AUTHOR(S): FATUROTI, B.

TITLE: Complementarity or disparity? The UNCITARAL Model Law on International Commercial Arbitration 1985 and English Arbitration Act 1996 Revisited.

YEAR: 2012

Publisher citation: FATUROTI, B. 2012. Complementarity or disparity? the UNICITARAL model law on international commmercial arbitration 1985 and English arbitration act 1996 revisited. University of Ibadan law journal, 12(1).

OpenAIR citation: FATUROTI, B. 2012. Complementarity or disparity? the UNICITARAL model law on international commmercial arbitration 1985 and English arbitration act 1996 revisited. University of Ibadan law journal, 12(1). Held on OpenAIR [online]. Available from: https://openair.rgu.ac.uk

Complementarity or Disparity? The UNCITRAL Model Law on International Commercial Arbitration 1985 and English Arbitration Act 1996 revisited.

Bukola Faturoti[1]

Abstract

Interest in the use of arbitration as a mechanism for resolving commercial disputes has grown tremendously in the last two decades. This growth could be credited to the awareness by national governments and international bodies to change the culture of strict litigation and allow parties some autonomy in resolving their disputes. Both UNCITRAL Law International Commercial Arbitration and English Arbitration Act 1996 have changed disputing-resolving culture in business environment. This article revisits the relationship of these two systems of arbitration and examines the extent they have contributed to the development of use arbitration across different commercial terrain.

I. Introduction

The past two decades have seen great strides towards the establishment of the 'global village' market place. With advancement in technology resulting in a new global business paradigm, various trade and governmental bodies such as Word Trade Organisation (WTO), the mechanism created by the North American Free Trade Agreement (NAFTA), the Economic Committee of West African States (ECOWAS) to mention a few, have intensified effort to end protectionism, establish liberalized cross border trade and put an end to the prevalence of beggar-thy-neighbour economic policies. While these efforts have been hugely successful, trade barriers are being erected in an unlikely place – international commercial arbitration. Although international arbitration has been a beneficiary of international consensus towards integration (i.e. The New York Convention), barriers have been erected because of conflicting national arbitral rules, applicability of substantive and procedural law, forum shopping, unenforceability of arbitration agreements and resulting arbitral awards (especially against state parties) etc.

Commercial parties are wary of being dragged before a foreign court or the court of the country of the other party where they have little or no knowledge of its language

[1]BA(Hons), LLB(Hons) Ibadan, LLM(Lond) LLM(RGU); MCIArb UK; Course Leader, Construction Law and Arbitration, and Lecturer-in-Law, Department of Law, Robert Gordon University; Barrister and Solicitor of the Supreme Court of Nigeria. The author would like to thank Vera Palli, Koko Udom, Olasupo Owoeye, Alexander Ezenagu and other anonymous reviewers for their comments and feedback. Every other error remains mine. Bukola can be contacted via bukkyrotty@yahoo.co.uk or b.faturoti@rgu.ac.uk

and legal procedure. (Commercial) arbitration and other forms of Alternative Dispute Resolution (ADR) afford parties the opportunity to avoid lengthy, and costly legal appearances which characterise litigation.[2] "In arbitration, the parties voluntarily agree to refer their existing or future disputes to a third party for determination and they agree in advance to accept the arbitrator's decision as final and binding".[3] The widely accepted advantages of arbitration over litigation are confidentiality, choice of procedure, choice of forum, a choice of how the dispute will be adjudicated and a choice of arbitrator(s). However, these advantages are repeatedly being called into question because arbitration laws and rules differ from one legal jurisdiction to another and offer diverse challenges to commercial parties.

The best two known systems for international commercial arbitration are the UNCITRAL Model Law and the English Arbitration Act 1996. This essay's main focus is to comparatively analyse both systems and answer the following questions: Are the two systems complimentary of are there major areas of differences especially in light of the need to protect the sanctity of the parties' agreement to arbitrate? What influenced the enactment of the Model Law and the 1996 Act? Is the UNCITRAL Model Law on International Commercial Arbitration 1985 really preferable to the English Arbitration Act 1996 as a system for the resolution of arbitration disputes? How valid are the reasons for non adoption of the Model Law by England or was it an exercise borne out of legislative arrogance? Are these systems capable to continue to drive arbitration in the twenty first century?

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985 as amended in 2006 (the Model Law) is one of the responses by the United Nations to help in fostering international trade especially in the area of international commercial dispute resolution. The Model Law aims to achieve harmonization among nations' arbitration laws and remove

[2] It is not settled whether arbitration should be classified along other forms of ADR such as mediation, conciliation or along with litigation. While some see this classification as mere academic distinction, others regard it necessary for characteristic reasons. See Roberts, S & Palmer, M. (2005) *Dispute Processes: ADR and the Primary Forms of Decision Making* Cambridge University Press for comprehensive discussions on all forms of dispute resolution and their development around the world.
[3] Zhaodong Jiang, "Federal Arbitration Law and State Court Proceedings", 23 LOY. L.A.L REV 473, 474 (1990) cited in Jurgen Nanne Koberg, "Costa Rican Commercial Arbitration Rules and the U.S. Federal Arbitration Act" *ILSA Journal of International and Comparative Law* (1996) Vol. 3 No.1 p.32

disparity which has been the cause of uncertainty for business parties. It also has among its objective to remedy the inadequacies found in many domestic laws. The English Arbitration Act (the 1996 Act) was enacted eleven years after the emergence of the Model Law. In as much that the Model Law aims to ensure uniformity, it would be expected that the English Arbitration Act of 1996 would follow the Model Law in its provisions. The 1996 Act aims to respond to the contemporary demands of international commercial dispute resolution by removing some of the scepticisms brought about the persistent of judicial intervention.

This essay is divided into five parts. Part II of this essay traces the emergence of the Model Law especially the uniformity that prompted its making while Part III provides some highlights on the act of consolidation and need for reform which influenced the enactment of the English Arbitration Act. There are selective comparative analyses of selected issues like scope of application, separability and court intervention etc under both systems in Part IV, and Part V is the conclusion.

II. The UNCITRAL Model Law on International Commercial Arbitration

Following a proposal by Hungary which urged the United Nations to be actively involved in removal of legal hindrances to the flow in international trade, UNCITRAL was established in 1966 by the General Assembly of the United Nations. The purpose is to "have for its object the promotion of the *progressive*[4] harmonisation and unification of the law of international trade".[5] The problem with international arbitration is that parties are always pessimistic about the law of the country of other party, not solely based on fear of not getting a fair decision but the strangeness of its principles in its entirety. To alleviate such fears, in 1982 the UNCITRAL Working Group began deliberations on the Model Law and this was adopted by the United Nations General Assembly on 11 December 1985 by consensus resolution 40/72. The Model Law is predicated on solving the problems of inadequacy of domestic laws and disparity between national laws.[6] Article 2A of the 2006 version provides that:

---

[4] Emphasis supplied

[5] United Nations Commission on International Trade Law, *Yearbook Vol. I: 1968-1970* (cited as Yearbook) 65 1971. See generally E.A. Farnsworth, "UNCITRAL- WHY? WHAT? HOW? WHEN?" 20 *American Journal of Comparative Law Quarterly* 34(1987)

[6] See Background to the UNCITRAL Model Law on International Commercial Arbitration as highlighted in the main text itself. Available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf accessed on 2 February 2012

> (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
> (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Principles of uniformity and internationalisation rather than nationalisation are at the heart of the Model Law. In other word, though the Law may be domesticated as a legislative instrument; it will give birth to consistent interpretation among state parties and will alleviate the fear of uncertainty among commercial users. Lord Justice Kerr expatiates further that:

> [T]he concept underlying the Model Law is to put an end to this state of affairs by widening the parties' choice of venue and thus their choice of arbitration clauses for incorporation to their contracts. In so far as a country will have enacted legislation based on the Model Law, both parties will be able to find it easier to accept arbitration in that country, because they will know basically where they stand.[7]

The Model Law is not a convention but an international persuasive legislation;[8] state parties have no treaty obligation to enact legislation in accordance with its terms. State parties can decide to modify it or adopt it wholly as a template for their national arbitration law. Around 70 countries have adopted with or without amendments have adopted the Model Law; among them are Australia, Canada, China(Hong Kong), Egypt, Japan, Germany, Nigeria, and Russia.[9] Seven states from the United States of America have also followed suit.[10] The Model Law applies to international commercial arbitration only. Its features include liberal character; restriction of the role of court, emphasis on fairness and due process; provisions assisting the recognition and enforcement of arbitral awards, short text and simple language are among others. The Model Law entails two groups of articles *viz*: those which deal various aspects of the initiation of the reference and those which create an exclusive regime for judicial intervention in arbitration matters. While it was regarded as a coherent whole document, whose part must not be dismembered to retain its harmonising trait; in some circles, other opinions suggested that States have a wide latitude to determine what they would make out of it.

---

[7] Micheal Kerr "Arbitration and the Courts: the UNCITRAL Model Law" *International and Comparative Law Quarterly* 34 (1985) p 7
[8] Andrew Okekeifere, *Appointment and Challenge of Arbitrators Under the UNCITRAL Model Law Part 1: Agenda for Improvement*, 2(5/6) Int'l A.L.R 167 (1999)
[9] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html accessed on 2 February 2012
[10] They are California, Connecticut, Florida, Illnois, Louisiana, Oregon and Texas.

III. The English Arbitration Act 1996

Upon appointment in March 1985 by the Secretary of State for Trade and Industry for the United Kingdom, the Departmental Advisory Committee (DAC) on International Commercial Arbitration under the chairmanship of the Rt. Hon Lord Justice Mustill published a consultative document. The document considered required modifications to the Model Law before its incorporation into the laws of the United Kingdom. Sir Johan Steyn, a member of the DAC, argued that the UK should not adopt the Model Law because so many necessary additions and variation would diminish the very concept of the Model Law.[11] By and large, the DAC in its Report of June 1989 decided not to adopt the Model Law but rather to enact a new Arbitration Act which set out in logical order and succinct language the important principles of the English Law of arbitration.[12] The DAC took cognisance of the fact that, though the principles of English arbitration law had advanced beyond the frontiers of the Model Law, not all of the developments in English arbitration law had been welcome by the international community.[13] The 1996 Act should be made a confluence of all existing English statutory arbitration law; English arbitration case law and relevant Model Law provisions.[14]

The 1996 Act is built around three main principles which are clearly stated in section 1 as: obtainment of fair, speedy, impartial and cost effective dispute resolution; party autonomy and court minimal intervention. Mance LJ in *Department of Economics Policy and Development of the City of Moscow v Bankers Trust Co*[15] explained that:

> 'Parliament has set out, in the Arbitration Act 1996, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual dispute resolution, with only limited possibilities of court involvement where necessary in the interest of the public and of basic fairness.

[11] Johan Steyn,(the Hon. Mr Justice), "Arbitration in England: the Current Issues" 15 *I.B.L* 432 p 435
[12] Report of June 1989 of the Departmental Advisory Committee on Arbitration Law under the Chairmanship of the Lord Justice Mustill
[13] The Rt. Hon the Lord Hacking, "Arbitration Law Reform: the Impact of the UNCITRAL Model Law on the English Arbitration Act 1996", *Arbitration* Vol. 63 No 4 pp 291-299
[14] ibid
[15] [2004] ECWA Civ 314 at para 31

IV. The Model Law and the English Arbitration Act 1996 Compared

Scope of Application

As already mentioned above, the Model Law aims to regulate international commercial arbitration whereas the 1996 Act applies to any arbitration whether domestic or international, whether commercial or non-commercial. The Model Law is driven towards "the need for uniformity" which "is greater regarding international arbitration than domestic arbitration and that states may be more inclined to preserve their traditional concepts and familiar rules in a purely domestic context than in international cases".[16] The "internationality" of the arbitration is the first converging point of these two documents. An arbitration assumes an international status, under the Model Law, when the parties have their places of business in different States or when the place of arbitration is situated outside the places of business of the parties or when the subject matter of the agreement is related to more than one States. This definition, it has been argued is "confusing, unworkable and unnecessary and will merely give rise to litigation at the outset".[17] The 1996 Act prefers a "monist" approach and does not deem it necessary to have separate legal regimes which cater for international commercial arbitration on one hand and all other types of consensual arbitration on other hand.[18]

Territorial Application

The 1996 Act applies to arbitrations where the 'seat of the arbitration' is in England and Wales or Northern Ireland and to arbitration that does not have seat in England to enable parties to overseas arbitrations to apply to stay legal proceeding in England and to enforce foreign arbitral awards.[19] The Model Law will apply "if the place of arbitration is in the territory of this (adopting) State" save provisions of articles 8(1) and 9 that deal with recognition of arbitral agreements and their compatibility with interim measures of protection. These provisions and articles 35 and 36 on recognition and enforcement of arbitral award will apply in the place of arbitration

[16] Lord Justice Mustill (now Lord Mustill) "the United Kingdom and the UNCITRAL Model Law: The Mustill Committees' Consultative Document of October 1987 on the Model Law (1987) 2 Arbitration International 278-297

[17] See note 14 at page 17

[18] Compare to Federal Law of 24 July 2002 No. 102 FZ, Concerning Arbitral Tribunals in the Russian Federation which was separately enacted to cater for domestic arbitration.

[19] See sections 2 and 3 1996 Act

either it is in adopting State or in another State, even the place of arbitration has not been determined.

The Model Law conservatively upholds the principle of territoriality; the 1996 Act recognises both territoriality and delocalization of arbitration. A short summary would suffice in demystifying this aspect of the work otherwise a comprehensive exploration of these two principles would change the focus of this essay in its entirety; Territoriality supports the fact that every arbitration takes place within a specific territory and must conform at minimum to the mandatory part of the *lex arbitri.* Territoriality ensures that states through their courts maintain their supervisory roles. This will not only guarantee fairness but permits the court to provide assistance necessary to move the arbitral process forward. Delocalisation, on the other hand advocates detachment of arbitral process from municipal law. This is necessitated by the argument that international arbitration should not be fettered by the law of the seat of arbitration. It must be noted that despite the fact that the debate on territoriality-delocalisation dichotomy has been on for years, the definition of delocalisation is more obscured than clear. While some scholars believe that delocalisation represents a *total* detachment of the arbitral process from municipal law and constitutes a 'dangerous heresy',[20] others such as Jan Paulsson[21] see it attaching only to the jurisdiction where the enforcement of award is sought.

Prior to the 1996 Act delocalisation was seen as impossible and practically unachievable. Mann explained that '…every right or power a private person (arbitrators) enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently be called …the lex arbitri.'[22] This view was given credence by Kerr LJ in *Bank Mellat v Helliniki Techniki* when he said that 'our jurisprudence does not recognise the concept of arbitral procedures floating in the transactional firmament unconnected with any other municipal system of law.' [23] Section 2 of the English Arbitration Act therefore constitutes a radical departure from

[20] W Park, 'The Lex Loci Arbitri and International Commercial Arbitration', 32 (1983) *International and Comparative Law Quarterly 21*
[21] J Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why it Matters', (1983) *International and Comparative Law Quarterly 53*.
[22] F Mann, 'The UNCITRAL Model Law - Lex Facit Arbitrum,' 2 Arbitration International (1986), pp. 244-251
[23] [1984]QB 291,301

the earlier views. The English court can stay legal proceedings or enforce arbitral awards where the seat is outside England or where no seat has been designated as if the seat were within England.[24] The court can also exercise its power by securing the attendance of witnesses and assist the tribunal in taking and preserving evidence.[25] Subsection 4 takes it further that the court may exercise any power for the purpose of supporting arbitral award process where no seat has been stipulated or agreed and by reason of a connection with England and the court is satisfied that it is appropriate to do so.

Arbitrability

Arbitrability constitutes one of the grips of municipal law on arbitration process. Disputes can only be resolved in private spheres to the extent permitted under the national law. For the purpose of our discussion it means whether the applicable law allows certain dispute to be determined by arbitration. This is what is known as *objective arbitrability.*[26] Arbitrability of disputes is based on a country's economic, political and social policy. Some Arab countries have conferred exclusive jurisdictions on their national courts to resolve disputes arising from contracts between their parastatal and foreign corporations. Law governing arbitrability would normally include the law governing the arbitration agreement, the law of the seat of arbitration, that law governing the parties and the law of the place of the enforcement of arbitration.

Article 1(5) of the Model Law excludes from its operation any disputes which may not be submitted to arbitration (statutory arbitration) by virtue of any other law of the State. Therefore what is arbitrable is under the remit of the State party adopting the Model Law. The general notion is that some disputes were not susceptible to resolution by private arbitration because they were exclusively within the jurisdiction of a court or other tribunal. According to the New South Wales Supreme Court in Australia, Those cases arose where there was 'the presence of a sufficient element of legitimate public interest in the subject matter of the dispute to make its private

[24] The English Arbitration Act1996 s2(2)
[25] Ibid sections 43 and 44
[26] As opposed to subjective arbitrability which focus on whether the dispute being considered by the arbitral tribunal has been agreed on by the parties.

resolution outside the national court inappropriate.[27] The Singaporean court held that issues like citizenship, legitimacy of marriage, grant of statutory licences, validity of registration of trademarks or patents, copyright winding-up of companies and other matters with public interests elements may not be arbitrable.[28] Under the Philippines Alternative Dispute Resolution Act 2004,[29] the following matters are not subject to any of the ADR mechanisms 'labour disputes, civil status of persons, validity of marriage, ground for legal separation jurisdiction of courts, future legitime [inheritance expectation], criminal liability, and those which law cannot be compromised. Unlike the Singaporean and the Philippines approaches, the Japanese Act adopts an inclusive approach. It provides that 'an arbitration agreement shall be valid only when its subject matter is a civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation).[30]

The 1996 Act expressly leaves it to the courts to develop rules on the issue of arbitrability. According to s.81(1), "[N]othing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to (a) matters which are not capable of settlement by arbitration…"[31] Thus areas such as civil status, liability for criminal offences are outside the coverage of English Arbitration Act. In *Soleimany v Soleimany* Waller LJ noted that some "illegal or immoral" dealings are "incapable of being arbitrated from an English law perspective because an agreement to arbitrate them would itself be illegal or contrary to public policy."[32] Nevertheless, the Court of Appeal held that the arbitration agreement was valid notwithstanding that the contract was contrary to the revenue laws and export controls of the country of performance.

The two systems agree in the area but the role of national laws prevents a specific determination of what is arbitrable and what is not. Arbitrability continues to evolve under case laws and legislations. Arbitrability of disputes relating to competition,

---

[27] Larkden Pty Ltd v Lloyd Energy System Pty Ltd [2011] New South Wales Supreme Court 268
[28] *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174 AT 205
[29] Alternative Dispute Resolution Act 2004 (Republic Act No. 9285) Chapter 1 Section 6
[30] Japanese Arbitration Act 2003, Article 13(1) available http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf accessed on 10 February 2012
[31] Such matters are to be defined by common law.
[32] [1999] QB 785 at 797

securities transaction, intellectual property rights, bribery and fraud is still not settled under the law.

Waiver

Article 4[33] of the Model Law regulates waiver of the right to object. In a dispute between an Austrian buyer and a Hungarian seller over a contract for the purchase and sale of sour cherries, the court held that the tribunal had properly exercised its jurisdiction on the matter because the buyer failed to object the jurisdiction of the tribunal when it submitted its defence to the claims.[34] Section 73[35] is the English corollary to Article 4. The Model Law requires an actual knowledge and "without undue delay", but section 73 expects the party contesting the absence of waiver to prove that even with reasonable diligence he would not have been aware of the grounds for objection. It was held in *Athletic Union of Constantinople v National Basketball Association*[36] that under s73(1) an applicant is deemed to have waived any ground of objection based on jurisdiction that could have been raised but was not raised. These provisions are a machinery to defeat the delay tactics and technicalities which are prevalent in litigation. First, they ensure that the issues of jurisdiction are raised at an early stage and thereby potentially save time and costs. Second, they ensure fairness and openness and the possibility of remedying the defect if raised at an early stage. Therefore where an applicant took part in an ad hoc arbitration but later sough to challenge the award on the basis that the consent of the signature of Georgian government was not given and as such unlawful under the Georgian law, the

---

[33] *" A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object".*

[34] Hungary: Arbitration Court attached to the Hungarian Chamber of Commerce and Industry Arbitral award in case No. Vb/97142 of 25 May 1999 CLOUT Case No 266avaibale at http://interarb.com/clout/clout266.htm accessed on 18 March 2012

[35] *(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection -*
(a) that the tribunal lacks substantive jurisdiction,
(b) that the proceedings have been improperly conducted,
(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
(d) that there has been any other irregularity affecting the tribunal or the proceedings,
he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

[36] [2002] 1 Lloyd's Rep 305

judge dismissed the application and held that the illegality was or ought to have been known to the applicant by the start of the arbitration and has thus waived his right to object.[37]

Extent of Court Intervention

Resort to arbitration by parties indicates they have ousted the jurisdiction of the court as agreed in their arbitration agreement. The influence of jurisdictional theory on the juridical nature of arbitration shows the ousting is only to the extent permitted by the municipal law or the *lex arbitri.* In the past the courts were known for extensive judicial intervention. This for example discouraged parties from choosing London as a forum of arbitration.[38] Both section 1(c) of the 1996 Act and Article 5 of the Model Law are a response to paternalistic approach of many courts. Unlike the *Art 5* of the Model Law which provides that "No court shall intervene except when so provided." Art.1(c) of 1996 Act says, "In matters governed by this Part the court should not interfere except as provided by this Part." The Model Law gives courts a narrow room for intervention. Conversely, the 1996 Act permits a wider scope of judicial intervention.

The role of the English court is limited to one of support even where the tribunal has made an error on question of fact. Under the Model Law, except for challenge and termination of arbitrator (*Arts 11, 13 and 14)*, jurisdiction of the arbitral tribunal (*Art 16)*, setting aside of the arbitral awards under *Art 34*, courts are not allowed to intervene.[39] Ruling on its own International Commercial Arbitration Act which has adopted the Model Law, the Ontario Court of Justice ruled that the interpretation of an arbitration agreement is a matter for the arbitral tribunal.[40] Here, the argument was on the tribunal's ability to construe a contractual relationship on the basis of the written clauses of the agreement. The plaintiff asked the court for rectification of a provision of the arbitration agreement or alternatively to declare that the relevant provision was void on the ground that it contained a draft error and did not actually reflect the

[37] *JSC Zestafoni G Nikoladze Ferralloy Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm)
[38] See DAC Report, February 1997, at para 21
[39] Other instances of intervention permitted by the Model are recognition of the arbitration agreement and its compatibility with court ordered interim measures of protection *Arts 8 and 9*, and recognition of arbitral awards *Arts 35 and 36*.
[40] Case 69, Ontario Court of Justice General Division January 2004, 1994 (Blair J) Case Law on UNCITRAL Texts (CLOUT), available at www.uncitral.org (accessed 30 November 2011)

intention of the parties. The court concluded that this is a task for the tribunal after which the court can decide if the "award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration" as provided by art 34(2) (iii) of the Model Law.[41]

Bridle J clarified the extent of judicial intervention under both the Model Law and the 1996 Act in an English case of *Runman Faruqi -v- Commonwealth Secretariat.*[42] The honourable judge explained that the word "shall" has not been used. The word "should" has quite deliberately been used in the English Act, which indicates that there may be some situations…in which the court might intervene other than those provided specifically in Part 1 of the Act, but those are by their very nature going to be situation which rarely occur, and the strong general principle is against intervention."[43] So as observed the restrictive scope of the Model Law is narrower than the corresponding provision of the 1996 Act.[44] While restrictive court intervention is compatible with spirit of speedy resolution, this becomes problematic in advanced legal systems as it gives uncontrollable powers to arbitrators. Besides, its total adoption would also be a retrograde step to these systems.[45] In case of systems at budding stage, Model Law would constitute a valuable legislative "package" to transform them into suitable international arbitration venues.[46]

Jurisdiction of the Arbitral Tribunal: Competence-Competence and Separability

The doctrines of *competence-competence and separability*[47] are part of both the Model Law and the 1996 Act. *Competence-competence* refers to the extent to which an arbitral tribunal may rule on its jurisdiction. This does not indicate the power of the tribunal to make a final and binding decision to arbitrate the matter but to adopt an initial ruling on its own jurisdiction. "Separability" or "autonomy" or "independence" of an arbitration clause on the other hand confers jurisdiction on an arbitrator who

[41] Jean-Paul Beraudo, "Case Law on Articles 5, 8 and 16 of the UNCITRAL Model Arbitration Law" *Journal of International Arbitration 23(1): 101-114*
[42] [2002] WL 498805 (QBD(Comm. Ct)
[43] ibid
[44] Alan Reid, "The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart? *Journal of International Tribunal Vol. 21 No 3 (2004)* pp 227-237
[45] See note 14 at p 16
[46] ibid
[47] See J. Paulsson (ed) *International Handbook on Commercial Arbitration* Suppl 11 (January/1990) at pp70-72

stays within the limits of his jurisdiction though the contract in which the arbitration clause is contained is invalid. Article 16(1) provides that "The arbitration tribunal may rule on its own jurisdiction including any objections with respect to existence or validity of the arbitration agreement…a decision by the arbitration tribunal shall not entail *ipso jure* the invalidity of the arbitration clause".

In England section 30 of 1996 Act allows an arbitral tribunal to rule on its substantive jurisdiction subject to court intervention under the sections 32 and 37.[48] The intervention of the court is predicated on the timely objection or otherwise of the complaining party[49] and the agreement in writing of all other parties to the proceeding.[50] The Model Law on the other hand stipulates 30days for a disputant to appeal if not satisfied with the tribunal finding that it has jurisdiction.[51] While these provisions of the 1996 Act may save time and money, they put one of the parties in advantageous position over the other. A party who is sure of benefiting from the arbitral tribunal competence would not agree to a court reviewing the tribunal's competence. What would happen if a court of the country that adopts the Model Law rules that it lacks jurisdiction? The Model Law is silent on this; this should automatically revive the concerned national court jurisdiction

As regards "separability" of the arbitration clause from the rest of the contract, both the Model Law and English Arbitration Act validate an agreement though the contract which created it is invalid in itself. Courts have applied these provisions- s16 (3) Model Law and s7 1996 Act - that arbitration clause is autonomous from the contract in which it is contained and its validity is not determined by the validity of the contract that created it.[52] In *Vee Networks Limited -v- Econet Wireless International Limited,*[53] the parties had entered into a Technical Support Agreement ("TSA"). Vee applied under s67 of the 1996 Act that the partial award granted by the arbitrators

[48] See also s16(3) Model Law
[49] S73(1)1996 Act
[50] ibid s32(2)
[51] Note 27 Cf Courts have however ruled that if a party does not raise objections to the existence of an arbitration agreement at the latest in the submission of the statement of defence, such party is precluded from raising this objection in an application for setting aside under article 34 of the Model Law, CLOUT case No. 148, Russian Federation, 10 February 1995; Oberlandesgericht Stuttgart, Germany, 1 Sch 16/01 (1), 20 December 2001
[52] CLOUT Case No 27 [Camara Nacional de Apelaciones en lo Commercial] Argentina, 26 September 1988
[53] [2004] EWHC 2909 (Comm.)14 December 2004

should be set aside arguing that if the "TSA" were *ultra vires*, the Arbitrators had no jurisdiction conclusively to determine any of the preliminary issues because their jurisdiction was derived from the arbitral clause in the "TSA". The court confirming s7 held that a ruling on the validity of the host contract does not –in and of itself affect the validity of its arbitration clause.

The Model Law relates "separability" to the arbitral tribunal's determination of its own jurisdiction using the word "for that purpose" but the 1996 Act is drafted broadly and does not distinguish between the determination of the jurisdiction of the arbitral tribunal by the arbitral tribunal itself or by the courts.[54] This should not be interpreted to mean that separability does not also apply to courts.[55]

Making of Award and Termination of Proceedings

Provisions for rules to govern the substance of dispute are the same under both the Model Law and the 1996 Act; both confer authorities on the parties to decide the applicable rules of law.[56] In the absence of agreement by the parties, the arbitrators must apply the law determined by the conflict of rules which they deem appropriate[57] but not necessarily the conflict of rules at the place of arbitration. Does the applicable law include or exclude *lex mercatoria*?

Lex mercatoria is "a set of general principle and customary rules … elaborated in the framework of international trade, without reference to a particular national system of law".[58] Soderlund,[59] while agreeing with Shackleton[60] that these provisions favour

---

[54] Section 7 of the 1996 Act provides: "*Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement"*.

[55] H. M. Holtzmann and J. E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law, Deventer 1989), p. 305.

[56] See article 28(1) *Model Law* and Section 46(1)(a) *1996 Act*

[57] See article 28(2) *Model Law* and section 46 (3) *1996 Act*

[58] See Goldman, Contemporary Problems in International Arbitration (1983), cited in Husain M. Al-Baharna, "International Commercial Arbitration in a Changing World", *Arab Law Quarterly Review* Vol. 9, No. (1994) PP. 144-157 at p145

[59] Christer Soderlund, " A Comparative Overview of Arbitration Laws: Swedish Arbitration Act 1999, English Arbitration Act 1996 and Russian Federal Law on International Commercial Arbitration 1993" *Arbitration International Vol. 20, No 1(2004) p 82*

[60] Stewart R. Shackleton, "The applicable law in International Arbitration Under the New English Arbitration Act 1996" *Vol.13 No.4 (1997) Arbitration International Vol. 20, No 1 p375-390*

application of national law, concludes that *lex mercatoria* such as UNIDROIT Contract Principles are excluded. The drafting history corroborates that "while some (States parties) representatives would have preferred an even wider interpretation or an even broader formula to include for example, general legal principles or case law developed in arbitration awards, the Working Group, after deliberations, agreed that this was too far-reaching to be acceptable to many states, at least for the time being. "[61] The "rules of law" as used under article 28(1) has a broader connotation compared to 'the law'. This Shackleton explains includes custom, trade usages, the rules of business associations, codes of conduct, general principles of law, lex mercatoria or rules of law and practice recognised and developed by international arbitration.[62]

Another issue on the applicable law is whether the arbitrators decide the dispute on the basis of equity and fairness, that is, acting e*x aequo et* bono or as *amiable compositeur*[63] This is in the affirmative provided they have the express permission of the parties- the implication of this permission is the express exclusion by parties of the right of appeal to the court because there is no question of law to appeal. According to the drafting history (*travaux preparatoires*) of the Model Law the advantage is that "it does not entail a risk for any unwary party unfamiliar with this type of arbitration since an express authorisation by the parties is required".[64] In *Home and Overseas Insurance Co. Ltd v. Mentor Insurance Co. (UK) Ltd*[65] the Court of Appeal decided in favour of an agreement for arbitration in England which required the arbitrators to interpret the contract as "an honourable agreement".[66] Also the court approved the decision of a US[67] arbitral tribunal in *Certain Underwriters at Lloyds, London –v- BCS Insurance Company*[68] decision applying article 28 (3) of the Model Law. An

[61] Report of the Working Group on International Contract Practices on the Work of its Sixth Session (Vienna, August 29- September 9, 1983), U.N.Doc. A/CN.9/245 paragraph 94 (September 22, 1983)
[62] See also H. M. Holtzmann and J. E. Neuhaus pp 764-807
[63] This is otherwise known as "equity clause" or "honourable engagement clause".
[64] Analytical Commentary on Draft Text of a Model Law on International Arbitration, Report of the Secretary General, U.N. Doc. A/CN.9/264 Article 32, para 1 March 25, 1985 reprinted in H. M. Holtzmann and J. E. Neuhaus pp. 884,884
[65] [I990] 1 W.L.R. 153; this case was decided before the English Arbitration Act 1996 came into force.
[66] Emphasis supplied.
[67] United States has not enacted the Model Law. Arbitration in many states of the US is governed by the Federal Arbitration Act of 1925 with amendments to incorporate New York and Panama Conventions. However California, Connecticut, Florida, Georgia, North Carolina, Ohio, Oregon and Texas have enacted some form of Model Law.
[68] 239 F. Supp. 2d 812 (N.D. Ill. 2003)

insurance company had *inter alia* sought the vacation of an arbitral award based on "equitable determination" when it was not part of the Agreements. Rejecting the request, the court held that while the decision did not ignore the rule of law, the insurance company had waived its objection because it had also appealed to "business fairness" for the tribunal to rule in its favour.

Decision Making

In an arbitral tribunal with more than one arbitrator, its decision shall be by majority of all its members under the Model Law.[69] Decisions on questions of procedure may be left, with other members of the panel agreement, to be determined by the presiding arbitrator.[70] Like the Model Law, arbitral decision shall also be made by the majority under the 1996 Act, section 20(3).

The 1996 Act makes provision for the post of the chairman and goes further to incorporate an umpire to the proceedings. The chairman has a casting vote where neither unanimity nor a majority decision could be reached under subsection 3. The problem with allowing a chairman of arbitration to have a prevailing view is that there may be instance of connivance with any of the party to the proceedings. Though it could be argued that the presence of an umpire may forestall such connivance, this also has its own limitation especially where Act fails to provide rules governing the selection of the umpire. An umpire under the 1996 Act could replace the arbitrators as if he were a sole arbitrator with power to make decisions, orders and awards in the event of their failure to agree on a matter relating to the arbitration.

Termination/Settlement

Like article 32, section 51(1) and (2) provides for the termination or settlement of the proceedings. An arbitration proceeding comes to an end either by the "final award" or by an "order of the tribunal" upon occurrence of any of the instances in article 32 (2) (a)-(c). When could we say an award could be said to be final? Neither of documents provides a definition and the decision of Singaporean Court of Appeal in *Tang v Tan*[71] did not resolve the issue. In the case an arbitrator had made an award in which he

[69] Article 29
[70] ibid
[71] [2001] 3 S.L.R 237 (Sing. Ct App. 2001), reversing [2001]1 S.L.R 624 (Sing. High Ct 2000)

dismissed both the claimant's claim and the respondent's counterclaim on 10 January 2000. The arbitrator made additional awards on 17 January 2000 and 6 March 2000 respectively. In the latter award, the arbitrator resolved the issue of cost, reversed himself on the counterclaim and proceeded to award A$1.3 million to the respondents. On application to the Singaporean High Court by the claimant that the arbitrator lacked authority to revisit the January 10 award, the award was set aside on the ground that the arbitrator had become *functus officio* and could not recall or reverse the award. On a further appeal to the Singaporean Court of Appeal, the decision of the High Court was reversed rejecting "the concept of partial *functus officio"*. The court said "the final award must be the one that completes everything that the arbitral tribunal is expected to decide including the question of cost…until such award is given, the arbitral tribunal's mandate continues; it is not functus officio".

With due respect to their lordship, the reversion is erroneous on the basic principles of law. The term "final award" could refer to (i) the decision of the court that terminates all the proceedings and decides all claims made by the parties and (ii) the decision which settles part of the proceedings but with a binding effect on that particular aspect of the proceedings.[72] Though the 1996 Act does not mention the right of the claimant to withdraw his claim, this should however be contemplated in subsection 2 which provides that "the tribunal shall terminate the substantive proceedings and, if so requested by the parties".

Upon the tribunal reaching a final decision, article 33(1) of the Model Law and section 57 of the 1996 Act afford the tribunal to correct "any errors in computation, any clerical or typographical errors of similar nature" within thirty days and twenty-eight days respectively. Thus in *Zimbabwe Electricity Supply Commission v. Genius Joel Maposa,*[73] the appellant sought to have an award set aside on the basis that the arbitrator had made a reviewable factual error in calculating the back pay of the respondent. The court dismissing the appeal found that the error was clearly one of computation for which the Model Law makes adequate provision and not contrary to

[72] That is an interim or interlocutory decision of a tribunal or court. This decision has been criticised by various scholars. For example see Lawrence G.S. Boo, "Arbitration" (2001) 2 SAL Ann Rev.24 at pp 33-35

[73] CLOUT Case 267 Zimbabwe: Harare High Court (Judge Devittie); Judgment No. HH23198 accessed from available http://interarb.com/clout/clout267.htm accessed on 1 March 2012

public policy as contested; a party may request the tribunal to correct such errors and, if necessary, the time limits for making such a request may be extended. The arbitral tribunal can also make an additional award, where it is found justified, either at the party request or the tribunal initiative. The Model Law stipulates sixty days while the 1996 Act, fifty-six days. Notably, the 1996 Act does not provide for "interpretation of a specific point or part of the award" which article 31(1) (b) of Model Law provides for, the power of the tribunal is limited to correction of clerical errors. The Model Law provision is superfluous because both the correction of errors and award tend towards the restoration of the true meaning of the award.[74] This provision is prone to abuse as a powerful party may use it to reopen the case and subvert the award already made. Either the interpretation or the additional award shall form part of the main award and shall be in the format provided in article 31 of the Model Law and Sections 52-54 of the 1996 Act.

Recourse Against Award

When can a court confirm, vary or reject an award made by an arbitral tribunal? Article 34 of the Model Law and sections 67-69 of the 1996 Act specify instances when the court can be invited to set an arbitral award aside.[75] An arbitral award could be challenged under the 1996 Act on "serious irregularity" affecting "the tribunal", "the proceedings" and "the award". Examples of acts that could constitute serious irregularity are listed in subsection 2. The right of appeal could be invoked subject to the provision of section 70(2) and (3).

Section 69 provides for appeal on a point of law subject to leave of court if and only if the arbitration has its seat in England and Wales. Disputing parties may exclude the jurisdiction of the court either by agreement or default, where their agreement dispenses with the reason for arbitral award. Though an arbitral tribunal is not analogous to a court of law that must state reasons for its decisions, in practice dispensing with reasons of an arbitral decision is not of common place. Under the Model Law, an award could be set aside based on incapacity of any of the parties to the agreement, violation of principles of fair trial, derogation from the terms of the

[74] David A.R. Williams and Amy Buchanan, Correction and Interpretation of Award Under Article 33 of the UNCITRAL Model Law *Vol. 4 No 4 Int. A.L.R.* 119 at 124 (2001)
[75] Article 34(1), "Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article".

submission to arbitration and agreed arbitral procedure, the subject matter is outside arbitration power according to the law of the adopting State or the award is contrary to public policy.

Both the Model Law and the 1996 Act recognise setting an award aside on the ground of being contrary to "public policy". Reaching agreement on what constitutes public policy is problematic even under a specific jurisprudence and not even an encompassing one as it may arise under international commercial arbitration. The term "public policy" has always been treated as an umbrella provision which encompasses all reasons a losing party may think of. As Cairns noted, "It has often been relied upon as a 'catch-all' in applications to set aside primarily based on other grounds or as a redundant means to re-express arguments made primarily on other grounds." [76] In *Protech Projects Construction (Pty) Ltd v Al-Kharafi & Sons Mohammed Abdulmoshin Al-Kharafi & Sons WLL v Big Dig Construction (Proprietary) Ltd (In Liquidation),*[77] upon five separate awards being made by the arbitral tribunal in favour of the defendant, the claimant under section 68 applied to the court to have the awards set aside. One of the grounds put forward by the claimant was that material documents relating to the assignment had not been disclosed by the defendant and, that therefore, the award had been procured in a way "contrary to public policy" pursuant to section 68(2)(g) of the Act. Rejecting the assertion of the claimant, the court held that conduct was only "contrary to public policy" if it involved more than inadvertence or something which could readily be described as unconscionable or reprehensible and of which it found no evidence of such acts from the facts. The court in *Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al. and STET International, S.p.A. et al*[78] that the public policy ground would include instances where enforcement would violate basic notions of morality and justice of which corruption, bribery or fraud so also is an infringement of the applicant's right to be heard.[79]

---

[76] DAVID J. A. CAIRNS, "The Spanish Application of UNCITRAL Model Law on International Commercial Arbitration" *Arbitration International*, Vol. 22, No. 4 pp 573-595 at 592

[77] [2005] WL 2608249 (QBD (Comm Ct)

[78] Canada: Superior Court of Justice (Lax J.) CLOUT case No 391 available at http://interarb.com/clout/clout391.htm accessed on 1 March 2012

[79] Germany: Bayerisches Oberstes Landesgericht; 4 Z Sch 23/99 CLOUT Case No 375 accessed from http://interarb.com/clout/clout375.htm accessed on 1 March 2012

V. Conclusion

It might not be appropriate drawing a wide conclusion that the Model Law is preferable to the 1996 Act or vice versa neither could be a reasonable assertion that the 1996 is an instrument borne of legislative arrogance. What could be established is that both instruments of law share a great number of similarities with a couple of divergent approaches. It is indubitable that the 1996 Act provides a competent and efficient statutory framework for international as well as domestic arbitrations but the Model Law limits its reach to the international context. This as observed above is dictated by eagerness of states parties to preserve their traditional concepts and familiar rules. While the 1996 Act reflects the reluctance of the English courts to release its hold on judicial intervention in disputes settlement, the Model Law dwells on the autonomy of the arbitral tribunal. The question of the role of *lex mercatoria* has not been addressed by either of the provisions. None of the two is a paragon of perfect legislative instrument because they have grounds where they have failed. Nevertheless, they complement each other and they represent a commendable package of arbitral rules which reflect the flexibility and expediency yearned by disputants in dispute resolution settings.