THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: INTERPRETATION, GENERAL PRINCIPLES AND ARBITRABILITY

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ABSTRACT

This article explores the possible modification of the UNCITRAL Model Law on International Commercial Arbitration (MAL) to include the topic of arbitrability. This is an area in which the domestic legal systems differ, particularly in relation to the arbitrability of intra-corporate disputes. The article also deals with new art 2A, introduced into the Model Law in 2006, which deals with the interpretation and gap-filling system under the Model Law. The interpretation of MAL in accordance with its international character is a very important step towards uniformity and therefore the different tools required for a uniform interpretation are analysed. These include case law and scholarly writings; the meaning and importance of achieving both a uniform and an international interpretation of MAL are also considered. The article also analyses the whole text of MAL in order to arrive at

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the general principles on which the Model Law is based; when problems have to be solved, these principles should guide issues of interpretation that arise under this law.

Keywords: UNCITRAL, arbitration, interpretation, general principles, arbitrability

INTRODUCTION

The United Nations Commission on International Trade Law (UNCITRAL) is by far the most successful international agency entrusted with the work of unifying and harmonising international trade law.[2] Arbitration has been a priority matter of study in the agenda of UNCITRAL since its creation in 1966, and several legal texts in this area have been adopted since then. In this article I analyse the UNCITRAL Model Law on International Commercial Arbitration (MAL)[3] in order to consider the fundamental principles embodied in the text of both the 1985 and the later 2006 revision that have been incorporated in many national arbitration laws. The reading of MAL in the light of its main principles is important in terms of new art 2A, as incorporated in 2006, and therefore in terms of its interpretation (see section 2 below). Finally, I consider some proposals for a future revision of MAL, particularly regarding arbitrability (see section 3 below).

INTERPRETATION OF MAL AND ITS GENERAL PRINCIPLES

New art 2A of MAL (2006)

The original draft of MAL did not contain a provision dealing with its interpretation and gap-filling system. This was in contrast to the majority of the uniform international commercial-law texts that did contain a rule on interpretation and gap-filling following the model of art 7 of the CISG (the 1980 Vienna Convention on International Sale of Goods).[4] In fact, UNCITRAL was the first organisation to insert a specific interpretation

2 More information about UNCITRAL can be found at <http://www.uncitral.org>.

3 The 1985 Model Law on International Commercial Arbitration (plus revision of 2006) has been incorporated into the national laws of almost a hundred jurisdictions. In Africa, the MAL countries are: Egypt (1994), Nigeria (1990), Kenya (1995), Rwanda (2008), **Madagascar (1998)**, Tunisia (1993), **Mauritius (2008)**, Uganda (2000), **Zambia (2000)**, **Zimbawe** (1996). Out of the 13 countries that are members of the Southern African Development Community (SADC), only the four in bold are MAL states. South Africa has still an old arbitration law (Arbitration Act 42 of 1965), but it is considering the adoption of MAL.
It has to be mentioned that the Uniform Arbitration Act of OHADA is based upon MAL.

4 Before similar provisions with no reference to good faith: UN Convention on the Limitation Period in the International Sale of Goods (14 June 1974) and art 3 of the Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules).

provision in its uniform law instruments. The influence of a provision on interpretation and gap-filling is seen not only in the instruments of UNCITRAL,[5] but also in those of UNIDROIT.[6] Usually the model is reproduced in its entirety, although sometimes with minor changes. In a minority of the texts, substantive changes are considered due to the need to develop the rules further or to accommodate them in line with the specifics of the subject-matter of the instrument. In particular, art 2A of the MAL does not mention subsidiary recourse to the national law.[7] This omission is consistent with the creation of an autonomous, self-sufficient system in arbitration.

It was not until the 2006 revision of MAL that a new provision, art 2A, dealing with interpretation and general principles, was introduced.

> **'Article 2A International origin and general principles**
>
> (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.'

There is no explanation as to why the MAL did not originally (1985) contain a provision dealing with its interpretation. It could be that since this kind of provision was new in international instruments and that the first texts which introduced this type of rule were international treaties – the Limitation Convention (1974) and CISG (1980) – it was considered to be out of place or unnecessary to incorporate one into the MAL. In this regard, the UNCITRAL Arbitration Rules of 1976 also lacked an interpretative provision and the Model Law was conceived as legislation to be 'transformed' into a national law. It is also interesting to note that it was impossible

5 Following art 7(1) of the CISG, eg: art 4 of the United Nations Convention on International Bills of Exchange and International Promissory Notes of 1988; art 5 of the UNCITRAL Convention on Independent Guarantee and Stand By Letters of Credit of 1995 that refers to good faith; art 8 of the UNCITRAL Model Law on Cross Border Insolvency; art 5 of the UN Convention on Independent Guarantees and Stand-by Letters of Credit; art 5(1) of the UN Convention on the Use of Electronic Communications in International Contracts (2005); art 2 of the UN Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008); art 6.1 of the UNIDROIT Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983); and art 4.1 of the UNIDROIT Model Law on Leasing (13 November 2008).

6 Article 6 of the UNIDROIT Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983) is a copy of art 7 CISG. Article 5 of the UNIDROIT Convention on International Interests in Mobile Equipment (Cape Town, 2001) follows art 7 of the CISG, but it considers also the Preamble and there is no reference to the good-faith principle.

7 The same approach is found in art 3(2) of the UNCITRAL Model Law on Electronic Commerce (1996); art 4(2) of the UNCITRAL Model Law on Electronic Signature (2001); art 2(2) of the UNCITRAL Model Law on International Commercial Conciliation (2002), and art 4.2 of the UNIDROIT Model Law on Leasing (13 November 2008).

to include a provision dealing with the interpretation of the UNCITRAL Rules when they were revised in 2010.[8]

The importance of this kind of provision is easy to understand: it provides a means of ensuring that the MAL is interpreted and applied in a uniform way. Article 2A of the MAL establishes an autonomous interpretative criterion based on the principles of internationality, uniformity and good faith (art 2A(1)), and an autonomous gap-filling method through the application of the general principles inherent in the MAL (art 2A(2)). In order for this provision to be applied, a distinction should be drawn between internal gaps (*lacunae praeter legem*), that is, an issue that is unresolved, and external gaps (*lacunae intra legem*), that is, issues intentionally excluded, on the one hand, and matters expressly outside the scope of MAL, on the other.

Different from CISG, art 2A of the MAL disregards completely the role of private international-law rules and therefore the role of the general principles, and party autonomy, is reinforced since the parties may agree that in the absence of general principles within the MAL, resort should be had to soft-law rules.

Article 2A of the MAL creates a self-sufficient system detached from the usual interpretation of domestic laws and in terms of which attention should be paid to certain principles in order to interpret it. By doing so, risks derived from the application of interpretative rules specific to a domestic legal system – which are inadequate for a text originated, elaborated upon, applied and approved in an international context – are avoided and at the same time an international, autonomous and uniform interpretation and application of the MAL is achieved. In any case, a balance must be achieved between the international origin of the MAL and the fact that it is inserted in the general structure of each domestic law (Perales Viscasillas 2011: 111–115).

Even before the incorporation of art 2A of the MAL very few countries were aware of the importance of having a provision dealing with its interpretation. Among the SADC countries, exceptions are the Zambia Arbitration Act (2000) (art 3.2(3)) and the Zimbabwe Arbitration Act (1996), which states:

> 'The material to which an arbitral tribunal or a court may refer in interpreting this Act includes the documents relating to the Model Law and originating from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law, that is to say the *travaux préparatoires* to the Model Law, and, in interpreting the Model Law, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application.'

8 See the discussion in: A/CN.9/WG.II/WP.143/Add.1, n29; A/CN.9/614, nn120–121. The text proposed, similar to art 2A of the MAL in: A/CN.9/WG.II/WP.145/Add.1, n48. The reasons for not including a provision on the interpretation of the UNCITRAL Arbitration Rules are found in: A/CN.9/648, nn41–44. The most recent Rules on Transparency in Investor–State Arbitration (2013) also lacks a rule on the interpretation and gap-filling, although the matter was discussed: see A/CN.9/794, nn83–88, and A/CN.9/799, nn27–28.

As it is derived from these rules, a provision on interpretation was introduced by which the legislative history, its internationality and the need to achieve a uniform interpretation were essential elements. However, a provision dealing with the gap-filling system as in para 2 of art 2A of the MAL is absent.

After the 2006 revision, the implementation of the MAL in domestic legislation had different results. There are arbitration laws that are silent on this area: those of Belgium, Brunei-Darussalam and Georgia, for instance. However, several of the most recent arbitration laws based upon the 2006 revision have introduced provisions dealing with its interpretation and gap-filling system following the text of art 2A of the MAL. Examples are Hong Kong (Arbitration Ordinance, Chapter 609, 2011) and Costa Rica. Special interpretative provisions are found in Australia, where the different state laws have not adopted the gap-filling provision.[9] Another special situation is that arising from the Lithuania Commercial Law on Arbitration (2012) that considers the interpretation of its arbitration law in accordance with the MAL and its subsequent amendments and supplements. It also specifies some general principles: justice, reasonableness, good faith and the interpretation of the law so as to ensure maximum compliance with the arbitration procedure (arts 4.5–4.7).

For this author, the most interesting provision is that found in the Mauritius International Arbitration Act (2008). This state seems to consider that a way to increase its appeal as a seat of international arbitration as well as to attract investors to the country is through a detailed provision on this matter that gives sufficient guidance to judges and arbitrators. The provision emphasises the mandate to a uniform and international interpretation of the arbitration law that will signal certainty and legal security in this area to investors and traders (Jequier 2013: 124–125). Article 3.9 of the Mauritius International Arbitration Act (2008) states that:

> 'In applying and interpreting this Act and in developing the law applicable to international arbitration in Mauritius –
>
> (*a*) regard shall be had to the origin of the Amended Model Law (the corresponding provisions of which are set out in the Third Schedule) and to the need to promote uniformity in its application and the observance of good faith;

9 New South Wales Commercial Arbitration Act (2010), Queensland Commercial Arbitration Act (2013), South Australia Commercial Arbitration Act (2011), Tasmania Commercial Arbitration Act (2011), Victoria Commercial Arbitration Act (2011), Western Australia Commercial Arbitration Act (2012). The similar provision reads: 'International origin and general principles:
(1) Subject to section 1C, in the interpretation of this Act, regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth) to international commercial arbitrations and the observance of good faith.
(3) Without limiting subsection (1), in interpreting this Act, reference may be made to the documents relating to the Model Law of: (a) the United Nations Commission on International Trade Law, and (b) its working groups for the preparation of the Model Law.'

(*b*) any question concerning matters governed by the Amended Model Law which is not expressly settled in that law shall be settled in conformity with the general principles on which that law is based; and

(*c*) recourse may be had to international materials relating to the Amended Model Law and to its interpretation, including –

(i) relevant reports of UNCITRAL;

(ii) relevant reports and analytical commentaries of the UNCITRAL Secretariat;

(iii) relevant case law from other Model Law jurisdictions, including the case law reported by UNCITRAL in its CLOUT database; and

(iv) textbooks, articles and doctrinal commentaries on the Amended Model Law.'

Also, subsection (10) of the 2008 Act disregards the role of domestic interpretations in interpreting the law:

'In carrying out the objects of subsection (9), no recourse shall be had to, and no account shall be taken of, existing statutes, precedents, practices, principles or rules of law or procedure relating to domestic arbitration.'

The interpretation of the MAL in accordance with its international character is a very important step towards uniformity. Interpretation in the light of its legislative history is particularly relevant to understandig the evolution of the rules and therefore to apprehend its finality and correctness. However, too much emphasis on the legislative history of the MAL should be avoided. On the contrary, a dynamic and progressive approach to the interpretation of the MAL should first also be taken into consideration, particularly catering to developments in international trade law (case law, new international arbitration instruments, the development of practices and usages, scholarly writing, new interpretative methods, comparative law and the evolution of legal thinking). Second, the analysis of the legislative history itself may be unclear or contentious and therefore several readers analysing the same legislative history might arrive at different interpretations or outcomes. Third, also regarding the Secretariat reports, certain reservations should be expressed: it is not an official commentary on the MAL and so countries used to this system – that is, a common-law system – should not consider it as such. This is because, even if considered similar or functionally equivalent to an official commentary, sometimes the statements of the Secretariat are influenced by the legal framework of its drafters or even assume a position that was not finally reflected in the provision (Perales Viscasillas 2011: 126–127).

Case law should be considered one of the primary sources for the interpretation of the MAL and one of the main tools for achieving consistency among the decisions

rendered under the arbitration laws based upon the MAL. A consistent body of case law is progressively being built up under the UNCITRAL system: CLOUT and Digest.[10] International case law is a persuasive authority, albeit not binding. Decisions that adopt a myopic and domestic interpretation of the MAL ought to be disregarded (Perales Viscasillas 2011: 128–129).

Scholarly writing is also an important tool for interpretation, particularly in civil-law systems but also in common-law systems, where a significant trend is observed in the use of scholarly work. The role of legal literature is not only to describe the state of affairs of a particular issue, but also to take a position on critical issues pertaining to the improvements in uniform international arbitration law and practices, case law and usages (Perales Viscasillas 2011: 130–131).

General principles

Having recourse to the general principles on which the MAL is based is an attempt to build a systematic interpretation of the CISG. These general principles would emerge from and be built up progressively from case law and academic scholars. However, having recourse to the general principles adds further problems to the method of filling gaps within the MAL. There is no enumeration of the general principles in the MAL and because their content and effect are not established within the Model Law, the obvious risk exists that interpreters would derive from the MAL not only different principles but also divergence.

Apart from the clear principles embodied in art 2A(1) (principles of internationality, uniformity and good faith), other principles are easily to be found. Others might be derived from a process of abstraction and deduction on specific provisions of MAL. These principles are those published in 1985 and 2006, which are listed below.

General principles of the MAL (1985)

The 1985 set of general principles of the MAL are these:

- Principle of freedom of contract: arbitration agreement and procedural rules: arts 7 and 19.1.[11]

10 Case law on UNCITRAL Texts and Digest at <http://www.uncitral.org>. Also worth mentioning is the recent web platform dealing with the interpretation of the New York Convention: <www.nyconvention.org>.

11 Also seen in other provisions, inter alia, arts 11.2, 13.1, 22, etc of the MAL. This was considered the most important general principle when discussing the general framework for the drafting of the Model Law; see Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration (A/CN.9/207), n18: 'Probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations. This

- Principle of the minimum intervention of States Court: art 5.
- Principle of 'reception' to determine the efficacy of written communications: art 3.
- Principle of estoppel: art 4.
- Principle of 'writing' for the arbitration agreements: art 7.
- Principle of impartiality or independence of the arbitrators: art 12.1.
- Principle of the duty of the arbitrators as to immediate disclosure to the parties of grounds for challenge: art 12.1.
- Principle of limited grounds to challenge an arbitrator: art 12.2.
- Principle of *competence–competence*: art 16.
- Principle of separability or autonomy of the arbitration agreement: art 16.1.
- Principle of a wide recognition of powers to the arbitral tribunal: conduct of the arbitration, evidence or interim measures arts 17 and 19.
- Principle of coexistence of powers between the Courts and the Arbitral Tribunals: arts 9 and 17.
- Principle of equal treatment of the parties: art 18.
- Principle of distinction between the physical place and legal place (seat) for arbitration: art 20.
- Principle of assistance of State Courts: art 27.
- Principle of the lack of relevance of conflicts of law rules in the determination of the rules applicable to the substance of the dispute: art 28.1.
- Principle of preference for law arbitration in place of equity arbitration: art 28.3.
- Principle of primacy of the contract and the usages of trade: art 28.4.
- Principle of majority in a three-member tribunal: art 29.
- Principle of writing, signature and the statement of reasons in the arbitral award: art 31.1 and 31.2.
- Principle that the arbitration award is made at the place of arbitration: art 31.3.
- Principle of termination of the mandate of the arbitral tribunal when the proceedings terminate: art 32.3.
- Principle of full coherence between the New York Convention and the MAL: arts 35 and 36.
- Principle of limited/exhaustive grounds for setting aside an award and for refusing recognition and enforcement: arts 34.2 and 36.2.
- Principle of identity of the grounds to set aside an award and to refuse recognition and enforcement: arts 34.2 and 36.2.

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would allow them to freely submit their disputes to arbitration and to tailor the rules of the "game" to their specific needs.' And so in n19 with a clear limit of mandatory rules: 'Their freedom should be limited by mandatory provisions designed to prevent or to remedy certain major defects in the procedure, any instance of denial of justice or violation or violation of due process.'

General principles of the MAL (2006)

The 2006 set of general principles of the MAL are these:

- Principles of internationality, uniformity and good faith: art 2A.1.
- Principle of gap-filling in accordance with the general principles in which the MAL is based: art 2A.2.
- Principle of the lack of relevance of conflicts of law rules in the gap-filling system: art 2A.2.
- Principle of full recognition of freedom of form: art 7, Options I and II.
- Principle of full recognition for arbitrators of the power to issue interim measures of protection through the creation of a complete legal regime: Ch IV.

There is another principle that, although not derived directly from the MAL, is coherent with the works undertaken by UNCITRAL both in 1985 when considering the written form of the arbitration agreements in art 7 and when revising this provision in 2006. This is the interpretative role of the MAL in relation to the New York Convention as considered by the UNCITRAL recommendation regarding the interpretation of arts II(2) and VII(1) of the New York Convention, also adopted in 2006.

In fact, at least one arbitration law based upon the 2006 revision of the MAL has considered this role: art 43.2(2) of the Mauritius International Arbitration Act (2008) states that:

> 'In applying the Convention, regard shall be had to the Recommendation regarding the interpretation of Article II(2) and Article VII(1) of the Convention adopted by UNCITRAL at its Thirty-Ninth session on 7 July 2006.'[12]

FUTURE REVISION OF THE MAL, PARTICULARLY A NEW RULE ON ARBITRABILITY

Revision of MAL and new issues to be included

Regarding a future modification or revision of the MAL, there are several provisions that might be revised. An example of a candidate provision to be modified is art 28.2 of the MAL, which currently considers that: 'Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the *conflict of laws rules which it considers applicable.*' A mere comparison with art 35.2 of the UNCITRAL

12 Also worth mentioning are the first two cases from Spain that rely on the UNCITRAL Recommendation in order to interpret art II.2 of the NYC: ATSJ Cataluña, 29 March 2012 (JUR 6128) and 15 March 2012 (JUR 6120).

Arbitration Rules as revised in 2010 clearly shows the need to revise it in order to reduce the impact of the conflict-of-laws rules: '*the arbitral tribunal shall apply the law which it determines to be appropriate*.'

Apart from the revision of some rules, there are several matters that could be included in a future revision of the MAL. These new topics have from time to time been on the possible future agenda of the revision of the MAL and include, inter alia:

- Confidentiality
- Institutional arbitration
- Appeal against awards
- Extension of arbitration agreement to third parties
- Intervention of third parties: joinder
- Consolidation of multiparty disputes
- Truncated tribunals
- Class actions
- Arbitrability
- Liability of arbitrators
- Sovereign immunity
- Anti-suit injunctions
- Power of arbitrators to award interests/fill gaps/modify contracts/adapt the contract in a situation of hardship
- Costs of arbitration.

Among these possible matters for inclusion, the arbitrability of the disputes will be referred to with a view to analysing the feasibility of uniformity.

Arbitrability as a matter to be included in the MAL

Silence in the MAL

Neither the 1985 MAL nor its 2006 revision contains a provision dealing with arbitrability. The legislative history is clear on this point, however: 'The prevailing view was that the Model Law should not contain a provision delimiting non-arbitrable issues.'[13] Despite that conclusion, on several occasions arbitrability was placed on the possible future agenda for a revision of the MAL.[14] In this regard, Working Group II

13 A/CN.9/216, 23 March 1982, n30.

14 A/CN.9/216, 23 March 1982, nn30–31. It was also considered by the Comission it its thirty-sixth (Vienna, 30 June–11 July 2003), thirty-seventh (New York, 14–25 June 2004) and thirty-eighth

considered problematic in international arbitration the differences in domestic laws and the uncertainties derived from distinct legal solutions to arbitrability.[15]

Is an arbitrability rule needed?

In the opinion of this author, the incorporation of an arbitrability rule within the MAL would be necessary, convenient and possible. This despite the fact that there is a general trend towards a more flexible and wider approach to arbitration and the possible submission to arbitration matters that have been traditionally beyond the scope of arbitration.[16] Incorporation, it is submitted, is necessary, convenient and possible for a number of reasons.

First, due consideration is to be given to the lack of uniform solutions in arbitration laws or domestic-specific laws. Owing to the silence on arbitration in the MAL, it is clear that a uniform approach towards arbitrability does not exist. Even if we consider typical commercial areas, the different approaches taken by domestic laws, scholars and case law result in uncertainties regarding the possible submission to arbitration of matters in dispute concerning intra-corporate disputes, securities, intellectual rights, patents, trademarks and industrial designs, fair and unfair competition issues, distribution contracts, financial contracts, insurance, transport, insolvency or regulated economic sectors such as energy, telecommunications and postal services.

Second, arbitrability is an important issue to be analysed by different 'actors' at different stages of the arbitration procedure and thereafter by the arbitrators (ex officio) and by the courts (also ex officio, because arbitrability is a ground for setting aside: art 34 of the MAL and for denying *exequatur* under art V2(*a*) of the New York Convention and art 36 of the MAL).

Third, the fact that general and broad definitions are present in many arbitration laws does not help to build a uniform solution, since arbitrability in specific areas would be subject to scholarly interpretation and judicial decisions that might put into its reasoning all kinds of domestic/national conceptions that would tend to limit the arbitrability of the subject-matter of a dispute. Furthermore, legal certainty is rarely achieved owing to the fact that many states that have their own, more comprehensive

(Vienna, 4–15 July 2005) sessions. In particular, the Commission noted that priority consideration might be given to the issue of arbitrability of intra-corporate disputes and other issues relating to arbitrability, for example, arbitrability in the fields of immovable property, insolvency or unfair competition (see A/CN.9/610, 5 April 2006, n6; and A/61/17, n183).

15 A/CN.9/610, 5 April 2006, n8.

16 An example of a rule pro arbitration and arbitrability is found in art 9.6 of the Spanish Arbitration Act (2003), which reads: 'When the arbitration is international, the arbitration agreement shall be valid and the dispute may be subject to arbitration if the requirements stipulated by the law chosen by the parties to govern the arbitration agreement, the law applicable to the substance of the dispute, or Spanish law, are fulfilled.' Therefore, the arbitrability might be considered under three different applicable laws. In order for the arbitrators to be able to decide the dispute, it is enough if the subject-matter of the dispute is arbitrable under any of those laws.

regulation in this area, regulation that deals with arbitrability rules in distinct and specific laws[17] (Perales Viscasillas 2010: 1–10).

Design of a general arbitrability rule: A simple uniform solution

In trying to find a uniform solution that would lead to an arbitrability rule, Working Group II foresaw the possible design of a rule on arbitrability: a general formula and a uniform list of exceptions.[18] In the opinion of this author, this kind of solution would be rather easy to implement and would contribute enormously to uniformity in this area. UNCITRAL will take a leading role in producing a uniform and international solution, bringing to the attention of states that are more reluctant to enter into arbitration the need to extend the boundaries of arbitrability. Although it is true that arbitrability will vary from country to country, and even within countries, it will inevitably vary from time to time since it is a concept that has changed over time. A general formulation should therefore not be considered difficult to implement and should not be regarded with caution or suspicion. In fact, generally speaking, domestic laws consider arbitrability under general rather than exhaustive provisions. Generally, national laws provide that all rights or matters that the parties 'may freely dispose' and 'property issues' are arbitrable. Also, many statutes link arbitrability to transactions, and therefore the matters that are the object of a transaction might also automatically be subject to arbitration.

As a result, a possible rule on arbitrability could comprise:

- A general rule that could be formulated in line with several general principles instead of choosing one:
- Parties may submit to arbitration matters that can be settled by agreement of the parties, matters involving rights which can be disposed of, any dispute involving property issues or subject-matters that concern economic interests.
- *An exhaustive short list of non-arbitrable matters:*

17 This is the case, for example, with Spain. Despite the fact that art 2 of the Spanish Arbitration Act contains a general rule on the arbitrability of disputes in accordance with the general principle of the free disposition of the parties, there are many specific laws that deal also with arbitrability.

18 A/CN.9/610, 5 April 2006, n8: 'Work might be geared, for example, towards formulating a uniform provision setting out three or four issues that were generally considered non-arbitrable and calling upon States to list any other issues that are regarded as non-arbitrable by the State. At the same time, concerns were expressed that any national listing of non-arbitrable issues might be inflexible and therefore counter-productive. It was said that the question of arbitrability was subject to constant development (including through case law) and that some States might find it undesirable to interfere with that development (see below, para. 13).' This simple solution was already in place in 1982: 'it was noted that further thought could be given to the possibility of devising a general formula to determine non-arbitrability along the following lines – a subject matter is arbitrable if the issue in dispute can be settled by agreement of the parties' (A/CN.9/216, 23 March 1982, nn30–31).

- A list of excluded areas (to be determined by agreement of the states), or
- An open list (for the states to decide what to include when implementing the MAL).

Regarding the possible exceptions or exclusions, it might be more difficult to agree on a uniform list, but not impossible. Therefore, the first option for the exceptions seems to be better rather than the second – or even a possible combination of the two lists.

Design of special arbitrability rules: A more complex task, intra-corporate disputes as an example

The general formula and the uniform list of exceptions would be a rather easy rule to implement.[19] However, from the perspective of uniformity it would not be sufficient,

19 In the SADC's MAL countries, the general rule plus the list of exceptions is the preferred model. See art 453 of the Madagascar CPC (international arbitration) (similar rule for domestic arbitration, art 440.1): 'Les parties à une convention d'arbitrage doivent avoir la capacité de disposer de leurs droits. On ne peut compromettre:
1 sur les questions concernant l'ordre public au sens du droit international privé;
2 sur les questions relatives à la nationalité;
3 sur les questions relatives au statut personnel, à l'exception des litiges d'ordre pécuniaire en découlant;
4 dans les matières où on ne peut transiger;
5 sur les litiges concernant l'Etat, les collectivités territoriales et les établissements publics, à l'exception des litiges découlant de rapports internationaux d'ordre économique, commercial ou financier régis par le présent titre.'
The Zimbabwe Arbitration Act (1996) (and also similarly the Zambia Arbitration Act (2000)) states that:
'(1) Subject to this section, any dispute which the parties have agreed to submit to arbitration may be determined by arbitration.
(2) The following matters shall not be capable of determination by arbitration–
(*a*) an agreement that is contrary to public policy; or
(*b*) a dispute which, in terms of any law, may not be determined by arbitration; or
(*c*) a criminal case; or
(*d*) a matrimonial cause or a matter relating to status, unless the High Court gives leave for it to be determined by arbitration; or
(*e*) a matter affecting the interests of a minor or an individual under a legal disability, unless the High Court gives leave for it to be determined by arbitration; or
(*f*) a matter concerning a consumer contract as defined in the Consumer Contracts Act [Chapter 8:03], unless the consumer has by separate agreement agreed thereto.'
The South African Arbitration Act (1965) states in s 2 **(**Matters not subject to arbitration) that: 'A reference to arbitration shall not be permissible in respect of (*a*) any matrimonial cause or any matter incidental to any such cause; or (*b*) any matter relating to status.'
Article 2.1 of the OHADA Arbitration Uniform Law: 'Any natural person or corporate body may recourse to arbitration on rights of which he has free disposal.'
Similar provisions in some MAL countries, such as art 2.1 of the Spanish Arbitration Act (2003),

and further consideration would have to be given to the design of more complex rules that cater for specific subject-matters that are controversial under domestic laws. For the sake of simplicity and clarity intra-corporate disputes will be referred to very briefly. This is quite a complex area where the traditional misconceptions, arguments and limitations contrary to arbitration are encountered. Such disputes raise questions of imperative rules, public order, the effects on third-party rights and the exclusive competence of state courts (Perales Viscasillas 2009: 273–280). These problems, however, are encountered not only at the level of arbitrability; some procedural aspects also need to be studied, such as the impact of the arbitration of intra-corporate disputes on third parties, issues related to the effects of an award and commercial registries, confidentiality versus transparency, and whether equity arbitrations are allowed in these kinds of dispute.

Very few statutes refer to arbitration/arbitrability in connection with corporations. Some of them link arbitrability in this special field to the general standards provided for in arbitration laws. Others, however, consider a wider scope to deal with some of the issues that arise in the sphere of corporations, although they sometimes limit the scope of arbitrability to certain intra-corporate disputes or limit the persons who can be subjected to arbitration.

Among the few MAL statutes that provide for the arbitration of corporate matters art 11*bis* (Corporate arbitration) of the Spanish Arbitration Act (2003, as amended in 2011) should be mentioned (Perales Viscasillas 2012: 385). It states that:

1. 'Companies may submit disputes arising within them to arbitration.
2. Insertion into a company's Articles of association of a clause providing for submission of disputes to arbitration shall require favourable vote representing at least two thirds of the share capital of the company.
3. A company's Articles of association may provide that any challenge to corporate resolutions by members or directors shall be subject to the decision of one or more arbitrators, designating an arbitration institution to administer the arbitration proceedings and appoint the arbitrator(s).'[20]

Also worth mentioning is the Mauritius International Arbitration Act (2008), art 3(6):

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and art 2.1 of the Peru Arbitration Act.

The New Zealand Arbitration Act (MAL country) considers that: '(1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration. (2) The fact that an enactment confers jurisdiction in respect of any matter on the High Court or a District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.'

20 In Peru (MAL country), through the Arbitration Act, the General Law on Corporation is modified so as to include a provision dealing with intra-corporate disputes (see art 48 of Law No 26887).

'(*a*) Without prejudice to the right of a GBL company[21] to agree to the arbitration of any dispute between itself and any third party under this Act, its shareholders may determine that any dispute concerning the constitution of the company or relating to the company shall be referred to arbitration under this Act.

(*b*) Notwithstanding any agreement to the contrary, the juridical seat of any arbitration under this subsection shall be Mauritius and the First Schedule shall apply to that arbitration.

(*c*) The shareholders of a GBL company may incorporate an arbitration agreement in the constitution of the company, whether by reference to the model arbitration clause contained in the Second Schedule or otherwise –

(i) at the time of the incorporation of the company; or

(ii) at any later time by a unanimous resolution of all current shareholders.'

Mauritius has this special regulation that applies to GBL companies but it does not provide for a general rule on arbitration in its General Corporation Law. Therefore, general principles of arbitration and doctrinal and judicial considerations ought to be considered for other corporate entities.

Among non-MAL countries, special regulations for corporate arbitration are also to be found in Italy and Spain.[22] In Italy the provisions are mandatory (Boggio 2012: 125–130). Spanish law allows arbitration for listed companies (publicly held corporations), contrary, for example, to Italian or German law, where it is forbidden. It requires a majority vote for an arbitration clause to be introduced into the bylaws of the corporation (obviously once the company has already been constituted) and does not recognise appraisal rights for dissenters. In contrast, in Italy dissenters have an appraisal right, and in Mauritian law the unanimity of the current shareholders is required. In Spanish law, both equity arbitration and arbitration on points of law are allowed, as opposed to Italian Law, where equity arbitration is forbidden.

A further comparison shows the limitations considered by those statutes or special procedural rules. For example, Spanish law provides for limitations to the challenge to corporate resolutions, since ad hoc arbitration is forbidden and all arbitrators are required to be appointed by the institution. Procedural rules for the annulment by arbitration award of the corporate resolutions subject to registration are also considered in art 11*ter* of the Spanish Arbitration Act. In this case the award itself must be registered in the Companies Register and the official journal must publish an extract of the award. Furthermore, in the event that the annulled resolution has already been registered, the arbitration award shall also provide for cancellation of such registration together with any subsequent provisions inconsistent with such cancellation.

Limitations and special rules are also found in Mauritius, where it is mandatory that the juridical seat of any arbitration under the Act shall be Mauritius. This

21 'GBL Company' means a company holding a Global Business Licence under the Financial Services Act.

22 Legislative Decree No 5 of 17 January 2003, as amended further, Title V – On Arbitration.

is also the case in Italy, where all arbitrators have to be appointed by a third person not connected to the company. Furthermore, in Italy, the request for arbitration must be filed at the Registry of Enterprises and must be available for inspection by all members. Italian law also allows third-party intervention, provides that an award is binding on a company even if the company was not a party to the arbitration, and, contrary to the general Arbitration Act where the arbitrators do not have the power to issue interim measures of protection, arbitrators do have this power regarding intra-corporate disputes.

This brief comparative survey indicates that a general formula on arbitrability would not be sufficient to deal with all the problems and issues that arise from the possibility of submitting intra-corporate disputes to arbitration. Moreover, it indicates that a special tailor-made provision would be needed in order to arrive at uniformity and certainty in this area. Furthermore, a specially worded rule would need to be drafted to deal not only with arbitrability but also with other aspects such as the persons who could be subject to arbitration – shareholders, boards of directors, etc – whether confidentiality should be the rule or the exception, equity law versus the law of arbitration, the impact on third-parties' rights, the type of majority required to introduce an arbitration clause, and so on.

Conclusion

In conclusion, although finding a uniform solution to the arbitrability of intra-corporate disputes would be more difficult in comparison to the design of a uniform rule on arbitrability in general, the recommendation would be that for specific commercial matters UNCITRAL deals separately with those that are considered to be problematic. An instrument developed by UNCITRAL in the area of the arbitrability of commercial disputes would help to fill an important gap in the MAL so far as achieving the desired uniformity, international consensus and legal certainty in the arbitration world is concerned.

Finally, UNCITRAL would be also of help in the design of a model arbitration clause that could be incorporated into the bylaws of corporations or into their articles of incorporation. In fact, an increasing tendency to offer model clauses is already evident. Examples of model clauses are found in the Mauritus International

Arbitration Act[23] and those prepared by interested bodies, including arbitration institutions.[24]

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UNCITRAL documents. Available at <www.uncitral.org> (accessed 10 June 2014):

23 Model Arbitration Provisions for GBL Companies:
'1. Shareholders in a Mauritius GBL company ("the Company") may incorporate an arbitration clause in the constitution of the Company, as provided in section 3(6) of the Act, by a unanimous resolution of shareholders in the following form –
"The shareholders of the Company hereby agree that the constitution of the Company shall be amended by the inclusion of the arbitration clause set out in the Second Schedule to the International Arbitration Act 2008. The chosen arbitral institution is [name of institution]. The number of arbitrators shall be [one or three]."
2. The effect of the resolution referred to in paragraph 1 shall be the incorporation in the constitution of the Company of the following arbitration clause –
(1) Any dispute, controversy or claim arising out of or relating to this constitution or the breach, termination or invalidity thereof, or relating to the company, shall be settled by international arbitration under the International Arbitration Act 2008 (referred to as the Act).
(2) The provisions of the First Schedule to the Act shall apply to the arbitration.
(3) The arbitration shall be conducted pursuant to the Rules of [name of institution]. Where no institution is chosen, the arbitration shall be conducted pursuant to the rules set out in the Act.
(4) The number of arbitrators shall be [one or three]. Where no option is chosen, the default rules set out in the Act shall apply.
(5) The juridical seat of arbitration shall be Mauritius.
(6) The language to be used in the arbitral proceedings shall be the English language.'

24 See, for example, Report on Corporate Arbitration and Model Arbitration Clause offered by the Spanish Club of Arbitration. Available at <http://www.clubarbitraje.com/files/docs/cea_Arbitraje_Societario.pdf>; and Model Arbitration Clause offered by the DIS (German Institution for Arbitration).

A/CN9/207, nº18
A/CN9/216, nº30
A/CN9/610, nº6
A/CN9/614, nnº120–121
A/CN9/648, nnº41–44
A/CN9/794, nnº83–88
A/CN9/799, nnº27–28
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