RECENT WORK ON DISPUTE RESOLUTION BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

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I. INTRODUCTION

My assignment today is to discuss the recent work of the United Nations Commission on International Trade Law ("UNCITRAL") in the field of arbitration and other forms of dispute resolution. Because UNCITRAL's recent activities are built on the foundations of its past accomplishments, they can best be viewed in the perspective of history.

That history began when UNCITRAL was established by the United Nations in 1966. At that time, the General Assembly, to use the words of one United Nations source, "recognized that disparities in national laws [and practices] created obstacles to the free flow of trade"[1] and assigned to UNCITRAL the goal of removing, or at least lessening, those obstacles. Over the years, to again quote the same United Nations source, UNCITRAL "has come to be the core legal body in the United Nations system"[2] devoted to facilitating international trade.

UNCITRAL's latest activities in the field of dispute resolution are closely related to its earlier projects for improving the laws, procedures and practices for resolving disputes that may arise in international trade transactions. It may, therefore, be useful to review briefly those earlier activities.

The first UNCITRAL project in the field of dispute resolution was the preparation of the UNCITRAL Arbitration Rules, which were completed in 1976. The Rules are widely used by agreement of parties, but even when the parties agree to arbitrate under institutional rules, the UNCITRAL Rules have a major influence because most modern institutional rules

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1. UNCITRAL Informational Release, p. 1 (Nov. 1996).

2. *Id.*

resonate with strong echoes of the UNCITRAL Rules, and some, indeed, include key provisions identical to the UNCITRAL text. Further, some new arbitration centers adopt the UNCITRAL text as their institutional rules.

Four years after publishing its Arbitration Rules, UNCITRAL broadened its approach by issuing the UNCITRAL Conciliation Rules. It is my impression that many more parties use institutional conciliation rules than apply the UNCITRAL Rules directly, but UNCITRAL nevertheless has an indirect effect because modern institutional conciliation rules often include key provisions that first appeared in the UNCITRAL text. In particular, UNCITRAL pioneered widely-followed provisions designed to protect confidential communications made in the conciliation process from being later used in arbitration or court litigation if the conciliation fails, and also, provisions for terminating an unproductive conciliation without needless delay. I have used the word "conciliation" because that is the term used by UNCITRAL, but it is synonymous with the term "mediation" and the process is the same whichever name is used.

UNCITRAL's most ambitious program in the field of dispute resolution and perhaps its most influential, was drafting the Model Law on International Commercial Arbitration, which was completed in 1985. It was prepared to assist legislators in reforming and modernizing arbitration laws, and has been enacted both in developed and developing nations, including several states of the United States. In some jurisdictions, the UNCITRAL text has been adopted with almost no changes, while elsewhere its principles and some of its wording have been enacted with modifications to reflect local legal preferences.[3] In any event, the UNCITRAL Model Law is the yardstick by which all arbitration laws are measured.

You may have noticed that I have not mentioned the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards that is the foundation on which the legal structure of effective international arbitration has been built. The task of drafting the Convention was completed in 1958 before UNCITRAL was born, but since UNCITRAL has come into existence the promotion of the Convention has been an integral part of UNCITRAL's work and all of its texts relating to dispute resolution have been carefully written to take account of the New York Convention.

UNCITRAL's most recent dispute resolution text is the Notes on Organizing Arbitral Proceedings, which were completed in 1996. I will comment on them briefly before moving on to describe UNCITRAL's newest task, which is a systematic exploration of what projects it might undertake in the future to improve the dispute resolution process.

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3. *See* G. Hermann *The UNCITRAL Arbitration Law: A Good Model of a Model Law*, UNIFORM L. REV. 483, 473-96 (1998).

Before turning to a discussion of the Notes, however, let me point out a noteworthy fact: Every one of the UNCITRAL texts that I have mentioned was recommended by the United Nations General Assembly by consensus, without a single voice or vote raised against it by any nation. That is, indeed, remarkable evidence of the broad acceptance that UNCITRAL's work has achieved in this field.

II. UNICITRAL'S MOST RECENTLY COMPLETED TEXT: THE NOTES ON ORGANIZING ARBITRAL PROCEEDINGS[4]

In considering the usefulness of the UNCITRAL Notes on Organizing Arbitral Proceedings, it is important to recognize that a basic characteristic of all leading international commercial arbitration rules is that they provide great flexibility for arbitrators to determine how each case will be conducted. This is a valuable feature because it permits the rules to be used in all legal systems, in many different kinds of transactions and in widely varying cultures. While such flexibility in arbitration rules and laws is also valuable in that it provides latitude for arbitrators to take into account the circumstances of particular cases, it can leave parties and their lawyers uncertain concerning the specific procedures that the arbitrators will choose to follow. The problem is acute in international commercial arbitration because there are likely to be three arbitrators, each from a different country, and there may also be lawyers from different countries. These participants often have different legal backgrounds and, consequently, varying expectations as to procedural details.

Typical of the flexibility of arbitral rules is a key provision of the UNCITRAL Arbitration Rules which states that "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided the parties are treated with equality and that at any stage of the proceeding each party is given a full opportunity of presenting its case."[5] The American Arbitration Association's International Rules include substantially identical wording.[6] Similarly, the London Court of International Arbitration Rules state that the tribunal shall have the widest possible discretion to conduct the proceedings in a manner which it considers to be the most efficient and effective in the particular circumstances of each case,[7] and other rules, such as those of the International Chamber of Commerce[8] have provisions to the same effect.

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4. This section is based in part on H. Holtzmann, *Introduction to the UNCITRAL Notes On Organizing Arbitral Proceedings*, 5 TUL. J. INT'L & COMP. L. 407 (1997).

5. UNCITRAL Arbitration Rules, art. 5 (1976).

6. American Arbitration Association International Arbitration Rules, art. 16 (1997).

7. London Court of International Arbitration Rules, art. 5.2 (1985).

8. International Chamber of Commerce Arbitration Rules, art. 11 (1998).

These provisions are consistent with many national laws which also permit arbitrators wide discretion in determining how to conduct cases.[9]

In 1993, UNCITRAL undertook a project to help solve the practical problems that arise from such flexibility. The approach was to prepare the Notes on Organizing Arbitral Procedures which provide a checklist to remind parties and arbitrators of procedural matters that it is useful to consider early in the proceeding in order to assist in the orderly planning of arbitrations and so as to give lawyers timely advance information needed in preparing their cases. The task was completed in May 1996 after three years of discussion and drafting by delegates and observers from more than fifty countries, representing a wide range of legal, social and economic systems, with the assistance of experts from a number of non-governmental organizations. Thus, the Notes drew on a deep reservoir of actual experience in conducting arbitrations.

In the time available this morning, I cannot describe the nineteen topics that are covered by the checklist. Suffice it to say that they are intensely practical and are designed to help parties and arbitrators fill the gaps left in flexible rules. Thus, for example, while rules and laws typically include provisions on hearings, they do not tell you which side will speak last or for how long, nor do they indicate whether summations are expected or as is customary in some, but not all, systems the tribunal expects first to hear arguments of each party on the facts and later hear each party argue the law. Let me give you a simple example of the surprises that can occur if procedural matters are not clarified in advance. I recently heard of an international case in which an American lawyer representing the claimant delivered a rousing summation that he thought was to be the last word in the Hearing. The American lawyer was taken aback when the Chairman, who was from a civil law European country, then asked counsel for the respondent to give the final argument. I cannot say that fundamental principles of justice require that the claimant be given the last word because he or she bears the burden of proof or whether the respondent is permitted to speak last in order to exercise the right of defense. What is important is that the lawyers on both sides know in advance when they prepare for the Hearing what the procedure will be. And while on the subject of the last word, all of the lawyers in the case I described went through the entire Hearing without knowing whether or under what circumstances the Tribunal might permit submission of post-hearing briefs. Use of the Notes avoids such surprises and uncertainty by alerting parties and arbitrators to decide on such questions early.

It is important to recognize that the Notes do not prescribe any one way to proceed; they simply point out, in a neutral manner, issues that should be decided early. Moreover, the Notes do not establish any legal requirements binding on parties and arbitrators. Thus, there is no legal

9. *See, e.g. UNCITRAL Model Law on International Commercial Arbitration*, 24 I.L.M. 1302, 1307, art. 19 (Sept, 1985).

requirement that the checklist be used, and, if it is used, it is subject to modification at the discretion of the arbitral tribunal. Arbitrators using the list may consult with the parties at any stage of the proceedings in person, by conference telephone calls, by electronic means or in written communications. While this will typically be done early in the case, further consultations on some of the items may also be useful at one or more later stages.

The Notes are intended for universal application and their use is not restricted to cases conducted under the UNCITRAL Arbitration Rules. The checklist provides helpful guidelines for cases under other arbitration rules and are especially useful in ad hoc arbitrations in which the parties have not agreed to any established rules.

The text of the Notes has been published by the United Nations in a booklet that is accompanied by a separate removable folder that lists the nineteen topics in the checklist and can be used as a convenient pocket agenda.

III. A LOOK INTO UNCITRAL'S FUTURE

The key texts that support international arbitration have had time to mature and parties and arbitrators have had time to gain experience in applying them. The New York Convention celebrated its Fortieth Birthday. The UNCITRAL Arbitration of Rules of 1976 have been in use for more than twenty years and the Model Law born in 1985 is now a teenager of thirteen. Neither time nor the imagination of man stands still. Recognizing that, UNCITRAL has embarked on a program to identify areas where improvements might be made and to determine suitable methods for effectuating them.

Appropriately, UNCITRAL began the process on the occasion of the Fortieth Anniversary of the New York Convention. A meeting was convened at United Nations Headquarters in New York on June 10, 1998, forty years to the day after the Convention was opened for signature by States. UNCITRAL, particularly its forward-looking Secretariat, recognized that this occasion should not just be a celebration of the past but a celebration concerning possibilities for the future. They therefore organized a symposium in which suggestions of areas for improvements were solicited. While there was much to cheer and celebrate, cerebration, which the dictionary defines as thinking, was the principal order of the day. In statements by rapporteurs and interventions by the highly sophisticated audience, a number of ideas were launched.

UNCITRAL is now continuing the process begun on New York Convention Day. At the Plenary Session of the full Commission in Vienna in June 1999, about three days will be devoted to exploring where experience reveals needs for improvements and how they might be achieved. As is the usual practice at UNCITRAL, the Commission's discussion will be aided by an analytical Note prepared by the Secretariat.

The text of the Note is not yet available, but on the basis of the discussion during New York Convention Day, it may be possible to forecast topics that may be considered in Vienna as possible subjects for future UNCITRAL actions.

One area of likely interest is the definition of what constitutes an arbitration agreement. In the light of experience, trade practice and the rapid evolution of means of electronic communication, some commentators have noted that the New York Convention and the UNCITRAL Model Law may be unduly cautious in requiring signed or written exchanges to constitute a valid agreement to arbitrate. As one observer noted, "[t]here is a strong case for a more expansive definition of agreement in writing," and indeed, for consideration of whether writing should be required in all circumstances.[10]

Another area in which improvements have been suggested is clarification of the scope of the kinds of disputes that may be arbitrated. While the frontiers of arbitration have expanded in some parts of the world, that development is not universal and there is less than international uniformity concerning the arbitration of disputes relating to anti-trust matters and issues relating to intellectual property. Harmony in these areas would enhance international trade.

While arbitration rules typically permit arbitrators to grant interim measures of relief, such measures can be largely meaningless without methods to enforce them on a world-wide basis. Can UNCITRAL help in devising ways to plug that loophole?

Confidentiality of arbitration is another area of active concern. Rules and laws are largely silent and case law in different countries conflict. Here, too, is an area where experience discloses need for improvement.

Another major issue that has recently attracted the attention of courts and commentators is the extent to which foreign courts should enforce arbitration awards that have been annulled for purely local reasons by a court in the country where the arbitration took place. Can UNCITRAL assist in this contentious and uncertain area?

Other areas where arbitrators have noted the need, or at least the advisability, for improvements include: (i) clarifying the power of arbitrators to award interest, including compound interest; (ii) adding procedures concerning consolidation in arbitration; (iii) drafting more specific provisions on costs; and (iv) providing firmer guidance concerning the immunity of arbitrators.

UNCITRAL's future agenda may well include consideration of ways to encourage and improve the practice of conciliation and other non-arbitral forms of ADR, including, for example, simplification of means of enforcing settlement agreements arrived at as a result of conciliation. Another item for possible consideration is what can be done to help

10. Report of Gavan Griffith, Q.C. at U.N. Convention Day (Jun. 10, 1998).

familiarize national courts with decisions of courts elsewhere in the interest of achieving uniformity and predictability.

I have mentioned some possible improvements but have not discussed the modalities for accomplishing them. One such modality might be modification of the New York Convention, a solution that was favored by almost no-one during the discussion at New York Convention Day. Or, perhaps, preparation of an additional Convention complementary to the New York Convention, as suggested by Dr. Werner Melis of Austria.[11] Also, I suggest States and arbitral institutions might be encouraged to act as *amicus curiae* or to submit statements of interest to support uniform application of the Convention by their national courts. Other possible steps to achieve improvements that UNCITRAL might spearhead include drafting of additional provisions for the Model Law and for the Arbitration Rules, as well as practice guides for conciliation and other non-arbitral forms of ADR.

All of these questions are likely to be subjects of discussion at the next UNCITRAL Session. I must caution, however, that I cannot pretend to predict with accuracy what subjects for discussion the Secretariat will suggest or the Commission might determine to explore. Nor would it be appropriate for me to comment at this early stage on the positions that the United States delegation might take on any of these matters. My purpose today is to alert you to issues on which your views will be needed as UNCITRAL moves forward with deciding its future agenda and in carrying out its future projects.

We should also note that UNCITRAL is not alone in looking to the future. The Office of the Legal Adviser of the United States Department of State is preparing for a meeting in the coming year to explore ways to improve the application of ADR in resolving disputes arising in trade between the NAFTA countries.

There are exciting times ahead!

11. Report of Dr. Werner Melis at UN Convention Day (Jun. 10, 1998).