

## UNCITRAL MODEL LAW: MISSED OPPORTUNITIES FOR ENHANCED UNIFORMITY

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Many practitioners aspire to an international commercial arbitration system that is ‘uniform’ and as far removed as possible from its purely domestic context. Indeed, some eminent commentators freely contend that international commercial arbitrators ‘have no forum’, or conversely, enjoy the benefits of a multitude of forums, namely those forums that will recognise and enforce their awards.<sup>1</sup> While this position is not without its difficulties and detractors, it nevertheless serves to underscore the increasingly globalised nature of international arbitration law and practice, and the mounting demands that international arbitration be guided by substantially the same basic principles, regardless of whether the seat of arbitration is in Melbourne or Mexico City.

It is against this background that the Secretariat of the United Nations Commission on International Trade Law (‘UNCITRAL’), in consultation with other international ‘interested parties’,<sup>2</sup> conceived the UNCITRAL Model Law (‘Model Law’). In its 1979 note on *Further Work in Respect of International Commercial Arbitration*, the Secretariat remarked that:

it would be in the interest of international commercial arbitration if UNCITRAL would initiate steps leading to the establishment of uniform standards of arbitral procedure. It was considered that the preparation of a model law on arbitration would be the most appropriate way to achieve the desired uniformity.<sup>3</sup>

The UNCITRAL Secretariat evoked three separate ‘reasons’ for this proposal. The first of them was that:

most national laws on arbitral procedure were drafted to meet the needs of domestic arbitration and that many of these laws are in need of revision. A model law could therefore be useful particularly if it would *take into account the specific features of international commercial arbitration and modern arbitration practice*.<sup>4</sup>

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1 Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) vol 2 [1181]; see also Berthold Goldman, ‘La Volonté des Parties et le Rôle de l’Arbitre dans l’Arbitrage International’ [1981] *Revue de l’Arbitrage* 469, 471–2; Emmanuel Gaillard, ‘Thirty Years of *Lex Mercatoria*: Towards the Selective Application of Transnational Rules’ (1995) 10 *ICSID Review – Foreign Investment Law Journal* 208, 222–3.

2 The Asian-African Legal Consultative Committee (‘ALCC’) and the International Chamber of Commerce (‘ICC’).

3 *Note by the Secretariat: Further Work in Respect of International Commercial Arbitration*, [6], UN Doc A/CN.9/169 (1979).

4 *Ibid* [7] (emphasis added).

The UNCITRAL Secretariat evoked other reasons militating in favour of drafting the Model Law: ‘the need for greater uniformity of national laws on arbitration’<sup>5</sup> and ‘the divergence existing between frequently used arbitration rules and national laws’.<sup>6</sup>

For international arbitration practitioners, this promise of ‘uniformity’ has the evident attraction of predictability. It pre-empts some of the more common problems faced by them. When drafting arbitration clauses and settling on the seat of arbitration, parties, rightly or wrongly, often omit to examine in detail the arbitration statute of the seat, but choose that seat principally for reasons of convenience (for example, physical proximity) or, more commonly, neutrality. In practice, this leads to difficulties. With astonishing frequency, parties to an arbitration agreement will find themselves hostage to a series of unanticipated national particularities which depart from conventional and usual arbitration practice, and were never envisaged at the time they entered into the agreement. Arbitrators, too, are occasionally caught off-guard by these national specificities, fail to take them into account, and find that their awards are subsequently set aside. ‘Uniform’ provisions, such as those of the Model Law, go a long way to avoiding such situations.

There can be no question that the Model Law has been highly successful in establishing ‘uniform standards of arbitral procedure’. At the time of writing, more than 60 states, territories and/or regions<sup>7</sup> have adhered to the UNCITRAL-sponsored model. For the experienced arbitration practitioner, the prospect of participating in arbitration with its seat in a ‘Model Law State’ usually augurs a largely predictable journey in well-navigated waters.

Yet the Model Law was adopted by the United Nations more than 20 years ago.<sup>8</sup> It is inevitable that, since then, ‘uniform standards of arbitral procedure’ and ‘modern arbitration practice’ will have evolved. Below, we offer an overview of some of the areas that have been identified by UNCITRAL as ripe for ‘possible future work’ in connection with the Model Law.

## I UNCITRAL PROPOSALS FOR ‘POSSIBLE FUTURE WORK’

In 1999 (nearly 15 years after the adoption of the Model Law), the UNCITRAL Secretariat published a note on *Possible Future Work in the Area of International Commercial Arbitration* with the express aim of adopting ‘uniform

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5 Ibid.

6 Ibid [8].

7 An up-to-date list of Model Law countries is available at *1985 - UNCITRAL Model Law on International Commercial Arbitration* United Nations Commission on International Trade Law <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)> at 23 April 2008.

8 *Resolution on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, GA Res 40/72, UN GAOR, 40<sup>th</sup> sess, 112<sup>th</sup> plen mtg, 308, UN Doc A/RES/40/72 (1985).

provisions', finding 'uniform solutions' or, in any event, leading to 'in-depth discussion'.<sup>9</sup> The topics considered were as follows:

- (a) Conciliation;
- (b) Requirement of written form for arbitration agreements;
- (c) Arbitrability;
- (d) Sovereign immunity;
- (e) Consolidation of cases before arbitral tribunals;
- (f) Confidentiality of information in arbitral proceedings;
- (g) Raising claims for the purpose of set-off;
- (h) Decisions by 'truncated' arbitral tribunals;
- (i) Liability of arbitrators;
- (j) Power by the arbitral tribunal to award interest;
- (k) Costs of arbitral proceedings;
- (l) Enforceability of interim measures of protection; and
- (m) Discretion to enforce awards that have been set aside in the State of origin.<sup>10</sup>

Points (a), (b), (d) and (l) (conciliation, the requirement of written form for arbitration agreements, sovereign immunity, and interim measures, respectively) have subsequently been dealt with by UNCITRAL in a variety of manners. Of course, points (b) and (l) were the subject of the Model Law amendments adopted in 2006 (resulting in the modification of Articles 7 and 17 of the Model Law).<sup>11</sup> As regards point (a) (conciliation), in 2002 UNCITRAL (or, more precisely, the United Nations) adopted a 'Model Law on International Commercial Conciliation with Guide to Enactment and Use'.<sup>12</sup> Finally, in its 32<sup>nd</sup> session, UNCITRAL deferred discussion of the question of sovereign immunity

9 *INTERNATIONAL COMMERCIAL ARBITRATION: Possible Future Work in the Area of International Commercial Arbitration: Note by the Secretariat*, [5], UN Doc A/CN.9/460 (1999) ('1999 Note by the Secretariat on Possible Future Work').

10 *Ibid.* Respectively: [8]–[19]; [20]–[31]; [32]–[34]; [35]–[50]; [51]–[61]; [62]–[71]; [72]–[79]; [80]–[91]; [92]–[100]; [101]–[106]; [107]–[114]; [115]–[127]; [128]–[144].

11 *Resolution on the Revised Articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958*, GA Res 61/33, UN GAOR, 61<sup>st</sup> sess, 64<sup>th</sup> plen mtg, UN Doc A/RES/61/33 (2006).

12 *Resolution on Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law*, GA Res 57/18, UN GAOR, 57<sup>th</sup> sess, 52<sup>nd</sup> plen mtg, UN Doc A/RES/57/18 (2003).

to a later stage, since that matter was ‘under consideration by the International Law Commission’.<sup>13</sup>

There was no follow-up of the remaining candidates for ‘possible future work’ identified by UNCITRAL in its *1999 Note by the Secretariat on Possible Future Work*. As was ultimately reflected in the *Report of the United Nations Commission on International Trade Law on the work of its Thirty-second session*,<sup>14</sup> although some of the areas identified for potential ‘future work’ were ‘important’,<sup>15</sup> ‘interesting’,<sup>16</sup> or merited further study,<sup>17</sup> they were all accorded ‘low priority’<sup>18</sup> and were not given the benefit of further substantive analysis.

Was UNCITRAL right to accord ‘low priority’ to these items? Put differently, did UNCITRAL miss the opportunity to further its aim of ‘uniform standards’ in international commercial arbitration? Absent direct guidance from UNCITRAL, have ‘Model Law jurisdictions’ taken the lead on these issues after 1999?

Since 2000, several Model Law jurisdictions have addressed some of those areas for ‘possible future work’ put forward – but not followed up – by UNCITRAL in the course of its 1999 deliberations. A global analysis of Model Law jurisdictions’ post-2000 treatment of each of those areas would properly be the subject of a relatively lengthy treatise, which cannot adequately be conducted here. Instead, we propose focusing on two representative issues of importance for arbitration practitioners – arbitrability (Part II) and confidentiality (Part III) – for the purposes of analysing the felicitousness of UNCITRAL’s approach to the improvement of the Model Law.

## II ARBITRABILITY

Article 1(5) of the Model Law states that ‘[t]his 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’.

There can be no question that Article 1(5) is vague and fails in practice to promote ‘uniformity’ or certainty. Its effect is that international practitioners participating in an arbitration with its seat in a Model Law ‘conformant’ jurisdiction will have to verify the entirety of the State’s relevant ‘provisions’ or ‘law’ so as to determine what matters are arbitrable. Commentators have already pointed out that this is an awkward result, particularly given the tenor of Articles

13 *Report of the United Nations Commission of International Trade Law on the Work of its Thirty-second Session*, UN GAOR, 54<sup>th</sup> sess, Supp No 17, [354], UN Doc A/54/17 (1999). On 16 December 2004, the General Assembly adopted the *United Nations Convention on Jurisdictional Immunities of States and their Property*, Resolution on the *United Nations Convention on Jurisdictional Immunities of States and their Property*, GA Res 59/38, UN GAOR, 59<sup>th</sup> sess, 65<sup>th</sup> plen mtg, UN Doc A/RES/59/38 (2004).

14 UN GAOR, 54<sup>th</sup> sess, Supp No 17, UN Doc A/54/17 (1999).

15 Such was the case of the power by the arbitral tribunal to award interest: *ibid* [368].

16 See, eg, confidentiality of information in arbitral proceedings: *ibid* [359].

17 See, eg, consolidation of cases before arbitral tribunals: *ibid* [356], decisions by ‘truncated’ arbitral tribunals: *ibid* [363] and liability of arbitrators: *ibid* [365].

18 The sole exception was the ‘possible enforceability of an award that has been set aside in the State of origin’, which was to be ‘accorded high priority’: *ibid* [376]. In practice, this was not followed up.

34 and 36 of the Model Law, pursuant to which an award can be set aside (or enforcement thereof be refused) where ‘the subject matter of the dispute is not capable of settlement by arbitration under the law’ of the State in question.<sup>19</sup>

In its *1999 Note by the Secretariat on Possible Future Work*, UNCITRAL put forward a number of solutions to this issue, suggesting that ‘a world-wide consensus on a list of non-arbitrable issues’ could be reached or, if that did not ‘seem feasible’, there could be scope for agreement on ‘a uniform provision setting out three or four issues that are generally considered non-arbitrable’.<sup>20</sup> However, UNCITRAL eventually afforded this issue ‘low priority’ on the grounds that ‘any national listing of non-arbitrable issues might be counter-productive by being inflexible’, that ‘the question of arbitrability was subject to constant development ... and that some States might find it undesirable to interfere with that development’.<sup>21</sup>

In spite of UNCITRAL’s conclusions, since 2000 various states have legislated extensively on the question of arbitrability. Thus, section 6 of the *Danish Arbitration Act 2005* states that ‘[d]isputes concerning legal relationships in respect of which the parties have an unrestricted right of disposition may be submitted to arbitration unless provided otherwise’. Section 7(1) of the same Act clarifies that ‘[t]he parties may agree to submit to arbitration disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not’, but specifies in section 1(5) that the Act ‘shall not apply to disputes which, under a collective labour agreement or s. 22 of the Labour Court Act, are to be resolved according to the “norm for regler for behandling af faglig strid” [code of rules for the resolution of labour disputes] ... or [the] corresponding provisions of a collective labour agreement ... [or to] disputes submitted to arbitral tribunals [which are] established by statute for the resolution of disputes in relation to particular matters’.

Similarly, the *Spanish Arbitration Act 2003* (Spain) (*Spanish Arbitration Law*) provides in Article 2(1) that ‘[a]ll disputes relating to matters that may be freely disposed of at law are capable of being settled by arbitration’, although Article 1(4) specifies that ‘[e]mployment arbitration is excluded from the scope of this Law’. Furthermore, and specifically in connection with international arbitrations, Article 9(6) of the *Spanish Arbitration Law* adopts a particularly internationalist regime:

When the arbitration is international, the arbitration agreement shall be valid and the dispute arbitrable if the requirements of any of the following are met: the rules of law chosen by the parties to govern the arbitration agreement, the rules of law applicable to the merits of the dispute or Spanish law.

For its part, Article 1157 of the Polish Code of Civil Procedure<sup>22</sup> states that:

19 See Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2<sup>nd</sup> ed, 2005) [1-038]–[1-039].

20 *1999 Note by the Secretariat on Possible Future Work*, [33].

21 *Report of the United Nations Commission of International Trade Law on the Work of its Thirty-second Session*, above n 13, [353].

22 Code of Civil Procedure (C Civ) (Pol) (as amended on 28 July 2005 by the Act on the Amendment of the Code of Civil Procedure).

Unless there is a specific provision of law to the contrary, the parties may submit to the settlement by arbitration disputes concerning patrimonial rights or disputes concerning non-patrimonial rights, – which can be subject to amicable settlement in court, with the exception of disputes concerning alimonies.<sup>23</sup>

Since 2000, Austria,<sup>24</sup> Croatia,<sup>25</sup> Singapore<sup>26</sup> and Zambia<sup>27</sup> have also enacted arbitration statutes that deal with the question of arbitrability more extensively than Article 1(5) of the Model Law. And, as is readily ascertainable from the cases of Denmark, Spain and Poland, the question is generally dealt with in a manner that leans toward the adoption of a wide conception of arbitrability that is over- (rather than under-) inclusive. This practice is wholly consonant with the global tendency to ensure that a maximum of matters are susceptible to being settled by arbitration, with a minimum of definition. Of course, this is achieved at the expense of certainty, with formulations that typically focus on the question of the ‘free’ or ‘unrestricted’ disposition of rights (as is the case of Spain and Denmark, respectively), or on ‘patrimonial rights’ (Poland).

It is submitted, in light of the foregoing, that there is some room for a uniform provision on arbitrability that will reduce uncertainty among international practitioners and ensure the consistent application of principles of arbitrability across Model Law jurisdictions. The current Model Law formulation is simply too broad and, if directly adopted in national statutes, affords far too much leeway for domestic courts and legislators to exclude from the ambit of arbitration (at their whim and leisure) matters which, in the reasonable expectations of international arbitration users and practitioners, are properly arbitrable matters. Put differently, international users and practitioners are entitled to expect that at the very least (or as a lowest common denominator) certain types of disputes, and particularly those in the commercial domain, can be entertained in Model Law jurisdictions without the fear of annulment at the hands of the local courts.

UNCITRAL’s decision not to follow up on the question of arbitrability was based on the premise that ‘a uniform provision setting out three or four issues that were generally considered non-arbitrable ... might be counter-productive by being inflexible’.<sup>28</sup> It is submitted that, had UNCITRAL instead concentrated on issues that generally *are* considered arbitrable, the outcome of its deliberations may well have been different. Many countries have, in fact, adopted definitions of arbitrability that are sufficiently flexible to permit the domestic development and refinement of the notion of arbitrability, but provide international arbitration practitioners *de minimis* yet essential guidance (and comfort) on this important

23 Further art 1163 of the Code of Civil Procedure (C Civ) (Pol) adds that ‘[a]n arbitration agreement inserted in an agreement (statute) of a commercial partnership or company, relating to disputes arising out of relationships within that partnership or company, binds the partnership or company as well as its partners (shareholders)’.

24 *Zivilprozessordnung (ZPO)* §582 (Aus).

25 *Law on Arbitration 2004* (Croat) art 3 (‘Arbitrability’).

26 *Arbitration Act 2001* (Sing) ch 143A, s 11 (‘Public Policy and Arbitrability’) (as amended and revised on 31 December 2002).

27 *Arbitration Act 2000* (Zambia) Pt II (‘Arbitration and Related Matters’), s 6.

28 *Report of the United Nations Commission of International Trade Law on the Work of its Thirty-second Session*, above n 13, [352]–[353].

matter. Denmark, Spain and Poland are cases in point. Moreover, consensus on a *de minimis* notion of arbitrability may already be within relatively easy reach, given the similarities between the approaches adopted by several domestic statutes. For instance, not only Spain and Denmark define arbitrability by reference to ‘disposable’ matters or rights: such an approach is also taken by French law,<sup>29</sup> Dutch law,<sup>30</sup> Swedish law<sup>31</sup> and Portuguese law.<sup>32</sup> For its part, the Polish statute’s allusion to the arbitrability of ‘patrimonial rights’ is mirrored by Swiss law.<sup>33</sup>

Inspiration might in particular be drawn from Article 9(6) of the *Spanish Arbitration Law* (see above), which in the case of international arbitration does not view arbitrability as a purely national concept that is artificially detached from its international context: the law recognises the arbitrability of any matter that is arbitrable not only under Spanish law, but also pursuant to the ‘rules of law chosen by the parties to govern the arbitration agreement’ and ‘the rules of law applicable to the merits of the dispute’. Such a rule avoids the trap of drafting a list of non-arbitrable issues (which would result in a lack of flexibility), but at the same time ensures that the notion of arbitrability is as wide as possible and, as a result, is predictable and reassuring to international arbitration practitioners and users.

### III CONFIDENTIALITY

Australian readers will be familiar with the landmark decision of *Esso Australia Resources Ltd v Plowman*,<sup>34</sup> in which the High Court of Australia concluded that confidentiality was ‘not an essential attribute’ of commercial arbitration.<sup>35</sup>

The position is often very different in other countries. In England, the principle continues to be that arbitration is an inherently confidential procedure.<sup>36</sup> Perhaps inevitably, this view is echoed and implicitly endorsed by English commentators on international commercial arbitration, even if they do take stock of international developments. As Redfern and Hunter put it:

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29 Code Civil (C Civ) art 2059 (Fr).

30 Wetboek van Burgerlijke Rechtsvordering [Rv] art 1020(3) (Neth).

31 *Swedish Arbitration Act 1999* (SFS 1999: 116) (Swed) s 1.

32 *Arbitration Act 1986* (Port) art 1(1).

33 *Loi Fédérale sur le Droit International Privé 1987* (Switz) art 177(1) (Swiss Federal Statute on Private International Law).

34 (1995) 183 CLR 10.

35 Ibid 30.

36 *Dolling-Baker v Merrett* [1991] 2 All ER 890.

One of the advantages of arbitration is that it is a private proceeding, in which the parties may air their differences and grievances and discuss their financial circumstances, their proprietary “know-how” and so forth, without exposure to the gaze of the public and the reporting of the media. The fact that arbitral hearings are held in private still remains a constant feature of arbitration. However, to ensure the confidentiality of the entire proceedings, it is increasingly necessary to rely on an express provision in the relevant rules ... or to enter into a specific confidentiality agreement ...<sup>37</sup>

These contradictory approaches, of course, are not limited to Australia and England, or even to different countries. The debate often rages domestically. Thus, the French courts have not yet convincingly settled on a fixed principle. Whereas in the 1986 case of *Aïta v Ojeh*<sup>38</sup> the Paris *Cour d’Appel* appeared to give its imprimatur to the confidential nature of arbitration, in the more recent 2004 ruling in the *Nafimco* case, the same court held that there was no prima facie presumption of confidentiality.<sup>39</sup>

The Model Law does not deal with confidentiality. Such a state of affairs is unsatisfactory for international arbitration practitioners, for at least two reasons. First, it means that most Model Law-inspired arbitration statutes do not feature a readily ascertainable confidentiality regime at all. This obviously leads to uncertainty, as international arbitration practitioners are not always familiar with the intricate aspects of the arbitration law of the country of the seat of the arbitration. Second, it means that where Model Law jurisdictions do address the question of confidentiality, they continue to do so in a manner that is far from ‘uniform’. For instance, they do not always adequately address whether the confidentiality obligations are applicable only to the information discussed and exchanged during the proceedings, or also to the existence of the dispute itself. This state of affairs is less than ideal, since local differences could lead practitioners to deal with similar types of disputes (eg, arbitrations under the aegis of the International Chamber of Commerce or the London Court of International Arbitration) in a different manner, depending on the confidentiality obligations applicable at the seat of the arbitration. Thus, an arbitration with its seat in a country with strict confidentiality obligations (such as England) might be conducted more openly and frankly (and, as a result, potentially more successfully) than in a place where the parties know that all documents produced are susceptible of subsequent dissemination, or that the existence of the dispute can be divulged to third parties (such as Australia).

Despite constituting seemingly fertile terrain for reform and identifying it as an ‘interesting’ topic, UNCITRAL expressly decided not to follow up on the question of confidentiality ‘because of the absence of any viable solutions’ and the opinion among some that ‘there was little likelihood of achieving anything

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37 Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> ed, 2004) [1-68].

38 Paris Cour d’Appel, 18 February 1986, in [1986] *Revue de l’Arbitrage* 583, 584–5.

39 Paris Cour d’Appel, 22 January 2004, in [2004] *Revue de l’Arbitrage* 647, 656–7.



more than a rule to the effect that “arbitration is confidential except where disclosure is required by law”<sup>40</sup>.

In the absence of UNCITRAL guidelines, since 2000 at least two major Model Law countries (Spain and New Zealand) have adopted their own solutions, with very different outcomes.

Thus, Article 24(2) of the *Spanish Arbitration Law* states that “[t]he arbitrators, the parties and the arbitral institutions, as the case may be, have a duty of confidentiality with respect to the information to which they are made privy in the course of the arbitral proceedings”. It follows that documentation known to the parties prior to the commencement of the arbitration, regardless of the effect to which it is employed during the procedure itself, will not be deemed confidential. Nor does the Spanish statute seem to protect as confidential the very existence of the dispute and resulting arbitration or, eventually, the award issued by the arbitral tribunal – particularly if the award is to be challenged before the Spanish national courts. The *Spanish Arbitration Law*’s approach to confidentiality can therefore be described as conservative.

This is in sharp contrast to the *Arbitration Act 1996* (NZ) – another Model Law jurisdiction – as amended by the *Arbitration Amendment Act 2007* (NZ). The *Arbitration Amendment Act 2007* (NZ) incorporated into the *Arbitration Act 1996* (NZ) not only UNCITRAL’s Model Law amendments in relation to the ‘requirement of written form for arbitration agreements’ and ‘interim measures’;<sup>41</sup> it also introduced very extensive provisions in respect of confidentiality of arbitration proceedings.<sup>42</sup> The Act’s new section 14B states that ‘[e]very arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information’.<sup>43</sup> The new section 14C then states:

A party or an arbitration tribunal may disclose confidential information –

- (a) to a professional or other adviser of any of the parties; or
- (b) both of the following matters apply:

40 *Report of the United Nations Commission of International Trade Law on the Work of its Thirty-second Session*, above n 13, [359].

41 Adopted pursuant to the *Revised Articles of the Model Law*, above n 11, and resulting in the amendment of Articles 7 and 17 of the Model Law.

42 *Arbitration Amendment Act 2007* (NZ) s 6.

43 Pursuant to s 2(1) of the *Arbitration Act 1996* (NZ) (as amended by the *Arbitration Amendment Act 2007* (NZ)) ‘confidential information’:

- (a) means information that relates to the arbitral proceedings or to an award made in those proceedings; and
- (b) includes–
  - (i) the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party;
  - (ii) any evidence (whether documentary or otherwise) supplied to the arbitral tribunal;
  - (iii) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal;
  - (iv) any transcript of oral evidence or submissions given before the arbitral tribunal;
  - (v) any rulings of the arbitral tribunal;
  - (vi) any award of the arbitral tribunal.

- (i) if the disclosure is necessary –
  - (A) to ensure that a party has full opportunity to present the party's case, as required under article 18 of Schedule 1; or
  - (B) for the establishment or protection of a party's legal rights in relation to a third party; or
  - (C) for the making and prosecution of an application to a court under this Act; and
- (ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph (i)(A) to (C); or
- (c) if the disclosure is in accordance with an order made, or subpoena issued, by a court; or
- (d) if both of the following matters apply:
  - (i) the disclosure is authorised or required by law ... or required by a competent regulatory body ... ; and
  - (ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure); or
- (e) if the disclosure is in accordance with an order made by -
  - (i) an arbitral tribunal under section 14D; or
  - (ii) the High Court under section 14E.

Section 14D then sets out the circumstances under which an arbitral tribunal may permit the disclosure of 'confidential information', and in section 14E stipulates that any party that wishes – absent the arbitral tribunal's authorisation – to 'disclose' any such information will require leave from the High Court of New Zealand. Finally, section 14F establishes the general rule that a '[c]ourt must conduct proceedings under this Act in public unless the Court makes an order that the whole or part of any proceedings must be conducted in private', with subsections 14G to 14I expanding, respectively, on the nature of any such application, the matters that the Court must consider in making that order, and the effect of such an order where it requires Court proceedings to be conducted in private.

It is readily ascertainable, even without the benefit of an in-depth analysis of the amended version section 14 of the *Arbitration Act 1996* (NZ) that the New Zealand legislature has done its utmost, first to ensure the confidentiality of most aspects of arbitration proceedings, and secondly to regulate in detail related scenarios which could indirectly affect confidentiality, such as appeals or actions to set aside the award before the New Zealand courts.

Thus, whereas the Model Law is completely silent on the issue, since 2000 two important Model Law jurisdictions have opted to include confidentiality provisions in their respective arbitration statutes. Yet their style and content is utterly different, the Spaniards preferring a conservative and succinct provision, and the New Zealanders settling on a pro-confidentiality approach that that

strives *in extenso* to control (and avoid) the ‘disclosure’ of arbitration materials even in open court.

These marked differences in style undermine the Model Law’s quest for ‘uniform standards’ in international arbitration. It is likely that with the effluxion of time, more states will adopt Model Law ‘conformant’ national statutes that, nevertheless, provide for contrasting (and potentially diametrically opposed) solutions to this same issue. Should this scenario develop, it is submitted that it will prove very awkward for international arbitration practitioners who, in addressing the important question of confidentiality, will have to deal with a plethora of conflicting rules and standards in (theoretically) ‘uniform’ states.

By deciding not to explore a solution to the issue of confidentiality, UNCITRAL has missed an opportunity to promote enhanced Model Law uniformity. The lack of a confidentiality provision in and of itself poses a challenge to international practitioners, a challenge which is only exacerbated by the existence of Model Law countries’ differing, ad hoc solutions to this matter. It is submitted that it would have been preferable for UNCITRAL to have examined the possibility of establishing a *de minimis* confidentiality principle, to be refined (where necessary) by those states adopting the Model Law. Even the rather basic formulation contemplated, but swiftly rejected, by UNCITRAL in 1999 – ‘arbitration is confidential except where disclosure is required by law’<sup>44</sup> – might have proved an appropriate starting-point for that analysis.

#### IV CONCLUSION

Has UNCITRAL missed opportunities to enhance ‘uniform standards of arbitral procedure’? It would seem, if only in light of the two subjects explored in this article – arbitrability and confidentiality – the answer must be in the affirmative. In the case of arbitrability, there appears to be some consensus pointing towards a loose, *de minimis* definition of arbitrability. Even a conservative definition, it is submitted, would provide international arbitrators with some comfort that certain types of disputes will always fall within their purview, regardless of national idiosyncrasies. Practitioners would also be able to rely on a widely-applicable threshold for arbitrability. As for confidentiality, the absence of a Model Law provision can lead to confusion among practitioners and, more troublingly, exacerbates the coexistence of conflicting rules between Model Law – and therefore (theoretically) to a large extent ‘uniform’ – jurisdictions. Even a succinct affirmation of the principle of confidentiality of arbitration proceedings would constitute an easily executed and salutary step toward enhanced uniformity.

Finally, these missed opportunities for improved Model Law uniformity must be viewed against the length of UNCITRAL’s Model Law review process. The latest (and only) Model Law reform took around seven years to complete (from 1999 to 2006). Further, UNCITRAL has now devoted itself to the review of the

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44 Report of the United Nations Commission of International Trade Law on the work of its Thirty-second Session, above n 13, [359].

UNCITRAL Arbitration Rules, diverting all its attention away from the Model Law. If the process for the review of the Model Law is to be taken as a yardstick, the UNCITRAL Arbitration Rules revision will take up several years of UNCITRAL's working time. *Tempus fugit*, and with it precious opportunities for reform.