Arbitration, (UNCITRAL) Model Law

I. Background and justification for unification efforts

1. The original 1985 text

The United Nations Commission on International Trade Law (→ UNCITRAL) adopted the UNCITRAL Arbitration Model Law (United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration as adopted on 21 June 1985, and as amended on 7 July 2006, UN Doc A/40/17 and A/61/17). On 11 December 1985, the General Assembly of the United Nations recommended that all states give due consideration to the Model Law in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial

RICHARD KREINDLER AND KRISTINA VON DER LINDEN / GILLES CUNIBERTI

arbitration practice. Almost 30 years later, the Model Law appears to be one of the greatest successes of international commercial law. In 2016, UNCITRAL announced that 103 states (including 28 individual states, territories or provinces, as the case may be, in the → USA, → Australia and → Canada) had passed legislation based upon it while many more have given it due consideration in reforming their arbitration laws.

The drafters' objective was to address two practical concerns. First, national laws contained a variety of mandatory provisions concerning the arbitration agreement and the arbitral process. Such provisions often frustrated the party expectations, causing them to verify whether the applicable law contained unfamiliar requirements that could render their arbitration agreement unenforceable. In the early 1980s, very few states had taken into account the peculiarities of international commercial arbitration. Accordingly most arbitration laws had been drafted with domestic arbitration needs in mind, and thus contained a number of distinctive requirements, such as the need to confirm consent to arbitration after the particular dispute had arisen. Many of these distinctive requirements were ill-adapted to international arbitration, such as an obligation to appoint only nationals as arbitrators. Second, the default rules of national arbitration laws were considered problematic. For instance, they could refer to national rules of civil procedure, thereby frustrating the expectations of the parties and arbitrators alike, who had not contemplated such rules governing their arbitral proceedings. Other national laws might lack default rules altogether, potentially generating further uncertainty, controversy and expense.

The Model Law was designed to address such practical difficulties. First, its scope was limited to international arbitration. One underlying reason for this narrow focus was the likelihood that the typical party lacking information about national arbitration law and its distinctive features would primarily be foreign and familiar only with the rules of their own jurisdiction. Hence it made sense to create a special regime designed for international arbitration, intended to be more liberal than domestic regimes, as well as uniform to the maximum possible extent. Moreover, it was thought the limited scope would render the Model Law more acceptable to states, in that reforms to national arbitration laws would be easier if the changes applied only to international cases.

Second, the Model Law gave expression to the desire to liberalize international arbitration law by (i) acknowledging the parties' freedom to agree on the particulars of their arbitral procedure and (ii) absent such agreement, granting the arbitral tribunal broad discretion to conduct the proceedings. The Model Law envisions a substantially reduced number of mandatory arbitration rules, but contemplates that those remaining will ensure that the parties' most fundamental procedural rights are respected. Finally, the Model Law offered a comprehensive set of default rules that apply in the absence of any party agreement.

2. The 2006 amendments

On 7 July 2006, UNCITRAL adopted a number of amendments to the 1985 Model Law (Amendments 7 July 2006, UN doc A/40/17 and A/61/17). Specifically, art 7 was revised to modernize the form requirement of arbitration agreements to more closely reflect international contracting practice. A new Chapter IV A, replacing the former art 17, established a more comprehensive legal regime to deal with interim measures in support of arbitration. Articles 1(2) and 35(2) were also revised and a new art 2A was added.

The Model Law as amended in 2006 is now the official version. However, as of 2016 only 25 states have based their national legislation upon it.

II. Overview of the uniform rules

The Model Law currently consists of 36 articles, which comprehensively address the entire international arbitral process, including pre-proceedings and post-award issues.

Article 1 defines its scope of application, which as previously mentioned is limited to international arbitrations. The criteria used to define an international arbitration for the purposes of the Model Law are markedly liberal. First, arbitrations are deemed to be international if (a) the parties have their places of business in different states at the time the arbitration agreement was concluded, or (b) either (i) a substantial part of the obligations of the relationship is to be performed in, or (ii) the subject matter of the dispute is most closely connected to, a place outside the state in which the parties

have their common place of business. Second, an arbitration is also deemed international if the parties have agreed on a place for their arbitration that is in a state other than their common place of business. Finally, the Model Law permits parties to domestic arbitrations to opt for its rules by allowing them to stipulate that the subject matter of the arbitration agreement relates to more than one state. However, this last option was rejected by a number of states when passing legislation otherwise based on the Model Law. Article 1 further limits the scope of application to commercial arbitrations, but provides that the term 'commercial' should be construed broadly to cover all relationships of a commercial nature.

Article 7 defines an arbitration agreement. Before the 2006 amendments, art 7 required that any such agreement be in writing to guarantee that the resulting award would be enforceable under the New York Convention (New York Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards, 330 UNTS 3). The amended Model Law now offers two options to national lawmakers. The first option allows legislatures to retain a written agreement requirement, but to modernize it by recognizing that any form of record of the agreement to arbitrate fulfils the written requirement. The second option simply omits any such requirement. Subject to the option chosen, arbitration agreements are presumptively valid and enforceable. Article 8 provides for the enforcement of valid arbitration agreements, regardless of the arbitral seat, by way of a dismissal or stay of national court litigation, while art 16 expressly adopts a separability doctrine.

Article 5 limits court involvement to only those cases expressly provided by the Model Law, thereby instituting a principle of judicial non-intervention in arbitral proceedings. Courts are authorized to assist the arbitral process in certain specified cases, such as → provisional measures, constitution of a tribunal and evidence-taking (arts 9, 11–13 and 27). As just underlined, courts are obliged to enforce valid arbitration agreements (art 8). As arbitrators have authority to consider their own jurisdiction under the competence-competence principle (art 16), there is no need to involve courts in challenges to arbitral jurisdiction. However, a court may assess the validity of the arbitration agreement and itself decide the dispute where it finds that the arbitration agreement is null and void, inoperative or incapable of being performed (art 8).

With respect to the arbitral procedure, the Model Law avoids any reference to national rules of civil procedure and instead affirms the parties' autonomy to establish their own agreed-upon rules, and absent such agreement the arbitral tribunal's authority to freely determine rules of procedure (art 19). The Model Law also offers a basic set of default procedural rules that the parties are free to alter by agreement, subject only to a limited number of mandatory rules (art 19: equal treatment of parties). A party which knows about a breach of any default rule or requirement under the arbitration agreement, but which proceeds with the arbitration without objecting to that breach, is deemed to have waived its right to object (art 4).

Article 34 Model Law restricts recourse to the courts to challenge arbitral awards. It provides that such recourse may only take the form of an application for setting aside the arbitral award, and then only on the limited grounds enumerated in art 34(2). Such grounds mirror those available under the New York Convention, ie, a party's incapacity, invalidity or non-compliance with the arbitration agreement, certain due process violations, non-arbitrability and/or public policy grounds. Moreover, only the courts of the seat of the arbitration may entertain such applications. In parallel provisions, arts 35 and 36 of the Model Law oblige the national court to recognize and enforce arbitral awards, whether made within the jurisdiction of the court or abroad, again on terms identical to those set forth in the New York Convention for the purposes of challenge.

III. Relationship to private international law

1. Express reference to private international law

a) Territorial scope of application

Article 1(2) Model Law defines its territorial scope by providing that, subject to certain exceptions, 'the provisions of this Law … apply only if the place of arbitration is in the territory of this state'. It accords a central role to the arbitral seat, which in turn designates the law governing the arbitration in most respects. As the vast majority of states have either adopted the Model Law or used the same criterion to define the territorial scope of their arbitration law, and as the widely ratified New York Convention also relies heavily on the place of arbitration as a → connecting factor where it

refers to national law, art 1(2) can be regarded as one of the most important illustrations of the importance of the arbitral seat in comparative international arbitration. Although not a choice-of-law rule as such, it contributes to the general understanding among arbitration scholars and practitioners that the law governing the arbitration (*lex arbitri*) is in principle the law of the place of arbitration.

The place of arbitration is defined by art 20 Model Law. It can be freely chosen by the parties or, failing such agreement, determined by the arbitral tribunal having regard to the circumstances of the case, including convenience for the parties. It is a juridical concept that need not be supported by facts such as the actual place where the arbitrators meet or where hearings are held, as art 20(2) expressly provides. This in effect means that the *lex arbitri* can be freely chosen by the parties. Thus the parties may simply designate as the 'place of the arbitration' any jurisdiction with the law they want to govern the arbitration, irrespective of any intention to physically be present there.

The initial 1985 Model Law drafters contemplated giving the parties the ability to choose not only the place of the arbitration, and thereby as mentioned earlier the law applicable to the arbitration, but also the law to be applied to their arbitration. Some states already permitted this in their national arbitration law and even the New York Convention provided some support for granting such a power to the parties (see art V(1)(a)). Ultimately, however, such a provision was rejected for reasons of certainty. The practical need for granting parties such a power was unclear, first because experience showed that they rarely used it even when available, and second because the Model Law was intended to be liberal and afford parties considerable autonomy in designing their arbitration regime, not least in themselves agreeing on rules of procedure. Moreover, as the place of arbitration is a juridical rather than physical concept, parties already in effect had the power to choose the *lex arbitri* by designating the place of the arbitration. Nevertheless, certain states preferred to leave the issue open. For instance, → Germany adopted a modified art 1(2) in which it deleted the word 'only', thereby suggesting that the place of arbitration is not the sole criterion for applying German arbitration law, and consequently allowing choice of the German law as a foreign *lex arbitri*. In contrast, most other states consider the Model Law to be mandatory, such that parties cannot opt out of it.

The Model Law provides two exceptions to its territorial application. The first concerns the recognition and enforcement of arbitral decisions, whether interim measures (arts 17H–17I) or awards (arts 35–36). Such provisions must necessarily apply universally and hence without regard to the arbitral seat. Under public international law (→ Public international law and private international law), states have exclusive jurisdiction to regulate enforcement within their territory. Thus, the courts of a given state necessarily have exclusive jurisdiction to determine whether to enforce any decision within their territory, including foreign arbitral decisions.

The second exception concerns the effect of an arbitration agreement on the jurisdiction of courts. Article 8 directs courts to refer the parties to arbitration if requested to do so in a matter otherwise subject to an arbitration agreement, while art 9 acknowledges that such direction does not deprive courts of the power to grant interim measures. In an effort to promote the universal recognition and effect of international commercial arbitration agreements (→ Arbitration, international commercial), the two rules are not subject to the general territorial scope of the Model Law and are thus applicable irrespective of the place of arbitration. In practical terms, this enables courts either to decline jurisdiction or to accept it solely for the purpose of taking interim measures in support of arbitrations seated in a foreign country without any need to consult the foreign *lex arbitri*. Articles 8 and 9 are therefore always applicable, which amounts to saying that the law of the court seized always governs in order to promote an arbitration-friendly rule. → France has gone farther down this road by requiring its courts to systematically apply French arbitration law without any reference to the seat of the arbitration (see → France, VII.1.).

b) Choice-of-law rules to be applied by arbitrators

Article 28 provides the choice-of-law rules to be applied by arbitrators in determining the law applicable to the substance of the dispute. Already in 1985, it was generally acknowledged that, unlike courts of the arbitral seat, arbitrators should not be required to apply local private international rules, so that special choices-of-law rules became necessary.

GILLES CUNIBERTI

The fundamental principle underlying art 28 is party freedom of choice. First, the parties are free to agree on the applicable rules of law (art 28(1)). They may also agree to authorize the tribunal to decide *ex aequo et bono* (art 28(3)). Although the parties' freedom to choose the applicable law governing their international contracts is widely recognized today, that was not the case in 1985. Even now, the freedom of choice acknowledged in art 28(1) appears far more extensive than many national rules of private international law. First, art 28(1) does not require that there be a connection between the transaction and the chosen law. Second, art 28(1) was highly innovative insofar as it allowed the parties not only to choose any national law, but also non-national 'rules of law'. At a time when even the existence of non-national 'rules of law' was hotly disputed, the language used in art 28 was unanimously understood to give arbitral tribunals the power to decide disputes in accordance with 'general principles of international commerce' or *lex mercatoria*. However, this provision proved too innovative for certain states (→ Spain, → Bulgaria and → Tunisia), which modified art 28 to give the parties the power only to choose the applicable 'law'.

Second, 'failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable' (art 28(2)). The Model Law drafters chose to adopt a more cautious approach in the absence of any agreement by the parties. The reference to the 'law' to be applied and the mandatory recourse to choice-of-law rules prevents arbitrators from applying non-national rules of law. Nevertheless, the Model Law gave the arbitral tribunal the freedom to decide which conflict-of-laws rule to apply, in turn giving it broad discretion to designate the applicable national law. However, art 28(2) was found unsatisfactory by a significant number of states for a variety of reasons. Some states found it too conservative, and instead empowered arbitrators to apply non-national rules of law also in this context (all Canadian states, California, Oregon). Others found it too liberal, and instead imposed a duty on the arbitrators to apply the most closely connected law (Germany, → Japan, → Turkey). Yet a third group opted for the direct method, empowering arbitrators to apply whatever 'law' they deem appropriate (Spain, Tunisia).

With respect to the rules of procedure to be applied by arbitrators, art 19 gives the parties or, absent agreement by the parties the arbitrators, the power to determine the applicable rules without reference to any national law, albeit only to the extent allowed by mandatory rules of the Model Law (see c) below).

c) Rules regarding the validity and the enforcement of arbitral awards

Articles 34 and 36 lay down the exclusive grounds on which arbitral awards may be respectively set aside or denied recognition and enforcement. They include a conflict with the public policy of the forum, which is a traditional ground for denying recognition and enforcement of arbitral awards and foreign judgments alike (see → Public policy (*ordre public*)).

Certain grounds afforded by arts 34 and 36 confirm the prevalence of the law of the arbitral seat (see a) above), which is referred to for the purpose of assessing the validity of the arbitration agreement (arts 34/36 (1)(a)(i)), the composition of the arbitral tribunal or arbitration procedure (arts 34/36 (1)(a)(iv)) and the arbitrability of the dispute (arts 34/36 (1)(b)(i)). → Party autonomy is allowed by arts 34/36 (1)(a)(i), which empowers the parties to provide for the law governing the arbitration agreement, and partially by arts 34/36 (1)(a)(iv), which recognizes the power of the parties to organize the procedure and the composition of the tribunal, but only to the extent that mandatory rules of the Model Law allow.

2. Need to resort to private international law

a) Limitations in the scope of application

As previously noted, the Model Law's scope of application is limited to international commercial arbitration. Domestic arbitrations do not raise issues of private international law, as they are connected to a single legal order. Although the Model Law encourages a broad interpretation of the term 'commercial', an arbitration can be considered non-commercial for the purpose of the Model Law, eg, in the field of employment law.

Article 1(2) is an illustration of the widely-accepted principle that international arbitrations are to be governed by the law of the arbitral seat. Accordingly, in most jurisdictions the applicable law would also be the arbitral seat law, with the commonly-accepted exception of applying the forum's law with respect to

recognition of the arbitration and enforcement of arbitral decisions.

Further, art 1(5) Model Law refers to the national law of the enacting state for the definition of arbitrability. This is consistent with the general principle that the law of the arbitral seat governs the arbitration.

b) Variations in enacting legislation

As a model law is nothing more than a suggested pattern for lawmakers to consider and perhaps follow when adopting domestic legislation, it is accepted that states enacting legislation based upon a model law have the flexibility to depart from it. Indeed, as indicated above many states that have based their domestic law on the Model Law have taken advantage of such flexibility, and modified a number of the Model Law's provisions.

In accordance with art 1(2) Model Law, the applicable enacting legislation would be that of the state of the place of arbitration, subject to the exceptions set forth in that article.

c) Interpretation of the provisions of the Model Law

Needless to say, certain issues arise of interpretation of the Model Law's provisions. In the absence of any supranational mechanism for uniform interpretation, it is for the national courts of the states which adopted the Model Law (or some variation of it) to interpret their own provisions. As part of the 2006 amendments, a new provision (art 2A) was introduced in the Model Law to encourage national courts to consider the international origin of the instrument, and accordingly the need to promote uniformity in its application. Thus art 2A(2) obliges national courts to resolve issues concerning matters governed by, but not expressly regulated in the Model Law, in conformity with the general principles on which the Model Law is based. Unfortunately, this rule, found in many modern international conventions, has not proven particularly successful, as determining the general principles underlying any particular international instrument has typically proven difficult and controversial. Unlike art 2A(2), similar provisions in other international instruments typically recognize that, absent such underlying principles, recourse to private international law is unavoidable to determine which national law will apply, which in turn determines which national interpretation of the instrument will apply.

The purpose of recourse to private international law being to identify which interpretation of the Model Law, art 1(2) would apply.

IV. Relationship to other legal instruments and to EU law

The Model Law drafters took great care to ensure its consistency with the New York Convention. As a result, a number of its provisions mirror the Convention, such as art 8 (the effect of the arbitration agreement on the jurisdiction of courts on the merits) and arts 35 and 36 (the enforcement and recognition of arbitral awards, including most importantly the grounds for denying enforcement). In response to this, a number of states already party to the New York Convention incorporated provisions in their Model Law legislation that exclude its application if the New York Convention also applies (Australia, Bermuda). Hong Kong took an even more radical step in that its legislation does not provide for application of Chapter VII of the Model Law (arts 35 and 36).

The Model Law also helps extend the reach of the liberal policies underlying the New York Convention, which does not itself cover recourse to courts to set aside arbitral awards. Thus, the courts of states party thereto may freely assess the validity of arbitral awards made within their territory. Moreover, as the New York Convention permits non-recognition of those awards set aside in the place where they were made (art 5(1)(e)), many scholars and courts consider the state of the place of arbitration to be the primary jurisdiction, which then binds all other secondary jurisdictions by its decision to annul the award. Thus the state of the place of arbitration could conceivably impose its views, however conservative, on other states, thereby frustrating the Convention's purpose. The Model Law largely eliminates this potential coordination issue by using the Convention's same limited grounds in the context of recourse to a court to set aside arbitral awards.

GILLES CUNIBERTI

Literature

Henry Alvarez, Neil Kaplan and David Rivkin, *Model Law Decisions: Cases Applying the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 2003); Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1990); Gerold Herrmann, 'The UNCITRAL Model Law: Its

Background, Salient Features and Purposes' (1985) 1 Arb.Int'l 6; Gerold Herrmann, 'UNCITRAL Adopts Model Law on International Commercial Arbitration' (1986) 2 Arb.Int'l 2; Howard M Holtzmann and Joseph E Neuhaus, *Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1989); Sigvard Jarvin, 'La loi-type de la C.N.U.D.C.I. sur l'arbitrage commercial international' [1986] RdA 509; Pieter Sanders, 'Unity and Diversity in the Adoption of the Model Law' (1995) 11 Arb. Int'l 1; Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (Kluwer 2004); Pieter Sanders, 'UNCITRAL's Model Law on International Commercial Arbitration: Present Situation and Future' (2005) 21 Arb.Int'l 443.