UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION OBJECTIVES AND PRINCIPLES.

Dissertation Submitted to Jawaharlal Nehru University in partial fulfilment of requirements for the award of Degree of

MASTER OF PHILOSOPHY

MARLI VANKUNGA

International Legal Studies Division
School of International Studies
Jawaharlal Nehru University
NEW DELHI - 110067

1989

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

Dissertation submitted to the Jawaharlal Nehru University in partial fulfilment of requirements for the award of the Degree of

MASTER OF PHILOSOPHY

Marli Vankunga

International Legal Studies Division
School of International Studies
Jawaharlal Nehru University
New Delhi - 110 067, India

1989

TO MY MOTHER

ACKNOWLEDGEMENT

I am indebted to many people in the completion of my dissertation. First of all, I express my most sincere thanks to my Supervisor, Dr B.S. Chimni, who has most patiently and diligently guided me throughout my work, and without whose guidance I would not have been able to complete my dissertation. My deepest appreciation goes to my teachers -- Professor R.P. Anand, Professor Rahmatullah Khan and Dr Y. Tyagi -- for their guidance. I must express my heartfelt gratitude to my class mate, Maya M. Issarani, who has been a source of encouragement and support to me throughout my work. I acknowledge my appreciation tothe staff of Sindhia House Library, Sapru House Library, the JNU Central Library, the Asian-African Legal Consultative Committee office, New Delhi, and to the Indian Council of Arbitration, for their co-operation in providing me with the necessary materials. I must also acknowledge Mrs Pahwa who has most kindly typed my dissertation. And, last but not the least, I thank my family members for their constant support throughout the course of my dissertation. My thanks to Sumathy, Satya, Ranjana and Monisha for proof-reading this work.

New Delhi,
3 January 1989.

MARLI

C_O_N_T_E_N_T_S

****
****
*****
***
*

CHAPTER I

INTRODUCTION

In the past few decades international trade has grown rapidly and is no longer confined to mere selling and buying of complicated process of sophisticated transactions involving a lot of technical know how and specialization. It has, almost as a necessary concomitant, led to the rapid growth of commercial arbitration, both nationally and internationally.[1] The use of arbitration is more common in international disputes given the unique characteristics of international transactions that make the parties to the dispute prefer to settle it through arbitration rather than going to the court of law. These include inter alia, the distance factor, barriers of language and commercial customs, and the differences in commercial laws among national legal systems.[2] International commercial arbitration is a reassuring alternative to the possibility of litigating a

---

1 Steven Lazarus and others, Resolving Business Disputes : The Potential of Commercial Arbitration (American Management Association, New York, 1965), p. 136.

2 Ibid., p. 142.

dispute in the courts of other party's country. A party may find itself at a disadvantage when it has to present a case before a foreign tribunal and often in a different language, and which may possess a different legal system. In the case of arbitration (assuming a panel of three arbitrators) there is an assurance that at least one member of the arbitral tribunal will be familiar with each of the parties own law and customs.[3] Besides, these are the well known advantages associated with the institution of arbitration.

The parties to the dispute find arbitration less costly and less time consuming than traditional litigation. Going to the court of law often leads to one or more appeals whereas an arbitration award is usually a final determination of the parties rights. The use of arbitration can also help avoid some of the procedural complexities that arise out of judicial proceedings. And with the increasing specialization of various forms of economic exchange parties to the dispute find that a lot of technical questions are involved which require experts in those fields. The parties in arbitration have substantive control over the choice of arbitration and can appoint people with specific expertise

---

3 D.J. Branson and W.M. Tupman, "Selecting an Arbitral Forum : A Guide to Cost-Effective International Arbitration", Virginia Journal of International Law, vol. 24 (1984), p. 219.

in the trade or industry in question. They are able to deal with the technical questions more efficiently and more surely than a judge whose expertise is often limited to law.[4] Furthermore, the parties to the dispute find that arbitration proceedings are mostly confidential, with the record of the award available only to the parties in contrast to most judicial proceedings which usually results in the publication of the decisions. This confidentiality is particularly desirable in business or commercial transactions and is of great value to parties dealing with sensitive commercial arrangement. Resorting to arbitration also means that parties are not bound by conventions of court rooms or the formality of positive law, and being less formal and less decisive than court proceedings it can promote means of resolving the dispute in a manner which is likely to preserve goodwill between the parties.[5]

As the volume of trade expanded, various arbitration centres were established. Efforts were made at national and international levels, specially in those countries which were

---

4 Russell Bennet Stevenson, "An Introduction to I.C.C. Arbitration", Journal of International Law and Economics, vol. 14 (1980), p. 370.

5 Stevenson, n. 4, p. 380.

historically important centres for international trade and commerce, to popularize and promote international commercial arbitration. In the 1920s the American Arbitration Association (AAA) was established for the purpose of promoting the practice of arbitration both within and outside the United States. The International Chamber of Commerce (ICC) in Paris in 1921 established a centralized arbitration tribunal open to all traders. The London Court of Arbitration, although strictly speaking a national body, plays a special role in the relations between British and foreign businessmen and was established in 1903. In 1932, the Arbitration Commission for Foreign Trade was established attached to the USSR Chamber of Commerce. There were also the Court of Arbitration of the Manchester Chamber of Commerce, the International Institute for the Unification of Private Law in Rome, the International Law Association and so forth. All these organizations worked towards the unification and popularization of commercial arbitration. In 1923, the League of Nations adopted the Geneva Protocol on Arbitration Clauses which was later supplemented by the Geneva Convention on the Execution of Foreign Arbitral Awards. The Protocol was ratified by 53 States and the Convention by 44 States. This was the first serious international effort towards the unification of the laws of arbitration and could

be considered as "a first step on the yet ill-chartered and uphill road towards the unification of the laws on arbitration".[6]

In spite of the increasing preference shown for arbitration, this need for the unification of the laws on arbitration was felt due to the many pitfalls and problems faced by the parties in settling their disputes through international commercial arbitration. There were, and remain, wide disparities among national laws on arbitration procedure. This led to difficulties since normally the laws of the country or countries concerned exercise a considerable degree of control over the arbitral procedure, the award and its enforcement. The parties are therefore often faced with the problem of 'conflict of laws' which occurs due to the criss-crossing of different legal systems. The expectations of the parties to the dispute are often frustrated because the whole arbitration process is generally subject to the mandatory provisions of the applicable law, which may be, for example, the law of the country where the arbitration agreement has been concluded, or where the seat of the arbitral tribunal is, or the place of recognition and

---

6 UN Doc A/CN.9/64 - Problems Concerning the Application and Interpretation of existing Multilateral Conventions on International Commercial Arbitration and related matters : report by Ion Nester, UNCITRAL Yearbook, vol. III, 1972, p. 219.

enforcement of arbitral award.[7] The fact that arbitration is subject to the authority of national laws or jurisdiction of the courts may tend to inject an element of uncertainty in the effectiveness of arbitration as a means for the final settlement of commercial disputes. Since different countries have different legal systems there could be occasions where the parties are not able to rely exclusively on their own agreement or on the decision of the arbitrators. This may deter them from having recourse to arbitration by the possibility that certain aspects of the arbitration process might be subject to a law which might be foreign and unknown to them.[8] The intervention of courts also tends to hinder the speed and effectiveness of arbitration process; when the losing party is allowed to appeal to the courts against the merits of the arbitral award or the courts are entitled to review the award ex officio, it results in the delay of the settlement of disputes. It also hinders arbitration by depriving the arbitrators, whose judgement was trusted by the parties, the power to render

---

7 UNCITRAL Yearbook, vol. I, 1970, p. 28.

8 Ibid., p. 30.

a final and binding award.[9] There are also occasions when the criss-crossing of legal systems leads to certain matters being governed by national laws not envisaged by the parties. This happens when the applicable law is not determined by the parties at the time of making the contract, than the applicable law depends of various factors, like the law of the country where the enforcement is sought or the law of the country where the arbitration takes place. This often results in uncertainties and complications because when an arbitration agreement is concluded, the seat of the arbitral tribunal might not be known or the place where the enforcement of the award is sought by one of the parties, may be uncertain. The location of these places depends on various factors, like the decision of the arbitral tribunal, the place of residence of its president, or the place where the party on whom enforcement of arbitral awards is sought may have transferred his assets and so forth.[10] It may happen that the arbitration agreement might not be valid under the law of the country where the arbitration is supposed to take place or an award might not be enforceable under the law of the country where the enforcement is sought. Different

---

9 Ibid., p. 31.

10 Ibid.

countries have legislative and doctrinal differences on the very nature of arbitration, the conditions for the validity of the arbitral agreement, the capacity to submit to arbitration, arbitrability, judicial checks on arbitral proceedings etc. The sovereignty of the national legal systems over arbitral procedures often interferes with the recognition of arbitral proceedings and the enforcement of foreign arbitral awards in foreign countries involving a national party.

In view of the many problems and uncertainties in the practice of arbitration in international commercial transactions the need for an uniform law on international commercial arbitration was greatly felt by the trading nations. The Geneva Protocol of 1923 and the Geneva Convention of 1927 tried to deal with some of the problems by making an attempt towards the unification of the laws of arbitration but were soon found to be not adequate, given the growing intensity of international trade after the Second World War. The countries were acutely aware of the need to develop further the facilities and rules for arbitration. This growing need and awareness of the improvement of international commercial arbitration led to the active involvement of the United Nations. Under the auspices of the United Nations Economic and Social Council

(ECOSOC) and the Economic Council for Europe (ECE) and Economic Commission for Asia and Far East (ECAFE), exhaustive studies of the current state of arbitration procedures in their respective geographical areas were conducted. An ad hoc Committee was established which submitted a report to the ECOSOC which concluded that it would be desirable "to establish a new convention which while going further than the Geneva Convention in facilitating the enforcement of foreign arbitral awards, would at the same time maintain generally recognized principles of justice and respect the sovereign right of the states".[11] Thus, on 3 May 1956, the Economic and Social Council decided to call a conference to consider the possible measures for increasing the effectiveness of arbitration in the settlement of private disputes. This conference was held in New York in 1958 and the Convention on Recognition and Enforcement of Foreign Arbitral Awards was adopted. This Convention attempts to clarify and be more useful than the Geneva Convention in the enforcement of arbitral awards and unification of arbitration procedures.

---

11 Official Records of the Economic and Social Council, Nineteenth Session, Annexes, Agenda item 14, Document E/2704/Rev. 1, p. 2.

The New York Convention supercedes the Geneva Protocol 1923 and the Geneva Convention 1927, and they cease to have effect once the contracting states become bound by the New York Convention. It provides a broader scope for the enforcement of foreign arbitral awards than the Geneva Convention, which had required that an arbitral award should be national, that there should be both personal and territorial reciprocity and that the award should become final in the country in which it was made. Under Article 1, of the New York Convention, the enforcement of awards may also be made in the territory of the State other than where the recognition and enforcement of awards is sought. The New York Convention also not only covers awards made by permanent arbitral bodies but also those made by ad hoc arbitral bodies.[12] It has made other important improvements. It contained stipulations which made it possible to arrive at a unified approach to certain problems which were solved in different countries in different ways. The New York Convention requires that the arbitration agreement should be in writing,[13] and this has been considered to be of much

---

12 UN Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (UST.2517. TIAS. No. 6997.330).

13 Ibid., Article I.

importance since the problem whether an arbitration agreement should be in writing or not has always been a controversial issue. Another valuable stipulation is that the arbitral agreement must refer to a "defined legal relationship, whether contractual or not",[14] this makes it possible to achieve a certain unity of approach to this problem which has been resolved differently by the legislation of different countries. The New York Convention lays down a completely different system or requirement for the enforcement of foreign arbitral awards from that embodied in the 1927 Geneva Conventions. It has made the arbitral award mandatory and the party against whom the enforcement is sought has to prove that there is a ground for refusal. This is a major improvement on the Geneva Convention, where, in order to get the recognition and enforcement of foreign arbitral awards, the party seeking recognition or enforcement had to prove that the condition required for the recognition had been fulfilled and that the enforcement could be authorized by a competent authority. Under Article V of the New York Convention an exhaustive list of the grounds on which the recognition and enforcement of award may be

---

14 Ibid.

refused is laid down. The party seeking refusal of enforcement of arbitral awards has to prove that (a) under the law applicable to them, the agreement must be valid or the parties have failed to agree on that point in the agreement, under the law of the country where the agreement or award was made, or (b) the party was not given proper information on the appointment of the arbitrator or arbitration proceeding or was otherwise unable to present his case, or (c) the award is of such a different nature, that it was not contemplated during the arbitration agreements, or (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or was not in accordance with the law of the country where the arbitration took place or (e) the award had not become binding on the parties and had been set aside by a competent authority. The New York Convention gives the parties greater autonomy and freedom to arrange the arbitral proceedings the way they like, and in determining the law which would govern the validity of the agreement, the composition of the arbitral authority or the arbitral procedure. The parties can refer to the existing arbitration rules or draft themselves elaborate rules for the arbitration proceedings and the appointment of arbitrators. It is only when they fail to reach an

agreement that the law of the country where the arbitration takes place will apply.

In brief, the New York Convention has been able to create a reasonably effective code for the enforcement of foreign arbitral awards. It has, however, not been adhered to by enough number of states and the benefits of whatever unification it has achieved has thus been reduced. Although it has been accepted by all the major trading nations of the world such as USA, USSR, UK, West Germany and France, at present there are only seventy-three states which have ratified or acceded to the Convention.[15] The other states, in particular the less developed countries, are hesitant to accept the Convention due to a number of issues which still need clarification under it. That is to say, the New York Convention has left some matters still unsettled and this has deterred the states from acceding to it. For instance, it has, under Article 1(3) provided for two instances where the parties may make reservations while signing or ratifying or notifying extension under Article X.[16] Firstly,

---

15 Ugar T. Kenneth, "The Enforcement of Arbitral Award under the UNCITRAL's Model Law", Columbia Journal of Transnational Law, vol. 25, no. 3 (1987), p. 722.

16 New York Convention, n. 12. Article X(1) states that "Any state may, at the time of signature, ratification,

-/-

the parties may make reservations on the basis of reciprocity and declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. Secondly, the parties may make reservations on what they consider as "commercial" under the national law of the state making such a declaration for the Convention to apply. Most of the Contracting States have made reservations under onr or both the reservation provisions and this has narrowed down the scope of application of the Convention to a considerable extent. Different countries with differing legal systems can thus have varying interpretations of the term "commercial". The Convention also does not clarify as to what matters should be considered capable of settlement by arbitration. Under Article V(2)(a) of the Convention this subject matter may be resolved under the law of the country in whose territory the recognition and enforcement is sought. But this leaves the "subject matter capable of settlement under arbitration"[17] to the provision of different national legislations. Many problems have also

---

(footnote contd.)

or accession, declare that the Convention shall extend to all or any of the territories for international relation of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the state concerned".

17 New York Convention, n. 12.

risen because of the reference in various clauses of Article V as to the country in which the award was made, since it is often difficult to ascertain the country where the award is said to be legally made, it can be also considered to have been made at the place where an arbitral tribunal has its seat, or where the arbitration proceedings are held, or where the arbitral award is signed.

The reason for the low response from the developing countries in ratifying or acceding to the New York Convention can be due, partly to historical reasons. Developing countries were generally suppliers of raw material and agricultural commodities and their bargaining powers in contracts were poor. The arbitral institutions have not been well developed in those countries and most of the international commercial arbitration proceedings were carried out under the auspices of private institutions or chambers of commerce located in the developed countries; in accordance with the rules and practices of these institutions.[18] These institutions were often not suited and geared to the needs of the parties of the developing countries and did not provide adequate procedures to protect the interest of the developing countries. Most of these arbitration institutions

---

18 Report by Mr Ion Nestor, n. 6, p. 205.

have not taken into account the distance factor and the different governmental rules and regulations and have often caused difficulties for the developing countries by stipulating short periods of time to take various steps like hearings, filing of papers and evidence providing of witnesses etc.[19] There were also not enough qualified and competent persons available as arbitrators in the developing countries and the selection of arbitrators is usually drawn heavily from the developed countries which often acts to the disadvantage of the developing countries by having "foreign arbitrators adjudicating in distant foreign country, on disputes connected with installations which are situated in developing countries, the local conditions of which they know little or nothing about".[20] These disadvantages have made the developing countries wary and hesistant in ratifying to international arbitration treaties including the New York Convention on the Recognition and Enforcement of Arbitral Awards. The New

---

19 Narayeswami Krishnamurthi, "Some thoughts on a new Convention on International Arbitration", in Jan C. Schultsz and Albert Jan Van Berg, ed., The Art of Arbitration (Kluwer, Deventer, 1985), p. 211.

20 Phiroze Irani, "International Commercial Arbitration : An Indian Prospect", in International Law and Development : Some Asian Perspectives (Sri Lanka Foundation, Colombo, 1980), p. 143.

York Convention does not provide for rules or regulations on the place of arbitration or the applicable law and regulates only the recognition and enforcement of foreign arbitral awards. Thus an agreement on the place of arbitration at the time of entering into the contract, becomes a matter of the stronger party.

With not enough states acceding to the New York Convention the need for a unified law on arbitration was again felt by the trading nations. In 1970, at the fifteenth session of the United Nations Commission on International Trade Law (UNCITRAL) several representatives expressed the opinion that uniform rules on international arbitration were desirable, and that it should be a world-wide system which should help in the unification and simplification of the national rules on the enforcement of arbitral awards, as also help in checking the judicial control over enforcement of arbitral awards. At the seventeenth session in 1972, some representatives also raised the point that the developing countries and the parties belonging to them often found themselves at a disadvantage in arbitration agreements with developed countries because the latter possessed better bargaining powers and consequently insisted on arbitration clauses

which were drawn from their own point of view, e.g., by providing the place of arbitration which would usually be in a developed country.[21]

In 1976, the UNCITRAL adopted the UNCITRAL Arbitration Rules which were initially a set of rules to be used in ad hoc arbitration but was later proved to be acceptable by arbitration institutions. The rules could be applied by countries with different legal, social and economic systems and has assisted in the development of harmonious international economic relations. Many arbitral institutions have accepted or adopted these rules. For example, the Kuala Lumpur and Cairo Regional arbitration centres established under the auspices of Asian-African Legal Consultative Committee (AALCC), the Inter-American Commercial Arbitration Commission, London Court of Arbitration, the optional clause for use in contract in the USA-USSR Trade 1977, etc. However, the UNCITRAL Arbitration Rules though widely accepted and adopted by the trading nations are merely procedural rules and its function was purely administrative. It contains no enforcement mechanisms and for international commercial arbitration to be effective,

---

21 Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17), para 77.

enforcement of the arbitral awards is one of the fundamental necessities. At the same time, it must be recognized that along with the various regional and scientific institutions on commercial arbitration, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Arbitral Rules of 1976, have greatly contributed to the unification of arbitration in the international commercial sphere. But, to reiterate, they have not been able to meet a number of problems still prevalent in international commercial arbitration. The mandatory provisions of the laws applicable to arbitration often caused frustration to the expectations of the parties to arbitration. The interference of the court on the merit of the case was also greatly undesired by the parties. There were also problems which arose due to the non-mandatory or from the non-existence of provisions in cases where the parties were not able to agree on certain procedural points or when the applicable law contained no provision to settle certain issues. These problems were mainly due to the fact that different states have different laws on arbitration and this divergence in the legal systems has created difficulties in the settlement of disputes through arbitration.

There was thus a general feeling among the trading nations that UNCITRAL should come up with a new project

which would meet these problems and concerns faced in international commercial arbitration. It was felt that UNCITRAL should prepare a model law which would unify and harmonize the various national laws on arbitration. The UNCITRAL, in 1979, took up this challenge in response to a recommendation of the AALCC to clarify certain issues that were put forward by the committee at its 10th session in Vienna in 1979.[22]

Objective and Scope

The objective of this study on the Model Law is to examine whether the Model Law has succeeded in meeting the divergent problems and 'pitfalls' in the field of international commercial arbitration. It shall seek to assess whether the Model Law will be an effective instrument in minimizing possible conflicts and foster fairness and equal treatment of the parties in the settlement of their disputes through arbitration. An attempt shall also be made to evaluate whether the Model Law has been able to meet the concerns expressed by the AALCC in the context of the interpretation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

---

22 Ibid.

The scheme of the study is as follows. The immediately following chapter deals with the genesis and the drafting of the Model Law. It shall mostly be a narration of the procedure which was followed for the drafting of the Model Law, though it shall also briefly enumerate the concerns and principles underlying the project. Chapter III shall take a critical look at some of the more important provisions of the Model Law. These include, inter alia, the definition of the terms "international", "commercial", "arbitration"; the stress placed on the autonomy of parties and their fair and equal treatment; the provisions which delimit the control and assistance of courts; and the provisions relating to the recognition and enforcement of awards. The concluding chapter shall enumerate the response of some of the trading nations towards the adoption of the Model Law and see how the Model Law could assist these states, specially the developing states in establishing a modern arbitration regime.

This study shall not delve into each article of the Model Law, nor will it deal in detail with the debates that took place while drafting the articles. It shall also not deal with any specific national legislation and its

possible interaction with the Model Law. Its primary aim is to highlight some of the more important provisions in the Model Law which seek to meet the well known problems and difficulties in the field of international commercial arbitration.

....

CHAPTER II

GENESIS AND DRAFTING OF UNCITRAL MODEL LAW : AN OVERVIEW

The UNCITRAL started its task towards the drafting of the much needed model law on international commercial arbitration at the challenge of the Asian-African Legal Consultative Committee (AALCC) to clarify certain issues on the recognition and enforcement of foreign arbitral awards in the 1958 New York Convention. The AALCC had suggested that a protocol to the Convention could help in the clarification of the issues that were identified. The following issues were raised by the AALCC:

> (a) "where the parties have themselves chosen the arbitration rules for settling their disputes, the arbitration proceeding should be conducted pursuant to those rules notwithstanding provisions to the contrary in the law applicable to the arbitral procedure and the award rendered should be recognised and enforced by the contracting States to the 1958 New York Convention";
>
> (b) "where an arbitral award has been rendered under procedure which operates unfairly against a party, recognition and enforcement may be refused";

> (c) "where a governmental agency is a party to a commercial transaction and it has entered in respect of that transaction into an arbitration agreement, it should not be able to invoke sovereign immunity in respect of an arbitration commercial pursuant to that agreement." (1)

The UNCITRAL at its tenth session in 1979 requested the Security General to prepare studies on the issues submitted by the AALCC with the consultation of the AALCC and other interested bodies or organizations. On the basis of the study of the Secretary-General on the application and interpretation of the 1958 New York Convention where a survey of more than 100 court cases was done,[2] the Commission concluded that despite some minor deficiencies, the Convention had satisfactorily met the general purpose for which it had been adopted and that it was not necessary to prepare a protocol to it, nor was it advisable to amend it.[3] There was, however, an unanimous view among the participants of the consultative meeting that a uniform standard of arbitration procedure was desirable, which would

---

1 "International Commercial Arbitration; Note by the Secretary General" (UN Document AOCN.9/127)".

2 UN Document A/CN.9/168. Study of Secretary-General on the application and interpretation of 1958. New York Convention, UNCITRAL Yearbook, 1979, part two, Chap III, Sec C, vol. X.

3 Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17), para 47.

also take into account the concerns expressed in the AALCC recommendations. This could be achieved by the preparation of a model law on commercial arbitration.[4]

The major reason for the proposal of a model law was that most national laws on arbitration were drafted to meet the needs of domestic arbitration and many of these laws needed revision. The model law would take into account the specific features of international commercial arbitration and the modern arbitration practice.[5] The need for a greater uniformity of national laws on arbitration was also pointed out by Mr. Ion Nestor (Romania), as a Special Rapporteur on the problems concerning the application and interpretation of the existing conventions on international commercial arbitration.[6] In order to clarify his points on the problems faced in the practice of international commercial arbitration, the Special Rapporteur made references to the judicial practices of countries which were parties to the conventions on arbitration. The report was a detailed one on the problems

---

4 Ibid.

5 Ibid.

6 UN Doc. A/CN.9/64, Problems concerning the application and interpretation of existing multilateral Conventions on international commercial arbitration and related matters : report by Ion Nestor.

concerning arbitration agreement, arbitral procedure, arbitral awards and also on problems concerning the enforcement of foreign arbitral awards. Based on this extensive study, the Special Rapporteur had submitted certain steps which might be taken to overcome the problems and this could be done under the auspices of UNCITRAL by preparing a model law.

The AALCC had also pointed out that the divergencies between the frequently used arbitration rules and national laws tended to create problems and uncertainties. There were some national laws, for example, which restricted the power of the parties to determine the applicable law and some which did not recognise the competence of the arbitration tribunal to decide on its own jurisdiction or they provided for jurisdiction over the composition of the arbitral tribunal and sometimes even over the application of the substantive law. There were laws which established certain requirements like the nationality of the arbitrators or required that the award be accompanied by a statement of reasons irrespective of any agreement by the party to the contrary. It was suggested that if the model law was implemented at the national level it would solve many of the problems found in the use of international commercial

arbitration. Though establishing an universal standard of fairness, many of the difficulties detected in the survey of the application and interpretation of the 1958 New York Convention, and discussed briefly in the previous chapter, would also be solved. Thus the Commission decided to start its work on a model law on international commercial arbitration which would take into account the provisions of the 1958 New York Convention and of the 1976 UNCITRAL Arbitration Rules.

The Secretary-General prepared a report in which arbitration experts from more than 50 states of all regions and legal and economic systems took part and more than 15 international organizations participated.[8] It was thus prepared after extensive studies and discussions, and contained the possible features of a model law on international commercial arbitration. On the basis of this report the Commission entrusted in 1981 to its Working Group on International Contract Practices the task of preparing the draft of a model law taking into account the

---

7 UN Doc. A/CN.9/169. Study of the General Assembly on the Application and Interpretation of the New York Convention.

8 UNCITRAL Yearbook 1979, part II, Chapter III, Sec. D.

1958 New York Convention and the 1976 Arbitration Rules, both of which were already widely recognized and accepted by the trading nations. The Working Group consisted of representatives of thirty-six member states. There were also representatives of other interested states and public and private international institutions which acted as observers.

The report which was prepared by the Secretary General was divided into three parts: (a) the concerns and problems encountered in international commercial arbitration, (b) the principles and purposes of a model law, and (c) an identification of the issues possibly to be dealt with.[9] The general concerns and problems faced by the parties in international commercial arbitration were that the expectations of the parties were often frustrated due to the conflicting mandatory provisions of the applicable law which would, for example, restrict the freedom of the parties to submit further disputes to arbitration or on the selection or appointment of arbitrators. The parties also felt restricted on the choice of the applicable law, both

---

9 Ivan I. Kavass and A. Livak, UNCITRAL Model Law on International Commercial Arbitration - A Legislative History (Kluwer Law and Taxation Publishers, New York, 1985); also in UN Doc. A/CN.9 n. 20.

on the law governing arbitral procedure and the law applicable to the substance of the disputes. The mandatory provisions also restricted the arbitral tribunal to decide on its own competence or to conduct the arbitral proceeding as it had deemed appropriate taking into account the wishes of the parties. It was because of these restrictions found in the mandatory provisions of law that the AALCC had come forward with the recommendation that once the parties had adopted rules for the conduct of arbitration between them, the rules should be followed notwithstanding provisions to the contrary in the municipal laws and that the award should be enforced by all the Contracting States to the 1958 New York Convention. The Commission however pointed out this does not mean that all mandatory provisions in the field of arbitration should be removed. As pointed out by the AALCC, in cases where the arbitral award has been rendered through procedures which were unfair against the other party, such enforcement of awards should be refused. This could be done by the courts in the country where the enforcement of the arbitral awards is sought. The court may also ensure that there is no denial of justice and lack of due process of law. Another source of concern, as noted earlier, was the non-mandatory provisions or lack of relevant provisions in the applicable law which often

resulted in unexpected legal consequences. Problems often arose when there were certain rules in the applicable law of which the parties were not aware of and may not have any contrary stipulation. It could also happen that the parties to the dispute were not been able to agree on a certain procedural point and the applicable law did not contain any provision settling the point. In such cases the lack of a supplementary rule created uncertainties and controversies which proved to be detrimental to the smooth functioning of the arbitration proceedings.

The above problems which arose due to the mandatory or non-mandatory provisions or due to the lack of relevant provisions were essentially because a given national law dealt only with certain aspects of arbitration or that it was out-dated and needed revision, or that it had been drafted to meet only the needs of domestic arbitration which laid emphasis on its local peculiarities or other reasons which made it inadequate for modern international arbitration practice. The problem became even more acute when the applicable law did not have connection with the dispute in hand due to the fact that the applicable law was chosen simply for reasons of convenience like it was the residence of the sole arbitrator or the chairman of a tribunal. The parties

were also often confronted with procedures and provisions with which they were not familiar because there existed wide disparities among the national laws on arbitration. And even where certain uniformity had been achieved by widely accepted multilateral conventions like the New York Convention 1958, unexpected different results were reached due to the divergent interpretations of its provisions by different national legislations which created confusion and uncertainties.

The second part of the report dealt with the general principles and purposes of the model law. The main purpose for the preparation of the model law was to facilitate international commercial arbitration and to ensure its proper functioning and recognition. This could be achieved only if the model law could meet the problems and difficulties encountered in the use of arbitration in international commercial arbitration. The report noted that the model law should be based on the principle of freedom of the parties to conduct the proper functioning of the arbitration procedure according to their expectations, so that they would freely submit their disputes to arbitration. Further, it should enable the parties to take full advantage of the rules and policies geared to modern

international arbitration practice, as for example, those embodied in the UNCITRAL Arbitration Rules. This however did not mean that the model law should grant the parties absolute freedom in the conduct of the arbitration procedures. The model law, it was noted, should provide a "constitutional framework" which would recognize the free will of the parties and the validity and effect of these agreements based on this free will. It should also serve as "supplementary rules" when the need arises. It was felt that there should be a certain link between the arbitration proceedings, including the award, and a national law which would give recognition and effect to arbitration agreements and awards and would provide for adequate assistance by the courts. This would avoid the problem of a "floating" or "stateless" award which could arise due to the lack of jurisdiction or "nationality" of the award in the state where the award was made.[10] The model law was an attempt to strike a balance between the interest of the parties to freely determine the procedure to be followed and the interest of the national legal systems expected to give recognition and effect. This would involve the demarcation

---

10 "ILA : Delocalized Arbitration and the New York Convention", Journal of World Trade Law, vol. 17, no. 2 (1983-84), pp. 184-5.

of the scope of possible intervention and supervision by the courts. While drafting the model Law the needs of modern international practice and the principles of fairness and equality were to be the guiding factors. It was to strive for a set of rules which would be comprehensive and as complete as possible and could also include matter which could possibly be regulated in other branches of law since their inclusion into the model law would allow the adoption of uniform answers adapted to international type of arbitration. The model would also be of assistance to lawyers, arbitrators and businessmen in finding out the legal rules of foreign systems. It was also found desirable that the law on international commercial arbitration be given priority over other laws unless stated otherwise in the model law itself.

The third part of the report identified the issues that were to be dealt with in the model Law. The issues that were identified were the need to define the terms "international", "commercial" and "arbitration", and issues like the validity and contents of the arbitration agreement, the selection of the arbitrators, the arbitral procedures to be followed, enforcement and forms of award, law

applicable to the substance of the dispute and the means of recourse against the arbitral award.

Based on this preparatory work done by the Secretary General, the Working Group took up the enormous challenge to prepare a draft model law on international commercial arbitration. The Working Group consisted of the following state members of the Commission: Austria, Czechoslovakia, France, Ghana, Guatemala, Hungary, India, Japan, Kenya, Philippines, Sierra Leone, Trinidad and Tobago, USSR, UK, North Ireland and USA. It first had a preliminary exchange of views on all the issues and possible features of a model law and only after that turned to the detailed work of drafting each article. This approach enabled the Working Group to adopt a common basis as regards the principles, policies and direction of the model law. This also helped them to get a better, though tentative idea of the scope and contents of the law as a whole. The Working Group found that many detailed issues were so closely connected with each other that the solution of one issue often depended on the position taken with regard to the others. The Working Group had series of discussions where exchange of views were held and this helped to reduce the difficulty faced due to the closely connected issues. When

it came to deciding a particular question, its attitude and effect towards the other point or issues which are relevant to it was thus ascertained beforehand, at least on tentative basis.[11]

The Working Group commenced its work in 1981 and started, as already indicated, by discussing a series of questions designed to establish the basic features of a draft model law at its third session. At its fourth session, it considered the draft articles prepared by the secretariat and reviewed them,[12] at its fifth[13] and sixth sessions it redrafted and revised the articles of Model Law.[14] At its seventh session, the Working Group considered a composite draft text, and established corresponding language version in six different languages. The draft Model Law was then adopted by the Working Group.[15] This

---

11 Report of the Working Group on International Contract Practices on the work of its third session (New York, 16-28 February 1982), UN A/CN.9/216.

12 Ibid.

13 UN Doc. A/CN.9/232. Report of the Working Group on International Contract Practices on its work of its fourth session.

14 UN Doc. A/CN.9/233. Report of the Working Group on International Contract Practices on its work of its fifth session.

15 UN Doc. A/CN.9/245. Report of the Working Group on International Contract Practices on its work of its sixth session.

draft model law was submitted to the Commission at its eighteenth session on 3 June 1985 where discussions were held on individual articles.[16] A brief account of some of the discussions that took place during the drafting of the model law regarding some of the more relevant provisions would be appropriate at this point. The Commission had at the outset of drafting the Model Law decided that the model law should apply to "international commercial arbitration". However, there were divergent views expressed on the definition of the terms "international", "commercial" and "arbitration". These have been discussed in the next chapter. Concerning the scope of court intervention, the text of Article 5 of the Model Law as considered by the Commission stated that "in matters governed by the law, no court shall intervene except where so provided in this law." Two main objections were put forward against this provision. The first objection was that this issue which was of fundamental importance did not give a clear answer to the question whether in a given situation court intervention was available or excluded. The second objection was that when this article was read with the other provisions of the model law, it presented an unacceptably restrictive scope of judicial control and that it was to the advantage of

---

16 United Nations Commission on International Trade Law Yearbook, vol. 16, 1985, p. 7.

businessmen who engaged in international commercial arbitration to have access to the courts while the arbitration was still in process in order to stop an abuse of arbitral procedure. This rigid limitation of the authority of the courts to interfere in the arbitral proceedings might even be in the contrary to the constitution of some of the states by having the arbitrators interfere in state matters and finally, even if the authority of the courts to intervene in supervision of an arbitration agreement may be limited, the courts should be given more power to act in aid of the arbitration.

In answer to the first problem it was pointed out that the problem was common in all texts of unification of law and since no text could be complete in every respect, what was not governed by it had to be governed by the rules of domestic law. And the provisions under the model law would not cause too difficult a problem since the answers could be found by using the normal rules of statutory interpretation, taking into account the principles underlying the text of the model law. In answering the second objection it was pointed out that resort to intervention by a court during the arbitral proceedings was often used only as a delaying tactic and was more often used only as a source of abuse of the

arbitral proceedings and it was a protection against abuse. The purpose of article 5 was to achieve certainty as to the maximum extent of judicial intervention, and all the instances of court intervention have been listed by the drafters of the model law. Thus, if the need for such an intervention arises it should be expressed in the model law. It was also recognized by the drafters of the model law that although it was hoped that states would adopt the law as it was drafted, since it was a model law and not a convention, any state which may have constitutional problems could extend the scope of judicial intervention when it adopted the law without violating international obligation. The Commission thus adopted the article in its present form.

Article 6 of the model law lays down the instances when the court would intervene and it was agreed that a state would not be compelled to designate merely one court but would be left free to entrust a number of its courts to perform those functions. A suggestion was made to recognize party autonomy regarding the choice of the forum in those cases where more than one court was competent to perform the functions of arbitration assistance and supervision. The Commission did not accept

this suggestion since the choice of forum within a given state fell in the national domain of regulating the organization of and access to its courts. Another suggestion put forward was to resolve any possible positive conflict of court competence by according priority to the court first seized with the matter. This issue was also left to the competence of the courts in different states concerned as it was felt that it could not be settled affectively by the Model Law.

The Working Group struggled with the issues dealt with under Article 19 which deals with the competence of the arbitral tribunal. First, the Working Group approved a provision stating unambiguously that the arbitral tribunal has the power to rule on its own jurisdiction including the power to rule on any objections with respect to the existence of an arbitration agreement. For the purpose of this provision, and arbitration clause should be treated as an agreement independent of all other terms of the contract, and thus, the invalidity of the main contract does not ipso facto jure invalidate the arbitration clause. These provisions are taken from the UNCITRAL Arbitration Rules concerning the separability

and autonomy of the arbitration agreement. The Working Group had considered the possibility of including provisions in the Model Law for judicial enforcement of arbitral interim measures, but decided against it and instead to leave it to the procedural law of each state. Extensive discussions were also held on the inclusion of the provisions on the Recognition and Enforcement of Arbitral Awards.--Articles 35 and 36 -- which are almost identical to the New York Convention. These are noted in the next chapter.

The Commission after having considered the text of the draft model law decided to adopt the UNCITRAL Model Law on International Commercial Arbitration as it appears in Annex I to this dissertation. The Commission invited the General Assembly to recommend to states that they should consider the model law when they enact or revise their laws to meet the current needs of international commercial arbitration. The Commission also requested the Secretary-General to send the text of the Model Law to Governments and to arbitral institutions and other interested bodies such as chamber of commerce. The General Assembly thus recommended that "all states give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of

the law of arbitral procedures and the specific needs of international commercial practices".[17] The next chapter shall give an account of the more important provisions in the Model Law which have assisted in clarifying the problems in international commercial arbitration.

---

17 GAOR, session 44, plen. mtg. 112.

CHAPTER III

SCOPE AND EFFECTIVENESS OF THE MODEL LAW

The final draft of the UNCITRAL Model Law[1] which was ultimately produced by the Commission in 1985 was, as would be sufficiently clear by now, mainly in response to the widespread problems arising from the great divergencies in the national laws regulating international commercial arbitration. It involved the creation of uniform rules to eliminate the local peculiarities which made it impossible to achieve international consistency.[2] The promulgation of the Model Law was also, it is perhaps worth noting, consistent with UNCITRAL's general mandate "to promote the progressive harmonization and unification of the law of international trade".[3]

The Model Law, it may be stressed at the outset, is not an international convention which has to be wholly

---

1 UNCITRAL Model Law on International Commercial Arbitration, UN Doc. A/40/17, Annex 1, for the Text.

2 John Honnold, "The United Nations Commission on International Trade Law : Mission and Methods", American Journal of Comparative Law, vol. 27, 1979, p.201.

3 Establishment of UNCITRAL UN Doc. A/6594 (1966).

rejected. Instead, it is a comprehensive set of rules which may be adopted by the countries as it is, or with certain modifications and adaptations. The Working Group while drafting the Model Law had taken into account the provisions of the UNCITRAL Arbitration Rules[4] and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[5] Many of the provisions of the Model Law are borrowed from the Arbitration Rules and the 1958 New York Convention to ensure its acceptability since the New York Convention and the Arbitration Rules were already widely accepted by trading nations. The Model Law would be of assistance to those countries which do not have any legislation in force at present to adopt a legal framework in the field of arbitration which would be comprehensive and satisfactory. It would also be of assistance to those countries whose arbitration rules are fragmentary, outdated and ill-suited to the needs of modern arbitration practice, as well as provide a useful basis on which national arbitral legislation could be pattenred in future.[6] The Model

---

4 UN Doc. A/31/17, Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (Vienna, 3-21 June 1985).

5 UN Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (UST.2517 TIAS No. 6997. 330 UNST. 3).

6 Establishment of UNCITRAL, n. 3.

has eight chapters and contains thirty-six articles which deal with rules governing the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the conduct of arbitral proceedings and the making of and recourse against arbitral awards.[7] This chapter shall critically examine some of the more important provisions of the Model Law. It shall also examine the extent to which the Model Law has assisted in clarifying the problems expressed by the Asian-African Legal Consultative Committee in the interpretation and application of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[8]

A. SCOPE OF APPLICATION

The Model Law has been given a wide scope of application to facilitate the incorporation of its text into the national legislation of all states. Article (1) of the Model Law states that the Model Law "applies to international commercial arbitration". To understand the substantive scope of application of the Model Law the

---

7 UNCITRAL Model Law, n. 1.

8 Study on the interpretation and application of the New York Convention : Note of the Secretary General on further work in respect of International Commercial Arbitration, UN Doc (A/C N.9/169), para 6.

terms "international", "commercial" and "arbitration" have to be understood. The term "arbitration" has not been defined but the Working Group at the time of drafting the Model Law agreed that it was to include all types of arbitration, both ad hoc and institutional arbitration. The only condition laid down is that it should be based on voluntary agreement of the parties and does not cover compulsory arbitration. It also does not include the various types of so-called "free arbitration" such as the Dutch bindend advies, the German Schiedsgutachten or the Italian arbitrato irrituale.[9] The term "commercial" has not been defined either, and though a clear-cut definition would have been desirable, the Working Group could not find a definition which could draw a precise line between commercial and non-commercial relationships. The Model Law is intended to cover trade and commerce in the broadest possible sense and it was felt that a definition of the term could narrow down its scope. It was however thought impractical to leave the matter to individual states since different state legislations would have different

---

9 Analytical Commentary on Draft Text of the Model Law on International Commercial Arbitration. Report of Secretary General, UN Doc. A/CN.9/264, para 16.

interpretations for the term "commercial".[10] As an intermediate solution a footnote was annexed to Article I which would serve as a guide to the interpretation of the term "commercial". The footnote may or may not be reproduced in the national enactment of the Model Law since such a legislative technique is not used in many legal systems. It is added merely to provide some guidance in the application and interpretation of the term "this law". The footnote provides for a wide interpretation of the term "commercial" and gives a long list of commercial relationships which is expressly not exhaustive. Transactions such as supply of electric energy, transport of liquified gas via pipeline and even transactions such as claims for damages arising in a commercial context are also covered by the term "commercial". Not covered are matters in labour or employment, dispute and ordinary consumer claims.[11] In sum, the footnote provides guidance for an autonomous interpretation of the term "commercial". Without the guidelines provided by the Model Law, the term "commercial" was susceptible to varying interpretations in different jurisdictions and in this sense it represented a useful step.

---

10 Ibid., para 15.

11 Ibid., para 18.

An example of a narrow interpretation of the term "commercial" appears in an Indian case[12] concerning the enforcement of an arbitral agreement subject to the New York Convention 1958. India has ratified the 1958 New York Convention and the Foreign Awards (Recognition and Enforcement) Act 1961, implements the 1958 New York Convention. Article 1(3) of the 1958 New York Convention declares that the Convention will apply on differences "which are considered as commercial under the national law of the state making such a declaration".[13] In this case the dispute arose between India and the United States, the two parties to the contract.[14] The Indian party tried to sue the US party in an Indian court over a dispute involving transfer of technology. The defendant i.e. the US party, attempted to stay the court proceedings and to initiate arbitration in accordance with an arbitration clause in the contract. The Bombay High Court denied the stay and continued the proceedings although the contract to the dispute was of commercial nature. However, the Court held

---

12 "Indian Organic Chemical Ltd. v. Chemtex Fibres Inc.", All India Report (Bombay), 1978, pp. 108-15.

13 UN Convention on Recognition and Enforcement of Foreign Arbitral Awards, n. 5.

14 "Indian Organic Chemical Ltd. v. Chemtex Fibres Inc.", n. 12, pp. 108-15.

that the contract must be commercial "by virtue of a provision of law or an operative legal principle in force in India" in order for it to be within the scope of New York Convention, 1958. The defendant had not been able to take the help of any provision or any operative legal principle or any operative legal principle in India to stay the court action.[15] Thus, by removing certain subjects from the realm of "commercial disputes", a state may obstruct the enforcement of awards made by foreign arbitral tribunals. In order to avoid this varied and narrow interpretation of the term "commercial" the Model Law does not define the term, but gives it a wide scope with a footnote for guidance.

The definition of the term "international" was another difficult and controversial issue. The Model Law was designed to establish a special regime for international cases where at present the disparity between the national laws created difficulties and adversely affected the functioning of the arbitral process. During the preparation of the draft Model Law in order to reach a unanimous decision as to what would constitute an international arbitration the Working Group proposed various tests of

---

15 Ibid.

"internationality". The Group started with the basic test adopted in the 1980 Vienna Convention on International Sale of Goods,[16] that the parties have their places of business in different states. However, it was argued that the test was unduly narrow and there was some sentiment in favour of a general formula, such as those "involving international commercial interest" adopted in France in their 1981 legislation on international commercial arbitration. This formula was opposed by some of the delegates who pointed out that it was too vague and could be under a serious risk of divergent interpretation of the language by the courts of different states. The Working Group as a compromise decided to broaden the standard of the Vienna Convention by adding as elements of internationality other objective criteria, such as place of performance, locale of the subject matter of the dispute and site of arbitration.[17] The solution is thus presented in Article 1 para 3 of the Model Law which starts with a rather precise criterion in subpara (a) which requires that the parties to an arbitration agreement have their place of business in

---

16 Conference on Contract for the International Sale of Goods. UN Doc. A/CONF.97/18, Annex 1.

17 UN Doc. A/CN.9/216. Report of the Secretary General on its first session on UNCITRAL Model Law.

different states, and widens its scope in sub-para (b) where the place of arbitration or the place where a substantial part of the obligations of commercial relationships is performed or the place with which the subject-matter of the dispute is most closely related are situated in a different place from where the parties have their place of business. Its scope is further widened under sub-para (c) which requires that the subject matter of the arbitration agreement is related to more than one state.

The basic criteria in sub-para (a) is that the parties have their places of business in different states. The determining factor is the location of business. Other characteristics of a party such as the nationality of the parties (i.e. the parties should be of different nationalities) or place of incorporation or registration are not determinative. Sub-para (b) requires that either the place of arbitration, or the place where substantial portion of the obligation of the underlying commercial relationships is to be performed, is outside the state in which the parties have their places of business or the subject matter of the dispute is most closely connected with a state other than the one where the arbitration takes place. The places listed in sub-para (b) relate either to

arbitration or the subject matter of the relationship or the dispute. The first relevant place is the place of arbitration, as the only arbitration-related criterion. Thus, the international link would not be established by any other arbitration related element such as the appointment of foreign arbitrator or choice of foreign procedural law. The final criterion, laid down in sub-para (c), is that the subject matter of the arbitration is related to more than one state. This has given the test of internationality a very wide scope and is designed to cover all worthy cases not covered by sub-paras (a) and (b). In determining the place of business Article 1 para (3) states that it is the one which has the closest relationship to the arbitration agreement. The location of the principal place of business or head-office is irrelevant but the criteria of closest connection was adopted because it was thought to reflect better the expectations of the parties and in particular for the sake of consistency with the 1980 Vienna Convention for International Sale of Goods.[18]

Assuming that the requirements of an "international" and "commercial" characteristics are met, the Model Law applies if the place of arbitration is in the territory

---

18 Analytical Commentary by Secretary General, n. 9.

of the adopting state. The only exception in this respect are Article 8 which obliges the courts to respect arbitration agreements, Article 9 which makes clear that criterion measures of protection are not objectionable per se before or during arbitral proceedings and articles 35 and 36 on recognition and enforcement of awards wherever rendered.[19] These provisions are intended to cover arbitration agreements or awards without regard to the place of arbitration or any choice of procedural law.

B. COURT INTERVENTION

Article 5 of the Model Law deals with the complex issue of the role of the courts with regards to the arbitral process. It states that "in matters governed by this Law, no court shall intervene except where so provided in this Law". This provision does not negate court intervention but merely requires the instances of court involvement in the Model Law be listed. This procedure will help exclude any residual power resting with the courts. The parties and the arbitrators could then be certain about the

---

19 Jan Paulson, "Report on the UNCITRAL Model Law on International Commercial Arbitration adopted in Vienna on 21st June 1985". Arbitration (London), vol. 52, n. 2, May 1986, p. 81.

instances in which court supervision or assistance is to be expected, and this would be a great extent help to smoothen the process of international commercial arbitration. The central idea here is that foreigners should not be surprised by the local particularities of a place which happens to have been chosen as the place for international arbitration. If the Model Law provisions were to be adopted then such a party would be in a position to know the interface between the arbitration and the local legal system without difficulty.[20] The instances in which the Model Law envisages judicial assistance are inter alia: in appointing an arbitrator (Article 11), in deciding on any challenge of an arbitrator (Article 13), or causes for terminating his mandate (Article 14), and in taking of evidence (Article 27). The court may also exercise control in proceedings for setting aside an exclusive recourse against an arbitral award [Article 84(2)]. These functions of the court are specified under Article 6. It calls upon each state adopting the Model Law to designate the particular court or courts which would perform certain functions of arbitration assistance and supervision. The Model Law also envisages court assistance in the following

---

20 Ibid., p. 85.

instances where resort may be had to other courts - request for interim measures of protection (Article 9), assistance in taking evidence (Article 27) and recognition and enforcement of awards (Articles 35 and 36).

C. CONDUCT OF ARBITRAL PROCEEDINGS : AUTONOMY OF PARTIES

Another important provision of the Model Law relates to the conduct of the arbitral proceedings. Article 19 determines the rules of procedure and goes a long way in establishing procedural autonomy by recognizing freedom of the parties to lay down the rules of procedure (para 1) and by granting the arbitral tribunal, failing agreement of the parties, wide discretion as to how to conduct the proceedings (para 2), but subject to fundamental principles of fairness. Article 19 thus provides a liberal framework to suit the great variety of needs and circumstances of international cases, unimpeded by local peculiarities and traditional standards which may be found in the existing domestic law of the place. Para (1) guarantees the freedom of the parties to determine the rules on how to implement these methods of dispute settlement. The parties are able to tailor the rules according to their specific needs and wishes. The parties may thus take full advantage of the services of

permanent arbitral institutions or of established arbitration practices of trade and associations. They may choose those features familiar to them and even opt for a procedure which is anchored in a particular legal system. And if a law on civil procedure is chosen then such a law would be applicable by virtue of their choice and not by virtue of being the national law. The freedom of the parties is subject only to the provisions of the Model Law, that is, to its mandatory provisions, the most fundamental provision being that the basic notions of fairness be followed.[21]

If the parties are not able to agree on the procedure to be followed, the arbitral tribunal may conduct the arbitration in a manner which it considers as appropriate and is subjected only to the provisions of the Model Law. The arbitral tribunal thus has considerable discretionary powers and is limited from exercising them only if the parties have laid down detailed and stringent rules of procedure. The arbitrators are free to adopt procedural features which are familiar, or at least acceptable to the parties. If the parties have different legal systems then a mixed procedure may be adopted by adopting the suitable features from the different legal systems to be used.

---

21 Analytical Commentary on Draft Text of UNCITRAL Model Law, n. 9.

Paragraph 3 of Article 19 provides for the basic notions of fairness by stating that the parties be treated with equality and that each party should be given full opportunity to present his case.[22] This wide discretionary power given to the tribunal has made the Model Law attractive for those countries with different legal systems.

Under Article 20, if the parties fail to agree on the choice of place of arbitration, the arbitral tribunal may determine the place of arbitration. The parties may also employ a third party to determine the place of arbitration as provided under Article 2(c) which lays down that the parties are free to determine certain issues which include the right of the parties to authorize a third party to make the determination. The place of arbitration is an important factor since the Model Law applies if the place of arbitration is in the territory of the adopting state and by virtue of Article 31(3), the place of arbitration is the place of origin of the award and as such relevent in the context of recognition or enforcement proceedings and specially in determining, for the purposes of Article 36(1)(a)(v), where the arbitral award may be refused if

---

22 Ibid.

the party proves that the award has been set aside or suspended by a court of the country in which, or under the law of which that award was made. Thus on failing to agree on the place of arbitration by the parties the arbitration tribunal can be trusted to select a venue whose national laws would operate fairly on both the parties. Arbitration rests on confidence of the parties in the laws of the place where arbitration takes place and when parties of different nationalities with differing national laws are involved in an arbitration agreement the parties often have misgivings about the laws of the other party. This had often resulted in the option of the parties to select a venue in a country where neither of the parties are really familiar with the laws of the land. This had often proved harmful to the effectiveness of arbitration procedure.

Article 20 para (2) also provides that the arbitral tribunal may meet at any place unless otherwise agreed by the parties; for consultation among its members, for hearing witnesses, or for inspection of goods, other property or documents. This could help the parties to lessen or balance the parties own expenses by scheduling some of the meetings at alternative places. This provision could be useful in contracts between developed countries like UK, USA and Commonwealth countries which are both parties to the Geneva

Protocol and the 1958 New York Convention, where the Commonwealth countries (for example, Indian parties) are at a disadvantage because of the high cost of conducting the proceedings in such countries and obtaining necessary permissions for travel and stay abroad etc.[23]

D. RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

At the time of drafting the Model Law it had been concluded by the working group that the New York Convention on Recognition and Enforcement of Arbitral Awards, in spite of there being problems and uncertainties in its interpretation, had provided a "generally satisfactory means of enforcing arbitral awards".[24] However, it was a fact that a great number of states had not ratified or acceded to the Convention. At present only seventy-three states have ratified it and there is a relatively low incidence of ratification from the lesser developed countries.[25] This

---

23 Phiroze Irani, "International Commercial Arbitration - And Indian Prospect", International Law and Development : Some Asian Perspectives (Sri Lanka Foundation, Colombo, 1980), p. 138.

24 GAOR, session 34, supplement no. 17 (A/34/17), para 47.

25 Kenneth T. Ungar, "The Enforcement of Arbitral Awards under UNCITRAL's Model Law on International Commercial Arbitration", Columbia Journal of Transnational Law, vol. 3, no. 25 (1987), p. 722.

is because, as stated in the previous chapter, of the many issues that are still in need of clarification under the Convention. The Model Law has attempted to meet the various problems and uncertainties found in the interpretation of the New York Convention. This section shall seek to examine the problems encountered in the New York Convention and how the Model Law has helped in clarifying the same. In order to do this a discussion is undertaken on the (i) scope of application of the Convention, (ii) enforcibility of the arbitral agreement, and (iii) its enforcement mechanism and the Model Law solutions.

(i) Scope of Application

The New York Convention applies only to recognition and enforcement of foreign arbitral awards. The Convention applies to two categories of cases.[26] Firstly, it applies to all states except the state in whose territory

---

26 New York Convention, Article I(1) states that "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement is sought."

the award is made. The determination of the place where the award is said to have been made has caused some difficulties since different criteria can be used to determine the site of the award -- like the place where the arbitration proceedings took place, or place of signing the award or the seat of the arbitral institution. The award is thus thought to be foreign under the Convention based on the country in which the arbitration takes place. Secondly, the Convention applies to arbitral awards which are not considered as domestic awards in the state where there recognition and enforcement is sought. The Convention defines "domestic" award by omission. All those awards which are not foreign under either of the two tests mentioned above are considered as domestic awards, which are regulated by the municipal law of the enforcing state. Situations could arise where the state of enforcement under its own laws considers an award, though rendered outside its territory to be a domestic award or as an award not enforceable as a foreign award. For example, the United States legislation, in order to implement the 1958 New York Convention provides that an agreement or award between the citizens of United States shall be deemed not to fall under the Convention, unless the transaction in question has a reasonable nexus with foreign states.[27]

---

27 D.S. Mohil, "Enforcement of Foreign Arbitral Awards :

The Model Law in order to avoid these uncertainties treaties the foreign and domestic awards through a single rule. Under Article 1, para (3) of the Model Law, as already seen, an arbitration is "international" if (1) the parties have there place of business in different states, or (2) either the place of arbitration or (3) the place where a substantial portion of obligations of the underlying commercial relationships to be performed is outside the state in which the parties have their places of business or the subject-matter of the dispute is more closely connected with a state other than the one where the arbitration takes place. The Model Law thus lays emphasis on the nature of arbitration rather than the place where the award is rendered and seeks to eliminate the distinction between foreign and domestic awards. By abandoning the emphasis of the New York Convention on the place of arbitration, and instead by treating all international arbitral awards uniformly, the Model Law is able to avoid the uncertainties encountered in the enforcement of foreign arbitration awards in the New York

---

Assistance through Inter-Institutional Co-operation", Regional Seminar on International Commercial Arbitration, New Delhi, 12-14 March 1984, p. 165.

Convention.[28]

Article 1, para (3)[29] of the New York Convention on the basis of reciprocity has also led to different interpretations. It lays down that it will apply the Convention only in the territory of another contracting state. There have also been questions whether it is possible for a contracting state to stipulate that it will only apply the Convention made in another contracting state, on the same criteria for classifying award as between domestic and foreign that the other state would apply. The drafters of the Model Law rejected the inclusion of the reciprocity mechanism. However, under Article 1(1), the Model Law is subject to any agreement in force between the state adopting the Model Law and any state or states". Thus, the states which are parties to the New York Convention may apply the terms of the Model Law on the

---

28 Ungar, n. 25, p. 724.

29 New York Convention 1958, Article I, para 3 is in the following terms : "When signing, ratifying or acceding to this Convention or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such a declaration."

basis of reciprocity and continue to make their reservations or choose in any event to enforce the awards from Model Law states which have not acceded to the New York Convention. Thus, the choice is left to the states adopting the Model Law and the Model Law will have little effect on those Convention states which wish to make reservations on the basis of reciprocity. Finally, the Model Law, by giving the term "commercial" a wide scope of interpretation removes another possible obstacle in the recognition and enforcement of awards. This matter has already been discussed and does not bear repetition here.

(ii) Article II, paras (1) and (3) of the New York Convention[30] permits a court of a contracting state seized of an action to permit the action to proceed if it holds that (a) the subject-matter is not capable of settlement by arbitration or (b) that the agreement is null and void, inoperative, or incapable of being performed. The grant

---

30 New York Convention 1958, Article II, para (1) states that "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any difference which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

of such powers to the court of the contracting states having jurisdiction in an action was not desirable because, by the exercise of these powers an arbitration can be stopped in limine.[31] Thus, if the nationals of two states conclude an arbitration agreement valid under these laws and subject matter is also capable of settlement by arbitration, a third state may defeat the legitimate expectations of the other two contracting states if it has jurisdiction over an action brought in respect of the transaction in question and prevents the arbitration on one of the grounds mentioned above. The fact that the courts of more than one contracting state may have jurisdiction often leads to delaying tactics and this problem arises due to the fact that the provision of the Article does not specify the choice of law rules to be applied by the courts of a contracting state, to the issues under question.[32]

Article 7(1) of the Model Law which defines the term "arbitration agreement" is similar to Article II(1) of the New York Convention. The Model Law recognizes not only an agreement concerning an existing dispute

---

31 Mohil, n. 27, p. 168.

32 Ibid.

(compromise) but also an agreement concerning any future dispute (clause compromissire).[33] By the inclusion of the latter type of agreement it is hoped that it would contribute in the global unification of international arbitration practice. Further, the Model Law provision does not retain the requirement, expressed in Article II(1) of the Convention, that the dispute concerned should be "a subject-matter capable of settlement by arbitration". However, this does not mean that the Model Law would give full effect to any arbitration agreement irrespective of whether the subject matter is arbitrable. The Working Group had felt that there was no need for an express provision since an arbitration agreement concerning a non-arbitrable subject-matter would normally be regarded as null and void and that the issue of arbitrability was adequately addressed in Articles 34 and 36.[34]

(iii) Enforcement Mechanism

Chapter VIII of the Model Law which has Articles 35 and 36 to deal with the recognition and enforcement of arbitral awards. It is almost identical to Chapters IV and V of the New York Convention. During the preparation

---

33 Analytical Commentary, n. 9, para.

34 Ibid., para.

of the draft articles, the International Chamber of Commerce (ICC), one of the leading arbitral institutions, had suggested that the Model Law need not deal with these chapters since it was satisfactorily dealt with in the New York Convention and that the model law should deal only with international awards which were made within the enforcing state.[35] The ICC's argument was that if the model law dealt with foreign arbitral awards, it might create difficulties with the New York Convention's reciprocity provisions for those states which were parties to the Convention. For example, if a state that had included a reciprocity reservation in its accession to the Convention were to adopt the Model Law, it would thereafter be obliged to enforce an international arbitral award, even if the award had been rendered in a non-Convention state.[36] However, it was pointed out by the Working Group that though the model did not have reciprocity provisions, nonetheless, under Article 1, para (1) of the model law, it is "subject to any agreement in force between this state and any other state or states". Thus,

---

35 Report of Secretary General : Analytical Compilation on the draft text of Model Law on International Commercial Arbitration, UN Doc. A/CN.9/263, para 21.

36 Ibid.

the Convention states may or may not choose in any event to enforce awards from Model Law states which have not acceded to the Convention. This choice can be made by a state in its implementary legislation designed for adoption of the Model Law. Hence, Article 1, para (1) will have little effect on the scope of reciprocity for Convention states adopting the Model Law. Article 1, para (5) of the Model Law was also added by the Working Group to assure the states that pre-existing legislation of a state adopting the Model Law will prevail over Article 1, para (1) and its footnote on the interpretation of the term "commercial". Article 1, para (5) of the Model Law states that "this law shall not affect any other law of the state by virtue of which certain disputes may not be submitted to arbitration, or may be submitted to arbitration only according to provisions other than those of this law." This provision was found useful by those states which were formerly unwilling to enforce foreign arbitral awards in certain sensitive issues (such as securities or anti-trust law). The states could now adopt the Model Law and use Article 1, para (5) to continue exempting sensitive areas from "commercial" category.[37]

---

37 Ungar, n. 5, p. 745.

It was also pointed out that while foreign awards were appropriately dealt with in the New York Convention, which is widely adhered to, often with the restriction of reciprocity, and is open to any state prepared to accept its liberal provisions, the Model Law would be incomplete if it did not include an equally liberal set of rules. And while domestic awards are often treated by national laws under the same favourable conditions as local court decisions, because of the disparity in national laws international commercial arbitration does not get this equal treatment. The Model Law once adopted by the trading nations would aim at unifying the domestic treatment in all legal systems, without imposing restrictive conditions.[38]

Article 35, para (1) of the Model Law, which is parallel to Article III of the New York Convention lays down that once an award has been recognized as binding, the court of the enforcing state must enforce it. The mandatory term 'shall' has been used in the Article which leaves no room for judicial discretion, except where the exceptions are specifically provided in the Article 36.[39] This mandatory provision which gives a binding effect to the

---

38 Analytical Commentary, n. 9, para 76.

39 Ungar, n. 5, p. 745.

arbitral award in Article 35, para (1) is the essence of the Model Law's enforcement framework. This article is also slightly different from Article III of the New York Convention given the addition of the phrase "irrespective of the country in which it was made". Here the policy that domestic and foreign awards rendered in international arbitrations will be treated alike for the purpose of enforcement has been established. This elimination of the distinction between foreign and domestic awards is a significant step towards the unification and harmonization of international commercial arbitration. Article 35, para (2) which was modelled after Article IV of the Convention lays down the technical procedures requires for recognition and enforcement of an arbitral award. It requires two documentary procedures for arbitral awards: authentication and certification under the New York Convention. Article IV was meant to "supersede domestic law in respect of conditions to be fulfilled by a party seeking enforcement of foreign award".[40] The Model Law would also have the same effect, if widely adopted, regardless of which country will enforce the award.

---

40 Ibid., p. 742.

Article 36 lays down an exhaustive list of grounds on which the recognition and enforcement of arbitral awards may be refused. It reestablishes the requirement that all awards be treated alike irrespective of the country in which they were made. Article 36, para (1)(a)(i) grants the court discretion to refuse enforcement when a party to the arbitration agreement is under some incapacity to conclude the arbitration agreement or when the agreement itself is invalid. A party may use this incapacity defence for example, when a state or other public body which are forbidden by domestic law to arbitrate disputes has nevertheless signed a contract containing an arbitration clause. This defence has however never been invoked under the New York Convention. The "invalidity defence" has also never been invoked successfully because it has been interpreted to include only lack of consent to the arbitration agreement and under Article II, para (2) of the Convention, as prerequisites for asserting the defence, there is a requirement that the arbitration agreement should be in writing and should be signed by the parties or the parties written communication should be included.[41] Article 36, para (1)(a)(ii) addresses irregularities in giving notice

---

41 Ibid., p. 746.

of an arbitration, on the appointment of arbitrators or of arbitral proceedings and the inability of a party to present its case before the arbitral tribunal. This inability is generally described as a physical barrier to participation and not the choice of not participating. Article 36, para (1)(a)(iii) deals with awards rendered in excess of the authority granted to the arbitrator. This happens when the type of dispute decided by the arbitrator does not fall within the terms of the arbitration clause in the original contract or if the arbitrator had made a decision on a matter which was not submitted to him by the parties. Article 36, para (1)(a)(iv) deals with the improper composition of arbitral tribunal or improper arbitral procedure applied. The parties decide which disputes are to be submitted to arbitration, which laws are to be applied, the composition of the arbitral tribunal and the arbitral procedures to be followed. The purpose of Article 36, para (1)(a)(iv) is "to reduce the role of the law of the country where the arbitration took place in the enforcement proceedings in other states",[42] since it would

---

42 Paolo Contini, "International Commercial Arbitration : The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", American Journal of Comparative Law, vol. 8 (1959), p. 303. The New York Convention made this requirement

-/-

not be proper for the law of the place of arbitration or the law of the awarding state to oppose the applicable law agreed upon by the contracting ~~states~~ parties. This, however, does not mean that the parties should disregard all national laws and determine some special procedure which is applicable to their case alone. This article is similar to Article V, para (i)(d) of the New York Convention and is hardly ever employed since an agreement on arbitral procedure generally affords wide discretionary powers to arbitrators on the conduct of the arbitral procedure it rarely happens that the arbitral procedure was not conducted in accordance with the agreement of the parties. Article 36, para (1)(a)(v) holds that an award will not be enforced until it is binding on the parties. Under the New York Convention whether the award is binding or not is determined by the law of the awarding state. The award may also be refused if it has been set aside or suspended under the law of which the award was made.

Article 36, para (1)(b)(i) empowers the court to refuse the enforcement of award if the issue in question is a non-arbitrable subject matter. The enforcing state may

---

explicit and since a contrary intent was not expressed in the Model Law, this requirement can be assumed to apply to the Model Law as well.

limit the permissible scope of arbitration by applying domestic standards. Article 36, para (1)(b)(ii) of the model is similar to Article (v)(i)(b) of the New York Convention and states that the recognition and enforcement of awards may be refused if it would be contrary to the public policy of the state. This substantive policy factor to be considered by a court under the provision come very close to "on the merits" review of an arbitral award. This provision allows the enforcing state to evaluate the fairness of the arbitral proceedings according to its own standards of justice. This public policy defense under the Convention has not been successful in most cases because national courts normally do not interfere in the arbitral process unless there is a gross violation of due process. The Convention states have given this provision a narrow interpretation and generally, an enforcing court must be satisfied that the arbitration was conducted as agreed by the parties and "in accordance with the principles of equality of treatment and the rights of each party to have a proper opportunity to present his case".[43] Again this depends on the public policy of each country which are set on different standards.

---

43 Ungar, n. 25, p. 751.

Article 36 (2) provides that the court where the recognition and enforcement is sought, may, if it considers proper, adjourn its decision and may also on the application of the party claiming recognition and enforcement of award, order the other party to provide appropriate security. This allows the losing party the right to contest the award and the awarding country may make full determination of the matter arbitrated within its boundaries. The losing party is allowed to exhaust its appeal process and at the same time the Model Law ensures that it does not engage in dilatory tactics by requiring it to supply appropriate security before the court adjourns the proceedings.

By including Articles 35 and 36 in the Model Law which incorporated almost identical rules as laid down in the New York Convention, the Working Group felt that some of the states which had not ratified the Convention, might for constitutional or other reasons, find it easier to adopt the provisions on recognition and enforcement of arbitral awards as a part of the Model Law than to ratify or accede to it.

Article 36 of the Model Law is practically identical to Chapter V of the New York Convention listing the grounds on which recognition and enforcement of foreign arbitral awards may be refused. Though the Model Law would

be a useful basis on which national legislations can pattern their laws on commercial arbitration and help to encounter the various difficulties met in the field of international commercial arbitration, the states which had been deterred from acceding to the New York Convention may be deterred from adopting the Model Law which contains almost identical provisions. It is also rather optimistic to expect the governments to be prepared to undertake comprehensive legislations on the basis of the Model Law, especially by those countries which have recently amended their domestic legislations such as France, Austria, Sweden and Switzerland and also by those countries which already have satisfactory domestic legislations in force in the field of domestic arbitration. Even if the states do adopt the Model Laws other Convention or treaties to which the states are parties to will take precedence by virtue of Article 1, para (i) which states that "(t)his Law applies to international commercial arbitration, subject to any agreement in force between this State and any other state or states". It is also not necessary that after the adoption of the Model Law, the rules of the Model Law will be followed unless there is a constraining influence of an international convention. Because of this a suggestion was made by a representative of the AALCC at a seminar held in New Delhi on International

Commercial Arbitration,[44] that another model provision could be prepared which could provide that where the parties have agreed to have their disputes and differences settled though arbitration under the UNCITRAL Arbitration Rules 1976, or under the rules of an arbitration institution, the proceedings be held in accordance with such rules notwithstanding anything to the contrary contained in the local law relating to arbitration. This could also meet the recommendation of the AALCC that "where the parties have themselves chosen the arbitration rules for settling their disputes, the arbitration proceedings should be conducted, pursuant to those rules notwithstanding provisions to the contrary in the law applicable to the arbitral procedure and the award rendered should be recognized and enforced by contracting states to the 1958 New York Convention".[45] The Model Law has not dealt with this matter in to the satisfaction of the AALCC. It was felt that such a set of model provisions on a limited number of matters would command wider acceptance. It would also be difficult for the nations to incorporate the Model Law,

---

44 Mohil, n. 27.

45 The recommendation of the AALCC is reproduced in International Commercial Arbitration : Note by Secretary General, UN Doc. (A/CN.9/127).

since the nationals will give priority to their country's particular legal procedure before accepting the Model Law's provisions for the regulation of the conduct of arbitrators in creating enforceable awards. Thus it was felt that a set of model provisions prepared separately on some essential questions in addition to the Model Law would prove to be extremely helpful.[46]

---

46 Mohil, n. 27, p. 175.

CHAPTER IV

CONCLUSION : THE AFTERMATH

The UNCITRAL Model Law on International Commercial Arbitration has been formulated to meet the concerns and problems met in the use of arbitration as a means of settling international commercial disputes. The concerns and problems have arisen mainly due to the lack of uniformity in the field of international commercial arbitration. Different nations have differing legislations and this caused conflicts between national laws in the interpretation of the existing international arbitration rules, like the New York Convention 1958, and the UNCITRAL Arbitration Rules, 1976. The Model Law would also help to foster fairness and equality between the parties in business relationships. It provides for a comprehensive set of rules which have taken into account all the possible problems and pitfalls associated with international commercial arbitration.

The Model Law has been given a wide scope of application and the term "international commercial arbitration" has been given a broad interpretation so that

it can be incorporated into the national legislation of all states. The most basic principle of the Model Law is the recognition of the autonomy of the parties to conduct the arbitration procedure according to their wish, this is reflected most prominently in Article 19 of the Model Law. The parties are free to select the rules according to their convenience and needs, uninhibited by local restraints and traditional domestic concepts. The Model Law merely provides a liberal procedural framework and does not try to impose a particular procedure on the parties. On failing to come to an agreement by the parties the arbitral tribunal is conferred with the power to conduct the arbitral procedure in a manner which it considers appropriate [Article 19(2)], subject only to the requirement that the parties be treated equally and be given full opportunity to present their case. [Article 19(3)] Thus, the fairness and justice of the arbitral procedure is ensured. The Model Law has also delimited or reduced the involvement of the courts and specifically lays down the instances where the courts may interfere. By reducing the legal importance of the chosen place of arbitration settlement of disputes through arbitration is made more attractive, specially to foreign parties. The Model Law's theme of harmonization and internationalization is most apparent in the provision of recognition and

enforcement of arbitral awards (Articles 35 and 36). Though the Articles are closely modelled after the provisions of the New York Convention, a global scope of application has been adopted. The Model Law treats all arbitral awards alike irrespective of the place where the arbitration happens to take place. It totally disregards territorial boundaries and instead of the distinction between domestic and foreign awards or awards made in contracting States and non-Contracting States, the Model Law lays importance only to whether or not an arbitration is international under Article I(3).

In order to be effective in the unification and harmonization of international commercial arbitration practices, the Model Law has to be widely adopted by the trading nations. The fact that it is not an international convention, has certain advantages. Firstly, it is easier to adopt a model law as natural extension of the existing rules as against asking the nation to ratify a totally alien treaty law. Secondly, the modulus Model Law will also help reduce the differences and difficulties experienced by federal systems in achieving uniformity of laws. Thus, though it is often mentioned that the Model Law is primarily intended for the third world countries as their laws are

fragmentary and outdated, the first country to adopt the model is the Government of Canada, a federal government. Under the existing constitutional doctrine, the Canadian federal government has the sole sovereign right to enter into international treaties but the provinces and territories must each pass implementing legislation where the subject matter comes within their competence. A number of Canadian jurisdictions have introduced legislation based on the Model Law and the others are in the process of implementing such legislation. Canada adopted the Model Law for both domestic and international arbitration.[1]

Another country which has adopted the Model Law is yet again a developed country; Netherlands has incorporated the principles of the Model Law in its Arbitration Act, 1986. The Act is consistent with the principles of natural justice and due process of law embodied in the Model Law and does not allow one of the parties to have a privileged position with regard to appointment of arbitrators. In such a case the arbitration agreement is considered invalid. The Act also incorporates the principle of "competence-competence"

---

1 Kurt H. Nadelmann and Willis L.M. Reese, "The American Proposal at the Hague Conference on Private International Law to Use the Method of Uniform Laws", American Journal of Comparative Law, vol. 7 (1958), p. 239.

found in Article 16 of the Model Law. The arbitral tribunal may decide on its own jurisdiction subject to judicial control or review. The Act, like the Model Law, recognizes full autonomy of the parties as regards appointment of the arbitrators, the only condition laid down is that the arbitrators must be of uneven numbers.[2]

The United States has also considered the renewal of its existing arbitration laws and has recently founded a new arbitration centre in Washington, D.C., where the possible adoption of the UNCITRAL Model Law is being evaluated for the district of Columbia, and the federal level.[3] The adoption of the Model Law would present a more attractive climate for American companies doing business in developing countries and want to increase their ability to contract for domestic choice of forum, rather than a neutral

---

2 D.S. Mohil, "UNCITRAL Model Law on International Commercial Arbitration", Joint Colloquiam on International Commercial Arbitration, held In Washington on 16 October 1987. Office of Asian-African Legal Consultative Committee, New Delhi.

3 D.O. Philip and Neil, Jr., "Recent Developments in International Commercial Arbitration : An American Perspective", Arbitration, vol. 53, no. 3, August 1987, p. 156.

site in a developing state which used to be the practice often due to the difference in their national laws on arbitration.[4]

Revisions and modernization of the arbitration rules and awards have also been done by United Kingdom, France, Austria, Italy, Djibouti and Belgium. The revisions done by these countries in their arbitration laws reflect some of the salient features of the Model Law, like granting more freedom to the parties in conducting the arbitration procedure and the limitation of court control. The United Kingdom has enacted the Arbitration Act of 1979 which has done away with two forms of judicial review, which were in existence before the enactment of the Act. They were the case-stated procedure and the procedure in which its courts were entitled to set aside an award on the grounds of mistake of facts or law. These provisions had often restrained the parties of other states from choosing London as a forum for international arbitration. The 1979 Act has abolished these procedures and introduced a simplified system of judicial review on the question of law which has limited the role of the courts and also allows agreements by which

---

4 Ibid.

judicial review procedure can be excluded in respect of certain agreements. Such an agreement would have been void prior to the 1979 Act. The Act has also had a direct bearing on the arbitration law in countries like Hong Kong, Singapore and Australia where the English law is closely followed. Hong Kong made improvements in its arbitration law in 1982, and in 1987 the sub-committee of the Law Reform Commission of Hong Kong submitted a report to the Commission in which it concluded that Hong Kong should adopt the Model Law. A draft Bill has been proposed for consideration in this regard.[5]

The Asian-African Legal Consultative Committee (AALCC) has also recommended to its member states to accept the Model Law and to promote it. At its Arusha Session (February 1987), the AALCC reminded its member states that one reason they are seldom the seat of international arbitration is because their laws on arbitration often contain rules which are inappropriate for international cases, and if they wanted to promote the holding of such arbitrations in their countries, they had to review their existing

---

5 Neil Kaplan, "Modern Commercial Arbitration : A Hong Kong Viewpoint", Arbitration, vol. 53, no. 4, 1987.

arbitration laws with a view to considering the adoption of the Model Law. In response to this recommendation some of the AALCC member states such as Cyprus, Egypt, India, Singapore and Thailand have already initiated steps towards enacting laws based on the Model Law. In a seminar on UNCITRAL Model Law and the use of Arbitration in Foreign Collaboration Agreements held in New Delhi, in 1987, it was felt that the Model Law generally presented a balanced approach to the rights and duties of the claimants and the respondents in international proceedings. There was a general opinion that the Model Law was favourable for adoption and that they should keep the Model Law in mind while revising its laws on commercial arbitration.[6] India is at present in the process of revising its laws on international commercial arbitration.

The Model Law will also be acceptable to those countries which have not ratified the New York Convention due to mutual distrust between the countries. The absence of mutual trust is due to the fact that the parties to the New York Convention are mostly developed countries and have better bargaining powers than the developing states. The

---

6 "Background discussion at the National Seminar on UNCITRAL Model Law and the Use of Arbitration in Foreign Collaboration Agreements, Consumer Disputes", Indian Council of Arbitration, New Delhi, 1987.

Model Law can be of assistance to such countries which have been deterred from becoming parties to the Convention. Such an example would be the Latin American nations, which with an exception of a few countries, have refused to sign the international commercial arbitration conventions.[7] The Latin American countries are unwilling to sign the conventions because of the fear that once they become bound by legal agreements, they will have to alter their standards of public policy and legal behaviour. Many of the states fear that they would lose their control over the enforcement of arbitral awards in their own courts and would be forced to subject them to foreign standards of public policy review.[8] These fears could be overcome if these states were to adopt the Model Law, for it would adopted through domestic legislation, and they could adapt the Model Law to suit their own legal systems at will. The adoption of Model Law by the Latin American states would contribute to a great extent in the unification of international commercial arbitration without foregoing their autonomy. Africa is

---

7 L. Straus, "Why International Commercial Arbitration is Lagging in Latin America : Problems and Cures", Arbitration Journal, vol. 33, 1978, pp. 21-24.

8 Ibid.

yet another continent where most of the states have not acceded to the New York Convention. This may be partly due to the distrust of foreign arbitration. However, the African legal system suffers from inadequate technical expertise in the field of commercial arbitration and outdated laws established by the colonial government are still in use. The African states by adopting the Model Law would be able to update their arbitration rules, and while Articles 1 to 34 would provide for a uniform arbitration law, Articles 35 and 36 make the adopting state a de facto party to the New York Convention. By adopting the Model Law the African states would modernize their arbitration laws without sacrificing their domestic control of legal standards. Thus there is a marked advantage for such countries to adopt the Model Law rather than not adopting it.[9]

Finally, some words in criticism. Though the Model Law has been able to help clarify and find solutions to many of the problems existing in the field of international commercial arbitration, it has left some issues still unsettled. The Model has, for instance, not clarified some

---

9 S. Agadon Tiewul and Francis A. Tsegah, "Arbitration and the Settlement of Commercial Disputes : A Selective Survey of African Practices", International Law and Comparative Law Quarterly, vol. 24, 1975, pp. 393-418.

of the issues put forward by the AALCC. These relate to the following points: (i) that the parties should be able to draft and agree to arbitration rules completely independent of national procedural law applicable to the arbitration, and (ii) to exclude claims of state immunity by those participating in international commercial arbitration. Secondly, though the Model Law has delimited the role of the courts under Article 5, which specifies that " no court shall intervene except where so provided in this Law", it does not negate the interference of the courts but merely requires that the instances of court involvement be listed in the Model Law. Thus, the Model Law has chosen to ignore the complicated and sensitive problem of state immunity and does not anywhere deal with it. Thirdly, the Model Law has also not been able to effectively solve the problem of reservation under Article 1(3) of the New York Convention,[10] under which the parties may make reservations on the basis of reciprocity and on the interpretation of the term "commercial".

---

10 New York Convention, Article I (3), states that "When signing ratifying or acceding to this Convention or Notifying extension under Article X, hereof, any state may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of the state making such a declaration".

Because the Model Law is merely a set of rules and not a convention it yields to treaty laws,[11] and is subject to any agreement in force between the state adopting the Model Law and any other state. Thus the convention states have the choice to apply the terms of the Model Law on the basis of reciprocity or enforce awards from Model Law states which have not acceded the Convention. The states may continue to make this reservation according to its convenience. The Convention states may also make reservations on the interpretation of the term "commercial" since under Article I(5) of the Model Law the states may continue to exempt certain issues from the "commercial" category.

Finally, the fact that the Model Law has given uncontrollable powers to the arbitrators, free from all checks and unrestricted authority in the conduct of arbitration proceedings may also be somewhat harmful specially to those countries which have modern and effective laws on arbitration. It is doubtful whether the states adopting the Model Law would follow it if there is no restraining convention to its effect.

However, in spite of some weaknesses to be found in the Model Law, it has to a great extent met the existing

---

11 Model Law, Article I, para (i). See Annex I.

problems in international commercial arbitration. The impact of the Model Law can be seen from the fact that within three years of its adoption in June 1985, it has been widely recognized by the trading nations. The fact that the major trading nations had participated in the drafting of the Model Law to their satisfaction has made the acceptability of the Model Law more positive. Canada and Netherlands have already enacted their legislation patterned to the Model Law provisions and a number of states have revised their arbitration laws and have incorporated the fundamental principles enshrined in the Model Law. In the Asian-African and Australasian countries such as Australia, Cyprus, Egypt, Hong Kong, India, Singapore and Thailand have already initiated steps to enact their legislative laws modelled on the Model Law. This positive response towards the Model Law goes a long way to prove the success of the Model Law and it can be hoped that it would be the major instrument in the unification and harmonization of the laws on international commercial arbitration.

....

I. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (A/40/17, ANNEX I)

UNCITRAL model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985)

CHAPTER I. GENERAL PROVISIONS

Article 1.

*Scope of application**

(1) This Law applies to international commercial** arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(3) An arbitration is international if:

(*a*) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(*b*) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(*c*) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(*a*) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(*b*) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2.

Definitions and rules of interpretation

For the purposes of this Law:

(*a*) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(*b*) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(*c*) "court" means a body or organ of the judicial system of a State;

(*d*) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(*e*) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(*f*) where a provision of this Law, other than in articles 25 (*a*) and 32 (2) (*a*), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3.

Receipt of written communications

(1) Unless otherwise agreed by the parties:

(*a*) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(*b*) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4.

Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

---

*Article headings are for reference purposes only and are not to be used for purposes of interpretation.

**The term "commercial" 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 co-operation; carriage of goods or passengers by air, sea, rail or road.

Article 5.

Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6.

Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11 (3), 11 (4), 13 (3), 14, 16 (3) and 34 (2) shall be performed by . . . [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II. ARBITRATION AGREEMENT

Article 7.

Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8.

Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9.

Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10.

Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

Article 11.

Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(*a*) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(*b*) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(*a*) a party fails to act as required under such procedure, or

(*b*) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(*c*) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12.

Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has partici-

pated, only for reasons of which he becomes aware after the appointment has been made.

Article 13.

Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12 (2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14.

Failure or impossibility to act

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12 (2).

Article 15.

Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16.

Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 17.

Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18.

Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19.

Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20.

Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for

consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21.

Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22.

Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23.

Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24.

Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25.

Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(*a*) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;

(*b*) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(*c*) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26.

Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(*a*) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(*b*) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27.

Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28.

Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29.

Decision making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30.

Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31.

Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32.

Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(*a*) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(*b*) the parties agree on the termination of the proceedings;

(*c*) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34 (4).

Article 33.

Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(*a*) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(*b*) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1) (*a*) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34.

Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(*a*) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which

contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(*b*) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35.

Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.***

***The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

Article 36.

Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(*a*) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(*b*) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (*a*) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

B I B L I O G R A P H Y

PRIMARY SOURCES

United Nations Documents

General Assembly Official Records, sessions 24-40, 1969-1985.

UNCITRAL Yearbooks, 1970-1985, vols. I-XVI.

Report of the Working Group on International Trade Law, sessions 3-7.

A/CN.9/64, Report by Ion Nestor on Problems concerning the application and interpretation of existing multilateral conventions on international commercial arbitration and related matters.

A/CN.9/127, "International Commercial Arbitration, Note by the Secretary General".

A/CN.9/168, Study of Secretary-General on the application and interpretation of 1958 New York Convention.

A/CN.9/169, Study of the General Assembly on the application and interpretation of the New York Convention.

A/CN.9/216, Report of the Working Group on International Contract Practices on the work of its third session, New York, 16-28 February 1982.

A/CN.9/232, Report of the Working Group on International Contract Parties, fourth session.

A/CN.9/233, Report of the Working Group on International Contract Parties, fifth session.

A/CN.9/245, Report of the Working Group on International Contract Parties, sixth session.

A/CN.9/263, Report of Secretary General : Analytical Compilation on the draft text of Model Law on International Commercial Arbitration.

A/CN.9/264, Report of Secretary-General - Analytical Commentary on Draft Text of the Model Law on International Commercial Arbitration.

A/31/17, Report of the United Nations Commission on International Trade Law on the Work of its eighteenth session (Vienna, 1985).

A/40/17, UNCITRAL Model Law on International Commercial Arbitration.

A/6594, Establishment of UNCITRAL, 1966.

SECONDARY SOURCES

(i) Books

A Study, International Law and Development : Some Asian Perspectives (Colombo: Sri Lanka Foundation, 1980).

Craig, V., et al., International Chamber of Commerce Arbitration (New York: Oceana Publications, Dobbs Ferry, 1984).

Kavass, Ivan I. and Livak, A., UNCITRAL Model Law on International Commercial Arbitration - A Legislative History (New York: Oceana Publications, 1985).

Lazarus, Steven and others, Resolving Business Disputes : The Potential of Commercial Arbitration (New York: American Management Association, 1965).

Sanders, Pieter, International Commercial Arbitration (The Hague: Martimus Nijhoff, 1966).

_____, ed., Commercial Arbitration and the Role of Arbitral and other Institutions (Deventer: Kluwer, 1983).

Schmitthoff, M. Clive, International Commercial Arbitration Documents and Collected Papers (New York: Oceana Publications Inc., Dobbs Ferry, 1974-1975).

Schultz, J.C. and Albert Jan Van Den Berg, ed., The Art of Arbitration (Netherland, Kluwer Law and Taxation Publishers, 1982).

(ii) Articles

Abrams, L. Jerome, "Arbitration Courts and Corporate Problems : A Semantic Approach", The Arbitration Journal, vol. 9, no. 3 (1984).

Aksen, Gerald, "The Need to Utilize International Arbitration", Vanderbilt Journal of Transnational Law, vol. 17, no. 1, winter 1984.

Azadon, Tiewul S. and Frances, Tsegalo A., "Arbitration and the Settlement of Commercial Disputes : A Selective Survey of African Practice", International Law and Comparative Law Quarterly, vol. 24 (1975).

Bennet, Stevenson Rusell, "An Introduction to I.C.C. Arbitration", Journal of International Law and Economics, vol. 14 (1980).

Branson, D.J. and W.M. Tupman, "Selecting on Arbitral Forum : A Guide to Cost - Effective International Arbitration", Virginia Journal of International Law, vol. 22, no. 1, (1984).

Contiri Paolo, "International Commercial Arbitration : The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards", American Journal of Comparative Law, vol. 8 (1959).

Croff, Carlo, "The Applicable Law in an International Commercial Arbitration : Is it still a Conflict of Laws Problems", The International Lawyer, vol. 16 (1982).

Cremades, M. Bernards, "The Impact of International Arbitration on the Development of Business Law", The American Journal of Comparative Law, vol. 31, no. 3 (1983).

De Vires, Henry, "International Commercial Arbitration : A Transnational View", Journal of International Arbitration, vol. 12, no. 1, April 1984.

Evans, Anthony (Hon. Justice), "Some Thoughts on Adoption of the UNCITRAL Model Law", Arbitration (London), vol. 53, no. 2, May 1987.

Fleischhauer, Carl August, "The Contribution of UNCITRAL in the Field of Commercial Arbitration", Essays on International Law, Thirteenth Anniversary Commemorative Volume, AALCC, 1987, New Delhi.

Hoellering, F. Michael, "The UNCITRAL Model Law on International Commercial Arbitration", The International Lawyer, vol. 20, winter 1986.

Holtzman, M. Howard, "International Commercial Dispute Settlement - Developments of a Decade", Essays on International Law, Thirteenth Anniversary Commemorative Volume, AALCC, New Delhi, 1987.

_____, "Arbitration : An Indispensable Aid to Multinational Enterprise", Journal of International Law and Economics, vol. 10 (1975).

Honnold, John, "The United Nations Commission on International Trade Law : Mission and Methods", American Journal of Comparative Law, vol. 27 (1979).

Hunter, J.M.H., "UNCITRAL Model Law - Which Road should London Take?", Arbitration, vol. 49, no. 4, May 1984.

Kalpan, Neil, "Modern Commercial Arbitration : A Hong Kong Viewpoint", Arbitration (London), vol. 53, no. 4, November 1987.

Kerr, Michael, "Arbitration and the Courts : The UNCITRAL Model Law", International and Comparative Law Quarterly, vol. 34, January 1985.

Krishnamurti, N., "International Commercial Arbitration", Indian Journal of International Law, vol. 10, 1970.

Lebedon, N. Sergei, "Developing Effective International Commercial Arbitration : A Keynote Address to New Delhi Congress", Arbitration Journal, vol. 30 (1978).

Lucio, E. Saturnrino, "The UNCITRAL Model Law on International Commercial Arbitration", University of Miami Inter-American Law Review, vol. 17, no. 2, winter 1986.

McLaughin, T. Joseph, "Arbitration and Developing Countries", International Lawyer, vol. 13, no. 2 (1979).

Mohil, D.S., "Enforcement of Foreign Arbitral Awards : Assistance through Inter-Institutional Co-operation", Regional Seminar on International Commercial Arbitration (Report and other Documents), New Delhi, 12-14 March 1984.

Nadelmann, H. Kurt and Willis, L.M., "The American Proposal at the Hague Conference on Private International Law to use the Method of Uniform Laws", American Journal of Comparative Law, vol. 7 (1958).

O Neil, D. Philip, Jr., "Recent Development in International Commercial Arbitration : An American Perspective", Arbitration (London), vol. 53, no. 3, August 1987.

Paulson, Jan, "Report on the UNCITRAL Model Law on International Commercial Arbitration adopted in Vienna on 21st June 1985", Arbitration (London), vol. 52, no. 2, May 1986.

Phillips, J.F., "Arbitration : The Revolution of the 80's", Arbitration, vol. 25, no. 2, May 1986.

Rhodes, J.M. and Lisa Sloan, "The Pitfalls of International Commercial Arbitration", Vanderbelt Journal of Transnational Law, vol. 17, no. 3, winter 1984.

Salter, M. Leonard, "International Commercial Arbitration : The Why, How and Where", Commercial Law Journal, vol. 88, August-September 1983.

Smit, Hans, "The Future of International Commercial Arbitration : A Single Transnational Institution", Columbia Journal of Transnational Law, vol. 25, no. 1 (1986).

Ungar, T. Kenneth, "UNCITRAL Model Law on International Commercial Arbitration", Columbia Journal of Transnational Law, vol. 25, no. 3 (1987).

Weiss, Glenn Andrew, "The Status of the UNCITRAL Model Law on International Commercial Arbitration vis-a-vis, the ICC, LCIA and UNCITRAL Arbitration Rules, Conflict and Complement", Syracus Journal of International Law and Commerce, vol. 13, no. 2, winter 1982.

*****