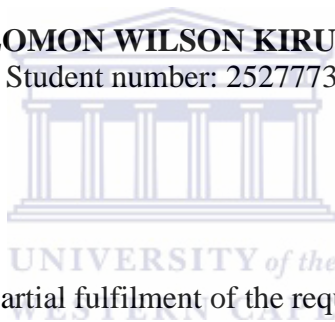


**SLITHERING TOWARDS UNIFORMITY: THE INTERNATIONAL
COMMERCIAL ARBITRATION AND CONCILIATION WORKING GROUP OF
UNCITRAL AS A KEY PLAYER IN THE STRENGTHENING AND
LIBERALISATION OF INTERNATIONAL TRADE.**

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A Mini Thesis submitted in partial fulfilment of the requirements for the award of the Magister Legum degree (Mode II) in the faculty of law, University of the Western Cape.

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KEY WORDS

- UNCITRAL
- Arbitration
- Conciliation
- International trade
- Model law
- Arbitral awards
- Alternative dispute resolution
- Strengthening
- Liberalisation
- United Nations
- Uniformity
- Enforcement.



DECLARATION

I declare that '*Slithering towards uniformity: The international commercial arbitration and conciliation working group of UNCITRAL as key player in the strengthening and liberalisation of international trade*' is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

.....

Solomon Wilson Kirunda

Date:



ABSTRACT

Slithering towards uniformity: The international commercial arbitration and conciliation-working group of UNCITRAL as key player in the strengthening and liberalisation of international trade

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LL.M mini thesis, Faculty of Law, University of the Western Cape.

This mini thesis explores the role-played by the international commercial arbitration and conciliation-working group of UNCITRAL in the strengthening of international alternative dispute resolution (ADR). It is argued that in enacting the model laws and rules in both the areas of international commercial arbitration and conciliation, and having adopted the Convention on Enforcement of Foreign Arbitral Awards the working group is carrying out the manifest function of doing away with the various disparities that have for long existed in international alternative dispute resolution. In so doing, the working group is contributing to the attainment of the sole purpose for the creation of UNCITRAL, progressive harmonisation and unification of international trade laws.

In a detailed examination of the UNCITRAL model laws, rules and Convention on the Enforcement of Foreign Arbitral Awards the importance of having a uniform legal regime in the area of international alternative dispute resolution is established. It is further argued that the respect of party autonomy being the foundation on which alternative dispute resolution stands as exemplified in the examined instruments goes a long way in instilling confidence in international business persons that they have a say and choice in their destiny. If properly used the international ADR (most especially arbitration and conciliation as modes of dispute resolution) will soar in growth and subsequently the courtroom will be avoided.

The UNCITRAL instruments and available case law are used to underline the urgent importance for all states to embrace a uniform and prejudice free legal regime if international trade is to thrive in their jurisdictions. A case is then made that doing away

with legislations marred with national prejudices will allow trade to transpire without feeling the effect of national borders.

The mini thesis is concluded with the observation that the working group in carrying out its functions is indeed slithering the world of international arbitration and conciliation as modes of dispute resolution towards uniformity and thus strengthening and liberalising international trade. Lastly, recommendations are made which if considered would ultimately improve arbitration and conciliation and increase the international businesspersons' confidence resulting in the soaring of international trade as a whole.

November 2005.



DEDICATION

This piece of work is dedicated to the memory of the late Dr. Godwin Baker Wairama (faculty of law, Makerere University, Uganda). A good friend and teacher, whose friendly teaching, advice and encouragement strengthened my will to pursue this course but unfortunately passed away in his prime. May his soul rest in peace.



LIST OF ABBREVIATIONS

AAA	American Arbitration Association.
ADR	Alternative Dispute Resolution.
CADR	Centre for Alternative Dispute Resolution, Uganda.
CCMA	Commission for Conciliation, Mediation and Arbitration, South Africa.
NASD	National Association of Securities Dealers.
PBA	Protection of Businesses Act.
UN	United Nations.
UNCITRAL	United Nations Commission on International Trade Law.
US	United States.



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CHAPTER ONE

1.1 INTRODUCTION

The United Nations (UN) was built upon the fundamental principle of respect for international law. The preamble of the charter calls on member states “to establish conditions under which justice and respect of obligations arising from treaties and other sources of international law can be maintained”.¹ An important aim of the U.N is, therefore, to bring about the implementation of both treaties and rules of customary international law.²

Since the founding of the UN six decades ago, over 500 multilateral treaties have been deposited with the Secretary General. Without exception, all these treaties have been the result of meticulous negotiations and reflect a careful balance of national, regional, economic and other interests. In many instances, these agreements were actively promoted by non-governmental organisations. These instruments reflect aspirations of nations and individuals for a better world governed by clear and predictable rules agreed upon at the international level. They constitute a comprehensive international legal framework covering a whole spectrum of human activity, including human rights, humanitarian affairs, international criminal matters, the environment, disarmament, narcotics, outer space, trade, goods and services such as transportation and use of the seas.³

In the UN system, various branches have been created to deal with specific problems. In this light, a body known as the United Nations Commission on International Trade Law was put in place to design and prepare trade law instruments. It is important at this point, to note that though they may not really attract as much public attention as other

¹ See the Preamble to the United Nations Charter available online at:
<http://www.unhchr.ch/html/menu3/b/ch-pream.htm> accessed on 30th October 2005.

² See: opening speech at UNCITRAL’s 33rd session by the under secretary for legal affairs, Hans Correll on the 12th June 2000, Pg 5. [Herein after referred to as: Hans Correll: 2000]. Available on line at:
<http://www.un.org/law/counsel/uncitral.htm> accessed on the 13th April 2005.

³ Ibid.

international law instruments, they do indeed, play a vital part in the quest for international peace and security. In the past, the task of unifying, harmonizing and further development of the law of international trade was hardly ever mentioned with the UN's efforts towards international peace and development. In recent years, however, we note a continuing and significant increase in the importance being attributed by Governments, domestic and international business communities, and multilateral and bilateral aid agencies to the improvement of the legal framework for international trade and investment, so badly needed in the era of globalisation.⁴

1.1.1 UNCITRAL

In an increasingly economically interdependent world, the importance of an improved legal framework for the facilitation of international trade and investment cannot be over emphasised. That is why the existence of various disparities in international trade laws all over the world drew the attention of the UN. In seeking a solution to these disparities that were affecting the smooth flow of international trade, the United Nations decided to put in place a body with the specific task of harmonising and unifying the existing laws relating to international trade.⁵ This body is UNCITRAL.⁶ The commission has done this by coordinating the work of organisations active in international trade; promoting wider

⁴ Ibid.

⁵ See: Preamble to General Assembly Resolution 2205 (XXI)(which established UNCITRAL) of 17th December 1966 where in its inter alia stated thus: “*having noted with appreciation* the efforts made by intergovernmental and non governmental organisations towards the progressive harmonisation and unification of law of international trade by promoting the adoption of international conventions, uniform laws, standard contract provisions ... *convinced* that it would therefore be desirable for United Nations to play a more active role towards removing legal obstacles to the flow of international trade ... *Noting* that such action would properly be within the scope and competence of the Organisation under the terms of Article 1, paragraph 3 and Article 13 and Chapters IX and X of the Charter of the United Nations ... *Decides* to establish The United Nations Commission on International Trade Law”. See: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf?OpenElement> accessed on 30th October 2005.

⁶ The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the General Assembly of the United nations which was established in 1966 (Resolution 2205(XXI) of 17 December 1966). In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles. See: <http://www.uncitral.org/uncitral/en/about/origin.htm> accessed on 4th April 2005.

participation in existing international conventions, model laws and uniform laws; promoting the codification and wider acceptance of international trade terms, customs and provisions; promoting ways of ensuring uniform interpretation and application of international conventions and collecting and disseminating information on national legislation and modern legal developments, including case law.⁷

UNCITRAL has since become the core legal body of the United Nations system dealing with international trade and is comprised of sixty members, all of whom are elected by the general assembly for six-year terms.⁸ In achieving the principle objective of its formation, progressive harmonization and unification of international trade laws,⁹ it has been availed with objectives to guide it, which include:

- Co-ordinating the work of organizations active in this field and encouraging co-operation among them;
- Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;
- Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field;
- Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;

⁷ Shapira, 'UNCITRAL and its work – Harmonisation and unification of international trade law', (1992) at 309ff. See also: Hercules Booyesen, 'International transactions and the international merchant', (1995) at 62-62.

⁸ The Commission is composed of sixty member States elected by the General Assembly. Membership is structured so as to be representative of the world's various geographic regions and its principal economic and legal systems. Members of the Commission are elected for terms of six years.

⁹ As the "core legal body within the United Nations system in the field of international trade law", as stated in General Assembly resolution 37/106, UNCITRAL was given the mandate to further the progressive harmonization and unification of the law of international trade. See Hans Correl: 2000: 4.

- Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;
- Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;
- Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade;
- Taking any other action it may deem useful to fulfil its functions."¹⁰

The law reform work of UNCITRAL is manifested mainly in conventions, model laws, and rules. It also drafts legal and legislative guides, and updates information on case law and uniform commercial law enactments. Its major law reform projects in the area of international commercial arbitration and conciliation have been the UNCITRAL Arbitration and conciliation Rules adopted in 1976 and 1980 respectively, the UNCITRAL Model Law on international commercial conciliation, 2002 and the UNCITRAL Model Law on International Commercial Arbitration adopted by the General Assembly and recommended to member States in 1985. The Commission has also assumed law reform responsibility for matters relating to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention)¹¹.

Realising that as a commission it would be difficult to accomplish these objectives, it adopted a mechanism by which it appointed special bodies referred to as “working groups” to address concerns in various sectors in light of the principle formation statement of modernisation of international commercial law. Six working groups were formed¹² and these included the working group on privately financed infrastructure projects; working group on transport law; electronic commerce; insolvency law; security

¹⁰ See: General Assembly Resolution 2205 (XXI) available online at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf?OpenElement> accessed on 30th October 2005.

¹¹ Cecil O. D. Branson Q. C, ‘Recent UNCITRAL Initiatives Relating to Arbitration and Conciliation’. Available on line at: <http://www.texasadr.org/uncitral.cfm> accessed on the 4th May 2005.

¹² See: <http://www.uncitral.org/en-index.htm> accessed on 29th March 2005.

interests; and the international arbitration and conciliation working group, which is the main subject of discussion in this mini thesis.

1.1.2 The international arbitration and conciliation-working group

This working group, with the able assistance of the UNCITRAL Secretariat, headquartered in Vienna, does much of the preliminary work of the Commission in relation to international commercial arbitration and conciliation. It is comprised of delegates from each of the Commission member States, observers from all other UN member States, and invited observers from selected international organizations.¹³ Observers participate in working group sessions on the same basis as member delegates. While the working group is in session, by custom votes are not taken. The preparatory work is done by consensus with the working group reviewing and approving at the end of a two-week session the report, which will go to the Commission. As the Commission delegates are part of the Working Group it is unusual for recommendations to be rejected¹⁴. This working group was set up with the sole duty of addressing the disparities existing in the available legislation on international arbitration and conciliation in international trade. In so doing it was tasked to come up with possible uniform rules concerning settlement of commercial disputes.¹⁵ As a consequence, UNCITRAL gave its working group on arbitration a broad mandate to assess the experience gained by applying the 1958 New York convention, with its narrow definition of an arbitration agreement in article II and its model laws on arbitration and conciliation.¹⁶

The mandate was backed by an institutional mission, which recognised that persons involved in trans-national commercial disputes require an impartial, global network that is insulated from national prejudices. They will need to resolve their disputes efficiently,

¹³ Peter Binder, 'International Commercial Arbitration in UNCITRAL Model Law Jurisdictions' (2000) at 5. [Herein after referred to as: Binder: 2000].

¹⁴ Cecil, loc cit.

¹⁵ Freedberg J.A, 'UNCITRAL working group on arbitration' (2001) 3 Issue 1, p62, 2p.

¹⁶ Freedberg, loc cit.

with confidence that the resolution mechanism they select will provide reliable, practical and impartial services.¹⁷ The lack of this, coupled with different and distinct laws applicable in the countries where the parties come from, have always sabotaged the process of alternative dispute resolution, especially in international business dealings. As such, the works of UNCITRAL have been used to instil confidence among the international business community to the effect that a reliable and practical way to resolve disputes out of court lies in arbitration and conciliation done under UNCITRAL laws which are uniform and thus stand to treat each of the parties fairly and equally.

In the business world today, uniformity has become of essence. The business world has thrived on communication through all avenues such as televisions, telephones, radio, telex and jet propelled travel that has contributed to the business interests meeting, corresponding and sharing. Arbitration will not be exempt from such developments.¹⁸ With such a trend prevailing, international arbitration and all other modern business administrative institutions will have to accommodate the increasing demand for uniformity.¹⁹ This is what was envisioned by UNCITRAL when passing the resolution to have the arbitration and conciliation-working group.

Conciliation on the other hand, forms no part of arbitration proceedings. Indeed, the request for conciliation is normally different from the request for arbitration and the roles of both the arbitrator and conciliator differ significantly. Conciliation was considered by UNCITRAL at a much later stage.²⁰ It was on the 23rd July 1980 that a report on the final decisions reached by UNCITRAL was tabled inviting the General Assembly to ‘recommend the use of the UNCITRAL conciliation rules in cases where a dispute arises

¹⁷ Robert Coulson, ‘the future growth of institutional administration in international commercial arbitration’ (1982) 73.

¹⁸ Robert Coulson, op cit 78.

¹⁹ Ibid.

²⁰ Frederic Eisemann, ‘Conciliation as a means of settlement of international business disputes: the uncitral rules compared with the ICC’ (1982) at 121 is to the effect that at its 13th session in July in 1980, UNCITRAL adopted for submission to the 35th session of the General Assembly a set of twenty articles constituting the uncitral conciliation rules embedded in UN DOC. A/35/17.

in the context of international commercial relations and the parties seek amicable settlement of that dispute by recourse to conciliation'.²¹ In line with this, the General Assembly adopted resolution 35/52 on 4th December 1980 after being convinced that the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations.²² Even much later a model law on international commercial conciliation was also enacted.²³

By and large, it's a realistic belief that the business community demands a practical trans-national system of dispute settlement designed to its specifications with relatively uniform procedures. This clearly explains the reason behind the formation of UNCITRAL and the particular working group in issue – to unify procedures of alternative dispute resolution by way of arbitration and conciliation. This is because in such a setting, the nationality of the arbitrators [or conciliators] may be less important than their expertise and professional standing.²⁴

1.2 STATEMENT OF THE PROBLEM

With the modern day increase in international trade and commerce, national commercial law has often proved inadequate to international business needs and the resolution of disputes involving international contracts. This is mainly because international contracts typically differ from their domestic counterparts in subject matter, size, duration, policy

²¹ See: General Assembly Resolution 35/52 adopted on 4th December 1980 available online at: <http://www.uncitral.org/english/texts/arbitration/conc-rules.htm> accessed on the 1st June 2005.

²² Ibid.

²³ The Model Law on International Commercial Conciliation was designed to provide uniform rules in respect of the conciliation process. The Model Law was adopted by the Commission on 24 June 2002 at its 35th Session in New York, and was published as Annex I to the Report of the United Nations Commission on International Trade Law on its 35th session, Official Records of the General Assembly (A/57/17). See: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html. Accessed on 01st June 2005.

²⁴ Robert Coulson, op cit 79.

considerations involved, sources of law, and with the participation of sovereigns as parties.²⁵ These differences have served to lessen the confidence of the international businesspersons who may want to amicably settle their disputes. They are not confident that the laws existing in the countries of their business partners will treat them fairly. The question then is whether a unified legal regime to govern this branch of international trade would be the ultimate solution to the existing problem.

In this spirit, the issue meriting investigation is whether the international commercial arbitration and conciliation working group in carrying out its duties has contributed to the attainment or fulfilment of the objectives envisioned in the setting up UNCITRAL.

1.3 RESEARCH OBJECTIVES

The general objective of this study is to examine and review the main features and works of the arbitration and conciliation-working group of UNCITRAL while demonstrating their impact on international trade. However, the specific objectives of this research are to;

- Examine the works of the arbitration and conciliation-working group of UNCITRAL while validating whether any benefits have accrued to international trade as a result of its existence.
- Critically analyse and weigh the option of arbitration and conciliation as a medium of dispute resolution in the field of international trade.
- Establish whether the existence of the arbitration and conciliation-working group has played a role in the attainment of the main UNCITRAL objectives.
- Recommend ways in which the working group can better the works of UNCITRAL and in effect positively affect international trade.

1.4 RESEARCH HYPOTHESIS

The proponent assumption of this research is that the current regime of dispute resolution ought to rise above national and cultural differences in a sensible effort to accommodate the emerging demands of the parties. It is imperative therefore, that the model laws and

²⁵ 'General principles of law in international commercial arbitration', (1988) 1820 – 1821.

rules put in place by the arbitration and conciliation working group be adopted worldwide. This is to pave the way for a uniform procedure of dispute settlement which is independent of all inequities in the current domestic legislation and have the pattern laid down in the model laws and rules viewed as ‘self sufficient.’

1.5 SCOPE

The subject to be canvassed being quite wide, makes the current space insufficient to delve into all historical expositions of arbitration and conciliation. For the said reason, a limited scope is proposed. The study is therefore limited to examining Uncitral model laws and rules as the main contribution of the working group on international commercial arbitration and conciliation plus the enforcement of arbitral and conciliation awards in light of the arbitration rules, conciliation rules, model law on international commercial arbitration, model law on international commercial conciliation and lastly the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²⁶ While the arbitration and conciliation regime consists of various terminologies, in this study the phrase:

“*Working group*” is used to refer to the international commercial arbitration and conciliation-working group of UNCITRAL.

“*Arbitration rules*” is used in reference to the UNCITRAL Arbitration Rules adopted under General Assembly resolution 31/98.

“*Conciliation rules*” is used in reference to the UNCITRAL Conciliation Rules adopted under General Assembly resolution 35/52.

“*Model law on arbitration*” is used in reference to the UNCITRAL Model Law on International Commercial Arbitration, 1985.

“*Model law on conciliation*” is used in reference to the UNCITRAL Model Law on International Commercial Conciliation, 2002.

As such, this study is therefore, confined to the features and works of the arbitration and conciliation-working group of UNCITRAL, arbitration and conciliation process and the

²⁶ Commonly referred to as the New York Convention, 1958.

working group's role in improving/ strengthening and liberalizing international trade while overcoming a clash of legal cultures.

1.6 SIGNIFICANCE OF THE RESEARCH

Taking into account the laborious exercise the working group is involved in, this research will inform academics, commercial lawyers and the international business community of its work and the effect it has on dispute settlement. The research will also inform the international business community that a reliable and practical way to resolve disputes out of court lies in arbitration and conciliation done under UNCITRAL instruments. This study will also serve to inform legislators that the future of dispute resolution in international trade lies in unifying the legislation picking a leaf from the UNCITRAL model laws and rules. In a nutshell, the mini thesis will be a timely contribution to the field of international trade.

1.7 RESEARCH METHODOLOGY

There is extensive literature on arbitration, conciliation, the working group and UNCITRAL as a whole. A critical analysis of this literature is proposed. It will also at a later stage in the study be necessary to compare the earlier regime of dispute settlement with the present one. The availability of case scenarios from various countries and bodies will provide a basis on which such comparison can be achieved.

It is therefore viewed that a critical examination and analysis of the available case reports, model laws, rules, working group documents and any other literature available on the subject will suffice to give birth to a constructive conclusion of the study. This literature will be accessed from both electronic and hard sources from the library but also the Internet.

1.8 SUMMARY OF CHAPTERS

This research is comprised of five chapters broken down as below:

Chapter one: serves as a general introduction to the study and to;

- UNCITRAL and its objects
- Arbitration
- Conciliation
- Statement of the problem
- Purpose of the study
- Scope
- Methodology
- Significance of the study
- Review of the available literature on UNCITRAL as a body, the working group on international commercial arbitration and conciliation and arbitration and conciliation as remedies that are serving to strengthen and liberalize international trade while overcoming a clash of legal cultures.

Chapter Two: serves to give an overview of various dispute resolution mechanisms with a view of establishing the most appropriate.



Chapter Three: discusses arbitration and conciliation as methods of dispute resolution critically examining UNCITRAL model laws and rules as the main contribution of the working group on international commercial arbitration and conciliation.

Chapter Four: studies arbitral and conciliation awards and their enforcement in light of the arbitration rules, conciliation rules, model law on international commercial arbitration, model law on international commercial conciliation and lastly the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (a United Nations convention adopted in New York prior to the establishment of the Commission, but actively promoted by UNCITRAL). The issues examined include but are not limited to the following:

- What are arbitral and conciliation awards?
- Process of getting them – role of the arbitrator/conciliator
- Are they enforceable?

- If so how?

Chapter Five: Conclusions and Recommendations

1.9 LITERATURE REVIEW

Various views have been expressed relating to UNCITRAL and its working groups. The majority however, relate to its successes. This part of the study examines some of the prominent views that have been expressed in line with its principle function of harmonisation and unification of the international trade legal regime and in particular initiatives relating to arbitration and conciliation as mediums of dispute resolution under the umbrella of the international commercial arbitration and conciliation working group.

A general applaud was given by Pieter Sanders²⁷ when he noted that ‘the arbitration world is greatly indebted to UNCITRAL for all the work it has done on behalf of international commercial arbitration. First of all, the UNCITRAL arbitration rules appeared in 1976. Parties in international contracts frequently refer to these rules and states frequently do so in treaties. Also UNCITRAL’s model law on international commercial arbitration of 1985 was a success. Presently almost 40 states, [while] modernising their arbitration law, have adopted the model law. Several states adopted the model law also for domestic arbitration; Germany did so in 1988. The model law has had a harmonising effect on new arbitration legislations in countries which did not adopt the model law as such e.g. The English Arbitration Act, 1996 ... finally UNCITRAL’s notes on organising arbitral proceedings of 1996 should be mentioned. These notes may be used as a checklist by arbitrators handling international arbitration’. This summation is an acknowledgement of the good deeds of UNCITRAL through the working group on international commercial arbitration and conciliation. Pieter Sanders categorically enumerates the principal successes of UNCITRAL, which according to him include: putting in place rules and model laws, which have in turn been adopted by many countries such as Germany. By so doing, he acknowledges the fact that model laws have also had the harmonising effect on new arbitration laws in countries, which did not adopt the model laws. An example could be drawn from Hong Kong, although this country did

²⁷ Pieter Sanders, ‘UNCITRAL’s model law on conciliation’ (2002) 12 at 1.

not adopt the model law, whenever it's confronted with challenges for instance in courts of law it always reflects and applies the provisions of the model law drafted by the working group in issue.²⁸ So the importance of uniformity is that everybody gets a satisfactory outcome of the proceedings irrespective of nationality because the process is administered under universally accepted norms proposed by UNCITRAL, which is a neutral body.

Earl McLaren²⁹ on the other hand advises that:

When faced with the prospect of either filing a complaint for arbitration or responding to one, refer to the UNCITRAL notes on organising arbitral proceedings which clearly and succinctly outline the essential elements of the arbitral process

This assertion points to the relevance of the work of the working group to the modern day business. As was desired in the formation of UNCITRAL, confidence is being won from all business sectors and authors such as Earl to the extent of advising the use of UNCITRAL documents in any form of arbitration. This has been aided by the fact that the documents in issue are viewed as neutral and unaffected by nationalistic prejudices.

Bobette Wolski³⁰ points out that UNCITRAL recognises that the absence of uniformity and consistency has an adverse impact upon the attractiveness and effectiveness of particular dispute resolution options. Its latest endeavours are aimed at enhancing legal certainty and predictability in the use of conciliation and arbitration and, in the case of conciliation, it was prompted by its increased use in various parts of the world and the

²⁸ Pursuant to the Arbitration (Amendment) (No. 2) Ordinance, 1989. This amendment made far-reaching changes to the Hong Kong Arbitration Law. These legislative changes came as a result of the recommendation of the law reform commission which considered the desirability of adopting the Model law on arbitration in Hong Kong. See: *Fung Sang Trading Co. Ltd v Kai Sun Sea Products & Food Co. Ltd* 1991 MP 2674 at pg 3 of the judgment.

²⁹ Earl McLaren, 'Effective use of international commercial arbitration: primer for in-house counsel' (2002) at 487.

³⁰ Bobette Wolski, 'Recent developments in international commercial dispute resolution: expanding the options' Pg. 19. Available online at: <http://www.bond.edu.au/law/blr/vol13-2/Wolski.doc> accessed on 20th June 2005.

desire to establish ‘internationally harmonised legal solutions designed to facilitate conciliation’.³¹ The Model Laws and Guides address a range of issues ‘where court decisions [have] left the legal situation uncertain or unsatisfactory’,³² including those of enforceability of agreements to conciliate and the enforceability of settlement agreements reached in conciliation.

Furthermore, Fabian Von Schlabrendorff³³ on the attempts to do away with the threat posed by cultural differences observes that ‘it is the strong current of legislative reform which is bringing about an even more uniform legal framework for arbitration in Europe. As there is hardly any reform project not guided by the UNCITRAL model laws, including the newest project to reformulate arbitration law in Austria, most of the issues concerning basic questions such as: arbitrability, interim measures of protection, applicable law, *kompetenz – kompetenz*, awards by consent, powers of state courts to review proceedings and awards, all tend to be regulated in a similar way with the consequence that the choice of the plan of arbitration is becoming less and less a matter of choosing between different legislative rules that apply to arbitration proceedings. From a point of view of a user of arbitral proceedings, it can nowadays be determined that there is no real significant difference whether such proceedings take place in Geneva, Frankfurt, Madrid, Paris or Amsterdam’. With the cited achievement, business stands to become easier to conduct across various borders with minimum fear among businesspersons. This is all accredited to the uniform regime that is being forged by UNCITRAL through the working group. As earlier noted³⁴ this was viewed to be the ulcer eating up international trade, hence, the formation of UNCITRAL to combat it as can be drawn from objectives three and four to wit: *“Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs*

³¹ United Nations Document No. A/CN.9/WG.II/WP.116, Para 8.

³² United Nations Document No. A/CN.9/506, Para 3.

³³ Fabian Von Schlabrendorff, ‘Resolving cultural differences in arbitration proceedings’ (March 2002) at 38.

³⁴ In the problem statement at 1.2 above.

*and practices, in collaboration, where appropriate, with the organizations operating in this field; and to Promote ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade”.*³⁵(Emphasis added)

Jernej Sekolec addressed the same matter³⁶ on the globalisation front saying that ‘... the benefits of globalisation are obvious: faster growth, higher living standards and new opportunities. Yet trade, services and investment can only cross national boundaries when the law crosses them as well. Traders and investors need to have the confidence that their property rights will be respected, that contracts will be fulfilled and that when disputes arise there is some agreed method of settling them. In such a global economy it’s vital to have clear, simple rules that everyone knows and applies’. (Emphasis added) This is the only avenue to successful international trade and so in trying to achieve it there is no doubt that UNCITRAL through the appropriate working group is playing a vital role in the strengthening and liberalisation of international trade while overcoming clashes of legal cultures. He goes ahead to note that ‘UNCITRAL has played and continues to play an essential role to facilitate international trade through modernisation and harmonisation of international commercial law. Some UNCITRAL instruments have become a landmark in the areas governed by them, such as ... UNCITRAL model law on international commercial arbitration (1985)’. Looking at the role that UNCITRAL has played through its appropriate working groups, he rightly points out³⁷ that by harmonising and unifying the law of international commercial contracts, promoting amicable settlement of disputes and removing legal barriers to the commercial use of new technologies, you help enhance legal certainty, reduce trans-national costs and improve the legal environment for international trade and investment. By adopting internationally agreed standards and solutions acceptable to different legal systems, UNCITRAL

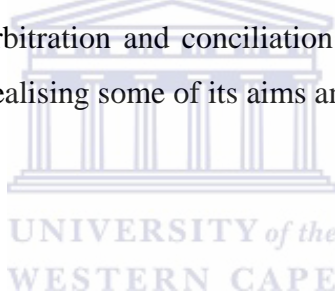
³⁵ See: General Assembly Resolution 2205 (XXI) available online at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf?OpenElement> accessed on 30th October 2005.

³⁶ Hans Correll: 2000 at 1.

³⁷ Hans Correll op cit 2.

increases transparency and predictability in international trade and eases the way for the integration of domestic markets in the global economy.

Indeed, as expressed by the Secretary General of the UN³⁸ “... open markets offer the only realistic hope of pulling billions of people in developing countries out of abject poverty, while sustaining prosperity in the industrialised world”. But as correctly observed by Hans Correll³⁹ markets cannot be truly open if the law creates barriers between them. Trade cannot thrive in an environment of legal uncertainty and disparity. Costs will remain high as long as no accessible means of dispute settlement are available. He applauds the commission and working group acknowledging that even in the narrow confines of its mandate it has made a remarkable contribution to overcome these obstacles. This speech is a valuable piece of literature that clearly points out the achievements that stand to sprout out of the works of UNCITRAL and the working group on international commercial arbitration and conciliation to both international trade and the UN as the parent body, in realising some of its aims and objectives.



³⁸ In an article published in the international herald tribune on the 26th July 2000.

³⁹ Hans Correl: 2000 loc cit.

CHAPTER TWO

2.0 An overview of dispute resolution mechanisms

2.1 Introduction

A dispute was defined in the *Mavromattis case*⁴⁰ as ‘a disagreement on a point of law or fact, a conflict of legal views or interests between two persons’. More specifically however, J.G Merrills holds the view that:

A dispute may be defined as a specific disagreement on a specific matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counterclaim or denial by another. In the broadest sense, an international dispute can be said to exist wherever such a disagreement involves governments, institutions, juristic persons (corporations) or private individuals in different parts of the world.⁴¹ (*Emphasis added*)

The existence of situations such as the above described in international trade has given rise to various modes of dispute resolution. This is because of the development of international competition and communication, which has made the world a global market place.⁴² Advancements in technology, transportation and communication have made international business the “most significant, ever-growing and predominate aspect of the modern world”.⁴³ Moreover, as states are becoming more interdependent, the number of international disputes is growing.⁴⁴ As rightly observed,⁴⁵ in this modern era of global competitiveness, international business must address new challenges, as well as rapid and

⁴⁰ *Mavromattis Palestine Concessions (Greece v. U.K)* 1924 P.C.I.J ser. A no.2 at 11 (judgment of august 13).

⁴¹ Quoted in Mary Ellen O’Connell, ‘International dispute settlement’ 3 (2003) at Pg.3.

⁴² Abbass Alkafazi, ‘What a small world after all’, in 1 international research in business disciplines—the dilemma of globalization: emerging strategic concerns in international business 5, 6 (*Carl. L. Swanson ed., 1993*).

⁴³ Abbass Alkafazi op cit 7.

⁴⁴ President Jimmy Carter, Jackson H Ralston Lecture: Principles of negotiation (1987) 23 *Stan. J int’l L* 2.

⁴⁵ Terence Brake et al, “Doing business internationally: The guide to cross cultural success”, (1995) at 2 – 25 (*discussing these issues and their effect on the global market place*).

complex changes. This is because as the businesspersons seek to shelve the dependence notion, which has let the former domestic problems, evolve into international ones,⁴⁶ a culture of interdependence has evolved consequently resulting in multi cultural communications, negotiations and other dispute resolution processes becoming an important part of day – to – day business relationships.⁴⁷

The growth of international trade has also led to an increase in disputes. In this light, various dispute resolution mechanisms have been put in place. However, each of the mechanisms has its own merits and weaknesses, which leaves the onus on the parties to weigh and choose the best mechanism. The onus on the parties allows them the chances to maximise an optimal strategy and achieve their goals in a cost effective manner.⁴⁸ It is crucial however; that the parties agree on the dispute resolution mechanism before the actual dispute has arisen. The rationale here is that before disputes arise the parties still have a clear mind towards the contract to which they attend with a lot of enthusiasm. The mechanism chosen will depend on various factors, including the identity and nationality of parties, nature of agreement they have entered into, and the type of disputes likely to arise there from. The options for the parties often include litigation in courts of a specified state, diplomacy with embassy officials (if the parties are states), expert determination, mediation or conciliation, mini trial, arbitration or some other process tailored to the prevailing circumstances.⁴⁹

This chapter, therefore, serves to give an overview of the options that will be available to an aggrieved businessperson in the international commercial domain. The resolution mechanisms are briefly discussed below with the aim of identifying the most suitable to the growing international commerce.

⁴⁶ Terence, loc cit.

⁴⁷ Bernard A Ramundo, 'Power and Law in international negotiation: The negotiators perspective', 17 *Willamette L. Rev.* 83, 84 (1980).

⁴⁸ <http://www.crowell.com/content/Expertise/InternationalArbitration/DisputeResolutionMechanisms/DisputeResolution.htm> accessed on 02nd July 2005.

⁴⁹ Singapore Government, 'Resolving business disputes', available online at: <http://www.business.gov.sg/manage/disp-index.htm> accessed on 03rd November 2005.

2.2 Mini-Trial

This is a relatively a new device for the resolution of disputes. Sometimes it is also called as "exchange of information"⁵⁰ or senior executive appraisal.⁵¹ It has nothing to do with a criminal or any other trial. This procedure is only named as a mini-trial. In fact, in this process, no adjudication process takes place.⁵² Various national and international institutions engaged in ADR have taken to using it for resolution of commercial disputes. The institutions such as the AAA have proceeded to design procedures for "mini-trials".⁵³ The parties to a dispute can select and adopt any such institution and its rules for the resolution of their dispute through mini-trial. Either party to the dispute can commence the process of mini-trial.⁵⁴ When one party invites the other party for mini-trial by sending a written invitation identifying the subject of dispute, the process of mini-trial is said to have been initiated. When the other party accepts the invitation in writing, the mini-trial proceedings are deemed to have commenced.⁵⁵ If the other party rejects the invitation, then there is no mini-trial proceeding. This process is time bound and the gist of it all is to advise the parties on the strengths and weaknesses of their respective cases. This advice is usually based on the presentations made by them of their respective cases to the neutral advisor.⁵⁶ The said neutral advisor may or may not be an expert in the subject of dispute.⁵⁷ The said advisor is at liberty to consult experts, if any, proposed to be produced by the parties. The important point with this mechanism is that it is aimed at

⁵⁰ Vinod K. Agarwal, 'Alternative Dispute Resolution Methods' (2001) at 3.

⁵¹ C Mark Baker & Arif Hyder Ali, 'Alternative international dispute resolution: A cross comparison of international mediation rules', (2001) at pg. 8. Unpublished paper presented at the ICC/AAA/ICSID joint colloquium in Paris on November 16, 2001.

⁵² Ibid.

⁵³ The procedures are available for the use of any business organization or government agency. See: <http://www.adr.org/sp.asp?id=22007> accessed on 03rd Nov. 2005.

⁵⁴ AAA Mini Trial Procedures. See: <http://www.adr.org/sp.asp?id=22007> accessed on 03rd Nov. 2005.

⁵⁵ Ibid.

⁵⁶ See: 'ADR World Observer', available on line at: http://www.aryme.com/aryme/eng/metodos_adr/mini_juicio.asp accessed on 01st November 2005.

⁵⁷ C. Mark Baker, 'ADR: Choosing the best process', (2000) at 7. [Herein referred to as: M Baker 2000].

facilitating the parties to gain insight in their cases with the expectation of entering a mutual discussion, which could result into a settlement.⁵⁸

The process of a mini trial as presented seems good but it typically requires a significant commitment of time by senior company executives and considerable planning and coordination.⁵⁹ It also suffers a weakness of being used as a fishing expedition for canny lawyers.⁶⁰ Another problem associated to this mechanism is that it is not decisive as it is largely dependent on the parties' cooperation.⁶¹ This cooperation is often not availed by the aggrieved party who thinks he has a stronger case. Further, there is no set procedure of enforcement of the results of the mutual negotiations in case a party defaults on his obligation.

2.3 Negotiation

This is a process whereby interested parties resolve disputes;⁶² agree upon courses of action, bargain for individual or collective advantage, and/or attempt to craft outcomes, which serve their mutual interests.⁶³ It is usually regarded as a form of alternative dispute resolution.⁶⁴ The parties exchange views and proposals personally or in writing or both, whether represented or not in an attempt to reach an agreement by way of compromise.⁶⁵

⁵⁸ AAA Mini Trial Procedures loc cit. See also: C Mark Baker & Arif Hyder Ali op cit 9.

⁵⁹ Baker & Arif loc cit.

⁶⁰ *ibid.*

⁶¹ Mini Trial Procedures, *supra*.

⁶² Singapore Government, loc cit.

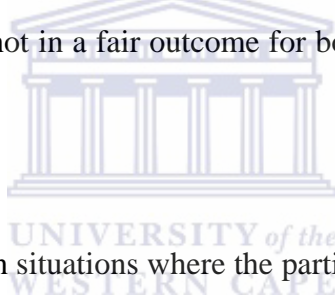
⁶³ It has also been described as a process of discussion and give-and-take between two or more bargainers/disputants who seek to find a solution to a common problem. See: Federal Energy Regulatory Commission, 'ADR Unassisted' available on line at: <http://www.ferc.gov/legal/adr/continuum/un-neg.asp> accessed on 01st November 2005.

⁶⁴ See: Wikipedia, the free encyclopedia. Available on line at: <http://en.wikipedia.org/wiki/negotiation>. accessed on 28th August 2005.

⁶⁵ C. Mark Baker, 'ADR: Choosing the best process,' (2000) at 3.

This definition shows that negotiation is part of every day life, from parenting to bargaining in a market place or ultimately in a courtroom. In this process the negotiator attempts to determine the minimum outcome(s) the other party is (or parties are) willing to accept, then adjusts her demands accordingly. A "successful" negotiation in the advocacy approach is when the negotiator is able to obtain all or most of the outcomes his party desires, but without driving the other party to permanently break off negotiations.⁶⁶

Negotiation is also associated with a number of weaknesses, which cause a problem for an aggrieved businessperson who is seeking resolution of his grievance such as; inequity of bargaining power. This inequity is always prevalent when one party thinks or is under the illusion that he has a stronger case. Such a party will make wild demands or ultimately frustrate the negotiation until the one with a weaker case concedes to the terms put to him whether they favour him or not. More often where one of the parties is a big corporate entity, their heart is not in a fair outcome for both parties but to do anything to save their corporate image.



2.4 Diplomacy

This mechanism is most used in situations where the parties to a dispute are states mainly through embassies or foreign missions. States tend to prefer this method to resolve their disputes not because it's commercially viable but because it enables them save face and reconstruct their political ties with the other state. In the business context, this mechanism is less appropriate when the parties to a dispute are persons or corporate entities because they do not have access to the foreign missions and thus, cannot rely on this procedure.

2.5 Litigation

This mechanism involves parties bringing a civil action before a court in which the party commencing the action, the plaintiff seeks a legal remedy. If the plaintiff is successful, judgment will be entered in his favour and various orders may result. It may also involve dispute resolution of private law issues between individuals, business entities or non-profit organizations. However, it may involve public law issues in those jurisdictions that

⁶⁶ Mark Baker, 'A better way to resolve legal disputes', *Houston Law Review* VI at 78.

enable the government to be treated as if it were a private party in a lawsuit (as plaintiff or defendant regarding to an injury), or that provide the government with a civil cause of action to enforce certain laws rather than criminal prosecution. Litigation may seem the viable course of action for an aggrieved party but it also has its shortcomings.

Seeking of redress in a court of law is effective but has been viewed to be very costly both in terms of time and finances.⁶⁷ The progress of a lawsuit is often constrained by the differing procedural rules that exist in various jurisdictions where the cause of action might have arisen or where one of the parties chooses to seek redress.⁶⁸ The details of procedure will differ from jurisdiction to jurisdiction, and often from court to court within the same jurisdiction. The rules are very important for litigants to know, however, because they dictate the timing and progression of the lawsuit--what may be filed and when to get what result. Failure to comply with the procedural rules can result in serious limitations in conducting the trial or even dismissal of the lawsuit.

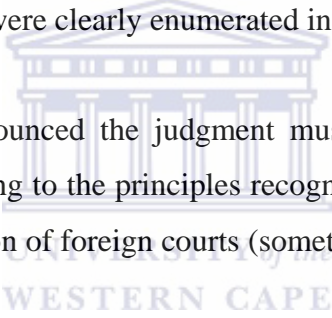
Another problem associated with litigation is the differing cultures in various countries such as language to be used in court. If one were to litigate or to answer to a civil suit filed in France then he would need to know French or acquire representatives who can speak the language. This is burdensome on business persons who will have for example to file a defence in a French court and subsequently affect the outcome of the case. On the other hand if one was to hire French lawyers it would also be very costly in terms of hiring an interpreter.

Litigation ends in judgment being issued. However, the way foreign judgments are treated differs from jurisdiction to jurisdiction. This problem goes to the core of dispute resolution because if a judgment is not fulfilled then the other party has to find a way of enforcing it for example by seizure of property. There might be rules to aid enforcement of foreign judgments but with very stringent measures to be complied with which discourages business persons. For instance, if all assets are located elsewhere, the plaintiff must file another suit in the appropriate court to seek enforcement of the other

⁶⁷ M. Baker 2000 at 77.

⁶⁸ Ibid.

court's previous judgment. An example of the trouble that brews in enforcing foreign judgments can be drawn from South Africa where the Enforcement of Foreign Civil Judgments Act, 32 of 1988 governs the enforcement of foreign civil judgments. This Act in section 2 (1) allows its application to judgments given in any country outside the Republic, which the minister has designated, by notice in the gazette. The only countries designated as required are the so-called TCVB states, which include Transkei, Ciskei, Venda and Bophuthatswana. To these states there is the addition of Namibia. These states (TCVB) are former homelands, which no longer exist because of their inclusion in the modern day Republic of South Africa. The effect being that it would be very difficult to enforce a foreign judgment from any other country other than these non-existent homelands. It, indeed, begs the question of what happens in case of judgments originating from other countries. The considerations taken into account by a South African court faced with a foreign judgment were clearly enumerated in *Jones v. Krok*⁶⁹ by Corbett CJ:

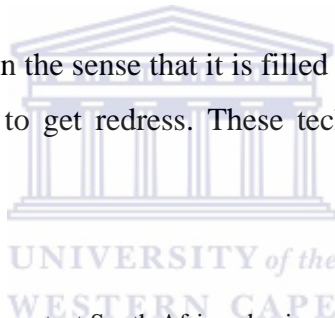
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- i. That the court that pronounced the judgment must have had the jurisdiction to entertain the case according to the principles recognised by South African law with reference to the jurisdiction of foreign courts (sometimes referred to as international competence);
 - ii. The judgment must be final and conclusive in its effect and has not become superannuated;
 - iii. That such enforcement should not be contrary to public policy;⁷⁰
 - iv. The judgment must not have been obtained by fraudulent means;
 - v. The judgment should not involve enforcement of a penal or revenue law of a foreign state;
 - vi. Lastly, enforcement of the judgment must not be precluded by the provisions of the Protection of Businesses Act 99 of 1978 as amended.

⁶⁹ 1995 (1) SA 677 (A) at 685B-E.

⁷⁰ See: *Eden v. Pienaar* 2001 (1) SA 158 (w). An example of something contrary to public policy in SA is the granting of punitive damages. This though has been interpreted to be dependent on the facts of the case. See: *Jones v. Krok* 1996 (1) SA 504 (T).

As seen above, the set conditions are reasonable save for the requirement of not being precluded by the Protection of Business Act (PBA).⁷¹ This provision causes a problem, which can only be circumvented with the minister's consent if the judgment results from a transaction connected to mining, production, importation, exportation, refinement, possession, use or sale of ownership of "any matter or material" into or from the Republic.⁷² This requirement has proved to be so cumbersome because it virtually includes everything a businessperson can engage into.⁷³ The fate of any businessperson here is put into the hands of the minister of economic affairs. Without any set requirements for such approval, great uncertainty looms as regards the minister's consent, which is not good for business. This can be a difficult task when crossing from a court in one state or nation to another, though courts tend to grant each other respect when there is not a clear legal rule to the contrary.⁷⁴

Litigation is also cumbersome in the sense that it is filled with technicalities which can be used to stifle a party's quest to get redress. These technicalities range from filing of



⁷¹ This Act was originally designed to protect South African businesses mostly from the exorbitant punitive damages that are characteristic of U.S. courts. It was also to control the enforcement of some judgments that were given as a secret punishment for apartheid.

⁷² Section 1 (1) PBA provides that, except with the permission of the minister, no judgment, order or arbitration award delivered, given, issued or emanating from outside the Republic and arising from any act or transaction contemplated in subsection (3) shall be enforced in the Republic.

⁷³ See: *Chinatex Oriental co. v. Erskine* 1998 (4) SA 1087 (c) and *Tradex Ocean Transportation SA v. MV Silvergate (or Astyanax) and others* 1994 (4) SA 119 (D) where the expression "any matter or material" was in issue with the latter case settling for the position that it means raw materials.

⁷⁴ This is what Mr Justice Gray while delivering an opinion in *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.ED. (1895) has described as 'Comity,' and gone ahead to explain it in the legal sense, as neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other but as the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws. He goes on to allude that '[e] very nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded.' Quoting Chief Justice Taney he went on to point out that: '[t] he comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests.' See: <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=159&invol=113> accessed on 02nd November 2005.

pleadings to the evidentiary rules which are filled with rigidity.⁷⁵ The result of such technicalities is that either the case is thrown out prematurely or it drags on for a very long time at the expense of the client. Actually most business litigants tend to abandon the proceedings because of the financial damage they have on their businesses.⁷⁶

2.7 Conciliation

Conciliation is being increasingly used in dispute settlement in various parts of the world, including regions where until a decade or two decades [ago] it was not commonly used. In addition, conciliation is becoming a dispute resolution option preferred and promoted by courts and government agencies, as well as the community and commercial spheres.⁷⁷

In pursuit of the above trend, various regions of the world have actively promoted conciliation as a method of dispute resolution by for example; establishing if not making the conditions favourable for the establishment of public and private bodies offering such services to the interested parties designed to foster the amicable settlement of disputes such as the American Arbitration Association (AAA) in the US, the Centre for Alternative Dispute Resolution (CADR) in Uganda and the Commission for Conciliation, Mediation and Arbitration in South Africa (CCMA).

⁷⁵ M Baker, op cit 77 - 78 referring to litigation in the United States opines that extensive discovery, authorised by both state and federal statutes, is incredibly intrusive by the legal standards of other countries ... Of course, there are numerous procedural safeguards and appellate protection for United States litigants. He goes on to say that 'without question, fair and reasonable decisions are rendered everyday by generalist juries and judges. However, the failure to agree to some type of contractual dispute resolution process means that the future of a company's investment, as well as potentially the company itself, is ultimately in the hands of individuals who have no substantial expertise in the area of the dispute.

⁷⁶ It has been argued that litigation is the most expensive, very time consuming, wasting vital business energy which can be better used elsewhere. See: K. G Mujawdiya, 'Best way to resolve business disputes: An opportunity for chartered accountants in practice', (2002) *The Chartered Accountant at 173* see: <http://www.icai.org/pdf/p173-175.pdf> accessed on 03rd Nov. 2005.

⁷⁷ Guide to enactment and use of the UNCITRAL model law on international commercial conciliation, 2002 Para 8.

Conciliation, which is sometimes referred to as “mediation”,⁷⁸ is a voluntary, non-binding; confidential and flexible dispute resolution procedure in which a neutral intermediary works with the parties to reach a mutually satisfactory settlement of a dispute.⁷⁹ As Mauro Rubino – Sammartano rightly observed⁸⁰ an institution that is not far from arbitration but certainly quite different from it in law, is conciliation. Indeed, conciliation is often confused with amicable settlements reached before arbitrators in the course of proceedings, which would otherwise be terminated with an award binding upon the parties. This is wrong because conciliation is no part of arbitration proceedings.⁸¹ The essential feature of this process is that it is founded on a request by the parties addressed to the third party.⁸² Important to note at this stage is the fact that the appointed third party assists the parties in negotiating a settlement that is designed to meet their interests and needs.⁸³ Significant to the conciliation process is the fact that the conciliator is not expected to determine the rights of the parties; he is supposed to help or guide the parties to amicable settlement of their differences. This duty is only stretched as far as making proposals, which the parties are at liberty to either accept or reject.⁸⁴ This third party should preferably be one who is in the same business as the parties or from the same

⁷⁸ The difference between ‘mediation’ and ‘conciliation’ if any does not appear meaningful, especially if proceedings are confidential. The difference in most countries such as Canada is meaningless. So argues Eric Van Ginkel in *The UNCITRAL model law in international commercial conciliation: A critical Appraisal*. This view is also backed up by C.W Moore, *The mediation process*’ 2nd edition 1996 at 161 in which he defines conciliation as a psychological component of mediation in which a third party attempts to create an atmosphere of trust and cooperation that promotes positive relationship and is conducive to negotiations. See also: Vinod K. Agarwal, ‘Alternative Dispute Resolution Methods’, available online at: http://www.unitar.org/dfm/Resource_Center/Document_Series/Document14/Agarwal/4conciliation.htm. Accessed on 28th August 2005.

⁷⁹ Baker and Arif, op cit 5ff.

⁸⁰ Mauro Rubino – Sammartano, ‘International Arbitration Law,’ 1990 at Pg. 3.

⁸¹ Frederic Eiseman, ‘Conciliation as a means of settlement of international business disputes: Uncitral rules compared with the ICC system’ at 122.

⁸² See: guide to the enactment and use of the Uncitral model law on international commercial conciliation (2002) at pg 10.

⁸³ See: A/CN.9/WG.11/WP.108, Para 11.

⁸⁴ Frederic Eisemann, loc cit; See also: C. Mark Baker, ‘Alternative Dispute Resolution: choosing the best process’ *A paper presented at the arbitration and mediation conference, May 11 – 12, Austin, Texas.* (Unpublished). See also: A/CN.9/WG 11/WP.108, Para. 11.

background and therefore, armed with an independent familiarity with each party's individual situation.

This mechanism has a number of advantages accredited to it such as; the proceedings being confidential which helps in keeping trade secrets from the public domain,⁸⁵ it is also less formal with the parties having a say in the procedure and its conduct since the principle of party autonomy is stressed in its conduct.⁸⁶ Conciliation is also less adversarial since the parties submit to it voluntarily but and resulting agreement is not enforceable unless it is reduced in writing and the parties assent thereto.

Another advantage also rests in the fact that the third party chosen to help solve the dispute does not have the authority to bind the parties.⁸⁷ This allows the parties to reach their own decisions. In most cases they come out with business driven solutions hence, fashioning a 'win – win' resolution reflecting business objectives and priorities,⁸⁸ which may not be available from a court or arbitral tribunal where the decision will be based on more technical and narrow issues. It is important to note that since conciliation is a non-adjudicative alternative dispute resolution mechanism parties can walk out without facing any serious consequences as opposed to arbitration. In a strict sense, the parties always remain in control of the process: the commencement of the process depends on their agreement to use it, its continuation, on their continuing acceptance and participation.

Be that as it may, conciliation's big disadvantage lies in the fact that, unless the parties sign a settlement agreement it is not binding on them. Yet without a signed settlement agreement there is no precedent created to dissuade against such or similar future conduct. Indeed, conciliation as a form of dispute resolution becomes disadvantageous

⁸⁵ Baker & Arif, op cit 2; Confidentiality of the process is discussed in detail in chapter three of this work.

⁸⁶ Parties retain full control of the outcome of the process. See: Mujawdiya op cit 175; Baker & Arif, op cit 3.

⁸⁷ K. G Mujawdiya, op cit 174.

⁸⁸ Ibid.

where a party is convinced he has a clear cut case, or where the objective of the parties or one of them is to obtain a neutral opinion on a question of genuine difference, to establish a precedent or to be vindicated publicly.

There is also a lot of uncertainty surrounding the enforcement of settlement agreements. In some jurisdictions these settlements are treated as arbitral awards which makes their enforcement possible under the New York convention.⁸⁹ In other jurisdictions however, the impasse of their enforcement has not been settled which leaves their recognition and enforcement at the mercy of the courts of law.⁹⁰

2.8 Arbitration

Arbitration has been defined as a form of dispute resolution in which parties agree to submit their dispute to someone or a panel of persons who will apply the same laws as would be applied by the courts.⁹¹ The major difference between this form of dispute resolution and conciliation is that arbitration has its roots in an arbitration clause or agreement, which, once entered into, binds the parties. The arbitrators derive their competence from this clause or agreement which is enforceable in a court of law.⁹² Arbitration tribunals exercise judicial functions but enjoy no sovereign state power.⁹³

The most prominent advantage that arbitration has over all other dispute resolution mechanisms is the ease with which arbitral awards can be enforced compared to foreign

⁸⁹ This matter will be considered at length in chapter four of this work, which mainly deals with recognition and enforcement of foreign arbitral awards.

⁹⁰ It has been argued that the settlement agreement is a contract and an action for breach of contract may be brought if it's not performed on either side. See: Baker & Arif, op cit 29. See also: Mark Baker, 'The corporate representative and ADR', *International Commercial Litigation*, (1997) at 37.

⁹¹ See: Hercules Booyens, 'International transactions and the international law of the merchant' (1995) at 367. See also: Richard Hill, 'Primer on international arbitration' 1995 available on line at <http://www.batnet.com/oikoumene/arbprim.html> accessed on 11th July 2005. See also Article 2(a) of the UNCITRAL model law on international commercial arbitration.

⁹² See: Article II (3) of the New York Convention which requires all member states to respect and enforce arbitration agreements as long as they are in writing.

⁹³ David, 'Arbitration in international trade,' Deventer (1985) at 5.

judgments.⁹⁴ This is all aided by the New York Convention,⁹⁵ which will be discussed later in chapter four of this work. The main factor being that very few grounds are permitted under which an arbitral award can be challenged.⁹⁶

The second advantage lies in the predictability factor. On the one hand, disputes are foreseeable and thus some problems such as forum for the hearing of the dispute are dealt with before the parties turn adversarial against one another. While on the other hand, as Arif Hyder Ali⁹⁷ notes, arbitration has sometimes been criticised for its ‘*solomonic*’ nature of arbitral awards. In ADR procedures, such as mediation, by contrast the outcome is based on the extent of the parties’ willingness to compromise, rather than being imposed on them. The final settlement, as a reflection of each party’s respective business interests and a consensus reached, thus has a much more predictable quality.

The other advantage is that parties competent in the field where the dispute might have arisen render the awards unlike judgments.⁹⁸ This is because even where the arbitrator is a legal expert and does not have knowledge of the subject matter he is permitted to consult an expert. In the use of arbitration the parties are at liberty to choose who to hear their dispute. They may also impose the credentials the arbitrator should possess. For example issues surrounding an information and communication technological dispute may involve technological and technical issues that are hard for a layperson to visualise and comprehend. But even if an initial understanding exists, lack of experience in the subject matter may result in the decision maker failing to fully appreciate all the technical

⁹⁴ Arif, *infra* 23.

⁹⁵ The New York Convention is also helped by the principle of “comity” which generally provides that courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect.

⁹⁶ See: Article V of the New York Convention.

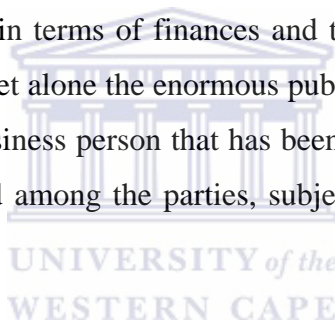
⁹⁷ Arif Hyder Ali, ‘Information Technology Disputes – arbitration and mediation as alternatives to court litigation’, *A paper presented at the arbitration and mediation conference, May 11 – 12, Austin, Texas*. (Unpublished) Pg. 12.

⁹⁸ This is important because under most Arbitral Rules the arbitrators must take into account usages of trade. See: John P Bowman, ‘*International commercial arbitration: Advantages and Disadvantages*’, (April, 2003) at 1.

issues or to consider all of the consequences of a particular determination.⁹⁹ With such a looming dilemma arbitration becomes advantageous because the parties have the option of having an expert decision maker knowledgeable about the business, technical and legal issues that may be involved in the dispute, which can lead only to saving both time and money.¹⁰⁰

The element of finality of the arbitral award is also advantageous.¹⁰¹ The award being final and binding however, must originate from a clause included in the arbitration agreement. This safeguards against dilatory conduct by a party who does not want the award enforced since the only option he has is to apply for the award to be set aside, but still, there are very stringent conditions to be satisfied.¹⁰²

Arbitration is less costly both in terms of finances and time that would be expended in fighting a lengthy court battle let alone the enormous public relations expense to have the reputation of a company or business person that has been dragged through mud restored. Financial costs here are shared among the parties, subject however, to an agreement to the contrary.¹⁰³



Confidentiality as will later be discussed is one of the strongest points of arbitration and certainly all other alternative dispute resolution mechanisms for that matter.¹⁰⁴ This

⁹⁹ Arif, op cit 11.

¹⁰⁰ Ibid.

¹⁰¹ Mujawdiya op cit 174.

¹⁰² Article 36(1) of the Model Law on Arbitration; Article V of the New York Convention.

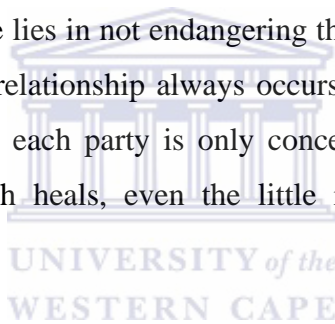
¹⁰³ Although one has to pay the arbitrators and the arbitral institution, the legal fees will ultimately be lower because of the more concentrated, shorter proceeding, the foreign party does not need to instruct local counsel and the shorter the proceeding, the less time spent by management, an important cost factor. See: Robert Briner, 'philosophy and objectives of the convention', *paper presented on the New York Convention day on the 10th June 1998 at the trusteeship council chamber of the United Nations to celebrate the 40th anniversary of the Convention on the recognition and enforcement of arbitral awards compiled under the theme enforcing arbitral awards under the New York Convention: experience and prospects Pg. 15.*

¹⁰⁴ Arif, op cit 10.

serves to protect businesspersons from having their trade secrets splashed in public through a lengthy court trial which may attract extensive media frenzy. Actually even where an award is rendered against one of the parties the outcome of it remains a secret and thus not affecting the running or reputation of his business.¹⁰⁵

The flexibility aspect also causes a great advantage to both parties since they have a big say in the way the proceedings are conducted.¹⁰⁶ This enhances party control and autonomy as opposed to for example national courts, which are strictly bound by national rules of procedure. The parties and their lawyers are availed with the opportunity to tailor their chosen procedure to suit their needs and preferences such as, what language will be used in the proceedings and evidentiary aspects as well.

Last but not least, an advantage lies in not endangering the business relationship between both parties. A rupture of the relationship always occurs when parties have a go at one another in courts of law since each party is only concerned with winning the case as opposed to conciliation, which heals, even the little rift that may have caused the dispute.¹⁰⁷



A disadvantage lies where arbitration is final and binding it may be viewed as curtailing justice since in most matters parties would like to exercise their right to appeal to seek different and various opinions.¹⁰⁸ Parties may view signing an arbitration agreement containing such a provision or clause as a waiver of their constitutionally guaranteed rights which will have them thinking twice before committing to arbitration as a mode of dispute resolution. Further, since enforcement of arbitral awards can only be refused on

¹⁰⁵ Arif supra, acknowledging that a public dispute may have severe consequences for future funding and other business and marketing activities argues that ADR, in its sense, allows for privacy to resolve a dispute, avoid public record and judgment, and minimise the potential impact on the future disputes.

¹⁰⁶ This is mainly in designing the procedures to be followed. The parties has a chance to fashion procedures that are not “hyper – technical” and thus with few procedural traps. See: Bowman loc cit; see also Arif op cit 12.

¹⁰⁷ Mujawdiya, op cit 173.

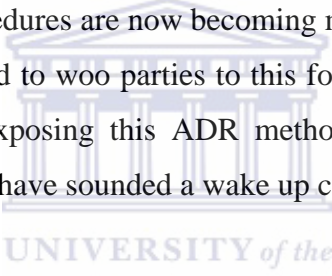
¹⁰⁸ Bowman, op cit 4; Arif, op cit 15.

very narrow grounds that do not include errors of fact or law parties may be scared away from this form of alternative dispute resolution.¹⁰⁹

In the absence of a really broad arbitration agreement or clause this ADR mechanism may be a source of further litigation – [which parties originally sought to avoid] – at the enforcement stage with disputes arising over scope of the agreement to arbitrate, subject of the agreement and interpretation of the agreement.¹¹⁰ Courts may also be called into action where a party ignores the agreement to arbitrate and files a lawsuit. The other party will be forced to go through with a lengthy procedure of applying to compel arbitration before he can get justice, which in effect increases costs that the parties sought to reduce.

Finally, another fact that stands to dissuade parties from using arbitration to resolve their disputes is that arbitration procedures are now becoming more legalised which is in effect killing the flexibility that served to woo parties to this form of ADR. This is mainly fast growing in the U.S, hence, exposing this ADR method to the risk of its demise.¹¹¹

Scholars who have argued thus have sounded a wake up call:



International commercial arbitration has traditionally been ‘less formal, less legalistic, faster and more final than judicial proceedings’.¹¹² It has also been less expensive than litigation in national courts.¹¹³ With the arrival of American law firms, arbitration has turned into a sort of ‘off – shore litigation’¹¹⁴ ... discovery, depositions, challenge of arbitrators, simultaneous legal proceedings

¹⁰⁹ Ibid.

¹¹⁰ John P Bowman, ‘Dispute resolution with host governments: What the international petroleum negotiator should know’, (2000) at 12.

¹¹¹ Elena V. Helmer, ‘International commercial arbitration: Americanized, civilized or harmonized?’ *Ohio Journal on Dispute settlement*, (2003) at 35.

¹¹² Rau and Sherman, ‘Tradition and innovation in international arbitration procedure’, *30 Tex. Int’l L. J* 89 at 91.

¹¹³ Hans Smit, ‘The future of international commercial arbitration: A single transnational institution?’ *25 Colum. J. Tran Nat’l L.* 9, 9 (1986) at Pg. 11.

¹¹⁴ Yves Dezalay and Bryant G. Garth, ‘Dealing in virtue: international commercial arbitration and the construction of a transnational legal order’ (1996) at Pg. 53.

in various fora and tactical manoeuvres have become common place in international arbitration and a source of concern for European arbitrators and practitioners.¹¹⁵ International arbitration is therefore exposed to loose its well-known or alleged flexibility and its traditional peaceful conciliatory character.¹¹⁶

This summation highlights almost all the challenges that are coming up against the modern day arbitration and therefore when a party is considering an appropriate dispute resolution mechanism he should have this in mind most especially when adopting the governing procedure.

2.9 Conclusion

In consideration of all the above resolution methods, one finds that almost all of them are flawed. This therefore, calls for weighing the deficiencies and advantages that lie in the use of any procedure to resolve a dispute. It is however submitted that the above overview highlights conciliation and arbitration as the more appropriate methods when resolving international trade disputes. The justification of this opinion lies in the predictability, party autonomy to the proceedings and above all the strict adherence to confidentiality.

¹¹⁵ See: Pierre Lalive, 'Some observations in the internationalization of international arbitration: the LCIA centenary conference' 52 (Martin Hunter et al. eds, 1993) while criticizing the "lack of international and comparative out look of too many practitioners who merely transpose into international arbitration proceedings their traditional national recipes and the 'aggressive' tactics they use in their courts".

¹¹⁶ Lalive, op cit 54.

CHAPTER THREE

3.0 International Commercial Arbitration and Conciliation under the UNCITRAL Instruments

3.1 Introduction

Generally, a contract will be governed by the law of the host country. This is not always as bad as it may first appear. The law of most countries is grounded on the equitable notions of commercial justice. It is not always necessarily unfair; it is the interpretation or application of the law that is often unfair.¹¹⁷

The above summation gives a compelling reason for alternative dispute resolution over litigation. It also makes a case of ADR under UNCITRAL instruments because they are neutral and free from all national prejudices. On coming to terms with a world governed by rules, most nations have moved away from settling disputes by force in favour of adjudicative and non-adjudicative forms of dispute resolution.¹¹⁸ Indeed, many nations are disenchanted with litigation in particular because of its adversarial nature and the significant problems surrounding the recognition and enforcement of litigated judgments.¹¹⁹ Many nations mistrust the supposed neutrality of foreign legal systems and have as a result chosen and favoured ADR processes such as arbitration and conciliation for resolving their disputes.¹²⁰

Rising to this challenge UNCITRAL has, through the working group, decided to address the legislative branch of alternative dispute resolution by unifying the laws relating to arbitration and conciliation. The working group has done enormous work in improving arbitration and conciliation as methods that could be resorted to in case of international

¹¹⁷ Andrew B Derman, 'A primer on oil and gas host government contracts', *46 OIL & GAS LAW & TAX*, 7.06[5] (1995).

¹¹⁸ Thomas Pricen, 'Intermediaries in international conflicts' 3 (1992).

¹¹⁹ See Chapter Two above.

¹²⁰ See generally Abraham Ribicoff, 'Alternatives to litigation: The application to international disputes', (1983) at 3, See also: H Camp, Jr, 'Binding Arbitration: A preferred alternative for resolving commercial disputes between Mexican and U.S businessmen, (1991)22 at 724

commercial disputes. Its main role has been to unify the legislation and provide guidance on the use of these legislations in international alternative dispute resolution. To achieve this end, it has drafted and enacted the model laws¹²¹ on arbitration¹²² and conciliation¹²³ (which are to serve as guidelines to countries that seek to identify with the international trend), the rules for both arbitration¹²⁴ and conciliation¹²⁵ (which are supposed to be used by parties who choose upon them for either ad hoc or institutional proceedings). It has also gone further to issue guides on the conduct of the processes in issue.¹²⁶ All the above

¹²¹ These differ from conventions in the sense that they are only recommendations to states which are available for their adoption into their national laws. States entirely possess the discretion whether and to what extent they will adopt a given model law. The degree of harmonisation is lower than that normally achieved by a convention, but its advantage is that it gives states greater flexibility in adapting their national laws. See: Hanold, 'Uniform laws for international sales under the 1980 United Nations Convention', Deventer (1987) 5ff. See also: Booyesen loc cit.

¹²² UNCITRAL Model Law on International Commercial Arbitration, [Herein after referred to as: Model Law on International Commercial Arbitration], adopted by the Commission at the 112th plenary meeting under Resolution 42/72 on 11th December 1985. *The Resolution is available online at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/477/79/IMG/NR047779.pdf?OpenElement> accessed on 30th October 2005.*

¹²³ UNCITRAL Model Law on International Commercial Conciliation, [Herein after referred to as: Model Law on International Commercial Conciliation], adopted by the Commission on 24 June 2002 at its 35th Session in New York, and was published as Annex I to the Report of the UNCITRAL on its 35th session, Official Records of the General Assembly (A/57/17).
See: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html accessed on 30th October 2005.

¹²⁴ UNCITRAL Arbitration Rules, [Herein after referred to as Arbitration Rules] adopted by the Commission at the 99th plenary meeting on 15th December 1976 under Resolution 31/98. *The Resolution is available online at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/302/81/IMG/NR030281.pdf?OpenElement> accessed on 30th October 2005.*

¹²⁵ UNCITRAL Conciliation Rules, [Herein after referred to as Conciliation Rules] adopted by the Commission at the 81st plenary meeting on 4th December 1980 under Resolution 35/52. *The Resolution is available online at: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/390/71/IMG/NR039071.pdf?OpenElement> accessed on 30th October 2005.*

¹²⁶ UNCITRAL Notes on Organising Arbitral Proceedings, 1996. The Notes are designed to assist arbitration practitioners by providing an annotated list of matters on which the arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings. The text, which is in no way binding, may be used whether or not the arbitration is administered by an arbitral institution. *See: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1996Notes_proceedings.html accessed on 30th October 2005.* UNCITRAL has also issued Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under UNCITRAL Arbitration Rules, 1982. The Recommendations are designed to assist arbitral institutions which are considering adopting the UNCITRAL Arbitration Rules when preparing or updating their institutional rules, as well as in the case of arbitral institutions or other bodies acting as an appointing authority as envisaged under the UNCITRAL

documents will be examined in this chapter. This chapter will also concentrate on arbitration and conciliation as methods of dispute resolution under the UNCITRAL model laws and rules.

3.2 Arbitration

One of the most prominent ADR mechanisms preferred by business persons is arbitration. This is because it allows parties to avoid hostile local courts. In this work the term ‘arbitration’ will be used to refer to international commercial¹²⁷ arbitration. The general rule is that for parties to engage in arbitration they must have agreed upon it in either an arbitration clause embodied in a general contract or in a separate arbitration agreement.¹²⁸ An arbitration agreement is an agreement by which parties agree to submit to arbitration all or certain disputes, which have arisen or may arise between them. This is in respect of a defined legal relationship whether contractual or not.¹²⁹ This agreement as a matter of precaution is required to be in writing.¹³⁰

Articles 7(1) and (2) as showed above give an extended definition of an arbitration agreement by recognising the commitment made by the parties. True, oral agreements are recognised in some countries but as a matter of fact they are harder to prove in case any of the parties deny ever entering into such an agreement hence, the emphasis on parties executing written agreements. As per the said provisions an agreement is said to be in

Arbitration Rules or in the provision of administrative services of a secretarial, technical nature for an arbitration conducted pursuant to the UNCITRAL Arbitration Rules. See: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1982Recommendations_arbitration.html accessed on 30th October 2005.

¹²⁷ The term “commercial” is given a wide interpretation so as to cover all matters arising out of all relationships of commercial nature, whether contractual or not. Relationships of commercial nature have been defined to include, but are not limited to the following transactions: any trade transaction for the sale or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction works; consulting; engineering; licensing; financing; banking; insurance etc. see: <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm> accessed on 3rd April 2005.

¹²⁸ David, *supra*.

¹²⁹ Article 7(1) of the Model Law on International Commercial Arbitration.

¹³⁰ Article 7 (2) *supra*.

writing “if it is contained in a document duly signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of agreement or in exchange of statements of claim and defence in which the existence of an agreement alleged by one party is not denied by the other”.¹³¹ These provisions are largely based on article II (2) of the New York Convention. The United States court while interpreting the requirement to have the arbitration agreement in writing in *Kahn Lucas Lancaster, Inc v. Lark International Limited*¹³² held contrary to an earlier decision of the U.S Fifth circuit court of appeals¹³³ that modifying the phrase “signed by the parties” in article II (2) applied to both an arbitration clause in a contract and to an arbitration agreement. Indeed, according to Professor Van den Berg, “the exchange of letters or telegrams implies that there must be a written proposal to arbitrate, that the proposal is accepted in writing and that the acceptance of such proposal is communicated to the proposing party. An oral or tacit exchange does not satisfy the exchange”.¹³⁴ This assertion serves to point out the importance attached to provisions well agreed to by the parties and proof thereof, which can only be obtained if such agreement was documented. The evidentiary value attached to documents must have prevailed in the drafting of the provisions in issue in order to limit the instances where courts have to deal with the question as to whether there was an agreement to use arbitration as a mode of dispute settlement under international trade contracts.

Having an arbitration clause as earlier alluded to, is where a contract for the sale of goods or services is drawn up by the parties and therein is a provision describing arbitration as the route to be taken in case a dispute arises under it. In essence there is only one contract

¹³¹ Ibid.

¹³² 186 F.3d 210 (2d cir. 1999).

¹³³ In *Sphere Drake, Ins. v. Marine Towing, Inc* 16 F.3d 666 (fifth circuit, 1994) the court outlined article II (2) of the New York Convention so that a requirement of a writing “signed by the parties” modified “arbitration agreement” but not “an arbitration clause in a contract” id., at Pg. 669. A signature is therefore not required.

¹³⁴ Albert Jan Van Den Berg, ‘The New York convention of 1958’ (Kluwer 1981) at 227 See also: Toby Landau, ‘The requirement of a written form of arbitration agreement’ (2002); Neil Kaplan, ‘Is the need for writing as expressed in the New York Convention and the model law out of step with commercial practice?’, 12 (1996).

encompassing all issues. Richard Hill¹³⁵ stresses that arbitration clauses are extremely common in international contracts. These clauses however, if not comprised in a separate contract should always be broad enough to cover all aspects that are crucial to any negotiation as explained in *Pennzoil Expl. & Production Company v. Ramco Energy Ltd.*¹³⁶

Broad arbitration clauses ... are not limited to claims that literally 'arise under the contract', but rather embrace all the disputes between the parties having significant relationship to the contract regardless of the label attached to the dispute

As observed by Mark Baker¹³⁷ the importance of a properly drafted clause or submission agreement cannot be over stated. Truly, where insufficient attention is paid to the drafting of such provisions, more often than not parties will find themselves fighting over the clause itself or resolution procedure that is to be followed before even getting to the merits of the dispute. Indeed, specifications of a good arbitration clause include but are not limited to:

- Choice of law: this is the law governing the contract. It is the most important clause in international contracts and is normally an independent clause and separate from the arbitration clause. It should be noted that the UNCITRAL rules only operate as procedural rules while the onus rests on the parties to choose the substantive laws that will govern their contracts.¹³⁸
- Seat of the arbitration: This is another term used to mean the venue of the arbitration in case it is to take place. In this regard, it should be noted that parties tend to choose venues with laws that would favour them. Article 20 of the model

¹³⁵ Richard Hill, op cit 2.

¹³⁶ 139 F.3d 1061, 1067 (fifth cir. 1998).

¹³⁷ C. Mark Baker, 'Mediation: a valuable partner to international arbitration' (2003) 2.

¹³⁸ See article 28(1) and (2) of the Model Law on International Arbitration.

law and article 16 of the rules give the parties authority to choose any place of their choice. This right can only be lost where parties fail to agree. In such a case, the arbitration tribunal assumes the authority to do so. Despite assuming the jurisdiction to choose for the parties the tribunal must take into account all circumstances relevant to the case including convenience of the parties. Choosing a seat does not prevent the tribunal from meeting in a different place for purposes of consultation, hearing witnesses, hearing experts or parties or for inspection of goods, other property or documents unless the parties agreed otherwise.¹³⁹ Of primary importance in taking this measure is that the arbitrators in order for them to secure their attendance or presence give both parties notice.¹⁴⁰

- The language in which proceedings will be conducted should also be catered for in the clause. The parties are still at liberty to choose and failure to exercise this right will prompt the tribunal to embrace the jurisdiction so to do on their behalf. The agreement on the language by the parties or the tribunal on their behalf applies to the hearing, any statement by a party and any award, decision or other communication by the tribunal. The essence of this is to ensure that all parties are in position to follow proceedings and prepare a solid case to lead to a fair result without prejudicing any party hence, eliminating the unfair advantage that would be created in case one party didn't understand the language of the proceedings.¹⁴¹ In fact, for purposes of enhancing the understanding of both parties the tribunal has the authority to order a translation of all documents tendered before it.¹⁴²

¹³⁹ Article 20(2) Model Law and Article 16(3) Arbitration Rules.

¹⁴⁰ Article 16(3) Arbitration Rules.

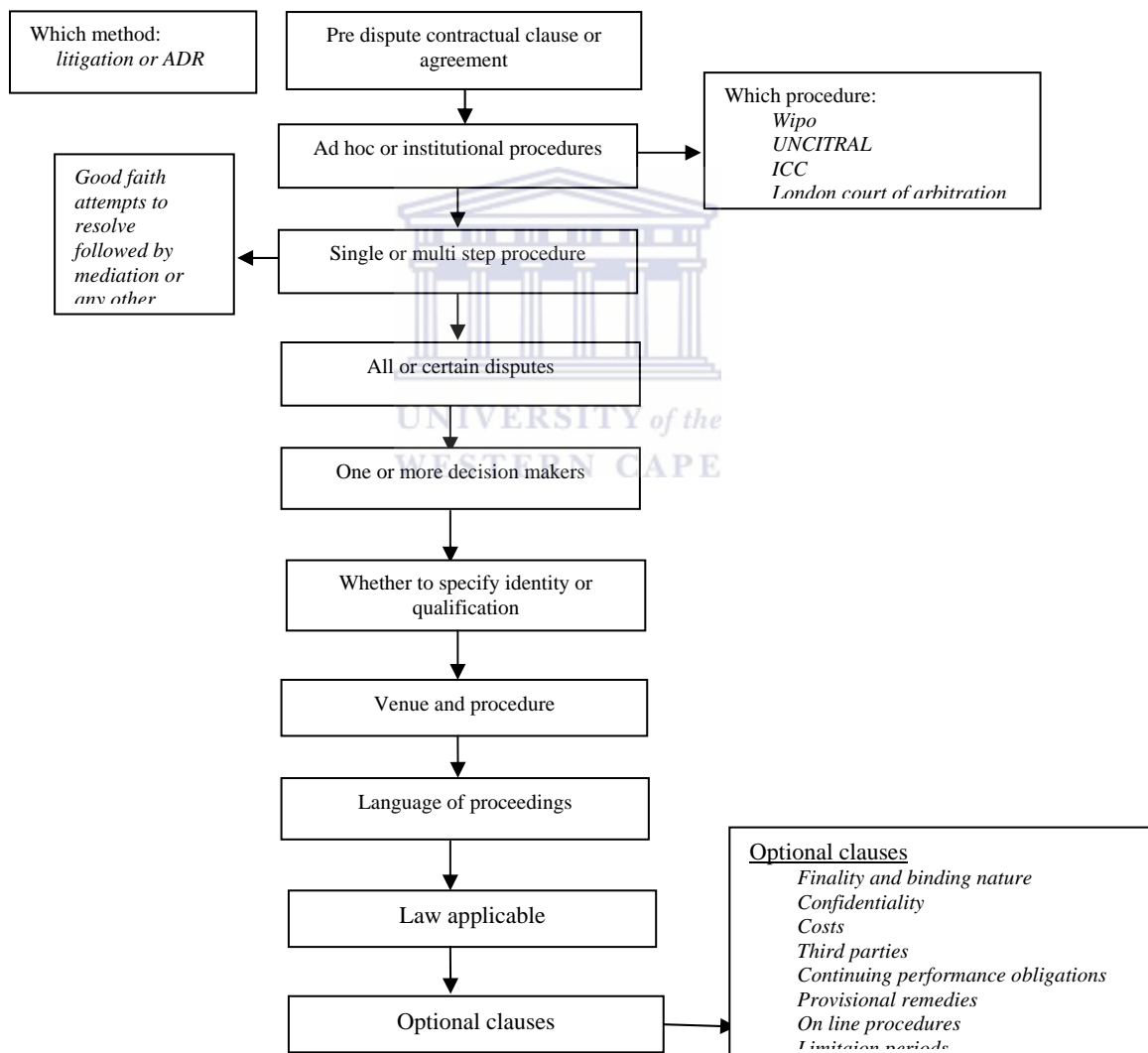
¹⁴¹ Article 17(1) Arbitration Rules.

¹⁴² Article 22(2) Model Law and Article 16(2) Arbitration Rules.

- The number of the arbitrators should be specified i.e. it helps avoid controversy as to the number and nomination procedure and prevents the party assuming to have a better case from calling the shots.¹⁴³

All the above considerations if put into effect by parties drawing arbitration agreements or clauses for that matter should save both parties the inconvenience in case of a dispute which needs to be settled. The above cited points of consideration while drafting an arbitration clause or agreement can be well illustrated in a properly drawn decision tree to guide parties better.

3.2.1 Decision Tree for Drafting a Dispute Resolution Clause



¹⁴³ However, where parties fail to agree the tribunal to be appointed shall have three arbitrators. See: Article 10 of the Model Law.

The above decision tree is adopted from C. Mark Baker¹⁴⁴ and serves to illustrate some of the most salient aspects that should be considered when drafting or recommending a dispute resolution clause or submission agreement, in context of an international relationship. Following this tree is not mandatory but can be done *'mutatis mutandis'*.

Guidance is also provided in the auspices of Article 1 of the arbitration rules which provides a model arbitration clause to wit:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL arbitration rules as at present in force¹⁴⁵

This clause is aimed at guiding parties but it falls short of highlighting what the parties ought to consider while adopting it or clearly drafting an independent arbitration clause or agreement. Clearly, it's not enough to merely state that "disputes arising under the contract shall be settled by arbitration" because while the language indicates the parties willingness to arbitrate any dispute and may authorise the court to enforce such intention it leaves many issues unresolved. Issues such as when, where, how and before whom the dispute will be arbitrated may be subject to disagreement once a dispute has arisen which may in turn leave the parties with no way to resolve them except by going to court. Something they originally sought to avoid.¹⁴⁶ This emphasises the need to draft carefully, comprehensively and indeed exhaustively in order not to leave any room for doubt or scepticism, which would only give rise to unwarranted litigation and subsequent inconvenience. Realistically, a dispute resolution clause if well drafted might expedite the peaceful settlement without the necessity of going to arbitration at all. Thus, an

¹⁴⁴ Mark Baker op cit 3.

¹⁴⁵ A note is also given of the items that may be included in the said agreement such as:

- (a) The appointing authority shall be ... (name of institution or person)
- (b) The place of arbitration shall be ... (city or country)
- (c) What the language(s) to be used in the arbitration proceedings shall be ...

¹⁴⁶ Agnes Wilson, 'Drafting dispute resolution clauses – A practical guide' *13 PLI/ NY 19 (1998)*.

arbitration clause is a form of insurance against loss of good will.¹⁴⁷ It should also be noted that a well drafted arbitration clause or agreement to arbitrate is the sole foundation of a stress free and fruitful arbitration because it is practically self executing in the sense that it does away with any curiosity relating to what to do, when to do it and where. Conclusively, the requirement of having all i's dotted and all t's crossed while drafting an arbitration clause or agreement can't be better emphasised than was by Agnes Wilson in holding the view that:

A dispute resolution clause should address all the special needs of the parties involved. An inadequate ADR clause can produce as much delay, expense and inconvenience as a traditional lawsuit. When writing a dispute resolution clause, keep in mind that its purpose is to resolve disputes and not to create them. If disagreements arise over the meaning of the clause its often because it failed to address the particular needs of the parties ... drafting an effective ADR agreement is the first step on the road to successful dispute resolution.¹⁴⁸

3.2.2 Commencement of Arbitral Proceedings

Upon a dispute arising out of a contract the party desiring to get redress through arbitration usually referred to as “the claimant” commences the process by giving a notice of arbitration to the other party normally referred to as “the respondent”. The arbitral proceedings shall be deemed to have commenced upon receipt of communication by the respondent.¹⁴⁹ Such privilege as to serving of the notice is unlike in litigation limited to the parties to the agreement. That is to say, arbitration can neither be commenced against nor can a person who is not a party to the agreement initiate it.¹⁵⁰ The notice should demand that the dispute be referred to arbitration. It must include the

¹⁴⁷ Agnes Wilson, op cit 3.

¹⁴⁸ Agnes Wilson op cit 15.

¹⁴⁹ Article 3 (1) and (2) Arbitration Rules.

¹⁵⁰ Arif Hyder Ali, ‘Information and communication technology disputes – arbitration and mediation alternatives to court litigation’, (2003)21.

names and addresses of the parties, reference to the arbitration clause or separate arbitration agreement, a reference to the contract out of which a dispute arises, nature of claim and an indication as to the amounts involved. It must also include the remedy or relief sought, and proposal as to the number of arbitrators if they had not previously been agreed upon.¹⁵¹ This notice essentially serves to notify the respondent of where the arbitration is to take place and the nature of the case he is faced with to enable him or her to make adequate preparation and consequently furnish a defence to the claim against him or her.¹⁵²

3.2.3 Appointment of Arbitrators

As earlier pointed out, arbitrators are to be agreed upon by the parties as per the agreement to arbitrate. The agreement is required to specify the numbers of arbitrators to be appointed but normally it is either one or three. In case the agreement provides for three arbitrators each of the parties shall appoint one arbitrator and the third one shall be agreed upon and appointed by the two already appointed arbitrators. However, if one party fails or neglects to appoint an arbitrator or the two already chosen fail to agree on who to appoint as the third arbitrator within thirty days of receipt of the request so to do or within thirty days of their appointment then the aggrieved party shall seek court intervention in appointing the arbitrator.¹⁵³ This issue was examined in *Pacific Int. Lines (pte) Ltd and Another v. Tsinlien Metals and Minerals Co. Ltd*¹⁵⁴ where the high court of Hong Kong concluded that article 7 of the model law had been complied with and gave the defendant seven days within which to appoint a second arbitrator, otherwise the court would appoint one on his behalf. Indeed, in *Oonc Lines Limited v. Sino – American*

¹⁵¹ Article 1 (3) Arbitration Rules.

¹⁵² The notice of arbitration is what is referred to in article 23 (1) of the Model Law as the ‘statement of claim’.

¹⁵³ The court is empowered to do so under article 6 of the model law. The court can be moved so to do by an aggrieved party under article 11 (4) of the model law.

¹⁵⁴ Published in English in 1992, *Hong Kong law digest 5 excerpts of the judgment can be found in arbitration and dispute resolution journal, part 4, December 1992, 240, [1993] 2 HKLR 249.*

*Trade Advancement Co. Ltd*¹⁵⁵ the plaintiff requested court to appoint an arbitrator on behalf of the defendant in pursuant to article 11 of the model law. The defendant objected on the ground that article 7(2) had not been complied with since the defendant had not signed the charter party that contained in a rider the arbitration agreement invoked by the plaintiff. Kaplan J found that even though either party had not signed the charter party, a number of communications had been exchanged between the parties that provided sufficient record in writing of the agreement to arbitrate. He then went ahead to appoint an arbitrator on behalf of the defendant.

The two cited authorities serve to exemplify the fact that even though a party disputes the arbitration agreement he has to appoint an arbitrator and once the arbitration tribunal is properly constituted, he can go ahead and raise his objection upon which the tribunal shall rule.

3.2.4 Challenge of Arbitrators

The parties are undoubtedly allowed a great deal of latitude when it comes to the appointment of arbitrators. Despite the freedom to appoint arbitrators of their choice however, the appointment by one party can be challenged by the other mostly if there are circumstances that put the impartiality or independence of the arbitrator in question.¹⁵⁶ However, the grounds for such a challenge should have come to light after the appointment of the arbitrator in issue.¹⁵⁷ The challenge must be founded in a notice in writing and within fifteen days after the appointment in issue¹⁵⁸ with the reasons for such challenge clearly stipulated.¹⁵⁹ Upon receipt of such notice of challenge the arbitrator may withdraw from office, which will pave way for the appointment of a substitute

¹⁵⁵ *In the supreme court of Hong Kong, High court miscellaneous proceedings no. 50/94.*

¹⁵⁶ Article 10 (1) Arbitration Rules and Article 12 (1) of the Model Law. Another reason for which the appointment of an arbitrator can be challenged can be if he doesn't possess the necessary qualifications.

¹⁵⁷ Article 10 (2) Arbitration Rules and Article 12 (2) Model Law.

¹⁵⁸ Article 11 (1) Arbitration Rules.

¹⁵⁹ Article 11 (2) Arbitration Rules, Article 13(4) Model Law.

arbitrator. This withdrawal however, does not and should not be interpreted to connote acceptance of the validity of the grounds of the challenge.¹⁶⁰ Of importance however, is the fact that the arbitration rules leave a gap as to what happens if the party who appointed the disputed arbitrator refused to acknowledge the challenge consequently, leading to the failure to withdraw by the disputed arbitrator. What is dealt with by article 12 of the arbitration rules only reflects a situation if the appointment was done by an appointing authority and thus, begs the questions as to what happens if the appointment was done individually? This lacuna was envisaged later hence, the enactment of article 13 (3) of the model law which allows the disputing party to seek court intervention within thirty days of receiving the notice of the decision to reject the challenge. The decision of the court in this matter shall be final and binding i.e. the decision will not be subject to appeal. The same provision uniquely allows the arbitral tribunal, including the challenged arbitrator to continue with the arbitration proceedings whilst the matter is pending in the courts to the extent of even making an award.

3.2.5 Jurisdiction of the Arbitral Tribunal

The jurisdiction of the arbitration tribunal at the onset derives from the arbitration agreement or clause entered into by the parties. The arbitral tribunal is mandated to rule on inter alia; its own jurisdiction,¹⁶¹ any objections as to the existence or validity of the arbitration agreement,¹⁶² the existence or validity of the contract of which the arbitration clause forms part.¹⁶³

¹⁶⁰ Article 11 (3) Arbitration rules.

¹⁶¹ Article 16 (1) Model Law and Article 21 (1) Arbitration Rules.

¹⁶² Article 16 (1) Model Law and Article 21 (1) Arbitration Rules.

¹⁶³ Article 21 (2) Arbitration Rules.

3.2.5.1 Own Jurisdiction

In both the rules and the model law we establish that arbitration tribunals have been empowered with the competence to rule on their own jurisdiction. This is what has grown to be known as the doctrine of *competence – competence*¹⁶⁴ i.e. arbitrators have the jurisdiction to determine their own jurisdiction, at least as a preliminary matter.¹⁶⁵ This is mostly challenged by one of the parties or when members of the tribunal feel the matters in issue are beyond their authority. Objections as regards the jurisdiction of the tribunal should always be raised at the earliest possible time so that they can be addressed.¹⁶⁶ The competence to rule on the very foundation of the tribunal’s mandate and power is subject to court control most especially if the tribunal finds itself with competent jurisdiction. In such a case, the aggrieved party is empowered to seek redress within thirty days of receiving the ruling. The court’s decision will of course be final and binding.¹⁶⁷ This is designed to protect a party who may be falling prey to another’s dilatory tactics coated in endless and frivolous litigation. Indeed, this matter was considered in *Fung Sang Trading Ltd. V. Kai Sun Sea Products Co. Ltd.*¹⁶⁸ the court positively held thus; “each case will depend on its own particular facts. One thing is clear however; arbitrators should pull down the curtains as soon as one party objects to the jurisdiction of the tribunal. The arbitrator can rule on the question as to whether he has jurisdiction but he can’t make a final and binding declaration on that issue as the matter can always be taken to court either by direct challenge or at setting aside or enforcement stage”. This was also emphasised in *Mind Star Toys Inc v. Samsung Ltd* citing *Rio Algom*

¹⁶⁴ Also known as the *kompetenz – kompetenz doctrine*.

¹⁶⁵ See generally: Allan Scot Rau, ‘The arbitrability question itself’, (1999) 10 at 287; William W. Park, ‘The arbitrability dicta in first options v. Kaplan: what sort of Kompetenz – Kompetenz has crossed the Atlantic?’ (1996) 12 at 137; William W. Park, ‘Determining arbitral jurisdiction: Allocation of tasks between courts and arbitrators’, (1997) 8 at 133.

¹⁶⁶ Earliest possible time is deemed to be not later than the filing the statement of the defence i.e. Article 21 (3) Arbitration Rules.

¹⁶⁷ Article 16(3) of the Model Law.

¹⁶⁸ (1991) MP 2674 at Pg. 30 of the judgment.

*Ltd v. Sammi Steel Co.*¹⁶⁹ the court *inter alia* said that courts powers in matters of contractual interpretation such as these are limited in that they appear to have the role in determining matters of law and construction. Jurisdiction and scope of authority are for the arbitrators to decide in the first instance, subject to later recourse to setting aside the ruling or award. These authorities clearly point out who has the power to determine matters of jurisdiction as being the arbitrator himself and in case of displeasure resulting in an appeal, the court. The model law and the rules serve to enlighten the parties on what to do, when to do it and above all, where to do it on matters of jurisdiction.

A further examination of the *kompetenz – kompetenz doctrine* was carried out by the U.S courts in *Howsam v. Dean Witter Reynolds, Inc* 537 U.S 79 (2002) where an investor in a limited partnership commenced proceedings against her broker for misrepresenting an investment's quality. The brokerage firm responded with a suit seeking an injunction against the arbitration because the investment advice was more than six years old and thus barred by the national association of securities dealers (NASD) eligibility rule¹⁷⁰ which functions as a statute of limitations for arbitration, but is imposed by the NASD rather than the state law. Unlike a statute of limitations that restricts a party's right to bring a claim, the eligibility rule arguably limits an arbitrator's jurisdiction to hear the dispute. Resolving a split among the circuits over who (judge or arbitrator) decides on eligibility requirements, the *howsam* court held that the time limits were for the arbitrator to determine. In the words of Mark W. Friedman, et al, 'developments in international commercial dispute resolution in 2003'¹⁷¹ "the running theme through out the cases is that for each question whose arbitrability is in issue, the arbitrators had the authority to determine the limits of their power. Conclusively, such judicial restraint in interfering with arbitration procedure is generally considered good for arbitration." Indeed, it has

¹⁶⁹ (1991) 47 C.P.C (2nd) 251 (Ont. Gen. Div) at Pg. 256.

¹⁷⁰ NASD code of arbitration section 10304 (formerly R.15) states that no dispute "shall be eligible for submission to arbitration ... where six years have elapsed from the occurrence or event giving rise to the ... dispute.

¹⁷¹ 38 *int'l law* 265.

been argued that the right balance as regards the courts powers ought to be struck if arbitration is to flourish.¹⁷²

3.2.5.2 Existence or Validity of an Arbitration Agreement

This power is also at the first instance vested in the arbitrator or arbitration tribunal. This underlies the fact that a party can't simply refuse to go to arbitration because he thinks the arbitration agreement is invalid or doesn't exist. In instances where parties have gone to the extent of refusing to appoint arbitrators because they find no validity or basis in the agreement, the court has gone ahead to force them to do so as was in *Pacific Int. Lines (pte) Ltd and Another v. Tsinlien Metals and Minerals Co. Ltd*¹⁷³ or even appoint them on behalf of the parties as seen in *Oonc Lines Limited v. Sino – American Trade Advancement Co. Ltd*¹⁷⁴. The bottom line here is that, even if one thinks there is no valid arbitration agreement he is supposed to comply and then raise his grievances to the tribunal because he is only allowed in court if the tribunal overrules him.

3.2.6 Validity of the Contract and Its Effect on the Arbitration Clause

The model law and the arbitration rules have all concurred on the fact that 'an arbitration clause which forms part of a contract and provides for arbitration shall be treated as an agreement independent of the other terms of the contract'.¹⁷⁵ The rationale for this being that parties can still pursue arbitration or any other remedy for acts subsequent to the annulment of the parent contract. Article 16 (1) of the model law and article 21 (2) of the rules serve to say that a decision by a tribunal that the parent contract is null and void

¹⁷² The right balance ought to ensure that there is minimization of court interference and maximization of court support for the arbitral process. See: Derviard in a paper presented at an international conference in Johannesburg on *Resolution of international trade and investment disputes in Africa on 6th – 7th March 1997*. In this light, the South African Law commission is of the view that the right balance has been struck in the model law. See Commission's Report Para 2. 12; David Butler, 'The South African Law Commission's proposal for a New International Arbitration Act for South Africa to implement the UNCITRAL model law' (1999) at 4.

¹⁷³ Published in English in 1992, Hong Kong law digest 5 excerpts of the judgment can be found in *Arbitration and Dispute Resolution Journal*, Part 4, December 1992, 240, [1993] 2 HKLR 249.

¹⁷⁴ In the Supreme Court of Hong Kong, High court Miscellaneous Proceedings No. 50/94.

¹⁷⁵ Article 16(1) Model Law and Article 21(2) Arbitration Rules respectively.

does not ‘*ipso jure*’ invalidate the arbitration clause. This summation has grown to be referred to as the doctrine of separability and has indeed been partially recognised in English law since the *Heyman v. Darwing*¹⁷⁶ decision where it was pointed out that the arbitration clause is separable from the contract containing it so that if the contract is repudiated or the repudiation is accepted the clause survives thus, enabling the arbitrator to render an award on the claim arising out of the alleged repudiation. Further more, Steyn, J (as he then was) in *Harbour Assurance Co (UK) v. Kansa General International Assurance Co Ltd and ors*¹⁷⁷ on the scope of the doctrine of separability enunciated / concluded that it was applicable to cases concerning the initial invalidity of the contract. However, in cases where illegality is raised to render the agreement containing the arbitration clause void *ab initio* he said:

... While the distinction between invalidity and illegality isn't one which in my view should prevail, I conclude that ... the separability principle doesn't extend to *ab initio* illegality of a contract in which arbitration is embedded.¹⁷⁸

The above cases were cited in contrast in *Fang Sang Trading Co. Ltd v. Kai Sun Sea*¹⁷⁹ with the ultimate position being addressed in *Enrique .C. Wellbers S.A.I.C.A.G v. Extraktions Technic Gesellschaft fur Anlagenbau M.B.M: s/m Ordinario* where the court for instance rejected the plea for lack of jurisdiction. The court of appeal affirmed that the arbitration clause was autonomous and therefore, its validity did not depend on the validity of the parent contract, on the applicable law or on the court with international jurisdiction to resolve any dispute. The principle of autonomy of such a clause is internationally accepted and as such incorporated in article 16(1) of the model law. The court hastened to say that although the said article had not been adopted in Argentina, it

¹⁷⁶ [1942] AC 356.

¹⁷⁷ [1993] 3 ALL ER 897 (English Court of Appeal).

¹⁷⁸ The court in this case seems to interpret and give legal meaning to article 8 (1) of the model law giving courts the power to oust arbitration if it finds the parent agreement null and void, inoperative and incapable of being performed.

¹⁷⁹ (1991) MP 2674 at Pg. 30 of the judgment.

reflects generally accepted principles in the matter and can be taken into account to make up for the absence of a specific national norm.

Clearly, the spirit behind the above findings and analysed articles is not to lead the parties to the court room they sought to avoid in subjecting themselves to arbitration as the forum for addressing the matters arising out of the repudiation of the contract. The parties can still have room for non-adversarial discussion and settlement before an arbitrator or arbitral tribunal, which will however, have trimmed powers. This is a positive piece of legislation which makes arbitration more advantageous compared to litigation, where invalidity of the contract kills all the rights that accrue therefrom. Such a provision only serves to boost the confidence of the parties to engage in ADR and particularly arbitration, because they can still get something out of the dealing or redress for inconvenience accruing from the invalid contract at worst.

3.2.7 Interim Measures

This means measures taken before the conclusion of the arbitral process. These measures are mainly designed for the protection of any of the parties in relation to the subject matter. The arbitration tribunal is surely endowed with the power to grant them at the request of either party.¹⁸⁰ The protection sought from the tribunal may include measures for the preservation of goods or commodities forming the subject matter of the dispute and the tribunal may indeed extend its authority to require the deposit of security for the costs of such measures.¹⁸¹ The essence of demanding security for costs as an interim measure is to guarantee adequate compensation in case inconvenience is suffered (to the party that suffers it) in relation to subject matter. In a way, one can relate these measures to the ones that are granted in civil proceedings aimed at preserving the status quo and in effect preventing the tampering with the subject matter with the aim of defeating the outcome of the case.

¹⁸⁰ Article 26 rules and Article 17 of the model law.

¹⁸¹ Article 26(2) rules and Article 17 of the model law.

It is important to note that the methods for obtaining such interim relief are dual i.e. can be obtained from the arbitral tribunal and / or from the courts of law as can be drawn from article 9 of the model law and article 26(3) of the arbitration rules. These provisions address the issue of compatibility of courts in awarding interim measures vis-à-vis the arbitration agreement and the proceedings, concluding that it's not incompatible with the arbitration agreement for either party to seek interim protection from a judicial authority. The effect of this is to give parties the confidence that they will always be protected when the need arises. With the provision of two forums from where this protection may be sought a party is never constrained when the tribunal is not sitting.

3.2.8 The Process

As earlier seen, in the presence of an arbitration agreement or clause the process is commenced by an aggrieved party in a statement of claim which basically enlists the facts, issues of conflict, relief sought, law applicable and the appointment of an arbitrator (if under the arbitration agreement / clause he was under obligation so to do). The respondent then files a statement of defence to the claim. Of paramount importance here is, that amendments are allowed on either documents.¹⁸² This right is provided for parties who feel the need to clarify certain issues during the arbitration process or address the issue that would be of interest to the tribunal and had not been earlier tackled. The only limitation to this right being that it should be exercised in reasonable time and that the amendment of the claim does not fall out of the scope of the arbitration clause or separate arbitration agreement. The arbitral tribunal is empowered with the jurisdiction to rule on these limitations.

With the above in place, then the arbitrator(s) may commence business assuming there are no objections or challenges raised. The tribunal will go on with the hearing by taking down the evidence from either party in support of their respective claims as the burden of

¹⁸² Article 20 rules and Article 23(2) of the Model Law. See also: Article 22 – 23 of the Arbitration Rules which provide for further written statements and the duration the tribunal can allow for the tendering of the same.

proof lies on all parties to prove their claims.¹⁸³ Evidence depending on the agreement of the parties or ruling of the tribunal may either be viva voce or documentary. The flexibility of the UNCITRAL instruments is reflected in the fact that apart from the normal notice of date, time and place being given, each party is required to communicate to the tribunal and the opposite party fifteen days before the hearing the names and addresses of the witnesses, subject upon which and language in which they will testify. Another advantage of the process is that unless the parties agree otherwise all proceedings shall be conducted in camera.¹⁸⁴ This is with the aim of maintaining the confidentiality. This flexibility allows a party to try his best to obtain a favourable yet fair decision without the rigidity of the substantive law procedures in courts while protecting his / her trade secrets and grievances from the public domain or know how.

3.2.9 Experts

For the purpose of getting a fair decision, the instruments allow for the calling of experts. The important aspect here is that, unless otherwise agreed by the parties the expert is appointed by the tribunal to give his opinion on specific issues that the tribunal may be confronted with.¹⁸⁵ Upon so doing, once the expert has come up with a report it's availed to all parties and in case of disgruntlement then he may be availed for examination on matters contained in his report at the request of the disgruntled party. The disgruntled party may also be permitted to call another expert to shed some light or give another opinion on the issue in dispute. This power endows the tribunal with extra knowledge on any issue that is novel to them hence, guiding them to making an informed decision.

3.2.10 Neglect of Proceedings

Like in a court trial, failure of a party to attend arbitration after submitting to the jurisdiction of the tribunal without showing sufficient cause shall lead to the termination

¹⁸³ Article 24 Arbitration Rules and Model Law.

¹⁸⁴ Article 25(3) and (4) Arbitration Rules.

¹⁸⁵ Article 27(1) Arbitration Rules and Article 26(1) (a) of the Model Law.

of the proceedings but with a decision in favour of the party that availed himself. Here, the tribunal makes its finding basing on the evidence before it.¹⁸⁶ Adequate notice is a prerequisite before such a step is taken. It looks a little harsh but experience has grown to show that, it is not uncommon that one party has no interest in cooperating and expediting matters. The measure was designed to penalise any party who seeks to stifle the work of the tribunal with the sole aim of giving international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

After going through the above discussed procedure and making certain that neither party still has any evidence to adduce or submissions to make, the tribunal may close the hearing giving itself the necessary time to render an award.¹⁸⁷ However, in bracing itself to render a decision, the tribunal is obliged under Article 28 of the model law to decide the dispute in accordance with the law the parties chose. A lot of significance can be drawn from this obligation; it gives the parties the mandate to choose the law that will govern the dispute.¹⁸⁸ This latitude of freedom is very important because laws of various jurisdictions don't fully address this, which leaves parties trapped in the frailties of national laws that tend to suffocate this right, hence, dampening the morale of the parties to arbitration. In addition, the reference to the choice of rules of law gives the parties a wide range of options regarding to the designation of the laws applicable to the substance of the dispute by for example agreeing to rules of law which have been elaborated by an international body, such as UNCITRAL in our case, but have not yet been incorporated into any national legal system.¹⁸⁹

¹⁸⁶ Article 25 Model Law and Article 28 Arbitration Rules.

¹⁸⁷ Article 29 Arbitration Rules.

¹⁸⁸ Butler op cit 3.

¹⁸⁹ Section 6 of the Explanatory note by UNCITRAL secretariat on the Model Law on International Commercial Arbitration.

The rendering of a final award then terminates the arbitration procedure and mandate of the tribunal unless subsequent recourse is sought in enforcement or legal challenge of the arbitral award.

3.3 Conciliation

In utilising this dispute resolution option, it should be noted that the UNCITRAL conciliation rules only apply if the parties specifically adopt them. The rules are designed for ad hoc proceedings, where no organisation specifically administers the case and where the parties along with the mediator/ conciliator determine the procedure to be followed. The UNCITRAL rules are very detailed and complex; however, the parties are at liberty to modify or exclude any rule by express agreement.¹⁹⁰

3.3.1 Conduct of Conciliation

Conciliation¹⁹¹ commences with the consideration whether it is international or domestic, because the UNCITRAL rules were mainly designed for international disputes. Article 1(1) of the model law on international commercial conciliation is clear on this point. However, the discretion to determine the scope of applicability is left to individual states. The test to distinguish international cases from domestic ones is given or established under article 1(4) where the internationality requirement will be fully met if the parties have their business premises in different states at the time they conclude the conciliation agreement or where a state where a substantial part of the obligation of the commercial relationship is to be performed or with which the subject matter of the dispute is almost closely connected differs from the state in which the parties have their places of business.

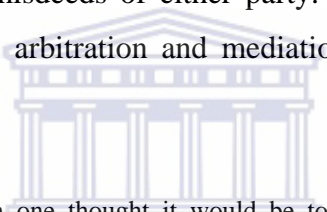
¹⁹⁰ Julie Baker, 'International mediation ... a better alternative for resolution of commercial disputes: Guidelines for US negotiators involved in an international commercial mediation with the Mexicans' (1996) 19 at Pg. 5.

¹⁹¹ As already defined in Chapter Two.

The second consideration should always be examining whether there is an existing conciliation clause or agreement in case of a dispute. To this end, a model conciliation clause has been provided at the very end of the conciliation rules to wit:

Where in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL conciliation rules as at present in force.

This clause is designed to provide guidance to parties who are desirous of avoiding problems in the event of disputes arising out of commercial contracts they may have concluded. Designing an appropriate dispute resolution clause is always prudent before relations are savoured by the misdeeds of either party. In this vein, C. Mark Baker¹⁹² while presenting a paper at an arbitration and mediation conference in Austin, Texas cautioned thus:



If I can leave you with one thought it would be to remind you what your grandmother probably told you: an ounce of prevention is worth a pound of cure. Time spent at the beginning of a transaction considering the disputes that are likely to arise and then creating an appropriate dispute resolution procedure will greatly advance the business objective of resolving future disputes more quickly, economically and efficiently.

The essence of having a good conciliation clause early enough could never be better emphasised. Upon establishing the existence of a conciliation clause then the aggrieved party is at liberty to initiate conciliation proceedings by sending out an invitation to the other party highlighting the subject of the dispute.¹⁹³ This gives the invited party thirty days within which to reply because failure of which is construed as a rejection of the process. This invitation is also important in determining when the conciliation is deemed to have started, this normally, is when the parties to the dispute agree to engage in such proceedings. That is to say an agreement to do so upon invitation is of the essence.

¹⁹² C. Mark Baker, loc cit.

¹⁹³ Article 2(1) Conciliation Rules and Article 4 of the Model Law.

Further, the time limit of thirty days is intended to facilitate the faster resolution of disputes and curb the dilatory conduct of the parties who seek to delay the dispute resolution. This time ceiling being the general rule is subject to an exception of parties' agreement to waive it. The waiver is solely intended to provide maximum flexibility and respect to the principle of party autonomy over the procedure to be followed in commencing the conciliation. The provision in issue however, has a weakness in that it omits to provide for what stands to happen in the event of non-compliance to the invitation unlike in arbitration where court is allowed to intervene by appointing an arbitrator on behalf of the defiant party.¹⁹⁴

However, if the other party honours the invitation then the parties appoint a conciliator.¹⁹⁵ This approach is viewed as respecting the consensual nature of conciliation and also providing parties greater control and therefore confidence in the process. It allows speedy commencement of conciliation and may foster settlement in the sense that party appointed conciliators, while acting independently and impartially, would be in better position to clarify the position of the parties and thereby enhance the likelihood of settlement.¹⁹⁶ The appointed conciliator may conduct the conciliation in any manner he chooses, taking into account the circumstances of each case and parties' instructions which may go as far as the mode of taking evidence – whether viva voce or by written statements – as long as it facilitates the settlement of the dispute.¹⁹⁷ Though the conciliator chooses the modus operandi he **must at all times ensure fair and equal treatment of the parties¹⁹⁸ if the integrity of the process is to be maintained, as this is the 'basic obligation and minimum standard to be observed by every conciliator.'**¹⁹⁹

¹⁹⁴ This is because conciliation as dealt with in chapter two is a consensual mechanism under which a party can't be punished for lack of interest.

¹⁹⁵ Article 4 rules and Article 5 model law.

¹⁹⁶ Guide to enactment and use of the UNCITRAL model law of international commercial conciliation, Para. 50.

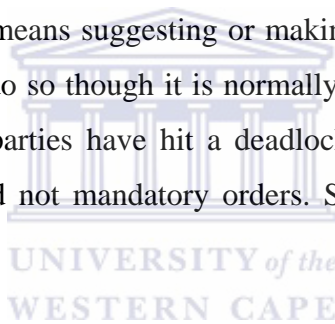
¹⁹⁷ Article 7 rules and Article 6 model law; C. Baker, *supra* at pg. 26.

¹⁹⁸ Article 6(3) Model Law and Article 7(2) Conciliation Rules.

¹⁹⁹ *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*, Para. 57.

This requirement should not at any moment be misconstrued because ‘fair treatment’ per se is intended to govern the conduct of the process and **not** the contents of the settlement agreement.²⁰⁰

Conciliators conducting the process may have both facilitative and evaluative roles. The rules require the conciliator to assist the parties in an independent and impartial manner in an attempt to reach an amicable resolution of the disputes. While so doing, “mediators also typically facilitate communication by clarifying issues and maintaining order during joint sessions. The mediator might [maintain] order the way a judge maintains order in a courtroom – by insisting that everyone communicates in a controlled and rationalised manner. More likely though, the mediator sees value in angry or emotional outbursts by one or more parties. The mediator may believe that the problem can’t be resolved without the parties venting.”²⁰¹ If this means suggesting or making proposals for settlement then the conciliator is at liberty to do so though it is normally advisable for the conciliator to reserve his opinion until the parties have hit a deadlock. But even then the proposals should just be suggestions and not mandatory orders. Stephen Ware²⁰² is alive to this point when he asserts thus:



The problem-solving mediator encourages each party to generate many possible solutions before assessing any of them. The crucial point is to separate the inventive phase of generating possible solutions from the evaluative phase of assessing the merits of those possibilities. When it comes to time to assess possible solutions, the problem-solving mediator helps the parties judge them by how well they advance the interests of both parties. The mediator’s assessment of the proposals may lead to the mediator making proposals of her own. But the problem solving mediator typically prefers that proposals come from the parties to increase the parties’ sense of ownership and to allow the mediator to remain more objective.

²⁰⁰ Guide, supra, Para. 60.

²⁰¹ Kimberlee K. Kovach, ‘Mediation: principles and practice’, (1994) Pg. 25.

²⁰² Stephen J. ware, ‘Alternative Dispute Resolution’ (2001) Pgs. 208 – 217.

In a bid to informatively advise the parties, the conciliator may request a party to submit a further statement of its position, facts and grounds in support thereof, which should also be served on the other party.²⁰³ This is to prevent an ambush on the other party as it helps him get better prepared and hence save the time spent in mediating the dispute, which is in the interest of both parties financially.

Upon positive conclusion of the process, the primary responsibility for drafting of the settlement framework rests with the conciliator. Under Article 13 he is required to submit such settlement framework to the parties for their observation. On receiving their comments and observations the conciliator may amend the terms of the possible settlement and resubmit them to the parties. Where upon the parties reach an agreement on the settlement of the dispute, it's their duty to draw up and sign the final settlement agreement, if desired with the conciliators assistance.²⁰⁴ The signing of which will effectively conclude the dispute and resolution process.

3.3.2 Disclosure of Information

There is a general presumption that any information disclosed by a party to a conciliator may be revealed to the other party or parties unless it is accompanied by a request for confidentiality.²⁰⁵ The notion of 'information' is intended to cover all information communicated by a party to a conciliator. The notion as used in the articles in issue should be understood as not only being limited to communications that occur during conciliation but also communication that takes place before the actual commencement of the conciliation.²⁰⁶ The intent of this is to foster open and frank communication of information between the parties and the conciliator and at the same time preserve the parties' right to maintain confidentiality. This also helps build the confidence of the

²⁰³ Article 5 Conciliation Rules.

²⁰⁴ Article 13 Conciliation Rules, see also: C Mark (supra).

²⁰⁵ Article 10 Conciliation Rules and Article 8 Model Law.

²⁰⁶ Guide, supra, Para 60.

parties in the system. The principle of disclosure however, is not absolute, as the conciliator has the freedom, but not the duty, to disclose such information to the other party as long as he thinks it will aid the speedy settlement of the dispute.²⁰⁷ On the whole disclosure of information has two aspects that go to the root of the process; confidentiality and admissibility of disclosed information.

3.3.2.1 Confidentiality

Confidentiality is not only the bedrock but also the strength of conciliation and other alternative dispute resolution mechanisms against adversarial judicial proceedings. Articles 9 and 14 of the model law and conciliation rules respectively were broadly drafted referring to ‘all information relating to conciliation proceedings’ to cover not only the information discussed during the conciliation proceedings, but also the substance and result of the proceedings, as well as matters relating to conciliation that occurred before the agreement to conciliate was reached, unless of course, the agreement to conciliate and its validity were in issue before a competent court of law.

Under the principle of confidentiality, all mediation sessions are confidential. The parties may neither disclose nor testify as to the content of these sessions. This principle stretches and applies to any offers, admissions or proposals made throughout the mediation.²⁰⁸ The aim of such restrictions is to facilitate open and candid discussions between the parties as it reassures the parties that the information revealed in the mediation will not be used against them in later proceedings. This is because the success of mediation is largely dependent on open discussions. To this end the U.S court of appeals fourth circuit in *Re Anonymous*²⁰⁹ held thus:

The assurance of confidentiality is essential to the integrity and success of the mediation program, in that confidentiality encourages candour, between parties

²⁰⁷ Guide, supra, Para 59.

²⁰⁸ Tobi P. Dress, ‘International commercial mediation and conciliation.’ (1988) at 575.

²⁰⁹ 283 F.3d 627.

and on the part of the mediator, and confidentiality serves to protect the mediation program from being used as a discovery tool for creative attorneys.

The circuit hastened to say:

If participants can't rely on confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in [a] cautious, tight-lipped, non-committal manner more suitable to poker players in a high stakes game than to adversaries attempting to arrive to a just resolution of a civil dispute. The atmosphere if allowed to exist would destroy the effectiveness of the program, which has led to settlement and withdrawal of some appeals and to simplification of issues in other appeals...²¹⁰

The need to enhance confidentiality is the sole reason as to why no notes are allowed to leave the mediation/ conciliation venue. Since this duty always binds the 'parties', a question has always prevailed as to whom the term refers to. The confidentiality rule in light of this question has been interpreted as not being limited in its application to the formal parties of the mediated dispute, but to all participants in mediation, including attendants of the mediation conference.²¹¹ In the same vein, conciliators or mediators cannot be summoned to testify in subsequent proceeding as regards the conciliation. To this the court was of the view²¹² that:

If mediators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent evidence from favouring or seeming to favour one side or the other. The inevitable result would be that the usefulness of the [mediation program] in settlement of future disputes would be seriously impaired, if not destroyed.

²¹⁰ Ibid.

²¹¹ U.S. court of appeals fourth circuit. Rule 33, 28 U.S. CA.

²¹² In *re anonymous*, loc cit.

Actually, the conciliator is required to make this clear right from the onset. He must warn the parties that any such attempt to have him testify about the contents of the conciliation will be vigorously fought at their cost.

However, like any other rule, the confidentiality rule is subject to exceptions to wit; where such disclosure is required by the law, such as an obligation to disclose evidence of the commission of a criminal offence, or where disclosure is required for purposes of implementation or enforcement of the settlement agreement and if it is in public interest for example, to alert the public about a health or environmental safety risk.²¹³ The test in examining as to whether to waive the confidentiality rule is one of ‘manifest injustice’ which requires the party seeking the disclosure to demonstrate that the harm that will be caused by nondisclosure will be manifestly greater than the harm caused by the disclosure.²¹⁴

3.3.2.2 Admissibility of Evidence in Subsequent Proceedings

This is the second limb connected by the thread of disclosure of information. Articles 10 and 20 of the model law and rules cater it for respectively. This limb basically bars the introduction and subsequent admissibility of any information procured from conciliation in subsequent proceedings, whether arbitral or judicial. This is to avoid conciliation being used as a fishing expedition by canny lawyers. The prohibition covers views regarding proposals for possible settlement, admissions or indications of a party’s willingness to settle, invitation to take part in conciliation or fact that a party was willing to take part in conciliation, proposals made by conciliator or documents prepared solely for conciliatory purposes. The reason behind this prohibition is to avoid the possibility of a ‘spill over’ of information, which might discourage the parties from trying to reach a settlement during conciliation proceedings and hence reduce the usefulness of conciliation.²¹⁵ The articles

²¹³ Guide supra, Para 63 and A/CN.9/514, Para 60.

²¹⁴ U.S. Court of Appeal Fourth circuit, supra.

²¹⁵ Guide, supra, Para 64.

impose dual obligations in terms of admissibility of evidence in subsequent proceedings: an obligation upon the parties not to rely on the types of evidence specified therein and an obligation to the courts to treat such evidence as inadmissible in the unlikely event of its introduction.²¹⁶ The only exception to this bar is if that information is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

It should however be noted that, any other information generated for other purposes than conciliation although presented at conciliation does not cease to be admissible i.e. all other information that would otherwise be admissible as evidence in a subsequent court or arbitral tribunal does not become inadmissible solely by reason of it having been presented in an earlier conciliation.²¹⁷

3.3.3 Termination of Conciliation Proceedings

It is clear that conciliation is founded on the principle of party autonomy, where by parties determine their own fate. In this vein, both the model law²¹⁸ and conciliation rules²¹⁹ provide guidelines on how and when conciliation proceedings are terminated which are: by conclusion of a settlement agreement by the parties, on the date of the agreement.²²⁰ In this aspect, the term ‘conclusion’ is used in the model law instead of ‘signing’ used in the Conciliation Rules to better reflect the possibility of entering into a settlement agreement in any form other than a signed document, such as by exchange of electronic communications or even orally. This was enacted bearing in mind that flexibility is the greatest advantage of conciliation.

²¹⁶ Official records of the General Assembly, fifty-seventh session, supplement no. 17 (A/57/17), Para 166.

²¹⁷ Article 10(5) Model Law. See also: Guide: Para 73.

²¹⁸ Article 11.

²¹⁹ Article 15.

²²⁰ Article 11 (a) Model Law and Article 15 (a) Conciliation Rules.

The conciliator can also terminate the proceedings upon consultation with the parties and realising that further efforts at conciliation are no longer justified.²²¹ A party can also declare to the conciliator that the proceedings are terminated²²² or by a party declaring to the other.²²³

In all termination procedures enumerated above it should be noted that less emphasis is placed on formality. The gist being that, parties should not have to go through a hassle to get out of a process they entered voluntarily.

3.3.4 Conclusion

It is worth mentioning that the UNCITRAL model laws and rules (herein after referred to as ‘UNCITRAL works’) represent a culmination of several years of effort by experienced arbitral experts from many countries.²²⁴ The existence of the UNCITRAL works has certainly accrued several advantages to international trade on the whole and alternative dispute resolution in particular. These advantages are:

- Coming with the acceptability of several countries with differing legal, social and economic backgrounds. Acceptability has also been enhanced by their being floated or presented by the United Nations in several major languages.
- Providing international uniformity and therefore not being a subject to parochial nationalistic labels, which was the sole reason for the creation of UNCITRAL and the particular working group.

²²¹ Article 11 (b) Model Law and Article 15 (b) Conciliation Rules.

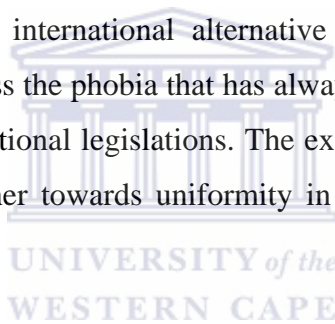
²²² Article 11 (c) Model Law and Article 15 (c) Conciliation Rules.

²²³ Article 11 (d) Model Law and Article 15 (d) Conciliation Rules.

²²⁴ More than 50 states of all regions and legal and economic systems as well as more than 15 international organisations participated in the preparatory work. The delegations included many internationally known arbitration experts. Small wonder that the discussions, as reflected in the *travaux préparatoires* and acknowledged by commentators, were of remarkably high quality. See: RH Christie, ‘The UNCITRAL model law and the powers of the courts: A South African perspective’ (1999) at 3; Gerald Aksen, ‘The Iran – U.S claims tribunal and the UNCITRAL arbitration rules – an early comment.’ (1982) at 1.

- Being easily referred to in contracts without necessarily the need for lengthy negotiations over procedural wrangles. To ensure this, model clauses have been included in the respective works.
- Lastly, their existence assures parties of the best possible procedures for ad hoc arbitration or conciliation without administering agencies, if this is desired. While at the same time they are flexible enough to permit accommodation to institutional aid either as appointing authority or for complete administrative services or with minor modifications they may be adopted as institutional rules.²²⁵

Conclusively, all that can be safely said now is that the UNCITRAL works provide a valuable framework to aid both government negotiators and private individuals responsible for clean and easy resolution of disputes. The existence of internationally acceptable instruments to aid international alternative dispute resolution can not be overstated as it serves to address the phobia that has always impeded international trade – cultural biases embedded in national legislations. The existence of these instruments has paved way for nations to slither towards uniformity in the bid to have one economic world.



²²⁵ An example can be drawn from the inter-American commercial arbitration commission. See Gerald Aksen, op cit 2.

CHAPTER FOUR

4.0 Arbitral and Conciliation Awards and Their Enforcement In Light Of the UNCITRAL Instruments

4.1 Introduction

As already seen in the previous chapters, one of the ways by which proceedings are terminated (whether conciliatory or arbitral) is by the rendering of an award. In conciliatory proceedings the parties reaching a settlement of the dispute can effect termination. This chapter therefore, seeks to examine what happens once those settlements or awards are rendered. The examination will be mainly based on the UNCITRAL model laws and rules on both arbitration and conciliation plus the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (herein after referred to as the New York Convention).²²⁶

4.2 Conciliation

Upon successful completion of conciliation, parties may choose to verbally agree on a settlement.²²⁷ This however, has evidentiary problems in case the other party fails to live up to his bargain. The other problem with oral settlements is that since conciliation is a consensual process, they are not binding upon the parties. In this light, it is always advisable for parties to enter into or conclude written settlement agreements.²²⁸ The model law is silent on this but the conciliation rules provide thus:²²⁹

If the parties reach an agreement on the settlement of the dispute, they draw up and sign a written agreement ...

²²⁶ Although the United Nations prepared the Convention prior to the existence of UNCITRAL, promotion of the Convention is an integral part of the Commission's programme of work. As its name indicates, it provides for the recognition and enforcement of arbitral awards rendered in foreign countries. See: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

²²⁷ Mark Baker, (1997) op cit 37.

²²⁸ Ibid.

²²⁹ Article 13(2) Conciliation Rules.

It is the duty of the parties as stated above to draw up the settlement agreement. However, where they find any difficulty the same provision allows them to seek the guidance of the conciliator. This is an exhibition of the authority that the parties have upon their proceedings. Being a consensual process, the parties are given the chance to design their destiny, enshrining it in a settlement agreement which goes a long way in cementing rather than breaking their relationship, be it commercial or otherwise. By having the agreement reduced to writing the parties avoid evidentiary problems and also impose legal obligations on one another to live to their bargain. Actually in this vein Article 13(3) of the conciliation rules hastens to say:

The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement

The effect of this provision is that in case one of the parties falters on this agreement or doesn't fulfil his obligation then the other can have a foundation upon which to seek redress through any other procedure that may be available to him, judicial or otherwise.²³⁰ As a precaution however, parties are advised to include a dispute resolution clause to address any dispute that may arise from the settlement agreement.²³¹

4.2.1 Enforcement of Conciliation Settlement Agreements

The issue of enforcement becomes crucial when one of the parties fails to satisfy his obligations under the settlement agreement. It should be noted that only settlement agreements that are reduced into writing and signed by the parties are enforceable. This is because the settlement agreement gives birth to contractual obligations for both parties, which give either party rights that are enforceable in the eyes of the law.²³² Despite the parties having a right to enforce settlement agreements that accrue from the conciliation process, a problem lies in the fact that there is no ultimate procedure to be followed in

²³⁰ Mark Baker, 'The corporate representative and ADR', (1997) 37. See also: Baker & Arif op cit 29.

²³¹ Ibid.

²³² Article 13(3) Conciliation Rules; Article 14 of the Model Law. Mark Baker loc cit; Baker & Arif loc cit.

doing so. Though the aim of conciliation is expedited resolution of disputes, when it has come to enforcement the matter has been dependent on the technicalities of domestic procedural laws, which do not easily lend themselves to harmonisation by way of uniform legislation.²³³

The contractual nature of the settlement agreements in many states is still a novel aspect of the process to the extent that some nations today don't have special provisions on the enforceability of such settlements, with the result being that they would be enforceable as any contract between the parties.²³⁴ In a nutshell, the process of enforcement of settlement agreements has been left to domestic authorities that have dealt with it in various ways around the world. Some states such as Hungary,²³⁵ Korea²³⁶ and China²³⁷ have provided for the appointment of a sole arbitrator for the sole purpose of rendering an arbitral award on the contents of the settlement agreement. In other jurisdictions such as Australia, the status of the agreement reached following conciliation depends on whether or not the conciliation took place in a court system and the legal proceedings in relation to the dispute are on foot.²³⁸ This consideration is bad for the flexibility of the conciliation regime because it handicaps the parties who wish to avoid the courts of law. In Uganda for example: the principal requirements are that the settlement agreement is drawn up and signed²³⁹ by the parties with the conciliator authenticating it too and

²³³ Guide to Enactment and Use of the UNCITRAL Model Law on Conciliation, 2002, Para 88.

²³⁴ A/CN.9/514, Para 78.

²³⁵ In Hungary, section 39 of Act LXXI, of 8 November 1994 provides that:
(c) An award agreed shall have the same effect as that of any award made by the arbitral tribunal.

²³⁶ In the Republic of Korea, the arbitration law does not contain provisions on conciliation but conciliation or mediation is practiced widely (see the Korean arbitration rules of the Korean commercial arbitration board, as amended on 14 December 1993). Article 18 (3) provides that, if conciliation succeeds, the conciliator shall be considered as the arbitrator appointed under the agreement of the parties and the settlement reached shall be treated as an award on agreed terms.

²³⁷ Arbitration Law of the People's Republic of China, article 51.

²³⁸ A/CN.9/514, PARA. 79.

²³⁹ Section 58(3) of the Arbitration and Conciliation Act, 2000, Cap 4, Laws of Uganda.

furnishing a copy to each of the parties.²⁴⁰ Upon so doing, the settlement agreement shall have the same status and effect as if it was an arbitral award.²⁴¹ The status and effect leaves one wondering whether the international conciliation settlement agreements are given the same treatment as international arbitral awards and thus enforced under the New York Convention.

Conclusively, therefore, one may rightly say that there is no recognised uniform procedure for the enforcement of conciliation settlement agreements. This is a weakness, which only serves to open the floodgates for court battles any time enforcement is sought. This sort of uncertainty is not good for the process because it erodes the confidence of the businessperson who wants to use this form of ADR.

4.3 Arbitration

Arbitration on the other hand, has a clearer regime when it comes to recognition and enforcement of the decisions that accrue there from. From the onset, it should be noted that decisions that result from arbitration are embodied in arbitral awards. The arbitral award is rendered by the majority of arbitrators or if it's a question of procedure, where there is no majority or when the arbitral tribunal so authorises the presiding arbitrator may exercise this jurisdiction subject to revision, if any by the arbitral panel.²⁴²

4.3.1 Form and Content of an Arbitral Award

An arbitral award like a judgment of a court of law shall be in writing²⁴³ and signed by the arbitrator(s) rendering it.²⁴⁴ In a process that involves more than one arbitrator the

²⁴⁰ Section 58(6) op cit.

²⁴¹ Section 59 op cit.

²⁴² Article 31(1) and (2) of the Arbitration Rules.

²⁴³ Article 32(2) of the Arbitration Rules and article 31(1) of the Model Law. It is almost a universal requirement in international commercial arbitration that the award be written and signed. The New York Convention implies in its Article IV that the award must be in writing, but does not say so explicitly. The UNCITRAL Model Law states it explicitly in Article 31. See: UNCTAD, 'Dispute settlement: International commercial arbitration' 2005 at pg. 24.

signatures of the majority shall suffice, on condition however, that reason is given for the omitted signatures.²⁴⁵ The award shall contain the *ratio decidendi* i.e. reason for the decision unless the parties agreed otherwise.²⁴⁶ This requirement is aimed at showing the parties where they went wrong to avoid any future wrongdoing. Generally, an award serves to record the terms of an amicable settlement by the parties.²⁴⁷ Importantly though, neither the model law nor rules require or prohibit dissenting opinions although it is the majority that counts. As a requirement, the arbitral award must be dated²⁴⁸ and must also state the place where the arbitration took place.²⁴⁹ This requirement plays three significant roles throughout the arbitration; in that it determines the law governing the arbitration and courts empowered to act in support thereof, or to interfere with, the arbitration. Similarly, stating the place of arbitration on the award confirms the court before which the losing party can move to have the award set aside. It also establishes whether enforcement of the award can be sought under the New York Convention.²⁵⁰

Upon successful rendering of the award each party must be availed with a copy of such award.²⁵¹ This is mostly for evidentiary purposes in the event of a party defaulting on his obligation and the other party wants to have recourse in other proceedings. These copies have educational value for businesspersons and institutions in that they guide them in

²⁴⁴ Article 32(4) of the Arbitration Rules and article 31(1) of the Model Law.

²⁴⁵ Ibid.

²⁴⁶ Article 32(3) of the Arbitration Rules and article 31(2) of the Model Law.

²⁴⁷ No arbitration law or rules set forth the style or extent of the reasons that must be given in the award. What is needed is sufficient explanation for the parties to understand the process by which the arbitral tribunal reached its decision. See: UNCTAD op cit 27.

²⁴⁸ The date determines when the award has res judicata effect and can be executed by a court. An example can be drawn from France's New Code of Civil Procedure, Article 1478. It is also important because it helps in calculating the period within which the losing party can move to have the award set aside in light of Article 34 (3) of the Model Law, though in some cases the time limit may be said to begin when the award is received.

²⁴⁹ Article 32(4) of the Arbitration Rules and article 31(3) of the Model Law.

²⁵⁰ UNCTAD op cit 25.

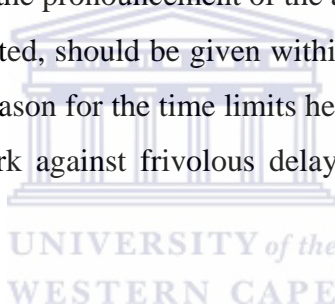
²⁵¹ Article 31(4) of the Model Law and article 32(6) of the Arbitration Rules.

avoiding a similar problem in future. This does not however, give the arbitrators the authority to publish the award. Making the award public depends on the laws of the country but this step should always be taken with the consent of the parties.²⁵² This consent is jealously guarded by the courts of law because such publication goes to the root of the confidentiality of the process.

4.3.2 Interpretation and Correction of the Award

These duties entirely lie with the arbitrator(s). Interpretation on one hand is with notice on the other party requested with in 30 days of receipt of the award.²⁵³ This is to avoid uncertainty and to obtain further explanation of the award so as to facilitate the understanding of the obligations that accrue there from.²⁵⁴ The courts have no place in the exercise of this power because the pronouncement of the arbitrators is final and binding.

This interpretation once requested, should be given within 45 days and upon so doing, it forms part of the award. The reason for the time limits here is to facilitate the expeditious resolution of disputes and work against frivolous delays in meeting of obligations by canny parties.



A party on the other hand requests correction within 30 days and with notice to the other party. This doesn't apply to the effect of altering the award but to errors in computation, clerical and typographical errors. The major difference here lies in the fact that unlike interpretation which has to be sought by either party the court can act on its own volition in matters of correction. This however, must be done in the availed time to reduce the endless process.

²⁵² Article 35 of the Arbitration Rules.

²⁵³ Domenico di Pietro and Martin Platte, *'Enforcement of international arbitral awards: The New York convention of 1958'*, 2001 at 22.

²⁵⁴ The interpretation should be of the award, not the reasoning. The arbitral tribunal must be careful not to allow a request for interpretation to become an opportunity for a party to present new arguments in regard to the matters that were already settled in the award. See UNCTAD op cit 15.

Where all the above is done then it's the duty of the parties to comply and satisfy the obligations imposed on to them by the award. In the event of failure, the party has a right under the New York Convention to apply for recognition and enforcement of the arbitral award.

4.4 Recognition versus Enforcement

These are two different processes with potentially different outcomes. They may actually be regarded as two different stages of parties' set of rights and obligations. Recognition on one hand, relates to acknowledgement of a status quo as ruled in an award by an arbitral panel.²⁵⁵ A party follows this course of action in order to make the award or outcome of the arbitral process known, which serves to alter the legal relationship between the parties in light of the rights that accrue from the award.²⁵⁶ The situation may remain this way in case the parties comply with their obligations. Recognition comes with no enforcement privileges but sets the ground for exercise of such rights at a later stage. This mere recognition of the arbitrators' decision is the province of enforcement in case the losing party defaults on his obligation.

Enforcement on the other hand, is aimed at altering the position of the parties to reflect the decision taken by the tribunal²⁵⁷ by for example seizure of the defaulter's property or garnisheeing his bank accounts. The bottom line here is that recognition and enforcement are complimentary processes. Recognition is a condition precedent for enforcement of an award, which can't be practically achieved without the former.

²⁵⁵ This is an area not covered by the South African Act 40/77 as it only contains provisions relating to enforcement yet in its short title its clear that the Act was to cover both recognition and enforcement. See: South African Law Commission, 'Arbitration: A draft international arbitration Act for South Africa', *Discussion paper 69, Project 94* Para 3.12.

²⁵⁶ Domenico op cit 23.

²⁵⁷ Ibid.

4.5 Application of the New York Convention

Article 1 sets the maximum standard for the application of the convention to any arbitral award. It lays down the condition precedent for the convention's applicability. In this sense, it states that the award sought to be recognised and enforced must have been rendered in the territory of a state other than where it is sought to be recognised and enforced.²⁵⁸ It must be a product of differences between persons, whether physical or legal and the award in issue must not be considered domestic in the state where such enforcement is sought.²⁵⁹ From this text we note that the criteria normally adopted in national conflict of law rules such as nationality of parties, place where assets are located or *lex loci contractus* have no place.²⁶⁰ The essential yardstick in the provision is the state where the award was made. This all points to the flexibility of the arbitration procedure because knowing that different states have various ways in which they resolve conflict of laws scenarios the New York Convention goes for a simple yet effective standard. This seemingly simple determination may encounter problems where the award is signed in a place other than the seat of arbitration. Such problems may open doors for the national courts for purposes of interpretation, which will call for enormous expenditure in terms of time and finances. The controversy that may ensue was exemplified in *Hiscox v. Outhwaite*²⁶¹ where the House of Lords held that an award signed in Paris despite being rendered in an arbitration located in England was to be considered as made in Paris for purposes of the convention.²⁶² This is a loophole, which needs to be addressed. The residual criterion is further extended in the last part of the provision, which calls for applicability to awards 'not considered as domestic', but it doesn't state the

²⁵⁸ Booyesen op cit 387.

²⁵⁹ Ibid.

²⁶⁰ Domenico op cit 23.

²⁶¹ [1991] 3 ALL ER 641; 1991 3 W.L.R 297.

²⁶² The House of Lords in this case further held that in the context, the word "made" should be given its ordinary, natural and common construction. It went further to say that, the award is simply a written instrument, which is made when, and where it is perfected and it is perfected when it is signed. The award was therefore made in Paris making it a convention award.

characteristics to be taken into account in order to differentiate between a domestic and foreign award.²⁶³

Conclusively on this point, though the premise of the process is its flexibility, as earlier noted, the determination of the requirement stands to be left at the discretion of the harsh national courts.

4.5.1 Reservations

The convention in order to be so widely accepted²⁶⁴ needed to give states the latitude of choosing who to cooperate with and what type of awards they would enforce. Hence, the reservations found in article 1(3); reciprocity and commercial reservations.²⁶⁵

4.5.1.1 Reciprocity Reservation

This reservation was adopted to cater for parties that did not believe in the principle of “universality” which would have permitted the enforcement of arbitral awards irrespective of their source. The effect of this reservation is to allow nations the latitude to only enforce awards that emanate from fellow contracting parties.²⁶⁶ This waves a red flag for international businesspersons to be aware of the status of the arbitration seat they choose.

4.5.1.2 Commercial Reservation

This reservation allows nations the right to reserve the application of the convention to awards resulting from a legal relationship considered commercial in nature. This

²⁶³ Examples of such characteristics are highlighted in *Sigval Bergesen v. Joseph Muller AG, U.S. ct App. 2nd cir 17 June 1983, 548 F supp. 650 (1982) 38 Arb. J. 70 (1983)* to include nationality of the parties, applicable law, contract subject matter or in case of property disputes, the location of that property.

²⁶⁴ To date the New York Convention has 137 signatories to its name. See: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. Accessed on 01st September 2005.

²⁶⁵ South Africa acceded to the New York Convention with effect from 1st august 1976 without reservation. See: *Hansard 18th March 1977 col 3834; South African Law Commission op cit 60.*

²⁶⁶ This counts for the large number of signatories because they feel their sovereignty is being respected.

reservation explains the reason for the existence of what constitutes ‘commercial disputes’ in the model laws on both conciliation and arbitration. Indeed, disputes have arisen as to what constitutes a commercial relationship; an example can be drawn from the High Court of India which held the rendering consultancy services by a company for promoting a related commercial deal should not be regarded as a commercial nature. This interpretation was contested in the Supreme Court, which held thus:²⁶⁷

While construing the expression commercial it has to be borne in mind that the aim of the convention is to facilitate international trade by means of facilitating suitable alternative ways of settlement of international disputes and therefore any expression adopted in the convention should receive consistent with its literal and grammatical sense a liberal construction. The expression commercial should therefore be construed broadly having regard to manifold activities, which are integral part of international trade nowadays.

This reservation was also extensively examined in *Societe d Investissement Kal v. Taieb Haddad Barret*²⁶⁸ where a dispute was between a company that had retained two architects to draw up urbanisation plans for a resort in Tunisia. The contract contained an arbitration clause for all disputes under the ICC in Paris. A dispute arose in relation to professional fees and the ICC rendered an award in favour of the two architects who attempted to enforce it in Tunisia. Both the court of first instance and the court of appeal denied the enforcement. On appeal the Supreme Court held that:

Tunisia made the commercial reservation when adhering to the convention. Thus, it will apply the convention only with respect to disputes which are commercial under Tunisian law. The contract from which the dispute arises is one concerning architectural plans drawn by architects, which do not fall within the definition of articles 1 – 4 of the commercial code; [the contract] is not by its nature commercial under Tunisian law. Since the contract between the parties is [not commercial], the convention does not apply to it and the arbitral clause cannot be contained there in according to article I (3) of the said convention. The parties have submitted the contract to Tunisian law

²⁶⁷ *RM Investments & Trading Co. pvt Ltd v. Boeing Co. Supreme Court Journal, 1994 vol. 1 pgs 657 – 664.*

²⁶⁸ Cour de cassation [Supreme Court], 10 November 1993; see also year book XXIII (1998) pgs 770 - 773

According to article 258 CCCP, arbitration clauses are allowed only for disputes concerning a commercial relationship. This contract is not commercial and does not concern a commercial relationship, thus it does not fall within the ambit of the jurisdiction of the arbitrators, independent of its being international or not, since the international aspect is linked to the commercial nature: the two co-exist and if one is absent the other loses its second essential component. Hence, the referral to arbitration is not allowed; this conclusion is drawn from articles 277 and 318 CCCP.

From the two cited authorities it is eminent that commerciality has been given a very narrow meaning leaving the courts with the discretion to interpret it. It is submitted that the only logical remedy would be to broaden the meaning of the word “commerce” to cater for the continuing evolution of new features of commercial relationships.²⁶⁹ As rightly pointed out by Domenico Di Pietro and Martin Platte²⁷⁰ such a test may be too broad and inadequate in certain specific matters but may still retain its validity given the attitudes of national jurisdictions²⁷¹ towards matters characterised by the element of internationality and yet retain the flexibility of the arbitration process.

4.6 Recognition and Enforcement of the Arbitration Agreement

An obligation is placed on all contracting parties to recognise any arbitration agreement that is in writing.²⁷² The effect of this requirement being that where a court is seized with a matter which is subject to an arbitration agreement in any member state it must stay proceedings and refer the parties to arbitration. The writing requirement in the provision serves two purposes; to provide evidence of mutual intent to submit to arbitration as well as the contents of the arbitration agreement and to exert some higher form of “warning”

²⁶⁹ To include items that go to the professional status of the parties such as: banking, insurance, supply of services such as energy, communication of information, carriage of goods by any means of transport etc.

²⁷⁰ Domenico, op cit 61.

²⁷¹ Because the final decision as to what qualifies as commercial is for the law of the country where enforcement is sought.

²⁷² Article II (1) of the New York Convention. South Africa lacks such a provision in its law. See: South African Law Commission op cit 61.

or notice that the parties are excluding national courts and there by waiving their constitutional right to have their cases heard in before a state court.²⁷³ The second paragraph to the provision sheds more light on what constitutes an agreement in writing; an arbitration clause or submission agreement signed by the parties or contained in the exchange of letters or telegrams.²⁷⁴ In essence the, written agreements are broadened to include exchanges of either letters or telegrams or the modern day e- mails. The effect of all this being that it's not the actual signature that is required but expression of intent in writing.²⁷⁵ The decisive criterion here is whether the parties are aware that they are entering into an arbitration agreement. The bottom line therefore, is if the acceptance notice is in writing, or if a duplicate of the offer or acknowledgement of the order is returned, the arbitration clause meets the writing requirement. Upon finding in the affirmative the court is bound to recognise and enforce the agreement by referring the parties to arbitration.²⁷⁶ This is what has been referred to as 'compelling arbitration'.²⁷⁷ The court must also be convinced that the dispute arises from a defined legal relationship. Simply stating that all future disputes will be referred to arbitration alone is not sufficient. The agreement in issue must refer to a specific (defined) legal relationship, which most commonly is a contract.²⁷⁸ The test of the thumb was laid down in *Astro venedor Compania Naviera SA of Panama v. Mabanafit GMBH ("The Dominos")*²⁷⁹ to the effect that if a claim or issue has sufficiently close connection with the claim under the contract

²⁷³ Yearbook XI (1986) at 532; yearbook XIII (1988) at 446; ICC award 5832 (1988).

²⁷⁴ This matter was considered in *Sphere Drake Insurance PLC v. Marine Towing Inc*, cited in year book XX (1995) Pg. 937 which was followed by the Swiss supreme court in *Compagnie de Navigation et Transport SA v. MSC (Mediterranean Shipping Co)* year book XXI (1996) Pg. 697 holding that "according to the formal requirements applicable in casu, arbitration agreements are valid which are contained in a signed contract or in an exchange of letters, telegrams, telexes and other means of communication. In other words a distinction should be made between agreements resulting from a document which must be in principle signed, and an agreement resulting from an exchange of written declarations, which are not necessarily signed".

²⁷⁵ See: court of appeals decision in *DIETF v. RF AG (5 July 1994)* year book XXI (1996) Pgs. 685 – 686.

²⁷⁶ Article II (3) of the Convention.

²⁷⁷ John P. Bowman, 'Compelling Arbitration in International Cases' (2003) at 14.

²⁷⁸ Domenic Di Pietro supra, at Pg. 90.

²⁷⁹ [1971] 2 QB 588, [1971] 2 ALL ER 1301.

it has to be referred to arbitration. This requirement however, goes to the construction of the arbitration agreement and clause, which demands that there must be a nexus between the contract and the resultant dispute.²⁸⁰

The last requirement is that the matter must be capable of settlement by arbitration. This requirement varies depending on the jurisdiction as it entirely rests on the national public policy. This requirement however, has caused a problem where nations have used it to kill actions that are brought by foreigners who try to infiltrate their markets for specific products while restricting others. An example can be drawn from the United States on anti trust matters. With the Sherman's Anti Trust Act the U.S prohibits contracts, combinations and conspiracies in restraint of trade or commerce.²⁸¹ In this Act, it is declared that any person who monopolises or attempts to monopolise trade or commerce, shall be guilty of an offence. As a matter of public policy, in the U.S. any dispute that arose from a contract that contravened the anti- trust laws was not arbitrable until 1985. It was at this time that the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*²⁸² rejected the arguments raised in an earlier case²⁸³ to hold in a 5: 3 decision that anti trust claims are arbitrable in the international context:

The Bremen and Sherk establish a strong presumption in favour of the enforcement of freely negotiated contractual choice of forum provision ... thus we must weigh the concerns of the American safety against a strong

²⁸⁰ See decision in *Concourse Village, Inc v. Local 32 F, Service Employees International Union*, 882 F.2nd 302, 304 (2d cir. 1987) where it was held that "indeed unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, the dispute should be referred to arbitration".

²⁸¹ The Sherman Anti-Trust Act, passed in 1890, was the first important federal measure to limit the power of companies that controlled a high percentage of market share. See: <http://projects.vassar.edu/1896/trusts.html> accessed on 20th Sep. 2005. It has also been argued elsewhere that the Sherman Act was never intended to protect competition. It was a blatantly protectionist act designed to shield smaller and less efficient businesses from their larger competitors. See: *Thomas J. DiLorenzo, 'The Origins of Antitrust: Rhetoric vs. Reality', published in The Cato Review of Business & Government, accessible on line at: http://www.cato.org/pubs/regulation/regv13n3/reg13n3-dilorenzo.html* accessed on 20th Sep. 2005.

²⁸² 473 U.S. 614; 105 S.Ct. 3346; 87 Led. 2d 444 (1988).

²⁸³ *American Safety Equipment Corp. v. Maguire (J.P) & co* 391 F.2d 821 (2d cir (1968).

belief in efficacy of arbitral procedure for resolution of international commercial disputes and equal commitment to enforcement of freely negotiated choice of forum clauses ... accordingly we require this representative of the American business community to honour its bargain ... by holding this agreement to arbitrate enforceable.²⁸⁴

Such an example shows the uncertainty surrounding what qualifies as public policy. It is however, advisable that parties while negotiating international contracts take into consideration such matters, which can give birth to a lot of inconvenience or result in leaving them with awards that they simply cannot enforce.

4.7 Recognition of Arbitral Awards

Contracting states of the New York Convention are duty bound under article III to recognise arbitral awards and enforce them in accordance with their laws of procedure.²⁸⁵ Of course, this is subject to any reservation that might have been made by the state where the award is sought to be recognised and subsequently enforced. In this vein, the article prohibits the imposition of substantially onerous conditions or fees or charges on the said duty than are imposed on the recognition and enforcement of domestic awards. To avoid controversy, article IV lays down what ought to be submitted by a party applying for recognition and enforcement of an arbitral award to wit; a duly authenticated original award or duly certified copy thereof,²⁸⁶ an original arbitration agreement referred to in article II of the convention or a certified copy of the same²⁸⁷ and a translation of the said

²⁸⁴ *The Bremen v. Zapata case* 407 U.S. 1; 92 S.Ct 1907; 32 L. ED. 2d 513(1972) referred to in the cited quotation of the judgment simply highlighted that the American business cant delve into international waters on their own terms, governed by their laws and having their disputes resolved in American courts reminding the Americans of the international trend of uniformity in the enforcement of arbitral awards, citing the principle of comity.

²⁸⁵ South Africa however, in S.2 (1) of Act 40/77 which is intended to give effect to article III provides that '[a]ny foreign arbitral award *may* subject to the provisions of section 3 and 4, be made an order of court'. (Emphasis added). The language used in the provision is discretionary, permissive and not mandatory which is contrary to the intention of the convention (where instead of '*may*' the provision uses '*shall*') which was intended to bind every signatory to it. This therefore, is a weak link which ought to be addressed in order to satisfy South Africa's international obligations.

²⁸⁶ Article IV (1) (a).

²⁸⁷ Article IV (1) (b).

documents if they are not in the language of the country where the award is relied upon.²⁸⁸ The convention in article IV serves to make the formal conditions for enforcement as simple as possible and it supersedes any municipal law. The applying party by furnishing the said documents is held to have produced *prima facie* evidence entitling him to obtain enforcement of the award. The burden is now cast on the resisting party to prove that enforcement should be denied. Of paramount importance is the fact that, the said documents should be supplied with the application and not at a later stage. However, this is not a very rigid requirement and should not be read literally which has resulted in a number of courts allowing the applicant to cure the non- (timely) - fulfilment of article IV.²⁸⁹ However, regardless of the standard set in article III some countries have contrary to their international obligation gone ahead to impose onerous conditions. In South Africa for example onerous conditions can be found in section 1 of the Protection of Business Act 99 of 1978 (PBA) which is to the effect that:

“No judgment or **arbitral award** made outside south Africa shall be enforced inside south Africa without the consent of the minister of trade and industry, if the judgment or award arose from an act or transaction ‘connected with mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from south Africa” (*Emphasis Added*)

As can be seen from above, this is a legislative huddle, which can only be circumvented with the minister’s consent if the arbitral award results from a transaction connected to mining, production, importation, exportation, refinement, possession, use or sale of ownership of “any matter or material” into or from the Republic. This requirement has proved to be so cumbersome because it virtually includes everything a businessperson

²⁸⁸ Article IV (1) (2) which requires the translation to be certified by an official or sworn translator or by a diplomatic or consular agent.

²⁸⁹ See: *year book I (1976) Pg. 182 (Australian supreme court decision of 17th November 1965)* and the U.S. supreme court decision in *Imperial Ethiopian Government v. Baruch Foster Corporation, year book II (1977) Pg. 252.*

can engage into.²⁹⁰ The fate of any businessperson seeking enforcement of a foreign arbitral award, like foreign judgments, in South Africa is determined by the minister of economic affairs. Without any set requirements for such approval, great uncertainty looms as regards the minister's consent and the chances of its being successfully challenged,²⁹¹ which is not good for business. As earlier alluded to, the section is very broad and covers almost the entire business arena literally forcing the businessperson who obtains a foreign arbitral award to apply for ministerial consent before attempting to enforce it. This requirement is ridiculous in the face of international commercial arbitration in that it serves to complicate and prolong the process, which ought to be short. In so doing, it increases the financial implications and thus is burdensome on the party seeking enforcement in South Africa. The provision in issue has been interpreted to be mandatory and actually applies notwithstanding any other law or legal provision to the contrary.²⁹²

4.7.1 Refusal of Recognition and Enforcement of Arbitral Award

Where an application for recognition and subsequent enforcement is made, the court is endowed with authority to deny this right on application of the opposing party if he furnishes it with proof that satisfies articles V and VI of the convention. The provisions clearly show that it is only the opposing party who can invoke this right. In essence, the court cannot at its own volition seek to investigate whether the grounds for refusal have been met. The court can only act on its own volition in circumstances laid down in article V (2).²⁹³ It is not mandatory however, that upon satisfaction of the conditions exemplified

²⁹⁰ See: *Chinatex Oriental co. v. Erskine* 1998 (4) SA 1087 (c) and *Tradex Ocean Transportation SA v. MV Silvergate (or Astyanax) and others* 1994 (4) SA 119 (D) where the expression "any matter or material" was in issue with the latter case settling for the position that it means raw materials.

²⁹¹ Hartzenber J in *Seton v. Silveroak Industries Ltd* 2000 (2) SA 215 at 226 (e).

²⁹² See: Forsyth C F, '*Private International Law*' 3 ed 1996 at Pg.402 who is keen to point out that the section was designed to protect South African businesses 'from the far reaching tentacles of American anti-trust legislation'; SA law commission, '*Arbitration: A draft arbitration Act for South Africa*' discussion paper 69, Para 3.78.

²⁹³ Article V (2) concerns the enforcing court and the law of the enforcing jurisdiction. It provides court with a 'safety net', in order to give courts a tool of not enforcing awards that violate basic notions of its own jurisdiction such as those against public policy.

in article V (1) enforcement should be denied. The language used (“may refuse”) is permissive rather than mandatory which therefore allows room for courts discretion in the matter as detailed in *China Nanhai Oil Joint Service Cpn v. Gee Tai Holdings Co Ltd*²⁹⁴ where the Hong Kong Supreme Court said that:

Even if a ground of opposition is proved there is still a residual discretion left in the enforcing court to enforce non-the less. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all circumstances...

This is sought to be in line with the flexibility that lies in arbitration. The gist being that if flexibility is found in the conduct of arbitration then it should also lie in the enforcement. Further still, the court is armed with the authority to measure whether its resultant order is likely to manifest grave injustice on the parties. This discretion therefore is a calling to reason.

4.8 Grounds for Refusal

The grounds upon which recognition and refusal can be denied as enshrined in the said provisions are here below examined.

4.8.1 Incapacity

Though most contracts are always affected by incapacity in the sense of irregular procedure, the New York Convention chooses to tackle the substantial aspect of incapacity in light of the arbitration agreement. This comes into issue where one party is a state, public body or national agency whose disputes are not allowed for referral to arbitration unless formal permission is obtained. This limitation is always embodied in the domestic law of the party in issue. This problem may be rare and not often encountered but a debate has always arisen whenever it comes up. An example can be drawn from *Fougerolle SA v. Ministry of Defence of the Syrian Arab Republic*²⁹⁵ where

²⁹⁴ Yearbook XX (1995) Pg. 671.

²⁹⁵ Yearbook 1990 Pg. 515.

the Syrian government availed its self this defence yet the contract had been duly approved under Syrian law. Arguments by the French company that the Syrian law breached the convention as to impossibility for contracting states to adopt stricter requirements for enforcement of awards and the Syrian law being superseded by their accession to the convention were rejected. The court found that the violated rules of the Syrian law were mandatory and pertaining to public policy and hence, the application for enforcement was dismissed.²⁹⁶ However, the demands of the modern day commerce were considered by the Italian Supreme Court, which laid down an advanced position in the judicial attempt to solve the dilemma caused by state bodies in international commercial arbitration stating thus:

We consider that, under the law applicable to international commerce, which necessarily governs the arbitration clause in the present case, legal persons of public law may, unless the parties have explicitly agreed otherwise, undoubtedly agree to arbitration independent of domestic prohibitions by expressing their consent and sharing the international market place, the conditions common to all operators²⁹⁷

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This case goes further to state that the burden of proof lies with the party alleging the ground impeding enforcement. This trend should be upheld in all jurisdictions if international arbitration is to maintain its reputation as independent from all local inferences.

4.8.2 Invalidity of the Arbitration Agreement

The relevant standard to determine such invalidity lies not in article II but rather in the law that the parties choose to govern their arbitration agreement and the law of the place

²⁹⁶ See also: *Southern Pacific Properties ltd v. The Arab Republic of Egypt & the Egyptian General Co. for Tourism and Hotels I*. LM 752 (1983) where a ministers signature to an arbitration agreement was found to merely be approval of worthiness of the agreement, as required by Egyptian law, and not as the intention to be bound by the agreement.

²⁹⁷ *Corte di cassazione (Italian supreme court) 9 May 1996 No. 4342 reforming corte di appello (court of appeal) di bari 2 November 1993, No. 811.*

where the award was made.²⁹⁸ To choose where the appropriate standard lies, we have to know whether the arbitration agreement is comprised in a parent contract or in an entirely separate agreement. If the situation were the former, then the arbitration clause would be judged under the law chosen by the parties. If however, it's a separate arbitration agreement all together, for which a separate choice of law has been made, then the most appropriate law will be where the arbitration took place. This has resulted from the test posed by the doctrine of separability which argues that an arbitration agreement is a contract separate from the main agreement and can be governed by a different law all together.²⁹⁹ This test however, only survives if the only invalidity in issue is that of the parent contract. The question on the law applicable to the agreement was resolved in a more convincing way by lord Mustill in *Channel Tunnel Group Ltd. V. Balfour Beatty constructions Ltd*³⁰⁰ where he said:

Certainly there might at times be an express choice of a curial law which is not the law of the place where the arbitration is to be held: but in the absence of an explicit choice of this kind, or at least some very strong pointer in the agreement to show that such choice was intended, the inference that when the parties contracted to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible.

Clearly the above assertion recognises the rights of the parties without imposing unrealistic conditions. In the words of *Domenico et al*³⁰¹ it seems safe to assume that the choice of a particular law to govern the agreement is such a pointer to the parties' intention.

²⁹⁸ Domenico op cit 143.

²⁹⁹ *Prima Paint Co. v Flood & Conklin Manufacturing Corp.*, 388 U.S. 395 (1967).

³⁰⁰ [1993] AC 334.

³⁰¹ Domenico op cit 148.

4.8.3 Where the Opposing Party Was Not Notified of the Proceedings

This is normally referred to as lack of due process. This requirement is grounded in the Latin maxim '*altri audi pateram*' (hear the other party) that is aimed to ensure a minimum standard of fairness during the process if justice is to be achieved. The process, firstly, refers to the right of the parties to be given adequate notice of the commencement of the arbitral process to enable them participate in the constituting of the arbitral panel. Secondly, the notion deals with a further right of the parties to play an active role in the arbitral proceedings. By so doing a party is given a chance to present his case, which is a kingpin in the notions of natural justice the violation of which invalidates any process. This requirement was well enunciated in *Sesostris v. Transportes Navales*³⁰² where a U.S. court relying on article V (1) (b) declined to enforce an award rendered in Spain because the party against whom it was sought to be enforced only received notice on completion of the process. The parties however, have found a way of circumventing this requirement by ensuring that service is indeed done but with in a very short time spell between that date of service and the day slated for the commencement of the process. Most challenges have been moulded around this mainly because there is no formal requirement for the time of service save for the fact that it must be reasonable to enable the other party participate in the proceedings and present is case. This was the crux in *Generica Limited v. Pharmaceuticals Basis Inc*³⁰³ where it was said that:

As the second circuit has noted that defence basically corresponds to the due process defence that a party was not given the opportunity to be heard at a meaningful time and in a meaningful manner ... therefore an arbitration should be denied or vacated if a party challenging the award proves that he was not given a meaningful opportunity to be heard as our due process jurisprudence defines it ... it is clear that an arbitrator must provide a fundamentally fair hearing ... a fundamentally fair hearing is one that meets the minimal requirements of fairness – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.

³⁰² 727 F. Supp. 737 (D. Mass. 1989).

³⁰³ U.S. Court of Appeals, Seventh Circuit, 29 September 1997. No. 96 – 4004.

Nonetheless the parties should not expect the formalities of court procedure to apply because the arbitrator enjoys wide latitude in conducting an arbitration hearing. Yet arbitral proceedings are not constrained by formal rules or procedure of evidence; the arbitrator's role is to resolve disputes, based on his consideration of all relevant evidence, once the parties to the dispute have had full opportunity to present their case.³⁰⁴

Conclusively on this point, the parties affected by this requirement should raise it to the tribunal as soon as it happens and if it is rejected, only then will the party be heard on this issue in the court where enforcement is sought.

4.8.4 Arbitrators Exceeding Given Authority

This as can be read from article V (1)(c) results from the dual actions of the arbitrators: where they entertained a claim which the parties didn't want referred to arbitration or are believed to have ruled on a matter beyond their scope of authority. Instances where arbitrators entertain matters which the parties didn't refer to arbitration are referred to as '*extra petita*' claims simply because where as the tribunal has performed its duty, it has done so outside the mandate granted to it by the parties. The test in such circumstances is whether the tribunal in acting outside the scope of authority found colourable justification for their decision. This minimum standard was set in *Andros Compania Maritima v. Marc Rich & Co.*³⁰⁵ where it was stated:

When arbitrators explain their conclusions ... in terms that offer even a barely colourable justification for the outcome reached, confirmation of the award can't be prevented by litigants who merely argue, however persuasively, for a different result

³⁰⁴ *Hoteles Condado Beach*, 763 F.2d at 38.

³⁰⁵ 579 F.2d 691 [1978].

So the point to be proved for such a defence to succeed is that the arbitrators delved into matters not subject to arbitration, relied on them in reaching their decision and as a result came to an irrational decision.³⁰⁶

The other branch of this defence is when the arbitrators have ruled on a case beyond the scope of authority granted to them by the parties. This is referred to as “*ultra petita*” where though starting with in the limits given by the parties they have exceeded these limits. This limb however is not more of a problem because the convention attempts to resolve it by allowing courts to extract the part that is within their scope of authority and allow its enforcement.³⁰⁷

4.8.5 The Composition of the Tribunal Was Contrary To the Agreement or the Law of the Country Where the Arbitration Took Place

While considering this defence it should be noted that it is coated to emphasise party autonomy, which is the bedrock of all ADR procedures. It should be noted that unlike in the Geneva Convention, under the New York Convention, the parties only consult the law of the place where the arbitration took place in the absence of an explicit agreement. This defence on its own is difficult to rely on unless it is backed by other defences under article V (1). This is because the minimum standard set for the arbitration process requires equal and fair treatment of the parties and above all affording each party a chance to present its case. These are the basic grounds on which enforcement will be denied as drawn from *China Nanhai oil joint service cpn v. Gee Tai holdings co. ltd*³⁰⁸ where the supreme court of Hong Kong rejected this defence when raised premised on the appointment of arbitrators on the Shenzhen list contrary to an earlier agreement to appoint arbitrators on the Beijing list. This was basically because the disputing party had not initially disputed the jurisdiction of the panel and therefore was estopped from doing it so late in the day.

³⁰⁶ *Parsons &Whittemore Overseas Co. Inc v.Societe Generale del Industrie du Papier (RAKTA) 508 F.2d 969 (2d cir. 1974).*

³⁰⁷ Article V (1) (c) of the New York Convention, 1958.

³⁰⁸ Yearbook XX (1995) Pg 671.

In the same light, where parties agree on a given procedure and it is followed enforcement may be denied on grounds of violating mandatory provisions of the country of origin.

4.8.6 Where the Award Has Not Yet Become Binding on the Parties

An award has been found binding for purposes of the New York Convention if it is no longer open to an appeal on the merits, be it to an arbitral tribunal or a competent court.³⁰⁹ This depends on both the law of where the arbitration took place and the agreement of the parties. If the agreement by the parties provides for finality of the award without any further appeal then, so it will be. But if the agreement allows an appeal and the same has been lodged, then the award will not be binding until the appeal has been disposed off. It has been argued elsewhere that there being some formalities to be satisfied does not render the award unenforceable for not being binding.³¹⁰ 'Binding' in this sense is decided depending on the procedural requirements embedded in the arbitration agreement and not domestically imposed unconventional steps. Nonetheless, it has been found reasonable to stay proceedings where the opposing party has applied to have the award set aside.³¹¹ Importantly however, it should be noted that the filing of an application to set aside the award in the country where it originated, is alone no automatic basis under article V (1) (e) to refuse enforcement. In such a case, it is only reasonable that the party is granted a stay under article VI and asked to deposit security for the fulfilment of the award.³¹²

4.8.7 Where a Competent Authority Has Set Aside the Award

This defence is availed to parties by article V (1) (e). However, the use of the word 'may' denotes that it's not mandatory but discretionary. There is no yardstick in deciding whether or not to grant or refuse enforcement when faced with this defence. As long as

³⁰⁹ See: Redfern / Hunter, *'Law and practice of international commercial arbitration'*, (1999) 3rd Ed, sweet & Maxwell, Pg. 468.

³¹⁰ See: *Fertilizer Corpn of India (FCI) v. IDI Management Inc*, yearbook VII (1982) Pg. 382 et seq.

³¹¹ Ibid.

³¹² 939 F. supp. 907 (D.D.C. 1996).

the court is of the view that enforcement would be proper then it is at liberty to grant it most especially if the setting aside is based on a local law or regulation, which would not affect the award in the country, where it is sought to be enforced. This position was well illustrated in *Chromalloy Aero services Inc v. Arab Republic of Egypt*³¹³ where an arbitral award that had been rendered in Egypt and later set aside there was found to be enforceable in the United States. The basis of such controversy is the permissive language used in the relevant article and article VII which out laws deprivation of more favourable provisions under the law of the country where such enforcement is sought. The cushion provided in article VII paves way for more domestic and yet arbitration friendly statutes which would otherwise have no place if the award was strictly a convention award.³¹⁴ The provision therefore permits the enforcement of the award on another basis even if the conditions of the New York Convention are not met. Indeed, it has been argued elsewhere³¹⁵ that, the party seeking enforcement is not deprived of more favourable recognition or enforcement procedures under national law of the state where enforcement is sought. So basically, in light of the issue, articles V and VII are complimentary to one another with the latter opening a wider door to ensure enforcement is not denied because of domestic frailties, which a party may not necessarily know about. However in exercising this power the courts ought to be extra careful lest they stand to destroy international comity, which is responsible for the thriving of international commercial arbitration. Frivolous exercise of this discretion has its own problems; it can be treated as disrespect of the courts of the jurisdiction where the award was set aside,³¹⁶ can lead to inconsistent judgments³¹⁷ and above all can result in a multiplicity of proceedings where a party who successfully had the award set aside will

³¹³ 939 F. Supp. 907 (D.D.C. 1996).

³¹⁴ See also: *Hilmarton Ltd v. OTV*, *Year book XX (1995) Pg. 663* where an award set aside in Switzerland was enforced in France with strength drawn from article VII backed by article 1502 of the French code of civil procedure which omits setting aside by a country where the awards was rendered as a ground for resisting enforcement.

³¹⁵ Van den Berg AJ, 'The New York Arbitration Convention of 1958', (1981) 154 at Pg. 243. See also: SA law commission, 'Arbitration: A draft arbitration Act for South Africa' discussion paper 69, Para. 3.71.

³¹⁶ Domenico op cit 174.

³¹⁷ Ibid.

have to initiate fresh proceedings to prevent the award from being enforced. This kills the flexibility and uniformity being sought for arbitration. Let alone the financial strain on the innocent party.

4.8.8 Where the Subject Matter of the Dispute Is Not Arbitrable In the Country Where Enforcement Is Sought

This brings in the issue of arbitrability. Undoubtedly, under article V (2) (a) the law based on to determine this arbitrability is the law of the state where the enforcement is sought. This provision however, is more suitable for domestic arbitrations rather than international ones where local national laws should be of less importance.³¹⁸

4.8.9 Where the Award Is Contrary To Public Policy

This as earlier discussed depends on the domestic laws of the country where enforcement is sought simply because public policy differs depending on jurisdiction. There can be no proper definition for public policy but an example can be found in disputes that have their genesis in anti – competition contracts, which will find it hard to be enforced in the United States as earlier alluded to. This defence has always worked to the detriment of the victorious party, which contracted without knowing the domestic practices of its opposite number. In such a case, this party will struggle and obtain a favourable award but remain empty handed if the opposite number does not have any assets outside the jurisdiction where enforcement of such award would be contrary to public policy. An example can be drawn from *Soleimany v. Soleimany*³¹⁹ where it was held that an English court will not recognise an international award where the award was based on an illegal contract. The court refused to recognise the award as it would be contrary to public policy in England to enforce an illegal contract.³²⁰ The main aim of the convention in providing this defence is to safeguard the basic morals and legal principles of the state where the

³¹⁸ The issue of arbitrability has already been discussed. See: 473 U.S. 614; 105 S. ct. 3346; 87 Led. 2d 444 (1968).

³¹⁹ [1999] 3 ALL ER 847 (CA).

³²⁰ *Seton Co v. Silveroak Industries Ltd* 2000 (2) SA 215 at 229.

enforcement is sought. This seems clear but ironically it is the parties that suffer due to the uncertainty of this defence because it is virtually impossible to know what violates public policy in the whole word. Even where fraud is alleged it has been interpreted in South Africa³²¹ and elsewhere³²² that unless it is clear on the face of the award or the arbitration agreement that the award is contrary to public policy then enforcement will not be denied. If however, extraneous evidence is necessary, as in the case of fraud, the respondents remedy lies in the jurisdiction of the court where the award was made. This is where an application to set aside the award should be made.³²³

The South African provision in the PBA (as earlier discussed) as Forsyth argues can also be construed as restatement of public policy aimed at protecting South African businesses from the large amounts of punitive damages awarded by most notoriously United States (U.S.) courts which if so would be ably dealt with by the South African courts under section 4 (1) (a) (ii). This proposition was exemplified in *Jones v. Krok*³²⁴ where court held that the mere fact that an award of damages is made on a basis not recognised by South African law does not necessarily make the award contrary to public policy. Reiterating the position that although the principle behind the award of punitive damages is not necessarily unconscionable, the award of double the amount claimed as punitive damages because of the defendant's reprehensible conduct was too excessive and exorbitant as to render it contrary to South African public policy. In so finding, the court showed its capability of handling matters of U.S. excessive damages on the public policy front hence watering down the need of having such a provision on South African law books. The provision of such statutory shields risks the danger of being viewed as over protection of South African businessmen from their liability, which goes against the fairness, sought by the convention. There is no basis for the retention of the provision given the fact that where the enforcement of an award is thought to be really unfair it can

³²¹ Hartzenberg J op cit 230 (d) – (g)

³²² *Interdesco v. Nullifire Ltd* [1992] 1 Lloyd's Rep 190.

³²³ Hartzenberg Loc cit.

³²⁴ 1996 2 SA 71 (T).

be refused on the courts discretion.³²⁵ In response to the criticism, the South African Law Commission has proposed new legislation to remedy the defects enshrined in Act 40/ 77. It is dismaying, however, that despite most problems being pointed out by the South African law commission they have never been attended to nine years down the road. The said Act 40 of 1977 undermines the principle behind the enactment of the New York Convention – to ease the rigours of enforcement of foreign arbitral awards through uniformity. It also undermines the courts’ authority in view of s.233 of the constitution of the Republic of South Africa considering the fact that they are supposed to prefer interpretation to any legislation in a manner that is consistent with international law over any other alternative interpretation that is inconsistent with international law.

4.9 Conclusion

In a nutshell, from the above examination of the enforcement procedure we note that the New York Convention has been the greatest architect of uniformity in the arbitral process. This is because though arbitration laws differ depending on the jurisdiction the enforcement mechanism is similar or almost similar all over the world. This has been aided by the fact that the New York Convention is the most ratified business convention³²⁶ which has resulted in most countries fine tuning their domestic laws to fit the standard set by it hence, resulting in uniform procedure and predictability which are key parts in the international business revolution.

³²⁵ As can be read from the language of article V of the NYC and replicated in the use of the word “*may*” in section 4 (1) of the South African Act. See: The language used (“*may refuse*”) is permissive rather than mandatory which therefore allows room for courts discretion in the matter as detailed in *China Nanhai Oil Joint Service Cpn v. Gee Tai Holdings Co Ltd*, cited in Year book XX (1995) pg. 671 where the Hong Kong Supreme Court said that “even if a ground of opposition is proved there is still a residual discretion left in the enforcing court to enforce non-the less. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all circumstances...”

³²⁶ 137 states have ratified it as of the 15th September 2005.

CHAPTER FIVE

5.0 Conclusion and Recommendations

5.1 Conclusion

International commercial arbitration and conciliation practices are developing new ways of conducting proceedings in this era where globalisation is opening cross-cultural trading and thus, creating more sophisticated problems and disputes. Presently, both dispute resolution mechanisms are under going a process of harmonisation in their basic notions through limitless combinations of their different elements in order to achieve a pleasing effect. The driving force behind the harmonisation has been UNCITRAL through its international commercial arbitration and conciliation-working group, which has drafted and introduced numerous instruments intended for cross cultural dispute resolution around the world. Through the particular working group, UNCITRAL has graced the business world with more acceptable and yet neutral instruments to ensure that a customer gains confidence in the process and also to engineer the law reform in many countries which have sought to identify with a model yet widely accepted trend of world trade and business dispute resolution at large. The provision of the model laws in several languages has served to bridge the gap that would have been created by a one 'languaged' legislation.³²⁷

The study has also revealed that as the rules of at least the major ADR institutions have become very similar, more ad hoc institutions refer to, or borrow from, the UNCITRAL model laws and rules, the common growing experience of arbitration and conciliation internationally stands to contribute towards a further greater harmonisation.

Further still, the examination of the UNCITRAL instruments on international commercial arbitration and conciliation has revealed that UNCITRAL clearly envisioned the potential conflict eating up different legal traditions and attempted to provide a “culturally – neutral” procedural regime that is flexible enough to make parties to a dispute relatively

³²⁷ The model laws have been provided in Arabic, Chinese, French, Russian, Spanish and English. See: http://www.eisil.org/index.php?sid=297648529&id=1046&t=link_details&cat=488 accessed on 09th October 2005.

comfortable by eliminating the sharp edges of both procedural and substantive styles. As a result of which, the UNCITRAL instruments as exemplified by the hefty case law examined, have gained even wider acceptance as model procedure codes for conducting international ADR's and thus, contributed to the harmonisation of both international commercial conciliation and arbitration legislations in general.

The study has also revealed that despite the hard work of UNCITRAL some nations that have purported to domesticate the model laws and convention such as South Africa have still imposed onerous conditions mostly in the enforcement procedure. This is exemplified in the use of permissive rather than mandatory language, restrictions on currency in which payment can be made and above all the restrictive provisions of the PBA. This does not help UNCITRAL's cause but instead stifles it due to national protectionist prejudices.

This work has also highlighted the pivotal role played by the uniform enforcement procedure. By taking up the New York Convention, UNCITRAL signalled its unified move towards globalisation on the business front. By so doing, UNCITRAL through the working group unlocked the mystery that surrounded the obtaining and enforcement of remedies that accrue from international commercial disputes. By fronting international instruments (the New York Convention inclusive), UNCITRAL through the international commercial arbitration and conciliation-working group, has played its role in liberalising and strengthening international trade by beginning the journey to slither the dispute resolution mechanisms towards uniformity. Clearly, what remains is for all states to adopt the model laws and bless them with the good will from all executive arms to make them work.

With such tremendous progress through the adoption of UNCITRAL instruments, it is just a matter of time before the world, even in the smallest African nation realises, appreciates and applauds the good work of the UNCITRAL working group on international commercial arbitration and conciliation in slithering the international

business community towards uniformity. Indeed, in this increasingly globalized world, it is the international, not national approach, that eventually stands to win.

5.2 Recommendations

Despite the tremendous progress made by the UNCITRAL secretariat and instruments, a lot remains to be done if the desired harmonisation and uniformity is to materialise. In this light, the following recommendations are made:

Regardless of their choice of rules, the parties should always specifically indicate their preference for ADR dispute resolution mechanisms in contracts before any disputes arise, in order to simplify and stream line the dispute resolution.

UNCITRAL should also step in to prevent the 'judicialisation' of ADR methods lest they stand to lose the flexibility and liberalism which worked as an attractive web for international businesspersons who sought less adversarial methods to resolve their disputes. In this light, it is recommended that procedural and legislative technicalities be limited so as the processes can remain as simple and accommodative as UNCITRAL wishes them to be.

Further still, a more systematic approach or regime when it comes to the enforcement of international conciliation settlement agreements in the mould of the New York Convention for arbitral awards should be considered by UNCITRAL. Currently, nations have been left to set the standard and procedure for the enforcement of the settlement agreements reached by parties to a dispute hence, the culmination to various standards and procedures. This trend does no favours to the UNCITRAL quest of achieving uniformity and harmonisation in the field of ADR and thus requires urgent attention.

Ideally, preparation of legal texts such as model laws is strongly complemented by training, dissemination of information and technical assistance. Such developments benefit developing countries and other countries whose economic systems are in

transition. It is submitted therefore, that the aforesaid be increased to raise awareness both in states where the model laws have been or are not yet adopted with the sole purpose of provoking curiosity as regards the good that lies in the adoption of the model laws and using ADR methods under them.

States that have already adhered to UNCITRAL Conventions and Model Laws should consider joining efforts to promote their acceptance and implementation by other states with which they maintain close business and trade relations. By so doing, states will enhance the benefits of legal certainty and predictability that the trading parties already derive from their countries' participation in those instruments.

The parties also need to be encouraged by court to embark on ADR if the facts are suitable. This is because the value and importance of ADR has been established in a remarkably short time. Indeed, all members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. The courts in trying to advise the parties to delve into ADR methods should not however, forget that their duty is not to compel but to encourage as was stressed by Justice Dyson in *Halsey v. Milton Keynes General NHS trust*.³²⁸

Further, as international trade has expanded in recent decades, so has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions have been called upon to resolve have increased in diversity and complexity and yet the potential of those tribunals for efficient dispositions has not yet been tested. If they are to take a central place in the international legal order, national courts will need to shake off the judicial hostility towards arbitration and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign and trans-national tribunals. To this extent, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration.

Word Count: 26,208 (excluding footnotes)

³²⁸ [2004] C.P. Rep 34.

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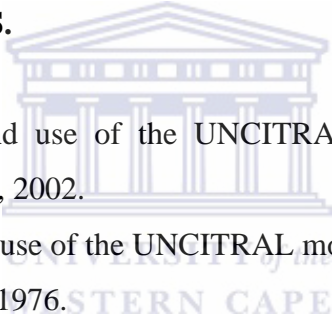
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