Modern Law for Global Commerce

Congress to celebrate the fortieth annual session of UNCITRAL
Vienna, 9-12 July 2007

COMMERCIAL LAW HARMONIZATION AND BILATERAL ASSISTANCE

Charles A. Schwartz*

Technical assistance to developing countries can take many forms; harmonization of commercial laws with international best practices being one of them. Many international organizations are active in developing model laws and practices for a plethora of legal subject-matter areas, such as contracts, company law, and insolvency and reorganization. A discussion of technical assistance practices in every area would fill a legal treatise. This paper will examine commercial legal harmonization in a crucial central area, something that we at the United States Agency for International Development (USAID) refer to as commercial dispute resolution (CDR). CDR is a term of art that attempts to provide a comprehensive categorization of all formal methods of resolving disputes in a given country. Thus, it would include the formal court system, alternate dispute resolution techniques, and international arbitration.

Commercial dispute resolution is essential to a thriving and vibrant business environment. With rapid globalization, differences in interpretation of contracts and other legal agreements are bound to multiply. Even assuming that all parties to all international agreements are acting in good faith, disputes will inevitably arise owing to misunderstandings based on differences in culture, language and local norms.

USAID has funded a great deal of technical assistance in commercial dispute resolution in developing countries. Typically, the need for CDR technical assistance activities is identified through a baseline diagnostic called a Commercial Legal and Institutional Reform (CLIR) Assessment.

* Charles A. Schwartz is Senior Commercial Law Reform Advisor in the Economic Growth Office, Bureau for Economic Growth, Agriculture and Trade, in the United States Agency for International Development. Mr. Schwartz is involved in a wide array of Commercial Legal and Institutional Reform activities, and has designed and implemented many projects, including an innovative project on Commercial Dispute Resolution. Mr. Schwartz has extensive experience in international commercial law, having served for many years in the private sector, working on matters in Europe, Latin America, Africa, Asia, as well as in the U.S. He has lectured for professional groups and taught at the university level. He has also been an Alternate Representative on the U.S. Government's Delegation to the Working Group for the UNCITRAL Model Law on International Commercial Arbitration. A graduate of Columbia College and Columbia University Law School, Mr. Schwartz also earned an LL.M. in Taxation from New York University Law School, and clerked for a Judge on the U.S. Court of Claims (which by merger with the U.S Court of Customs and Patent Appeals became the U.S. Court of Appeals for the Federal Circuit). Mr. Schwartz can be reached at cschwartz@usaid.gov and at caschwartz2004@yahoo.com.
The views expressed herein are solely those of the author, and do not necessarily represent those of the United States Agency for International Development or of the United States Government.

What are the CLIR Assessments?

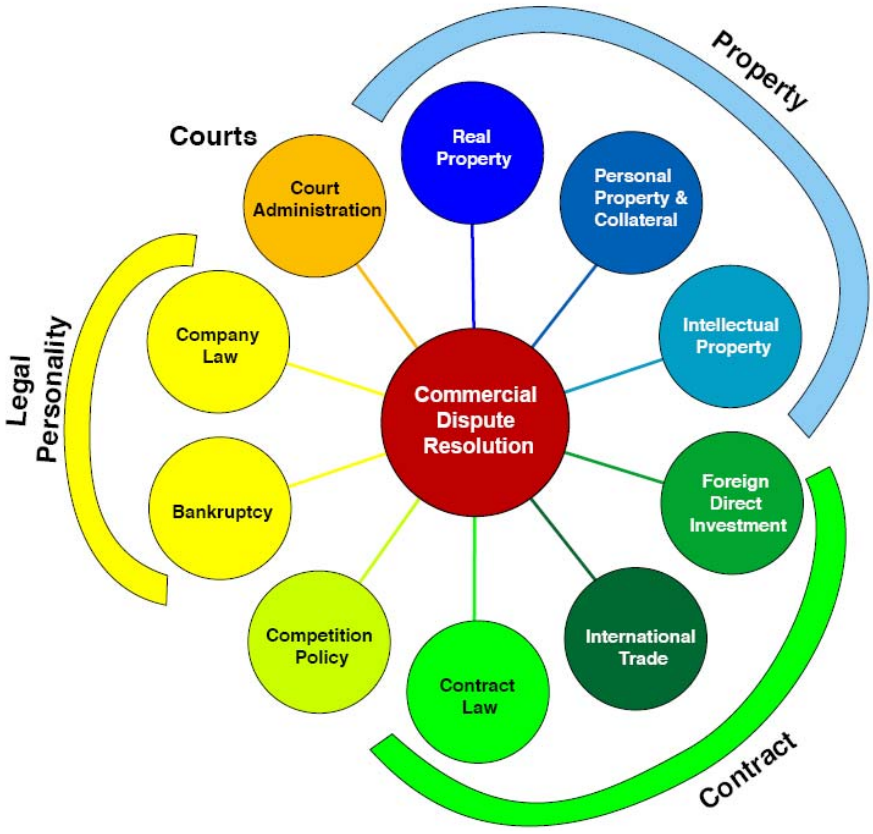
Stemming in large part from the U.S. Congress's mandate to assist countries in Eastern Europe and the former Soviet Union to become market economies, USAID designed a CLIR Assessment tool in 1997. The Support for Eastern European Democracy (SEED) Act of 1989, 22 U.S.C. 5401, had a number of objectives, one of which was "to promote the development in Eastern European countries of a free market economic system…" Under the FREEDOM Support Act (or the Freedom for Russia and Emerging Eurasian Democracies and Open Market Support Act of 1992), 22 U.S.C. 5801, programs for developing market economies, similar to those conducted under the SEED Act, were extended to the former Soviet Union. The earliest CLIR assessments were conducted beginning in 1998 in Poland, Ukraine, Kazakhstan, and Romania, and were found to be quite useful in pinpointing bottlenecks and chokepoints in the commercial legal systems. These and other assessments led to CDR projects, such as those in Croatia and Serbia. The Croatia project, for example, dealt with extensive court administration and case management improvements.

As the importance of improving the business enabling environment was better understood by the world community, demand for CLIR assessments from USAID local offices in other regions of the world increased. As a result, we conducted a regional set of country assessments for the CAFTA region. Conducting CLIR assessments for a grouping of countries pointed out even more clearly for us the need for effective CDR mechanisms, such as the need for an effective arbitration institution for countries in the CAFTA region, which will be dealt with later in this paper.

Recently, the commercial law systems of several Southeast Asia countries have been the subject of Commercial Law Assessments, specifically in Vietnam, Laos, Cambodia, the Philippines and Indonesia. Also, recent assessments have been performed in Ethiopia, Afghanistan and Pakistan. Future assessments are planned for Africa. All the Assessments that have been published to date can be found at the following website: www.bizlawreform.com.

The existing CLIR Diagnostic methodology covers 15 subject-matter areas (11 legal areas and four trade areas); additional areas are being developed. These subject matter areas are thematically linked and grouped, as visibly demonstrated in the following diagram.

USAID COMMERCIAL LAW PARADIGM



As you can see, Commercial Dispute Resolution occupies the center of the chart, further underscoring its centrality to a sound business enabling environment. The chart further groups the various CLIR subject matter areas into four legal groupings: Contract, Legal Personality, Property, and CDR.

A key feature that distinguishes the CLIR diagnostic methodology from other tools developed so far is that it takes a four-dimensional approach to assessing legal systems. This allows for a holistic understanding of specific CLIR and Trade-related challenges and also allows the assessors to identify cross-cutting problems that may pervade the entire commercial law system. The analysis consists of the following:

♦ *Legal Framework.* Basic legal documents that define and regulate substantive rights, duties, and obligations;

♦ *Implementing Institutions.* Governmental, quasi-governmental or private institutions in which the primary legal mandate to implement, administer, interpret, or enforce framework law(s) is vested;

♦ *Supporting Institutions.* Governmental, quasi-governmental or private institutions that either support or facilitate the implementation, administration, interpretation, or enforcement of framework law(s); and

♦ *Social Dynamics.* The interplay of stakeholder interests within a given society, jurisdiction, or group that, in aggregate, exert an influence over the substance, pace, or direction of commercial law reform.

What has USAID Learned?

In trying to improve the Dispute Resolution environment, regional as well as national approaches should be considered. Regional approaches can range, depending on the region and the countries in it and the conditions which prevail, from a modest approach such as exchanges of information, to a more ambitious approach such as the creation of a regional arbitration center.

The CAFTA region is one for which a regional arbitration center has been proposed. A recent law journal article by Omar Garcia-Bolivar[1] draws heavily on the results of the USAID Assessments in the CAFTA region and contains a number of recommendations regarding the demand for arbitration and for enhanced quality of arbitration. It views the passage of the CAFTA Free Trade Agreement as presenting special opportunities.

"As a result of the Agreement, Central America is bound to integration. As a single market, Central America will have a greater appeal to local and foreign investors. Thus the demands of globalization call for world-class arbitration centers where sophisticated international disputes can be solved quickly and transparently… One option would be for Central American countries to coordinate the use arbitration in the region and create a regional arbitration center… For this to occur, countries need to harmonize their legal frameworks regarding arbitration. While ambitious, given the nascence of alternative dispute resolution as a concept throughout the region, it would likely be easier to pursue such reforms and harmonization in the near future before each country becomes entrenched in disparate practices."[2]

Note that Mr. Garcia-Bolivar sees economic integration leading to:

- Greater local and foreign investment
- Demands of globalization calling for more sophisticated, speedy and transparent international dispute resolution

[1] Omar Garcia-Bolivar, *Dispute Resolution Process and Enforcing the Rule of Law, 12 S.W.J.L. Trade Am 381 (2006).*
[2] Id. at 403-404.

- The establishment of a regional arbitration center as one way to coordinate the use of arbitration
- The need to harmonize legal frameworks regarding arbitration in order to achieve these results

Other Regional Approaches and Harmonization

A regional approach can also be helpful when one country can serve as mentor to other countries in the region. One example of a regional project with a mentoring approach is a project which I developed and supervised. The design of the project was influenced by the belief that finding a "champion" in the region is the best way to attract interest among countries in the same region.

The goal of the project was find an institution in one country which was relatively well advanced and had the capacity to mentor sister institutions in neighboring countries which were relatively less advanced. Two parallel programs were run – one in Eastern Europe and the second in the former Soviet Union. This was done for a number of reasons, one of which was that the social, political and legal institutions in Eastern Europe (especially those of the republics of the former Yugoslavia) were similar to each other, but different from those of the republics of the former Soviet Union, and vice versa.

The project was remarkably successful in leveraging resources, incorporating the *pro bono* assistance of organizations and individuals, and in mentoring and knowledge-sharing. For example, the Project held symposia in which U.S. Federal Judges and court personnel, and officials and representatives of UNCITRAL and the International Chamber of Commerce, all gave of their time to help new and developing ADR institutions in the two separate geographic regions covered by the Project. These efforts were joined in by the two mentoring institutions – for Eastern Europe the mentoring institution was the District Court in Ljubljana, Slovenia, which has a court-annexed mediation program, and the mentoring institution in the region covering the former Soviet Union was the Russian Chamber of Commerce and Industry.

Unfortunately, not all countries are in a position to learn from each other or to harmonize their laws. Indeed, many newly independent countries wish to assert their new-found "separateness" and consciously try to differentiate their laws (and other institutions) when formerly they had had very similar or even identical laws and institutions.

Harmonizing through use of Model Laws

If countries are willing to harmonize their laws, one very effective way to do so is to encourage the adoption of Model Laws. I have personally seen, as a member of the U.S. Delegation to the UNCITRAL Working Group for the Model Law on International Commercial Arbitration, that developing countries see the benefit of using a well thought-out Model Law as the basis of their own legislation.

What is the attraction of a Model Law? One is that it is a form of best practices and the result of deliberations by experts in the field. Moreover, since a developing country can itself participate in the proceedings and influence the drafting of the Model Law, it will be familiar with the Model and will understands the reasoning behind the provisions. And UNCITRAL is making efforts to assist countries which have adopted the UNCITRAL Model Law on International Commercial Arbitration with substantial deviations which jeopardize the application of these national laws. UNCITRAL is also looking to promote the New York Convention among Sub-Saharan African countries. This is vital to promoting investment in the region, since the granting of an award is meaningless without the ability to enforce.

UNCITRAL'S influence in developing Model laws can be seen from the great number of countries which have adopted the various models. For example, the Model Law on International Commercial Arbitration has been adopted by approximately 50 countries, plus six states within the United States. Other Model Laws have also received similar widespread acceptance.

CONCLUSION

With the world becoming "smaller' through globalization, and with economic growth depending so heavily on international trade, technical assistance programs are increasingly looking at regional solutions. Often, this will entail harmonization. While it is important to respect local cultural and social practices, it is also important to understand that having an efficient CDR system is crucial for investment and economic growth. National governments will not be able to achieve economic growth without making their CDR systems more efficient, user-friendly, understandable, and effective.