CHAPTER 9

DEALING IN THE VIRTUAL – INTERNATIONAL ARBITRATION'S NEW TURF

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I INTRODUCTION

Commerce is increasingly migrating to the digital domain, excluding the dynamics of geography and neutralizing the boundaries of legal jurisdiction. The ever-expanding market frontiers for B2B and B2C transactions across industry sectors, will precipitate the emergence of claimants who, though globally dispersed, are aggrieved by defendants in geographically and legally diverse jurisdictions. International arbitration would be the only dispute resolution mechanism that would be able to overcome the consequent challenges of jurisdiction, procedural and economic efficiency, and enforcement posed by these claims. The flexibility of international arbitration, malleable with dispute-sensitive expertise, would allow efficient redress of micro-transactions as well as more complex transactions, including in both representative and aggregate proceedings. A creative use of information technology supported by the expanding body of soft law and jurisprudence in the field would easily vanquish the numerous procedural and conceptual challenges cited against arbitration of such claims.

II THE RISE OF THE VIRTUAL

The economic playground of this century is the internet. The advent of the internet has changed the way the world does business. The virtual domain is the arena where new age online businesses have mushroomed, and traditional and more conventional businesses have increasingly begun to operate. The new age business model requires no inventories, no manufacturing, no infrastructure, and above all, distribute digitally. To put it in perspective, Uber, the world's largest taxi

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company, owns no vehicles.[1] Facebook, the world's most popular media owner, creates no content.[2] Alibaba, the most valuable retailer, has no inventory.[3] And Airbnb, the world's largest accommodation provider, owns no real estate.[4] According to industry estimates, Skype & WeChat are the largest phone companies, in spite of the fact that they own no telcom infrastructure; and SocietyOne, the fastest growing banks, have no actual money.

Then again, it is not only the new age companies but also the traditional companies and enterprises that have been impacted and changed by the digital revolution. Since the Industrial Revolution, the world has developed complex supply chains, from designers to manufacturers, from distributors to importers, wholesalers and retailers. This is what has allowed billions of products to be made, shipped, bought and enjoyed in all corners of the world.[5] The power of the Internet has unleashed a movement that's rapidly destroying these layers and moving power to new places. The emergence of a virtual, digitalized marketplace is revolutionizing the global market. National boundaries are no more barriers to new competitors, and therefore, competition doesn't essentially look like you, it takes an unexpected form. And most importantly, international expansion now need not be capital intensive.

The most recent example of acceptability of the power of electronic and digital commerce is the Trans-Pacific Partnership (TPP).[6] The TPP lays down some digital objectives,[7] which reflect the vision of a future single - global - unencumbered virtual marketplace where the free flow of global information and data is the driving force. Notable of these objectives are: firstly, securing commitments not to impose customs duties on digital products (eg, software, music, video, e-books); secondly, ensuring non-discriminatory treatment of digital products transmitted

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1 Tom Goodwin "The Battle is for the Customer Interface" (3 March 2015) <http://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/>.

2 Ibid.

3 Ibid.

4 Ibid.

5 Ibid.

6 Executive Office of the President Office of the United States Trade Representative "The Trans-Pacific Partnership" <https://ustr.gov/tpp/> Agreement between the US, Japan, Australia, Peru, Malaysia, Vietnam, New Zealand, Chile, Singapore, Canada, Mexico, and Brunei Darussalam.

7 Office of the United States Trade Representative "the Trans-Pacific Partnership Agreement" (5 November 2015) United States Representative <https://medium.com/the-trans-pacific-partnership/electronic-commerce-87766c98a068#.bnmr4yz42> at Chapter 14.

electronically, and guaranteeing that these products will not face government-sanctioned discrimination based on the nationality or territory in which the product is produced; thirdly, establishing requirements that support a single, global Internet, including ensuring cross-border data flows, consistent with governments' legitimate interests in regulating for purposes of privacy protection; fourthly, creating rules against localization requirements that force businesses to place computer infrastructure in each market in which they seek to operate, rather than allowing them to offer services from network centers that make better business sense; fifthly, ensuring close cooperation among countries to help businesses, especially small and medium-sized businesses, overcome obstacles and take advantage of electronic commerce; and lastly, promoting public participation and transparency in the development of laws and regulations affecting the Internet, including opportunities for public comment.

III THE SIZE OF THE VIRTUAL

The digital revolution has permeated across all industry sectors and all forms of business. Business-to-business (B2B) online retailing has been witnessing strong growth due to the rapid migration of manufacturers and wholesalers from legacy systems to open, online platforms.[8] As legacy systems involve the use of electronic data interchange, which is expensive and cumbersome to handle, B2B models will continue to move towards ubiquitous online platforms that allow buyers and sellers from anywhere in the world to transact goods and services with ease.[9] In fact, the B2B online retail market is expected to reach double the size of the business-to-consumer (B2C) online market, generating revenues of 6.7 trillion USD by 2020.[10]

New analysis from Frost & Sullivan[11] reveals that B2B online sales will account for close to 27 percent of total manufacturing trade, which is likely to hit 25 trillion USD by 2020. Geographically, China and the United States will lead the B2B online retailing market. The latter is anticipated to double its revenue contribution to 1.2 billion USD by 2020.[12]

And this growth is not limited to consumer goods. Petroleum and petroleum products, as well as pharmaceuticals and druggist sundries, represent the largest categories today within B2B ecommerce, according to Forrester, and will continue

8 Frost & Sullivan "Future of B2B Online Retailing" (31 December 2014) <http://www.frost.com/ma4e>.

9 Ibid.

10 Ibid.

11 Ibid.

12 Ibid.

to claim the largest share of all B2B ecommerce through 2020. [13] The pharmaceutical industry will see 20 percent of total sales coming from online sources by 2020, the highest penetration of all industries.[14] However, the fastest growing segments between 2015 and 2020 will be durable goods categories - motor vehicles, motor vehicle parts and supplies, electrical and electronic goods, and machinery, equipment, and supplies.[15]

After carefully combing and analyzing the evidence, it would not be speculative to conclude that the disruption by electronic and digital commerce to the way business has traditionally been conducted across the globe, has just begun. The advent and development of cryptocurrencies has the potential to exponentially change this dynamic.[16]

IV RESOLUTION OF THE VIRTUAL DISPUTE

It's the ambition of the commerce that gives rise to disputes. The history of international dispute resolution, for a better part, is the story of large and small businesses and their global ventures and transnational misadventures.

Commerce has found a new virtual domain unrestricted by the constraints of brick and mortar, unfettered by the ideological challenges of judicial and political idiosyncrasies. Dispute resolution on the other hand, with its rules, processes and procedures, is still domiciled in geography.

Effective dispute resolution is not only a means of settlement of disputes but also a key factor in enhancing consumer confidence in the process of trade, which in terms of electronic commerce is buying and selling over the Internet. Consumers are in general known to be reluctant to pursue court-based action for small value purchases, and are plagued with handicaps like lack of finance, knowledge, experience and access to legal assistance, which impede their effective access to the legal system, and these issues are further aggravated by problems of

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13 Marcia Kaplan "B2B Ecommerce Growing Becoming More like B2C" (9 April 2015) <www.practicalecommerce.com/articles/85970-B2B-Ecommerce-Growing-Becoming-More-Like-B2C>.

14 Ibid.

15 Ibid.

16 Kai Schulz "Cryptocurrency 2015: The Rise and Adoption in E-Commerce" (30 January 2015) <http://insights.wired.com/profiles/blogs/cryptocurrency-2015-the-rise-and-adoption-in-e-commerce#ixzz4AseqPnZz>.

jurisdiction, choice of law and enforcement in the cross-border world, and above all by the uncertain legal dimensions of Internet transactions.[17]

Cross-border electronic transactions are indeed notoriously dispute-prone. A recent Eurobarometer survey[18] shows that 41% of EC cross-border consumers who launched a formal complaint concerning their purchases were not satisfied with the way their complaint was handled. Yet despite this, most of the dissatisfied consumers took no further action, and only 6% brought the matter to any kind of ADR body.[19] The question that therefore arises is why do so few consumers resort to this kind of dispute settlement, and in particular, why is more use not being made of online alternative dispute resolution (ODR) in Internet consumer transactions, even where large amounts of money have been spent by online businesses to provide such redress options?[20] The answer is lack of trust in the process and the result.

V MATCHING THE FUNDAMENTALS

Given this background, the obvious way forward in the promotion of electronic and digital commerce is to encourage and establish means of alternative dispute resolution, particularly international arbitration. The fundamental principles of digital commerce – spontaneity, universality and autonomy, find their echo in international arbitration.

The relative formality of arbitration also has advantages for users in terms of preservation of rights of due process.[21] Despite the inherent formality of the arbitration process, it is final and binding, transparent and most importantly, addresses the imbalance of power between two disputing parties.

The ability to choose an arbitrator with specialist knowledge, and to specify a governing law which might be the law of a sovereign state, connected to the dispute or not, or soft law general customs of the trade, makes international arbitration highly appropriate for electronic and digital commerce, especially in trans-national disputes.

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17 Lilian Edwards and Caroline Wilson "Redress and Alternative Dispute Resolution in EU Cross-Border E-Commerce Transactions" (2007) 21 International Review of Law Computers & Technology 315.

18 European Commission "Consumer Protection in the Internal Market" Special Eurobarometer 252/Wave 65.1-TNS Opinion and Social, Eurobarometer Special Report 252 September 2006 <ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs252_en.pdf>.

19 Ibid.

20 Ibid.

21 See, above n 17.

International arbitration has the conceptual foundation to rise to the challenge to becoming the mechanism to envelop the wide spectrum of the digital disputes that are bound to arise. It is International Arbitration that in its true spirit can provide a dispute resolution mechanism that is unencumbered from the burdens of jurisdiction, structures and procedures. It can give you flexibility with predictability tempered with some innovation, or atleast the best concoction of it available on the market.

VI THE FUTURE DISPUTES

Electronic and digital disputes are likely to come in various shapes and sizes. These could be B2B, B2C, C2C, M2M, and even B2G. And these claims can be large value or small value claims, individual or mass claims. Consumer protection law addressing online transactions have already become a reality in the EU,[22] and are fast taking shape in other parts of the world. Further, as the digital vision of the future takes shape and rights of businesses get further crystalized by multinational agreements, like the TPP, very soon businesses may be in a position to sue governments in an investment treaty arbitration manner.

The avant-garde simplicity introduced by electronic and digital commerce to many aspects of international commerce is also bound to create a common set of injuries and grievances that arise in same or similar circumstances. The complexity of such a situation would lie in the global dispersion of the claimants. The only prudent answer to such address such claims would be a class or mass claim.

Procedurally, class arbitration reflects a strong bias toward U.S. conceptions of collective justice, since the device adopts procedures that are largely reminiscent of those used in judicial class actions.[23] In the last few years, a second mechanism for large scale arbitration, in addition to class arbitration has developed, namely, collective arbitration,[24] which involves either aggregative or opt-in representative

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22 "The European Commission's new online dispute resolution (ODR) platform goes online for traders and consumers on 15 February 2016". See <www.ecommerce-europe.eu/news/2016/the-odr-platform-what-are-the-obligations-for-online-merchants>.

23 SI Strong "Mass Procedures as a Form of Regulatory Arbitration - Abaclat v Argentine Republic and the International Investment Regime" (2013) 38 Journal of Corporation Law 259.

24 Ibid. According to a four-judge panel of New York's Appellate Division, First Department, collective arbitration is not the same as class arbitration, such that the Supreme Court's holding in *Stolt-Nielsen SA v Animalfeeds International Corp* 559 US 662, 130 S Ct 1758 (precluding class arbitration if the arbitration agreement is silent on the issue) does not apply to a collective of more than 700 Jet Blue pilots (*discussed below*) seeking arbitration of a salary dispute with the airline. The pilots alleged that the airline violated a provision of their employment contracts requiring the airline, if it raises the base salary of new pilots, to raise all pilots' salary by the same percentage.

procedures rather than representative opt-out procedures, as are used in class arbitration.[25] Finally, a third type of large-scale arbitral proceedings-the mass arbitration appears to be developing in the international investment arena as a result of *Abaclat v Argentine Republic.*[26] Although the majority award on jurisdiction indicated that it was too early to determine the precise procedures to be used during the merits phase of the proceeding, the tribunal did set forth certain broad guidelines to assist the parties in preparing for the next stage of the arbitration.

The majority decision in *Abaclat v Argentina*[27] categorized collective proceedings largely as: *First*, Representative proceedings, in which there are a number of claims, but a single action with a representative. Such proceedings can be largely symbolized as US-style class actions. The mechanism can be categorized by reference to its approach to three different issues: (i) the nature of the claim, with regard to which representative relief can take the form of a purely procedural

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In *Jet Blue Airways Corp v Stephenson 88 A.D.3d 567, 573–74 (NY App Div 2011)*, the appellate court ruled that the arbitrator, not a court, decides whether the pilots' employment agreements precluded a collective arbitration proceeding. The court distinguished *Stolt-Nielsen* on the grounds that, in the proposed collective arbitration, all of the affected pilots would be actual parties. The court then found that the decision whether the employment contracts precluded collective arbitration was not a "gateway" issue that the contracting parties would likely have expected a court to decide.

This decision tracks an opinion issued earlier this year in which a federal district court held that collective actions are not class actions within the meaning of Financial Industry Regulatory Authority (*FINRA*) Code of Arbitration Procedure Rules 12204 and 13204, which bans class arbitration at FINRA. In *Velez v Perrin Holden & Davenport Capital Corp, 769 F. Supp. 2d 445 (SDNY 2011)*, an employee of a FINRA member sued his employer in the Southern District of New York, alleging violations of the Fair Labor Standards Act and of state law. He sued on his own behalf and on behalf of similarly situated broker-employees of Perrin. Velez asked the district court to designate his Fair Labor Standards Act (*FLSA*) claims as a collective action and his state law claims as a class action. The employer petitioned to compel arbitration of the FLSA claims arguing that FINRA's ban of class arbitration proceedings in its forum does not apply to collective actions under the FLSA. The district court agreed, and sent the FLSA claims to arbitration. Not long after this decision, FINRA's Board authorized its staff to file a proposal with the SEC to amend its Code to expressly extend the ban of Rules 12204 and 12304 to collective actions under the FLSA. It seems that some lower courts have carved out an exception to the Supreme Court's class arbitration cases by finding collective claims sufficiently distinguishable from class claims as to exempt them from the full impact of the Court's anti-class arbitration decisions in *Stolt-Nielsen* (See, above n 24) and *AT&T v Concepcion* 131 S Ct 1740 Legislative correction may be needed to have collective claims treated like class claims in the arbitration world.

25 Ibid. Collective arbitrations are found in the United States on a trans-substantive basis, in Spain in consumer actions, and in Germany in shareholder actions.

26 *Abaclat (formerly Beccara) v Argentine Republic*, Decision on jurisdiction and admissibility, ICSID Case No ARB/07/5, 483, 488 (4 August 2011) <http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf>.

27 Ibid at 189, para 483.

device available regardless of the type of substantive law at issue, or be limited to certain fields of law (eg, consumer law, antitrust, etc); (ii) the nature of the representative, who can be a private named individual on behalf of a large group of unnamed others or an approved intermediary entity on behalf of all injured individuals; and (iii) the nature of the relief, which can take the form of individual damages or representative relief (eg, declaratory or injunctive relief). For those who believe that arbitration requires parties' explicit consent not only to arbitration of the dispute but also to the procedure to be used, such proceedings throw up the conceptual issues of consent. And *second*, aggregate proceedings, in which several individual claims arising out of the same fact pattern, are brought together for management purposes. In the context of municipal court jurisdiction, mechanisms such as joinder, intervention or consolidation easily apply, but in the context of arbitration, issues remain where the number of parties reached the 'mass' level, especially whether the Tribunal has the authority and discretion to proceed collectively arise.

VII THE JURISDICTIONAL CHALLENGE

The ease of doing business introduced by electronic and digital commerce in transgressing geographic and artificial boundaries, creates an outlandish challenge by undermining established rules of geographic and legal jurisdictions. Jurisdiction of courts[28] is yet another significant issue that needs to be taken into account when discussing dispute resolution in the world of electronic and digital trade. The development of the Internet as a global network has raised significant jurisdictional issues at both the national and international levels.

Jurisdiction is generally divided into three types: Prescriptive jurisdiction[29] limits legislative power. When a sovereign state has jurisdiction to prescribe, it legitimately may apply its legal norms to conduct. Adjudicative jurisdiction[30] limits judicial power. When a state has jurisdiction to adjudicate, its tribunals may resolve disputes. Enforcement jurisdiction limits executive power. When a state has

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28 Refer the Lotus case [*SS Lotus (Fr v Turk), 1927 PCIJ (ser A) No 10 (Sept. 7)*] for understanding the issue of jurisdiction in international law. While establishing jurisdiction, the case presented two principles; the first principle of the Lotus case said that jurisdiction is territorial: A State cannot exercise its jurisdiction outside its territory unless an international treaty or customary law permits it to do so. (Refer para 45). The second principle of the Lotus case: Within its territory, a State may exercise its jurisdiction, on any matter, even if there is no specific rule of international law permitting it to do so. In these instances, States have a wide measure of discretion, which is only limited by the prohibitive rules of international law. (refer para 46 and 47).

29 Refer case: *Kiobel v Royal Dutch Petroleum Co, 133 S Ct 1659 (2013)* to understand the concept of prescriptive jurisdiction in international law.

30 Refer case *Hartford Fire Insurance Co v California 509 US 764, 770 (1993).*

jurisdiction to enforce, its police, and customs authorities may restrict the flow of trade, detain individuals, and alter property interests.[31]

Historically, jurisdiction was limited by the impracticality of enforcing a judgment against someone or something over which the court has no control. However, a sovereign can extend its prescriptive jurisdiction beyond its enforcement jurisdiction in two ways. It can ask other sovereigns to enforce its judgments and, where it does not have adjudicative jurisdiction, it can ask other sovereigns to apply its laws to certain controversies.

Both courts and sovereigns, recognizing limits on prescribing law to controversies that have no connection to the sovereign, have developed choice of law rules to determine which sovereign's laws to apply. Choice of law and the enforcement of judgments are also governed by international treaty as well as norms of international law. As international law has developed, respecting the sovereignty of other nations has become an important governing principle in limiting prescriptive jurisdiction and preventing overreaching.

International jurisdiction disputes often sound similar to the 'minimum contacts' issues found in American cases.[32] To be effective, jurisdiction over foreign nationals or corporations must rely on international treaties or reciprocal enforcement agreements. These agreements often look at the contacts that the foreign entity has within the sovereign district in order to determine if the sovereign's interest in the matter is legitimate.

The European Union (EU) adopted a regulation, effective in March 2002, allowing an EU consumer who purchases goods or services online to sue the seller either in the EU country in which the consumer resides or in the EU country in which the seller is physically located, even if the seller has no business operations or employees in that country. In an explanatory note to the Regulation, two key EU bodies have indicated that a passive website alone (which advertises products but does not allow the consumer to order or download the products online) will not invoke the consumer jurisdiction clause.

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31 Henry H Perritt, Jr, Jurisdiction and the Internet: Basic Anglo/American Perspectives, presentation at Internet Law and Policy Forum, Jurisdiction: Building Confidence in a Borderless Medium, Montréal, Canada, 26-27 July 1999 <www.kentlaw.edu/perritt/conflicts/intromontreal.html>.

32 Also see, Anne McCafferty "Internet Contracting and E-Commerce Disputes: International and United States Personal Jurisdiction" (2011) 2 The Global Business Law Review 95.

The most closely watched international jurisdiction case involved the website Yahoo and auctions on its site of Nazi memorabilia.[33] A French court ruled that the sales, which could be accessed by French Internet users, violated French law. After hearing from a panel of experts that it was technically possible to block 70 to 90 percent of French users from a website, the court gave Yahoo 90 days to block French users or face a fine of $13,000 per day. It may be impossible for the French court to enforce the ruling, since Yahoo has no assets in France (although it did have an interest in Yahoo-France). Yahoo is already fighting the ruling in US in Federal District Court in San Jose, Calif, arguing that the French order cannot be enforced for several reasons, including conflicts with the First Amendment. Meanwhile, it has voluntarily banned the sale of hate group related merchandise.

International arbitration, as it has developed in modern times, is naturally predisposed to overcome issues of jurisdiction. Arbitration clauses are often agreed to in contracts, in which case the parties are later required to use arbitration. Specifying binding international arbitration in any e-commerce contracts involving international transactions is becoming a common practice. The nature of online trade and business today, and more importantly, the ever changing nature of the disputes make a compelling case for the growing need and acceptance of international arbitration as a tool to not only ensure efficient bilateral dispute resolution, but also in the resolution of mass disputes.

VIII THE EFFICIENCY ARGUMENT

It is well recognized that difficult and unsettled legal problems relating to jurisdiction, choice of law, and in particular, enforcement would arise regularly if electronic and digital commerce disputes were to be litigated in conventional fora. Consumers are even more reluctant to litigate cross-border than they are to go to court in their home countries, for obvious reasons-of fear, language problems, lack of knowledge of the legal system, lack of access to reasonably priced legal advice and xenophobia as to the effectiveness of the process and the post-judicial enforcement means.[34]

Parties to arbitration can choose their own forum, rules of procedure, arbitrator(s), governing law, and for all purposes, craft the way the dispute resolution process will develop and function. As for the oral hearings, technology with the improved webcams, videocast and high speed data transmission, has already provided the answer for the future. However, it must not be forgotten that

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33 *Ligue contre le racisme et l'antisémitisme et Union des étudiants juifs de France c Yahoo! Inc. et Société Yahoo (LICRA v Yahoo! 2000).*

34 See, above n 17.

an international arbitration proceeding can be a documents-only affair, without the need for an oral hearing.

Arbitration has long been able to offer parties with procedural options that are not available in courts. International commercial arbitration has long been used as a means of harmonizing procedures from both the civil and common law traditions so as to provide parties from all legal traditions with a fair and familiar dispute resolution process. This attribute will be equally welcome in electronic and digital disputes, since it will allow parties from divergent legal traditions to craft procedures that suit their particular needs and also comply with the peculiar requirements of their legal systems, thus increasing the likely enforceability of the final award.

Claims usually move faster through the evidentiary and decision-making phases of arbitration than similar proceedings in court. Further, arbitrators are less likely to be swayed by emotion and popular sentiment, and more likely to consider damages in a measured, reasoned and business-like manner. This is also particularly true in cases involving a great deal of technical or scientific information, since an arbitral tribunal is likely to be better equipped to deal with that sort of complex case than a jury of laypersons. The importance of this advantage though plays out in all jurisdictions to a varying extent, however, it especially beneficial in protecting defendants from over-zealous and socialism-minded judges rather common found in the developing world.

IX THE ARBITRATION ADVANTAGE

The IBM – Fujitsu arbitration[35] is a very good example of the great advantages of international arbitration in a developing field of law. This case also showcases the flexibility, adaptability and malleability of international arbitration processes and procedures that make it adept to service a field of business that is rapidly evolving. In the IBM – Fujitsu arbitration, the arbitrators were able to compensate for the underdeveloped state of law by fashioning remedies of their own[36]. Interestingly, arbitration was only part of the story of how the dispute between IBM and Fujitsu was resolved. The procedure followed in this case is also an excellent example of how various alternative dispute resolution techniques can be combined with to design a procedure that is tailored to the particularities of a controversy, and how these techniques can be integrated into the framework of international commercial arbitration.

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35 Christian Bühring-Uhle "The IBM-Fujitsu Arbitration: A Landmark in Innovative Dispute Resolution" (1991) 2(1) American Review of International Arbitration 8.

36 Ibid.

The IBM-Fujitsu arbitration was exceptional in many ways.[37] *First*, the dimensions of the conflict, both in stakes and complexity, were gigantic. IBM, the world's largest computer company, and Fujitsu, Japan's largest computer manufacturer and the fourth largest in the world, were disputing claims involving the proprietary rights to thousands of computer software programs and alleged damages amounting to several hundred million dollars. *Second*, the matters decided went well beyond the scope of ordinary dispute resolution. The arbitrators were asked to devise a regime to govern the relationship between the two parties for the ten years subsequent to the proceedings, and were even given jurisdiction to resolve additional disputes arising from the parties' business relationship until the year 2002. *Third*, the controversy touched on a number of unsettled, highly controversial legal issues that were further complicated by the global scale of the companies' operations and the intercultural implications of the dispute. The latter complication is illustrated by the fact that the concept of intellectual property and its correlation to the concept of free competition are not necessarily understood in the same manner in the United States and Japan. *Finally*, the 2 arbitrators, a computer expert and the other an expert of alternative dispute resolution, were authorized to define the constantly expanding body of information as well as assess a fair compensation for the use of know how in the past as well in current and future years. The tribunal even decreed the contract to be independent of any applicable rule of US or Japanese copyright law for the lifetime of the revised agreement.

X THE DELOCALIZATION PHENOMENA

The internet has delocalized and de-jurisdiction-alized commerce, and would require a dispute resolution mechanism that can operate in such a space. The delocalization of international commercial arbitration has been a topic that has sparked imaginations and fueled debate for over two decades. In its most simplistic form, delocalization involves freeing an international arbitration from the constraints of the *lex loci arbitri*, the procedural law of the place of arbitration. This leaves it to float free of national jurisdiction, irrespective of where the arbitration takes place.[38] Whilst delocalization was initially rejected by traditionalists, and even branded by some as a dangerous heresy over time the concept has drawn considerable support from commentators.[39] In practice, though

37 Ibid.

38 Pippa Read "Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium" (1999) 10(2) American Review of International Arbitration 17.

39 See Gary Born *International Commercial Arbitration* (2nd ed, Kluwer Law International, Netherlands, 2014).

there were few judicial decisions that could be clearly seen as supporting the notion of delocalization, a trickle of judgments has provided the proponents of delocalization with sufficient ammunition to continue the debate.[40] In the last few years, however, stronger support for delocalization, particularly in the context of enforcing locally annulled awards, has been evident in a number of jurisdictions.[41]

The delocalization theory is an attractive one from the perspective of both arbitrators and the parties to arbitration. Very often the place of arbitration is selected for reasons of convenience or neutrality, with neither party desiring to submit the arbitration to the procedural norms of that forum, especially those that permit the intervention of the local court system. In addition, failure to comply with the local procedural law could result in the final award being set aside by a local court, which may jeopardize any chances of enforcement elsewhere. Delocalization of the arbitral process and the final award would mean that parties remain unaffected by unforeseen and undesired local procedural law, and do not face the risk that non-compliance with such law would render their award unenforceable.

The growing acceptance of the UNCITRAL Model Law for Arbitration and the amendment of many other national arbitration laws to become more liberal in a desire to attract international arbitration has meant that the risk of parties being subjected to procedural laws peculiar to the place of arbitration has lessened. The delocalization theory continues to have its critics, however, it might just be the need once the body of international electronic and digital disputes begin to increase.

XI THE ENFORCEMENT ADVANTAGE

Enforcement is, beyond any doubt, one of the most attractive aspects of international arbitration. The New York Convention 1958[42] provides near global enforceability of arbitral awards. The award in arbitration is binding on both parties, and except in exceptional circumstances, which are limited and well defined, subsequent re-litigation of disputes is not allowed.

Nevertheless, in case of digital commerce, it is imperative that new methods of enforcing are also developed which do not flow through a court, and most importantly, do not require physical assets to enforce.

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40 Ibid.

41 Ibid.

42 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>

Three such methods[43] come to mind. *First*, follow the money. Methods of enforcement relying on money include financial guarantees, escrow accounts, insurance and charge-back agreements with credit card companies.[44] *Second*, target the address. In very specific situations, technical control may be used to make decisions self-enforcing.[45] The Uniform Dispute Resolution Process (UDRP) procedure for domain name disputes is a good example. Ten days after the decision by the panel of experts, the domain name is either cancelled or transferred to the winning party, depending on the panel's decision. The decision is implemented by the registrar that registered the domain name and exercises technical control over the registration.

And *third*, attach the reputation. Reputation may provide leverage causing businesses to voluntarily comply with decisions. Imagine a business site is granted a trust-mark certifying that it complies with a certain code of conduct that provides for dispute resolution and for compliance with the resulting decisions[46]. Failure to comply would lead to the suspension or removal of the trust-mark, which would damage the trust-mark holder's reputation and - it is hoped - deter potential clients from using the site.[47] To avoid losing business, the trust-mark holder will therefore endeavor to comply with the decisions.[48]

XII THE DOMAIN OF THE LAWS

Business operates in the wider realms of legal frameworks, both national and international. Therefore, the question that arises is has law - the jurisprudence, the dispute resolution mechanism, et al., truly evolved to match these developments in electronic and digital commerce or is it just playing catch-up. The slow development of the law and jurisprudence on electronic contracting[49] seems to

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43 G Kauffman-Kohler and T Schultz *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International, The Hague, 2004).

44 Ibid.

45 Ibid.

46 Ibid.

47 Ibid.

48 Ibid.

49 See, Anjanette H Raymond and J Benjamin Lambert "Technology, E-Commerce and the Emerging Harmonization: the Growing Body of International Instruments Facilitating E-Commerce and the Continuing Need to Encourage Wide Adoption" (2014)17 International Trade & Business Law Review 419. In response to the growing use of electronic commerce, UNCITRAL approved recommendations of the Working Group on Electronic Commerce to prepare an instrument to address the needs of contracting in an electronic environment. During the early surveys and discussions, the working group determined that one of the main barriers to electronic contracting was the lack of legislation on a domestic level. Hence, the Working Group

suggest the latter. Nevertheless electronic and digital commerce is slowly becoming a major area of focus for legal harmonization.[50]

While the electronic and digital commerce businesses confront a variety of the same legal issues faced by traditional brick-and-mortar companies, they also must manage other challenges that are unique to conducting business operations and transactions in a virtual environment. The range of legal issues to consider and manage continues to grow, and ignoring this reality could lead to financial liability, regulatory penalties, or unauthorized exploitation of company intellectual property. Also, since electronic transmissions through the internet reach parties throughout the world, businesses may become subject to the laws of many different countries or states within a country when engaging in electronic and digital commerce. Thus, there is a critical need to refine the scope of jurisdiction to the extent possible by stating the governing law, venue, or forum and limiting online activities to only those jurisdictions in which the electronic and digital commerce business is prepared to comply with applicable laws and regulations.

Alternatively, a more logical, but more complicated, solution may be to internationalize the law that governs various aspects of the electronic and digital commerce.

The internationalization of commerce has made the internationalization of law simply a necessity. The vision of a single – global – unencumbered virtual market, where there are no boundaries, is a reality that is taking shape. We are living in an era where there are known unknowns and unknown unknowns. Virtual commerce

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created two separate Model Laws: one that facilitates the recognition of electronic signatures and one that facilitates electronic commerce. Both of these Model Laws have facilitated, either through influence, adoption or both, the recognition of electronic contracting on the domestic front. However, the Model Laws could not remedy the issue of cross-border or international electronic contracting. Thus, the need for a Convention in the area was necessary to remove the barriers that continued to exist. As a result, UNCITRAL initiated the Convention on the Use of Electronic Communications in International Contracts (ECC). The ECC's purpose was to 'facilitate the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents'. Although the purpose of the ECC seems to be necessary, the convention suffered from several years of dormancy, originally resulting in only two nations ratifying the ECC. However, more recently several nations have demonstrated a renewed interest in the Convention, resulting in additional states ratifying. The renewed interest in international e-commerce harmonization is not limited to these new signatories, however, as numerous other States are considering or are in the process of implementation of the Convention. In fact, the Australian Parliament passed the Electronic Transactions Act 2011, which was explicitly drafted to comply with the ECC. Moreover, Australia, along with well over 40 States, is in the process of using the UNCITRAL Model Law on Electronic Commerce to update domestic law within the larger area of electronic commerce.

50 Ibid.

is stretching the boundaries of the known at break-neck speed, and law needs to keep pace.

Harmonizing the law related to internet-related issues with a true worldwide prospectus is not the best way, but it is the only way. There is an immediate need to work towards global approaches to legal standards with supranational concepts, and regulation and taxation standards that go beyond a particular jurisdiction or geography. At the same time, it is essential to leave enough leeway for flexible application and responsiveness for rapid change in this area.

International Arbitration can be the medium for the evolution and growth of an autonomous law of virtual commerce, founded on the universally accepted standards of business conduct, constituting a common platform to enable those from civil law and common law, fully developed and developing economies, to co-operate in the perfection of this legal mechanism of the virtual market.[51] It would be a *Lex Mercatoria Virtualis*, of sorts. Because it would be senseless to add layers of international and national legislation and jurisprudence, only to peel it back in the name of harmonization to find a common nucleus.

Change, like evolution, may be slow but it has started.[52] Writing can be paperless, signature can be electronic, and intent and consideration can be electronic and electronically traceable. Resultantly, there is a contract. There are three main categories of Internet transactions constituting e-commerce: those agreements with shrink-wrap terms, those with click-wrap terms, and those with browse-wrap terms.[53] Shrink-wrap terms are found were a purchaser orders a

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51 See, Emmanuel Gaillard "Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules" (1995) 10 ICSID Review-Foreign Investment Law Journal 208. Also see, Michael Pryles" "Application of the Lex Mercatoria in International Commercial Arbitration" (2003) 18(2) Mealey's International Arbitration Report 319.

52 See, above n 49.

53 See McCafferty, above n 32. Also see, Knapp, Crystal & Prince *Problems in Contract Law: cases and Materials 193* (6th ed, Wolters Kluwer, 2007). For each of the following terms, electronic signatures have been found to be a valid and enforceable method of agreement to an electronic contract. This has been recognized in such statutes as E-Sign, Electronic Signatures in Global and National Commerce Act (E-SIGN): 15 U.S.C. §§ 7001 et seq (2000) (signed by President Bill Clinton on June 30, 2000, and effective Oct. 1, 2000), UETA, Uniform Electronic Transactions Act (UETA) (approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) on July 23, 1999; as of July 2001, 36 states enacted this Act), and in the EU, by the Directive on a Common Framework for Electronic Signatures. EU: Directive on a Common Framework for Electronic Signatures, 1999: Directive 199/93/EC of 13 December 1999 on a Community Framework for Electronic Signatures, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:en:HTML>. Additionally the United Nations has approved an approach to e-signatures in the Model Law on Electronic Signatures by UNCITRAL "UNCITRAL Model Law on Electronic Signatures with Guide to

product that arrives, usually wrapped in plastic, with the seller's contract terms located somewhere in the package. Click-wrap terms require that the buyer click an "I agree" button, thereby consenting to the seller's terms, before a sale is completed. Browse-wrap terms are the most flexible, providing that a buyer implicitly agrees to the terms of use on a seller's website without express consent, simply by utilizing the site. In considering each form of e-commerce transaction, it quickly becomes evident that classic negotiation methods and dispute resolution are not always easily applied to Internet contracts.[54]

On the side of international arbitration, the concepts of arbitrability, incorporation by reference, evidence collection, transparency, to name a few, have undergone a massive change. And what clearly emerges is that the seasoned jurisprudence of international arbitration can be both the vehicle of dispute resolution and development of law.[55]

XIII THE VIRTUAL - THE NEW TURF OF INTERNATIONAL ARBITRATION

The virtual world will be the new turf of international arbitration. However, what it needs is the establishment a global institution to facilitate arbitration and other forms of dispute resolution of electronic and digital commerce-related disputes. There is a need for to be an institution that can develop into a modern, multi-faceted arbitral institution that is perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of electronic and digital disputes. Such an institution will register and administer the claims that arise, empanel and appoint arbitrators when required, and support the proceedings, legally, technically and administratively. Also it would need to undertake scholarship to aid in the development of jurisprudence and keep it relevant to business. Fundamental to this process of development would be to engineer processes and procedures so as to provide services for the resolution of disputes involving disputes of various shapes and sizes, and various combinations of parties which one day, may be state actors.

Enactment 2001" (April, 2002) UNCITRAL <www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>.

54 Ibid.

55 See, Philip McConnaughay "The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles" (2013) 1(1) Peking University Transnational Law Review 23. See, Bernardo M Cremades "The Impact of International Arbitration on the Development of Business Law" (1983) 31(3) The American Journal of Comparative Law 526. Also see, David W Rivkin "The Impact of International Arbitration on the Rule of Law" 2012 International Arbitration Lecture, Sydney University, Sydney, 13 November 2012 in (2013) 29 (3) Arbitration International 327-360.

Legal certainty in virtual commerce does not primarily mean well-balanced substantive rules. It also includes access to fast and effective means for resolution of disputes and the efficient conclusions to disputes, in terms of arbitration awards and other forms of settlement, that are enforceable.

However enthusiastic one may get, it is highly unlikely that dispute resolution will go completely virtual, at least in the near future. Virtual magistrates, cyber tribunals, e-justice systems, are coming up and will continue to surface. These are not necessarily a pig in a poke, but their long-term ability to resolve disputes sustainably and effectively is still questionable. Their use, acceptability, working and enforcement of their decisions will continue to be debated and written about. But what we have is a tangible and acceptable option in international arbitration. Is this the best possible solution; most likely not. But then there isn't a better one.w