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UNCITRAL Model Law: Still a Model or Second Best?

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for Young Arbitrators Forum (YAP)

In 2000, only five Latin American countries had enacted the Model Law, and perhaps even worse, roughly a fifth of Latin American countries had still not acceded to the New York Convention. Today, the Model Law is in force in roughly half of all Latin American countries[1)] and all of Latin America has acceded to the Convention. However, there continue to be significant challenges and debates regarding the future international commercial arbitration in the region, as well as the rest of the developing world.

Mexico, for example, is now home to the well-known and increasingly prolific "recurso de amparo" (discussed below). The Dominican Republic in 2008 became the only country in the world to adopt the Model Law subsequent to 2006 without the 2006 amendments. Colombia recently enacted a new arbitration statute with significant departures from the Model Law.[2)] Finally, Bolivia, Ecuador, and Venezuela recently renounced ICSID, the first renouncements of an international arbitration treaty in history. Yet none of these events should be taken as an indication of a wider rejection of international arbitration in the region; quite to the contrary, the overall popularity of international commercial arbitration continues to grow rapidly. Instead, each of these events is an example of how complicated the adoption of international arbitration continues to be in Latin America and the broader developing world. It is also an indication that the international arbitration community still has work to do to address the specific concerns of the emerging arbitration venues that the Model Law was originally intended to serve.

At the 11th YAP Colloquium, immediately following the ICCA Congress in Miami, Andres Jana and Andrea Carlevaris moderated a panel discussion on the overall state of the UNCITRAL Model Law in Latin America and elsewhere. Among the panelists was Nuno Ferreira Lousa, who described the strong support which the Model Law has enjoyed in Latin America. Mr. Lousa attributed such support to the Model Law's simplicity and flexibility, noting that nearly all modifications that Latin American countries have made to the Model Law have been minor, technical changes designed to further increase efficiency and limit costs.[3)]

However, obstacles to implementation of the Model Law in Latin America remain. As stated above, the chief concern in Mexico is likely to continue to be the "recurso de amparo," by which parties can effectively bring a constitutional challenge as a means of immediate interlocutory

appeal in arbitration matters, despite arbitration statutes and treaties to the contrary. In Brazil, the related action of "mandado de seguranca" (writ of security) has also been used effectively against an arbitral award. In other Model Law countries which also provide the amparo, including Costa Rica, Paraguay, and Venezuela, the amparo's effects on arbitration are less clear.[4] In any event, there continue to be significant questions about the future impact of Latin American[5] constitutional law on international commercial arbitration, specifically on the issues of scope of arbitrability, the enforceability of choice-of-law clauses, and limitations on appeals.

Another obstacle to adoption and implementation of the Model Law in Latin America and the rest of the developing world is the ability of the Model Law to sufficiently address modern practical problems of international arbitration. To discuss this point, the YAP Colloquium panel included Luiz Claudio Aboim, who described the 2006 amendments to the Model Law. The amendments were introduced as a major update and expansion of the Model Law to rectify modern problems of arbitration practice. Specifically, the amendments modified Article 7 (Definition and Form of the Arbitration Agreement), Article 17 (Interim measures and preliminary orders), and Article 35(2) (Recognition and Enforcement), in addition to adding Article 2A (International Origin and General Principles). Mr. Aboim stated that the amendments have been welcomed in most adopting countries, but he also wondered whether the Model Law has now become too complex and consequently requires its own set of interpretation principles. The most prominent example of this increased complexity is the lengthy 2006 amendment to Article 17 on requests for interim measures, specifically its sections on *ex parte* requests for preliminary measures.

However, while there is certainly no complete consensus that Article 17's approach represents the best method for regulating interim measures, there is widespread agreement that some additional regulation of preliminary and interim measures is necessary. As Mr. Aboim noted, in the case of interim measures, tribunals are currently divided between requiring satisfaction of an "irreparable harm" standard and requiring satisfaction of a balancing test. The irreparable harm standard requires the arbitrators to decide i) whether the harm is adequately reparable by damages, ii) whether the harm substantially outweighs other harm likely to result if the measure is granted, and iii) whether there is a reasonable possibility that the applicant will succeed on the merits. Conversely, the balancing test requires tribunals to evaluate not only whether the harm is likely to be irreparable, but also the interests of each party in relation to the measure being sought. Nevertheless, the amendment to Article 17 has largely been as widely adopted as the rest of the 2006 amendments.

The debate over Article 17, though, is a good example of how the international commercial arbitration conversation has moved on from basic arguments about fundamental principles to more complicated arguments about how courts, parties, and practitioners will integrate international arbitration into modern global commerce. This is also partially in response to the increased diversity of users, practitioners, and policymakers involved in international arbitration.

The theme of the ICCA Congress which immediately preceded the YAP Colloquium was "Legitimacy: Myths, Realities, Challenges." This title alludes to the many questions about international commercial arbitration which have arisen in response to the field's changing landscape. In this new landscape, practitioners are confronting new and pressing questions regarding the economics, demographics, and politics of international commercial dispute resolution. The foundational principles of party autonomy, state sovereignty, strong tribunals, and limited court interference remain unchallenged; however, questions are arising about how to deal

with the differences between arbitration practice today and the practice in place thirty years ago at the time of the drafting of the Model Law.

For example, international tribunals today regularly decide disputes involving small businesses or businesses based in the developing world. Those businesses are also increasingly represented by a more diverse set of arbitration practitioners. In fact, a majority of the attendees at the YAP Colloquium would have been children or not yet born when the Model Law was first drafted. Most are also from countries which played no part in the creation the Model Law, the UNCITRAL Rules, the New York Convention, the ICSID Convention, and other instruments which were written during international arbitration's foundational era of the mid-1950's to mid-1980's.

However, they are enthusiastic about bridging the gap between 20th Century arbitration traditions and new 21st Century practical realities. They are asking important questions about how to align the liberal standards of the Model Law with respect for the developing world's local public policies, local legal traditions, and local court procedures.

However, one could respond that the Model Law's three decades of functionality thus far provides a strong rebuttal against calls for local modifications. Nevertheless, in developing countries that have recently adopted the Model Law, small business are understandably concerned about arbitrating against financially powerful foreign parties from Europe, North America, and East Asia. There is also the increasingly common practice of manipulating the arbitration process to engage in warfare by financial attrition. Finally, the growing middle class in many developing countries is demanding inclusion of consumer protection guarantees, labor rights, and other "social" rights not discussed during the Model Law's initial drafting.

One could again respond that any modifications of the Model Law should be kept to a minimum in order to protect the Model Law's most important purpose: reassuring foreign parties that the adopting jurisdiction is a "uniform" and "predictable" place to settle international disputes. Moreover, the Model Law was never intended to serve as a means of addressing domestic arbitration problems.

However, members of the arbitration community must acknowledge that regardless of the original intention behind the Model Law, the process of international commercial arbitration now plays a role in global commerce which the UNCITRAL Working Group could not have imagined thirty years ago. Thus, in order for the Model Law to remain "the Model," its drafters and defenders should deal with the concerns of the world's diverse, young arbitration community.

References

?1 The 1985 Model Law is now in force in roughly half of all Latin American countries, including: Chile, Costa Rica, the Dominican Republic, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela. Moreover, the 2006 amendments to the Model Law have been adopted in Costa Rica and Peru. Notably, with only the exceptions of Costa Rica and Chile, all of the aforementioned countries that have adopted the Model Law have also adopted it for domestic arbitrations.

?2 For example, Art. 107 of Colombia's statute, Law 1563 of 2012, permits parties to agree to selectively derogate from individual grounds of set-aside, something which Art. 34 of the Model Law does not permit.

?3 One common example is providing that parties shall default to a single arbitrator rather than to three arbitrators as provided in Model Law Article 10(2).

?4 Companhia do Metropolitano de São Paulo – Metrô v. Tribunal Arbitral do Processo nº 15.283/JRF da Corte Internacional de Arbitragem da Câmara Internacional de Comércio – ICC

?5 Many Latin American constitutions provide very strong guarantees of procedural and substantive due process rights which cannot be derogated by contract or statute.

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