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# ALTERNATIVE DISPUTE RESOLUTION IN RESOLVING NON-UNION HUMAN RESOURCE CONFLICTS IN THE CONTEXT OF THE NORTH AMERICAN FREE TRADE AGREEMENT

*Edward C. Chiasson**

*NAFTA's future, and all the benefits it will bring to the citizens of the three great member countries, depends on the resolve of each and every company and manager to make human relationships work. You can plug in a machine, but you can't just plug in a person.*[1]

PART OF MAKING HUMAN RELATIONSHIPS work is the provision of effective dispute resolving techniques. This fact is illustrated by the National Employment Conclave convened by the American Arbitration Association on September 22-23, 1995 in Washington, D.C.[2] It drew 121 participants from many sectors of society and explored the many facets of resolving disputes in the employment context.

The NAFTA obliges the parties "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."[3]

Respecting this mandate, the American Arbitration Association, the British Columbia International Commercial Arbitration Centre, the Mexico City National Chamber of Commerce, and the Quebec City National and International Commercial Arbitration Centre formed the Commercial Arbitration and Mediation Center for the Americas (CAMCA).[4] In the introduction to the CAMCA rules it is stated that: "mediation. . .and arbitration. . .can be [used] for the resolution of all types of private commercial disputes arising in investment and trade, construction, *employment*. . . ."[5] (Emphasis added).

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[1] Robert T. Morgan & Jeffrey Abbott, NAFTA: MANAGING THE CULTURAL DIFFERENCES 66 (1994).

[2] Six papers from the conclave are reproduced in DISP. RESOL. J., American Arbitration Association, Oct.-Dec. 1995.

[3] *North American Free Trade Agreement*, Art. 2022 as reproduced in John H. Jackson et al., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (1955).

[4] A multi-national panel of arbitrators has been formed to serve under the CAMCA Rules. Each of Mexico, the United States, and Canada put forward a list of individuals. The author is proud to have been included in the Canadian list.

[5] CAMCA Rules, Introduction, at 2.

The introduction states further that "consistent with the objectives of the NAFTA. . .CAMCA and the procedures in this booklet were designed to provide parties in the free trade area with an efficient, international forum for the resolution of private commercial disputes. . . ."[6]

As trade increases, so too will the extent of multi-cultural employment relations. Combining workers and managers with different cultural backgrounds has the potential for an increase in disputes in the workplace. These disputes can be between workers at the same level of employment, whether they are staff or managers, and employees at different levels. For illustrative purposes managers are examined.

Culture has been defined as: "[T]he unique response by a group of people to the physical and human environment confronting them in a particular location, and the survival mechanisms that they collectively develop and pass on consciously and unconsciously to succeeding generations."[7]

Research has shown "great variations between cultures with respect to the role of the manager."[8] Managers' opinions about what organizational hierarchies were desirable and what the nature of power within the organization should be, were strongly affected by their nationalities.[9]

Four features of national cultures have been identified as useful in assessing cultural differences in the management context: power distance; uncertainty avoidance; individualism versus collectivism; and masculinity.[10]

Canada and the United States are similar, although not the same in these features, but Mexico is markedly different.

Mexicans have a high tolerance for unequal distribution of power. Their management style tends to be authoritarian and centralized. Canadian and American workers expect to share power.

Mexicans exhibit group loyalty. The preservation of relationships is important. In Canada and the United States, workers often are very individualistic. Competition is more of a feature.

Ten important areas have been identified: "[W]here national cultural differences cause the greatest impact on Mexican and American co-workers. . . .These differences, related to management style and general cultural values, can have a profoundly negative impact in the workplace if they are not duly recognized and pro-actively addressed."[11]

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[6] CAMCA Rules, Introduction, at 3.
[7] Robert T. Morgan & Jeffrey Abbott, *supra* note 1, at 38.
[8] *Id.* at 51.
[9] *Id.*
[10] *Id.* at 51-52.
[11] *Id.* at 56.

The ten areas are:

| | *Mexico* | *United States* |
|---|---|---|
| work/ leisure | works to live | lives to work |
| | leisure essential | leisure a reward |
| direction/ delegation | autocratic | delegate |
| theory and practice | theoretical | pragmatic |
| control | dislike/nervous of it | accepted |
| staffing | family and friends | emphasize performance |
| loyalty organization | to superior over | self-loyalty |
| competition | avoids | enjoys |
| training and development | theoretical | concrete and specific |
| time | relative & flexible | imperative |
| planning | short-term | long-term |

The recognition and addressing of these differences requires a little self-analysis. "Leadership, decision-making, teamwork, organization, motivation. . .everything that managers do is learned. Because management functions are learned, they are based upon assumptions about one's place in the world. . .managers from other business systems are not merely 'underdeveloped' managers from one's own particular country."[12]

It is here that the techniques of alternative dispute resolution can come to the fore.

Stephen Sondheim wrote a play *Into The Woods* that contains a song called: *No One Is Alone*. Some of the words of that song are instructive in the ADR context.

> People make mistakes,
> holding to their own,
> thinking they're alone
> * * *
> Someone is on your side.
> Someone else is not.

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[12] *Id.* at 55 (referring to P.R. Harris & R.T. Morgan, MANAGING CULTURAL DIFFERENCES 8 (1991)).

While we're seeing our side,
Maybe we forgot:
They are not alone.
No one is alone.

When performing the task of the identification and selection of the best means of helping each side, remember that no one is alone and that seeing the other side is the beginning of the resolution of conflict. Recognizing the need to address cultural differences in workplace disputes is the first step.

The strength of international arbitration is its capacity to generate a process that accommodates the legitimate legal and cultural expectations of parties. The parties to the NAFTA are not strangers to recent developments in international arbitration and have embraced this dispute resolving method through CAMCA and through the processes in the Investment Chapter 21 of the NAFTA.

Mexico is a civil law jurisdiction and uses inquisitorial procedure. Canada and the United States are common-law jurisdictions — with limited exceptions — and use the adversarial system.

Until 1986, Canada did not accommodate arbitration and certainly not international arbitration.[13] It was in that year that Canada acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and began enacting the UNCITRAL Model Law on International Commercial Arbitration.

The United States has a reasonably well-developed history and experience with arbitration and recent initiatives and court pronouncements support and encourage the process. Several states have adopted the Model Law.[14]

Mexico and the United States were well ahead of Canada in acceding to the New York convention, respectively on April 14, 1971 and September 30, 1970,[15] but Mexico was not considered a well-developed jurisdiction for arbitration, although mediation was used.[16] On January 4, 1989 Mexico embraced the Model Law through the amendment of its Commercial Code. Title 1V, *The Arbitral Procedure* was added.[17]

The new law applies to both domestic and international arbitration. It substantially incorporates the Model Law with language to accord with Mexican legislative drafting and a few minor changes. Prin-

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[13] *See* Edward C. Chiasson, *Canada - No Man's Land No More*, 3 J.INT'L ARB., June 1986.

[14] As identified by Peiter Sanders, *Unity and Diversity in the Adoption of the Model Law*, 11 ARB. INT'L, 1, 3 (1995).

[15] Mexico made no reservations. The United States made both the reciprocity and the commercial reservation. Canada made the commercial reservation.

[16] Humberto Sierra, MEXICO YEARBOOK, 94 (Albert Van Den Berg & B.V. Kluwer eds., (1978)).

[17] *Id.* at 307 (referencing the work of Jose Luis Siqueiros).

ciples from the UNCITRAL Arbitration Rules (1976) are included on matters of procedure and costs.[18]

> [T]he principal purpose of the new legislation is to modernize and to update the legal framework of commercial arbitration through the embodiment of the most advanced norms on the subject thus achieving harmonization of the arbitral procedural rules oriented to the specific needs of the settlement of disputes in international commerce.[19]

Harmonization is an approach to the development of international legal instruments that recognizes that participation by national courts and the effect of local law, whether welcome or not in theory, is, in certain situations, inevitable and sets out to minimize the differences between national laws and with them the practical significance of the choice of forum.[20]

The UNCITRAL Model Law and the UNIDROIT Principles of International Commercial Contracts are examples.

A fundamental feature of the Model Law is party autonomy. One observer commented towards the end of the process that led to the adoption of the Model Law, "The working group wishes the model law to have the widest possible scope, and to give the maximum effect to the principle of party autonomy. . . ."[21]

From the outset, party autonomy was a key feature. In 1981, the secretary of the UNCITRAL wrote:

> Probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations. This would allow them to freely submit their disputes to arbitration, and to tailor the 'rules of the game' to their needs.[22]

Party autonomy gives international arbitration the capacity to accommodate cultural differences and diverse legal traditions because the parties can design their process.

In many ways in the resolution of a dispute, the law tends to look after itself. It is in the process and its procedure that international arbitration's strength appears.

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[18] Jose Luis Siqueiros, *Ad Informandum Mexico International Handbook on Commercial Arbitration*, ICCA, Oct. 1993.

[19] *Id.*

[20] *See* S.A. Coppee Lavalin N.V. vs. Ken Ren Chemicals and Fertilizers Ltd., [1994] W.L.R. 631,639-70 (referring to Lord Mustill's opinion).

[21] Martin Hunter, *International Commercial Arbitrations: The Uncitral Model Law*, INT'L BUS. LAW. 189 (Apr. 1984).

[22] *International Commercial Arbitration: Possible Features of a Model Law on International Commercial Arbitration*, 14th Sess. U.N. Doc. A/CN.9/207 (1981) (report given by General Secretary); as contained in Igor I. Kavass & Liivak Arno, UNCITRAL MODEL LAW OF INTERNATIONAL COMMERCIAL ARBITRATION: A DOCUMENTARY HISTORY 1 (1985).

Parties can decide the number and profile of the arbitrators in advance of a dispute arising; for example: one or three persons with a mix of nationalities and experience or training requirements — so many years in certain capacities in a particular industry.

Once a dispute does arise, parties can select the individual or individuals who best appear to fit the requirements of the case. Selecting an arbitrator does not mean bias. The role of the party-appointed arbitrator has been described as follows: "The party-appointed arbitrator must ensure that the appointer's case is understood by the tribunal, but at the time of decision. . .must assume a personal responsibility to render a fair judgment."[23]

In circumstances of cultural diversity and differences in legal traditions, ensuring that the tribunal understands each party's case often is very difficult in domestic litigation. Parties must rely on the scope of understanding of a judge who regularly manages a fixed process with prescribed rules and who generally must apply a particular national law. Consideration of cultural factors may play no part in the process. There may be no scope for it.

Recognizing the potential for cultural diversity and differences to be at the root of human relationship disputes in the context of NAFTA, the limitations of the court process lead to consideration of alternatives.

Mediation clearly has great potential. To resolve conflicts in the workplace by agreement is most desirable considering the usual need for the preservation of long-term relationships. In circumstances where mediation does not work or is not appropriate, a decision is needed to, for example, define rights or give guidance for the future. Arbitration is designed to facilitate preservation.

It is essential to recognize that with party autonomy comes party responsibility. Arbitration is not a panacea. It does not operate in a vacuum. The recognition that no one is alone and of the need to see more that just "our side," must come from the parties. If it does, international commercial arbitration can work to address "the national cultural differences related to management styles and general cultural values." The "profoundly negative impact in the workplace" can be avoided, or at least controlled.

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[23] Stephen, J. Toope, *The Iran-United States Claims Tribunal: Nature and Function, in* MIXED INTERNATIONAL ARBITRATION: STUDIES IN ARBITRATION BETWEEN STATES AND PRIVATE PERSONS (1990).