Penn State International Law Review

Volume 27
Number 3 *Penn State International Law Review*

Article 12

5-1-2009

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I. THE "COCA-COLA PHENOMENON"

The Coca-Cola Company was established in 1886, employs 9500 worldwide, and it operates in more than 200 countries.

Let's imagine that you are a successful senior in-house counsel in the Legal Department of the Coca-Cola. Your job as head of the department's litigation unit is interesting work. Recently, disputes have arisen regarding the usage of Coca-Cola's trademarks in some countries. Over the course of a few weeks, you bring claims against partners in Mexico, Hungary, India, New-Zealand, and Zimbabwe. Naturally, the first task of a lawyer in this situation is to look at the contract signed with the above-mentioned partners to establish the proper venue. Should you file a claim in the state court of the relevant country or is your choice governed by an arbitration clause included in one of the contracts signed with the partners? If the contracts do not contain any provision regarding jurisdiction and/or if the case falls within the competence of a state court (or courts) seated in the country of the relevant partner, the lawyer may struggle to establish how and in which state court to initiate proceedings according to the applicable national code of civil procedure. Even if the lawyer can contact local counsel, the parties will still be eager to follow the progress of the case. Thus, their lawyer(s) must be familiar, to a certain extent, with the applicable legal provisions in the forum's court.

If we assume that countries tend to possess different legal traditions and that Coca-Cola has to initiate proceedings in the counter parties' state courts, the room for manoeuvring will not be forgiving. Should, however, our esteemed colleague from Atlanta be lucky enough to find that the relevant contracts provide for arbitration and the place of

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arbitration is in one of the above countries, she/he can avoid nightmares during the weekend before preparing and submitting the claims.

This article explains and illustrates why arbitration, as a "re-discovered" tool for the resolution of international commercial disputes, might be more convenient than filing claims before national state courts.

II. ROOTS

When speaking about the most popular means of alternative dispute resolution ("ADR")—i.e., mediation and arbitration—lawyers tend to think that these ways of dispute resolution are "phenomena" of our modern, globalised epoch. In fact, the origins of ADR can be traced back to ancient China, 2500 B.C. The schools of Confucianism and Taoism might be responsible for the endeavour of trying to handle controversies in a less aggressive way, to attempt to settle disputes and create harmony between partners again. This may remain true today. According to statistics from the Arbitration Court of the International Chamber of Commerce, of Asian parties who participated in ICC cases, only one-third initiated the proceedings. The remaining two-thirds ("preferring to be claimed against") were defendants.

And even skipping the history of private and public arbitration proceedings in the Greek and Roman Empires, the Middle Ages include examples of ADR practice. During this time, even in Europe, one can see that disputes between merchants and/or craftsmen were resolved within the competent guilds—by the master or some other "senior" colleague(s)—instead of allowing commercial disputes to be decided by "functionaries" exercising judicial power. Dispute resolution by laymen was in most cases more professional, less expensive, and less time-consuming than the proceedings of judges. That ancient pattern of alternative dispute resolution (as described above) might convince the experts of the United Nations Commission on International Trade Law ("UNCITRAL") to adopt and use these traditional methods of jurisdiction once again: that is, UNCITRAL could encourage businessmen to make use of ADR to eliminate difficulties caused by state court proceedings based on national codes of civil proceedings.

III. THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

The divergences among provisions in different national procedure laws are sources of insecurity and uncertainty in the field of international commercial disputes. This explains why even the United Nations has moved toward harmonisation in this field. In 1958, the U.N. General Assembly adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This Convention has been

very successful, and it has served to illustrate the necessity of unification of law regarding international commercial arbitration. At the same time, it has also stressed the importance of arbitration in the development of world trade. This phenomenon could well have influenced the U.N. Economic and Social Council ("ECOSOC") in its passing of resolution No. 708 in 1959, which invited governments "to consider sympathetically any measures for improving their arbitration legislation and institutions to encourage interested organizations in the development of arbitration facilities."[1] Of course, the establishment of UNCITRAL was a determinant step toward the unification and harmonization of international trade law.[2] This Resolution provided that ". . . [t]he commission shall further the progressive harmonisation and unification of the law of international trade by . . . preparing or promoting the adoption of new international conventions, **model laws** and uniform laws."[3] According to the Secretary General's report on the development of international trade law, "Commercial Arbitration" was included in this concept. During its successful activities, UNCITRAL achieved progress in the area of international arbitration. First, it drafted the UNCITRAL Arbitration Rules, which were endorsed by the U.N. General Assembly in 1976.[4] The mission of these rules was to lend a helping hand to parties in "ad hoc" arbitration, although even permanent arbitration courts used these Rules when elaborating or modernising their own rules of proceeding.

UNCITRAL's second step towards unification of arbitration law was the instigation of the Model Law on International Commercial Arbitration ("MAL"). The MAL Working Group—consisting of representatives of the thirty-six member states of UNCITRAL—had to decide several preliminary questions. First of these issues was the special nature of international commercial arbitration: some previous experiments had shown that the unification of national procedure laws would be difficult because this field of legislation arose from other areas of traditional domestic law. During the preparation of the MAL, UNCITRAL was careful to consider the provisions and phraseology of the two previous, related documents discussed above: the New York Convention and the UNCITRAL Rules. The main purpose of the MAL

1. ECOSOC Res. 708 (XXVII), U.N. ECSOR, 27th Sess., Supp. 1, U.N. Doc. E/3262 (Apr. 17, 1959).

2. G.A. Res. 2205 (XXI), U.N. Doc. A/6369 (Dec. 17, 1966). The author cannot resist the temptation to mention that UNCITRAL was established via a motion from Hungary.

3. *Id.* ¶ 8 (emphasis added).

4. G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976).

drafters was to reduce the discrepancy between domestic procedural laws affecting international commercial arbitration.[5]

When choosing a route toward harmonisation, it is important to distinguish between the roles played by supranational organisations (e.g., the European Union) and classical international organisations (e.g., the United Nations). Instruments created by U.N. organisations, such as UNCITRAL, may only become binding in law after a state has decided to adopt it. This could happen by ratification—as in cases of a convention such as the United Nations Convention on Contracts for International Sale of Goods ("CISG")—or by domestic enactment—as with a model law like MAL. On the other hand, the instruments produced by supranational organisations are in most cases binding on all member states. Therefore, the results of harmonisation undertaken by UNCITRAL take full account of state sovereignty. When we recognize and respect the traditionally national character of procedural law, the elaboration of a model law would seem to be practical because it is more acceptable to the different states. MAL achieved wide adoption: in 2008, almost 50 countries have adopted its provisions.[6] This is evidence that the drafters succeeded in choosing model law as the appropriate instrument for the harmonisation of the laws of international commercial arbitration. MAL adopts the most essential elements of the appropriate legal framework of international arbitration proceedings. These include the following: the scope of application, the function of state courts in assisting and supervising arbitration, the arbitration agreement, the composition of an arbitral tribunal (appointment of arbitrators, grounds for challenges, challenging procedure), the jurisdiction of the arbitral tribunal (competence of the tribunal to rule on its own jurisdiction and to dictate interim measures), the arbitral proceedings' conduct (equal treatment of parties, determination of the rules of procedure, place of

5. *See* Corinne Montineri, *Legal Harmonisation Through Model Laws: The Example of the UNCITRAL Model Law on International Commercial Arbitration*, *in* CELEBRATING SUCCESS: 20 YEARS OF UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 13 (Sing. Int'l Arbitration Ctr. 2006).

6. The following states adopted MAL: Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Bermuda (as an overseas territory of the United Kingdom), Bulgaria, Cambodia, Canada, Chile, Croatia, Cyprus, Denmark, Egypt, Estonia, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Paraguay, Peru, the Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Scotland (within the United Kingdom), Slovenia, Spain, Sri Lanka, Thailand, Tunisia, Turkey, the Ukraine, Uganda, Venezuela (the Bolivarian Republic of), Zambia, and Zimbabwe. Within the United States of America, California, Connecticut, Illinois, Louisiana, Oregon, and Texas have adopted provisions of the MAL. Likewise, China's Hong Kong and Macau Special Administrative Regions have adopted the MAL.

arbitration, hearings and written proceedings, party default, the appointment of experts), making awards and proceedings' termination (form and content of arbitral award provision, its amendment and interpretation, settlements), setting aside arbitral awards, and the provisions regarding the recognition and enforcement of awards.

IV. THE MAIN PRINCIPLES OF MAL

A. Freedom of the Parties

The core element of arbitration is the parties' autonomy, which refers to the parties' actual decision-making—i.e., whether they would prefer the jurisdiction of state courts or whether they might decide to resolve their disputes by arbitration. The parties are free to nominate their arbitrators, to determine the rules of proceedings within the framework of the arbitration law at the seat of arbitration, and to choose the language for proceedings. They can also determine both the substantive law that will govern the dispute and the place of arbitration.

B. Burdening the National State Courts

To allow for "a private court procedure" like arbitration, the sovereign state must exercise some kind of control on the procedure so as to protect its own public order. This is particularly evident where the state chooses to enforce the decisions of an arbitral tribunal. An important decision is how close the link between national courts and international arbitration might be. If a national court has too much power to intervene both in arbitral proceedings and in the setting aside of awards, the parties' freedoms will be restricted. But if there is absolutely no "supervision" by national courts regarding arbitration, both the arbitral procedure and "its outcome"—the award—may be too unpredictable. In that case, both the parties' rights and the public order will be vulnerable to abuse.

V. WAYS OF ADOPTION

At the beginning of MAL's preparatory work, the drafters thought that it would be primarily useful for developing countries. In the last 20 years, however, many industrialised countries have reformed their arbitration laws by adopting MAL. Countries who utilised this model were not burdened by minimum adoption criteria. Consequently, they had a freedom to vary texts according to their own traditions or intentions regarding the drafting of new or modified arbitration provisions.

In adopting the MAL template, states have chosen the following ways of adapting and/or modifying MAL's provisions:

1. Some states simply translated the text and enacted it (e.g., the Russian Federation and California);
2. Other countries made editorial changes that did not affect the meaning of the recommended MAL text—for example, by renumbering, re-ordering, or re-prioritizing provisions, or by designating the appropriate court or appointing authority (e.g., Hungary);
3. Other states used their own terminology to reflect local usage or practice—for example, staying court proceedings or dismissing action for want of court jurisdiction, or Scotland's use of "arbiter" instead of "arbitrator";
4. Some states extended or limited the scope of MAL's application to domestic arbitration (e.g., Germany and Hungary);
5. Other states omitted certain MAL provisions such as Article 36's provisions regarding grounds for refusal of the enforcement of awards;
6. Some states, including Mexico and India, changed MAL's default rules that governed aspects of arbitration that the parties did not agree upon including, for example, the number of arbitrators;
7. Several states added supplemental provisions related to costs (Germany, New Zealand), interest (India), and immunity (Great Britain and Northern Ireland);
8. Other states specified the tribunal's powers concerning interim measures (e.g., Ireland); and
9. Some states added other avenues of recourse for use against awards, orders or directions (e.g., Austria).[7]

Notably, MAL does not include any provisions dealing with confidentiality. This is curious because confidentiality is one of arbitration's distinguishing characteristics and it embodies a benefit that would seem to be essential for parties choosing arbitration as a means of dispute resolution. Thus, some countries have provided for confidentiality regarding oral hearings and deliberations. But the arbitration law of those states remains silent on the publication of awards

7. *See* Lawrence Boo, *Modifications, Changes and Additions Made by States Adopting the Model Law on International Commercial Arbitration*, *in* CELEBRATING SUCCESS: 20 YEARS OF UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 19 (Sing. Int'l Arbitration Ctr. 2006).

(e.g., Singapore, Hong Kong SAR). This is particularly striking when compared with the fact (well-known to arbitration practitioners) that the ICC Court regularly publishes its awards in either full text or, at a minimum, in a sanitized form. A special problem follows confidentiality or its absence in connection with state court proceedings that arise out of any matter related to arbitration proceedings. In many countries, civil law procedures are (and should be) public. In those situations, the details of arbitration proceedings and awards may reveal, for example, when a party wants an ordinary court to set aside an arbitration decision. There is a conflict between the public nature of state court procedures and the basic principle of confidentiality in arbitration. Most codes of civil procedure do not address this problem and its resolution will depend on the relevant state court: will, for example, the court order in-camera hearings of such cases and restrict discovery of the files of entities that are not party to the arbitration proceedings?

VI. HARMONISATION VIA COLLECTION OF CASE LAW

As we have seen above, MAL was the successful result of the harmonisation of arbitration laws. A further step could have been *unification* via a convention relating to international commercial arbitration that might be ratified by states. As has already been pointed out, this approach carries with it some difficulties because of the states' resistance to ratify (more or less binding) international instruments touching upon their traditional domestic procedure law. UNCITRAL, however, found the right route to additionally harmonise international arbitration: namely, a more or less uniform interpretation of MAL by the collection and publication of case law. In 1988, the Commission established the so-called CLOUT system: Case Law On UNCITRAL Texts. This includes both a summary and the full text of decisions relating to both the CISG and the MAL. CLOUT includes decisions rendered both by state courts and arbitral tribunals. In 2001, the Commission reconsidered interpretations of certain articles of the CISG and found that the CISG was quite diversified. So a suggestion was made ". . . to prepare an analytical digest of court and arbitration cases." There were two possible ways of drafting the digest: (1) simply to make a note of diverging case law for information purposes or, alternatively, (2) to provide guidance as to the interpretation of instruments. The Commission suggested that "the digest could be merely a compilation of differences in interpretations of the Convention rather than a guide." It pointed out that the digest should not criticize domestic case law.[8] In

8. U.N. GAOR, 56th Sess., Supp. No. 17, U.N. Doc. A/56/17 ¶ 370 (June 25, 2001).

2002, the Secretariat began to draw up a similar digest in relation to MAL. The purpose of the MAL digest is to consider and report trends relating to interpretations of MAL. These could be influenced by the fact that they are based on a model law (and not a convention) whereby the method of a state's enactment will be determinative. Differences in interpretation may also come from divergences in understanding among state courts and arbitral tribunals.

VII. CONCLUSION

We are certainly able to say that UNCITRAL did a good job when drafting MAL and so, too, did the states that codified it in their national law. It is worth emphasising the fact that this model is the third pillar of a worldwide system: it stands alongside the New York Convention and the UNCITRAL Arbitration Rules as the basis of arbitration justice. Harmonisation in this area of international commercial law is thus being achieved, and the introduction of CLOUT and preparation of the Digest can only contribute to a more uniform interpretation of MAL.

* * *

And what about our learned colleague sitting in the Litigation Department of the Coca Cola Company?

We can only cross our fingers in the hope that she/he will find an arbitration clause in each contract signed by the Company with its partners from Mexico, Hungary, India, New Zealand and Zimbabwe. If those clauses include the jurisdiction of an arbitration court seated in one of the partners' countries, our colleague will have less trouble with the preparation and submission of claims because all those states—and Coca Cola's domestic home of Georgia in the United States, too—have adopted MAL. Thus, the lawyer likely will not find "surprising" provisions of any national code of civil procedure.