (known as CIDIPs from the initials in Spanish). CIDIP-I took place in 1975. CIDIP-VI produced a Model Inter-American Law on Secured Transactions; CIDIP-VII has now produced a model regulation for registration of security interests.

NLCIFT Board member Prof. Dale Beck Furnish (emeritus, Arizona State University) traced the evolution of secured transactions law involving personal, i.e., non-real estate, property in the U.S. (beginning after World War II), Canada (beginning in the 1970’s) and Mexico (with piecemeal reforms in 2000, 2003 and 2009). He spoke about cross-border business transactions with respect to security interests in growing crops, as for example when a U.S. lender finances a Mexican grower with a crop loan, secured against the growing crop, the harvested produce and proceeds. After harvest, the produce will be sold to a U.S. buyer, creating an account receivable in the U.S. (and possibly also sold in Canada as well). He then focused on changes over time in Article 9 of the U.S. Uniform Commercial Code (UCC §9) with respect to foreign borrowers and concluded that a U.S. lender seeking to perfect a security interest involving a Mexican borrower and Mexican collateral should file in Mexico under Mexican law, in the District of Columbia in the U.S. and in any U.S. State where the collateral, its proceeds or other assets of the debtor may be found.

The session concluded with a lively discussion of a hypothetical case prepared by Mandig involving borrowing by a Mexican grower from a U.S. or Canadian lender with the crop to be distributed throughout the U.S. and Canada. The discussion benefited from participation by Robert C. (Kip) Martin, Esq., of the law firm Coogan & Martin, Nogales, Arizona; among his clients are many firms in the produce business. The case gave opportunity to explore due diligence, securing repayment of loans, risks of unrecorded interests and disputes and remedies.

PUBLICATION: ENHANCEMENT OF MEXICAN COMMERCIAL ADJUDICATION

The *Arizona Journal of International and Comparative Law* each year produces two traditional issues, with articles and student notes, and one symposium issue. For 2010, this *Journal* has published its symposium issue on “ENHANCEMENT OF MEXICAN COMMERCIAL ADJUDICATION BY IMPROVED TRANSACTIONAL FACT-FINDING, APPLICATION OF EQUITABLE PRINCIPLES, AND DRAFTING OF STANDARD CONTRACTS AND BEST CONTRACTUAL PRACTICES,” which refers to legal reform work carried out in Mexico over an extended period. The *Journal* issue includes:

- workshop presentations and discussions,
- working group reference materials, and
- documents drafted by the working group.

All content is in both English and Spanish with a total of 691 pages. The section in Spanish is entitled “*EL MEJORAMIENTO DE LA JUSTICIA COMERCIAL EN MÉXICO A TRAVÉS DE UNA MÁS PRECISA IDENTIFICACIÓN DE LOS HECHOS NEGOCIALES, DE LA APLICACIÓN DE PRINCIPIOS EQUITATIVOS, Y DE LA REDACCIÓN DE CONTRATOS MODELO Y MEJORES PRÁCTICAS CONTRACTUALES.*”

The *Journal's* editor, Aaron T. Martin, wrote that the symposium was “spearheaded” by the National Law Center for Inter-American Free Trade (NLCIFT) and represents a report about a great deal of hard “work undertaken by the NLCIFT in close and productive collaboration with the

highest court of Mexico’s Federal District (the *Tribunal Superior*), that court’s Judicial Training Institute (*Instituto de Estudios Judiciales – IEJ*), USAID-Mexico, and distinguished members of Mexico’s judicial, legal, notarial, business and academic communities.”

NLCIFT president, Dr. Boris Kozolchik, hailed the close cooperation of the participants and the interdisciplinary nature of the effort. “[T]he workshops and working group gathered not only jurists, legal practitioners and scholars, but also merchants and other commercial professionals and intermediaries such as real property and commercial brokers” and solicited their reactions and recommendations. They “sat down together to draft a standard agreement and an accompanying set of best commercial and legal practices” for “what the Federal Civil Code of Mexico refers to ... as “promises of sale” (known in other countries also as options to purchase real property.” The recommendations distinguish between law and practice with respect to high-value, sophisticated projects and “promises or options that involve lower-value transactions, less sophisticated participants and fewer formalities.”

Going forward, a further workshop in Mexico is planned for later in 2010. Further, the hope is that the recommendations put forward will find their way into Mexican real estate law and that the process pursued will offer a template for Mexican legal discussion and recommendations in other sectors of the economy.

NLCIFT has a limited number of copies of this issue of the *Journal*. For anyone interested in purchasing a copy, information is available from Margarita Willis Martinez at natlaw@natlaw.com or 1-800-LAW-FIND.

THE INTERAMSM DATABASE & RESEARCH AND TRANSLATION SERVICES

The Center’s *InterAm*sm Database is a unique online service providing **Latin American legal and regulatory information**. Subscribers to the database receive same-day electronic access to Mexico’s *Diario Oficial de la Federación*, the equivalent of the U.S. Federal Register. The *InterAm*sm Database contains laws, regulations and secondary source materials for 25 countries in the Americas—primarily original language text (Spanish or Portuguese), but with some key legislation translated into English, especially for Mexico. The collection is arranged in 26 substantive areas and now includes case law for many countries. Subscription and pricing information is available at www.natlaw.com, or e-mail natlaw@natlaw.com, or call: 1-800-LAW-FIND from the U.S. or (001)(520)622-1200 from outside the U.S. The same contacts can provide information on the Center’s Inter-American Legislative Research and Translation Services. To request a trial subscription, go to <http://natlaw.com/iadbform.htm>

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GRADUATE LEVEL PROGRAM IN INTERNATIONAL TRADE LAW

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exchange students under the North American Consortium for Legal Education (NACLE). The program is directed by David A. Gantz, Esq., Samuel M. Fegtly Professor of Law and NLCIFT Associate Director. In addition to extensive course offerings, the law college has an excellent library, which provides many opportunities for research in international trade, commercial law, customs law, cross-border environmental problems, etc.

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Vassil Zhivkov (Bulgaria)

SJD CANDIDATES

Basem El Hendawy (Egypt)

Pervaiz Khan (Pakistan) coming in January

NACLE EXCHANGE STUDENTS FROM CANADA

As a participant in the North American Consortium on Legal Education (NACLE), the James E. Rogers College of Law welcomes three Canadian exchange students in their third year of law school; they are:

Andrew Harapa (University of Ottawa)

Betony Rowland (Dalhousie University)

Andrée-Ann Rivard (University of Ottawa)

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