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THE ARBITRATION OF PRIVATE COMMERCIAL DISPUTES BETWEEN RESIDENTS OF TEXAS AND MEXICO

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I. INTRODUCTION

As private commercial transactions between residents of Texas and residents of Mexico increase in number, some inevitably will give rise to disputes requiring resolution by (1) litigation in Texas or in Mexico; (2) court-ordered alternative dispute resolution (ADR) in Texas (whether by a Texas state court or a federal court sitting in Texas); or (3) private mediation, conciliation, or arbitration in Texas or in Mexico. Owing to differences among cultures, languages, and legal systems, attorneys in the United States and in Mexico are turning with increasing frequency to binding arbitration as the method of choice for the resolution of international disputes.[1] In fact, to foster expanded international trade and to facilitate the resolution of international commercial disputes through conciliation and arbitration, Texas enacted an International Arbitration Act in 1989.[2]

Proponents of international arbitration argue that it is the method of choice for the resolution of private commercial disputes for the following reasons:

1. Predictability: the dispute will be resolved in one place and not by a race to judgment in the courts of two nations;
2. Competence: at least in theory, the arbitrators will have applicable commercial and legal expertise;
3. Party participation: the parties and the arbitrators can shape the procedures that they will follow;
4. Finality: there is relatively little risk that the award will be set aside or altered by a court;
5. Enforceability;
6. Costs: usually, there are no costly depositions in arbitration although arbitrators must be paid, so that the cost may ulti-

1. *See* Hope H. Camp, Jr., *Binding Arbitration: A Preferred Alternative for Resolving Commercial Disputes Between Mexican and U.S. Businessmen*, 22 ST. MARY'S L.J. 717, 720-22 (1991) (illustrating causes of increased arbitration in resolving Mexican-United States trade disputes).

2. TEX. REV. CIV. STAT. ANN. arts. 249-1 - 249-43 (Vernon Supp. 1993).

mately be as high as that of litigation.[3]

This paper evaluates whether the Texas International Arbitration Act will prove to be a helpful addition to the laws governing arbitration of private commercial disputes between residents of Texas and residents of Mexico.

II. RELEVANT UNITED STATES LAW

In Texas, there are four potential sources of law related to the arbitration of private commercial disputes between residents of Texas and residents of Mexico: (1) Texas statutes; (2) federal statutes; (3) treaties of the United States; and (4) state and federal judicial decisions. This section of the paper identifies and briefly describes each of the relevant statutes and treaties and examines how these various statutes and treaties work together under current case law.

A. *Texas Statutes*

As previously noted, in 1989 Texas adopted the Texas International Arbitration Act (TIAA).[4] The TIAA supersedes Articles 225 through 233[5] of the previously enacted Texas General Arbitration Act,[6] but does not supersede Article 224 or Articles 234 through 238-6.[7] Therefore, the TIAA and the General Arbitration Act must be read together. The TIAA is the Texas version of the Model Law on Commercial Arbitration, which was developed by the United Nations Commission on International Trade Law (UNCITRAL).[8] Although a careful reading of both the TIAA and the Texas General Arbitra-

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3. James Carter, *Dispute Resolution and International Agreements, in* INTERNATIONAL COMMERCIAL AGREEMENTS 503 (PLI Handbook No. 592 1991).

4. TEX. REV. CIV. STAT. ANN. arts. 249-1-249-43 (Vernon Supp. 1993).

5. TEX. REV. CIV. STAT. ANN. art. 249-1, § 8 (Vernon Supp. 1993).

6. TEX. REV. CIV. STAT. ANN. arts. 224-238-20 (Vernon 1973 & Supp. 1993).

7. TEX. REV. CIV. STAT. ANN. art. 249-1, § 8 (Vernon Supp. 1993).

8. Jack Garvey & Totton Heffelfinger, *Towards Federalizing U.S. International Commercial Arbitration Law*, 25 INT'L LAW. 209, 210 (1991) (discussing various states' adoption of UNCITRAL model law). In addition to the Model Law, UNCITRAL also adopted recommended rules for the administration of international arbitration proceedings. Copies of both the UNCITRAL Model Law and the UNCITRAL Rules are reprinted in their entirety in numerous textbooks on international arbitration. *E.g.*, ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 688, 798 (2d ed. 1991). Copies also may be obtained by writing to the United Nations Commission on International Trade Law at the United Nations in New York.

tion Act is essential to a thorough understanding of their operation, the following provisions of the TIAA are particularly noteworthy.

1. Article 249-1, Section 1 provides that the TIAA "applies to International Commercial Arbitration and Conciliation, subject to any agreement that is in force between the United States and another state or states."[9]
2. Article 249-1, Section 3 defines "international" for purposes of the TIAA.[10]
3. Article 249-1, Section 6 defines "commercial" for purposes of the TIAA.[11]
4. Article 249-5 provides that "[a] court may not intervene in a matter governed by this part except as provided by this part or applicable federal law."[12]
5. Article 249-16 codifies the legal principle of "separability"[13] by providing that "[a] decision by the arbitral tribunal that the contract is void does not make the arbitration clause invalid."[14]

B. *Federal Statutes*

In 1925, Congress enacted the United States Arbitration Act (sometimes referred to as the Federal Arbitration Act (FAA)), and Congress has amended it several times since its original enactment.[15] The FAA, by its terms, applies to any "maritime transaction" and to "commerce," with commerce defined as "commerce among the sev-

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9. TEX. REV. CIV. STAT. ANN. art. 249-1, § 1 (Vernon Supp. 1993).

10. *Id.* § 3 (Vernon Supp. 1993).

11. *Id.* § 6 (Vernon Supp. 1993).

12. TEX. REV. CIV. STAT. ANN. art. 249-5 (Vernon Supp. 1993).

13. *See* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 174-77, 277-80 (2d ed. 1991) (discussing the principal of "separability" in arbitration agreements).

14. TEX. REV. CIV. STAT. ANN. art. 249-16, § 1 (Vernon Supp. 1993).

15. 9 U.S.C.A. §§ 1-307 (West 1970 & Supp. 1992). The Act was first enacted on February 12, 1925. United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-307 (West 1970 & Supp. 1992)). It was codified on July 30, 1947. United States Arbitration Act, Pub. L. No. 80-282, 61 Stat. 669 (1947) (codified as amended at 9 U.S.C.A. §§ 1-307 (West 1970 & Supp. 1992)). The act was amended on September 3, 1954. Act of Sept. 3, 1954, 68 Stat. 1233 (codified at 9 U.S.C.A. § 1-307 (West 1970 & Supp. 1992)). Chapter 2 of the act was added on July 31, 1970. Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 693 (codified at 9 U.S.C.A. § 201-08 (West Supp. 1992)). Chapter 3 was added on August 15, 1990. Act of Aug. 15, 1990, Pub. L. No. 101-369, 104 Stat. 448 (codified at 9 U.S.C.A. §§ 301-06 (West Supp. 1992)).

eral states or with foreign nations. . . ."[16] It remains to be seen whether the FAA, the TIAA, or both are the controlling legislation in international arbitration proceedings.

C. *Treaties*

1. 1958 New York Convention

In 1958, UNCITRAL, sitting in New York, promulgated the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[17] Some authorities have described the New York Convention as "the most important international treaty relating to international commercial arbitration,"[18] because it "requires recognition of both agreements to arbitrate and foreign arbitral awards."[19] Both the United States[20] and Mexico[21] have ratified the New York Convention. However, when the United States ratified the Convention, it took two reservations, as permitted by Article I(3) of the Convention.[22] The first reservation states that the United States will apply the Convention only to awards that are rendered in the territory of another contracting state.[23] The second reservation states that the United States will apply the Convention only to commercial disputes, as defined under United States law.[24] Because Mexico also has ratified the Convention, the Convention can apply to

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16. 9 U.S.C.A. § 1 (West 1970). For the purpose of this paper, maritime transactions are excluded from analysis.

17. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 9 U.S.C.A. § 201 (West Supp. 1992).

18. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 63 (2d ed. 1991).

19. W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 660 (1990).

20. 9 U.S.C.A. § 201 (West Supp. 1992).

21. INSTITUTE FOR TRANSNATIONAL ARBITRATION, SCORECARD OF ADHERENCE TO TRANSNATIONAL ARBITRATION TREATIES 5-3 (S. Tex. C. Law 1992). In addition to the United States and Mexico, eighty-seven other countries have ratified, and two more countries have signed but not ratified, the New York Convention. A complete listing of the countries that have ratified or signed the New York Convention (as well as several other treaties) can be obtained by writing to Prof. Richard Graving, Director, Institute for Transnational Arbitration, South Texas College of Law, 1303 San Jacinto, Houston, Texas 77002-7000.

22. W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 660 (1990).

23. *Id.* at 661.

24. *Id.*

commercial disputes between residents of Texas and residents of Mexico.

2. 1975 Inter-American Convention on International Commercial Arbitration

In August 1990, the United States Congress passed legislation to implement the Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention).[25] The United States, Mexico, and twelve other countries that are members of the Organization of American States have ratified the Panama Convention.[26] The Panama Convention is similar to the New York Convention and, thus, to avoid confusion, Section 305 of Title 9 of the United States Code provides that:

> When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:
> 1. If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.
> 2. In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.[27]

Therefore, in cases in which either the New York Convention or the Panama Convention could apply to the arbitration of a private commercial dispute between residents of Texas and residents of Mexico, the Panama Convention would control.

D. *Overview of State and Federal Case Law*

As we have seen, there are at least two Texas statutes,[28] one federal statute,[29] and one United States treaty[30] that are relevant to this pa-

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25. 9 U.S.C.A. §§ 301-07 (West Supp. 1992).

26. INSTITUTE FOR TRANSNATIONAL ARBITRATION, SCORECARD OF ADHERENCE TO TRANSNATIONAL ARBITRATION TREATIES 5-1-4 (S. Tex. C. Law 1992).

27. 9 U.S.C.A. § 305 (West Supp. 1992).

28. TEX. REV. CIV. STAT. ANN. art. 224, 234-238-6, 249-1-249-43 (Vernon Supp. 1993).

29. *See* 9 U.S.C. §§ 1-14 (1988) (detailing rules of arbitration).

30. 9 U.S.C.A. §§ 301-07 (West Supp. 1992) (adopting Inter-American Convention on International Commerce Arbitration into law).

per's analysis. Research, as of this writing, has revealed no Texas state-court decisions on point. There is, however, some relevant federal case law.

The United States Supreme Court has held that if Congress legislates an area in which both federal and state governments have the right to legislate, Congress may specifically prohibit parallel state legislation by preempting the entire field.[31] This preemption doctrine arises out of the Supremacy Clause of the United States Constitution, which dictates that federal statutes and treaties are "the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."[32] Therefore, it seems self-evident that the controlling law in a commercial arbitration proceeding between a Texas resident and a Mexican resident would be either the FAA or the Panama Convention.

One might wonder why the Texas legislature went to the trouble of enacting the TIAA. A possible answer to this question is that not all individuals with whom Texas residents do business will be residents of a country that has ratified either the New York Convention or the Panama Convention. However, some eighty-nine countries have ratified the New York Convention. Furthermore, if a Texas resident is engaged in international business, by definition the Texan is engaged in commerce and, therefore, an arbitration proceeding growing out of that business should be covered by the FAA. A 1989 decision of the United States Supreme Court provides some additional insight.

In *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*,[33] the United States Supreme Court held that the FAA did not preempt application of a California statute in a case in which the parties had agreed that their arbitration agreement would be governed by the law of California.[34] The *Volt* case is a landmark decision concerning arbitration proceedings arising out of

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31. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983).

32. U.S. CONST. art. VI, cl. 2.

33. 489 U.S. 468 (1989). The Volt decision was rendered by a vote of six to two. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices White, Blackmun, Stevens, Scalia, and Kennedy joined. *Id.* at 469. Justice Brennan filed a dissenting opinion in which Justice Marshall joined. *Id.* Justice O'Connor took no part in the consideration or decision of the case. *Id.*

34. *Volt*, 489 U.S. at 470.

interstate commerce. The case, therefore, merits scrutiny to determine the controlling law in a commercial arbitration proceeding between residents of Texas and residents of Mexico.

Volt concerned a dispute arising out of a construction contract between a contractor (Volt) and a university (Stanford). The contract contained a clause which stated that:

> All claims, disputes and other matters in question between the parties to this contract, arising out of or relating to this contract of the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing unless the parties mutually agreed [sic] otherwise . . . this agreement to arbitrate . . . shall be specifically enforceable under the prevailing arbitration law.[35]

The contract also contained a choice-of-law clause which provided that "[t]he Contract shall be governed by the law of the place where the Project is located."[36] The Project was located in California.

A dispute developed during the course of the project. Volt made a formal demand for arbitration, and Stanford responded by filing suit in California Superior Court against Volt. Stanford also sought indemnity against two other companies involved in the construction project, neither of whose contracts contained arbitration agreements.[37] Volt petitioned the Superior Court to compel arbitration, and Stanford moved to stay the proceeding.[38] The California Superior Court denied Volt's motion to compel arbitration. The case eventually reached the United States Supreme Court, and the Court found the following: (1) the case involved interstate commerce; (2) the FAA governs interstate commerce; (3) although the FAA contains no provision permitting a court to stay an arbitration proceeding pending the resolution of related litigation involving third parties not bound by the arbitration proceeding,[39] the California statute did permit such a stay; and (4) by specifying that their contract would be governed by "the law of the place where the project is located . . . the parties had incorporated the California rules of arbitration."[40]

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35. *Id.* at 470 n.1.
36. *Id.* at 470.
37. *Id.* at 470-71.
38. *Volt*, 489 U.S. at 471.
39. *Id.* at 472-73.
40. *Id.* at 472.

After distinguishing a series of landmark arbitration cases,[41] the Court found that the FAA does not prevent "the enforcement of agreements to arbitrate under different rules than those set forth in the act itself."[42] This holding in *Volt* led one commentator to note that after *Volt*:

> it must be assumed that most procedural aspects of arbitrations not addressed in federal statutes or treaties can be regulated by state or other local (domestic or foreign) law deemed by the finder of fact to be applicable by reason of choice by the parties, or absent such choice, choice of law principles.[43]

It remains to be seen whether the *Volt* decision will lead to certainty or confusion in the expanding field of international commercial arbitration.

F. *Controlling Law of the Case*

An analysis of current case law, statutes, and treaty law reveals that determining the controlling authority in an arbitration of a private commercial dispute in Texas between residents of Texas and residents of Mexico depends on answers to such questions as the following:

(1) Was there a contract in writing?

(2) If the contract had a choice-of-law clause, what law did it specify?

(3) If the choice-of-law clause specified Texas, does that choice of law also include the Texas law on conflicts of law?

(4) Was the transaction covered by the United Nations Convention on the International Sale of Goods,[44] and, if so, does it matter?

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41. *See id.* at 474-79 (discussing prior cases); Perry v. Thomas, 482 U.S. 483, 493 (1987) (applying state-law principles within Arbitration Act); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985) (ruling that Arbitration act was designed to overcome judicial reluctance to enforce arbitration agreements); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1984) (allowing exclusion of certain claims from arbitration agreements); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (noting that a judicial forum is needed for resolving agreements to arbitrate).

42. *Volt*, 489 U.S. at 479.

43. Jack Garvey & Totton Heffelfinger, *Towards Federalizing U.S. International Commercial Arbitration Law*, 25 INT'L LAW. 209, 213 (1991).

44. The United Nations Convention on Contracts for the International Sale of Goods (Convention) has been adopted by both the United States and Mexico. *See* 15 U.S.C.A. app. (West Supp. 1992) (setting out English version of Convention); *see* JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 693 app. (1991) (listing signatory countries and reserva-

(5) Is the question to be decided a matter of substance or procedure?
(6) Did the contract have an arbitration clause, and, if so, did it specify the rules to be followed in the arbitration proceeding?[45]
(7) If the contract had a choice-of-law clause, did the same choice of law apply to both the substance of the contract and the arbitration clause?
(8) If the contract is found to be invalid but the arbitration clause enforceable, what law controls?
(9) At what point in the arbitration process do the following questions arise: is a party resisting arbitration; is a party to an ongoing arbitration asking for ancillary relief from the court; or is a party trying to enforce or overturn an arbitration award?

III. ARBITRATION IN MEXICO

If the arbitration proceedings are in Mexico, the attorneys in both Texas and Mexico will have to understand and apply the arbitration laws of Mexico. While this paper will not attempt an in-depth analysis of these laws, some general comments are in order.[46]

To understand international commercial arbitration in Mexico, one needs to start with a review of Mexican statutory law in the domestic context. In the broadest sense, the phrase "arbitration of private commercial disputes" might include all arbitrations of a commercial nature, including banking arbitration. However, a more restrictive definition would only refer to arbitration pursuant to Mexico's Code of Commerce, which in 1890 first regulated commercial arbitration in

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tions). With the adoption of the Convention, the United States now has two bodies of sales law, a domestic sales law and the Convention.

45. Article 3 of the Inter-American Convention on International Commercial Arbitration provides that "[in] the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission." OFFICIAL JOURNAL OF THE FEDERATION, INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION art. 3 (published in Mexico in *Official Journal of the Federation*, Feb. 9, 1978).

46. For a more detailed analysis of various circumstances under which arbitration might occur in Mexico, see generally Hope H. Camp, Jr., *Binding Arbitration: A Preferred Alternative for Resolving Commercial Disputes Between Mexican and U.S. Businessmen*, 22 ST. MARY'S L.J. 717 (1991); Horacio A. Grigera-Naon, *Latin America: Overcoming Traditional Hostility Towards Arbitration*, *in* INTERNATIONAL COMMERCIAL ARBITRATION 375-447 (PLI Handbook No. 477 1988).

Mexico.[47] Although the legal framework for commercial arbitration was modified in 1989, and is now regulated by Articles 1051 and 1415 through 1437 of the Code of Commerce, this original codification is still in effect today.[48]

In the international context, commercial arbitration in Mexico with residents of Texas would also be subject to the New York Convention[49] and the Panama Convention.[50] The Code of Commerce, like the Panama Convention and the New York Convention, sets out rules affecting the enforcement in Mexico of an arbitration award handed down by an arbitral tribunal sitting in Texas.[51]

The Mexican judiciary has become increasingly supportive of arbitration. Although judicial opinions in Mexico do not have the same precedential weight as do judicial opinions in the United States, judicial opinions are still helpful in understanding the statutory and treaty law of Mexico. For example, in *Mitsui de México, S.A. de C.V. and Mitsui and Company, Ltd v. Alkon Textil, S.A. de C.V.*,[52] the Superior Court of Justice permitted an arbitration to go forward in Japan pursuant to the provisions of a contractual arbitration clause, despite the objections of a Mexican company that had filed a legal proceeding in Mexico seeking rescission of the contract that contained the arbitration clause.

In the case of *Presse Office v. Centro Editorial Hoy, S.A.*,[53] a French

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47. *Cf.* Moctezuma Barragan, Gonzalo, *El Impulso al Arbitraje para la Solucio de Controversias Mercantiles, in* REVISTA MEXICANA DE JUSTICIA 4, vol. VII, at 54 (1989).

48. *See* Appendix A *infra* for an English translation of Articles 1051 and 1415 through 1437 of the Code of Commerce of Mexico.

49. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 11, 1970, 21 U.S.T. 2517 (published in Mexico in OFFICIAL JOURNAL OF THE FEDERATION, June 22, 1971).

50. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, (published in Mexico in OFFICIAL JOURNAL OF THE FEDERATION, February 9, 1978).

51. See Appendix B *infra* (providing English translation of Article 1374-A of Code of Commerce).

52. Mitsui de México, S.A. de C.V. & Mitsui & Co., Ltd. v. Alkon Textil, S.A. de C.V., File of Appeal 850/86 of the Fourth Chamber of the Superior Court of Justice of the Federal District (Oct. 21, 1986) (reviewing judgment of Eighteenth Court on Civil Matters of Mexico City), *cited in* José Luis Siqueiros, *El Arbitraje Comercial en Latinoamérica la Perspectiva Mexicana, in* ESTUDIOS EN HOMENAJE A JORGE BARRERA GRAF T. II, at 1366 & 1367 (Méx., Instituto de Investigaciones Jurídicas, 1st ed. 1989).

53. Final judgment of the Eighteenth Court on Civil Matters for the Federal District (Feb. 24, 1977), *reprinted in* Guillermo Aguilar Alvarez, *El Régimen Jurídico de la Ejecución de Laudos Arbitrales Extranjeros en América Latina, in* ESTUDIOS EN HOMENAJE A JORGE BARRERA GRAF T. I. at 108-09 (Méx., Instituto de Investigaciones Jurídicas 1989); *see also*

Company (Presse) sought enforcement in Mexico of an arbitration award rendered by the International Court of Arbitration of the International Chamber of Commerce (ICC) in Paris. The Mexican company (Centro) sought judicial relief to avoid payment of the award on the basis that it had not received proper notice of the arbitration proceeding in Paris. The lower court, whose decision was affirmed on appeal, authorized enforcement of the award. However, the lower court also stated the following:

> On the other hand, the arbitration proceeding must comply with all of the requirements set forth in the Constitution and secondary laws in reference to the constitutional rights of audience and evidence. . . . In the instant case however since there is a contractual agreement providing for international arbitration in case of disputes arising from the editorial contract of February 21, 1977, there is also express agreement to submit themselves to the regulations of the International Chamber of Commerce and its Court of Arbitration as well as to the French domestic laws, in coordination with Mexican laws and international treaties.
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> Under such circumstances the arbitration agreement . . . complies with the formal requirements in reference to procedure as provided by Articles 14 and 16 of the Constitution and Article 619 of the Code of Civil Procedure. . . .
>
> Therefore, the service of process which is being challenged by defendant was really made correctly because when in the editorial contract the parties agreed to the arbitration, they implicitly withdrew from the formalities established by the Mexican procedural law, especially in that mentioned in Article 605 Section IV of the cited procedural body in reference to the personal service of process in order to adopt the regulations of the Court of Arbitration and of the domestic French law.[54]

Moreover, in the case of *Malden Mills, Inc. v. Hilaturas Lourdes, S.A.*,[55] the Superior Court of Justice of the Federal District permitted enforcement in Mexico of an American Arbitration Association

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YEARBOOK OF COMMERCIAL ARBITRATION IV 301-02 (1979) (providing brief of *Presse* decision).

54. *Id.*

55. Judgment of the Eighteenth Court on Civil Matters for the Federal District (Jan. 20, 1977), *revoked*, Judgement of the Fifth Chamber of the Superior Court of Justice of the Federal District (Aug. 1, 1977), *cited in* Guillermo Aguilar Alvarez, *El Régimen Jurídico de la Ejecución de Laudos Arbitrales Extranjeros en América Latina*, ESTUDIOS EN HOMENAJE A JORGE BARRERA GRAF T. I., at 108-09 (Méx. Instituto de Investigaciones Jurídicas, 1st ed.1989); *see also* YEARBOOK OF COMMERCIAL ARBITRATION IV 302-04 (1979) (providing brief of *Malden Mills* decision).

award against a Mexican company (Hilaturas). The award was a result of a default judgment in New York. Hilaturas had challenged the jurisdiction of the arbitration tribunal and, thus, did not answer the claim, file evidence, or participate in any of the hearings. The Mexican Court wrote the following:

> [T]herefore, if there is an express agreement, as in the instant case, to be submitted to the rules of the American Association of Arbitration, it happens that the service of process was properly made, because when the parties expressly withdrew from the formalities established by the Mexican procedural court in reference to notification in order to submit themselves to the rules of the aforementioned Association, which authorizes notifications via mail, the lower court was not correct to consider that the petition should have to be served in a different manner.[56]

IV. THE NORTH AMERICAN FREE TRADE AGREEMENT

On August 12, 1992, the governments of the United States, Canada, and Mexico issued a joint press release announcing that the Canadian Minister of Industry, Science, and Technology and Minister for International Trade (Mr. Michael Wilson), the Mexican Secretary of Trade and Industrial Development (Sr. Jaime Serra), and the United States Trade Representative (Ambassador Carla Hills) had completed negotiations for a proposed North American Free Trade Agreement (NAFTA).[57] At the time of the writing of this article, the NAFTA was in the initial stages in the United States of the ratification process pursuant to the "fast track" legislation under which the NAFTA was negotiated.[58] Although the process will probably not be completed by the time this article is published, an overview of the dispute resolution provisions of the NAFTA is still in order.

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56. Judgment of the Eighteenth Court on Civil Matters for the Federal District (Jan. 20, 1977), *revoked*, Judgement of the Fifth Chamber of the Superior Court of Justice of the Federal District (Aug. 1, 1977), *reprinted in* Guillermo Aguilar Alvarez, *El Régimen Jurídico de la Ejecución de Laudos Arbitrales Extranjeros en América Latina*, ESTUDIOS EN HOMENAJE A JORGE BARRERA GRAF T. I., at 108-09 Méx., Instituto de Investigaciones Jurídicas, 1st ed. 1989); *see also* YEARBOOK OF COMMERCIAL ARBITRATION IV 302-04 (1979) (providing brief of *Malden Mills* decision).

57. *See* James Risen, *U.S., Mexico, Canada Agree to Form Huge Common Market; Trade Pact Would Eliminate Most Barriers to the Flow of Goods and Services, Fierce Political Battles Loom as Approval is Sought from Lawmakers*, L.A. TIMES, Aug. 13, 1992, at A1 (reporting announcement of intent to enter into free trade agreement).

58. Trade Act of 1974, 19 U.S.C.A. § 2903(b) (West Supp. 1992) (providing "fast track" procedure).

A. *Private Dispute Resolution Provisions*

The official NAFTA text, published September 6, 1992,[59] contains the following provisions regarding the resolution of private commercial disputes.

1. Chapter Seven—Agriculture

Article 707 of Chapter Seven (Agriculture) of the NAFTA provides:

> The advisory committee established pursuant to Article 2022(4) shall work toward a system for resolving private commercial disputes that arise in connection with transactions in agricultural goods. The system of each Party[60] shall be designed to achieve prompt and effective resolution of such disputes with attention to special circumstances, including the perishability of the goods involved.[61]

2. Chapter Twenty—Subchapter C

The main provision of the NAFTA concerning the resolution of commercial disputes between private parties is found in Article 2022 which reads as follows:

1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.
2. To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.
3. A Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* or the 1975 *Inter-American Convention on International Commercial Arbitration*.

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59. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can. (text revised Sept. 6, 1992).

60. Chapter Two of the NAFTA sets out the general definitions for words and phrases used in the text. *Id.* ch. 2. Although "Party" is not defined in Chapter 2, it is clear from a reading of the NAFTA in general, and Chapter 2 in particular, that "Party" refers to each of the three parties to the agreement—the governments of Canada, the United States of America, and the United Mexican States. *Id.* pmbl.

61. *Id.* ch. 7, art. 707.

4. The Commission[62] shall establish an Advisory Committee on Private Commercial Disputes comprising persons with expertise or experience in the resolution of private international commercial disputes. The Committee shall report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area.[63]

Because both the United States and Mexico have ratified both of the Conventions referred to in the above paragraph, even if the NAFTA is ratified, it will not change the current state of the law controlling arbitration of private commercial disputes either in Texas or in Mexico.

B. *Disputes Involving a Party*

Although in the area of private commercial dispute resolution the drafters of the NAFTA simply encouraged the resolution of disputes through arbitration without adding to the substantive law on the subject, the drafters were much more specific in other areas of dispute resolution. A detailed analysis of the other dispute-resolution provisions of the NAFTA is beyond the scope of this paper, but they may be summarized as follows:

1. Emergency Action
   Chapter Eight of the NAFTA states that "No party may request the establishment of an arbitral panel under Article 2008 regarding any proposed emergency action."[64]
2. Investment
   Subchapter B of Chapter Eleven sets out the mechanism for the resolution of investment disputes between investors (as defined therein) and a Party.[65]
3. Financial Services
   Except for those services specifically excluded by paragraph 2

62. Chapter 2, Article 201 of the NAFTA defines "Commission" to mean "the Free Trade Commission established under Article 2001." *Id.* ch. 2, art. 201. Chapter 20, Subchapter A of the NAFTA governs the establishment, composition, and functioning of the Commission. *See id.* ch. 20, art. 2001 (describing Free Trade Commission).

63. NAFTA ch. 20, art. 2022.

64. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., ch. 8, art. 804 (test revised Sept. 6, 1992).

65. *Id.* ch. 11, arts. 1115-38.

of Article 1401,[66] Chapter Fourteen sets forth the dispute settlement procedures relating to financial services.[67]

4. Temporary Entry
   Article 1606 restricts a Party's rights to initiate proceedings under Article 2007 for disputes related to temporary entry for business persons.[68]
5. Antidumping and Countervailing Duty Matters
   Chapter Nineteen is entirely devoted to mechanisms for the review and resolution of disputes related to antidumping and countervailing duty matters.[69]
6. Institutions for Dispute Resolution
   Chapter Twenty establishes the institutions and mechanisms to be used for the resolution of disputes (other than private commercial disputes) arising under the NAFTA.[70]

V. AVOIDING THE PATHOLOGICAL ARBITRATION CLAUSE

In 1974, Frederick Eisemann, who served for twenty-six years as Secretary General of the International Chamber of Commerce Court of Arbitration in Paris, coined the expression "pathological arbitration clauses." The expression describes arbitration clauses so poorly drafted that they inevitably result in controversies that give "rise to cost and delay, and, even worse, may cast a continuing doubt on the enforceability of the award."[71]

Because of the confusing state of the Texas law dealing with private arbitration of commercial disputes between residents of Texas and Mexico, drafting an arbitration clause in a contract presents a trap for the unwary. The attorney thus must approach the task of drafting such a clause with the utmost of caution. As one leading expert has warned, "There is an astonishing contrast between the degree of so-

66. *Id.* ch. 14, art. 1401(2).
67. *Id.* ch. 14, arts. 1415 & 1416.
68. NAFTA ch. 16, art. 1606.
69. *Id.* ch. 19. An "antidumping duty" is a duty designed to counter price discrimination by a foreign manufacturer (exporting goods at substantially lower prices than charged at home). A "countervailing duty" is a tariff that is levied in response to and designed to counter-balance a foreign export subsidy. *See generally* JOHN H. BARTON & BERT S. FISHER, INTERNATIONAL TRADE AND INVESTMENT, chs. V & VI (1986) (describing antidumping duties and countervailing duties).
70. NAFTA ch. 20.
71. W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 158 (1990).

phistication reflected in the substance of some voluminous international contracts, prepared by highly competent and resourceful personnel, and the primitiveness of the error to be found in the arbitration clause."[72]

A well-known treatise discusses common pitfalls in international arbitration agreements and provides suggestions for avoiding them.[73] These pitfalls may be summarized as follows:

1. "Equivocation: the cardinal sin.
   If the parties want arbitration, they should say so clearly. . . ."[74]
2. "The case of the missing authority.
   One frequent problem with arbitration clauses is that they define subjective conditions under which the arbitral mechanism is to be triggered or abandoned without specifying who is to determine whether the relevant condition in fact has arisen. . . ."[75]
3. "The case of the disastrous compromise.
   Sometimes parties resolve negotiation deadlocks by compromising on issues where compromise is not appropriate. . . ."[76]
4. "Overdoing the search for institutions.
   Litigation is serious business, and one should not be surprised that third parties who are not required to do so are reluctant to implicate themselves even marginally in international disputes. There is no excuse for a cavalier approach to the designation of the authority required to make the arbitration work. . . ."[77]
5. "The illusory arbitration clause.
   Avoid language that necessitates further agreement of the parties after a dispute has arisen and thus affords the defendant (respondent) the opportunity to avoid arbitration by simply refusing to agree."[78]
6. "Suffocating the process with specificity.
   Overly detailed descriptions of the identity, qualifications and

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72. *Id.*
73. *Id.* at 157-66.
74. *Id.* at 158.
75. W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 160 (1990).
76. *Id.* at 163.
77. *Id.* at 164.
78. *See id.* (discussing "illusory arbitration clause").

comportment of the arbitrators and the practical functioning of the tribunal may have the effect of making it impossible to constitute the tribunal and to make the process operational in accordance with the parties' stipulations."[79]

7. "Haste makes waste.
Parties are occasionally tempted to stipulate that the arbitrators must render their award within a given brief time period. The intent behind such a provision is to incite the arbitrators to act rapidly. But what may not occur to the contract negotiator is that such a provision may be so constraining as to destroy the entire arbitral mechanism, which in certain cases may play into the hands of a defendant seeking to avoid any responsibility whatsoever. An overly strict time limit may have the unavoidable result that the arbitral tribunal's mandate expires before it is practically possible to conduct an international arbitration."[80]

VI. CONCLUSION

When an attorney, either from the United States or from Mexico, represents a client in a cross-border transaction, the attorney must act as a bridge between people who come from different cultures, do not speak the same language, and are accustomed to totally different legal systems. The attorney who properly fulfills this role, must: (1) have specific knowledge of the substantive and procedural laws of his or her own jurisdiction; (2) have a general familiarity with the other country's legal system; (3) consult with local counsel; and (4) remain alert to the possibility that the substantive and procedural rules of his or her own country may be different in cross-border commercial transactions. In passing the TIAA, the Texas Legislature, in good faith, attempted to create an atmosphere in Texas that would be conducive to international business. The unanswered question is whether the TIAA will have its desired effect or will only be fertile ground for further litigation as practitioners attempt to reconcile the various relevant laws, such as state statutes, federal statutes, and international treaties.

Considering the fact that not all countries in which Texas residents

79. W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 165 (1990).

80. *Id.*

do business are signatories to either the Panama Convention or the New York Convention, the adoption of the TIAA Act probably will serve a useful purpose. However, for the TIAA to fulfill its promise, and not serve simply as another basis for protracted litigation, more analysis and guidance are needed in those areas in which there is more than one relevant statute or treaty.

VII. APPENDIX A
ARBITRATION PROVISIONS OF THE CODE OF COMMERCE OF MEXICO*

Article 1051 - Above all others, the preferred commercial proceedings are those which are freely agreed among the parties according to the limits set forth in this book and it might be a conventional proceeding before the court or an arbitration proceeding.

Any unlawful aspect of the agreement or the nonperformance of the same can be challenged at any time before the rendering of the final award or judgment by means of an interlocutory process, but without interrupting the principal proceedings.

The conventional proceedings before the court shall be governed according to Articles 1052 and 1053, and the arbitration proceedings shall be governed by the provisions of Title Four of this book.

Article 1415 - Whenever the parties are merchants, they can agree to submit to an arbitral decision the disputes arising from their commercial relationships. The arbitration agreement can be adopted as a compromisory clause included within the contract or as an independent agreement.

The arbitration agreement must be in writing; it can be made of exchanged letters, telex, telegrams or any other similar means.

Article 1416 - Only persons with legal capacity can submit their business to an arbitration.

Article 1417 - In the arbitration agreement there shall be established the issues which can be submitted to an arbitration process and the name of the arbitrator or arbitrators or the manner in which they can be designated. If there is no mention of the issues covered by the agreement, it shall be void as a matter of law without requiring a judicial decision to that purpose.

Article 1418 - Whenever there is evidence by any of the means covered in Article 1415 that those interested have decided to submit their

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* The authors endeavored wherever possible in Appendix A and B to provide a precise translation from the Spanish text of the Code to English. However, due to the different legal systems in the United States and Mexico, and due to the fact that some Spanish phrases do not have an exact corollary in English, this was not always possible. When an exact translation from Spanish to English was not possible, the authors attempted to provide the analogous United States legal principle. In the authors' opinion, there is no better testament to the argument in favor of an official text of a contract being in only one language than the difficulties the authors' faced in the effort to translate this text.

disputes to an arbitral decision and the arbitrator or arbitrators have not been designated, and there is not agreement on the manner to make the designation, the arbitration proceeding shall be prepared so that the appointment shall be made by the judge.

Once the document evidencing the arbitration has been filed before the court by any interested party, a meeting shall be called within three days so that the parties can choose the arbitrator, and they must be warned that if they do not attend, an arbitrator shall be appointed in their default.

If the compromisory clause is contained in a private document, at the time the defendant is served with notice of the above mentioned meeting, the defendant shall be required to acknowledge the document; if the defendant does not appear or refuses to answer, the document shall be considered as acknowledged.

During the meeting, the judge shall require the parties to appoint an arbitrator by mutual agreement, and if they do not do so, the arbitrator shall be appointed by the court; the appointment shall be made upon a qualified person taking into consideration his or her personal qualifications.

Upon receipt of a written record of the above mentioned meeting, the work of the arbitrator shall begin, and service of process shall be given according to the provisions of this Code.

Article 1419 - The arbitration agreement shall be valid although the period of the arbitration process has not been established, in which case the term shall be sixty working days, beginning from the time of initiation of the arbitration proceeding.

Article 1420 - During the term of arbitration, the appointment of the arbitrators cannot be revoked except by the unanimous consent of all the parties.

Article 1421 - Whether the arbitration is domestic or international, the provisions of this Code shall apply in both cases, except where provided by international treaties and conventions to which Mexico is a party. If the arbitration is held in Mexico, the provisions of this Code shall be observed to supplement the agreement among the parties and the rules of procedure approved by the parties under the terms of the following articles; the Code of Civil Procedure of the State in which the arbitration is held will supplement the above unless the commercial statutes set forth a special procedure.

Article 1422 - The parties can specifically include in the arbitration agreement all the rules of procedure which must be observed, pro-

vided the essential rules of due process are observed. The parties can also agree that the arbitration will be governed by the regulations approved or used by institutions administering arbitration proceedings.

Article 1423 - In the arbitration agreement the parties can agree on:

I. The number of arbitrators and the procedure for their appointment. The appointment of arbitrators can be delegated to a third person who can be an institution administrating arbitration proceedings;

II. The place where the arbitration will be held;

III. The language or languages which shall be used in the proceedings. If the proceedings are to take place in Mexico, the use of the Spanish language will be required although another language can also be used;

IV. The withdrawal of the right of appeal; and

V. Any other clause which seems to be of importance, including the rules to be applied on the merits of the case and the procedure consistent with what has been established above.

Article 1424 - The arbitrators will always be bound to receive evidence and to hear legal arguments, if any of the parties shall ask for it, anything to the contrary notwithstanding.

Article 1425 - An arbitration agreement can deny the right of appeal in which case the arbitration award shall be final and there shall be no further right of appeal.

Article 1426 - The parties can choose the law applicable to the merits of the case, unless the law that is chosen is against public policy. If said election is not made, the arbitrator or the arbitration panel considering the circumstances of the case shall determine the law applicable to the merits of the case.

Article 1427 - Note: In essence, this Article provides a party the right to obtain a stay of a lawsuit filed in court if there is an arbitration agreement in effect.

Article 1428 - The arbitration ends:

I. By the death of the arbitrator chosen in the arbitration agreement or in the arbitration clause if a substitute has not been appointed or if in a thirty-calendar-day term the parties do not agree on a new arbitrator or if they did not provide for a process to appoint the substitute. If the parties have not designated an arbitrator but the court appoints an arbitrator, the agreement shall not be extinguished and the appointment of the substitute shall be made in the same manner as the first;

II. By means of excuse filed by the arbitrator or arbitrators appointed by the parties when having a justified cause which is an impediment to perform the office if the parties do not agree on a new arbitrator within thirty calendar days. If the excuse is filed by an arbitrator appointed by the court, the appointment of the substitute shall be made in the same manner as the first. If the arbitrator designated in the second instance files an excuse for a justified cause, the agreement shall be extinguished.

III. By a justified challenge accepted by the court when the arbitrator has been appointed in the second instance by the court, because an arbitrator appointed by mutual agreement cannot be challenged.

IV. When the arbitrator designated by the parties receives an appointment to hold an office in the administration of justice for more than a three-month period, so that by matter of fact or by a matter of law the appointee has an impediment to act as an arbitrator. If the arbitrator has been designated by the court, a new appointment shall be requested; and

V. By expiration of the term referred to in Article 1419, unless the parties agree on an extension.

If the parties settle the case in reference to the merits of the case, the arbitrator shall declare that the arbitration process has ended and if the settlement does not contravene public policy, then the arbitrator shall approve the settlement giving it the effect of a final award.

Article 1429 - Whenever it is necessary to appoint a substitute arbitrator, the arbitration process shall be suspended during the time required to make the new appointment.

Article 1430 - The arbitration award shall be signed by all the arbitrators, but if there are more than two and the minority refuses to sign, the others shall attest the above and said award shall have the same effect as if signed by all.

Article 1431 - If the arbitrators are authorized to appoint a third arbitrator and they are unable to agree on whom they are going to appoint, they shall go to the court of first instance.

Article 1432 - The arbitrators shall decide according to the rules of law, unless the arbitration clause or agreement allows them to act on amiable composition or if the resolution shall be rendered in conscience.

Article 1433 - The arbitrators can only be challenged for the same causes that judges can be challenged; the challenges and excuses of

the arbitrators shall be heard by the court of first instance, according to the rules of law and without the right to appeal the decision.

Article 1434 - The arbitrators can hear those interlocutory matters without which resolution they cannot resolve the principal matter. They can also hear preemptory exceptions. (Note: Additional language follows concerning when a counterclaim can be heard.)

Article 1435 - The arbitrators can order the parties to pay costs and damages. The Court of first instance shall have jurisdiction to enforce an arbitration award.

Article 1436 - Once the parties have been given notice of the arbitration award, the arbitrator shall transfer the file to the court of first instance for the purpose of its enforcement. The prevailing party can also personally require the court of first instance to enforce the award.

Article 1437 - Except for what is provided by the treaties and conventions to which Mexico is a party, enforcement in Mexico of foreign arbitral awards shall be governed by the provisions of this Code or according to what is provided in the arbitration agreement and the Code of Civil Procedure of the pertinent state, making supplementary application of the Federal Code of Civil Procedure, consistent with the provisions of the treaties and conventions to which Mexico is a party.

VIII. APPENDIX B
ARTICLE 1347-A OF THE CODE OF COMMERCE OF MEXICO

Article 1374-A. - The judgments, awards, and resolutions issued abroad can be enforced if the following rules are fulfilled:

I. That the formalities established in the treaties and conventions to which Mexico is a party are complied with in matters related to letters rogatory coming from abroad; in the case of awards, letters rogatory shall not be required;

II. That they have not been issued in reference to a real estate action;

III. That the judge of court of the case had jurisdiction to hear and decide the matter according to the rules acknowledged by international law which are compatible with this Code;

IV. That the defendant was notified or given service of process in person in order to assure the guarantees of audience and the right to have a defense;

V. That they are final in the country where they were rendered, and there is no further right of appeal;

VI. That the action which originated the judgment or award is not the subject matter of a pending judicial proceeding among the same parties before Mexican courts . . . The same rule shall apply when there is a final judgment;

VII. That the obligation which is being enforced is not against public policy in Mexico; and

VIII. That all requirements for the award to be authenticated have been fulfilled.

Although the above mentioned requirements have been fulfilled, the court can deny execution if it is established that in similar cases the country of origin does not enforce foreign judgments, judicial resolutions, or awards.