Are We Beyond The Model Law — Or Is It Time For A New One?

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When the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law) was approved by the United Nations General Assembly in 1985, "uniformity of the law of arbitral procedures"[2] was a stated purpose. The uncertainty produced by the disparity among the national laws was one of the drafters' concerns. The other was the inadequacy of domestic laws to govern arbitration for international disputes. In the Explanatory Note (Section A), national laws were described as "outdated", "fragmentary" and/or "too domestic", making them inappropriate for arbitration of international commercial disputes.

More than 20 y ears later, in 2006, the Model Law was modified on two substantive aspects: the form of the arbitration agreement under article 7 and provisional measures under article 17. All other provisions of the Model Law were left intact, save for a new paragraph in article 2 on the interpretation of the law and a change in the second paragraph of article 35. Did that reform go far enough?

I. Introduction

These lines are an attempt to spark a debate on whether the time has come for a more general reform of the Model Law or whether, to the contrary, the international arbitration community has evolved beyond the need for a pattern to follow.

Between 2010 and 2013 there were legislative reforms in Australia, Hong Kong, Spain, France, Portugal, and Singapore.[3] Within the same time frame Colombia, Costa Rica, and Mexico also modernized their international arbitration regimes; Bahrain, Bolivia, Brazil, Korea, Myanmar, The Netherlands, and Slovakia revised theirs since as well. Most recently, Russia passed a reform that entered into effect in September 2016, and Argentina's Congress is currently discussing a bill that will govern international commercial arbitration. If we add legal reforms since the year 2000, there are surely more than 40 international arbitration legal regimes.

Most of those legislations are based on the Model Law.[4] However, the question that is begged is, how harmonious are they?

Generally, one can say that the Model Law brought about harmonization regarding two crucial aspects: a) enforcement of arbitration agreements and b) setting aside as the only recourse against the award, with limited grounds. As regards adequacy, it is not far-fetched to affirm that

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[1] Principal, DJ Arbitraje, www.djarbitraje.com. Updated from original publication in the Kluwer Arbitration Blog, 24 May 2013.

[2] Section A of the "Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006" ("Explanatory Note") is dedicated to this discussion.

[3] *Global Arbitration Review*: "Reforming arbitration law: a Swiss perspective" by Alison Ross (April 24, 2013).

[4] Legislation based on the Model Law has been adopted in 72 States in a total of 102 jurisdictions. For more information visit http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

the Model Law introduced two hallmarks of modern arbitration: a) limited court intervention and b) respect for party autonomy. Indeed, the majority of modern international arbitration regimes, even those that are not based on the Model Law, such as the French and the Brazilian laws, share these characteristics.

However, besides sharing those characteristics — admittedly fundamental—, legal regimes in different jurisdictions may be quite diverse. Thus, when drafting arbitration clauses, parties must devote valuable time to the selection of the seat of the arbitration in order to minimize the risk of facing undesired of unexpected results. This is exactly what UNCITRAL sought to avoid, as stated in paragraphs 8 and 9 of the Explanatory Note.

Several questions arise. Does the difference among the legal regimes of the XXI century reflect a sophisticated arbitration culture, where each seat has its own brand and competes against the others? Does the post-modernism of arbitration laws also mean that there is no need for the Model Law, since practitioners are expected to be sensitive to these differences? Is the sign of times: "Let the jurisdictions (and practitioners) compete!"? In other words, are we beyond the Model Law?

Or should we ask, rather, while improvement of domestic laws has been achieved, is not harmonization still a valid desire? Surely, the more harmonized the local regimes, the more effective and secure arbitration is in the international sphere. Is the disparity due, not to evolution alone, but to evolution without a model framework that reflects current best practices? In other words, do we need to revise the Model Law?

Harmonization is part of the reason why arbitration as a neutral means is so appropriate to settle international commercial disputes. The less uniform the legal regimes are, the higher the transactional costs are likely to be for the end users of arbitration. The more harmonized the language of the different regimes, the higher the likelihood that courts will interpret and apply the laws harmoniously and, therefore, the more certainty there can be for the users. This also applies for practitioners, academics, arbitrators and institutions, which --though not the final beneficiaries-- are undoubtedly important players in the field.

Admittedly, States will always be free to adapt the Model Law, but the more up-to-date the Model Law is, presumably the less the need for adaptation. The Model Law is more than 30 years old and arbitration as a means to solve international disputes has gained significant ground since it was crafted.[5] The breadth of changes and innovations in arbitration is significant, and laws have adapted to those changes by incorporating diverse norms in different aspects of the arbitral process. However, while arbitration globally is still a flexible and final means, the more

[5] Only in the past five years, arbitration has shown a growth trend. For instance, as established in the LCIA's Registrar's Report for 2015, the LCIA saw an increase in its casework during said year, "once again reaching a new all-time high in the number of referrals". In 2015, a total of 326 arbitrations were referred to the LCIA, in addition to 6 Requests for Mediation or some other form of ADR, bringing the total to 332, representing a 10% increase on 2014. Also, according to ICC statistics, in 2015, the Court recorded the second highest number of new cases in its 93-year history, with some 801 cases filed during 2015. "New cases administered by the Court involved a total of 2,283 parties-with multiparty disputes accounting for more than 30% of the total new caseload for the first time."

diversity among the regimes around the globe, the more room there is for challenge and the lengthy arbitral and often court proceedings that go with that.

II. Specific proposals

An integral revision of the Model Law will not come easily. Member States would have to agree to invest resources in this exercise, and it might not be the priority for many of them. However, should member States decide that there is indeed a need for a complete revision of the Model Law, the following matters should be modified.

1. Scope of application

The Model Law should include two options for States: a) a monist regime for all arbitrations, whether national or international[6], or b) a dualist system, whereby the law is only applied to international arbitration and the internal regime is applied for national arbitration, which is the system the Model Law follows currently. In the monist option, it would be unnecessary to include elements that define arbitration as "international", and instead the application of the law would extend to all matters that are arbitrable, according to the law of the State in question.

In the dualist option the definition of "international arbitration" should be revised. A possibility is to define international arbitration as an arbitration a) whose object involves more than one State[7], b) where the seat of the arbitration is in a place different to the parties[8], and c) when the parties expressly agree to be governed by the law. The current text is not clear. For example, even though article 1(3)(c) of the Model Law leaves the parties the option to expressly agree if the subject matter relates to more than one country, in practice this seldom occurs. It would be more direct and effective to allow parties to expressly choose to be governed by the international arbitration law (a sort of waiver of dualism)[9].

2. Requirements to the arbitration agreement

In the international commercial relations of the XXI Century, arbitration is practically the natural means to solve disputes.[10] Some jurisdictions refer to the so-called "pro-arbitration principle"[11]. Even though this is not correct from the doctrinal point of view, the advancement of this principle reflects some sort of arbitration-consent presumption. For this reason, the validity or existence of the arbitration agreement should only require examination of consent.

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[6] This is the (subtle) recommendation of UNCITRAL itself, in paragraph 10 of the Explanatory Note: "States may thus consider extending their enactment of the Model Law to cover also domestic disputes (…)."

[7] Although some commentators find that this is the meaning of the current article 1.3, this is not clear from the text.

[8] It is interesting to note that this option was not included in the Russian reform.

[9] Paragraph 11 of the Explanatory Note states that "(…) recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Law."

[10] Gary B Born, *International Arbitration: Law and Practice* (Wolters Kluwer, 2012) at p. 5.

[11] The First Chamber of the Supreme Court of Costa Rica has used this term, see Decision No. 000953-C-S1-2014 given in San José at 12:10 hours of the July 10, 2014, and Decision No. 000208-A-S1-2015, given in San José, at 10:05 hours of February 11, 2015. Similar situations occur in other Latin American countries. For example, in Venezuela the pro-arbitration principle has been used in court decisions, and, in article 3 of the Nicaraguan Law on Mediation and Arbitration, this principle appears as one of the guiding principles.

In this way, the suggestion is to leave option II of article 7 as the only wording. Capacity of the parties may be included as an additional requirement, if deemed necessary, in order to mirror the ground for setting aside of article 34 –and the New York Convention.

3. Multi-tiered or stepped clauses

Arbitrators (and judges) should be able to know with certainty what effect to give to stepped clauses. One option is to gauge the pre-arbitration steps as admissibility requirements, so that the arbitral tribunal may stay the proceedings and allow parties to comply with the corresponding steps before going forward. Another option is to include the non-compliance with the pre-arbitral steps as part of the issues to be determined by the arbitral tribunal, just as any other contractual matter submitted to it. In either case, the Model Law would do well in addressing this issue.

4. Negative effect of the principle of *kompetenz-kompetenz*

The negative effect of the principle of *kompetenz-kompetenz* should be recognized, so that judges refer parties to arbitration upon a *prima facie* verification of an arbitration agreement when the defendant so requests.[12] With that, courts would not have to deal with arbitration matters so early on. Arbitral tribunals would decide on their own competence (as a preliminary matter whenever possible), and local judges would revise the relevant decision residually, as provided in the second sentence of article 16(3) of the Model Law.

5. Judicial support regarding evidence

Judicial support regarding evidence (Art. 27 of the Model Law) should also apply when the place of arbitration is not in the same jurisdiction, so it should be included under the exceptions of article 1(2).

6. The Arbitral Tribunal

The provisions on the constitution of the arbitral tribunal should be revised to include a) an odd (or "uneven") number requirement (Art. 11(2)), b) the possibility of having the Permanent Court of Arbitration act as appointing authority (as an alternative to local courts), and c) a mechanism for multi-party situations (Art. 11(5)).

Also, the obligation of arbitrators, as well as administrative secretaries, to be and remain independent and impartial should be stated out clearly.

7. Limitation of liability

The Model Law should include language regarding the limitation of civil liability of arbitrators. This issue is not yet hotly debated, but the international arbitration community would do well if it is prepared for this kind of litigation. If so, a provision could be added to article 11 or in a new article 15bis in Chapter III "Composition of Arbitral Tribunal". The text could read as follows:

[12] France (article 1448 of the New Code of Civil Procedures), Mexico (articles 1432 and 1433 of the Commercial Code), and Peru (article 99 of the General Arbitration Act) follow this approach, for example.

"Acceptance by the arbitrator means that anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator is excluded from liability." *Questions of liability should be determined, according to the law of the seat of the arbitration, by the competent judge of said seat."*[13]

8. Third-party funding

The issue of third parties owning potential awards and therefore becoming parties-in-interest is increasingly common. The Model Law could include a provision expressly allowing third-party funding and contingency/success fee arrangements. The scope of the relevant provision will depend on the various concerns that this issue raises. For the time being, two options come to mind, either a) a provision stating that in case of third-party funding the arbitral tribunal shall take the necessary measures to ensure the appropriate safguards in each case, after hearing the parties, or b) a provision whereby if a third party owns more than 50% of the potential award, the identity of the third party must be disclosed as soon as the arrangement with that third party is executed.

9. Applicable law

In modern arbitration, discussions revolve around "legal norms" more than "applicable laws". It would be advisable to modify this term in Article 28. Besides, where parties have not agreed on the applicable law, the *voie directe*[14] practice should be reflected in Article 28(2), so reference to the conflict of laws should be deleted.

10. Security for costs

While argument can be made for the case that article 17(2) of the 2006 version of the Model Law includes the powers of the arbitral tribunal to order security for costs, it is not clear. For that reason, and given the increasing need to protect respondents from frivolous claims brought by claimants, two slight modifications would be desirable: a) add "among others" after "…orders a party to" in article 2, and b) add a the following in article 17(2)(c): ", including security for costs".

11. Enforcement of provisional measures[15]

Decisions on provisional measures should be able to be enforced readily, as they are often crucial to the effectiveness of the arbitration. The same goes for orders directed by emergency

[13] Inspired by the London Centenary Principles of 2015. For more on this subject, see Jiménez Figueres, Dyalá, "Norma uniforme en materia de responsabilidad civil de los árbitros, ¿llegó su hora?", to be published in the Lima Arbitration Review.

[14] The "direct means", that is, the determination of applicable law using criteria such as reasonability, legality and convenience.

[15] For an analysis on the enforcement of decisions on provisional measures, see Jiménez Figueres, Dyalá, "Enforcement in Latin America of Provisional Measures ordered by Arbitral Tribunals. Where we are. Where we can go." Umberto Celli Junior, Maristela Basso, Alberto Amaral Junior (coord.), "Arbitragem e Comercio Internacional. Estudos em Homenagem a Luiz Olavo Baptista. Sao Paulo, Quartier Latin (2013), 675.

arbitrators. These decisions should be denied enforcement only if one of the following grounds is proven by the party resisting enforcement:

> *"Decisions on provisional measures rendered by an arbitral tribunal, whether in the territory of this country or abroad, shall be enforced by the competent court under applicable procedural laws [alternatively, select a single court]. Said court may deny enforcement of the decision only if:*
> *a) The decision is directed at a third party, not party to the arbitration;*
> *b) The decision includes orders that exceed the applicant's request. Provided the ultra or extra petita orders are separable form the rest, the court shall enforce the rest of the orders and declare the ultra or extra petita order null and void;*
> c) *The measure is not within the competence of the court. Should the court be able to adapt the measure to one of the measures it can adopt according to its laws, it may order such an alternative measure; or*
> d) *The applicant has not afforded the security ordered by the arbitral tribunal;*
> e) *The measure has been subsequently revoked or modified by the arbitral tribunal.*
>
> *The decision of the court is final and not subject to appeal.*
>
> *The applicant shall keep the arbitral tribunal informed of the enforcement proceedings."*[16]

Indeed, the current article 17H of the Model Law is not perfectly suited for provisional measures. Language along these lines should satisfy the concerns of parties seeking to ensure the outcome of a future award, the needs of arbitral tribunals to find support in local courts, as well as the interests of the judicial policy of the country where the decisions will be enforced.

12. Awards and award-making

It might be useful to add a definition of "award", so as to include partial awards and interlocutory decisions (such as decisions on applicable law or awards that decide on provisional measures). In addition, States could consider adding the requirement that all awards be reasoned—including those deciding on provisional measures[17]—, save for awards on agreed terms. Consideration should be given also to adding the requirement that deliberations be kept confidential (*sécret du déliberé*) and limiting the administrative secretaries' roles to matters other than those related to decision-making powers.

13. Waiver of setting aside

Setting aside should be considered waived if the bases on which it is raised—such as party capacity, validity of the arbitration agreement, and improper constitution of the arbitral

[16] Taken from Jiménez Figueres, Dyalá, supra Note 15.
[17] Just as established in the Costa Rican law, in article 17.2.

tribunal—were not raised timely[18]. Further, if a party has applied to the recourse provided under Article 16(3), it should not have a second shot at setting aside the award on the same grounds.

14. Recognition and enforcement of awards

The provisions on recognition and enforcement of awards should be revised to a) clarify whether "recognition" is one step and "enforcement" is another and, if so, whether international awards rendered in the seat of the law need to be recognized (why should they, if they can be set aside?), and b) to designate the competent court/s for enforcement, at least by referring to local regulation. Ideally, the specific procedure for setting aside should be laid out as well.[19]

15. International public policy

The "public policy" ground for setting aside and for denial of enforcement should be changed to "international public policy" (articles 34(2) and 36(1), respectively). In this way, the Model Law would leave no doubt as to the limited reach of this ground and would harmonize with article 2A.

III. Conclusion

It is hoped that these lines contribute to a discussion on whether an integral reform of the Model Law is needed and if so, what the new text should envisage. There were far too many developments that were not included in the 2006 mandate of the reform of the Model Law, so the next time that the member states decide to revise such an important instrument, they should give their representatives the most ample mandate for change.

[18] From the Peruvian law on arbitration (Decreto Legislativo N° 1071), published in Perú on June 28, 2008, and entered into force on September 1, 2008, as established in article 11.
[19] Panamá has such provisions. See articles 66, 67 and 68 of Law 131.