

Comment:

An Outside Perspective

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Introduction

The project “Promotion of International Commercial Arbitration and Other ADR Techniques” is designed, among other things, to “help the MEDA countries develop increased capacity and confidence in the handling and resolution of commercial disputes”. One way to achieve this goal is to have a “more solid arbitration infrastructure operational in the MEDA region” upon completion of the project. The regulatory framework in which dispute resolution takes place plays an essential role in this process. However, the success of this framework, and in particular the acceptance of arbitration statutes in these countries, involves not only the confidence of the various legislatures in the arbitral process as an appropriate means of dispute resolution. It also involves the confidence of the users of these mechanisms. As far as international arbitration is concerned, these users come from abroad. Facilitation of foreign investment and international trade through the use of arbitration requires not only a stable political and socio-economic environment but also a modern and up to date legislative framework for international arbitration. Only the combination of these measures will lead to an increased competitiveness of these economies as an essential prerequisite for the implementation of free trade which is one of the overreaching policy goals of the EU-sponsored MEDA-Programme.

I. The Requirements for a stable regulatory framework

It is generally acknowledged today that a modern legislative framework for international arbitration is characterized by three essential characteristics:

- signaling effect,
- user-friendliness,
- arbitration-friendliness.

These characteristics follow from the very nature of the international arbitral process. From an international perspective, arbitration laws are geared not so much to the domestic lawyer who is familiar with his or her legal system but to the foreign party that expects an easy-to-read and easy-to-work-with arbitration law for its arbitration in a third, "neutral" country. It is for this reason that in the contemporary legal climate of international arbitration, "consumer satisfaction has assumed far greater importance than theoretical or structural purity".¹

Thus, the idea of the signaling effect means that the law has to be familiar to the foreign practitioner. He has to recognize the law as a well-known set of rules and provisions, thus mitigating the fear of any local particularities hidden in the statute or in the commentaries. The UNCITRAL Model Law on International Commercial Arbitration² plays a very important role in this context. The government report pertaining to the 1998 German law – which transformed the Model Law into German law - has rightly emphasized the necessity to create "transparency" for all parties involved in the arbitral process. The foreign practitioner "has to feel at home" immediately when reading the law. For this reason, the basic guideline for both commissions was "in *dubio pro* Model Law".³ Drafting the new law as closely as possible along the original wording of the Model Law also meant that the translation of the law could use the original wording of the official English and unofficial German UNCITRAL text. This identity in the wording in turn shows foreign practitioners that the new German law is in line with the original text of the Model Law.

The Commission at the German Federal Ministry of Justice has expressed this in the following words:

"If we want to reach the goal that Germany will be selected more frequently as the seat of international arbitrations in the future, we have to provide the foreign parties with a law that, by its outer appearance and by its contents, is in line with the framework of the Model Law which is so familiar all over the world. This is particularly necessary in view of the fact that in negotiating international contracts, usually not much time is spent on the drafting of the arbitration agreement. The aim of the Model Law, to make a significant contribution to the unification of the law of international arbitration, can only be met if one is willing to prefer the goal of unification instead of a purely

¹ *Samuel*, Jurisdiction Problems in International Commercial Arbitration, 1989, at 73.

² UNCITRAL Model Law on International Commercial Arbitration, UN Doc. A/40/17; see for a detailed article-by-article account of the drafting history *Holtzmann/Neuhaus*, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, 1989.

³ *Berger*, International Economic Arbitration, 1993, at 53.

domestic approach when it comes to the question of the necessity and the scope as well as to determining the contents of individual rules".⁴

From this basic guideline the other two drafting principles just mentioned can be inferred: the user-friendliness and the arbitration friendliness of the law is ensured when the drafters do not omit any important provisions from the text of the Model Law and do not add too many provisions in order to preserve the original spirit and regulatory framework of the Law. This approach has been aptly described by the Scottish Advisory Committee on arbitration:

"While certain changes to the Model Law are necessary in every country in order to accommodate it to the legal structures of that country, the main object of the Model Law is to provide a framework for arbitration which is readily understandable by people of very different legal cultures. Accordingly, the Committee recommends that any legislation to give effect to its proposals should depart from the language of the Model Law only where essential. This is the course of action which has been taken in those countries which have already adopted the Model Law".⁵

II. The Status Quo in the MEDA Region

It became clear from the above that in order to determine the attractiveness of the regulatory framework for arbitration in the MEDA region, one needs to study the impact which the UNCITRAL Model Law has left on the MEDA landscape. So far, only three out of the ten MEDA countries have adopted arbitral legislation based on the Model Law, i.e. Egypt (1994), Jordan (2001, there is no reference to the Model Law but the Law is based on the 1994 Egyptian statute), and Tunisia (1993). The Turkish International Arbitration Law of July 5, 2001 was drafted under the inspiration of both the UNCITRAL Model Law and the Swiss Arbitration Law contained in Chapter 12 of the Swiss Federal Statute of Private International Law of 1989. Turkey is therefore considered by UNCITRAL as a "Model Law jurisdiction". Other MEDA countries possess rather old arbitration laws. Thus, Israel's arbitration law dates back to 1968. The Lebanese arbitration law is contained in the Lebanese Code of Civil Procedure of 1985, albeit with some amendments made in 2000. The Syrian arbitration law is contained in the Syrian Code of Civil Procedure of 1953 which is based on Egyptian pleading law. The Palestinian arbitration law was enacted in the

⁴ Bundestags-Drucksache No. 13/5274 of March 12, 1996, at 28.

⁵ Scotland and the UNCITRAL Model Law, The Report to the Lord Advocate of the Scottish Advisory Committee on Arbitration Law, Arbitration International 1990, at 63, 67.

year 2000 but was apparently not based on the UNCITRAL Model Law. The Moroccan arbitration law is contained in the Moroccan Code of Civil Procedure of 1974.

Looking at the worldwide success of the Model Law⁶ it becomes clear that many more MEDA countries must accept the need to modernize their arbitration statutes and adopt the Model Law, possibly without substantial amendments. From the outside perspective the need for reform cannot be negated by referring to the ostensible liberal character of the arbitration laws of those MEDA jurisdictions which have not adopted the Model Law. Again, important lessons can be learned from the German experience. The old German arbitration law was extremely liberal but it was contained, almost unchanged, in the German Code of Civil Procedure of 1877. Also, its twenty-seven paragraphs did not reveal the whole picture and much was left to the decision of the German courts. This meant that foreign practitioners were not able to become familiar with the German arbitration law by simply studying the text of the law itself⁷. As a result, Germany had for a long time been neglected and even avoided by the international arbitration community as a seat for international arbitrations. It seems that under these circumstances, Turkey provides the perfect example for the other MEDA countries which have not (yet) adopted the Model Law. The Turkey Country Chapter of the MEDA Project provides that the preparation of the Turkish International Arbitration Law of July 5, 2001 (Law No. 4686) was conducted under the motivation that this new law may enable Turkey to harmonize its legislative framework with the developing trading countries of the west with a view to attract foreign investors.

III. The Amendments of the Model Law (“Model Law 2006”)

⁶ As of September 2007, the UNCITRAL Model Law has been adopted in the following countries: Australia, Austria (2005), Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia (2006), Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Denmark (2005), Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua (2005), Nigeria, Norway (2004), Oman, Paraguay, Peru, the Philippines, Poland (2005), Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Turkey (2001), Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the United States of America: California, Connecticut, Illinois, Louisiana, Oregon and Texas; Zambia, and Zimbabwe.

⁷ See *Lörcher*, *Arbitration International* 1995, at 391, 392.

It must be noted that on July 7, 2006 UNCITRAL has adopted a number of amendments to the text of the 1985 Model Law. While these changes pose a problem for countries such as Germany which have adopted the Model Law already and hesitate to interfere once again with their arbitral legislation⁸, they are a chance for those countries which are still to adopt the Model Law.

Thus, the new Art. 2A of the Model Law constitutes an important legislative ramnification of the “signaling effect” for foreign users described above. Art. 2A (1) provides that in the interpretation of the Model Law, “regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith”. This provision is to be found in UN Conventions such as Art. 7 (1) of the UN Convention on Contracts for the International Sale of Goods (CISG) or Art. 7 (1) of the UN Convention on the Assignment of Receivables in International Trade. The significance of that provision should not be underestimated. Its goal is to avoid the classical problem that the Model Law, once adopted by a domestic legislature, appears (or rather “disappears”) as genuine domestic law without any indication as to its international origin. This is exactly the situation in Germany where the Model Law was inserted into the Tenth Book of the German Code of Civil Procedure (ZPO) and no mention is being made in the law as to its international origin and the character of the Model Law as an instrument of international uniform law. The danger of this approach is that by simply incorporating the Model Law into domestic legislation the goal of achieving uniformity and user-friendliness underlying the Model Law will be frustrated by a purely domestic approach towards the interpretation of the law by the courts of the country that has adopted the Model Law. The new Art. 2A serves an important reminder for the courts that, just like any other uniform law instrument⁹, the day-to-day application of the relevant legislation that incorporates the Model Law into domestic law requires an autonomous method of interpretation that does justice to its international origin. Making this clear by an explicit provision in the law itself will, in turn, greatly enhance the attractiveness of that jurisdiction for international arbitrations.

Art. 2A (2) of the 2006 Model Law provides that questions “concerning matters governed by this Law which are not expressly settled in it are to be settled in

⁸ See *Sanders*, *Arbitration International* 2005, 443, 480, criticising the fact that after the amendments by UNCITRAL, two versions of the Model Law exist and that many states that have adopted the 1985 Model Law will refrain from entering into a second adoption round. *Sanders* therefore recommend a “non-legislative” approach in the form of a “Document of Recommendations”.

⁹ See *generally Diedrich*, *Autonome Auslegung von Internationalem Einheitsrecht*, 1994, at 110 et seq.

conformity with the general principles on which this Law is based". Again, this provision was modeled on identical articles to be found in the CISG (Art. 7 (2)) and the UN Assignment Convention (Art. 7 (2)). It serves as an important guideline for the courts when faced with so-called "internal gaps" in the Model Law. These gaps should be filled not by reference to domestic legal principles of the relevant jurisdiction, but with respect to the spirit underlying the Model Law. This spirit is based on three essential principles:

1. Maximum degree of party autonomy;
2. Minimum number of mandatory provisions;
3. Minimum degree of judicial intervention.

These principles provide the hallmark of any modern arbitral legislation and the benchmark against which any modern arbitral legislation, whether based on the Model Law or not, must be judged.

Other amendments of the Model Law relate to the form requirement (Art. 7), interim measures and ex parte preliminary orders and recognition and enforcement of interim measures by the courts (Art. 17A-17 J) and the recognition and enforcement of arbitral awards (Art. 35 (2)).

IV. Arbitration-Friendliness and the role of courts

The third of the three essential characteristics of the Model Law listed above makes it clear that even the most sophisticated regulatory framework will not attract foreign users and with them international arbitrations to a given country unless the courts in that country understand their role and refrain from any unnecessary intervention. Legislative reform and making the courts aware of the specificities of international arbitration must go hand in hand. Art. 5 of the Model Law contains a very clear message in this respect by stating that in matters governed by that Law, "no court shall intervene except where so provided in this Law". *Jan Paulsson*¹⁰ has rightly observed in his analysis of the 10th anniversary of the 1996 English Arbitration Act that there are two key factors that account for the arbitration-friendliness of a certain jurisdiction because they drive a party's choice of venue in today's global market for arbitration:

¹⁰ *Paulsson*, *Arbitration International* 2007, 477, 479.

1. Will the national courts hinder a party from obtaining an award within a useful time period at reasonable cost?
2. Will there be wasteful post-award litigation before the national courts at the seat of the arbitration or at the enforcement venue?

It is therefore of utmost important that the parallel to the adoption of modern arbitral legislation, the judiciary in all MEDA countries must adopt a pro-arbitration bias. Thus, granting appeal to the ordinary court of appeal from an award as under the Lebanese and Syrian arbitration law must be avoided. An action for the setting aside of an arbitral award may never amount to a full review of the arbitral tribunal's decision on the merits (*révision au fond*).¹¹ This would violate the principle of finality of the arbitral award.¹² This principle has been emphasized by the 'ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' of April 2002 which provides in its General Recommendation 1 (a):

'The finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances.'¹³

This statement makes it clear that the role of the courts in setting aside proceedings, in deciding 'the struggle between finality and fairness',¹⁴ is essentially limited to that of a guardian of basic principles of arbitral due process.¹⁵ This policy is particular relevant when the losing party attacks the award before the courts of the seat of the arbitration because it thinks that the tribunal has not reached the 'correct' decision. The courts in many other jurisdictions around the world have held that, in order to safeguard the principle of finality of arbitral awards, an incorrect application of

¹¹ See generally Berger, *RIW* (1989), 850, 853; Sandrock, *BB* (2001), 2173, 2177.

¹² See Leggat J. in *Arab African Energy Corp. Ltd. v. Olie Produkten Nederland B.V.*, *Lloyd's L. Rep.* (1984), 419, 423: 'True it is that formerly the Court was careful to maintain its supervisory jurisdiction over arbitrators and awards. But this aspect of public policy has now given way to the need for finality. In this respect the striving for legal accuracy may be said to have been overtaken by commercial expediency.'

¹³ See Mayer/Sheppard, *Arb. Int'l* (2003), 249, 250 with reference to the European Court of Justice in *Eco Swiss China Ltd. v. Benetton International NV* (1999), 2 *All E. R. (Comm.)* 44, where the Court stated that 'it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances.'

¹⁴ Lew, Mistelis, Kröll, *Comparative International Commercial Arbitration*, 2003, No. 25-5.

¹⁵ See Lew, Mistelis, Kröll, *id.*, No. 25-33: 'The grounds [for setting aside an award] listed in Article 34 Model Law unequivocally suggest that judicial review in the context of an application to challenge an award can only be based on natural justice and legality grounds.'

substantive law by the arbitrators does not provide sufficient reason to set aside the award or refuse enforcement.¹⁶ An American court has held that:

‘The arbitrators in the present case made a procedural decision that allegedly led to a misapplication of substantive law after considering Egypt’s arguments that Egyptian administrative law should govern the contract, the majority of the arbitral panel held that it did not matter which substantive law they applied – civil or administrative. At worst, this decision constitutes a mistake of law, and thus is not subject to review by this Court.’¹⁷

Also, time limits for rendering the award, the passing of which render the arbitrators *functus officio* must likewise be avoided. Subjecting awards rendered abroad to various appeals at the enforcement stage or simply ignoring them¹⁸ is likewise detrimental to the recognition of a legislative framework as arbitration-friendly. Refusing enforcement of a foreign award that violates domestic public policy (e.g. because it violates certain Sharia principles) must also be avoided. Instead, these states should adopt the clear distinction between domestic and international public policy. Enforcement should therefore *only* be refused if the award violates that forum state’s most basic notions of morality and justice, a notion that is much narrower than the wider principle of domestic public policy which is reserved to domestic arbitrations only. It is this strict distinction between international and domestic public policy which is regarded today as an essential feature of every modern arbitral legislation. The situation to be found in countries such as Saudi Arabia where any award made abroad or using foreign law is subject to the public policy reservation of Art. V 2 of the New York Convention if the award is deemed contrary to the Shariah¹⁹, thereby making refusal of enforcement the rule rather than the exception, goes to far and is extremely detrimental to the attractiveness of any jurisdiction as a venue for international arbitration.

Conclusion

For the users of international arbitration, what counts is that an arbitration law promotes finality, speed and saving of costs²⁰. Against this background improving the

¹⁶ Mayer, Sheppard, Nassar, in ILA (ed.), *Report of the Sixty-Ninth Conference*, 2000, at 340, 366 (referring to Swiss, French, English and Philippine case law).

¹⁷ *Chromalloy Aeroservices, Inc. v. The Arab Republic of Egypt*, 939 F. Supp. 907, 912 (1996) (emphasis added).

¹⁸ See Gemmell, Santa Clara J.Int’l.L. 2006, 169, 188.

¹⁹ See Gemmell, id., 188; Hamid El-Ahdab, *Arbitration with the Arab Countries*, 1999, at 601.

²⁰ Paulsson, *supra* note 11, at 479.

attractiveness of the regulatory framework for international arbitration in the MEDA countries requires a dual approach: reform of arbitral legislation intended to bring the law in line with the UNCITRAL Model Law and improving the awareness of domestic courts for a pro-arbitration bias in their decision-making related to arbitration. Only under these circumstances will the arbitration-friendliness improve and will foreign users and arbitration proceedings be attracted to the MEDA-countries.