Rationale of International Arbitrate and World Business Law

Introduction

The rationale of International Arbitrate and World Business Law is given by economic globalization, which is a practice, which supersedes all national laws, and generates a world-wide supranational Body of Law (i.e. the customary law).
Therefore, while inside a national market we apply for its relating business law, in a global market (i.e. in a supranational economy) we need to recur to supranational laws (i.e. world laws).

A law can be defined as "international" when it is applied in cases where one or more parties are domestic, and other parties are foreign, i.e. "non-resident" in the Country of Jurisdiction.
In this case we apply, both domestic and foreign parties, to a domestic law, which regulates a deal, which could have noting to do with the supposed country of jurisdiction except for the residence or citizenship of at least one of the parties.
In effect in every Bodies of Law any rule coming from an International Treaty becomes an internal rule of that body of law. Therefore, only internal operators can understand and recognize an International Rule of Law as a proper law.

A law can be defined as "supranational" (or multinational) when belongs to no domestic body of law, but is customary recognized and accepted by all parties in a business, included the eventual body of law that could be competent to enforce that particular rule.

Premises

The French Civil Code

Following the French Law (Code Civil - Lois en Gènèral - v. Obligations, art. 57) we can assume:
"la Loi applicable aux contracts, soi en ce qui concerne leur formation, soi quant à leurs effects et conditions, est celle que les parties ont adoptèe": (The Law applicable to contracts, either in what their formation, and their effects and conditions are concerned, is the one adopted by the parties).

The Italian Civil Code

From the Italian Law (Codice Civile - Disposizioni sulla Legge in generale, art. 25 - Legge Regolatrice delle obbligazioni) even if now abrogated, we can assume: "Le obbligazioni che nascono dal contratto [c. 1321 s] sono regolate dalla legge nazionale dei contraenti se comune; altrimenti da quella del luogo nel quale il contratto è stato conchiuso [c. 1326]. E' salva in ogni caso la diversa volontà delle parti." (The obligations that arise from a contract [c. 1321 s] are regulated by the national law of the parties, if common; otherwise by that of the place where the contract has been signed [c. 1326]. It is save, anyway, any different wishes of the parties).

The German Code of Commerce

Section 346 of the German Code of Commerce obliges courts to take into consideration trade usages when they decide upon the legal consequences of the acts and dealings of the parties.

The Uniform Commercial Code (UCC) of the United States

In the United States most rules of the Uniform Commercial Code must give way to usages of trade (and course dealing) as means of construing, forming, supplementing, or qualifying the terms of an

agreement. Section 1-205 defines usages of trade as practices or methods of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that they will be observed with respect to the transaction in question. Thus the UCC adopts the principle set forth by Judge Learned Hand in a case involving the question of whether tender of a marine insurance certificate instead of a police meets the requirement of a c.i.f. sale. Judge Hand stated: "When a usage of this kind has become uniform in an actively commercial community that should be warrant enough for supposing that it answers the needs of those who are dealing upon the faith of it,I cannot see why judges should not hold men to understandings which are the tacit presupposition on which they deal."

The 1980 United Nations Convention on the International Sale of Goods (CISG)

A similar rule is contained in the CISG, which is now law in the United States and in most countries. According to article 9, the parties are not only bound by any usage to which they have agreed and by any practices, which they have established between themselves, but are also considered, unless otherwise agreed, to have implicitly made applicable to their contract or its formation a usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Such rules are often viewed as guides to supplying omissions in the contract terms, but they should also be viewed as guides to interpretation of the ordinary meaning of those terms and to resolution of their ambiguities. Under such rules, customary commercial understandings enjoy almost total recognition, although some difficulties remain concerning the binding nature of unreasonable custom, local custom, and newly developed practices that are not yet widely known or regularly observed. "Such rules may not be very conspicuous and may easily be overlooked by scholars dealing with international commercial cases. They are, however, nothing less than the loophole through which the transnational law merchant enters into national law and even supersedes the predominantly non-mandatory national rules."

The Bodies of Law of Common Law

The Bodies of Law of Common Law are pertinent to English-like Countries (UK, USA, Canada, Australia, etc.).

In the Common Law the aforementioned principles are assumed as customs of the people, therefore they have the same strength of any positive or civil norm.

The Foundations of World Law

The mandatory transnational juridical principles are, for instance, those set up by the European Union (U. E.), the World Trade Organization (W.T.O.), and pertinent International Treaties, while it is a faculty of the parties to accept other norms such as those of the United Nations Environment Program (UNEP), United Nations Trade and Development (UNCTAD), ICC Uniform Rules, and the like.

Anyway, the consultation of the National Bodies of Law themselves, give us the answer to the question we have posed above. We can definitively state that most national bodies of law allow traders to set up the principles they want to apply in their contract, in order to have a common law well known and understood by all traders.

The Supranational Principles we assume in our business dealings

The principles we assume in our businesses are those set by the UNIDROIT, the World Trade Organization (W.T.O.), the International Chamber of Commerce (I.C.C.), the United Nations Environment Program (U.N.E.P.), the United Nations Trade and Development (U.N.C.T.A.D.), the United Nations Trade And Labor (U.N.C.I.TR.A.L.).

These Principles set forth general rules for international contracts, which shall be applied when the parties have agreed that their contract be governed by them, or when the parties have agreed that

their contracts be governed by general principles of law, lex mercatoria, or the like.
All business disputes of multinational characters may be submitted to conciliation and arbitration by a conciliator/arbitrator appointed and administered by the ICC, and/or other pertinent Organisms such as the American Association for Arbitration (A.A.A.), Associazione Italiana Arbitrato (A.I.A.), etc.
Arbitral Awards are provided with an execution of judgment order, therefore they are enforceable at law likewise any judicial sentence of a domestic or foreign Court provided with an execution of judgment order. These new rules turn over and upset old professions and generate brand new professional people and organizations.

note:
(2) Convention on the Recognition on Enforcement of Foreign Arbitral Awards - New York (NY) 10th June 1958 - Entry into force: 7th June 1959.

Explanatory Note by the UNCITRAL Secretariat
on the Model Law on International Commercial Arbitration*

From the Explanatory note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration we can assume: "Quote"

1. The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the close of the Commission's 18th annual session. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice".
2. The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.
3. The form of a model law was chosen as the vehicle for harmonization and improvement in view of the flexibility it gives to States in preparing new arbitration laws. It is advisable to follow the model as closely as possible since that would be the best contribution to the desired harmonization and in the best interest of the users of international arbitration, who are primarily foreign parties and their lawyers.

** This note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an earlier draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI - 1985)(United Nations publication, Sales No. E.87.V.4).*

"Unquote"

CONCLUSIONS

We can conclude using the words of the UNCITRAL:

A. BACKGROUND TO THE MODEL LAW

4. The Model Law is designed to meet concerns relating to the current state of national laws on arbitration. The need for improvement and harmonization is based on findings that domestic laws are often inappropriate for international cases and that considerable disparity exists between them.

A1. Inadequacy of domestic laws

5. A global survey of national laws on arbitration revealed considerable disparities not only as regards individual provisions and solutions but also in terms of development and refinement. Some laws may be regarded as outdated, sometimes going back to the nineteenth century and often equating the arbitral process with court litigation. Other laws may be said to be fragmentary in that they do not address all relevant issues. Even most of those laws which appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by a general arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

6. The expectations of the parties as expressed in a chosen set of arbitration rules or a "one-off" arbitration agreement may be frustrated, especially by a mandatory provision of the applicable law. Unexpected and undesired restrictions found in national laws relate, for example, to the parties' ability effectively to submit future disputes to arbitration, to their power to select the arbitrator freely, or to their interest in having the arbitral proceedings conducted according to the agreed rules of procedure and with no more court involvement than is appropriate. Frustrations may also ensue from non-mandatory provisions which may impose undesired requirements on unwary parties who did not provide otherwise. Even the absence of non-mandatory provisions may cause difficulties by not providing answers to the many procedural issues relevant in an arbitration and not always settled in the arbitration agreement.

A2. Disparity between national laws

7. Problems and undesired consequences, whether emanating from mandatory or non-mandatory provisions or from a lack of pertinent provisions, are aggravated by the fact that national laws on arbitral procedure differ widely. The differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. For such a party it may be expensive, impractical or impossible to obtain a full and precise account of the law applicable to the arbitration.

8. Uncertainty about the local law with the inherent risk of frustration may adversely affect not only the functioning of the arbitral process but already the selection of the place of arbitration. A party may well for those reasons hesitate or refuse to agree to a place which otherwise, for practical reasons, would be appropriate in the case at hand. The choice of places of arbitration would thus be widened and the smooth functioning of the arbitral proceedings would be enhanced if States were to adopt the Model Law which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard with solutions acceptable to parties from different States and legal systems.

B. SALIENT FEATURES OF THE MODEL LAW

B1. Special procedural regime for international commercial arbitration

9. The principles and individual solutions adopted in the Model Law aim at reducing or eliminating the above concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime geared to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the need

for uniformity exists only in respect of international cases, the desire of updating and improving the arbitration law may be felt by a State also in respect of non-international cases and could be met by enacting modern legislation based on the Model Law for both categories of cases.

a. Substantive and territorial scope of application

10. The Model Law defines an arbitration as international if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States" (article 1(3)). The vast majority of situations commonly regarded as international will fall under this criterion. In addition, an arbitration is international if the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated in a State other than where the parties have their place of business, or if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

11. As regards the term "commercial", no hard and fast definition could be provided. Article 1 contains a note calling for "a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not". The footnote to article 1 then provides an illustrative list of relationships that are to be considered commercial, thus emphasizing the width of the suggested interpretation and indicating that the determinative test is not based on what the national law may regard as "commercial".

12. Another aspect of applicability is what one may call the territorial scope of application. According to article 1(2), the Model Law as enacted in a given State would apply only if the place of arbitration is in the territory of that State. However, there is an important and reasonable exception. Articles 8(1) and 9 which deal with recognition of arbitration agreements, including their compatibility with interim measures of protection, and articles 35 and 36 on recognition and enforcement of arbitral awards are given a global scope, i.e. they apply irrespective of whether the place of arbitration is in that State or in another State and, as regards articles 8 and 9, even if the place of arbitration is not yet determined.

13. The strict territorial criterion, governing the bulk of the provisions of the Model Law, was adopted for the sake of certainty and in view of the following facts. The place of arbitration is used as the exclusive criterion by the great majority of national laws and, where national laws allow parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties in practice rarely make use of that facility. The Model Law, by its liberal contents, further reduces the need for such choice of a "foreign" law in lieu of the (Model) Law of the place of arbitration, not the least because it grants parties wide freedom in shaping the rules of the arbitral proceedings. This includes the possibility of incorporating into the arbitration agreement procedural provisions of a "foreign" law, provided there is no conflict with the few mandatory provisions of the Model Law. Furthermore, the strict territorial criterion is of considerable practical benefit in respect of articles 11, 13, 14, 16, 27 and 34, which entrust the courts of the respective State with functions of arbitration assistance and supervision.

b. Delimitation of court assistance and supervision

14. As evidenced by recent amendments to arbitration laws, there exists a trend in favor of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court.

15. In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions which should be entrusted, for the

sake of centralization, specialization and acceleration, to a specially designated court or, as regards articles 11, 13 and 14, possibly to another authority (e.g. arbitral institution, chamber of commerce). A second group comprises court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures of protection (articles 8 and 9), and recognition and enforcement of arbitral awards (articles 35 and 36).

16. Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". This is stated in the innovative article 5, which by itself does not take a stand on what is the appropriate role of the courts but guarantees the reader and user that he will find all instances of possible court intervention in this Law, except for matters not regulated by it (e.g., consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Especially foreign readers and users, who constitute the majority of potential users and may be viewed as the primary addressees of any special law on international commercial arbitration, will appreciate that they do not have to search outside this Law.

B2. Arbitration agreement

17. Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts. The provisions follow closely article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereafter referred to as "1958 New York Convention"), with a number of useful clarifications added.

a. Definition and form of arbitration agreement

18. Article 7(1) recognizes the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("compromise") or a future dispute ("clause compromissoire"). The latter type of agreement is presently not given full effect under certain national laws.

19. While oral arbitration agreements are found in practice and are recognized by some national laws, article 7(2) follows the 1958 New York Convention in requiring written form. It widens and clarifies the definition of written form of article II(2) of that Convention by adding "telex or other means of telecommunication which provide a record of the agreement", by covering the submission-type situation of "an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another", and by providing that "the reference in a contract to a document" (e.g. general conditions) "containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract".

b. Arbitration agreement and the courts

20. Articles 8 and 9 deal with two important aspects of the complex issue of the relationship between the arbitration agreement and resort to courts. Modeled on article II(3) of the 1958 New York Convention, article 8(1) of the Model Law obliges any court to refer the parties to arbitration if seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request which a party may make not later than when submitting his first statement on the substance of the dispute. While this provision, where adopted by a State when it adopts the Model Law, by its nature binds merely the courts of that State, it is not restricted to agreements providing for arbitration in that State and, thus, helps to give universal recognition and effect to international commercial arbitration agreements.

21. Article 9 expresses the principle that any interim measures of protection that may be obtained

from courts under their procedural law (e.g. pre-award attachments) are compatible with an arbitration agreement. Like article 8, this provision is addressed to the courts of a given State, insofar as it determines their granting of interim measures as being compatible with an arbitration agreement, irrespective of the place of arbitration. Insofar as it declares it to be compatible with an arbitration agreement for a party to request such measure from a court, the provision would apply irrespective of whether the request is made to a court of the given State or of any other country. Wherever such request may be made, it may not be relied upon, under the Model Law, as an objection against the existence or effect of an arbitration agreement.

B3. Composition of arbitral tribunal

22. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the approach of the Model Law in eliminating difficulties arising from inappropriate or fragmentary laws or rules. The approach consists, first, of recognizing the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to fundamental requirements of fairness and justice. Secondly, where the parties have not used their freedom to lay down the rules of procedure or a particular issue has not been covered, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively to the resolution of the dispute.

23. Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, Articles 11, 13 and 14 provide for assistance by courts or other authorities. In view of the urgency of the matter and in order to reduce the risk and effect of any dilatory tactics, instant resort may be had by a party within a short period of time and the decision is not appeallable.

B4. Jurisdiction of arbitral tribunal

a. Competence to rule on own jurisdiction

24. Article 16(1) adopts the two important (not yet generally recognized) principles of "Kompetenz-Kompetenz" and of separability or autonomy of the arbitration clause. 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 shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

25. The arbitral tribunal's competence to rule on its own jurisdiction, i.e. on the very foundation of its mandate and power, is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision is not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending with the court. In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

b. Power to order interim measures

26. Unlike some national laws, the Model Law empowers the arbitral tribunal, unless otherwise agreed by the parties, to order any party to take an interim measure of protection in respect of the subject-matter of the dispute, if so requested by a party (article 17). It may be noted that the article does not deal with enforcement of such measures; any State adopting the Model Law would be free to provide court assistance in this regard.

B5. Conduct of arbitral proceedings

27. Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. It opens with two provisions expressing basic principles that permeate the arbitral procedure governed by the Model Law. Article 18 lays down fundamental requirements of procedural justice and article 19 the rights and powers to determine the rules of procedure.

a. Fundamental procedural rights of a party

28. Article 18 embodies the basic principle that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. Other provisions implement and specify the basic principle in respect of certain fundamental rights of a party. Article 24(1) provides that, unless the parties have validly agreed that no oral hearings for the presentation of evidence or for oral argument be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24(1) deals only with the general right of a party to oral hearings (as an alternative to conducting the proceedings on the basis of documents and other materials) and not with the procedural aspects such as the length, number or timing of hearings.

29. Another fundamental right of a party of being heard and being able to present his case relates to evidence by an expert appointed by the arbitral tribunal. Article 26(2) obliges the expert, after having delivered his written or oral report, to participate in a hearing where the parties may put questions to him and present expert witnesses in order to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24(3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24(2)).

b. Determination of rules of procedure

30. Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to 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.

31. Autonomy of the parties to determine the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional domestic concepts and without the earlier mentioned risk of frustration. The supplementary discretion of the arbitral tribunal is equally important in that

it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without restraints of the traditional local law, including any domestic rules on evidence. Moreover, it provides a means for solving any procedural questions not regulated in the arbitration agreement or the Model Law.

32. In addition to the general provisions of article 19, there are some special provisions using the same approach of granting the parties autonomy and, failing agreement, empowering the arbitral tribunal to decide the matter. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language of the proceedings.

c. Default of a party

33. Only if due notice was given, may the arbitral proceedings be continued in the absence of a party. This applies, in particular, to the failure of a party to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25(c)). The arbitral tribunal may also continue the proceedings where the respondent fails to communicate his statement of defence, while there is no need for continuing the proceedings if the claimant fails to submit his statement of claim (article 25(a), (b)).

34. Provisions which empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance since, as experience shows, it is not uncommon that one of the parties has little interest in co-operating and in expediting matters. They would, thus, give international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

B6. Making of award and termination of proceedings

a. Rules applicable to substance of dispute

35. Article 28 deals with the substantive law aspects of arbitration. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with such rules of law as may be agreed by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important in view of the fact that a number of national laws do not clearly or fully recognize that right. In addition, by referring to the choice of "rules of law" instead of "law", the Model Law gives the parties a wider range of options as regards the designation of the law applicable to the substance of the dispute in that they may, for example, agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not designated the applicable law, the arbitral tribunal shall apply the law, i.e. the national law, determined by the conflict of laws rules which it considers applicable.

36. According to article 28(3), the parties may authorize the arbitral tribunal to decide the dispute ex aequo et bono or as amiables compositeurs. This type of arbitration is currently not known or used in all legal systems and there exists no uniform understanding as regards the precise scope of the power of the arbitral tribunal. When parties anticipate an uncertainty in this respect, they may wish to provide a clarification in the arbitration agreement by a more specific authorization to the arbitral tribunal. Paragraph (4) makes clear that in all cases, i.e including an arbitration ex aequo et bono, the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

b. Making of award and other decisions

37. In its rules on the making of the award (articles 29-31), the Model Law pays special attention to the rather common case that the arbitral tribunal consists of a plurality of arbitrators (in particular, three). It provides that, in such case, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

38. Article 31(3) provides that the award shall state the place of arbitration and that it shall be deemed to have been made at that place. As to this presumption, it may be noted that the final making of the award constitutes a legal act, which in practice is not necessarily one factual act but may be done in deliberations at various places, by telephone conversation or correspondence; above all, the award need not be signed by the arbitrators at the same place.

39. The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms, i.e. an award which records the terms of an amicable settlement by the parties. It may be added that the Model Law neither requires nor prohibits "dissenting opinions".

B7. Recourse against award

40. National laws on arbitration, often equating awards with court decisions, provide a variety of means of recourse against arbitral awards, with varying and often long time-periods and with extensive lists of grounds that differ widely in the various legal systems. The Model Law attempts to ameliorate this situation, which is of considerable concern to those involved in international commercial arbitration.

a. Application for setting aside as exclusive recourse

41. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other means of recourse regulated in another procedural law of the State in question. An application for setting aside under article 34 must be made within three months of receipt of the award. It should be noted that "recourse" means actively "attacking" the award; a party is, of course, not precluded from seeking court control by way of defence in enforcement proceedings (article 36). Furthermore, "recourse" means resort to a court, i.e. an organ of the judicial system of a State; a party is not precluded from resorting to an arbitral tribunal of second instance if such a possibility has been agreed upon by the parties (as is common in certain commodity trades).

b. Grounds for setting aside

42. As a further measure of improvement, the Model Law contains an exclusive list of limited grounds on which an award may be set aside. This list is essentially the same as the one in article 36(1), taken from article V of the 1958 New York Convention: lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; award deals with matters not covered by submission to arbitration; composition of arbitral tribunal or conduct of arbitral proceedings contrary to effective agreement of parties or, failing agreement, to the Model Law; non-arbitrability of subject-matter of dispute and violation of public policy, which would include serious departures from fundamental notions of procedural justice.

43. Such a parallelism of the grounds for setting aside with those provided in article V of the 1958 New York Convention for refusal of recognition and enforcement was already adopted in the European Convention on International Commercial Arbitration (Geneva, 1961). Under its article IX, the decision of a foreign court setting aside an award for a reason other than the ones listed in article V of the 1958 New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

44. Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences should be noted. Firstly, the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State in question (i.e. State of setting aside or State of enforcement). Secondly, and more importantly, the grounds for refusal of recognition or enforcement are valid and effective only in the State (or States) where the winning party seeks recognition and enforcement, while the grounds for setting aside have a different impact: The setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of article V(1)(e) of the 1958 New York Convention and article 36(1)(a)(v) of the Model Law.

B8. Recognition and enforcement of awards

45. The eighth and last chapter of the Model Law deals with recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the 1958 New York Convention.

a. Towards uniform treatment of all awards irrespective of country of origin

46. By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law draws a new demarcation line between "international" and "non-international" awards instead of the traditional line between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions.

47. 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.

b. Procedural conditions of recognition and enforcement

48. Under article 35(1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35(2) and of article 36 (which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

49. The Model Law does not lay down procedural details of recognition and enforcement since there is no practical need for unifying them, and since they form an intrinsic part of the national procedural law and practice. The Model Law merely sets certain conditions for obtaining

enforcement: application in writing, accompanied by the award and the arbitration agreement (article 35(2)).

c. Grounds for refusing recognition or enforcement

50. As noted earlier, the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention. Only, under the Model Law, they are relevant not merely to foreign awards but to all awards rendered in international commercial arbitration. While some provisions of that Convention, in particular as regards their drafting, may have called for improvement, only the first ground on the list (i.e. "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity") was modified since it was viewed as containing an incomplete and potentially misleading conflicts rule. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention.

Further information on the Model Law may be obtained from:

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