The UNCITRAL Model Law on International Commercial Arbitration

Michael F. Hoellering

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The UNCITRAL Model Law on International Commercial Arbitration

I. Introduction

On June 21, 1985, following a three-week diplomatic conference attended by representatives and observers from 58 states and 18 International organizations, the United Nations Commission on International Trade Law (UNCITRAL) adopted a model law on international commercial arbitration. The model law was drafted and developed by the Working Group on International Contract Practices, which was entrusted with the project in 1981. The new model law is intended to serve as a model of domestic arbitration legislation, harmonizing and making more uniform the practice and procedure of international commercial arbitration while freeing international arbitration from the parochial law of any given adopting state. Its existence should be of particular value not only in countries which would benefit from modernization, but also in those countries which may be adopting or expanding their arbitration laws for the first time.

This article briefly describes the background of the model law, its guiding principles, and last, examines the structure and features of the model law.

II. Background

The project to develop a model law was conceived in 1979 when, after a review of the favorable experience over the past twenty years with the 1958
United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (N.Y. Convention), the Commission concluded that a protocol to the Convention was not necessary, but that further work on a model law "could assist States in reforming and modernizing their law on arbitration . . . reduce divergencies encountered in the interpretation of the 1958 Convention . . . and minimize the possible conflicts between national laws and arbitration rules." Thus it was decided that the project should be in the form of a model law, and that due account should be taken of the Convention and of the UNCITRAL Arbitration Rules.

The work was undertaken by the Working Group in February, 1982 and proceeded over the course of five sessions, and, in February, 1984, a draft model law was completed and circulated for comment to governments and international organizations. Comments were submitted until the close of 1984, and, in June, 1985, at a plenary session of UNCITRAL in Vienna, the model law was finalized, taking into account the various comments received. A total of twenty-two states and five international organizations submitted initial comments on the draft text. Virtually all of the respondents commented on the value of the model law, and expressed support for it generally.

III. Guiding Principles Underlying the Model Law

There are a number of basic principles which guided the drafting of the model law, and which are highlighted below.

A. PARTY AUTONOMY

The entire scheme of the model law provides for a wide scope of party autonomy, reflecting that this was one of the most significant principles as defined by UNCITRAL. The Secretariat has stated that "Probably the most important principle on which the model law should be based is the

freedom of the parties . . . to tailor the 'rules of the game' to their specific needs."

As finalized by the Commission, the model law expressly permits the parties to specify the international nature of the arbitrable subject matter (Art. 1(3)(c)); choose institutionalized arbitration and rules (Art. 2(d)); agree on the manner in which written communications are deemed received (Art. 3(1)); determine the number of arbitrators (Art. 10(1)); determine the procedure for arbitrator appointment (Art. 11(2)); agree on a procedure for arbitrator challenge (Art. 13(1)); determine the procedure for conduct of the arbitral proceedings (Art. 21); determine the language(s) to be used (Art. 22(1)); agree to the manner and time frames governing presentation of claims (Art. 23(1)); agree to oral hearings (Art. 24(1)); agree as to defaults (Art. 25) and experts appointed by the tribunal (Art. 26); choose the law(s) which will govern the proceedings (Art. 28(1)); and authorize the arbitrators to decide *ex aequo et bono* or as *amicable compositeur* (Art. 28(3)).

**B. Consistency with N.Y. Convention and UNCITRAL Rules**

Viewed in the context of existing machinery for effective international commercial arbitration, the model law was drafted to promote the policies and principles underlying both the N.Y. Convention and various institutional and the UNCITRAL Arbitration Rules. Because of the success of the N.Y. Convention in terms of recognition and enforcement of awards among its signatories throughout its twenty-eight-year history, the interest in maintaining its standards and promoting their general acceptance was desirable. In addition, there was also agreement that the basic principles of the UNCITRAL Arbitration Rules, now generally well recognized for their neutrality and comprehensiveness, should be maintained to the greatest extent possible.

**C. Scope—Broad Definitions of “International” and “Commercial”**

It was decided at the outset that the scope of the applicability of the model law be restricted to international commercial arbitration. Because of the special needs of transnational dispute resolution, and since the term “commercial” has been defined differently by states, it was deemed important to define these terms widely, so as to apply to the broadest range of interna-

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7. See Possible Features, *supra* note 3, at para. 28.
tional commercial transactions, thus adding certainty to the dispute settlement mechanism applicable to such transactions.\(^8\)

Article 1(3) provides that an arbitration is deemed "international" if the parties' places of business are in different states; if the arbitration or principal place of contract performance is in a state other than that of the places of business of the parties; or if the parties expressly agree that the subject-matter of the arbitration agreement relates to more than one country.\(^9\)

The term "commercial," according to an explanatory footnote to Article 1(1), is to be given "wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."\(^10\)

D. LIMITED COURT INTERVENTION

One of the key concepts of the model law is that of limited and clearly defined instances of court intervention into the arbitration process, with a curtailed right of appeal from a court decision sought during the pendency of the arbitral proceedings. A fundamental aim throughout all stages of drafting was to strike a proper balance in the relationship between arbitration and the courts. As ultimately reflected in the model law, the role of the courts in general is one of assistance supportive of the arbitral process and not one of interference with it.\(^11\)

Article 5 expressly limits court intervention and assistance to those instances specifically delineated by the law, which are: granting of provisional remedies (Art. 9); assisting the arbitral tribunal, if so requested, in the taking of evidence within the model law state (Art. 27); granting recourse

\(^8\) See Report of UNCITRAL on the Work of Its Eighteenth Session, supra note 1, at paras. 18-35. It has been conceded that the definition of "international" by the parties may lead to some abuse. See Hunter, *International Commercial Arbitrations: The UNCITRAL Model Law*, INT'L BUS. LAW. Apr. 1984, at 189.


\(^10\) *Id.*, at 40. See also Bernini, Recent Legislations and International Unification of the Law on Arbitration, (paper delivered at a symposium on International Commercial Arbitration, Chateau Frontenac, Quebec, Canada, Oct. 14-16, 1985, p. 44).

against an award if the grounds outlined are met (Art. 34); and enforcing an award (Art. 35) or refusing enforcement where sufficient grounds are proven (Art. 36).  

The model law further provides that, for certain functions, either a court or other named authority may be designated to perform the tasks of appointing an arbitrator failing party agreement (Art. 11); deciding challenges of arbitrators (Art. 13); removing an arbitrator (Art. 14); deciding a challenge to arbitral jurisdiction (Art. 16); or setting aside an award (Art. 34). The enacting state chooses the court or other authority of competent jurisdiction for such actions (Art. 6). These matters, once referred to the court or specified authority, are not subject to appeal.

The approach of the model law, which allows limited prompt recourse to court during the arbitral proceedings, but simultaneously permits the arbitration to go forward, represents a balance between the potential for delay through dilatory tactics of a recalcitrant party, and the futility and high cost of arbitral proceedings in which the award is ultimately set aside by the court.

E. BROAD ARBITRATOR AUTHORITY

Under the provisions of the model law, the arbitrators are given expansive power to make certain decisions, subject only to contrary agreement of the parties. The arbitral tribunal is empowered to decide on challenges to a given arbitrator (Art. 13(2)); rule on its own jurisdiction (Art. 16); order interim measures of protection or provide security (Art. 18); determine the procedure for conduct of the arbitration and admissibility of evidence (Art. 19(2)); determine the place of arbitration (Art. 20); determine the language of the proceedings (Art. 22); decide whether to hold oral hearings where such hearings are not requested (Art. 24(1)); terminate or continue proceedings on default of a party duly notified (Art. 25); appoint experts to assist the tribunal (Art. 26); request court assistance in the taking of evidence (Art. 27); decide the controversy in accordance with the applicable rules of law (Art. 28); correct facial errors in the award on its own initiative within 30 days (Art. 33(2)); and extend the period of time for such corrections or interpretations of the award (Art. 33(4)).

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12. See Melis, Arbitration and the Courts, in INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION. UNCITRAL'S PROJECT FOR A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 83 (Netherlands 1984).
13. See Herrmann, supra note 5.
14. Such determinations, however, may be subject to appeal to a court or other authority. See Report of UNCITRAL on the Work of Its Eighteenth Session, supra note 1. at art. 6; 13(3).
IV. Structure and Features of the Model Law

The UNCITRAL model law is divided into eight chapters and 36 articles.\textsuperscript{15} The chapters cover (1) basic definitions and general provisions of the law; (2) the arbitration agreement; (3) composition of the arbitral tribunal; (4) jurisdiction of the arbitral tribunal; (5) conduct of the arbitral proceedings; (6) making of the award and termination of the proceedings; (7) recourse against the award; and (8) recognition and enforcement of awards. It is intended as domestic law of the adopting state, subject to any international treaties, conventions or agreements in force between the adopting state and other states\textsuperscript{16} (such as the N.Y. Convention), and, by its own terms,\textsuperscript{17} as \textit{lex specialis}, would be subordinate to any other domestic law affecting arbitration.

There are a number of interesting and important aspects of the model law. These features will be discussed in numerical order, article by article, as they appear in the law.

A. General Provisions (Chapter I)

\textit{Scope of application} (Art. 1).—The scope of application of the model law, as discussed in the underlying principles above, is limited to international commercial arbitration, subject to any treaties and conventions already in force. It is intended as domestic law and applies only if arbitration is held within the territory of the enacting state except for the following limited circumstances where domestic courts may exercise jurisdiction, even though the place of arbitration may not be within the model law state, or the locale of same has not yet been determined: actions to compel arbitration (Art. 8); court grants of interim relief (Art. 9); and granting or refusing recognition of an award (Arts. 35–36).

\textit{Definitions and rules of interpretation} (Art. 2).—Article 2 defines “arbitration,” “arbitral tribunal,” and “court,” and further expressly provides that parties may delegate to a third party, \textit{e.g.}, an arbitral institution, determinations they themselves are authorized to make, or that parties may choose rules for the conduct of their arbitration.

\textit{Receipt of written communications} (Art. 3).—Written communications under the model law are deemed received if delivered, on the day delivery was made. This section expressly does not apply to court proceedings, but to the arbitral proceedings only.


\textsuperscript{17} Report of UNCITRAL on the Work of Its Eighteenth Session, \textit{supra} note 1, at art. 1(5) provides that “[t]his 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.”

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**Waiver of right to object** (Art. 4).—Failure to object when the provisions of the model law from which the parties may derogate have not been adhered to acts as a waiver of the right to object. This is true not only throughout the course of the arbitral proceedings, but in any subsequent litigation as well.\(^\text{18}\)

**Extent of court intervention** (Art. 5).—Court intervention and assistance is limited to those functions expressly specified in the law, as explained in the underlying principles above. To be noted, however, is that these provisions are expressly limited to “matters governed by this law,” thus excluding certain questions such as subject-matter arbitrability, capacity of the parties, sovereign immunity, consolidation, etc., which may be covered by other domestic law.\(^\text{19}\)

**Court or other authority for certain functions of arbitration assistance and supervision** (Art. 6).—The enacting state may name a special court or courts, or other competent authority, which will perform the functions of a court as specified in this article.

### B. Arbitration Agreement (Chapter II)

**Definition and form of arbitration agreement** (Art. 7).—In this article the term “arbitration agreement” is defined as including both present and future disputes, either under a contractual clause or a separate agreement. It mandates that such agreement be in writing, and, consistent with terms of the N.Y. Convention, defines an agreement in writing broadly to include advances in communications technology which have developed over the years. It further provides for incorporation of the arbitration agreement by reference, and for constructive agreement, where such agreement is alleged by one party and not denied by the other in the course of an arbitration proceeding.

**Arbitration agreement and substantive claim before court** (Art. 8).—The terms of this article require that a court “shall” refer the parties to arbitration unless it finds the arbitration agreement flawed, as defined by this article. Despite the commencement of such a court action, however, arbitration proceedings may continue through award.

**Arbitration agreement and interim measures by court** (Art. 9).—Provisional remedies are not deemed inconsistent with the arbitration process, and there is no waiver of the right to arbitration by seeking interim relief from a court.\(^\text{20}\)

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C. COMPOSITION OF ARBITRAL TRIBUNAL (CHAPTER III)

Number of arbitrators (Art. 10).—Three, absent a contrary agreement by the parties.

Appointment of arbitrators (Art. 11).—A significant feature of this article, which also provides for court assistance in the appointment of arbitrators whenever necessary, is that the nationality of an arbitrator candidate does not preclude service as an arbitrator. The provision brings the model law into line with the UNCITRAL Rules, Art. 6(4) of which provides that “the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties” should be taken into account. This matter is currently a problem in certain countries, as only nationals of those states are permitted to serve as arbitrators in any arbitration, international or domestic, conducted within those states. 21

Grounds for challenge (Art. 12).—Article 12 requires arbitrators to disclose any relationships likely to affect their impartiality and independence, or the lack of any qualifications agreed to by the parties. The obligation to disclose continues throughout the course of arbitral proceedings. 22 Parties have the right to challenge an arbitrator, on those grounds. If the arbitrator is a party-appointee, however, challenge by the appointing party must be made at the time of appointment. Challenges to arbitrators are permitted by the party appointing them thereafter only if the circumstances giving rise to the challenge came to light after appointment.

Challenge procedure (Art. 13).—A challenge procedure is set out in this article, which further provides that a dissatisfied party may appeal the results of the challenge to court in timely fashion and subject to no appeal. Arbitral proceedings, however, may continue during such an action, at the discretion of the tribunal.

Failure or impossibility to act (Art. 14).—The provisions of this article, as well, include the right of an application to court, subject to no appeal. The withdrawal of the arbitrator, or party agreement to termination of service, however, is not to be inferred as an admission of the validity of any challenge which may have been raised.

Appointment of substitute arbitrator (Art. 15).—Herein are provided the mechanics of replacing an arbitrator removed or unable to act under Articles 12–14.


22. Cf. Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) (arbitrators have a duty to disclose any relationships which give the appearance of bias).
D. JURISDICTION OF ARBITRAL TRIBUNAL (CHAPTER IV)

Competence of arbitral tribunal to rule on its jurisdiction (Art. 16).—The arbitrators are authorized under Art. 16 to determine their own jurisdiction. This provides for the severability of the arbitration agreement from the contract, thus providing jurisdiction to the arbitrators under the agreement to determine the validity of the contract itself. Art. 16 further authorizes the arbitrators to make interim rulings. Again, a dissatisfied party, without having to wait for the conclusion of the arbitration, has recourse to court on jurisdictional decisions of the tribunal, subject to no appeal, and the arbitration proceedings may continue, at the discretion of the tribunal.

Power of arbitral tribunal to order interim measures (Art. 17).—Absent a contrary agreement by the parties, the arbitrators are authorized to grant provisional remedies, although such remedies will be more limited in scope than those available from the court in that the arbitral tribunal's authority extends only to the arbitrating parties.

E. CONDUCT OF ARBITRAL PROCEEDINGS (CHAPTER V)

Equal treatment of parties (Art. 18).—This article highlights the basic requirement of fairness and due process, providing that "(t)he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." One commentator has noted the importance of such a provision, stating that "(t)his principle is, of course, indispensable in all systems of justice. Without it, there is denial of justice, and lack of due process of law, and no court could be expected to enforce the arbitral award." 24

While the language of this article is not included word for word in the grounds for the setting aside and refusal of recognition and enforcement of an award (Art. 34 and 36); failure to comply with the terms of Article 18 provides a ground for recourse against the award. 25

Determination of rules of procedure (Art. 19); place of arbitration (Art. 20); commencement of arbitral proceedings (Art. 21); language (Art. 22); statement of claim and defence (Art. 23); hearings and written proceedings


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(Art. 24); default of a party (Art. 25); expert appointed by arbitral tribunal (Art. 26); court assistance in taking evidence (Art. 27).—These articles discuss generally the "rules" of procedure to be followed during the course of the arbitral proceedings, and generally track the provisions of the UN-CITRAL Arbitration Rules. The principle of party autonomy governs most of these provisions, and, failing party agreement, such decisions fall to the tribunal.

Several points arise in these provisions which are worthy of highlight. Art. 21 provides that arbitral proceedings officially commence with the receipt by the respondent of the request for arbitraction. The parties have a right to oral hearings, and may demand them under Art. 24, unless they have agreed that the arbitration be conducted on the basis of documents and other materials only. The United States government commented that "[u]nless the right is expressly waived, a party should have the right to introduce oral evidence by witnesses and to have the tribunal determine the credibility of any witness. A party also should have the right to communicate its legal and factual arguments as effectively as possible." Failure to prosecute or failure to defend one's position at the hearings, if duly notified, amounts to a default under Art. 25, and the arbitrators are authorized to decide the matter ex parte. Parties have the right to question any expert appointed by the arbitral tribunal, under Art. 26, and the tribunal, or any party with the tribunal's approval, may petition the court for assistance, within the model law state, in taking evidence, under Article 27.

F. Making of Award and Termination of Proceedings (Chapter VI)

Rules applicable to substance of dispute (Art. 28).—Art. 28 provides that the arbitrators shall decide in accordance with the applicable law or rules of law. Applicable law is chosen by the parties, and this formulation provides parties to international commercial transactions with newly defined freedom to designate as applicable to their agreement rules of more than one legal system, including rules of law which have been elaborated on the international level. In the absence of choice of law by the parties, the law applicable shall be determined by the arbitral tribunal based upon the conflict of laws rules which it considers applicable.

The United States government noted, in its comments on the draft model law, that this was a most important feature:

The United States fully endorses the decision of the Working Group, contained in Article 28(1), to extend party autonomy in the designation of the law applicable to the substance of the dispute to include "the rules of law" which parties may designate as applicable to their dispute.27

27. Id., at 202.
The arbitrators must also decide in accordance with the terms of the contract and take into account trade usage. In considering the value of this provision it has been recognized that:

the law applicable to the contract is, in international business relations, a delicate subject on which, at the end of lengthy negotiations, it may be difficult to reach agreement. Each party will prefer to have its own law be declared applicable, afraid of surprises the law of the other party may present. The question remains therefore often outstanding. It may even be a stimulant for insertion of an arbitration clause into the contract as the parties, not without good reason, expect from arbitrators that they will above all base their decision on the wording and history of the contract and the usages of trade.\(^\text{28}\)

Additionally, the tribunal may not decide ex aequo et bono, or as amiable compositeur, unless expressly so authorized by the parties.

**Decision-making by panel of arbitrators (Art. 29).**—Awards must be made by a majority of the tribunal. Procedural decisions may be made by “a presiding arbitrator” alone, however, if so agreed by the parties or the tribunal.

**Settlement (Art. 30).**—Settlements may be memorialized into consent awards, which have the same effect as any other award on the merits, if the arbitrators approve.

**Form and contents of award (Art. 31).**—The parties may agree to an unreasoned award, if they so desire. Otherwise, the award must state reasons. The award further is deemed made where stated in the award, irrespective of where it may have been executed by the arbitrators.

**Termination of proceedings (Art. 32).**—The conditions of termination, which include withdrawal of claim, settlement, making of final award, or agreement of the tribunal, are outlined in this article.

**Correction and interpretation of award; additional award (Art. 33).**—The parties may agree that interpretation of a particular point or part of an award may be requested from the tribunal, and any party may request correction of any facial errors on the award. The arbitrators themselves have the authority to correct facial errors to the award *sua sponte* within thirty days. They further have the authority to extend that period of time, if they so agree.

**G. Recourse Against Award**

(Chapter VII)

**Application for setting aside as exclusive recourse against arbitration award (art. 34).**—The grounds for setting aside an award are the same as those of the N.Y. Convention, including nonarbitrability and public policy. The article provides a short three month time limit for actions to set aside, and

\(^{28}\) *Id.*, at 203 (quoting Pieter Sanders, Fifth International Arbitration Congress, New Delhi, 1975).
gives the court discretion, upon the request of a party, to suspend the proceedings to allow the tribunal to resume the arbitration or take such other action as will eliminate the grounds for setting aside.

H. RECOGNITION AND ENFORCEMENT OF AWARDS (CHAPTER VIII)

Recognition and Enforcement (Art. 35).—Awards under the model law are considered binding and enforceable, irrespective of the country in which made. This article was included to provide supplementary assistance in the enforcement of non-Convention awards without adversely affecting the operation of the N.Y. Convention. Recognizing that some states may find it easier to adopt the model law rather than adhere to a multilateral convention, the model law thus represents a further means of creating, in addition to the multilateral and bilateral network, a unilateral system of recognition and enforcement of foreign arbitral awards. The provisions for recognition and enforcement outlined in this article are deemed “maximum standards;” thus, the adopting state may impose less rigorous standards for recognition and enforcement.

Grounds for refusing recognition or enforcement (Art. 36).—Again, the grounds for such refusal are the same as those in the N.Y. Convention, and are essentially identical to the grounds for setting aside the award. It is noteworthy that a party who has not timely moved to set aside the award under Art. 34 is not foreclosed from raising defenses to recognition and enforcement of that award.29

The court is expressly authorized by the terms of this article to “adjourn its decision” pending a decision on setting aside an award from another court. The article thus may be used to avoid concurrent judicial review and the possibility of conflicting decisions.30 The court also is authorized to order appropriate security where deemed required, to ensure satisfaction of the award.

V. Conclusion

The result of UNCITRAL’s latest arbitration initiative is a comprehensive model law of arbitration procedure which, in time, will serve to streamline and make more uniform the practice of international commercial arbitration worldwide. Although just completed, the model law has generated wide interest in the international community, and already has had a

harmonizing effect in the very process of seeking to formulate an international consensus on the necessary procedural elements of effective international commercial arbitration. To a large extent the model law parallels existing United States law in that many of its provisions and basic concepts are essentially similar.

The law, as finally adopted by the Commission, was made possible by the dedicated common efforts of representatives and observers from many states, representing the various geographic regions and principal economic and legal systems of the world. The cooperative efforts over the last two and a half years have produced a model law on international commercial arbitration which is in most respects excellent, one which provides for broad party autonomy in fashioning the arbitration process, reflects principles of fairness and equality of treatment of the parties, includes basic provisions for the functioning of arbitral proceedings where the parties have not made necessary provisions, and strikes a proper relationship between arbitration and the courts.

The model law represents a further step in the advancement of international commercial arbitration as a viable and preferred forum for resolution of transnational business disputes—so greatly needed to facilitate and stimulate the smooth flow of international trade and investment.