

UNCITRAL (United Nations Commission
on International Trade Law)
ITS WORKINGS IN INTERNATIONAL
ARBITRATION AND A NEW MODEL
CONCILIATION LAW***

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I. INTRODUCTION

On November 19, 2002, amidst the vital discussions on global security and possible military intervention in Iraq spanning across the halls and offices of the United Nations' ("U.N.") Headquarters along the East River of New York City, the General Assembly adopted Resolution 57/18, recommending to the UN Member States to consider and enact the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Conciliation. The efforts of the international commercial dispute resolution community, stretching over the years, finally had come to fruition. The present triumvirate of UNCITRAL instruments in the area of arbitration and conciliation (also referred to as mediation) expanded, admitting a fourth companion. It remains to be seen what the reaction of the national governments will be towards UNCITRAL, but initial feedback hints optimism. At the same time, the UNCITRAL continues to keep the matters regarding arbitration under review.

This article offers a "one-stop-shop" analysis of the texts and implementation of all four UNCITRAL instruments covering international arbitration and conciliation. Part II gives a necessary overview of UNCITRAL's history and organization. Part III addresses the enactments in the field of arbitration and their recep-

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tion throughout the world, while the next steps and the topics for the near future are considered in detail. In Part IV, we present a summary of instruments regarding commercial conciliation, including the prospects of the Model Conciliation Law's reception in the United States.

II. UNCITRAL

A. History

“The [UNCITRAL] was created by the General Assembly in 1966¹ to enable the United Nations to play a more active role in reducing or removing legal obstacles to the flow of international trade.”² The U.N. recognized that various economic and legal differences existed between States. These differences were the source of many of the problems that hindered the advancement of an integrated international trade system. “The General Assembly considered it desirable that the process of harmonization and unification of the law of international trade be substantially coordinated, systemized, accelerated, and that a broader participation by States be secured.”³

As a result of an initiative by the Hungarian Government, the 20th Session (1965) of the General Assembly included an agenda item entitled “Consideration of Steps to be Taken for Progressive Development in the Field of International Law with a Particular View to Promoting International Trade.”⁴ In response, the U.N.'s Secretariat distributed a survey on the unification of international trade.⁵ This survey asked several questions concerning the problems of international commercial transactions that resulted from conflicting State laws. Through the survey, the General Assembly sought suggestions from member States concerning how the goal of the harmonization of global trade could be reached.⁶ “On the basis of a recommendation contained in that survey, the General Assembly requested [that the] Secretariat prepare a com-

¹ UNCITRAL: THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW at 3, U.N. Sales No. E.86.V.8 (1986) [hereinafter UNCITRAL].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *See id.*

⁶ *Id.*

prehensive report on the progressive development of the law of international trade.”⁷

While the report noted that some progress had been made toward the unification and harmonization of international trade laws, there also existed several widespread problems resulting from efforts to achieve these goals:⁸ the process had been slow in relation to the amount of effort exerted into achieving harmonization; developing countries were left out of deciding key decisions and had little opportunity to participate; some geographic and economically viable regions were left out of the decision-making process altogether; and little cooperation existed between the decision-makers in this field.⁹ “The report proposed the creation by the General Assembly of a new United Nations organ to systematize and accelerate the process of harmonization and unification of the law of international trade and to remedy the shortcomings that had characterized the process.”¹⁰ Based on this report and recommendation, the General Assembly adopted the resolution establishing the Commission.¹¹

“The [Commission] has since come to be the core legal body of the United Nations system in the field of international trade law.”¹² In response to some of the problems noted by the survey results, the Commission included the world’s “various geographic regions and its principal economic and legal systems.”¹³ Originally composed of twenty-seven member States, UNCITRAL’s membership expanded in 1973 to include thirty-six member States.¹⁴ As of June 25, 2001, some of the thirty-six member states included (followed by the date when their term expires): Brazil (2007),

⁷ *Id.* at 3; see also E. Allan Farnsworth, *UNCITRAL – Why? What? How? When?*, 20 AM. J. COMP. L. 314 (1972) [hereinafter Farnsworth] (statement of Professor Willis L. M. Reese: “The General Assembly requested the Secretary-General to submit a report on the subject, which he did in the following year [1966] on the basis of a report by Dr. Clive M. Schmitthoff, a British authority on the law of international trade and comments by five experts in the field, one of them an American.”).

⁸ See UNCITRAL, *supra* note 1, at 4.

⁹ See *id.*

¹⁰ *Id.*

¹¹ See *id.*

¹² United Nations Commission on International Trade Law (UNCITRAL) General Information, United Nations Publications, at <http://www.uncitral.org/english/commiss/geninfo.htm> (last visited Nov. 12, 2002) [hereinafter UNCITRAL General Information].

¹³ *Id.*

¹⁴ UNCITRAL *supra* note 1, at 5.

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Rwanda (2007), Sudan (2004), Japan (2007), the United States of America (2004), and Germany (2007).¹⁵

B. Structure

Composed of a diverse composition of member States, the UNCITRAL carries out the goals of harmonizing and unifying international trade laws.¹⁶ “The Commission has established six working groups to perform the substantive preparatory work on topics within the Commission’s program of work. Each working group is comprised of all member States of the Commission.”¹⁷

Located in Vienna, Austria, the Secretariat of UNCITRAL “carries out legal research on subject matters within the program of work of UNCITRAL and prepares reports, preliminary draft texts and commentaries on draft legal texts.”¹⁸ This research forms the basis for topics that will be addressed by the working groups.¹⁹ In addition to researching substantive legal issues, the Secretariat also “organizes administrative services for meetings of the Commission and of its working groups and groups of experts.”²⁰

C. Scope

The scope of work originally carried out by the Commission was far narrower than the wide range of topics addressed today.²¹ Over the past thirty-six years, the Commission has addressed and recommended laws, rules, and legal guides on topics ranging from international commercial arbitration²² to rules governing commer-

¹⁵ For a full list of the 36 countries that are currently member States of UNCITRAL, see UNCITRAL General Information, *supra* note 12.

¹⁶ For UNCITRAL mandate, see GA Resolution 2205.

¹⁷ *Id.*

¹⁸ UNCITRAL, *supra* note 1, at 6.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Howard M. Holtzmann, *Recent Work on Dispute Resolution by the United Nations Commission on International Trade Law*, 5 ILSA J. INT’L & COMP. L. 425 (1999) (noting the wide range of topics covered by the UNCITRAL commission while focusing on UNCITRAL’s work on alternative dispute resolution initiatives). Cf. Farnsworth, *supra* note 7, at 316 (In 1968, UNCITRAL initially gave priority to three topics: international sale of goods, international payments, and international commercial arbitration).

²² See UNCITRAL General Information, *supra* note 12. See also Michael F. Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration*, 20 INT’L L. 327

cial conciliation²³ to a model law governing electronic commerce.²⁴ “It is noteworthy that UNCITRAL’s program of work avoids such critical problems as tariffs, import quotas, export restrictions, and exchange controls.”²⁵ Other techniques to promote the harmonization and unification of international trade laws include the creation of international conventions, model treaty provisions, legal guides that “identify legal issues arising in a particular area,” and recommendations to governments and international organizations.²⁶ Also, the Commission provides “updated information on case law and enactments of uniform commercial law, technical assistance in law reform projects,” and offers regional and national seminars to promote the Commission’s work.²⁷

“In 1969, [UNCITRAL] authorized the Secretary-General to establish a *Yearbook* which would make the work of the Commission more widely known and readily available.”²⁸ Published in 1971, the first *Yearbook* discussed UNCITRAL’s activities in 1968-1970, the first three years of UNCITRAL’s operation.²⁹ The *Yearbook* demonstrates a genuine effort toward educating the member States and provides “a rich store of information on the most ambitious attempt yet at unification of private law on an international scale.”³⁰

Additionally, the Commission has worked, or is working, on topics such as the international sale of goods and related transactions, international transport of goods, international commercial arbitration and conciliation, public procurement and infrastructure development, construction contracts, international payments, electronic commerce, and cross-border insolvency.³¹ Currently, the six working groups are assigned the topics of privately financed infrastructure projects, international arbitration and conciliation, transport law, electronic commerce, insolvency law, and security interests.³²

(1986) (exploring the substance and implementation of The UNCITRAL Model Law on International Commercial Arbitration). Mr. Hoellering is a member of the 1986 United States Delegation.

²³ See generally UNCITRAL Conciliation Rules (1980).

²⁴ See generally UNCITRAL Model Law on Electronic Commerce (1997).

²⁵ Farnsworth, *supra* note 7, at 316.

²⁶ UNCITRAL, *supra* note 1, at 11.

²⁷ See UNCITRAL General Information, *supra* note 12.

²⁸ Farnsworth, *supra* note 7, at 314.

²⁹ See *id.*

³⁰ *Id.* at 322.

³¹ See UNCITRAL General Information, *supra* note 12.

³² See *id.*

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UNCITRAL recommends, upon the adoption of certain of its model laws or rules, that the General Assembly stamp its approval on the work through a General Assembly resolution. A General Assembly resolution typically recommends that member States give “serious consideration” to a law or set of rules and, “where appropriate[,] implement them in the form of either a model law or a convention.”³³ The General Assembly typically shows little resistance to adopting the recommendations of UNCITRAL.³⁴ States are free to follow (or adopt) some or all of the General Assembly’s resolutions. There are no restrictions preventing a non-UN State from utilizing or implementing those recommendations.

Of all the texts prepared under the auspices of UNCITRAL and then launched into the world of international commerce by the UN General Assembly, the ones discussing dispute resolution, particularly arbitration, distinguish themselves as obvious success stories. Those instruments, namely the Arbitration Rules of 1976,³⁵ the Model Law on International Arbitration of 1985,³⁶ and the Conciliation Rules of 1980,³⁷ will be the topic of the following chapters, before we look into the most recently adopted “missing link,” the Model Law on International Commercial Conciliation of 2002.³⁸

III. ARBITRATION

A. UNCITRAL Arbitration Rules

1. Introduction

The UNCITRAL Arbitration Rules were adopted and recommended for use in the settlement of disputes arising in the context of international commercial relations by the UN General Assem-

³³ UNCITRAL, *supra* note 1, at 192 (quoting the “Uniform Rules on Contract Clauses for an Agreed Sum Due Upon Failure of Performance”).

³⁴ See Holtzmann, *supra* note 21, at 427 (noting that both the UNCITRAL Arbitration Rules and UNCITRAL Conciliation Rules were recommended by the General Assembly by consensus, “without a single voice or vote raised against it by any nation”).

³⁵ See G.A. Res. 31/98 (1976), available at <http://www.un.org/documents/ga/res/31/ares31.htm> (last visited Dec. 6, 2004).

³⁶ See G.A. Res. 40/72 (1985), available at <http://www.un.org/Depts/dhl/res/resa40.htm> (last visited Dec. 6, 2004).

³⁷ See G.A. Res. 35/52 (1980), available at <http://www.un.org/documents/ga/res/35/ares35.htm> (last visited Dec. 6, 2004).

³⁸ See G.A. Res. 57/18 (2002), available at <http://www.un.org/Depts/dhl/resguide/r57.htm> (last visited Dec. 6, 2004).

bly in Resolution 31/98.³⁹ The Rules resulted from extensive consultations with arbitral institutions and experts, spearheaded by a truly international and inter-cultural committee, which included representatives of common and civil law systems used in developed and developing nations. An unusual partnership between UNCITRAL and a private entity, the International Commission on Commercial Arbitration (“ICCA”), provided effective auspices for the preparatory work.⁴⁰ A draft of the Rules was discussed at the ICCA Congress in New Delhi, India in January 1975.

The Rules were primarily designed with *ad hoc* arbitration in mind. Nevertheless, they have become widely used in both institutional and *ad hoc* arbitrations. Many arbitral institutions allow the parties to opt for UNCITRAL Rules instead of their own arbitration rules, and still offer full administration services. Those institutions include, *inter alia*, American Arbitration Association (“AAA”), London Court of International Arbitration, Stockholm Chamber of Commerce, Arbitral Center of the Federal Economic Chamber of Austria in Vienna, Foreign Trade Arbitration of the Yugoslav Chamber of Commerce in Belgrade, and Indian Council of Arbitration. Support from several other institutions is limited to serving as the appointing authority: e.g., the International Chamber of Commerce (“ICC”), the Netherlands Arbitration Institute, and Zurich Chamber of Commerce.

Another significant example of the incorporation of the Rules in the arbitration world is seen in the entities whose statutes, administrative rules, or founding treaties include a provision that states that disputes shall be settled in accordance with the UNCITRAL Arbitration Rules, subject to possible modifications, or alternatively, with other rules. The Iran-US Claims Tribunal⁴¹ and investor/government disputes under NAFTA⁴² are undoubtedly examples that brought UNCITRAL Rules closer to the wider legal community and general public in the US, but their pattern is identi-

³⁹ See G.A. Res. A/RES/31/98 (1976), available at <http://www.un.org/documents/ga/res/31/ares31.htm> (last visited Dec. 6, 2004).

⁴⁰ Members of the ICCA Consultative Group were Donald B. Strauss (Chairman), Dr Carlos A. Dunshee de Abranches, Prof. Tokusuke Kitagawa, and Prof. Heinz Stohbach. Prof. Pieter Sanders was appointed an expert consultant to UNCITRAL Secretariat.

⁴¹ Established in the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981; Article III(2), see Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, U.S.-Iran, 20 I.L.M. 230.

⁴² North American Free Trade Agreement (1993), art. 1120, 321 I.L.M. 605.

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cal to the rules followed by the Asian-African Legal Consultative Committee and its regional centers.⁴³

Moreover, the 1978 Rules of Procedure of the Inter-American Commercial Arbitration Commission⁴⁴ and the 1980 Procedures for Arbitration and Additional Rules of the International Energy Agency Dispute Settlement Center⁴⁵ are modeled after the UNCITRAL Rules.

2. Salient points

The Rules are divided into four sections: Section I – Introductory Rules (Articles 1-4), Section II – Composition of the Arbitral Tribunal (Articles 5-14), Section III – Arbitral Proceedings (Articles 15-30), and Section IV – The Award (Articles 31-41).

In Section I, the Rules set out the basic prerequisites for arbitration, such as the requirement of writing, conveniently supplying the prospective parties to a contract (and, *ergo*, to a dispute) with a model arbitration clause in a note to Article 1.

Section II calls for the selection of an odd number of one (1) to three (3) arbitrators, three (3) being the default rule (Article 5). With respect to the appointment of arbitrators, the Rules had to provide a solution for the composition of the tribunal in the absence of consensus by the parties since UNCITRAL is not an institution. Hence, the Rules introduced the notion of a party-agreed upon appointing authority (or, if parties cannot agree, either party may request the Secretary General of the Permanent Court of Arbitration at the Hague to designate an appointing authority). In appointing the sole or the third arbitrator, the so-called “list procedure,” a concept borrowed from the AAA practice,⁴⁶ shall be used.⁴⁷ The issues of challenging procedure, covered in Articles 9-12, center on the standard of “justifiable doubts as to . . . impartiality or independence.” Article 10 clarifies that these standards apply to party-appointed arbitrators, whereas paragraph 2 allows for a challenge of a party’s own arbitrator, though not unconditionally.

⁴³ Rules for Arbitration of the Kuala Lumpur Regional Arbitration Center, 1983, Rule I, 23 I.L.M. 241.

⁴⁴ See SICE Foreign Trade Information, at <http://www.sice.oas.org/dispute/comarb/ia-cac/ia-cac1e.asp> (last visited Nov. 12, 2004).

⁴⁵ See 20 I.L.M. 1307 (1981).

⁴⁶ See Rule 13 of the AAA Commercial Arbitration Rules, available at <http://www.adr.org> (last visited Nov. 12, 2004).

⁴⁷ See Pieter Sanders, *THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION* (2004).

The Rules cover the arbitral proceedings in great detail in Section III. Skipping the provisions regarding the place of arbitration, language, claims, defenses, amendments, time periods, *Kompetenz-Kompetenz* (Article 21(1)),⁴⁸ and separability⁴⁹ (Article 21(2)), we turn to the matters of evidence and hearings in Articles 24 and 25. The Rules do not provide for discovery, and Article 25(4) leaves the tribunal free to determine the manner in which witnesses are examined (*viz.*, whether it be under the common law tradition of examination primarily by the lawyer and cross-examination by the other party's lawyer, or under the civil law tradition of examination from the bench, or perhaps a mixture). Another discrepancy between civil and common law was resolved by adhering to a civil law norm – experts are tribunal-appointed (Article 27(1)). The question of interim measures shall be separately discussed later, but the Rules do provide for arbitral-tribunal ordered measures (Article 26), and a rather narrowly defined requirement of “security for the costs of such measures.”⁵⁰

Turning to the arbitral award, Article 31 calls for a majority of arbitrators to agree, while Article 32 sets out the requirements of writing, reasons, and signature. Consent of the parties is needed for publication of the award.⁵¹ According to Article 33, the arbitrators may decide on the merits either according to the applicable law designated by the parties, or absent such designation, “the law determined by the conflict of laws rules which they consider applicable” (Article 33(1)), or as *amiables compositeurs*, if expressly authorized by the parties (Article 33(2)). However, the conflict of laws approach is considered outdated and is rarely used. The Model Law approach⁵² of direct choice is widely followed. Article 34 provides for an award on agreed terms, or award by consent, and Articles 38-41 cover the issue of costs – with the requirement that the tribunal, when fixing its fees, shall take into account the schedule of fees of the appointing authority (Article 39(2)). The latter was necessary, as UNCITRAL is not an arbitral institution and, consequently, has no schedule of fees.

⁴⁸ Power of the tribunal to rule on its own jurisdiction.

⁴⁹ Also referred to as “severability.”

⁵⁰ *But see* Sanders, *supra* note 47.

⁵¹ This provision was modified in the Iran-US Claims Tribunal, where awards are made public as a rule.

⁵² *See infra*, Sec. III.B.3.

B. UNCITRAL Model Law on Arbitration

1. Introduction

The Model Law on Arbitration was said to be, by one distinguished writer, worthy of standing alongside the New York Convention⁵³ and the UNCITRAL Arbitration Rules as a crucial pillar in the worldwide system of arbitral justice.⁵⁴

Improvement and harmonization of national laws remain key factors in the facilitation of international arbitration because of the need for increasing uniformity and predictability of effective arbitral procedures to lower the risks of international commerce and to contribute to overall global economic relations. It assists in curing the adverse effects of disparity between national laws in international cases, avoiding territorial constraints and local peculiarities, and it provides for functioning and fairness of the arbitral process by a universal standard.⁵⁵ Among the objectives of the Model Law were to devise a fairly complete and generally acceptable set of non-mandatory provisions, closely modeled on, but sometimes distinguished from, UNCITRAL Rules, and to clarify a number of issues in the interpretation and application of the New York Convention.

The drafting process was initiated with a 1977 recommendation⁵⁶ by the Asian-African Legal Consultative Committee (“AALLC”) to review and possibly amend the New York Convention. Eventually, the Commission decided to draft uniform rules in the shape of a model law (or, alternatively, a treaty) rather than fix the well-established regime of the New York Convention. From the outset, UNCITRAL opened its door for the arbitration community to participate in the process.⁵⁷ In 1981, the Working Group on International Contract Practices, chaired by Professor Ivan Szasz, was entrusted with the preparation of a draft.⁵⁸ The Group consisted of all thirty-six members of the Commission, while thirty other states and more than fifteen organizations participated as observers. The most active organizations were the Hague Conference

⁵³ See 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38, at <http://www.uncitral.org> (last visited Nov. 12, 2004).

⁵⁴ See H. Holtzmann, *The Conduct of Arbitral Proceedings*, Report submitted to ICCA Interim Meeting at Lausanne, in *UNCITRAL's Project for a Model Law on International Commercial Arbitration*, 2 ICCA CONGRESS SERIES 159 (1984).

⁵⁵ See *id.* at 12.

⁵⁶ See U.N.Doc. A/CN.9/127.

⁵⁷ AALLC, ICCA and ICC representatives took part in the initial consultations.

⁵⁸ Reports on the work of the Group's five sessions are contained in documents A/CN.9/216, A/CN.9/232, A/CN.9/233, A/CN.9/245, and A/CN.9/246.

on Private International Law, the Chartered Institute of Arbitrators, the International Bar Association, the ICC, the ICCA, and the AALCC's Cairo Regional Center for International Commercial Arbitration. Individuals such as Professor Kazuaki Sono, then Secretary General of UNCITRAL, and Dr. Gerold Herrmann, then Secretary of the Working Group, provided the necessary personal contribution on the part of "insiders." After the Group finished its work, the Secretary General transmitted the draft text to all governments and interested international organizations for their comments, and the ICCA convened a meeting of 550 practitioners and scholars from thirty-nine nations. At UNCITRAL's June 1985 meeting in Vienna, the draft text was reviewed article by article. By the end of the session, a final text of the Model Law was adopted. The UN General Assembly recommended it to its Member States in Resolution 40/72 of December 11, 1985. By November 2002, legislation based on the UNCITRAL Model Law on International Commercial Arbitration had been enacted in forty-one jurisdictions.⁵⁹

2. Practical Concerns

Fully aware of the deficiencies in the system of international commercial arbitration, the Model Law drafters focused on the following issues: expectations of parties as expressed in their arbitration agreement, which was often being frustrated by mandatory provisions of applicable law; the extent of judicial supervision and control; limits to obtaining full and precise accounts of foreign law; automatic operation of non-mandatory default rules of applicable law; lack of rule on point (*lacuna*) in applicable law; applicable law often not suitable for international arbitration and/or mostly drafted to meet the needs of domestic arbitration.⁶⁰

One of the dilemmas the drafters had to resolve was whether to pursue the harmonization process through a model law or treaty. Opinions were divided, but from the beginning, the model law

⁵⁹ The forty-one jurisdictions are Australia, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong Special Administrative Region of China, Hungary, India, Iran (Islamic Republic of), Ireland, Jordan, Kenya, Lithuania, Macau Special Administrative Region of China, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Republic of Korea, Russian Federation, Singapore, Sri Lanka, Tunisia, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; within the United States of America: California, Connecticut, Oregon and Texas; Zambia, and Zimbabwe.

⁶⁰ See Gerold Herrmann, *The UNCITRAL Model Law – Its Background, Salient Features and Purposes*, 1 *ARB. INT'L* 6, 7-12 (1985).

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seemed the more likely solution. Although a treaty theoretically has the binding authority that a model law lacks, treaty reservations might often completely negate the enactment's purpose. The unsuccessful example of the 1966 European Uniform Law convention, ratified only by Belgium, served as a sufficient warning to all involved in the work on the model law.⁶¹ Practical considerations determined the advantage of following the model law – no need for a diplomatic conference; simpler, faster, and less costly process of drafting; no need to wait for a certain number of ratifications for entering into force. Ample flexibility was assured in the varied and necessary adjustment to the varying language and style of national procedural legislation (the success of the Uniform Commercial Code in the US served as an effective guiding paradigm).

The Model Law text deliberately omits legal terms or concepts specific to certain jurisdictions and, instead, relies on descriptive language, embodying the generally recognized principles and utilizing the usual phases and industry jargon of international arbitration.

3. Salient points

The Model Law is divided into eight chapters: Chapter I – General Provisions (Articles 1-6), Chapter II – Arbitration Agreement (Articles 7-9), Chapter III – Composition of Arbitral Tribunal (Articles 10-15), Chapter IV – Jurisdiction of Arbitral Tribunal (Articles 16-17), Chapter V – Conduct of Arbitral Proceedings (Articles 18-27), Chapter VI – Making of Award and Termination of Proceedings (Articles 28-33), Chapter VII – Recourse Against Award (Article 34), and Chapter VIII – Recognition and Enforcement (Articles 35-36).

Certain matters are not covered by the Model Law, which explicitly provided that national rules on arbitrability are not affected (Article 1(5)). Other questions where national laws remain applicable include the capacity of parties to conclude arbitration agreements, the impact of sovereign immunity, consolidation of arbitral proceedings, the competence of the arbitral tribunal to adapt contracts, security for fees or costs, the period of time for enforcement of arbitral awards, the enforcement of interim measures of protec-

⁶¹ See A. Broches, *1985 UNCITRAL Model Law on International Commercial Arbitration: An Exercise in International Legislation*, 18 NETH. YB. INT'L L. 3, 15-22 (1987) (comparing the New York Convention, the European Uniform Law, and the UNCITRAL Model Law).

tion granted by arbitrators,⁶² and the manner in which arbitration awards are enforced.⁶³

Article 1(1) states that the Model Law applies to international commercial arbitration. Hence, the scope of its application hinges on the definitions and interpretations of these terms. While it was impossible to come to a satisfactory definition of “commercial” and the accompanying note provides an illustrative, non-exhaustive list, controversy surrounded the attempts to define “international.” Between proposals to adopt the broad descriptive recipe of the 1981 French law,⁶⁴ state the list of objective criteria, or leave it to enacting states to define it, the final solution was to set the determinative factor to be the parties’ place of business (Article 1(3)(a)), with supplementary factors to include the place of arbitration, place of performance, or the place most closely connected to the subject matter of the dispute (Article 1(3)(b)(i) and (ii)). As for the definition of arbitration, Article 2(a) avoids providing one particular definition, and instead, states that the Model Law applies to both *ad hoc* and institutional arbitration.

The territorial scope of the Model Law is determined by the place of arbitration under Article 1(2): the Model Law applies if the place of arbitration (covered in Article 20) is a Model Law state. Article 4 is modeled after Article 30 of the Rules and it discusses estoppel and the principle *venire contra factum proprium non valet*.⁶⁵ If the party’s objection is not timely, it loses the right to claim that a provision of the Model Law or any clause of the arbitration agreement has not been complied with.⁶⁶ The basis for court intervention, for either assistance or control, is provided for in Article 5. Although criticized as an attack on the partnership between the bench and arbitrators,⁶⁷ it in fact merely limits the situations when the court can intervene “in the matters governed by this law.”

The requirement for the arbitration agreement is stated in Article 7(2), but the definition of “writing” is broadened and adapted to modern commercial practices in comparison to Article II(2) of the New York Convention. Article 8 provides for the court to refer

⁶² See *infra*, Sec. III.C.

⁶³ See Broches, *supra* note 61, at 22.

⁶⁴ Article 1492 of the 1981 New Code of Civil Procedure (“Nouveau Code de Procédure Civile”); English translation in 20 I.L.M. 917-22 (1981).

⁶⁵ Sanders, *supra* note 47.

⁶⁶ Naturally, this does not apply to mandatory provisions of the Model Law, as those cannot be derogated by the parties.

⁶⁷ For arguments *pro et contra*, see Herrmann, *supra* note 60, at 14-15.

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the parties to arbitration, unless the agreement is found “null and void, inoperative or incapable of being performed,” which parallels Article II(3) of the New York Convention. Also, the Model Law allows the arbitration to proceed while the issue is pending before a court. Article 9 sets forth the grounds for court-ordered interim measures.

The provisions on appointment and challenge of arbitrators are fairly standard. Article 13(3) requires the prospective or appointed arbitrator to disclose all circumstances that might cast doubt on his/her impartiality or independence, to set the default rule for the decision on challenge to lie with the tribunal, but still retains the final say for the court. Certain unfortunate consequences of the truncated tribunal process, such as when an arbitrator (most likely the party-appointed variety) fails to act or withdraws, are addressed and proposed remedies are described in Article 14.

The principles of *Kompetenz-Kompetenz*⁶⁸ and severability of the arbitration clause from the contract are endorsed in the Article 16(1), but the final word still belongs to the courts (Article 16(3)). Article 17 empowers the tribunal to order interim measures, but limits the discretion of the tribunal “in respect of the subject-matter of the dispute.”⁶⁹

Chapter V opens with the provisions that the Secretary General of UNCITRAL labeled the *Magna Charta* of Arbitral Procedure.⁷⁰ The equal treatment of parties (Article 18) is a mandatory provision. A large degree of discretion is conferred upon the parties or, if they fail to agree, the arbitrators, in determining the rules of procedure (Article 19). The parties’ freedom is restricted only by mandatory provisions (plus, in the case of arbitrators, non-mandatory provisions). The consequence of this article is the exclusion of local procedural rules, unless the parties or arbitrators deem them suitable.

The place of arbitration (Article 20) is a significant factor for two purposes: for determining the applicable national law, and for the purpose of setting aside, recognizing or enforcing arbitral decisions. Articles 20 and 31(3) outlines the procedure of designating the place of arbitration and for rendering the award at the place so designated legal, not factual, acts.

⁶⁸ See *supra* note 50.

⁶⁹ Cf. Rule 36(a) of the AAA Rules, Article 23(1) of the ICC Rules.

⁷⁰ See Herrmann, *supra* note 60, at 19.

The next few articles tackle the essential issues of procedure – commencement of proceedings, language, statements of claim and defense, hearings and written proceedings, and endorsement of widely recognized principles. Model Law Article 24(3) has improved the requirements of communication of documents to the other party,⁷¹ and thus affirmed the *audiatur et altera pars* principle. Article 25 contains a default rule on the wayward party, while Article 26 deals with the tribunal-appointed experts, though on a less detailed basis than the Rules. Alongside court assistance of the appointment of arbitrators, the court of a Model Law country might also be called upon for assistance when a witness is unwilling to be heard (Article 27). Commentators observed that the court should, additionally, invite the arbitrators to be present during such proceedings.⁷²

Article 28(1) introduced a sweeping change in comparison to the Rules insofar as the choice-of-law provisions. Instead of allowing the parties the freedom to designate a given “law,” which is commonly understood as the law of a particular state, Article 28(1) opts for the “rules of law as may be agreed by the parties.” The parties, thus, are not restricted to the rules of one national legal system, but may introduce rules from other systems, rules of non-binding instruments of international law, *lex mercatoria*, trade usages, etc. However, the choice via conflict of laws rules was copied from the Rules, despite disregarding this provision in actual practice.

Article 28(3) discusses *amiables compositeurs*, whereas Article 29 sets the rules for decision-making: both odd and even numbers of arbitrators are permitted (mainly addressed at jurisdictions following the English tradition of two arbitrators, who may, if need be, be substituted by an umpire). The agreed-upon award (i.e., a settlement), is given the same weight and effect as any other award on the merits (Article 30(2)). Reasons for the award are the default rule (Article 31(2)).

Given the impact of the grounds for setting aside the arbitral award, it is not surprising that Article 33 embodies one of the essential objectives of the Model Law. First, the Model Law calls for the application for setting aside an award to be made within three months of the receipt of the award. This application is the only available means of recourse to challenge the award. The list of grounds to vacate an award is substantially the same as those in

⁷¹ See Article 15(3) of the UNCITRAL Arbitration Rules.

⁷² See Sanders, *supra* note 47.

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Article V of the New York Convention: lack of capacity of the parties to conclude the arbitration agreement; lack of a valid arbitration agreement; lack of notice of the appointment of arbitrators; inability of a party to present its case; issuance of awards dealing with matters not covered by the submission to arbitration; composition of an arbitral tribunal or conduct of arbitral proceedings contrary to an effective agreement of the parties, or, failing agreement, to the Model Law; non-arbitrability of the subject-matter of a dispute; and the violation of public policy. Bearing in mind that the grounds for setting aside are then relied upon as the grounds for refusing recognition and enforcement (in addition to the grounds that the award has been set aside in the country of origin) (Article 34), and that the last two grounds (namely non-arbitrability and violation of public policy) depend on different national provisions, this provision opens the gate for “double-checking” arbitral awards and conflicting judgments in two jurisdictions.

4. Variations and deviations

The general opinion regarding the question of modifications in the enactment of the Model Law is adequately summarized in the opinion of the Scottish Advisory Committee on Arbitration Law that preceded the adoption of the Model Law in Scotland:

While certain changes to the Model Law are necessary in every country in order to accommodate it to the legal structures of that country, the main object of the Model Law is to provide a framework for arbitration which is readily understandable by people of very different legal cultures. Accordingly, the Committee recommends that any legislation to give effect to its proposals should depart from the language of the Model Law only where essential. This is the course of action which has been taken in those countries which have already adopted the Model Law.⁷³

In a survey of twenty-two enactments of the Model Law, Pieter Sanders stressed that “the success of the Model Law as a whole may be seen in the fact that there is no one particular article which generally has been deviated from [by a considerable number of states].”⁷⁴ Nonetheless, Gerold Herrmann pointed out four is-

⁷³ Lord Dervaird, *Scotland and the UNCITRAL Model Law: The Report to the Lord Advocate of the Scottish Advisory Committee on Arbitration Law*, 6 *ARB. INT'L* 63, 67 (1990).

⁷⁴ Pieter Sanders, *Unity and Diversity in the Adoption of the Model Law*, 11 *ARB. INT'L* 1 (1995).

sues⁷⁵ with more than two modifications in the enacting states' laws, preceded by strong minority views asserted during the deliberations of the draft text.

The requirement of written form is, undeniably, the question where the statutes and treaties can hardly keep pace with reality and the needs of commercial activity. In spite of the considerable modernity and flexibility of Model Law's Article 7(2), certain situations forced the enacting states to modify that provision. Those situations include bills of lading and other "half form" cases (e.g., Singapore, Germany). Hong Kong pursued a non-exhaustive list of criteria with a general catchall formula. New Zealand, on the other hand, eliminated the need for writing by recognizing oral agreements in its 1996 Arbitration Act. Quite a few states left out the permission for an even number of arbitrators, while some opted for a preferred sole arbitrator (e.g., India, Mexico, Scotland, and certain states in the US).

Consistent with the remarks made in the summary of the Model Law, Article 28(2), which envisages the choice-of-law via conflict of laws rules, was replaced by a direct choice rule adopted by British Columbia, Egypt, Germany, India, Mexico, Tunisia, Oman, and Bulgaria (though the last two limited the choice to "law" rather than "rules of law"⁷⁶). Many of these countries instruct arbitrators to use the law of the closest connection to the dispute along the lines of typical choice of law criteria.

The last provision that was rejected in some states is the uniform treatment of recognizing and enforcing domestic and foreign awards, and eradicating the reciprocity requirement. As explained above,⁷⁷ Article 36 called for differentiation only on the basis of whether the award is made in the international or non-international context, and thus, if it is within the scope of the Model Law, irrespective of the place of origin of the award. Notably, the traditional reciprocity requirement is incompatible with this solution. Therefore, jurisdictions such as Australia and Germany, and especially those that made the reciprocity reservation to the New York Convention – Bermuda and Hong Kong – decided to preserve the New York Convention distinction between domestic and foreign awards when it comes to recognition and enforcement.

⁷⁵ See Gerold Herrmann, *The UNCITRAL Arbitration Law: a Good Model of a Model Law*, 2/3 UNIFORM L. REV. 483, 492-94 (1998).

⁷⁶ See *supra*, § III.B.3; see also Herrmann, *supra* note 60, at 22-23.

⁷⁷ See *supra*, § III.B.3.

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Other less frequent variations involve foregoing the solutions drafted in the Model Law to avoid dilatory tactics through recourse to courts in Article 13(3) and 16(3), adding or clarifying the grounds for setting aside (e.g., Egypt,⁷⁸ New Zealand, Singapore, Australia), no reasons or mandatory reasons, etc.

5. Additions

At this moment, sixteen years after the first enactment (Canada 1986), four issues may be singled out as the prevailing additions to the original text of the Model Law.⁷⁹ Conciliation is one of them, ranging from the simple mention to sophisticated schemes. This matter will be elaborated in Section IV.

Another issue that created the need for further legislative efforts is consolidation of multi-party arbitrations.⁸⁰ The enacting jurisdictions dealt mostly with the role of the court in ordering consolidation. Solutions range from court-ordered (Canada, California, Oregon, Texas), to tribunal-ordered (Australia, New Zealand, Germany), to parties-agreed consolidation (Ireland).

Considerable attention was given to the issues of costs, fees, and interest, ranging from regulating simple empowerment of the tribunal and rules on court control to detailed computation schemes. A number of countries (Australia, Singapore, Hong Kong, Germany, Peru, etc.) addressed the liability of arbitrators.

C. Next Steps in Arbitration

In the immediate future, most scholars and practitioners agree on the topics that require further clarification or additional regulation on the international plane. As summarized in the Provisional Agenda for the 37th session of the UNCITRAL's Working Group

⁷⁸ Commentators believe that the Egyptian addition of “[failure] to apply the law agreed by the parties to the subject matter of the dispute” and “[if] the arbitral proceedings are tainted by nullity affecting the award” to the grounds for setting aside opened the gate for the rather troublesome saga of the *Chromalloy Aeroservices v. Arab Republic*, 939 F. Supp. 907 (D.D.C. 1996). See Hermann, *supra* note 60, at 495. For the *Chromalloy case*, see R. Hulbert, Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied, and an Opportunity Foregone, 13 ICSID REV. 124 (1998); S. Ostrowski, Y. Shany, *Chromalloy: US Law and International Arbitration at the Crossroads*, 73 N.Y.U. L. REV. 1650 (1998).

⁷⁹ See Sanders, *supra* note 74, at 59-68.

⁸⁰ Present particularly in cases of complex investments and construction contracts.

on Arbitration and Conciliation,⁸¹ those topics are conciliation (i.e., adopting the Model law on Conciliation), the written form requirement for the arbitration agreement, and the issue of interim measures of protection. In addition, the Working Group identified the matters potentially worthy of future consideration – enforceability of an award that has been set aside in the state of origin, Article VII of the New York Convention, residual discretionary power to grant enforcement of an award despite the existence of a ground for refusal, and the power of a tribunal to award interest.

With respect to the written form requirement, a large majority of the arbitration community is aware that Article II(2) of the New York Convention, and even Article 7(2) of the Model Law, strive to be modernized. The obstacles, especially with regard to the Convention, are clearly seen in the complicated process of ratifications. So for the time being, with regard to the New York Convention, interpretation of Article II(2) in conjunction with Article VII (more favorable right) is quite satisfactory.

The interim measures issue seems to be provoking more controversy. The dilemmas before the UNCITRAL Working Group and the arbitration community in general are numerous. Who should have the power to order interim measures the arbitral tribunal or the court, or both concurrently? What should be the time limits for the exercise of the powers of each, especially if any such power is granted to the arbitral tribunal? What are the appropriate limitations of those powers? If the power is given to the courts only, should the request be made by the arbitrator(s) or by the party directly? Should *ex parte* relief be allowed, and, if so, on what conditions? Turning to substance, what are the elements and preconditions to be satisfied in the request? Should the formula of Article 17 of the UNCITRAL Model Law limiting the power of the tribunal to measures “in respect of the subject matter of the dispute” be upheld, or should a broader approach expressed in the rules of the most prominent institutions prevail?⁸² How are the interim measures to be defined or classified? Lastly, should any specific provisions address the interim measures in support of foreign arbitration (i.e., when a court is called upon to issue interim measures when the arbitration takes place outside its country or jurisdiction)?⁸³

⁸¹ See U.N. Doc. A/CN.9/WG.II/WP.120.

⁸² See Rule 36(a) of the AAA Rules, Article 23(1) of the ICC Rules.

⁸³ For example, Austria, Canada, Germany, and Greece set some specific requirements for this situation, while India and China reject this possibility. On the other hand, the

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The Working Group analyzed the recent texts dealing with international litigation (and, thus, may be applied, *mutatis mutandis*, to arbitration) such as the International Law Association's "Principles of Provisional and Protective Measures in International Litigation,"⁸⁴ American Law Institute / Unidroit's "Draft Fundamental Principles and Rules of Transnational Civil Procedure,"⁸⁵ and the Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, prepared by the Hague Conference on Private International Law.⁸⁶ At the end of the Note by the Secretariat on preparation of uniform provisions on interim measures of protection, written for the 36th session of the Working Group, a draft for revised Article 17 of the Model Law was provided,⁸⁷ together with alternative solutions for court-ordered measures⁸⁸ and additional provisions on enforcement of the interim measures.⁸⁹

The provisions on the power of the tribunal to order interim relief would remain as the default, and would not apply only if the parties specifically provide so. The limiting clause of "in respect of the subject matter of the dispute" was deleted.⁹⁰ The scope and form of the measures was dealt with in draft article 17(2), while the preconditions and requirements to be shown by the party seeking relief are covered by paragraph (3). The Working Group agreed to follow the jurisprudence of several international courts in introducing the standard of "irreparable harm" and the balance of hardship test.⁹¹ Considerable debate arose around the issue of empowering the arbitral tribunal to order *ex parte* interim measures. Eventually, this suggestion survived, though its wording is not free from

Federal Arbitration Act 9 U.S.C. § 1 does not provide clear answers, though federal courts have often derived their authority from state law. *See* David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 253 (2d Cir. 1991); Borden Inc. v. Meiji Milk Products Co. Ltd., 919 F.2d 822 (2d Cir. 1990).

⁸⁴ Report of the 67th conference of the ILA, held in Helsinki, 12-17 August 1996 – Committee on International Civil and Commercial Litigation, Second interim report on provisional and protective measures in international litigation, published by the ILA, London 1996.

⁸⁵ Draft Fundamental Principles and Rules of Transnational Civil Procedure, available at www.ali.org/ali/PP4.pdf (last visited Nov. 12, 2004).

⁸⁶ Prepared by the Permanent Bureau and the Co-reporters on the basis of the discussion in Commission II of the first part of the Diplomatic Conference, 6-20 June 2001, The Hague.

⁸⁷ *See* Note by the Secretariat, U.N. Doc. A/CN.9/WG.II/WP.119 at 22, para. 74.

⁸⁸ *See id.* at 24, paras. 75-81.

⁸⁹ *See id.* at 25, para. 83.

⁹⁰ *See* Report of the Working Group on Arbitration on the work of its 36th Sess. (New York, 4-8 March 2002), UNCITRAL, 35th Session, U.N. Doc. A/CN.9/508, paras. 52-54.

⁹¹ *See id.* at para. 56.

unresolved difficulties. Some concern was expressed about the idea of subjecting the nation state to *ex parte* interim relief.

Regarding the question of enforcement of interim measures, a system of international recognition is envisaged, subject to Articles 35 and 36 of the Model Law. The US proposal submitted at the Working Group's 37th session contained the provisions authorizing the court to condition enforcement of *ex parte* measures, without laying out the conditions in the text itself, as the Working Group's draft did.

It is expected that the UNCITRAL's work on interim measures in arbitration and the amendments to the Model Law would define the standards for both the arbitral tribunals and the courts, and thus bring a major contribution to facilitating the harmonization of international commercial arbitration rules on a global level. The draft was presented for final adoption in Spring 2003.

IV. CONCILIATION

A. The Impetus for Creating the UNCITRAL Conciliation Rules

The United Nations was originally created as a means to advance higher global standards of living, social progress, and economic development.⁹² UNCITRAL, too, was established to promote those same objectives.⁹³ As an extension of these efforts, the General Assembly adopted the UNCITRAL Rules on International Commercial Conciliation on December 4, 1980.⁹⁴

These Rules were designed for the disputing parties' selection either as part of the contract they had entered into, or after their dispute had arisen.⁹⁵ Unlike the eventual Model Law that is directed at States, the Conciliation Rules are directed at potential or actual parties to a dispute.⁹⁶ The Rules are meant to govern "the conduct of a conciliation" intended to resolve a dispute or disputes

⁹² See Hans Correll, Opening Speech at UNCITRAL's Thirty-Fifth Session (Jun. 17, 2002).

⁹³ See *id.*

⁹⁴ See UNCITRAL Conciliation Rules (1980), available at <http://www.uncitral.org/en-index.htm> (last visited Nov. 12, 2004).

⁹⁵ See UNCITRAL homepage, at <http://www.uncitral.org/en-index.htm> (last visited Nov. 12, 2004).

⁹⁶ See *id.*

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between the parties.⁹⁷ UNCITRAL Conciliation Rules have significantly influenced modern international conciliation and mediation procedures. Specifically, most modern institutional rules greatly resemble the UNCITRAL Conciliation Rules.⁹⁸ Some international ADR providers have actually included key provisions or rules that are identical to the UNCITRAL text.⁹⁹ Those who have argued that more parties use institutional conciliation rules, rather than directly applying the actual UNCITRAL rules themselves, are quick to concede that UNCITRAL indirectly effects their conciliation. This is due to frequent inclusion of the key UNCITRAL provisions in modern institutional conciliation rules.¹⁰⁰ Some international dispute resolution centers' admiration for UNCITRAL's efforts has resulted in their actual adoption of the entire UNCITRAL text as their institutional rules.¹⁰¹

The Conciliation Rules were first adopted because the supporters of the Resolution recognized the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations.¹⁰² These Rules pioneered widely-followed provisions designed to protect confidential communications that were made in the conciliation process from being later used in arbitration or litigation if the conciliation had failed.¹⁰³ The Rules also provided provisions for terminating an unproductive conciliation without needless delay.¹⁰⁴ These provisions continue to be referred to and depended upon by disputing parties in subsequent international conciliations.

The UNCITRAL Conciliation Rules are widely used and have served as a model for many institutional rules.¹⁰⁵ With the increased use of international commercial conciliation came the prevailing view that it would be worthwhile to prepare uniform legislative rules, in addition to the existence of such Rules, to sup-

⁹⁷ *Id.*

⁹⁸ See Howard M. Holtzmann, *Recent Work on Dispute Resolution by the United Nations Commission on International Trade Law*, 5 ILSA J. INT'L & COMP. L. 425, 425-26 (1999).

⁹⁹ See *id.*

¹⁰⁰ See *id.* at 426.

¹⁰¹ See *id.*

¹⁰² See UNCITRAL: Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation, U.N. Doc. A/CN.9/514 at 3 [hereinafter UNCITRAL: Draft Guide].

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See Holtzmann, *supra* note 98, at 425.

port this increased conciliation use.¹⁰⁶ While issues such as the admissibility of certain evidence in subsequent judicial or arbitral proceedings or the conciliator's role in subsequent proceedings could typically be solved by reference to the UNCITRAL Conciliation Rules, there were many cases or disputes where no such rules were agreed.¹⁰⁷ As efficient and instructive as the Rules were, they might have left a void for dispute resolution institutions and disputing parties. In an effort to fill in these gaps when the parties mutually desired to conciliate but had not agreed on a set of conciliation rules, the conciliation process might benefit from the establishment of non-mandatory legislative provisions.¹⁰⁸ Additionally, in countries where agreements regarding the admissibility of certain kinds of evidence were uncertain, uniform legislation might provide useful clarification.¹⁰⁹ Furthermore, only legislation could achieve the level of predictability and certainty necessary to facilitate enforcement of settlement agreements resulting from conciliation.¹¹⁰

B. Model Conciliation Law

1. The Impetus for Creating the UNCITRAL Conciliation Model Law

Though two decades have passed since the adoption of the Conciliation Rules, the principle behind the effectiveness of conciliation has only strengthened and still promulgates the adoption of more recent conciliation laws and provisions. UNCITRAL recognized the importance of creating a Model Law to establish a suggested pattern for lawmakers in national governments to consider adopting as part of their domestic legislation on the subject matter.¹¹¹ A model law is a legislative text that is recommended to States for incorporation into their national law, as opposed to the Conciliation Rules that were intended to act as an aid to the individual conciliating parties and the dispute resolution administrative bodies.

UNCITRAL issued its Model Law on International Commercial Conciliation because of the increased use of conciliation in dispute settlement practice in various parts of the world, including

¹⁰⁶ See UNCITRAL: Draft Guide, *supra* note 102.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See *supra* note 95.

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regions where until two decades ago it was not commonly used. Indeed, approximately two decades passed between the adoption of the UNCITRAL Model Conciliation Rules and the eventual adoption of the UNCITRAL Model Conciliation Law. In addition, the overall acceptance and use of conciliation is becoming a dispute resolution option preferred and promoted by courts and government agencies, as well as in community and commercial spheres. For example, this trend is reflected in the growing establishment of a number of private and public bodies offering services to interested parties designated to foster the amicable settlement of disputes.¹¹² In addition, various regions of the world have actively promoted conciliation as a method of dispute settlement and the development of national legislation on conciliation in various countries has given rise to discussions calling for internationally harmonized legal solutions designed to facilitate conciliation.¹¹³

The growing interest in and use of international conciliation, particularly in the international trade arena, has not gone without a response. In fact, UNCITRAL drafted the Model Law on International Commercial Conciliation to assist states in designing dispute resolution procedures intended to reduce the costs of dispute settlement, foster and maintain a cooperative atmosphere between trading parties, prevent further disputes, and inject certainty into international trade.¹¹⁴ The Model Law's objectives, which include encouraging the use of conciliation and providing greater predictability and certainty in conciliation's use, are essential for fostering economy and efficiency in international trade.¹¹⁵ The Model Law was developed in the context of heightened recognition of the increasing use of conciliation as a method for settling commercial disputes.¹¹⁶ The Model Law was also designed to provide uniform rules within the conciliation process.¹¹⁷ Uniformity helps to provide greater integrity and certainty in the conciliation process.¹¹⁸ The benefits of uniformity are magnified in cases involving conciliation via the Internet where the applicable law may not be self-evident.¹¹⁹ As the burgeoning Internet world continues to expand, and countries' borders continue to become less significant obsta-

¹¹² See UNCITRAL: Draft Guide, *supra* note 102, at 3.

¹¹³ See *id.*

¹¹⁴ See *id.* at 4.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.* at 4-5.

¹¹⁹ See *id.* at 5.

cles to effective international commercial transactions, the implementation of an International Model Law to guide the settlement of disputes will reassure the disputing parties and might ultimately reaffirm their confidence in participating within the sphere of international trade.

Yet, despite the goals of uniformity throughout the international trade spectrum, the Model Law also recognizes that there are inherent differences between parties from different countries. In recognition of this, the provisions of the Model Law of International Commercial Conciliation are designed to accommodate differences and leave the parties and conciliators free to carry out the conciliatory process in an appropriate manner.¹²⁰ Essentially, the provisions seek to strike a balance between protecting the integrity of the conciliation process, for example, by ensuring that the parties' expectations regarding the confidentiality of the mediation process are met, and providing maximum flexibility by preserving party autonomy.¹²¹ It is this stability that UNCITRAL continues to strive to achieve, whether it be through the adoption of the Model Rules, Model Law, or any other international dispute resolution mechanism that might find itself in front of the Commission.

2. A Glimpse at the Model Law¹²²

At its thirty-fifth session, held in New York in June 2002, the UNCITRAL delegates discussed and finally adopted the Model Law on International Commercial Conciliation (hereinafter "Model Conciliation Law"). They requested that the Secretary General transmit the text to governments and other interested bodies for consideration.¹²³ After the 1976 Arbitration Rules, the 1980 Conciliation Rules, the 1985 Model Arbitration Law, the Model Conciliation Law was adopted in the form of a U.N. General Assembly Resolution. The following sections give a brief illustration of the debate at the UNCITRAL session, using the three essential features of the Model Law: appointment of conciliators, duty of confidentiality, and the issue of conciliator acting as arbitrator.

¹²⁰ *See id.*

¹²¹ *See id.* at 3-4.

¹²² For the full text of the Model Conciliation Law, as adopted by UNCITRAL and recommended by the General Assembly, *see* Annex.

¹²³ *See* Minutes of the 35th session in Report of the U.N. Commission on International Trade Law on its thirty-fifth session [hereinafter *The Report*], 17-28 June 2002, U.N. Doc. A/57/17. The final text of the Model Law, as adopted, is provided in the Annex I to the Report, 54-58.

3. Article 5: Appointment of Conciliators

Draft Article 6 as considered by the Commission was as follows:

- (1) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of the sole conciliator.
- (2) In conciliation proceedings with two conciliators, each party appoints one conciliator.
- (3) In conciliation proceedings consisting of three or more conciliators, each party appoints one conciliator and shall endeavor to reach agreement on the name of the other conciliators.
- (4) Parties may seek the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular:
 - (a) A party may request such an institution or person to recommend names of suitable persons to act as conciliator; or
 - (b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.
- (5) In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.
- (6) When a person is approached in connection with his or her possible appointment as a conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment and throughout the conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.¹²⁴

Two Variants considered by the Commission were as follows:

Variant 1:

- (1) In conciliation proceedings with one conciliator, the parties shall endeavor to reach agreement on the name of the sole conciliator.
- (2) In conciliation proceedings with two or more conciliators, the parties shall endeavor to reach agreement on either a joint appointment of the conciliators or on [the procedure for the appointment of the conciliators] [the way in which the parties will

¹²⁴ The Report, *supra* note 123, at 7.

appoint the conciliators].¹²⁵

Variant 2:

(1) The parties shall endeavor to reach agreement on either a joint appointment of the conciliator or conciliators or on [the procedure for the appointment of the conciliator or conciliators] [the way in which the parties will appoint the conciliator or conciliators].¹²⁶

The discussion surrounding the Article's first three drafting paragraphs helped elucidate some of the concerns faced by the Commission during the process of adopting the remaining Model Law. There was concern that the verbiage used in this particular Article should not mimic the appointment of arbitrators Article in the Model Law on International Arbitration.¹²⁷ During an arbitral proceeding, the law may provide for the parties to endeavor to select a single arbitrator or arbitrators (Article 10 of the Model Arbitration Law). However, if a multi-neutral arbitration ensues, the parties might wish to each select a single arbitrator and allow their party-appointed arbitrators to select a third arbitrator to ensure neutrality (Article 11 of the Model Arbitration Law). The Commission's debate focused, in large part, on whether to mimic those same words in the appointment of conciliators.¹²⁸ After all, the process of conciliation is procedurally different from that of arbitration. The effort to distinguish the appointment process in conciliation from the arbitration process was apparent.¹²⁹

Specifically, paragraph (2) of Variant 1 as adopted by the Commission was selected for many reasons. First, it allowed the parties to be autonomous throughout the conciliation proceedings.¹³⁰ Should the parties be unable to choose their conciliators or an appropriate procedure by which to appoint their conciliators, conciliation could not occur.¹³¹ This autonomy was preferred over an article that put forth a conciliator selection process by which the parties' choices were not restricted.¹³² The Variant adopted appeared to be the most neutral view to address the parties' concerns about appointing conciliators, or selecting a process by which con-

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See AAA Delegate S. Lieberman, personal notes from the Thirty-Fifth Session (Jun. 2002).

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See* The Report, *supra* note 123, at 7.

¹³¹ *See id.*

¹³² *See id.*

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ciliators would be appointed, without limiting their freedom to choose or participate in decision-making.¹³³

The Commission also favored Variant 1 because it left Draft Paragraph (1) relatively undisturbed. Variant 1 still instructed the parties that where one (1) conciliator was appointed, they should endeavor to agree on that conciliator.¹³⁴ Variant 1 Paragraph (2) was also preferred over Variant 2 because it left intact the essence of Draft Paragraph (2).¹³⁵

There was concern amongst the delegates that the Model Law should include explicit wording that would aid adopting countries in differentiating this process from arbitration.¹³⁶ In an arbitration regime, it is rare for two arbitrators, or any even number of arbitrators for that matter, to preside over the arbitration because of the continual emphasis on the appointment of an odd number of arbitrators.¹³⁷ There is a greater chance of creating a majority opinion with an odd numbered arbitrator panel.¹³⁸ However, the conciliation process is different. There is no push towards a panel with an odd number of conciliators, because, unlike arbitration, there is no conciliation decision.¹³⁹

Out of fear that nations adopting the Conciliation Model Law would assume that the same stigma of appointing an even number of arbitrators would apply to the conciliation process,¹⁴⁰ Variant 1 paragraph (2) specifically began with the similar language of draft article 6, paragraph (2): “In conciliation proceedings with two or more conciliators. . .”¹⁴¹ This debate focused on the significance of the number “two.” Some opined that by indicating a specific number, the Commission was contradicting the purpose of giving the parties the freedom to appoint any number of conciliators they so choose.¹⁴² Therefore, the mere mention of two conciliators suggested a restriction of choice on the part of the parties.¹⁴³ However, the majority of the Commission believed that the inclusion of

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *See Lieberman, supra note 127.*

¹³⁷ *See UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, Articles 10-11.*

¹³⁸ *See id.* at Article 11.

¹³⁹ *See MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION, (2002), available at www.uncitral.org/english/texts/arbitration/conc-rules.htm (last visited Nov. 12, 2004).*

¹⁴⁰ *See Lieberman, supra note 127.*

¹⁴¹ The Report, *supra note 123*, at 7.

¹⁴² *See id.* at 8.

¹⁴³ *See id.*

the number “two” was important because it served to distinguish this process from the processes employed to appoint arbitrators.¹⁴⁴ Without mentioning “two,” any countries that might prospectively adopt the Model Law might have been confused about the adequacies of appointing even number conciliators because of the general disapproval associated with appointing an even numbered arbitrator panels.¹⁴⁵

However, not only does the adopted version explicitly mention the possibility of utilizing two conciliators, but it also allows for more than two conciliators to be appointed by including the phrase “two or more” (draft article 6(1), Article 5(1) as adopted). Although other suggestions were made by delegates to explicitly include the term “three conciliators” in the Article, as was included in draft article 6, paragraph (3), there was less of a need to include this because there was little question in an arbitration or conciliation context that having three neutrals was acceptable.¹⁴⁶

Although some delegates expressed concerns that neither Variant included the possibility of each party selecting a conciliator and having the two party-appointed conciliators select a third conciliator, they were appeased when the commission expressed its desire to differentiate the Model Conciliation Law from the arbitrator appointment process in the Model Arbitration Law. If the Variants did include such a provision, the similarity between the conciliator and arbitrator appointment processes would be great and it might be a possible source of procedural confusion.

Finally, both Variant 1, paragraph (2), and Variant 2 had originally called for the joint appointment of conciliators.¹⁴⁷ Although there was some support for this language because it provided a sense of solidarity and camaraderie throughout the process,¹⁴⁸ an overwhelming number of delegates expressed concern for the use of the word “joint.”¹⁴⁹ Specifically, Judge Holtzmann of the United States delegation pointed out that using the word “joint” would imply that “the parties’ mutual agreement on the conciliator[s] or the conciliator[s] selection process was contingent upon the parties’ approval.”¹⁵⁰ There also might be some question whether joint ap-

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 7.

¹⁴⁸ See Lieberman, *supra* note 127.

¹⁴⁹ See The Report, *supra* note 123, at 8.

¹⁵⁰ See AAA Delegate J. Weiner, personal notes from the Thirty-Fifth Session (Jun. 2002).

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pointment occurred where the parties each separately selected a conciliator.¹⁵¹ This uncertainty might lead to greater confusion among adopting States.¹⁵² Moreover, Judge Holtzmann and the supporting Commission were wary of any words that might restrict the parties' autonomy in the conciliation process.¹⁵³ The unanimous sentiment amongst the delegates was that the word "joint" was superfluous and might only lead to confusion.¹⁵⁴ Therefore, it was removed upon the Article's adoption.¹⁵⁵

4. Article 10: Duty of Confidentiality

"Unless otherwise agreed by the parties all information relating to the conciliation proceedings should be kept confidential except where disclosure is required under the law or for the purpose of implementation or enforcement of a settlement agreement."

After considerable discussion over the wording of Article 10, the Commission decided to retain the Working Group's draft. Several states placed great emphasis on maintaining the Working Group's wording of this provision, while others felt that the Article was overly broad.¹⁵⁶ The latter group was concerned about the question of who must adhere to the duty of confidentiality expressed in Article 10¹⁵⁷ and they expressed trepidation over the words "duty of" in the Article's title.¹⁵⁸ Considerable argument took place surrounding this article, but the Commission ultimately retained the draft proposed by the Working Group, with the guarantee that the guide would address some of the concerns presented during argument.

States expressed fear that:

[B]ecause of the broad definition of conciliation of the draft model law, article 10 as drafted might apply to establish liability where a person other than the professional conciliator was asked to facilitate the settlement of a dispute in informal circumstances where neither the parties involved nor the person asked to facilitate would have any knowledge of the application of the

¹⁵¹ *See id.*

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ *See id.*

¹⁵⁵ *See* The Report, *supra* note 123, at 8.

¹⁵⁶ *See id.* para. 75.

¹⁵⁷ *See id.* para. 79.

¹⁵⁸ *Id.* at para. 76.

model law or expectations as to their involvement in an international commercial conciliation.¹⁵⁹

The delegation from the United States weighed in on this issue in an attempt to effectively narrow the scope of the article.¹⁶⁰ The U.S. delegation proposed that the words “[u]nless otherwise agreed” upon by the parties should be replaced by the word “[w]henever,” agreed upon by the parties.¹⁶¹ This suggestion was strongly opposed by the rest of the Commission.¹⁶² The general sentiment of the Commission reflected the view that the confidentiality of the participants involved in an international commercial conciliation should be presumed.¹⁶³ The proposal advanced by the U.S. delegation was rejected and placed as a footnote following draft article 10 in an apparent attempt to demonstrate the drafters’ intentions of keeping the article broad.¹⁶⁴

The Japanese delegation, among several others, worried over “who would be required to observe the obligations of confidentiality and whether the article as drafted would cover the parties, the conciliator, and third persons, including those charged with administering the conciliation.”¹⁶⁵ The Commission’s general view was that “the draft article 10 was broader than the draft article 9 [Disclosure of Information Between the Parties] and applied broadly ‘to all information relating to the conciliation proceedings, regardless of who might be in possession of that information.’”¹⁶⁶ This broad application of the article seemed quite agreeable to arbitral institutions including the Permanent Court of Arbitration and the American Arbitration Association.¹⁶⁷

The argument surrounding the removal of the words “duty of” from the title took an interesting turn. Some states felt that removing the words “duty of” from the title would necessitate additional explanation and instruction should a court or tribunal consider “an allegation that a person did not comply with Article 10.”¹⁶⁸ This sentiment was popular among the States. It was then suggested that the guide should address whether a conciliation was or was not

¹⁵⁹ *Id.* at para. 75.

¹⁶⁰ *See* Weiner, *supra* note 150.

¹⁶¹ *See* The Report, *supra* note 123, at para. 75.

¹⁶² *See* Weiner, *supra* note 150.

¹⁶³ *See* The Report, *supra* note 123, at para. 75.

¹⁶⁴ *See id.*

¹⁶⁵ The Report, *supra* note 123, at para. 79.

¹⁶⁶ *Id.*

¹⁶⁷ Weiner, *supra* note 150.

¹⁶⁸ The Report, *supra* note 123, at para. 76.

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being conducted for the purposes of other articles in the model law including Article 11: admission of evidence in other proceedings. As a result of this argument, it was determined that “further explanation was required in the Guide with respect to Article 1 to clarify the circumstances in which a conciliation could be deemed to exist.”¹⁶⁹

Although the wording of Article 10 never changed from the draft submitted by the Working Group, the issues raised during the session added valuable and useful information, as well as, important clarification to an instrumental component of the model law.

5. Article 12: Conciliator Acting as Arbitrator

The third issue worthy of examination, because it raised significant objections and remarks and led to lively deliberations during the session, is the question of the conciliator acting as an arbitrator and *vice versa*. This was the topic of the draft Article 13, which was submitted by the Working Group as follows: “Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract or any related contract.”¹⁷⁰

The first of the debated issues pertained to the “unless otherwise agreed” proviso,¹⁷¹ touched upon in a number of other Model Conciliation Law articles. Some viewed this language as redundant to Article 3, which confirms the parties’ freedom to exclude or modify any provision of the Model Law, as they see fit. Others warned that the language might indicate the existence of two different degrees of party autonomy. In the end, the opinion that it should be retained prevailed, for purposes of clarification, as well as due to the general nature of Article 3, and the lack of uniformity in comparative law on this point.

Another matter of concern was the closing language, namely reference only to contracts, narrower than the “contractual or other legal relationships” of Article 1(2) that defined the scope of the Model Law. Among the suggestions such as “same or related contract or legal relationship,” “closely related disputes,” and “the same factual situation,” the Commission eventually opted for copying the Article 1(2) position.

¹⁶⁹ *Id.* at para. 78.

¹⁷⁰ See The Report, *supra* note 123, at para. 100.

¹⁷¹ *Id.*

Some other questions raised will be addressed in the Guide to Enactment and Use of the Model Law¹⁷² instead of the Model Law itself. The Guide reflects other similar documents adopted by UNCITRAL with regard to arbitration standing between an authentic interpretation and regular guidelines. For instance, the possible conflict of serving as conciliator while acting as counsel or witness was explained in the Guide.¹⁷³ The understanding that “another dispute” from the last part of the sentence could involve parties other than the parties to the conciliation proceedings was affirmed, but left for the Guide.

The situation set in the other direction, arbitrator acting as a conciliator, was also on the table.¹⁷⁴ It was not resolved whether to tackle it in a footnote to the draft Article 13 or in the Guide. The substance, notwithstanding the location of the statement, can be described as a reiteration that it is not incompatible with the function of an arbitrator in raising the question of a possible conciliation and participating in such efforts. Those who supported the footnote option emphasized that this practice was already widely accepted in many jurisdictions and did not belong in either the Model Conciliation Law or in the Guide to its implementation. Therefore, they decided that a footnote would be the most appropriate way of addressing it.

Those arguments were dismissed as unconvincing. Not only does the Model Conciliation Law already contain several provisions dealing with arbitration issues, but it would also be inconsistent with Article 1(8), which excluded settlement facilitation in the course of judicial or arbitral proceedings from the scope of this Law. The matter was ultimately allocated to the contents of the Guide.

Eventually, draft article 13 became Article 12 in the final text of the Model Conciliation Law, due to the merger of draft articles 5 and 6 (number and appointment of conciliators). Its adopted version is different from the draft only in that the formulation of related disputes is broader:

Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator in respect of a dispute that was or is the subject of the conciliation proceedings or in respect of another dispute that has arisen from the same contract *or legal relation-*

¹⁷² See the draft in U.N. Doc. A/CN.9/514.

¹⁷³ See *id.* at paras. 117-18.

¹⁷⁴ See The Report, *supra* note 123, at paras. 106-10.

ship or any related contract *or legal relationship*. (emphasis added).¹⁷⁵

C. Reception of the UNCITRAL Model Conciliation Law in the United States

The first positive reaction to the Model Law on Conciliation is unfolding in the United States. There is a high likelihood that the National Conference of Commissioners on Uniform State Laws¹⁷⁶ will prepare an amendment to the Uniform Mediation Act (“UMA”) that would implement the Model Conciliation Law. The amendment would modify the UNCITRAL’s text in order to make it appropriate for enactment by the state legislatures. It is expected that the variations would serve only to conform the wording to the American legislative drafting traditions, with only one exception. It is highly likely that the Model Conciliation Law’s provision on admission of evidence and disclosure in proceedings would be excluded because it is not in accordance with the UMA.

This amendment to the UMA would be helpful to facilitate uniformity in US state law, and also encourage US parties to international contracts to include a conciliation clause. It would also be a strong support for the UNCITRAL’s efforts.

V. CONCLUSION

In the thirty-six years of its existence, UNCITRAL’s name has become most widely associated with its enactments in international commercial dispute resolution: the 1976 Arbitration Rules, the 1980 Conciliation Rules, the 1985 Model Arbitration Law, and now, also the 2002 Model Conciliation Law. Moreover, the work related to the 1958 New York Convention is now within the realm of UNCITRAL’s authority. Its reach as a powerful sphere of influence in policy development extends far beyond the list of national and domestic bodies that have formally adopted its model laws and rules. Indeed, the contributions of UNCITRAL, through the formulation of universal arbitration and conciliation practices, have been immense and continue to both harmonize and facilitate international economic relations.

¹⁷⁵ *Id.*

¹⁷⁶ See <http://www.nccusl.org> (last visited Nov. 12, 2004).