

4-1-2003

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Recommended Citation

Robert N. Dobbins, *UNCITRAL Model Law on International Commercial Conciliation: From a Topic of Possible Discussion to Approval by the General Assembly*, 3 Pepp. Disp. Resol. L.J. Iss. 3 (2003)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol3/iss3/5>

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UNCITRAL Model Law on International Commercial Conciliation: From a Topic of Possible Discussion to Approval by the General Assembly

Robert N. Dobbins

As has often been the case for this virtually unsung Commission of the United Nations, with little fanfare outside the United Nations earlier this year the General Assembly formally adopted the Model Law on International Commercial Conciliation (the “Model Law”) created by the United Nations Commission on International Trade Law (“UNCITRAL”; also the “Commission”). Readers should not misconstrue the quietude as something indicative of insignificance. The Model Law is landmark legislation in this age of globalization, providing a solid foundation on which UN Member States and businesses can build international commercial relationships with the comfort of knowing that they can control the outcome of the inevitable future disputes.

By no means a Pulitzer Prize winner, for those interested enough to inquire, the story of the creation of the Model Law is remarkable. The purpose of this Note is to give a snapshot of how, what began in the shadow of Arbitration as a “possible work topic considered by the Commission . . . Conciliation,”¹ in the space of two and one-half years became the Model Law. As a secondary and intentional focus of this note, this author (conceding his own bias) hopes to allow the Secretariat of UNCITRAL to enjoy its well-deserved moment in the spotlight for its monumental efforts in the creation of the Model Law.

In the first section of this Note, we will review the structure of the Secretariat — the working arm of the Commission. Here we will also examine the Working Group — the representatives of Member States and Non-Government Organizations (“NGOs”) who helped to craft the wording and the spirit of the Model Law.

The second section will discuss some of the background to the actual process by which the Model Law went from the Commission’s suggested

1. “Report of the Working Group on Arbitration on the Work of Its Thirty-Second Session (Vienna, 20-31 March 2000)”, United Nations Commission on International Trade Law “A/cn.9/468” (10 April 2000) [“Working Group Report 468”].

work topic to approval by the General Assembly. In this section we will begin with a short introduction to the concept of a “model law” — a uniform legislative text intended as a tool for stabilization in its assigned subject. We will also consider the “shadow of arbitration” from which the Model Law emerged and can be recognized as covering a subject — conciliation — wholly distinguishable from arbitration.

In the third section, we will explore the evolution of the Model Law. We will follow the progress of what began as a possible topic for consideration and, after extensive debate, negotiations, and redrafting, found its way to the final draft.

We conclude in the fourth section with a discussion of the final draft — how, in one and one-half years, the Secretariat and the Working Group had developed the Model Law and readied it for delivery to the Commission. This section ends with the words of the General Assembly acknowledging the Commission’s remarkable achievement as it adopted the Model Law.

I. THE SECRETARIAT AND THE WORKING GROUP: WHERE THE WORK GETS DONE

Based in the magnificent city of Vienna, Austria, the Secretariat is the hard-working arm of the Commission responsible for taking from idea to fruition the concepts identified by the Commission as important to international trade law. The Secretariat’s under-staffed senior lawyers from several different countries, taking directions from the Working Groups,² prepare the draft provisions and working paper reports for the Working Group. The Secretariat also delivers the Report of the Working Group to the Commission.

The Commission entrusted the work on the Model Law to the Working Group on Arbitration (which later became the “Working Group on Arbitration and Conciliation” [the “Working Group”]) with directions to the Secretariat to prepare the necessary documentation. Besides the Secretariat, the Working Group participants occupy three tiers: States Members of the Commission;³ States’ “observers;”⁴ and, observers from interna-

2. With apologies to the Secretariat for what may appear to be short shrift, a full discussion of its valuable service is beyond the scope of this note. As of this writing, the Secretariat oversees six Working Groups, including Arbitration and Conciliation: Publicly Financed Infrastructure Projects; Transport Law; Electronic Commerce; Insolvency; and, Security Interests.

3. At its inception, these were: Austria, Cameroon, China, Colombia, Egypt, Finland, France, Germany, Honduras, India, Islamic Republic of Iran, Italy, Japan, Lithuania, Mexico, Nigeria, Russian Federation, Singapore, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland, and the United States of America.

tional organizations.⁵

The Working Group met twice annually, once in Vienna and then in New York City.⁶ The meetings are conducted quite formally: a Chair and *Rapporteur* are elected, an agenda adopted, and discussion among Working Group participants is conducted by recognition from the Chair. Sessions are conducted in English with real time translations into French, Russian, Chinese, Arabic, and Spanish. All proceedings are recorded, except for the frequent and fascinating behind-the-scenes discussions held off the record.

At the end of each day's session, the Secretariat prepares comprehensive working paper reports of the proceedings, presents the reports to the translators, and has the reports ready for distribution before the next morning's session begins. Boiled down to their essence, the working paper reports state the proposed legislative provisions, including alternative wording, and reflect the Working Group's deliberations and conclusions had during the session regarding each provision and alternative.⁷ The report serves as the starting point for the next day's session, and the basis for the final report produced at the end of the two-week session.

THE CONCEPT OF A "MODEL LAW"

Before we examine the evolution of the Model Law, a brief explanation of the concept of a "model law" is useful. The term refers to a form of legislative text. The text is designed so that it can be adopted in total, without modification, by Member States' legislatures, at which point it

4. The States Members sit on a rotating basis and, when not represented on the Commission, rotate into observer status. These were originally representatives from: Argentina, Canada, Costa Rica, Cuba, Czech Republic, Denmark, Indonesia, Lebanon, Morocco, Netherlands, Peru, Poland, Portugal, Republic of Korea, Rwanda, Saudi Arabia, Slovakia, Sweden, Switzerland, Turkey, Ukraine and Venezuela.

5. Though no less active participants, the NGO-observers were: Economic Commission for Europe; NAFTA Article 2022 Advisory Committee; Permanent Court of Arbitration at the Hague; Cairo Regional Centre for International Commercial Arbitration; Chartered Institute of Arbitrators; International Chamber of Commerce (ICC); and the International Federation of Commercial Arbitration Institutions.

6. Most likely attributable to budget constraints, the Working Group now meets only once per year.

7. For an example of this, go to www.uncitral.org, click on *travaux preparatoires*, click on "UNCITRAL Model Law on International Commercial Conciliation", scroll down to "Working Group Reports", then click on any or all of the four that are listed.

would become the law of that State; hence the term “model.” The legislative provisions are crafted so that they can be adapted to fit within the Member State’s legislative and procedural framework. It can also be referred to in commercial contracts as the law to be applied in the event of a dispute.

The underlying philosophy is to afford stability and advancement of international commerce through uniformity.⁸

II. IN THE SHADOW OF ARBITRATION

If you have been with us since the beginning of this note, you have twice read the phrase “in the shadow of arbitration”. Given its importance to the evolution of the Model Law, let us set this phrase in context.

As noted above, the Working Group began as the “Working Group on Arbitration.” The States Members, States’ and NGO observers are, in large part, those who created the globally recognized and highly respected UNCITRAL Model Law on International Commercial Arbitration.⁹

The Commission’s view that conciliation may be merely an extension of international arbitration was apparent. “It was thought that,” the initial Commission Report states, “even if ultimately no new uniform text would be prepared, an in-depth discussion by delegates from all major legal social and economic systems represented in the Commission, possibly with suggestions for uniform interpretation would be a useful contribution to the practice of international commercial arbitration.”¹⁰ This arbitration shadow both fostered and framed the debate on the Model Law’s provisions. Fortunately, Working Group participants’ comments made on and off the record provided continuing reminders that conciliation is and must be treated as a process fundamentally distinguishable from arbitration.

8. “International commerce” contemplates State-to-State transactions, State-to-private business transactions, and business-to-business transactions. In the right situation, the term can include business-to-consumer transactions. Each type of transaction occurs in the international arena, the term international ultimately being defined in the Model Law (see Article 1).

9. To review the Arbitration Model Law, go to www.uncitral.org, click on “approved text”, then click on “UNCITRAL Model Law on International Commercial Arbitration”. You can also find there the “Guide to Enactment”, which discusses the letter and spirit of the model legislation. Note also, for examples, the NGO observers and the head of the United States’ delegation — Howard Holtzman, considered to be an icon in (if not a “founding father” of) international commercial arbitration.

10. Working Group Report 468, *supra*, note 1.

III. THE MODEL LAW EVOLVES

We have a snapshot of the Secretariat and have been exposed to the make up of the Working Group. We have a notion of the concept of a “model law” and an understanding that the Model Law emerged from the shadow of arbitration. Let us look now at the Model Law’s evolution.

As a foundation for its considerations, the Working Group acknowledged the growing use of conciliation as a process of choice for resolving commercial disputes. Intending conciliation and mediation as synonymous terms, the Working Group confirmed “. . . that the use of such non-contentious methods of dealing with disputes deserved to be promoted and that the work of the Commission in the area should be geared to such promotion.”¹¹ They also wanted the picture of conciliation to be painted with the broadest brush to encompass an array of proceedings where the parties sought assistance from an independent and impartial third person to help the disputants reach an amicable settlement.

Confirming that the process contemplated was a non-binding method of dispute resolution, the Working Group recognized that procedural techniques used to facilitate settlement and the expressions used to refer to the proceedings (for example, “mediation”) may differ. Whatever the form of text to be prepared (legislative or non-legislative), and by whatever name the process might be called, the consensus was to limit the context to commercial disputes. Similarly, the Working Group was clear that the overriding proposition throughout their deliberations was that party autonomy throughout the dispute resolution process was paramount.

The Working Group had as a backdrop the previously-adopted UNCITRAL Conciliation Rules.¹² Though more procedural, the Conciliation Rules provided a frame of reference for the Working Group’s substantive considerations as it began development of the Model Law’s structure.

At the outset, concerns were raised regarding confidentiality of information disclosed by the parties during the proceeding. Couched in terms of “admissibility of certain evidence in subsequent judicial or arbitral proceedings,” the Working Group recognized this fundamental aspect of con-

11. *Id.*

12. UNCITRAL Conciliation Rules (1980); Resolution 35/52 Adopted by the General Assembly on 4 December 1980.

ciliation. Their aim was to prevent a “spillover” of information into subsequent judicial or arbitration proceedings. “As to cases where the parties have not agreed on a rule [governing confidentiality]” the Working Group suggested, “. . . the model provision should state that it was an implied term of an agreement to conciliate that the parties undertook not to rely in any subsequent arbitral or judicial proceedings on evidence of the types of facts to be specified in the model provision.”¹³

In their initial considerations, the Working Group was also concerned with issues relating to the role of the conciliator: could she subsequently serve as arbitrator, as a party representative in a subsequent proceeding, or as a witness in a later dispute? Other topics viewed as important included questions relating to enforceability of settlement agreements reached in conciliation; whether it was appropriate for a sitting arbitrator to assume a role of conciliator during the arbitration; what effect would proceeding with conciliation have on the running of limitation and prescription periods; should provisions be made that would treat conciliation agreements as binding; and, were there guiding principles of conciliation proceedings that needed to be articulated in any uniform provisions. There was also concern raised over whether the Working Group should attempt to draft a conciliator’s code of ethics “. . . to build confidence in the conciliation process by distilling issues from the best traditions and openly enunciating standards of practice.”¹⁴

Lest we lose sight of where we are, the preceding discussion in this section addressed only the starting point for the Working Group as of March 2000. As of this writing, we are a mere three years later, with the Model Law having been approved by the Commission and adopted by the General Assembly. When the Working Group met in March 2000, the Secretariat had not yet been given the task of beginning the draft legislative provisions. Working Group sessions only occurred approximately every six months, and the final draft of the Model Law was agreed upon in November 2001. In other words, in three sessions over a year and a half, the Working Group and the Secretariat met its Herculean challenge of creating the Model Law.

To put this in context, after the March 2000 session, the Secretariat commenced drafting the initial legislative provisions. Over the ten days of the next Working Group meeting six months later, they debated the draft provisions, directing the Secretariat to make changes, additions, deletions,

13. Working Group Report 468, *supra* note 1.

14. *Id.*

[Vol. 3: 529, 2003]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

and providing insight into the philosophical and practical thinking upon which the provisions were based.

The Secretariat then had only another six months to re-draft and have ready well in advance of the next Working Group meeting the working paper containing the revised provisions and the detailed discussion of the basis upon which these provisions were created. Moving forward to March 2001, again, a ten day extensive debate; again, daily preparation of reports; and again, a Report prepared by the Secretariat and adopted by the Working Group reflecting the progress on what had become apparent would be UNCITRAL's next model law.

In case the reader may think this author's use of the term "Herculean" was a bit melodramatic, let us not forget the Secretariat's and Working Group's task. Think about it a moment: we are dealing with a concept neither generally recognized, understood, nor accepted as a means of resolving international commercial disputes. Working Group participants represent constituencies with as broad and diverse perspectives and experiences as are found in the global marketplace. On one end of the spectrum is the developing "Third World Country," with little if any stabilized legal system let alone alternative dispute resolution procedures; on the other end, are the dominant and sophisticated economies of the US, the UK, and others. And, let us not overlook the impact of the NGOs perspective, and the influence from the shadow of arbitration. More than 50 participants trying to create a universally acceptable and uniform Model Law governing international commercial conciliation; melodramatic or not, the task was Herculean.

The final version of the Model Law restructured, consolidated and removed provisions found in the first draft.¹⁵ Party autonomy throughout the process continued to be a dominant theme. The development of confidentiality and the role of the conciliator reflected the importance to the Working Group of these two aspects of the Model Law. Refinements were made to assure a clear understanding of the concept of "internationality," to guide the parties in their effort to determine the place for the conciliation proceeding, and to provide an expansive definition of conciliation to assure the broadest application of the Model Law. Significant debate was

15. For a more comprehensive review of the development of the final draft, see the Report of the Working Group on the Work of Its Thirty-Fifth Session; UNCITRAL document A/cn.9/506.

had on provisions designed to address the enforceability of settlement agreements borne of the conciliation. The Working Group had extensive discussions on the issue of if and how a conciliation would effect the running of the statute of limitations.

In continued deference to assuring that parties control the conciliation process, provision was made for them to vary or exclude portions of the Model Law. Extensive discussion, drafting and re-drafting were had to address concerns about the use of information obtained during a conciliation in subsequent proceedings. And if there was not enough drafting and debate going on, the Secretariat, at the behest of the Working Group, also prepared its "Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation." Finally, the Secretariat and the Working Group were ready for the final push.

IV. THE FINAL DRAFT, ADOPTION BY THE COMMISSION & THE IMPRIMATUR OF THE GENERAL ASSEMBLY

The on-the-record debate is concluded, the discussion in the hallways and the quiet negotiations over lunch, dinner, cocktails are behind them, and the final draft Model Law meets the approval of the Working Group at the end of its November 2001 session. To get there, a "drafting group" met daily, often-times more than once and into the evening, working with the Secretariat to formulate language for the various provisions to be considered by the Working Group.

During the time leading up to the eventful November session, the Secretariat prepared the draft "Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation." As stated in its preamble, this comprehensive document was created as background and explanatory material.

In large part derived from the *travaux préparatoires*, "[t]he Guide explains why the provisions in the Model Law have been included as essential basic features of a statutory device designed to achieve the objectives of the Model Law."¹⁶ The Guide states,

In preparing and adopting model legislative provisions on international commercial conciliation, the . . . Commission was mindful that such provisions would be a more effective tool for States modernizing their legislation if accompanied by background and explanatory information. The Commission was also aware of the likelihood that the model provisions would be used in a number of States with limited familiarity with conciliation as a method of dispute settlement. Primarily directed to executive branches of Governments

16. Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation; A/cn.9/514 (27 May 2002).

and legislators preparing the necessary legislative revisions, the information provided in this Guide should also provide useful insight to other users of the text, including commercial parties, practitioners, academics and judges.”¹⁷

Prepared by the Secretariat, the Guide discusses issues left unsettled in the Model Law, recognizing that some provisions may need modifying to conform the Model Law to particular legal traditions and nuances of a State contemplating adoption of the Law.

Following the Working Group’s approval of the language for the final draft Model Law and the Guide to Enactment and Use, the Secretariat set upon the task of preparing the final Report of the Working Group — the vehicle by which the Model Law would be presented to the Commission. This included preparing the “Compilation of comments by Governments and International Organizations,”¹⁸ these comments having been received after the Secretariat circulated the approved Draft Model Law.

In June 2002, the Commission approved and adopted the Model Law and Guide to Enactment and Use as submitted in the Secretariat’s Report. From there, the Model Law found its way to and surmounted its last hurdle — adoption by the General Assembly.

At its 52nd Plenary Meeting, 19 November 2002, the General Assembly adopted the following resolution, to which was annexed the approved Model Law:

The General Assembly,

Recognizing the value for international trade of methods for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that such dispute settlement methods, referred to by expressions such as conciliation and mediation and expressions of similar import, are increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of such dispute settlement methods results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

17. *Id.*

18. UNCITRAL document A/cn.9/513

Convinced that the establishment of model legislation on these methods that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Noting with satisfaction the completion and adoption by the United Nations Commission on International Trade Law of the Model Law on International Commercial Conciliation, *Believing* that the Model Law will significantly assist States in enhancing their legislation governing the use of modern conciliation or mediation techniques and in formulating such legislation where none currently exists,

Noting that the preparation of the Model Law was the subject of due deliberation and extensive consultations with Governments and interested circles,

Convinced that the Model Law, together with the Conciliation Rules recommended by the General Assembly in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on International Commercial Conciliation, the text of which is contained in the annex to the present resolution, and for preparing the Guide to Enactment and Use of the Model Law;
2. *Requests* the Secretary-General to make all efforts to ensure that the Model Law, together with its Guide to Enactment, becomes generally known and available;
3. *Recommends* that all States give due consideration to the enactment of the Model Law, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial conciliation practice.¹⁹

CONCLUSION

The Model Law, as amplified by the Guide, gives testimony to the vision of the Commission, the Working Group and the Secretariat. The use of dispute resolution processes that empower the parties to find their own settlement — especially conciliation or mediation — is rapidly ascending.

What this author has tried to do in this Note is give the reader a glimpse of development of the Model Law — groundbreaking legislation of international magnitude that fundamentally contributes to stability in the global marketplace.

It seems appropriate to conclude with the words from the presiding legal officer of the Secretariat. When asked about the Model Law, Jernej Sekolec commented, “The UNCITRAL process provides universal applicability. The Model Law is prepared and approved by consensus of representatives from across the spectrum. In part, this makes the Model Law significant in international commercial dispute resolution.”

19. Resolution adopted by the United Nations General Assembly; document A/res/57/18.