

An Appraisal Of The Uncitral Model Law On International Commercial Arbitration

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Abstract

International commercial arbitration is an alternative method of resolving disputes arising out of commercial transactions between private parties across national borders that allows the parties to avoid litigation in national courts. This guide identifies the best tools for locating primary sources for international commercial arbitration research, including treaties, national legislation, arbitration rules, arbitral awards, and court decisions. Arbitration can be either “institutional” or “*ad hoc*.” The terms of the contract will dictate the type of arbitration. If the parties have agreed to have an arbitral institution administer the dispute, it is an institutional arbitration. If the parties have set up their own rules for arbitration, it is an *ad hoc* arbitration. *Ad hoc* arbitrations are conducted independently by the parties, who are responsible for deciding on the forum, the number of arbitrators, the procedure that will be followed, and all other aspects of administering the arbitration.

Keywords: Uncitral, Model Law, International Commercial, Arbitration

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1. INTRODUCTION TO UNCITRAL MODEL LAW

The growth of international commercial arbitration is largely a post-World War II phenomenon, fueled by the explosive growth of international trade and commerce and foreign investment in both developing and developed countries. While trade and investment were becoming increasingly transnational, and the multinational corporation was developing with an interest in promoting business and profits without regard to national boundaries, national courts, at least from the foreign trader's or investor's point of view, remained resolutely local in outlook. In many jurisdictions the judiciary was slow to change, ill-informed about modern commercial and financial practices, and hesitant to abandon local traditions and procedures that often seemed arcane or unbusinesslike to outsiders. Moreover, judicial procedures and formalities built on accepted national traditions have a very different impact on foreign persons and entities, to whom not only the procedure but frequently the language is foreign, than they do on their local contracting partners. Finally, there is always the possibility, or at least the perception, that local courts will be biased in favor of domestic parties and less protective of foreign interests.

Noting that the Model Law on International Commercial Arbitration¹ was adopted by the United Nations Commission on International Trade Law at its eighteenth session, after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration,

Convinced that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards² and the Arbitration Rules of the United Nations Commission on International Trade Law³ recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.

¹ Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I.

² United Nations, Treaty Series, vol. 330, No. 4739, p. 38.

³ United Nations publication, Sales No. E.77.V.6.

2. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

Within the past decade, the United Nations Commission on International Trade Law (UNCITRAL) has developed a model arbitration law which is geared specifically for international commercial disputes. In June, 1985, the Commission finalized and formally adopted this model law⁴. In the coming months the UN Secretary-General will send the text to Governments, recommending that the model law become the basis for national laws which regulate international commercial arbitration. The Model Law has been a success. 66 States, including major trading powers, have adopted national laws on the basis of the Model Law. It is not a treaty and thus is not legally binding. It is a model for States to follow when they adopt new arbitration laws or revise old ones. In addition, the reason for adopting international commercial arbitration is because of the need to address considerable disparities in national laws on arbitration and for addressing the issue of the inappropriateness of national laws for international cases.

UNCITRAL developed a model law applicable to international commercial arbitration in response to widespread problems arising from the great divergency in national laws which regulate this field. Domestic laws, to varying degrees, restrict the disputes which can be submitted to arbitration, the selection and appointment of arbitrators, as well as the operation of the arbitration proceedings. The supervision and control which national courts may exert on these proceedings can additionally be effected by domestic regulations. The uncertainties which thus are cast upon the parties in their efforts to develop a workable arbitration agreement highlight the reasons UNCITRAL has attempted to unify measures in this field.

The UNCITRAL model law approach, rather than looking to national law, which is generally geared toward domestic arbitration as opposed to international arbitration issues, emphasizes the will of the parties as the governing principle. The model law leaves the parties free to determine the composition of the arbitral tribunal, to select the rules to govern appointment and challenge procedures, and to choose the rules of law applicable to the substance

⁴ The final text of the UNCITRAL model law on International Commercial Arbitration is contained in the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, June 3-21, 1985, 40 C.N. GAOR Supp. (No. 17) at 82-94, C.N. Doc. A/40/17 (1985). (Cnpublish~d; to be formally issued to governments in the coming months) [hereinafter cited as C.N. Doc. A/40/17]. The final text of the model law is included in the appendix, *infra*.

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of the dispute. This freedom, however, is limited by certain mandatory provisions guaranteeing due process. It is also limited by the model's link with national law, particularly at the post-award stage, though also where the court may render assistance at specific points in the proceedings. The approach of the UNCITRAL model law, therefore, balances the role of the national legal system with the freedom and will of the parties.

UNCITRAL chose to use a model law structure because it is a flexible approach and it allows states to adopt easily the principles contained within the document. Initially, UNCITRAL considered preparing a protocol to supplement and clarify the 1958 New York Arbitration Convention⁵, but UNCITRAL dropped this approach in favor of a model uniform law to serve as the basis for national arbitration laws⁶. Through a model law, rather than a convention or protocol, the need for flexibility vis a vis domestic law is recognized. This approach makes the legal principles in the model more palatable to individual states, allowing these states either to adopt the law in its entirety or tailor it to fit the specific domestic legal system. A protocol to the 1958 New York Convention, on the other hand, would lack the flexibility inherent in the model law approach, decreasing the likelihood of widespread international acceptance⁷. Within this framework, the UNCITRAL model law aims to provide for the harmonization and unification of the national laws regulating international commercial arbitration⁸

2.1 GENERAL PROVISION

The model law attempts to have a broad scope of application which is evidenced by its expansive definition of fundamental terms. As indicated in Article 1, the terms "international"

⁵ The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun' 30, 1958, 330 U.N.T.S., No. 4739. The scope of this convention is narrower than that of the UNCITRAL model law, limited in its title to the "Recognition and Enforcement of Foreign Arbitral Awards." See generally J. VAN DEN BERG, *NEW YORK ARBITRATION CONVENTION OF 1958* (1981).

⁶ See United Nations Commission on International Trade Law, Report of the Secretary-General, U.N. Doc. ACNII27, at 1-3 (1977).

⁷ See, e.g., The European Uniform Law of 1966 in the European Convention on Arbitration, 1966 *Europ. T.S.* No. 56. This agreement was only signed by Austria and Belgium.

⁸ But see A. Herrmann, *THE INTERNATIONAL ARBITRATION CONGRESS IN LAUSANNE: DOUBTS OVER THE UNCITRAL MODEL LAW* Business Law Brief 3, 3-4 (1984). The idea of the model law has not been unanimously accepted. Some commentators have argued that there is no need for a model law at all; it will only add to the present confusion engendered by the multiplicity of already existing bilateral and multilateral international arbitration agreements.

and "commercial" are intended to be interpreted in a non-restrictive manner⁹. Thus, Article 1(3) defines arbitration as "international" not only when the parties have their places of business in different states¹⁰, but also when a portion of either party's business is performed in another state. This broad approach is additionally supplemented with further objective criteria to encompass more fully the broad field of non-domestic arbitration. If, therefore, either the site of arbitration, place of performance, or subject-matter of the dispute is in or closely connected to a foreign state, the model law will consider the dispute to be "international" in nature.

Paragraph 3(c) contains what can be termed an "opting-in" provision; the arbitration will be classed international when the parties have expressly agreed that it relates to more than one country. This catch-all provision further extends the scope of the model law to include, for example, disputes between parties of the same state when one party is controlled by a foreign corporation. The term "commercial", within the model law, has a similarly broad definition.

Based on the model law, any transaction regarding the sale or exchange of goods or services, banking, financing, insurance, joint venture, exploitation agreements is of a commercial nature¹¹. It also should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road¹². The model law, however, intentionally refrains from developing an exhaustive list of the relationships that should be considered as commercial in nature and only attempts to illustrate the expansive meaning of the term¹³. The UNCITRAL model law, therefore, is designed to prevail

⁹ For the evolution of the drafting of Article (1), see United Nations Commission on International Trade Law, Report of the Secretary-General on the Possible Features of a Model Law on International Commercial Arbitration, U.N. Doc. *NCN.9/207*, para. 28-40 (1981) [hereinafter cited as U.N. Doc. *A/CN.9/207*]; United Nations Commission on International Trade Law.

¹⁰ This basic criterion is drawn from the United Nations Convention on Contracts for the International Sale of Goods 1980, U.N. Doc. *A/CONF 97/18*, Annex 1.

¹¹ U.N. Doc. *A/40/17*, *supra* note I, at Ch. 1 n.2 lists samples of those relationships which would be considered commercial in nature. *See* appendix.

¹² United Nations document A/40/17, annex I

¹³ *See* U.N. Doc. *A/CN.9/233*, *supra* note 6, at para. 52-56; U.N. Doc. *A/CN.9/264*, *supra* note 6, at para. 16.

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over any domestic law limiting the scope of international commercial arbitration. This approach is in contrast with Article 1(3) of the 1958 New York Convention which limits the Convention's scope to only those relationships which the state's domestic law defines as commercial.

2.2 ARBITRATION AGREEMENT

Article 7 refers to the arbitration agreement itself, and discusses concepts relevant to the form, validity, and contents of the agreement¹⁴. Of special significance is the provision in paragraph (1) which accords recognition to both an agreement to arbitrate an existing dispute as well as an agreement to submit future disputes to arbitration¹⁵. This feature is of particular importance with respect to Latin American countries, and other States with systems founded in Spanish law, which at present do not give full effect to the latter type of agreement¹⁶. Because this clause is a common element of international arbitration practice, UNCITRAL considered its equal treatment under the model law a necessity¹⁷. In efforts to unify disparate national requirements concerning the form of an arbitration agreement, Article 7(1) also provides for the equal recognition of an arbitration clause, whether it is contained in the contract itself or in a separate agreement. The model law imposes few requirements on the text of that agreement, and essentially gives the parties complete freedom to determine its contents. This freedom, however, is minimally restricted since the parties may submit to arbitration only those disputes which arise from a "defined legal relationship."¹⁸

Following in this unrestrictive approach, the model law contains a broad definition of what constitutes a "writing" needed to satisfy requirements that the arbitration agreement be in written form. To remedy uncertainties raised by the 1958 New York Arbitration Convention's treatment on this issue¹⁹, Article 7(2) of the model law expands the definition of writing to include various forms of telecommunication. Furthermore, an explicit reference in the contract to

¹⁴ For the evolution of the drafting of this article, see U.N. Doc. A/CN.9/216, *supra* note 6, at para. 22-24; U.N. Doc. A/CN.9/232, *supra* note 6, at para. 38-46; U.N. Doc. A/CN.9/233, *supra* note 6, at para. 62-68; U.N. Doc. A/CN.9/245.

¹⁵ *Compromise-clause compromissoire*.

¹⁶ See The Fifth Conference of Ministers of Justice of the Hispanic-Portuguese-American Countries, Resolution No.5, 1981. The conference adopted a model arbitration law restricting the *clause compromissoire*. In addition to the Latin American countries, the member States are Spain, Portugal, and the Philippines.

¹⁷ U.N. Doc. A/CN.9/207, *supra* note 6, at para. 42.

¹⁸ Article 7(1), U.N. Doc. A/40/17, *supra* note I, at 84.

¹⁹ U.N. Doc. A/CN.9/232, *supra* note 6, at para. 43

a separate document containing an arbitration clause is sufficient to satisfy the writing requirement²⁰.

2.3 COMPOSITION OF ARBITRAL TRIBUNAL

The model law gives the parties extensive autonomy on issues pertaining to the composition of the arbitral tribunal. Articles 10 and 11²¹ leave determination of the number and appointment of arbitrators to the parties' discretion. Failing agreement by the parties, the model law provides supplementary rules for the appointment. In this instance, the common system is employed whereby each party appoints an arbitrator and these two appointees in turn select the third. In the event of failure of these procedures, Articles 11(3) and (4) establish a "reserve mechanism" whereby any party may resort to the courts to secure the necessary appointment. The model law provides guidelines for the decision of the court as well²².

The challenge procedure in Article 13 follows the same "two-level" approach as the appointment procedures and allows the parties to set their own rules for challenging an arbitrator. If an agreement cannot be worked out, the model law sets out additional rules, designating the arbitral tribunal to decide the unresolved matter, with the court again acting as the "reserve mechanism." This formula was adopted amidst controversy over whether resort to the courts should be permitted during the arbitral proceedings, or only after the final award is made. The former position could encourage dilatory tactics, while adoption of the latter could result in considerable waste of time and expense. Ultimately UNCITRAL incorporated the first option into the text, but added several features to reduce the risk of delaying tactics. Article 13(3) imposes time limitations on the challenging party's right to judicial recourse, and allows the arbitration proceedings to continue while that appeal is pending. In addition Article 13 makes it clear that parties can only challenge an arbitrator's appointment in circumstances where there are

²⁰ See generally United Nations Commission on International Trade Law, Report of the Secretary-General on International Commercial Arbitration: The Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), U.N. Doc. A/CN.91J68 para. 19-26 (1979). The study notes problems with the definition of a writing employed in Article 11 of the 1958 New York Convention.

²¹ For the evolution of the drafting of Articles 10 and II, see U.N. Doc. A/CN.9/207, *supra* note 6, at para

²² UNCITRAL declined to include specifications on the eligibility or qualifications of an arbitrator, although Article II is intended to supersede national laws which restrict the appointment of foreign arbitrators. Some States, however, may hesitate to entrust such broad responsibilities to a foreigner. See Lausanne Conference Proceedings, *supra* note 18, at 108.

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'justifiable doubts as to the arbitrator's impartiality and independence."²³ While this broad standard includes numerous impossible situations, it precludes reliance on specific grounds set forth by domestic laws²⁴.

Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, Articles 11, 13 and 14 provide for assistance by courts or other authorities. In view of the urgency of the matter and in order to reduce the risk and effect of any dilatory tactics, instant resort may be had by a party within a short period of time and the decision is not appealable.

2.4 JURISDICTION OF ARBITRAL TRIBUNAL

Article 16(1)²⁵ empowers the tribunal to rule on its own jurisdiction²⁶ although Article 16(3) subjects this decision to ultimate court control²⁷. The tribunal's competence to rule on its jurisdiction may be exercised on its own initiative and arbitrators are not required to wait until an objection is raised by a party²⁸. Should an objection be raised promptly, paragraph (3) accords the arbitral tribunal discretion to rule on this plea, either as a preliminary question or in the award.

Paragraph (3) also outlines an objecting party's right to challenge the jurisdiction of the arbitral tribunal in a court of law. In defining the parameters of this right, the text adopted by UNCITRAL on June 21, 1985 provides for immediate resort to the court. This right, however, is restricted by the same time limitations imposed in Article 13(3) on challenge procedure.

²³ Article 12(2); U.N. Doc. A/40/17, *supra* note I.

²⁴ One observer commented that although the model law outlines the general procedures and grounds for a challenge, it does not address what effect a successful challenge could have on prior proceedings and to what extent those proceedings would remain valid. *See* "Convegno dell'ICCA sul Progetto di Legge Modello dell'UNCITRAL sull'arbitrato Commerciale Internazionale, Losanna, 9- 12 Maggio 1984," 24 *Rassegna del'arbitrato* No. 1-2 (1984), at 38-39 [hereinafter cited as *Rassegna*].

²⁵ The evolutions of the drafting of this article see U.N. Doc. A/CN.9/216, *supra* note 6, at para. 81-83; U.N. Doc. A/CN.9/232, *supra* note 6, at para.

²⁶ , Article 16(1) may prove controversial, since many states do not at present grant such power to arbitrators. *But see* the European Convention of 1961, Article V, and the Washington Convention of 1965, Article 41, which grant the arbitral tribunal power to rule on its own jurisdiction. Similar provisions are also found in the UNCITRAL Arbitration Rules and the ICC Rules of Arbitration

²⁷ Article 16 does not specify which law arbitrators should apply in determining jurisdiction. It has been suggested, however, that the applicable law would be the same as that which an assisting court, designated by the state through Article 6, would apply. *See* U.N. Doc. A/CN.9/264, *supra* note 6, at 38.

²⁸ *Cf* UNCITRAL Arbitration Rules which limit the tribunal's competence to rule on its own jurisdiction to those cases where a party has raised a jurisdictional objection

Furthermore, with an Article 13(3) challenge arbitration proceedings may continue pending a court decision on the jurisdiction question. This newly adopted provision represents a significant change from the original model law text which initially provided for court control only in setting aside proceedings. In the original text the arbitral tribunal's determination of jurisdiction could then only be contested once the final award on the merits was made²⁹. Both proposed provisions were controversial; the issue became one of balancing the conflicting policy considerations of avoiding waste of time and money, on the one hand, and preventing dilatory tactics on the other. UNCITRAL ultimately concluded that because of the need for certainty with the fundamental question of jurisdiction, the model law should provide for instant court control over an arbitral tribunal's ruling on the issue. The provision for court control in Article 16(3) was therefore aligned with that of Article 13(3)³⁰.

Article 16 codifies the "doctrine of separability" of the arbitration clause; the principle that the arbitration clause may be considered independent of other contract terms. Thus, a ruling by the arbitral tribunal that the contract is invalid does not ipso jure require the conclusion that the arbitration clause is also invalid³¹.

The arbitral tribunal's competence to rule on its own jurisdiction, i.e. on the very foundation of its mandate and power, is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision is not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending with the court. In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36³².

2.5 CONDUCT OF ARBITRAL PROCEEDINGS

²⁹ U.N. Doc. A/CN.9/264, supra note 6, at 37-42.

³⁰ U.N. Doc. A/40/17, supra note I, at 33.

³¹ Mary E. McNerney and Carlos A. Esplugues, International Commercial Arbitration: The UNCITRAL Model Law, 9 B.C. Int'l & Comp. L. Rev. 47 (1986), <http://lawdigitalcommons.bc.edu/iclr/vol9/> iss1/3 page 53.

³² United Nations document A/40/17, annex I

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Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. It opens with two provisions expressing basic principles that permeate the arbitral procedure governed by the Model Law. Article 18 lays down fundamental requirements of procedural justice and article 19 the rights and powers to determine the rules of procedure.

Article 18 embodies the basic principle that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. Other provisions implement and specify the basic principle in respect of certain fundamental rights of a party.

Article 24(1) provides that, unless the parties have validly agreed that no oral hearings for the presentation of evidence or for oral argument be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24(1) deals only with the general right of a party to oral hearings (as an alternative to conducting the proceedings on the basis of documents and other materials) and not with the procedural aspects such as the length, number or timing of hearings.

Another fundamental right of a party of being heard and being able to present his case relates to evidence by an expert appointed by the arbitral tribunal. Article 26(2) obliges the expert, after having delivered his written or oral report, to participate in a hearing where the parties may put questions to him and present expert witnesses in order to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24(3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24(2))³³.

One commentator has termed Article 19 the "Magna Carta of Arbitral Procedure."³⁴ This article guarantees the parties complete autonomy in determining what procedural rules shall govern the arbitration. The parties may develop their own rules, employ those of an arbitration institution³⁵,

³³ United Nations document AI40117, annex I

³⁴ Herrmann, *The UNCITRAL Model Law-Its Background, Salient Features, and Purposes*, 1 ARB. INT'L 19 (1985)

³⁵ For example, parties may employ ICSID, ICC, or UNCITRAL Arbitration Rules.

or follow the standard arbitration practice of a particular trade association. They may even choose to refer to the civil procedure law of a specific legal system. In the event the parties have not agreed on some specific procedural rules Article 19(2) empowers the arbitral tribunal to conduct the proceedings in the manner it deems appropriate. This includes the power to determine the admissibility, relevancy, materiality and weight of any evidence.

Within this liberal framework, a limited number of mandatory provisions have been included to safeguard due process. The most fundamental of these is Article 18, which requires that the parties be treated with equality, and that each party be given a full opportunity to present his case. Among other mandatory provisions securing the procedural rights of the parties are those specified in Article 24(1), the right to request a hearing, and Article 26, the right to appoint and to question an expert?

In the case of default by a party, Article 25 can be applied³⁶ when failure to participate in the proceedings is without a showing of "sufficient cause."³⁶ Where the respondent fails to communicate a statement of defense or fails to appear, the arbitral tribunal may not treat this inaction as an admission. The tribunal is empowered to continue the proceedings and make the award based on the relevant evidence. Many national laws do not presently recognize such *ex parte* awards, and thus if accepted Article 25 would add considerable uniformity to this field.

Under Article 20, the parties are free to agree on the place of arbitration. In the event they do not agree, the arbitral tribunal determines the site. Venue is particularly important because it provides a connection for the territorial applicability of the model law. It also establishes a link to a national legal system, which is necessary both at the post-award stage, and during arbitral proceedings, when model law provisions provide recourse to the national courts³⁷.

2.6 MAKING OF AWARD AND TERMINATION OF PROCEEDING

Article 28(1) provides the parties with full autonomy in choosing the substantive law applicable to the dispute³⁸. Article 28(1) is very broad and states that the parties may choose to apply "rules of law," not merely the "law" of a given state. This reference to "rules of law" provides the parties with a wide range of options. It enables the parties, for example, to select

³⁶ Article 25 is not mandatory; the parties may agree on other procedures to be applied in the case of default

³⁷ Mary E. McNerney and Carlos A. Esplugues, *International Commercial Arbitration: The UNCITRAL Model Law*, 9 B.C. Int'l & Comp. L. Rev. 47 (1986), <http://lawdigitalcommons.bc.edu/iclr/vol9/iss1/3> page 54.

³⁸ For the evolution of the drafting of Article 28, see U.N. Doc. A/CN.9/207, *supra* note 6, at para. 90-91;

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laws from more than one legal system and apply them to different aspects of their relationship, or to choose rules embodied in an international convention, whether or not that convention is in force. This progressive³⁹ approach is intended to provide the parties of an international transaction with the flexibility to apply those laws which are most suitable for their specific case⁴⁰.

If the parties have not determined which substantive rules of law shall apply, the arbitral tribunal is required to apply conflict of laws rules to determine the applicable law⁴¹. This more cautious approach is a significant step away from the freedom of choice allowed the parties under paragraph (1). It has been argued that there is no reason to deny the arbitrators the same freedom and flexibility accorded the parties⁴². The intention behind this more restrictive provision, however, is to provide the parties with some degree of certainty as to what law the arbitral tribunal will apply to the substance of their dispute⁴³.

Alternatively, under 28(3) the parties can agree that the arbitral tribunal shall decide the dispute *ex aequo et bono* or as *am.iable com.positor*. The model law does not define this type of arbitration, which in practice is implemented in various forms. It is supposed that the parties must establish the necessary rules or guidelines⁴⁴.

Article 31(3) provides that the award shall state the place of arbitration and that it shall be deemed to have been made at that place. As to this presumption, it may be noted that the final making of the award constitutes a legal act, which in practice is not necessarily one factual act but may be done in deliberations at various places, by telephone conversation or correspondence; above all, the award need not be signed by the arbitrators at the same place.

Articles 8 and 9 pertain to the relationship between the arbitration agreement and court intervention. When a party to an arbitration agreement initiates litigation, Article 8 obligates the court, upon request, to refer the dispute to arbitration unless it finds the agreement "null and

³⁹ This approach has only been undertaken in the Washington Convention of 1965, Article 42, and the international arbitration laws of France and Djibouti.

⁴⁰ *But see* U.N. Doc. A/40117, *supra* note I, at para. 233 for criticisms of this concept of "rules of law."

⁴¹ *d.* at 90, art. 28(2).

⁴² *See, e.g., Rassegna, supra* note 22, at 51-52.

⁴³ *See* U.N. Doc. A/CN.9/264, *supra* note 6, at 62.

⁴⁴ Dr. Herrmann offers the following general guidelines: "The arbitral tribunal would seek a fair and equitable solution, bound merely by those norms which ensure the international public policy of a given State, i.e., *ordre public*, relating to international transactions." Herrmann, *supra* note 29, at 23. Further, in all cases, under Article 28(4) the arbitral tribunal must apply the conditions of the contract and consider trade usages.

void, inoperative or incapable of being performed."⁴⁵ UNCITRAL modeled Article 8 after Article II(3) of the 1958 New York Convention, although it included several additional elements.⁷ First, the model law imposes a time restriction: the opposing party must request the court to decline jurisdiction prior to or with his first statement on the substance of the dispute. Should the party fail to invoke the arbitration agreement within the specified time, he is precluded from raising it as a defense in the ensuing court proceedings. Second, even if a jurisdictional issue is pending before a court, Article 8 paragraph (2) provides that the arbitration may be commenced or continued⁴⁶.

It is important to note that Article 8 would require courts of the adopting State to refer all valid agreements to arbitration, and not just those agreements where the adopting State is also the Forum State. If widely accepted, this provision would constitute a significant step toward global recognition of international commercial arbitration agreements.

Article 9 makes it clear that a request for interim measures of protection by a court is compatible with the arbitration agreement⁴⁷. UNCITRAL recognized that interim protection may often be necessary to secure the efficacy and success of the arbitration, and that the arbitration agreement should not operate to exclude court jurisdiction, nor should a party's request for such court action be construed as a waiver of that agreement. Article 9 however does not specify which interim measures are available. It only states that courts may employ those measures which are appropriate under national law, or are compatible with the agreement. The envisioned range of compatible measures includes pre-award attachments for the protection of the subject-matter or the evidence and extends to the protection of trade secrets and proprietary information⁴⁸

Article 17 gives the arbitral tribunal a concurrent power to order interim measures of protection, although the range of such measures is more limited than those provided for under Article 9. The text requires that the interim measure pertain to the subject-matter of the dispute, and the measure may only be directed to a party. Additionally, the arbitral tribunal lacks power to enforce these orders. As a result compliance may require assistance of the courts, assuming

⁴⁵ /d., at 84 art. 8.

⁴⁶ Mary E. McNerney and Carlos A. Esplugues, *International Commercial Arbitration: The UNCITRAL Model Law*, 9 *B.C. Int'l & Comp. L. Rev.* 47 (1986), <http://lawdigitalcommons.bc.edu/iclr/vol9/> iss1/3 page 56.

⁴⁷ For the evolution of Article 9, see U.N. Doc. A/CN.9/207, *supra* note 6, at para. 77-78; U.N. Doc. A/CN.9/216, *supra* note 6, at para. 39; U.N. Doc. A/CN.9/232,

⁴⁸ U.N. Doc. A/40/17, *supra* note I, at para. 96.

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the national procedural law gives the court the authority to act⁴⁹. In addition to allowing court assistance in the context of interim measures of protection, the model law also recognizes the occasional need for judicial assistance in the taking of evidence. Since most national laws do not provide the arbitral tribunal with powers of compulsion, Article 27 provides that the tribunal or a party, with the tribunal's approval may resort to the court at this stage of the proceedings⁵⁰.

2.7 RECOURSE AGAINST AWARD RECOGNITION AND ENFORCEMENT OF AWARDS

At the post-award stage, most existing national laws provide numerous means and grounds for recourse against the award, means which vary widely from State to State. The model law takes an entirely different tactic and recognizes only one means of challenging the award⁵¹. Article 34 requires the challenging party to submit to the court an "application for setting aside."⁵² Through this setting aside procedure, the objecting party maintains the option of proceeding directly against the award, rather than having to wait and oppose the award when the successful party brings an enforcement action. This means of direct recourse is available to the objecting party only for a relatively short period of time. An application for setting aside must be made within three months of receipt of the award⁵³.

Article 34 paragraph (2) sets forth the limited number of grounds upon which an award may be set aside. Paragraph (2) was modeled after Article 5 of the 1958 New York Convention, and the grounds listed are similar to those which may be invoked under Article 36 as a defense to recognition and enforcement of the award. By adopting similar grounds for Articles 34 and 36, the model law attempts to avoid the problem of "split validity" which enables an award to be found invalid in the state of origin but valid and enforceable abroad⁵⁴.

⁴⁹ Earlier versions of Article 17 provided for court executory assistance, in an attempt to help the tribunal gather evidence. Drafters, however, did not adopt this factor in the final version of Article

⁵⁰ ⁵⁰ Mary E. McNerney and Carlos A. Esplugues, *International Commercial Arbitration: The UNCITRAL Model Law*, 9 B.C. Int'l & Comp. L. Rev. 47 (1986), <http://lawdigitalcommons.bc.edu/iclr/vol9/> iss1/3 page 56.

⁵¹ No definition of "award" is included in the model law.

⁵² For an evolution of the drafting of Article 34, see U.N. Doc. *NCN.9/232*, *supra* note 6, at para. 15-22; U.N. Doc. *NCN.9/233*,

⁵³ Article 34(3); U.N. Doc. *A/40117*, *supra* note I, at 92.

⁵⁴ *But see* G. Herrmann, *The Role of the Courts Under the UNCITRAL Model Law* Script 14-17 (unpublished manuscript) that notes and responds to criticisms which have been voiced regarding this parallelism of grounds.

The overall objective of Articles 35 and 36, which deal with the recognition and enforcement of awards, is to attain uniform treatment of all international commercial arbitration awards, irrespective of their country of origin⁵⁵. Article 35 states that all arbitral awards shall be recognized as binding, and establishes uniform conditions for the recognition and enforcement of awards, wherever made⁵⁶. Article 36 specifies the exclusive criteria on which recognition and enforcement may be refused. These criteria are to apply to all international commercial arbitration awards, whether domestic or foreign⁵⁷.

In developing these award provisions, UNCITRAL noted that some states may not be willing to follow such an unrestrictive approach. States adopting the model law may therefore choose to specify that Articles 35 and 36 will be applied on some basis of reciprocity⁵⁸.

Conclusion:

The model law, through its three-part framework guaranteeing parties freedom to agree on fundamental aspects of the arbitration, providing a limited number of mandatory rules, and establishing supplementary, non-mandatory rules, establishes a structure for unifying and harmonizing disparate national laws on international commercial arbitration. Although the model law addresses many important intervention and commercial arbitration issues, it nevertheless leaves some questions and issues unresolved⁵⁹. Potential problems have already been noted because of inadequate and imprecise definitions of fundamental terms. As one observer commented, through its open-ended approach the model law fails to define fundamental terms, leaving the text in a state where "... it can be given almost any meaning in some of its critical passages, and has no meaning in others."⁶⁰ In effect, this could leave important provisions in the model law subject to disparate interpretations, rendering it unacceptable in a number of national legal systems. Despite these potential problems, the model law has initially been well-received

⁵⁵ See U.N. Doc. A/40/17, *supra* note I, at 61.

⁵⁶ Article 35 leaves procedural details of recognition and enforcement to be determined by national laws, since there is no practical need for uniformity in this area.

⁵⁷ For the evolution of the drafting of Article 35, see U.N. Doc. A/CN.9/216, *supra* note 6, at para. 109; U.N. Doc.

⁵⁸ U.N. Doc. A/40/17, *supra* note I, at 61.

⁵⁹ For example, should the arbitral tribunal be empowered to adapt a contract for changed circumstances, or empowered to fill gaps therein, how should the concept of sovereign immunity apply under the model law? Furthermore, as questioned by Dr. Herrmann, should the law of the forum state govern the important issue of arbitrability, as Article 34(2)(b)(i) provides, or should this matter be governed by the law of the main contract? G. Herrmann, *supra* note 54, at 13.

⁶⁰ A. Herrmann, *supra* note 5, at 13.

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by Government representatives and international arbitration organizations, and the majority of comments emanating from conferences and symposia on the subject have been favorable. As one Supreme Court Justice advised his audience, "[W]e should accept the concept of the model law if our trading partners do so, and we should then use it as a basis for a comprehensive and explicit restatement of our law, which is at present far too diffuse and inexplicit."⁶¹

⁶¹ The Right Honorable Sir Michael Kerr, Lord Justice of Appeal of the Supreme Court of Judicature (U.K.). Kerr, *supra* note 40, at 16.

BIBLIOGRAPHY

- 1- Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I.
- 2- United Nations, Treaty Series, vol. 330, No. 4739.
- 3- United Nations publication, Sales No. E.77.V.6.
- 4- The final text of the UNCITRAL model law on International Commercial Arbitration is contained in the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, June 3-21, 1985, 40 C.N. GAOR Supp. (No. 17) at 82-94, C.N. Doc. A/40/17 (1985). (Cnpublish~d; to be formally issued to governments in the coming months) [hereinafter cited as C.N. Doc. A/40/17]. The final text of the model law is included in the appendix, *infra*.
- 5- The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 30, 1958, 330 U.N.T.S., No. 4739. The scope of this convention is narrower than that of the UNCITRAL model law, limited in its title to the "Recognition and Enforcement of Foreign Arbitral Awards." See generally J. VAN DEN BERG, *NEW YORK ARBITRATION CONVENTION OF 1958* (1981).
- 6- United Nations Commission on International Trade Law, Report of the Secretary-General, U.N. Doc. A/CN.12/7, at 1-3 (1977).
- 7- The European Uniform Law of 1966 in the European Convention on Arbitration, 1966 Europ. T.S. No. 56. This agreement was only signed by Austria and Belgium.
- 8- This basic criterion is drawn from the United Nations Convention on Contracts for the International Sale of Goods 1980, U.N. Doc. A/CONF 97/18, Annex 1.
- 9- U.N. Doc. A/40/17, *supra* note 1, at Ch. 1 n.2 lists samples of those relationships which would be considered commercial in nature. See appendix.
- 10- United Nations document A/40/17, annex I
- 11- U.N. Doc. A/CN.9/233, *supra* note 6, at para. 52-56; U.N. Doc. A/CN.9/264, *supra* note 6, at para. 16.
- 12- U.N. Doc. A/CN.9/207, *supra* note 6, at para.
- 13- U.N. Doc. A/CN.9/264, *supra* note 6, at 37-42.

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- 14- Herrmann, *The UNCITRAL Model Law-Its Background, Salient Features, and Purposes*, 1 ARB. INT'L 19 (1985)
- 15- Mary E. McNerney and Carlos A. Esplugues, *International Commercial Arbitration: The UNCITRAL Model Law*, 9 B.C. Int'l & Comp. L. Rev. 47 (1986),
<http://lawdigitalcommons.bc.edu/iclr/vol9/iss1/3> page
- 16- Dr. Herrmann offers the following general guidelines: