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# THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

SATURNINO E. LUCIO\*

On June 21, 1985, after years of analysis and discussion, the United Nations Commission on International Trade Law (UNCITRAL) adopted a final version of a proposed model law on international commercial arbitration (the Model Law).<sup>1</sup> The Model Law, which complements the earlier UNCITRAL Arbitration Rules of Procedure, is designed to harmonize and unify the laws of member nations to facilitate international commercial arbitration and ensure its proper functioning and recognition.

The Model Law arose from the desire to provide answers to the manifold problems encountered by parties contemplating an international arbitral remedy.<sup>2</sup> UNCITRAL noted in 1981:

A major complaint . . . is that the expectations of the parties as expressed in their agreements on arbitration procedure are often frustrated by conflicting mandatory provisions of the applicable law . . . [S]uch provisions may relate to, and be deemed to unduly restrict, the freedom of the parties to submit future disputes to arbitration, or the selection and appointment of arbitrators, or the competence of the arbitral tribunal to decide on its own competence or to conduct the proceedings as deemed appropriate taking into account the parties' wishes. Other such restrictions may relate to the choice of the applicable law, both the law governing the arbitral procedure and the one applicable to the substance of the transaction. Supervision and control by courts is another important feature not always welcomed by parties especially if exerted on the merits of the case.<sup>3</sup>

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1. Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, 40 U.N. GAOR Supp. (No. 17) 1, U.N. Doc. A140117 (1985) [hereafter cited as Eighteenth Report].

2. 12 U.N. Y.B. COMM'N INT'L TRADE L., 77 U.N. Doc. A/CN.9/SER.A (1981).

3. *Id.*

UNCITRAL commenced work on an international arbitration model law after its twelfth session in 1979. There have been various drafts of a Model Law and numerous commentaries thereon by UNCITRAL member nations<sup>4</sup> and by many international legal organizations.<sup>5</sup> The resulting Model Law, though not perfect, evidences a strong international consensus on the implementation of arbitration legislation.

Pursuant to U.N. General Assembly Resolution 2205 (XXI) of December 17, 1966, the Model Law and accompanying report must now be submitted to UNCTAD for its comments and then to the U.N. General Assembly for its endorsement and recommendation that the nations of the world enact or revise their laws to conform to the Model Law, thereby serving the dispute resolution needs of international businessmen.<sup>6</sup> It is expected that U.N. General Assembly endorsement will be obtained sometime in 1986.

The following is a summary of the major provisions of the Model Law.

## I. SCOPE OF APPLICATION AND JURISDICTION

The Model Law is intended to apply to "international commercial arbitration," whether *ad hoc* in nature or administered by a permanent arbitral institution.<sup>7</sup> The term "commercial" is given a wide interpretation and covers matters "arising from all relationships of a commercial nature, whether contractual or not."<sup>8</sup> This

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4. Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, 36 U.N. GAOR Supp. (No. 17) para. 70, U.N. Doc. A/36/17 (1981). Current UNCITRAL member states include Algeria, Australia, Austria, Brazil, China, Cuba, Czechoslovakia, Egypt, France, Federal Republic of Germany, Guatemala, India, Iraq, Italy, Japan, Mexico, Nigeria, Peru, Singapore, Spain, Sweden, the USSR, the United Kingdom, and the United States of America. Representatives from other states were present during many of the working sessions, including Argentina, Canada, Chile, Colombia, South Korea, Greece, Indonesia, Iran, Netherlands, Norway, Oman, Panama, Portugal, Switzerland, and Venezuela.

5. *Id.* Among the organizations participating in the elaboration of the Model Law were the U.N. Economic Commission For Europe, United Nations Commission on Trade and Development (UNCTAD), the Bank for International Settlements, the Council for Europe, the Hague Conference on Private International Law, the International Institute for the Unification of Private Law, the Inter-American Bar Association, the International Chamber of Commerce and the International Council for Commercial Arbitration.

6. Eighteenth Report, *supra* note 1, at para. 333.

7. UNCITRAL Model Law on Int'l Commercial Arbitration art. 2(a), Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, 40 U.N. GAOR Supp. (No. 17) 81, U.N. Doc. A/40/17 (1985) [hereafter Model Law].

8. Model Law, art. 1(1).

definition encompasses disputes relating to trade transactions, distribution agreements, factoring or leasing transactions, consulting, engineering or construction, licensing, investment, exploitation agreements or concessions, financing, banking, insurance, joint ventures, carriage of goods or passengers, and other types of commercial relationships, regardless of whether the parties involved are “merchants” in the strict sense of international commercial law.

An arbitration is “international” if:

(1) [T]he parties have their places of business in different countries at the time of the conclusion of the arbitration agreement;

(2) the parties expressly agree that the subject matter of the arbitration relates to more than one country;

(3) the place of arbitration as determined in, or pursuant to, the arbitration agreement is outside the country or countries in which the parties have their places of business; or

(4) the place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of dispute is most closely connected, is outside the country or countries in which the parties have their places of business.<sup>9</sup>

Special rules are provided with respect to parties with no place of business (use “habitual residence” instead) or multiple places of business (focus on the place with the closest relationship to the arbitration agreement).<sup>10</sup>

The Model Law is “subject to any agreement in force” between two or more nations, and hence leaves undisturbed any international treaties or conventions such as the New York convention on the Recognition and Enforcement of Foreign Arbitral awards.<sup>11</sup> Another saving provision states that the Model Law “shall not affect any other law of [a] . . . 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 [the Model Law]. . . .”<sup>12</sup> Nevertheless, in all matters gov-

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9. *Id.* art. 1(3).

10. *Id.* art. 1(4).

11. *Id.* art. 1(1).

12. *Id.* art. 1(5). Most legal systems exclude certain disputes from the domain of arbitration, and often confer exclusive jurisdiction on specific courts, e.g., bankruptcy, securities,

erned by the Model Law, no "court" (defined as any body or organ of the judicial system of a state) shall intervene except where provided in the Model Law. Domestic courts are empowered to carry out certain tasks in furtherance of international commercial arbitration including the selection of a neutral arbitrator,<sup>13</sup> compelling a recalcitrant party to honor its arbitration commitments,<sup>14</sup> reviewing challenges to an arbitrator for cause,<sup>15</sup> reviewing a determination by the arbitral tribunal as to the scope of its jurisdiction,<sup>16</sup> and setting aside an arbitral award for certain specified grounds.<sup>17</sup> Notice requirements imposed in connection with court privileges must be complied with notwithstanding the more liberal notice provisions of the Model Law regarding the arbitration.<sup>18</sup>

## II. THE ARBITRATION AGREEMENT

An arbitration agreement is one in which the parties have agreed in writing to submit to arbitration all or certain disputes that have arisen or may arise between them in respect to a defined commercial relationship. The "written" requirement is met if the agreement is included in an exchange of letters, telexes, telegrams, or other means of telecommunication.

The court in which an arbitration agreement action is brought must, upon the timely request of a party, refer the matter to arbitration unless it finds that the arbitration agreement is null and void, inoperative, or incapable of being performed.<sup>19</sup> Interim protection measures may be sought from a court either before or during the pendency of an arbitral proceeding.<sup>20</sup> The Model Law appears to permit a party to go to a court outside the place of arbitration to compel a party within such court's jurisdiction to appear in the arbitration or to obtain interim relief measures in support of the foreign arbitration.<sup>21</sup>

An arbitral tribunal will consist of three arbitrators unless the

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patents, trademarks, copyrights, customs, and foreign exchange controls and their application.

13. *Id.* art. 11(3).

14. *Id.* art. 11(4).

15. *Id.* art. 13(3).

16. *Id.* art. 16(3).

17. *Id.* art. 34(2).

18. *Id.* art. 3(2).

19. *Id.* art. 8(1).

20. *Id.* art. 9.

21. Compare Model Law, art. 8, 9 with art. 1(2).

parties otherwise agree.<sup>22</sup> A single arbitrator is sufficient. The parties may agree on a procedure for the selection of the arbitrators, failing which there are several technical provisions in the Model Law which provide for the composition of the necessary tribunal.<sup>23</sup> An arbitrator may be challenged if the circumstances show that: (i) there are justifiable doubts about his impartiality or independence (which the arbitrator has the affirmative duty to disclose), or (ii) he lacks the qualifications agreed upon by the parties. No arbitrator may be challenged solely on the basis of his nationality unless the parties previously agreed to do so.<sup>24</sup> An arbitrator selected by a party may be challenged by that party only for reasons discovered after the initial selection has been made. Any problem of which a party had prior knowledge is presumably waived. Arbitrators may be challenged by filing an objection within fifteen days after the arbitral tribunal has been constituted or the factual basis for the challenge has been discovered by the objecting party.<sup>25</sup> The arbitral tribunal shall rule on the challenge, subject to review by a court after the filing of a petition within thirty days from the date of receipt of notice of the rejection of the challenge. All determinations by a court on these issues are final and nonreviewable.<sup>26</sup> Unless agreed by the parties, the arbitral tribunal may proceed with the arbitration to its conclusion notwithstanding the pendency of a challenge or appeal.<sup>27</sup> The Model Law provides for the resignation, termination, and replacement of arbitrators.<sup>28</sup>

### III. CONDUCT OF ARBITRAL PROCEEDINGS

An arbitral tribunal has the competence to rule on its own jurisdiction, subject to judicial review.<sup>29</sup> The nullification of a contract containing an arbitration agreement by an arbitral tribunal will not, by itself, result in the invalidity of the arbitration. This allows one to escape the dilemma of presenting a tribunal with a claim or defense which could be grounds for nullifying the contract and then ousting the arbitral tribunal of its jurisdiction *ab initio*.

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22. Model Law art. 10.

23. *Id.* art. 23.

24. *Id.* art. 12.

25. *Id.* art. 13(2).

26. *Id.* art. 13(3).

27. *Id.*

28. *Id.* art. 14, 15.

29. *Id.* art. 16(1).

An objection to the jurisdiction of the tribunal must be raised in the response to the claim, or such objection will be waived unless excused.<sup>30</sup>

The key principle for the conduct of an arbitral proceeding is that the parties "shall be treated with equality and each party shall be given a full opportunity of presenting his case."<sup>31</sup> The term "full opportunity" is not defined in the Model Law and will likely raise a plethora of procedural issues with implementation of the Model Law.

The first matter for decision in an arbitration is the selection of the applicable rules of procedure. Failing agreement between the parties on rules of procedure, the arbitral tribunal is free to conduct the arbitration in any manner it deems appropriate, albeit consistent with the other provisions of the Model Law.<sup>32</sup> The arbitral tribunal is empowered to determine the admissibility, relevance, materiality, and weight of any evidence presented.<sup>33</sup> The intent of this provision appears to be to permit the tribunal to develop its own rules and interpretations of concepts such as "materiality" and "relevance," rather than borrow the current interpretation of these concepts from the applicable national law.

The situs of the arbitration and the language to be used in the conduct of the proceedings are subject to the reasonable discretion of the arbitral tribunal when there is no agreement between the parties.<sup>34</sup> The tribunal may take into account various factors, including the convenience of the parties, the witnesses and the members of the tribunal, as well as the present location and language of the relevant documents. The tribunal may order that documentary evidence be accompanied by translation into the language of the proceeding.<sup>35</sup>

An arbitration case is commenced on the date the respondent receives a request that a dispute be referred to arbitration.<sup>36</sup> The Model Law is silent on the limitations period that would determine whether or not the arbitration was timely commenced after a dispute had arisen. Presumably, this is a matter to be decided under

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30. *Id.* art. 16(2).

31. *Id.* art. 18.

32. *Id.* art. 19(2).

33. *Id.*

34. *Id.* art. 20, 22.

35. *Id.* art. 22(2).

36. *Id.* art. 21.

the applicable substantive law. Within the time period chosen by the parties or determined by the tribunal, the claimant filing a request for arbitration must present a statement of his claim which includes supporting facts, the points at issue, and the relief or remedy sought.<sup>37</sup> The respondent must thereafter, within the time agreed by the parties or as required by the tribunal, respond to the claim. Amendments are to be allowed except where deemed inappropriate by the arbitral tribunal.<sup>38</sup> The Model Law is silent as to whether any counterclaim by the respondent against the original claimant may or must be filed.<sup>39</sup> Generally, the same rules applicable to a claim apply to a counterclaim if one is made.

Unless otherwise agreed by the parties, the tribunal will determine whether to hold oral hearings for the presentation of evidence or argument. The tribunal may seek assistance from a local court to enforce its procedural decisions, such as calling witnesses to testify or requiring the production of documents from a party.<sup>40</sup> Parties are to be given sufficient advance notice of any hearing or meeting of the arbitral tribunal for the inspection of goods, property, or documents.<sup>41</sup> Otherwise, the Model Law provides for no pretrial discovery.<sup>42</sup> Article 26 provides for the use of experts appointed by the arbitral tribunal to assist in the resolution of any matter concerning the dispute. All objections based on the failure of a party to comply with the provisions of the arbitration agreement or the Model Law, with some exceptions, are waived if the other party proceeds with the arbitration without making a timely objection.<sup>43</sup>

#### IV. DETERMINATION OF AWARD

The arbitral tribunal must base its decision on the rules of law chosen by the parties. The designation of a particular country's law is construed to mean the substantive law thereof, not the then-applicable conflict-of-laws principles of such nation.<sup>44</sup> If the parties have not agreed upon the applicable substantive law, the arbitral

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37. *Id.* art. 23(1).

38. *Id.* art. 23(2).

39. *Id.* art. 2(f).

40. *Id.* art. 24(1), 27.

41. *Id.* art. 24(2).

42. *Id.* art. 24(3).

43. *Id.* art. 4.

44. *Id.* art. 28(1).



tribunal must then rely on conflicts-of-law analysis to determine the appropriate governing law.<sup>45</sup> In all cases, the award of the arbitrators must take into account the terms of the agreement establishing the commercial relationship between the parties and any relevant usages and customs of the trade applicable to the transaction (*e.g.*, *lex mercatoria*).<sup>46</sup> There is no provision in the Model Law for the applicable burden of proof.

The parties may settle at any time and agree to dismiss the arbitration. An award may be entered pursuant to a settlement.<sup>47</sup> The arbitral tribunal may also decide *ex aequo et bono* or as *amiable compositeur* only if expressly authorized by the parties.<sup>48</sup>

The default of a party has certain consequences under article 25 of the Model Law. Failure of the claimant to present his statement of claim as required<sup>49</sup> will result in the dismissal of the arbitration. Failure of the respondent to present a defense will not constitute an admission or terminate the arbitration. If a party fails to appear at a hearing or produce documentary evidence, the tribunal may enter an award based on the evidence before it; it cannot issue an award based solely on the absence of the respondent.

Any arbitral award must be in writing and must generally be signed by all of the arbitrators before being delivered to each party.<sup>50</sup> The award must state the reasons upon which it is based, unless the parties previously agreed that no reasons for the award should be given.<sup>51</sup> The award is deemed to be issued at the date and place where the arbitration took place.<sup>52</sup> Within thirty days, or other agreed period of time, from the receipt of an award, any party may request the arbitral tribunal to correct a mathematical, clerical, or typographical error or to address a claim presented in the arbitration but omitted from the award through inadvertence.<sup>53</sup> With the consent of all parties, a party may also request the tribunal to clarify any portion of the award.

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45. *Id.* art. 28(2).

46. *Id.* art. 28(4).

47. *Id.* art. 30.

48. *Id.* art. 28(3).

49. *Id.* art. 23(1).

50. *Id.* art. 31(1).

51. *Id.* art. 31(2).

52. *Id.* art. 31(3).

53. *Id.* art. 33.

## V. CHALLENGES TO AND ENFORCEMENT OF AWARDS

To reverse an award pursuant to article 34 will be difficult under the Model Law, and requires proof that

(1) the party to the arbitration agreement was under some “incapacity”—a term not defined in the Model Law;

(2) the arbitration agreement is not valid under the applicable law—the Model Law is silent on what would constitute the “invalidity” of such an agreement;

(3) the award deals with a dispute outside the scope of the submission to arbitration;

(4) the composition of the arbitral tribunal or the arbitral procedure followed was not in accordance with the agreement of the parties or the provisions of the Model Law;

(5) the subject matter of the dispute is not susceptible to resolution through arbitration; or

(6) the award is in conflict with the public policy of the forum state—meant by the UNCITRAL Working Group to relate to notions of procedural and substantive justice, not to the political stance or international policies of a state.

All challenges must be presented to a court within three months from the date of the receipt of the award or the denial of the reconsideration.<sup>54</sup> The reviewing court may, upon request, refer the matter back to the arbitral tribunal for the opportunity to correct any error or take other action that may eliminate the grounds for setting aside the award.<sup>55</sup>

A critical feature of the Model Law is that an arbitral award, irrespective of the country in which it was made, will be recognized as binding and enforced subject to the provisions of the Model Law.<sup>56</sup> The party relying on the award need supply only the authenticated award, the original arbitration agreement, and an application to enforce the award.<sup>57</sup> A court may refuse to recognize or enforce an arbitral award only for the reasons specified in article 36, which are similar to the reasons required to challenge awards. The award should not be enforced if it is not yet binding or if it

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54. *Id.* art. 34(3).

55. *Id.* art. 34(4).

56. *Id.* art. 35(1).

57. *Id.* art. 35(2).

has been set aside or suspended by a court of the forum state.

## VI. CONCLUSION

The Model Law is based on three major concepts. First, the parties to an arbitration should have the maximum freedom to conduct the arbitration in accordance with their stated expectation, rather than in accordance with general legal rules which may be irrelevant or may hinder the desire of the parties to achieve a fair but efficient resolution of their dispute. Second, such freedom should be limited only in very specific cases, in order to prevent or remedy major defects in the arbitral procedure, denial of justice, or violation of due process—right and opportunity to be heard. Third, arbitration is a dispute settlement procedure outside of the normal judicial system. Use of this system should be limited to discrete circumstances and used only when necessary to further a goal of the arbitration.

The Model Law is an ambitious but well considered attempt to give substance to and implement the above concepts. Although a product of a complex compromise between different legal systems and principles, the Model Law appears to have broad international support at this time. Whether the Model Law will become the standard mechanism for countries desiring to implement the arbitration alternative of dispute resolution in international commercial matters is another question. All compromises are problematic and there could be significant international differences in the application of the Model Law provisions from country to country. The Model Law is fairly straightforward and leaves tremendous freedom to the parties in shaping their system of dispute resolution. Assuming near-universal adoption of some variant of the Model Law, international businessmen will find greater tolerance among foreign courts in recognizing and enforcing international arbitral awards. The Model Law is an initial step and is a major contribution towards the facilitation of international commerce.