

TOWARD A NEW INTERNATIONAL DISPUTE RESOLUTION PARADIGM: ASSESSING THE CONGRUENT EVOLUTION OF GLOBALIZATION AND INTERNATIONAL ARBITRATION

DAVID J. MCLEAN*

1. INTRODUCTION

Increased globalization of business and expansion of international trade have led to a paradigmatic shift in the way international business disputes are resolved. Over the last thirty years, hundreds of bilateral and multi-lateral trade agreements have been drafted and various international conferences convened to address the myriad issues raised by world commerce and disputes arising from trade among nations and their respective citizens. Prior to this shift, cross-border business disputes most often were resolved in the national courts of one party's home country. This approach disfavored the other party where a judge's partiality toward the domestic party was evident, or where the foreign party lacked a neutral forum. Moreover, resolving cross-border disputes within one party's national courts sometimes involved the inability to enforce these courts' awards abroad.

The inherently problematic nature of resolving international business disputes domestically led to a search for a better approach. In the decades that followed, multi-national businesses began to realize that the global transformation of trade and economics necessitated a parallel transformation in the world's dispute resolution systems. Thus, traditional international litigation has given way to international arbitration as the preferred and fastest-growing method of cross-border dispute resolution. This Article seeks first to explore the historical underpinnings of the shift from resolving international disputes

* David J. McLean is a senior litigation partner at Latham & Watkins LLP and the managing partner of the firm's New Jersey office. He is the former co-chair of the firm's International Dispute Resolution practice group. The Author gratefully acknowledges the substantial contribution of Sean-Patrick Wilson, an associate in the New Jersey office of Latham & Watkins LLP, in the preparation of this Article.

through litigation to a new dispute resolution paradigm, and then to analyze the consequences and future implications of that movement.

2. RESOLVING DISPUTES IN A GLOBAL ECONOMY

As international trade grows, countries that previously tended to concentrate on domestic business have begun to advance their economies through a proliferation of cross-border transactions, resulting in an international business community that is more sizeable in terms of numbers and more significant in terms of its transactional capacity. Companies worldwide have expanded to locate their manufacturing and distribution centers, as well as their advertising, beyond their home country's borders. In the United States, significant "brand name" businesses generate greater revenue from international transactions than from their domestic transactions.¹ To be sure, increased communication and technological advances, as well as institutional support for cross-border transactions, have created a substantial global business community that handles international transactions no different from domestic transactions. The rapid expansion of cross-border commercial transactions has resulted in a concomitant increase in cross-border disputes, and the need for culturally sensitive decisionmakers possessing a familiarity with international commerce to resolve such disputes.

At the same time, international businesses have grown more wary of seeking redress in national courts, and for good reason. The same characteristics that make the national courts attractive to its citizens often make those courts undesirable to counter-parties. National courts often apply procedural rules intended to fit a particular judicial framework which may be unfamiliar to, or ill suited for, parties from dissimilar legal traditions. A national court's formalities, customs, or language understandably can be viewed as significant disadvantages to the uninformed party.

¹ General Electric ("GE") is one such company. GE earned approximately fifty percent of its revenues outside the United States in 2007, and since then, the percentage of its revenues from non-U.S. sales has increased. GE projects it will reach sixty percent of its revenue from outside the United States within the next three years. *General Electric Sees Growing Revenue from Emerging Markets*, INT'L HERALD TRIB., July 24, 2007, available at <http://www.iht.com/articles/ap/2007/07/24/business/AS-FIN-COM-General-Electric-Emerging-Markets.php>.

Another concern arises where the counter-party outsider perceives it is, or in fact is, treated unfairly by the national courts. Whether a "hometown" decisionmaker's impartiality is merely perceived creates no less of a dilemma for the outsider, who subsequently retains little or no faith in the system and is less likely to resort to seeking redress in foreign courts going forward. Compounding these problems is the challenge of enforcing awards outside the rendering country. Sometimes foreign countries either outright refuse to recognize and enforce a judgment obtained in the national courts of another country, or find thinly-veiled excuses to avoid doing so, leaving the plaintiff with a moral victory but not a financial one.² Yet another difficulty is presented by the very nature of the litigation process. Parties often experience the extreme inefficiency of national court systems, where cases can linger for years while the parties await a decision, and the annoyance of delay is exacerbated by the vast amounts of money required to conduct protracted international litigation.

A combination of these factors—unfamiliar rules, different legal customs, languages and traditions, bias, challenges to enforcement and the inefficiency of national courts—created a growing need for global, rather than parochial, adjudication. This has necessitated a move away from traditional litigation to a new dispute resolution paradigm—international arbitration—which portends a more neutral, efficient and certain process, one which favors neither party but affords each the occasion to fully and equitably present its case, and results in an award recognized around the globe.

3. THE RISE OF INTERNATIONAL ARBITRATION

This historic shift from litigation in foreign courts to international arbitration has occurred over the last half-century. To appreciate this evolution, let us review a series of events which laid the groundwork for the new dispute resolution paradigm, beginning with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"). The New York Convention, composed by the United Nation Conference on International Commercial

² U.N. COMM. INT'L TRADE L., ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS at 4, U.N. Sales No. E.99.V.2 (1999), available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-convention/NYCDay-e.pdf> [hereinafter EXPERIENCE AND PROSPECTS].

Arbitration, was convened to remedy problems associated with international litigation, particularly through its protocol for the recognition and enforcement of awards.³ The foremost achievements of the New York Convention were to restrict the grounds pursuant to which a country could refuse to recognize and enforce a foreign award and to shift the burden of proving such grounds to the party against whom enforcement was sought.

To be sure, the New York Convention was a bellwether effecting a dramatic increase in the popularity of international arbitration as a method of dispute resolution. By 1978, the New York Convention had fifty-one signatories and was the principal document in the field of international arbitration. Today, there are 144 signatories who continue to rely on the New York Convention's recognition and enforcement protocol to ensure that their businesses can easily and securely enter into international business transactions.⁴ Indeed, the New York Convention is considered by many to be the most successful multi-lateral convention adopted by the United Nations to date.⁵

Not long after the New York Convention was signed came the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Washington Convention") which, among other things, set up the International Centre for the Settlement of Investment Disputes. Since the Washington Convention, hundreds of bilateral investment treaties, which provide for international arbitration, have been signed.

Also contributing to the development and wide acceptance of international arbitration has been the formulation of model laws and rules, such as the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, adopted in 1976, and UNCITRAL's Model Law on International Commercial Arbitration, adopted in 1985.⁶ Parties to a cross-border contract, in

³ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

⁴ See United Nations Commission on International Trade Law, Status: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Mar. 27, 2009) (listing the signatories to the treaty).

⁵ Fali Nariman, *East Meets West: Tradition, Globalisation and the Future of Arbitration*, 20 *ARB. INT'L* 123, 127 (2004).

⁶ United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, G.A. Res. 31/98, U.N. GAOR, 31st sess., Supp. No. 17, U.N. Doc. A/31/17 (Dec. 15, 1976). <http://www.uncitral.org/pdf/english/texts>

drafting their forum selection and choice of law provisions, may designate the UNCITRAL arbitration rules as the procedural rules to be followed for any arbitration proceedings arising out of their transaction.⁷ Other institutions, such as the International Chamber of Commerce ("ICC"), the International Institute for Conflict Prevention and Resolution ("CPR"), the American Arbitration Association ("AAA") and the London Court of International Arbitration ("LCIA"), also have promulgated model rules and procedures to be used in arbitrations as the parties may provide.

The proliferation of such model rules has been critical to the development of the field as they have imposed uniformity on the process. The difficulties associated with familiarizing the arbitrators and counsel with arbitration rules particularized to a singular arbitration are diminished when many arbitrations can be conducted using the same set of procedures codified as model rules. Moreover, although these model rules vary somewhat, they are largely consistent with one another, reflecting best practices and avoiding the significant variations in the substantive and procedural laws of different countries.

There can be no doubt that the international Conventions and model rules promulgated over the last half-century have contributed significantly to the paradigmatic shift toward international arbitration. The near-universal acceptance of the tenets of New York Convention and similar Conventions fosters confidence in the process. So too, has the acceptance of legislators from many nations who have codified their respective domestic laws to permit more enforceable results from international arbitration than from traditional court proceedings.

/arbitration/arb-rules/arb-rules.pdf; UNCITRAL, MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf. Note that during the same period that UNCITRAL was promulgating international arbitration procedural provisions, world trade was being endorsed and supplemented by the United Nations Convention on Contracts for the International Sale of Goods—adopted in 1980 and now in force in more than sixty countries—as well as the decision of the International Institute for the Unification of Private Law ("UNIDROIT") to research, draft, and subsequently adopt written Principles of International Commercial Contracts.

⁷ Interestingly, UNCITRAL's Arbitration Rules have been adopted by several countries to govern domestic arbitration proceedings. See EXPERIENCE AND PROSPECTS, *supra* note 2, at 4 ("[H]arminization has gained momentum since the appearance in 1985 of UNICTRAL's model Law on International Commercial Arbitration (the Model Law), now adopted by some twenty-eight States, of which some ten did so for domestic arbitration as well.").

As the global framework supporting international arbitration has evolved, caseloads at leading arbitral institutions have increased. Statistics from the International Chamber of Commerce International Court of Arbitration ("ICC Court") demonstrate this trend. From the time it was founded in 1923 until 1976, the ICC Court received 3,000 requests for arbitration.⁸ Since 1976, the ICC Court has handled more than 12,000 cases, four times as many cases in the past thirty-two years as in the fifty-three years prior. In 2008 alone, the ICC Court handled 665 cases involving 1,613 parties from 125 countries.⁹

Supporting this conclusion, a 2006 survey of 150 global in-house counsel indicated that 73% of corporations prefer international arbitration to trans-national litigation.¹⁰ In 2008, the PricewaterhouseCoopers survey was revisited, and the results not only revealed that 86% of corporate counsel respondents stated they were satisfied with international arbitration, but that certain industries—such as insurance, shipping, energy, oil and gas—now use international arbitration as their default dispute resolution mechanism.¹¹ When asked why they preferred international arbitration, the most common responses cited by corporations were an appreciation for the confidentiality which the process affords, the procedural flexibility, the opportunity to choose arbitrators who specialize in a field particular to the dispute at hand, and most importantly, the ability to enforce awards in many courts around the world.¹²

While it is true that businesses in some emerging countries have utilized international arbitration to a lesser degree than those located in more industrialized nations, the former are being brought into the fold. The ICC Court and the AAA's International Centre for Dispute Resolution ("ICDR") have reported an increase

⁸ Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. DISP. RESOL. 35, 38 (2003).

⁹ International Court of Arbitration Dispute Resolution Services, *Arbitration Today*, <http://www.iccwbo.org/court/arbitration/id4584/index.html> (last visited Mar. 29, 2009).

¹⁰ PricewaterhouseCoopers, *Smarter Use of International Arbitration Could Help Boost the Bottom Line*, July 25, 2006, <http://www.pwc.com/Extweb/ncpressrelease.nsf/docid/178C5837CF45D26E802571C0002F7763>.

¹¹ PRICEWATERHOUSECOOPERS, *INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES (2008)* http://www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf?utr=1

¹² *Id.*

in the number of “non-traditional users” of their arbitration services.¹³ By 1997, more than forty percent of the parties to ICC Court arbitrations came from outside Western Europe and North America.¹⁴ The proliferation of international arbitration as the preferred method of dispute resolution among emerging economies will continue as these countries gain greater knowledge of and experience with the process.

In sum, since the advent of the New York Convention, a global movement away from transnational litigation and toward international arbitration has been steady and certain. The figures cited by the ICC Court and the PricewaterhouseCoopers survey attest to the remarkable growth in the field of international arbitration over the last half-century. While international arbitration undoubtedly has emerged as the first resort for dispute resolution among more industrialized nations, in time the majority of emerging countries will endorse the arbitral tribunal as their primary remedy for addressing cross-border commercial disputes as well.

4. CHALLENGES TO INTERNATIONAL ARBITRATION

Despite its tremendous growth and acceptance, international arbitration is not a panacea for cross-border dispute resolution. Any even-handed description of international arbitration must acknowledge that certain challenges intrinsic to the process endure, including the need to make the process acceptable to all who seek to utilize it. To be sure, in its attempts to invite parties from all nations to the arbitral table and to provide a uniform method for resolving global disputes, international arbitration inherently risks ignoring certain cultural or legal traditions and thus marginalizing—or worse, outright offending—at least some participants. The often subtle, but sometimes gross, disparities among the national cultures and different legal traditions of the disputants must be given special attention and handled with particular care to avoid the actuality, or even the perception, of unjust outcomes. It is essential that each party rightly feel it is equitably participating in the process—certainly one of the preeminent goals of international arbitration—and obtaining that

¹³ Helmer, *supra* note 8, at 39.

¹⁴ EXPERIENCE AND PROSPECTS, *supra* note 2, at 10.

important goal often requires that inherent tensions be addressed and compromises reached.

For example, tensions can arise when contracting parties hail from separate legal traditions, such as when a common law party and a civil law party are joined by contract. The ensuing battle of the drafters to prescribe either common law or civil law approaches to dispute resolution can prove unsatisfactory to at least one party. For example, a common law attorney representing a party in drafting an arbitration agreement would likely prefer substantial pre-hearing discovery, where each side provides considerable amounts of documents and depositions of key players are taken. On the other hand, a civil law attorney would likely prefer, or at least be more comfortable with, minimal or no discovery, such as a procedure disallowing depositions and permitting only a limited exchange of documents. It remains a challenge for the international arbitration community to develop a satisfactory solution to these competitive approaches. Hopefully, as the international arbitration community continues to hone its best practices, such tensions between common law and civil law traditions will be eased and parties will implement procedures that incorporate elements of both common and civil law.

The field has already witnessed this sort of compromise with respect to the exchange of documents. Procedures favored by the divergent traditions effectively have merged to create a new form of evidence-taking, wherein the parties must provide to opposing counsel anything on which they intend to rely, and anything opposing counsel can describe with particularity.¹⁵ This compromise approach permits each party to maintain an aspect of pre-hearing disclosures with which it is familiar, while at the same time requiring a move closer to the procedures preferred by the other party.

Another challenge is presented by the growing influence of American litigation styles on international arbitration. To be sure, the aforementioned conflict between common law and civil law traditions is exacerbated to some extent by the growing American influence. As U.S. companies become more frequent users of international arbitration, their preferences become manifest in such things as the incorporation into international arbitration of the American predisposition toward more aggressive examination of

¹⁵ Hans Smit, *Substance and Procedure in International Arbitration: The Development of a New Legal Order*, 65 TUL. L. REV. 1309, 1313-14 (1991).

witnesses and more invasive discovery procedures. What remains unclear is how this American influence will be felt during the next few decades, and what effect American litigation styles will have on the field as it continues to develop.

An argument could be made that the American influence is likely to weaken as more countries become involved with the international arbitration process, diluting the potency of any one nation's stylistic tendencies. I believe, to the contrary, that it is more likely the American influence will continue to shape the field of international arbitration, particularly as a result of the proliferation and increasing specialization of American law firms in international arbitration practice. Many American firms are becoming more active in this field, offering international arbitration services from within their expanding international litigation departments. Additionally, American law firms have been establishing offices abroad at an accelerated pace. The matriculation of foreign lawyers into American law schools also has increased the American presence in this field. Lawyers trained in the American common law tradition returning to practice in their home countries bring with them their knowledge of and experience with American litigation techniques, which they introduce to foreign counsel.¹⁶ Furthermore, the prevalence in international arbitration of English over most other languages results in a preference for counsel familiar with the language, and thus grounded in Anglo-American jurisprudence.¹⁷

5. WHERE DOES INTERNATIONAL ARBITRATION GO FROM HERE?

Acknowledging the dangers of making predictions about future events, I nevertheless will hazard some forecasts about the field of international arbitration. In the coming years, countries with an established international economic presence will likely increase their participation in cross-border transactions, just as the growth of the international economy will bring more emerging economies into the fold. As the world gets smaller, the importance and frequency of cross-border disputes will increase, and international arbitral forums will continue to be the first resort for

¹⁶ See Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 82 (2003) (discussing the growing trend of foreign lawyers obtaining American L.L.M. degrees).

¹⁷ *Id.* at 86-87.

parties seeking to resolve such disputes. This preference for international arbitration will enhance cultivation of the process, as arbitrators, parties, and their counsel seek to strengthen and develop the system to improve efficiency and outcomes.

Neutrality in decision-making, already among the fundamental concerns promoting the use of international arbitration, will be vital to the expansion of the international dispute resolution process. As countries become increasingly invested in international arbitration as a means to safeguard their domestic businesses from potentially problematic cross-border transactions, they must be assured of truly neutral decision-makers. The ability of neutrals to maintain the highest ethical standards and to provide just and equitable outcomes will be essential. Knowledge of and experience with various institutional model rules, as well as personal experience in the process itself, will be of greater import to practitioners in this field and will assist arbitrators in rendering fair decisions.

Cross-cultural issues will continue to play an important role. As more emerging countries desire a seat at the arbitral table, the differences among various contracting nations' cultures will need to be acknowledged, understood, and managed appropriately. While the American influence on international arbitration will likely persist, it will be important for all those involved in international arbitration to reach a consensus about appropriate arbitration procedures, styles, and techniques. The compromise between the civil and common law systems, already evidenced by the standardization of evidence taking in international arbitrations, will become more necessary as the two traditions strive to find a solution acceptable to adherents of both.

Another challenge for the future of international arbitration is the need to make the process sufficiently flexible to reflect the ever-accelerating pace of international commerce. With the astounding growth in the value and volume of transactions over the last thirty years, economic relationships between commercial parties have become far more intricate than before. As disputes substantively grow more complex, involve more stakeholders, and are fought for higher stakes, international arbitration must continue to offer a less time-consuming, more efficient alternative to cross-border litigation. As a result, practitioners, arbitrators, and the parties themselves will need to continue to advocate for a role in the evolution of the process to ensure its efficiency and effectiveness, in even the most complicated of circumstances. From both a social

and economic standpoint, the search for more effective means to arbitrate cross-border disputes, and thus to meet the needs of a global economy engaged in an ever-changing array of business transactions, is unquestionably worth the endeavor.