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Litigation, Arbitration, and Alternative Dispute Resolution

I. POTENTIAL IMPACT OF MODELING NAFTA AFTER THE AGREEMENT BETWEEN THE UNITED STATES AND CANADA

JULIO C. TREVIÑO:

If the United States and Mexico model NAFTA's dispute resolution process on the agreement between Canada and the United States, then the access that private parties will have will be very limited, except for anti-dumping and countervailing duties. With that exception, private parties will have no mechanism to solve their problems and disputes under the treaty. Actually, we should refer to problems and disputes between private parties regarding their business transactions under the treaty. NAFTA will not deal with such questions, but rather with dispute settlement between the member countries. However, the expected increased flow of business between the three countries, particularly between the United States and Mexico, will result in more disputes with respect to interpretation of agreements. Thus, compliance and enforcement must be expected. The question is raised, how are these disputes or controversies going to be solved? NAFTA alone does not provide the answer. Thus, the two remaining avenues are litigation or arbitration.

Negotiating settlements is a good method of solving problems but does not always work, and litigation is always difficult. Further, litigation is expensive and time consuming. Justice is not done quickly. Thus, when time is important, litigation is not a good avenue.

II. ARBITRATION

In regard to Mexico, arbitration also appears to be an attractive method of dispute resolution for international business controversies. With respect to the law of arbitration, we should remember, first of all, that like in the United States, statutory law is divided into federal law, which is enacted by the Mexican Federal Congress within its jurisdiction, and state law, enacted by the legislatures of the thirty-one states. In addition, there is a distinction between commercial law, which is all federal, and the so-called civil law, which relates to all personal matters involving private parties, except for commercial

transactions. If a contract involves at least one professional merchant, it will be deemed to be commercial. As regards commercial arbitration, the federal Code of Commerce ("C. Com.") will govern. And this is true for both domestic and international commercial arbitration, except that in the case of the latter, the C. Com. may be preempted by the international treaties on arbitration to which Mexico is a party, in accordance with express provisions of the C. Com. itself, and of Article 133 of the Federal Constitution (supreme law of the land clause) which allocates a greater hierarchy to treaties ratified by Mexico than to federal law. With regard to international arbitration, the treaties entered into by Mexico are particularly relevant with respect to the enforcement of foreign arbitral awards.

As noted above, the C. Com. is the primary source of legislation for commercial arbitration, whether domestic or international. So-called "civil" arbitration is dealt with in the codes of civil procedure of the various states and the Federal District, which includes Mexico City. The C. Com. was amended in 1989 to incorporate six or seven provisions of the UNCITRAL Model Law of Arbitration of 1985 and some of its "spirit." Additionally, in order to "federalize" the provisions on arbitration of the Code of Civil Procedure for the Federal District ("CCPFD"), which dates from 1931, they were also incorporated into the C. Com. The result is not entirely satisfactory. Nevertheless, considerable progress was made due to those few UNCITRAL rules and "spirit," and, generally speaking, we can say that Mexico has an adequate law of arbitration, as we will describe briefly.

With respect to domestic arbitration, the C. Com. provides that arbitration may be agreed upon in writing by way of an arbitration clause in a contract or separate document. "Submission" to arbitration after a controversy has arisen is also possible. An exchange of letters, telex, or telefax is acceptable. The arbitration clause or submission agreement must contain certain information regarding the parties, the subject matter of the arbitration, the place and language of the arbitration (Spanish and, if desired, any other); a waiver to the right of appeal; the applicable substantive law; and the rules of procedure to apply to the arbitration. In this respect, the parties may agree on their own rules or they may choose the arbitration rules of any institution engaged in the administration of arbitration without distinction as to the nationality of the institution. Thus, a purely domestic arbitration in Mexico may be submitted to the rules of the

National Chamber of Commerce of the City of Mexico (which indeed has arbitration rules), but also to those of the International Chamber of Commerce ("ICC") or the American Arbitration Association ("AAA"), provided that the "essential formalities" of Mexican procedure are respected. Those formalities generally correspond to what is known as "due process" that is normally observed in the arbitration rules of any of the institutions mentioned above.

It is only when the parties have not selected any such institutional rules, or have not adopted any *ad hoc* arbitration procedural rules, that the C. Com. will govern the arbitration procedure; and in that which is not expressly provided for, the Code of Civil Procedure of the state of the "situs" of the arbitration shall apply supplementarily.

I do not consider it necessary to expand on this discussion regarding domestic arbitration in Mexico, and it should only be mentioned that, generally, domestic arbitration works well. Besides, if such arbitration involves, for example, a Mexican subsidiary of a United States company, the parties to the arbitration would be well advised to select the rules of an international arbitral institution. But the arbitration may still be domestic.

As regards international commercial arbitration, one should note that the matter is regulated by the international treaties on arbitration to which Mexico is a party, the Federal C. Com., the CCPFD, and the state codes of civil procedure, in that order. The Civil Code for the Federal District may also apply to certain matters, such as conflict of laws.

The treaties entered into by Mexico for the most part relate to the enforcement of foreign awards. Therefore, a primary source for the answer to such questions as the arbitration agreement, appointment of arbitrators, applicable substantive law, rules of procedure and conduct of the arbitral proceedings is the C. Com., and in that which is not provided in it, the state code of civil procedure of the place of the arbitration.

However, it is important to note that the parties to an international arbitration to be held in Mexico, as in the case of domestic arbitration, may submit to the rules of arbitration of institutions such as the ICC, the AAA, or the Inter-American Commercial Arbitration Commission ("IACAC"), located in Washington, D.C. If that is the case, the rules so selected shall supersede the C. Com. except as regards such matters under provisions which may be considered of a

mandatory nature and may not be derogated by the will of the parties, for example, such essential rules of Mexican procedure requiring notice to the defendant of the arbitral proceedings and providing for the right to file defenses and evidence in support thereof. Also, it is required that the proceedings be conducted in Spanish, in addition to any other language selected by the parties. There are some provisions on arbitration under the C.Com. which might be considered as mandatory, but the nature of which has not been defined by the courts and, therefore, may be argued that they may be substituted by the corresponding provisions under the rules of an Arbitration institution. These include a provision, for instance, that an arbitrator selected by both parties can only be challenged before a court of law; or that a counterclaim can only be filed for such an amount as necessary to offset it against the amount of the claim. No such limitations are to be found in any of the well-known rules of arbitration of the institutions mentioned before. In my opinion, such rules would apply if selected by the parties under the provisions of the C.Com. which authorize the parties to do so (Art. 1422), since the corresponding provisions of the C.Com are not mandatory in nature.

Therefore, we strongly recommend, for international arbitrations to take place in Mexico, the adoption of the rules of arbitration of the ICC, IACAC, or AAA, and, of course, check with Mexican Counsel on the number and extent of provisions under the C.Com which may be considered as mandatory. We will assume that the reader is familiar with or has access to said rules, and, therefore, we will not discuss them.

But what happens if, for some reason, particularly in an arbitration clause in a contract, the parties provide for arbitration in Mexico but fail to provide for the applicable procedural rules? The answer may be different depending upon whether the parties to the arbitration are nationals of countries which are members of the (Panama) Inter-American Convention on International Commercial Arbitration of 1975. Both Mexico and the United States have ratified the said convention. Now, the Convention recognizes the validity of an arbitration agreement regarding present or future controversies of a commercial nature (Article 1) and further provides that, in the absence of an express agreement of the parties (as to rules of procedure), the arbitration shall be conducted in accordance with the Rules of Procedure of the IACAC.

Therefore, in the hypothesis under consideration, the Rules of

Procedure of the IACAC (as amended on January 1, 1978) shall apply to an arbitration in Mexico; except that, under Article 1.2 of said Rules, if there is a conflict with a provision of Mexican law, which the parties cannot derogate, that provision shall prevail (see above for a brief discussion on mandatory provisions under Mexican arbitration law). We believe this is a valid conclusion under Article 133 of the Mexican Constitution and Article 1421 of the C.Com which provide that international treaties ratified by Mexico take preference over that law.

The IACAC Rules of Procedure, which are based on the 1976 UNCITRAL Arbitration Rules (not to be confused with the Model Law of Arbitration), are an excellent set of modern rules of arbitration and should work out very well in an international arbitration to be held in Mexico. We do not propose to discuss said rules, which are very well known.

Finally, as regards international arbitrations to be held in Mexico, there are at least two instances where it is difficult to conclude that, in the absence of an agreement of the parties with respect to procedural rules, the Panama Convention and the IACAC Rules of Procedure shall apply. Said two instances are the following: (i) where only one of the parties is a national of a member country to the Panama Convention; e.g., Mexico or the United States, but not both; and (ii) when the place of arbitration is Mexico, but neither party is a national of a member country to the Panama Convention. The Convention itself does not provide the answer, since it does not define its scope of application. Therefore, it is submitted that in those cases the rules of the C.Com for domestic arbitration (as modified by such provisions dealing specifically with international arbitration) shall apply.

III. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

VICTOR A. VILAPLANA:*

Litigation as a way of resolving domestic business disputes has numerous shortcomings. It is time consuming, public, expensive, and it can generate a great deal of animosity and hostility among the parties. Applying that same model to the international context enhances

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the problems. There may be problems with service of process, language, and the perception of national bias, making what is already a deficient mechanism in the domestic realm even more deficient in the international context. Consequently, arbitration and conciliation or mediation seem to be much more desirable ways to resolve commercial international disputes.

International arbitration has many of the same advantages inherent in domestic arbitration. It is faster, less expensive, and the procedures are more certain. There is less of a problem with bias because the parties may select a panel comprised of experts familiar with the area in dispute.

Choice of law is another important advantage to arbitration. In a recent Supreme Court decision, the Court upheld an arbitration agreement between Mitsubishi and a Puerto Rican car distributorship that specified arbitration in Japan and application of Swiss law. Normally, in the international context, the parties choose to apply the law that is reasonably related to the forum. Sometimes, however, in order to give the appearance of impartiality, the parties to an international arbitration agreement want to apply law unrelated to either party's laws. Courts will enforce these arbitration agreements rather than applying the usual tests applicable to a choice of law dispute. They do this in order to give effect to the intention of the parties to have totally neutral law apply in the event of a dispute.

One of the main advantages of arbitration is that it is not public. Documents and information may be held in confidence. This contributes to preserving ongoing business relationships between the parties where litigation would be very disruptive of these relationships.

On the downside, there may be more of a tendency on the part of the arbitrator to compromise and "split the baby." For example, a recent arbitration agreement failed to designate the place of arbitration. The plaintiff filed his claim in New York while defendant felt that the arbitration ought to be in California and tried to move for change of venue. The defendant claimed that the arbitration should be moved because the dispute involved some machinery that was shipped to Mexico and there would have to be site visits to the Mexicali plant, thus rendering San Diego a more convenient arbitration location. The administrative tribunal decided to "split the baby" and have some of the arbitration in New York and some in San Diego.

IV. CALIFORNIA AND THE INTERNATIONAL ARBITRATION ACT

In recognition of the importance of arbitration with regard to the settlement of international disputes, California adopted the International Arbitration Act. This Act is modeled after the IACAC model law. Procedures are, therefore, more certain if California is chosen as the sight of arbitration.

An overriding principle of the California law is that the parties can contract to whatever they want. However, if the parties fail to indicate certain provisions, the law fills in these gaps. For example, if the number of arbitrators is not specified, the law will fill the gap with "one." If the parties fail to provide for a procedure to choose an arbitrator, the California law allows the parties to have the superior court appoint an arbitrator.

The law attempts to eliminate any disadvantage that parties from civil law countries may have in arbitrating in a common law jurisdiction. Finally, it also recognizes cultural differences in dispute resolution. There is a conciliation provision that attempts to reflect the importance of Pacific Rim and Asian trade in the state. This procedure emphasizes confidentiality, and the parties must agree that any information cannot be used as evidence in any subsequent civil proceeding.

If the parties agree to conciliation, they are not necessarily agreeing to the jurisdiction of California courts or to California law in any other respect. The parties must also agree that if they are in conciliation then all other judicial actions are stayed until that conciliation is exhausted.

These and other issues must be kept in mind when developing an arbitration clause. The parties should consider such items as the place of arbitration, the method of selecting arbitrators, whether an arbitrator must be a disinterested party, what language the arbitration will be conducted in, whether oral argument will be permitted or must be requested, and whether discovery procedures are provided for and in what form.

California law also contemplates interim relief. Under the California law, the arbitral tribunal can issue the equivalent of a temporary restraining order, preliminary injunction, and other preliminary relief so that an effective award can be rendered. California law provides that such interim award, or interim relief, can be enforced through the superior court.

In order for arbitration to be effective, it must provide an efficient

and relatively easy means of enforcing arbitral awards. Both Mexico and the United States are parties to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Under that convention, arbitral awards can be recognized and enforced in either of the respective countries. The law states that it cannot be substantially more onerous to award or enforce an international award than a domestic one. This ensures that national treatment and the enforcement of a Mexican tribunal award in California will be identical to the enforcement of a domestic one.

There are limits to the degree of scrutiny the court may give the award. For instance, the court cannot review the award on its merits, and must review the award only for fairness, ability to be arbitrated, public policy, and due process. In order to enforce an award, the party must provide a certified copy of the award, a certified copy of the agreement allowing arbitration, translation if it is necessary, and, in the United States, the information must be submitted within three years of the award.

The respondent has the burden of proving that the award should not be enforced. There are six specific reasons that can be used to attack the validity of the award. These are: (1) the absence of a valid arbitration agreement; (2) the lack of a fair opportunity to be heard; (3) the award exceeds the amount submitted to the arbitration; (4) the tribunal was improperly composed; (5) jurisdiction was improper; and (6) the award has been set aside. There are other more general bases in the New York Convention for setting aside awards. One of these is that the award is contrary to the public policy of the forum. The ambiguity of this provision leads to much litigation. Where, as in the United States, the courts are very pro-enforcement, an award that goes against public policy may still be enforced.

In the international context, United States courts are inclined to defer to the arbitration laws. The one exception to this may be in the bankruptcy area, in derogation of the jurisdiction of a bankruptcy court. This may change, however, as a result of NAFTA. With free trade will come many more insolvencies in Mexico. As free competition blooms, an unfortunate consequence of the blooming is business failure. An intriguing corollary to the free trade agreement may be some sort of provision to handle bankruptcies of corporations that have assets on both sides of the border.

V. UNITED STATES FEDERAL ARBITRATION LAW

VICTOR A. VILAPLANA:

Next, there is the question of federal arbitration law. There is indeed a federal law of arbitration, the Federal Arbitration Acts of 1920 and 1925. In fact, the Conventions mentioned above are a part of that law. If they are consumed within kinds of disputes then that act says it can be arbitrated. Because the United States is a party to the New York Convention there is little need for a federal law of arbitration.

VI. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN MEXICO

JULIO C. TREVIÑO:

The existing conventions on the enforcement of foreign arbitral awards are applicable in the first place, and only as regards those matters which are not expressly provided for in the said conventions, or if the conventions yield to local law, the C. Com. and the Federal Code of Civil Procedure may apply. The relevant conventions are the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1988 (the New York Convention) and the Panama Convention of 1975, already mentioned above. Both Mexico and the United States are members of those two conventions.

There are two other interrelated conventions which would appear to be relevant to our subject, but that is not the case. These are the so-called Montevideo Convention of 1979 and the Convention of La Paz of 1984. The United States is not a party to any of these conventions. In any case, Article 1 of the Montevideo Convention provides that it shall apply to awards issued in any of the member states in that which is not provided for in the Panama Convention on International Commercial Arbitration, and the Convention of La Paz expressly states that it shall not apply to "arbitration," but rather only to foreign judgments, with certain limitations. And that leaves us with only the New York and Panama Conventions to deal with the subject of enforcement of foreign awards in Mexico.

The New York Convention is of special importance since, upon its execution or ratification in 1971, Mexico did not make any reservation to the effect that it would apply only to awards issued in another member state, based on reciprocity, or only to commercial controversies. This has been adequately interpreted to mean that Mexico will recognize and enforce a foreign judgment from any country in the world if it meets the tests of the New York Convention, that

reciprocity shall not be a condition to recognition, and that the foreign judgment may refer to matters other than commercial. With respect to the Panama Convention, ratified by Mexico in 1978, no reservations were possible nor made by Mexico, and its scope of application is limited to commercial controversies and, in our opinion, to awards issued in member countries.

At any rate, with respect to foreign arbitral awards, the texts of both conventions are practically identical and provide a basis for recognition and enforcement in Mexico, subject to what has been mentioned. In addition, the Panama Convention ensures recognition and enforcement of Mexican awards in member countries which have not signed the New York Convention.

In specific terms, based on the New York Convention, the recognition and enforcement of foreign awards in Mexico shall be guided, in the first place, by the overriding principle that there can be no conditions or requirements specifically more onerous to enforce an international award than those required for the enforcement of a domestic award. The Panama Convention provides that the recognition and enforcement of a foreign award may be subject to *the same requirements* as those provided for execution of domestic or foreign judgments. We much prefer the text of the New York Convention and, therefore, the "no more onerous" test, especially since the legislation on the enforcement of foreign judgments certainly includes conditions and requirements which are more onerous than those required by the New York and Panama Conventions for the execution of foreign awards, including the archaic rule of reciprocity. We believe that the text of the New York Convention prevails over that of the Panama Convention in this respect due to its specificity in dealing with the recognition of foreign arbitral awards.

Aside from that or another discrepancy (e.g., Article II.3.2 of the New York Convention which is not reproduced in the Panama Convention), the text of both conventions is almost identical when dealing with the actual reasons and grounds for denying recognition and enforcement of a foreign award. Therefore, said provisions (Article V of the New York Convention and Article 5 of the Panama Convention) constitute the basic guidelines for a Mexican court to grant or deny recognition and enforcement of a foreign award, regardless of what the federal or local laws may say, since such laws are preempted by international conventions under Article 13 of the Mexican Constitution. Such provisions include the well-known principles that enforce-

ment shall be denied when the parties against whom the enforcement is sought, cannot demonstrate:

1. That the arbitration agreement was invalid.
2. That the defendant party was not duly notified or was unable to defend himself.
3. That the award refers to a controversy not contemplated in the arbitration agreement.
4. That the integration of the arbitral tribunal or the proceedings did not conform to the law of the place of arbitration.
5. That the award is not binding.

Or when the judge discovers or verifies any of the following:

1. That the award deals with a matter not arbitrable in accordance with the law of the place of enforcement.
2. That the recognition and enforcement of the award would be contrary to the public policy of the place of enforcement.

The actual recognition and enforcement of a foreign award shall be requested from a court of competent jurisdiction. In a special proceeding, the court shall grant the parties a period of nine days within which to petition that which is convenient to their interests and may order the holding of a hearing if evidence has been submitted. Thereafter, a resolution will be issued, which may be appealed. Such resolution may also be contested by way of an "Amparo" proceeding before a federal court in the case where it is alleged that due process was not respected in the enforcement proceeding. The court may not review the merits of the award, and it would only verify the authenticity of the documents filed and the requirements of the New York or Panama Conventions, as the case may be, with respect to grounds for denying enforcement. If enforcement is granted, the court may order to levy execution on the assets of the respective party. The practice of bringing a legal action to set aside an arbitral award and which is contemplated in the New York Convention is not at all common in Mexico.

This concludes our overview of the law and practice of arbitration in Mexico, not without a note of encouragement and optimism. Arbitration is a good answer to controversies between business parties in international transactions with Mexican parties, and the law and practice of arbitration in Mexico should be contemplated whenever possible.

VII. ENVIRONMENTAL REGULATIONS

Few attributes of environmental regulations in Mexico must also be considered. First, and probably the most obvious, attribute is that environmental law and regulation is new to Mexico. Mexico began establishing a comprehensive body of environmental law and regulation in 1988. Only since May of 1989 has the *maquiladora* industry had to comply with regulations other than corporate imposed requirements, which mirrored United States standards. Additionally, there is a unique situation between the two countries; tensions arise because a more highly industrialized country borders a less industrialized country.

Mexico's environmental laws now in effect require companies wishing to operate in Mexico to comply with environmental regulations from the beginning. In order to operate in Mexico, a company must meet the Mexican requirements. Those requirements include water, air and hazardous waste generator permit requirements, technical standards and regulations, labor regulations, health and safety permit requirements and regulations, and land use regulations. These regulations limit the location of industrial sites as well as their operation. The ultimate approval of NAFTA is expected to be influenced by the degree to which the United States Congress is satisfied with Mexico's environmental progress. Environmental issues will be dealt with parallel to the NAFTA negotiations.

The Regulations in place with regard to hazardous waste and *maquiladoras* deserve particular mention. Simply stated, hazardous waste produced from material which the *maquiladora* industry temporarily imports into Mexico, as a general rule, must be returned to the country of origin, which is the United States. Because the United States recognizes that there is a lack of infrastructure in Mexico to deal with hazardous waste, the United States government also tolerates the return of *maquiladora* hazardous waste that is produced from hazardous material in Mexico and material that was permanently imported into Mexico.

The United States' resistance concerning Mexico's inability to deal effectively with environmental protection will be eased if, as free trade prospers, Mexico gains additional resources with which to deal with environmental enforcement and clean-up. Mexico clearly has the resolve to deal with its environmental problems. This is evidenced by the number of enforcement actions that have been undertaken. However, the important issue is whether Mexico has the resources to

provide adequate enforcement. The inspection force along the border has more than quadrupled, and larger numbers of inspectors are paying primary attention to the *maquiladora* industry which is the most visible segment of industry. Due to the shortage of resources, Mexico often deals inadequately with environmental problems which then become the subject of controversy in the United States. An increase of resources resulting from NAFTA would enable Mexico to deal effectively with these problems. How soon and how quickly problems are solved depends, in my view, on the success of free trade.

Enforcement efforts by Mexican regulatory officials generally are of a cooperative nature in the first instance; that is, a negotiated resolution of an enforcement problem is the first effort, and only if that fails are closure and fines resorted to. Mexico's enforcement personnel are not as well trained as needed and are subject to rapid turnover. NAFTA should improve enforcement capability because Mexico's enforcement efforts may become increasingly cooperative efforts with enforcement authorities working together on both sides of the border to enforce environmental standards.

In addition, because of the enforcement of environmental laws in Mexico, opportunities for environmental service businesses in Mexico have developed. The environmental service industry is relatively new to Mexico. After two and a half years, education of managerial personnel and the general workforce has some way to go to accommodate fully the demands of environmental protection. Opportunities exist for United States companies to satisfy the need for hazardous waste transfer stations, transportation equipment, and disposal sites. Furthermore, municipal solid waste disposal and municipal hazardous waste disposal will some day offer genuine opportunities. Necessity demands that Mexico welcome the environmental technology that the United States can offer.

If NAFTA adopts the dispute resolution framework similar to the Free Trade Agreement, which is likely, disputes which arise under NAFTA will be disputes defined by public international law. Dispute resolution mechanisms will primarily be those available between states. As the Free Trade Agreement now stands, there is only one mechanism which private parties can require their states to engage, namely Chapter 19 actions which deal with countervailing duties and anti-dumping violations. Although both states recognize the obligation to request an arbitration panel and proceed with the complaint,

the injured party has the burden of initiating the action, for the disputed conduct has occurred in its country.

It is also worth determining whether NAFTA will establish a uniform process for resolving cross-border trade disputes. If NAFTA adopts resolution mechanisms similar to those of the Free Trade Agreement, the answer is no; there will be available a wide range of potential dispute avoidance and resolution mechanisms. Like the Free Trade Agreement has already done, NAFTA is likely to increase the amount of commercial dealings between private parties of both countries, be they companies or individuals. These international dealings will require an increased use of dispute resolution mechanisms between private parties.

By far the predominate method of resolution of international disputes today is international commercial arbitration, as opposed to litigation. There are a host of reasons for this, but politically, arbitration is preferable. In 1986, Canada adopted the New York Convention, and was the first country to adopt the UNCITRAL Model Law on International Commercial Arbitration by expressly granting the New York Convention precedence.

The arbitral regimes in Mexico, the United States, and Canada are quite compatible. Therefore, one drafting contracts between citizens of these three countries should consider arbitration as a dispute resolution mechanism because it will allow parties to avoid potential limitations, such as service of process in court proceedings.

An increase in the use of conciliation and mediation as dispute resolution mechanisms is due to the influence of the Pacific Rim countries. Canada, the United States, and Mexico should welcome conciliation and mediation as developments beneficial to international commerce. Note, however, that these dispute resolution mechanisms can be expensive. For example, an arbitrator costs approximately \$600 per day. With three arbitrators per panel, that is \$1800 per day, just for the arbitrators. Such expenses add up quickly.

Whether a non-Mexican is liable for non-payment of a debt is also worthy of discussion. A non-Mexican risks criminal prosecution in Mexico for the non-payment of debt resulting from commercial or other disputes. Regardless of his citizenship, a non-Mexican who commits a crime in Mexico, whether or not he flees the jurisdiction, is guilty of committing a crime in Mexico. An American who presumably commits some crime in Mexico is subject to criminal prosecution

in Mexico. Of course, non-payment of debt is only criminal when fraud is involved.

To insure repayment of a debt which lacks fraudulent conduct, is it not advisable to place an arbitration clause in promissory notes which includes a service of process waiver? It is not advisable to spoil a promissory note with an arbitration clause because, under Mexican law, a promissory note allows for a summary action. Putting an arbitration clause in the promissory note converts it into a contract, thus preventing the summary action. The promissory note always allows for the attachment of the debtor's goods while the action is pending.