17 International Commercial Arbitration

1) Introduction

This chapter looks at international commercial arbitration. The subject is vast. As with other topics considered in the Manual, the hope is that what is set out here will give an overview of the subject, highlighting certain areas and pointing in the direction where more detailed information can be found.[71] With that in mind, the chapter considers the agreement to arbitrate; the course of an international arbitration; arbitration and national laws; the UNCITRAL Model Arbitration Law; and the New York Convention. First, however, it looks at the advantages and disadvantages of arbitration over litigation.

While the International Court of Justice (ICJ) deals with disputes between States, there is no international court to deal with pure international commercial disputes. Therefore if no provision is made in a contract for dispute resolution, any disputes arising out of that contract that cannot be resolved by negotiation between the parties are likely to have to be dealt with by litigation in the national courts.

As mentioned in Chapter 16, resort to litigation in these circumstances will probably mean that one of the parties will have to fight a case in a foreign court, in a foreign language and under a foreign legal system.

The way to avoid that problem is to make provision for some other method of resolving disputes. One obvious dispute resolution process to include in an international commercial contract is arbitration. The parties can agree that, instead of their disputes being dealt with in the national courts, any disputes will be heard by an arbitral tribunal.

Advantages of arbitration

The advantages of arbitration over litigation are clear.

Control of the parties over the procedure, etc

Because arbitration is a consensual process, the parties have far more control over it than would be the case with litigation in a national court. For example, the parties can decide which language shall be used for the purposes of the arbitration and which law shall govern their contractual relationship – a matter of considerable significance. It is generally accepted worldwide, in both the common law and civil law countries, that – subject to certain constraints – the parties are to be allowed to choose the law that will govern the contract between them.

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71 See in particular Alan Redfern and Martin Hunter, *Law and Practice of International Arbitration*, Sweet and Maxwell, 2004 (4th edition); and Gary Born, *International Commercial Arbitration: Commentary and Materials*, Transnational Publishers Inc, 2001 (2nd edition).

Selection of the tribunal

Because of the degree of control that they exercise over the process, the parties can select the tribunal that is to decide the dispute. In an ad hoc arbitration the parties may have complete control and can name the arbitrator or arbitrators. In an institutional arbitration the parties will generally be able to name arbitrators, although in those circumstances the choice may be limited to arbitrators listed in the panel of the particular arbitral institution. The obvious benefit is that the parties have the opportunity to choose arbitrators who are known and respected in the field of international commercial arbitration and/or who are experts in the area of the dispute in question.

Neutral venue

Again, because of the degree of control that the parties exercise over the arbitration process, it is open to them to specify the country in which the arbitration will take place. Parties from State A and State B may agree that the arbitration be held in neutral State C.

Flexibility

Arbitration is a far more flexible process than litigation in the national courts. The parties can choose an arbitral procedure that suits them – for example, arbitration under the rules of one of the international arbitral institutions such as the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC) or the American Arbitration Association (AAA). Or they can choose ad hoc arbitration, where they agree to adopt the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

Finality

While many judgements handed down by national courts are subject to appeal, arbitral awards are final and subject only to challenge in very limited circumstances.

Enforceability

The New York Convention has provided a very successful means of enforcing arbitral awards. Generally speaking, the international enforcement of arbitral awards is a far more effective process than is available for the enforcement internationally of judgements made in national courts.

Confidentiality

Because arbitration is a private dispute resolution process, the parties will know that, subject to certain exceptions, the proceedings will be confidential.

Cost and speed

Arbitration may – indeed in many cases should – prove to be a cheaper and quicker means of resolving disputes than litigation in the national courts.

Disadvantages of arbitration

However, arbitration does have its disadvantages. Because it is a consensual process, the powers of the arbitrators are limited to those that are given to them either by the parties or by national legislation. Arbitrators therefore do not have the range of powers that are vested in judges sitting in national courts. One particular example is the general inability of arbitrators to order joinder of parties or consolidation of issues. These are powers that can be exercised by judges and that are aimed at ensuring that different courts do not reach different decisions on the same issues – a problem referred to in the earlier chapters dealing with investor-State disputes.

Similarly, arbitrators do not possess the same coercive powers as judges. To take a simple and obvious example, arbitrators cannot order committal to prison on failure of a party to comply with a direction made by the tribunal.

2) The Agreement to Arbitrate

Given that arbitration may be used as a dispute resolution process only as a consequence of the agreement between the parties, the wording of that agreement is of considerable importance. It can either relate to future disputes (a *'clause compromissoire')* or to an existing dispute (a *'compromis')*. The agreement in relation to future disputes is likely to be contained within the trading or commercial contract. An agreement in relation to an existing dispute will probably be a one-off contract drawn up following the emergence of the dispute.

Most international arbitral institutions provide model forms of arbitration clauses. For example, the LCIA model clause relating to future disputes provides:

> *"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference to this clause.*
>
> *The number of arbitrators shall be [one / three].*
>
> *The seat, or legal place, of arbitration shall be [City and/or Country].*
>
> *The language to be used in the arbitral proceedings shall be [ ].*
>
> *The governing law of the contract shall be the substantive law of [ ]."*

The model clause for a dispute that has already arisen provides:

> *"A dispute having arisen between the parties concerning [ ], the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules.*
>
> *The number of arbitrators shall be [one / three].*
>
> *The seat, or legal place, of arbitration shall be [City and/or Country].*
>
> *The language to be used in the arbitral proceedings shall be [ ].*
>
> *The governing law of the contract [is / shall be] the substantive law of [ ]."*

3) The Course of an International Arbitration

A general idea of the course that an international commercial arbitration is likely to follow can be gathered from the outline of the English Arbitration Act given earlier, from the UNCITRAL Model Law referred to later and from the Notes provided by UNCITRAL for the organisation of arbitral proceedings.

UNCITRAL Notes on Organising Arbitral Proceedings

The matters listed in the UNCITRAL Notes for possible consideration indicate the potential complexity of an international commercial arbitration. UNCITRAL states that the purpose of the Notes *"... is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful. The text, prepared with a particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution."*[72]

The Notes list the following questions:

1 Set of arbitration rules: if the parties have not agreed on a set of arbitration rules, would they wish to do so

2 Language of proceedings
   (a) Possible need for translation of documents, in full or in part
   (b) Possible need for interpretation of oral presentations
   (c) Cost of translation and interpretation

3 Place of arbitration
   (a) Determination of the place of arbitration, if not already agreed on by the parties
   (b) Possibility of meetings outside the place of arbitration

4 Administrative services that may be needed for the arbitral tribunal to carry out its functions

5 Deposits in respect of costs
   (a) Amount to be deposited
   (b) Management of deposits
   (c) Supplementary deposits

6 Confidentiality of information relating to the arbitration

7 Routing of written communications among the parties and the arbitrators

8 Telefax and other electronic means of sending documents
   (a) Telefax
   (b) Other electronic means (e.g. electronic mail and magnetic or optical disk)

9 Arrangements for the exchange of written submissions
   (a) Scheduling of written submissions
   (b) Consecutive or simultaneous submissions

72 The full text of the UNCITRAL Notes can be viewed on the UNCITRAL website: www.uncitral.org/.

10 Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)

11 Defining points at issue; order of deciding issues; defining relief or remedy sought

(a) Should a list of points at issue be prepared

(b) In which order should the points at issue be decided

(c) Is there a need to define more precisely the relief or remedy sought

12 Possible settlement negotiations and their effect on scheduling proceedings

13 Documentary evidence

(a) Time-limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission

(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate

(d) Are the parties willing to submit jointly a single set of documentary evidence

(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples

14 Physical evidence other than documents

(a) What arrangements should be made if physical evidence will be submitted

(b) What arrangements should be made if an on-site inspection is necessary

15 Witnesses

(a) Advance notice about a witness whom a party intends to present; written witnesses' statements

(b) Manner of taking oral evidence of witnesses

(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted

(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made

(iii) May witnesses be in the hearing room when they are not testifying

(c) The order in which the witnesses will be called

(d) Interviewing witnesses prior to their appearance at a hearing

(e) Hearing representatives of a party

16 Experts and expert witnesses

(a) Expert appointed by the arbitral tribunal

(i) The expert's terms of reference

(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony

(b) Expert opinion presented by a party (expert witness)

17 Hearings
   (a) Decision whether to hold hearings
   (b) Whether one period of hearings should be held or separate periods of hearings
   (c) Setting dates for hearings
   (d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses
   (e) The order in which the parties will present their arguments and evidence
   (f) Length of hearings
   (g) Arrangements for a record of the hearings
   (h) Whether and when the parties are permitted to submit notes summarising their oral arguments
18 Multi-party arbitration
19 Possible requirements concerning filing or delivering the award

International arbitral bodies

Many commercial contracts in which the parties have agreed to have their disputes resolved by arbitration will specify one of the well-known international arbitral bodies considered later. The Rules of these institutions will similarly indicate the course that an international arbitration is likely to follow:

- commencement of the arbitration;
- appointment of the arbitral tribunal, challenge and replacement of arbitrators;
- powers of the tribunal (including *competence / competence,* interim measures, and the power to make different types of award at different stages of the arbitral process);
- language and place of the arbitration;
- governing law, conflict of laws, any right of the tribunal to decide *ex aequo et bono* or to act as *amiable compositeur;*
- conduct of the arbitration: pleadings, evidence (including documents), factual witnesses and experts, oral and written submissions, conduct of the hearing;
- the award: revision of the award, additional awards and the finality of the award.

4) Arbitration and National Laws

International commercial arbitrations conducted under the Rules of international arbitral bodies must be conducted in accordance with the relevant national laws – and with an eye to the New York Convention.

As to national laws, it is clear that arbitration – as a private dispute resolution system separate from the litigation systems of the national courts – can only operate with the consent of national governments. Broadly speaking, national governments support arbitration as a 'private' dispute resolution system principally in two ways: first, by staying litigation in the national courts in circumstances where the parties have agreed to arbitrate; and second, by enforcing in the national courts the awards made by arbitral tribunals.

In addition, the national courts may aid the arbitral process by, say, granting injunctions. But in return the State expects to exercise a degree of control over the arbitral process by, for example, allowing appeals / challenges in certain circumstances to the national courts against arbitration awards. The position under the English Arbitration Act was considered earlier.

The situation obviously varies from country to country. It was with a view to standardising the arbitral process internationally that UNCITRAL adopted the Model Arbitration Law. The English Arbitration Act was structured on the Model Law. Other countries – one example is Scotland – have adopted the Model Law.

5) The UNCITRAL Model Arbitration Law

i) Introduction

The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations in the field of international trade law. It has specialised in commercial law reform on a worldwide basis for over 30 years. Its Secretariat, the International Trade Law Branch of the UN Office of Legal Affairs, is located in Vienna.

UNCITRAL was established by the UN General Assembly in 1966. The General Assembly recognised that differences in national laws dealing with international trade law were creating *"obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles"*. It gave to the Commission a mandate to *"further the progressive harmonization and unification of the law of international trade"*. The Commission is currently composed of 36 member States elected by the General Assembly, but will be expanded to a total of 60 States. Membership is structured so as to be representative of the world's various geographic regions and its principal economic and legal systems.

UNCITRAL has adopted various measures in the field of international commercial arbitration. These include the UNCITRAL Notes on Organising Arbitral Proceedings, adopted in 1996 (outlined above) and the Arbitration Rules, adopted in 1976, which are discussed in the next chapter. The vitally important New York Convention was prepared by the UN prior to the creation of UNCITRAL, but promotion of the Convention is a major part of the Commission's work. The New York Convention is considered later in this chapter.

The Model Law on International Commercial Arbitration was adopted in 1985. This was designed to assist States in *"reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration"*. As at April 2004, over 40 countries had enacted legislation based on the Model Law.

The Law consists of eight Chapters and thirty-six Articles. Chapter 1 contains general provisions; Chapter II deals with the arbitration agreement and Chapter III with the composition of the arbitral tribunal; Chapter IV contains provisions dealing with the jurisdiction of the tribunal and Chapter V deals with the conduct of the arbitral proceedings; Chapter VI deals with the award and the termination of the arbitral

proceedings; Chapter VII contains provisions dealing with recourse against the award; and the provisions of Chapter VIII are concerned with recognition and enforcement of awards.

ii) The Model Law

Chapter I: General provisions

Article 1 states that the Model Law applies to *"international commercial arbitration, subject to any agreement in force between this State and any other State or States"*. With certain exceptions, the Law applies only if the place of arbitration is in the territory of *"this State"*. Arbitration is *"international"* only if:

"(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any 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 the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country."

Article 1(5) states that the Law *"shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law"*.

Article 2 contains various definitions and Articles 3 and 4 deal with written communications and waiver of the right to object. Article 5 provides that in matters governed by the Law *"no court shall intervene except where so provided in this Law"*.

Article 6 makes provision for each State in enacting the Law to specify the court or courts or other competent authority to perform functions referred to in Articles 11 (3), 11 (4), 13 (3), 14, 16 (3) and 34 (2). Those articles deal with the appointment of arbitrators and recourse against the award.

Chapter II: Arbitration agreement, stay of litigation and interim measures

Article 7 states that the arbitration agreement is *"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement."* The agreement is to be in writing and may be contained in an exchange of documents.

Provisions relating to the stay of litigation are contained in Article 8. A court before which action is brought in a matter that is the subject of an arbitration agreement is to refer the

parties to arbitration *"unless it finds that the agreement is null and void, inoperative or incapable of being performed"* (the wording in the New York Convention). However, the request to a court for interim measures of protection is not incompatible with an arbitration agreement (Article 9).

Chapter III: Composition of arbitral tribunal

Articles 10 and 11 deal with the number of arbitrators (three, unless the parties determine otherwise) and their appointment. Articles 12 and 13 contain the provisions relating to the grounds of challenge to arbitrators and the challenge procedure. An arbitrator may be challenged only if *"circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties"*.

Article 14 contains provisions dealing with the situation where an arbitrator is unable to perform his/her functions or fails to act without undue delay. Article 15 deals with the appointment of substitute arbitrators.

Chapter IV: Jurisdiction of arbitral tribunal

The *'competence / competence'* provisions are contained in Article 16: *"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."*

A plea that the tribunal does not have jurisdiction is to be raised not later than the submission of the statement of the defence. The tribunal may rule on such a plea either as a preliminary question or in the award on the merits. Unless the parties have agreed otherwise, the arbitral tribunal has power to order interim measures (Article 17).

Chapter V: Conduct of arbitral proceedings

The parties are to be treated with equality and each party *"shall be given a full opportunity of presenting his case"* (Article 18).

Subject to the provisions of the Law, the parties are free to agree on the procedure to be followed. Failing such agreement, the tribunal may conduct the arbitration in such a manner as it considers appropriate: *"The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence"* (Article 19).

The parties are free to agree on the place of arbitration, but failing such agreement the place is to be determined by the tribunal *"having regard to the circumstances of the case, including the convenience of the parties"*. However, the tribunal (unless the parties have agreed otherwise) may meet at any place it considers appropriate for consultation among its members, for hearing witnesses / experts / the parties, or for inspections (Article 20).

Unless agreed otherwise, the arbitral proceedings commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent (Article 21). Article 22 provides that (unless the parties agree otherwise) the language or languages to be used in the arbitration are to be determined by the tribunal.

Pleadings and relevant documents are dealt with an Article 23. The claimant is to *"state the facts supporting his claim, the points at issue and the relief or remedy sought"*, and the respondent is to *"state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements"*. The parties may submit with their statements all documents they consider to be relevant or *"may add a reference to the documents or other evidence they will submit"*. The parties may amend or supplement the claim and defence, unless they have agreed otherwise, or unless the arbitral tribunal considers it inappropriate having regard to the delay.

Whether the arbitration should proceed by way of an oral hearing or whether it should be conducted on a documents-only basis is a matter of decision for the tribunal (unless, again, the parties have decided otherwise). In relation to evidence *"All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties"* (Article 24).

Article 25 makes provision for party default in the event that the parties have not agreed otherwise. If, without showing sufficient cause:

"(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it."

Article 26 deals with experts appointed by the tribunal. Unless the parties have agreed otherwise, the tribunal:

"(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection."

Article 26 (2) states that *"Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue."*

The final Article of Chapter V deals with court assistance in relation to the taking of evidence. Both the tribunal and the parties – with the approval of the tribunal – may request *"from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence"* (Article 27).

Chapter VI: Governing law; the award; settlement and termination of proceedings

The first Article of Chapter VI deals with the rules applicable to the substance of the dispute. The tribunal is to decide the dispute *"in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules."*

Failing a designation of the parties, the tribunal is to apply the law *"determined by the conflict of laws rules which it considers applicable"*. Article 28 then states expressly that the tribunal *"shall decide* ex aequo et bono *or as* amiable compositeur *only if the parties have expressly authorized it to do so"*.

Article 28 (4) states that in all cases *"the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction"*. That provision, like the express reference to *ex aequo et bono* and *amiable compositeur*, does not appear in the English Arbitration Act.

Article 29 deals with decisions made by the panel: *"In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal."*

If the dispute has been settled during the course of the proceedings, the tribunal is to *"terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.... An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case"* (Article 30). This provision is important in the context of the New York Convention as only an 'arbitral award' is enforceable under the Convention.

Article 31 contains provisions dealing with the form and contents of the award, which is to be in writing and signed by the tribunal. Where there is more than one arbitrator, the signatures of the majority of the tribunal suffice *"provided that the reason for any omitted signature is stated"*. Unless the parties have agreed otherwise (or unless it is an award on agreed terms under Article 30), the award is to state the reasons on which it is based. It is to state its date and the place of arbitration, and a copy signed by the arbitrators is to be delivered to each party.

Article 32 states that the arbitral proceedings are terminated by the final award or by an order of termination issued by the tribunal when:

"(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible."

The tribunal's mandate ends with the termination of the arbitral proceedings, subject to the provisions of Article 33 and Article 34 (4) (re-correction, etc of and recourse against the award – see below).

Article 33 contains provisions for the correction and interpretation of the award and for the making of an additional award. Within 30 days of receipt of the award (unless some other period of time has been agreed by the parties):

"(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award."

If the tribunal considers that the request is justified, it is to make the correction or give the interpretation, which forms part of the award. In addition, the tribunal may correct errors on its own initiative. Unless the parties have agreed otherwise, a party may also request the tribunal to make an additional award *"as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days."* The correction and interpretation provisions apply also to any additional award.

Chapter VII: Recourse against the award

Article 34 contains provisions for recourse to a court against the award. Article 36 (in Chapter VIII) contains the grounds for refusing recognition and enforcement of the award. Both are based on Article V of the New York Convention, save that Article 34 does not contain the Article V (1) (e) provision of the Convention relating to a situation where the award has not yet become binding on the parties, or has been set aside or suspended. They will both nevertheless be set out in full since they are important in the field of international trade and international commercial arbitration.

Under Article 34, recourse to a court against an arbitral award may only be made by an application for setting aside. Such setting aside may only be made by the court specified by the particular State in Article 6, and may only be done if:

"(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the

parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State."

Article 34 (3) states that an application for setting aside *"may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal".*

Article 34 (4) states that the court, when asked to set aside an award *"may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside".*

Chapter VIII: Recognition and enforcement of awards

Articles 35 and 36 deal with recognition and enforcement of awards. Article 35 states that an award *"irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36".*

The party relying on the award or applying for its enforcement is to supply *"the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language."*

These provisions are similar to those contained in Article IV of the New York Convention.

The grounds for refusing recognition or enforcement are set out in Article 36. These are very similar to the Article 34 recourse against the award provisions, but with the additional *"not yet binding, etc"* ground contained in Article V (1) (e) of the New York Convention. Recognition or enforcement of an arbitral award, irrespective of the country in which the award was made, may be refused only:

"(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State."

Article 36 (2) provides that: *"If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."*

An Explanatory Note by the UNCITRAL Secretariat states that *"By modelling the recognition and enforcement rules on the relevant provisions of the 1958 New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention."*

iii) Case law relating to the Model Law

Two cases decided on the provisions of the UNCITRAL Model Law are set out below. These and other case reports can be found on the UNCITRAL website as part of the Case Law on UNCITRAL Texts (CLOUT) system.[73]

Europcar v Alba Tours

Canada has enacted legislation based on the Model Law. The case of *Europcar Italia S.p.A v Alba Tours International Inc* was heard in the Ontario Court of Justice by Mr Justice Paul Dilks in January 1997. The case concerned Articles 35 and 36 of the Model Law (referred to in the report as MAL).

The CLOUT report of the case states that:

> *"Europcar Italia S.p.A ('Europcar'), a major European motor vehicle rental agency, and Alba Tours International Inc. ('Alba'), a tour operator based in Toronto, entered into an agreement in Rome for car rental services. A dispute brought the parties to arbitration resulting in an award in favour of Europcar. Alba Tours asked the Italian courts to set aside the award on the ground that the arbitrator had made a serious error of fact which resulted in a loss of his jurisdiction. In the interim, Europcar sought enforcement of the arbitral award against Alba in Ontario.*
>
> *"The Court began by noting that, in accordance with article 35 of the MAL, it was obliged to recognize an arbitral award unless one of the grounds for refusal, listed in article 36, was available. Even then, it noted that a discretion remained to recognize the award under that provision on the basis that the word 'may' is used in the preamble to article 36(2). The Court found that it is 'therefore clear that even should one of the circumstances [set out in article 36(1)] exist, enforcement could still be ordered in the exercise of judicial discretion'.*
>
> *"Alba objected to recognition on the basis of article 36(1)(a)(iii) and (v). Under the first provision, Alba argued that by misinterpreting the agreement, the arbitrator lost jurisdiction, and that accordingly his award contained decisions on matters beyond the scope of the submission to arbitration. The Court rejected this argument on two grounds: first, that this issue was already before the Italian courts and should therefore not be considered by the Ontario Court, and second, that in any event, the evidence did not indicate that any errors committed by the arbitrator substantially affected his conclusions. The Court also rejected the submission based on subparagraph (v), holding that the conditions for its application had not been met.*
>
> *"The Court considered that the conditions for the application of article 36(2) had been met by Alba's appeal in Italy. The only issue was the exercise of the Court's discretion under article 36(2). In exercising its discretion, the Court considered the balance of convenience to the parties. It found that Alba Tours would suffer extreme prejudice if the award were enforced in Ontario only to be set aside later in Italy. The Court thus ordered an adjournment of the enforcement proceedings in Ontario, conditional upon Alba furnishing security pending a determination of the appeal in Italy."*[74]

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73 www.uncitral.org/uncitral/en/case_law.html.

74 CLOUT Case 366.

Skandia International Insurance Company v Al Amana Insurance

Bermuda is another example of a Model Law jurisdiction. In January 1994 the Supreme Court of Bermuda dealt with a case concerning Article 16 of the Model Law. Mr Justice Vincent Meerabux gave judgement in *Skandia International Insurance Company and Mercantile & General Reinsurance Company, and others v Al Amana Insurance.*

A report of the case in CLOUT states that proceedings were initiated in the Supreme Court by Skandia and other insurance companies seeking an injunction to restrain Al Amana Insurance and other insurance companies from continuing legal proceedings against Skandia and others in Kuwait:

> *"Skandia and others were reinsurers of Al Amana, a company incorporated under the laws of Bermuda, in respect of real and personal property located in Kuwait and belonging to Alghanim Industries ('Alghanim') and its associated companies. Alghanim sustained extensive property damage in Kuwait during and consequential to the invasion of Kuwait by Iraq in August 1990. Disputes arose as to whether the losses sustained by Alghanim were excluded by virtue of a War Risks Exclusion Clause contained in the reinsurance agreements between Al Amana and Skandia and others.*
>
> *"Al Amana was sued by Alghanim in Kuwait and joined Skandia and others as third parties. Skandia and others argued that the Kuwaiti court had no jurisdiction over them as there were arbitration provisions in the reinsurance agreements with Al Amana. In the meantime, Skandia and others served notices of arbitration on Al Amana and initiated the proceedings in the Supreme Court of Bermuda for an injunction to restrain Al Amana from continuing legal proceedings against them in Kuwait on the ground that there existed an agreement to have their disputes determined by arbitration 'at the seat of the defendant party' (i.e., Bermuda).*
>
> *"Al Amana challenged, inter alia, the existence of an arbitration clause in one of the reinsurance agreements. Al Amana argued that article 7(2) MAL requires that, for incorporating an arbitration clause by reference into another document, the reference has to be 'such as to make that clause part of the contract.' Al Amana submitted that a reference to insurance coverage 'as per wording attached' simply incorporated the description of the risks in respect of which reinsurance was effected, but could not incorporate the entirety of the policy and was inadequate to incorporate the arbitration clause contained in another document.*
>
> *"The Supreme Court held that there was prima facie evidence that the arbitration agreement existed and satisfied the requirements of article 7(1) MAL and Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The Supreme Court held, under reference to the travaux préparatoires of the MAL, that the contractual documents do not need to make an explicit reference to the arbitration clause and that general words of incorporation suffice under article 7 MAL. The Supreme Court pointed out, however, that, in any event, a challenge to the existence, validity and scope of the arbitration agreement was a matter to be first determined by the arbitral tribunal under article 16(3) MAL. Accordingly, the Supreme Court granted the injunction restraining Al Amana from continuing with the proceedings brought by it against Skandia and others in Kuwait."*[75]

75 CLOUT Case 127.

6) The New York Convention

i) Introduction

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the New York Convention, is the third of the three international conventions mentioned at the beginning of the Manual as being of particular significance to international trade and investment. The other two Conventions have been referred to in earlier chapters: the 1982 United Nations Law of the Sea Convention (UNCLOS III) and the World Bank's International Convention on the Settlement of Investment Disputes (ICSID).

The 1958 New York Convention is widely accepted as being the cornerstone of international commercial arbitration. Enforcement of the award made by the tribunal is the ultimate object of international commercial arbitration. The purpose of the Convention is to provide for the mutual recognition and enforcement of arbitral awards made in countries that are parties to it.

Over 130 states have ratified, acceded to or succeeded to the Convention. These include the world's major trading nations.[76] Thus, for example, in the case of a dispute between Canadian and Nigerian companies, an award made in Switzerland against the Canadian company could be enforced by the Nigerian company in Canada through the Canadian courts. And if the Canadian company had assets in, say, France and Italy, the Nigerian company could likewise enforce the award through the French and Italian courts, since both France and Italy have ratified the Convention.

The late Sir Michael Kerr, a former English Court of Appeal Judge and distinguished international arbitrator, described the New York Convention as *"the foundation on which the whole of the edifice of international arbitration rests. Without the Convention the process could have no effective existence."*[77] The Convention was also described by Alan Redfern and Martin Hunter in the first edition of their work *Law and Practice of International Commercial Arbitration* as *"…easily the most important international treaty relating to international commercial arbitration. Indeed, its general level of success may be regarded as one of the factors responsible for the rapid development of arbitration as a means of resolving international trade disputes in recent decades."*[78]

The Convention is the successor to the Geneva Protocol and the Geneva Convention. As noted above, it was prepared by the United Nations prior to the creation of the UN Commission on International Trade Law (UNCITRAL), but the promotion of the Convention is an important aspect of UNCITRAL's work.

Put shortly, the New York Convention:

- requires Contracting States to recognise relevant arbitration agreements;

76 See the list of States on the UNCITRAL website: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

77 [1997] 13 Arbitration International, 121-143 at p 127.

78 Sweet and Maxwell, 1986, p 46.

- requires the courts of Contracting States to refer disputes to arbitration where a relevant agreement to arbitrate has been made, unless the Court finds that the agreement is null and void, inoperative or incapable of being performed;
- requires a Convention State to recognise and enforce a foreign arbitral award made in another Convention State, only refusing recognition and enforcement on the limited specified grounds set out in Article V of the Convention. These comprise five procedural defects that must be proved (e.g., failure to give proper notice of the appointment of the arbitrator) and two additional defences that a court can find on its own motion: first, the subject matter of the difference is not capable of settlement by arbitration; and second, that recognition or enforcement would be contrary to public policy.

ii) The Convention

The New York Convention is, by the standard of international conventions, relatively short. It comprises 16 articles.

Article I (1) sets out the scope of the Convention. It applies to *"the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."*

Article I (2) defines 'arbitral awards'. They include *"not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted"*.

When signing, ratifying or acceding to this Convention (or notifying extension under Article X), any State *"may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such Declaration"* (Article I (3)).

Article II (1) deals with the recognition of arbitration agreements. Each Contracting State *"shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractua1 or not, concerning a subject matter capable of settlement by arbitration"*.

Article II (2) defines 'agreement in writing'. It shall include *"an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams"*.

Article II (3) contains the requirement that a court of a Contracting State must stay litigation where there is a relevant agreement to arbitrate.

The combined powers of a national court to 'stay' litigation and to enforce arbitral awards are arguably the most vital support mechanisms in the field of arbitration, both domestic and international.

The Article states that a court of a Contracting State *"when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."* The reference to agreements being *"null and void, inoperative or incapable of being performed"* appears in the UNCITRAL Model Law and in the English Arbitration Act.

Article III contains the recognition and enforcement provisions: each Contracting State *"shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."*

The requirements for obtaining recognition and enforcement are set out in Article IV. The party applying *"shall, at the time of the application, supply:*

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof."

If either the award or the agreement is not made in an official language of the country concerned, the party applying for recognition and enforcement of the award *"shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."*

Article V contains the grounds on which recognition and enforcement of an award may be refused (referred to in the earlier section on the UNCITRAL Model Law).

Article V (1) sets out the five procedural defects grounds:

> *"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
>
> *(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*
>
> *(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*
>
> *(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on*

matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

Article V (2) deals with the two additional grounds on which recognition and enforcement may be refused by the court on its own motion:

"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

Article VI states that if an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V (1) (e) *"the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security".*

Article VII (1) deals with recognition and enforcement of arbitral awards under multilateral or bilateral investment treaties or other processes: *"The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."*

For example, the World Bank's ICSID Convention contains its own enforcement mechanism, and the Framework Agreement between the United Kingdom and Norway concerning the laying of inter-connecting submarine pipes under the North Sea between the two countries (discussed in Chapter 8) provides that a decision of the relevant arbitral tribunal shall be treated as if it was an agreement between the two Governments.

Article VII (2) provides that the predecessors of the New York Convention, the Geneva Protocol of 1923 and the Geneva Convention of 1927, shall cease to have any effect between Contracting States on their becoming bound by the New York Convention.

Article XIV provides that a Contracting State *"shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention".*

The remaining Articles VIII to XVI are concerned with signature, accession, the extension of the Convention to territories for which a State has responsibility for international relations, federal or non-unitary States, the date of coming into force of the Convention, denunciation of the Convention, notification by the UN Secretary-General of Article VIII matters, and the authentic texts of the Convention (Chinese, English, French, Russian and Spanish).

iii) Case law relating to the New York Convention

Set out below are brief notes on two New York Convention cases decided in the English courts.

Westacre v Jugoimport

The English Court of Appeal considered the public policy ground in Article V (2) (b) in relation to refusing recognition and enforcement of a New York Convention award.

The case of *Westacre Investments Inc v (1) Jugoimport-SDRP Holding Co Ltd (2) Beogradska Banka DD* came before the Court of Appeal on 12 May 1999, on appeal from a decision of Mr Justice Colman. The appeal was against the refusal by Mr Justice Colman to set aside a Swiss arbitration award on the ground of illegality, and for leave to re-amend the defence by relying on fresh evidence showing that the claimant's evidence at the arbitration was perjured.

The respondent to the appeal accepted that if the appellants were entitled to establish the facts now alleged, and if it was assumed those facts were correct, enforcement of the award should be refused as contrary to public policy. Two of the issues before the Court of Appeal were:

- Whether the court should allow the facts as found by the arbitrators to be re-opened;
- Whether, on the authority of *Lemenda Trading Co Ltd v African Middle East Petroleum Co* [1998] 1 QB 448 and *Soleimany v Soleimany* [1998] 3 WLR 811, the English courts should not enforce an English law contract that fell to be performed abroad as a matter of public policy.

The Court of Appeal held (with Lord Justice Waller dissenting) that the attempt to re-open the facts should be refused. Swiss law was both the proper law of the contract and the curial law of the arbitration and Switzerland, like the United Kingdom, was a party to the New York Convention. The allegation of bribery in the arbitration had been made and been rejected. Had it not been rejected the claim would have failed, Swiss and English public policy being indistinguishable in this respect. In those circumstances and without fresh evidence, there could be no justification for refusing to enforce the award.

The seriousness of the alleged illegality was not a factor to be considered at the stage of deciding whether or not to mount a full-scale inquiry. It was something to be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality, which could only be performed in response to the question, if it arose, of whether the award should be enforced.

In addition, although the award was not isolated from the underlying contract, it was relevant that the English court was considering the enforcement of the former and not the latter. It was legitimate to conclude that there was nothing that offended English public policy if an arbitral tribunal enforced a contract that did not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view. Mr Justice Colman was right on the *Lemenda* point and, unless the appellants were entitled to go behind the facts as found by the arbitrators, there was no public policy answer to the enforcement of the award.

The Court of Appeal dismissed the appeal.[79] In October 1999 the House of Lords refused an application for leave to appeal the decision of the Court of Appeal.

Omnium v Hilmarton

Omnium de Traitement et de Valorisation SA v Hilmarton Ltd involved an arbitration award made in Geneva under Swiss law. Omnium applied:

- to set aside an ex parte order giving effect in England to an ICC award in favour of Hilmarton, and
- for an order that the award be refused enforcement in England under Section 103 of the English Arbitration Act 1996 (which contains the grounds for refusing recognition and enforcement of New York Convention awards – including the public policy ground).

Omnium had appointed Hilmarton to be its legal and tax consultant and to carry out certain work relating to the design and completion of a drainage project in Algiers. The fees payable were conditional on a public contract being awarded to Omnium by the City of Algiers. The contract was awarded, but Omnium only paid Hilmarton half the agreed fees. The claim arising as a result led to the commencement of an ICC arbitration and an award.

The relevant arbitration clause in the agreement between the parties established Swiss law as the proper law. The agreement provided for ICC arbitration and specified Geneva as the seat of the arbitration. Omnium argued that the award should not be enforced in England because such enforcement would be contrary to public policy. Omnium relied on the fact that the law of Algeria prohibited the intervention of a middleman in connection with any public contract or agreement within the ambit of foreign trade. The principal issue was the manner in which the term 'public policy' was to be assessed in such an international context.

Mr Justice Timothy Walker held that the enforcement of a New York Convention award was to be refused only in certain limited circumstances. One ground was that it would be contrary to public policy to enforce the award. It had to be established that enforcement would be contrary to public policy in English law: *Soleimany v Soleimany* [1998] WLR 811. Omnium must also establish not merely that the agreement was unlawful in its place of performance but also that the unlawfulness infected the award itself.

79 A full report of the case can be found in [1999] 2 Lloyd's Reports 65.

Following *Westacre Investments Inc v Jugoimport*, Mr Justice Walker held that, despite the fact that performance was contrary to domestic public policy in its place of performance (Algeria), because it was not contrary to the domestic public policy of the country of the proper law (Switzerland) or the curial law (Swiss law), enforcement should be allowed. There were therefore no public policy grounds on which enforcement of the award could be refused.

The application was refused.[80]

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80 (a) A full report of the case can be found in [1999] 2 Lloyd's Reports 222.

(b) The case of *Hilmarton (UK), Appellant v Omnium (France), Appellee* is reported in the *ICCA Yearbook Commercial Arbitration*, Volume XIX, 1994, p. 665: a decision of the Cour d'Appel, Paris in December 1991.