CHAPTER – III
COMMERCIAL ARBITRATION AND UNCITRAL MODEL LAW

Commercial arbitration is of several forms of dispute resolution for commercial agreements. The use of arbitration has increased along with the growth of international trade and commerce and the accompanying disputes springing from these pursuits. In its broadest sense, arbitration is a vehicle of dispute resolution in which parties to a contract select a neutral arbitrator (or a panel of arbitrators) to present their dispute for a legally binding ruling. Arbitration is often selected for the reasons of confidentiality, speed, enforceability of arbitral awards, and to eliminate the uncertainties in the choice of arbitrator and forum. Parties from different national origins may also be reluctant to accept national court litigation with the potential for national bias. Arbitration offers parties more control over how proceedings will be conducted. Arbitration awards are, with rare exception, final and binding.

Commercial arbitration has many different issues and the researcher need to have access to numerous resources to make informed decisions. Since no individual format provides exhaustive coverage of commercial arbitration resources, both print and electronic resources are presented in this guide.¹

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(1) **Arbitration**

Arbitration is derived from the nomenclature of the Roman Law, and means and arrangement for investigation and determination of a matter or matters of difference between contending parties by one or more unofficial persons chosen by the parties. It is the settlement of disputes, by the decision not of a regularly constituted tribunal, or ordinary court of law, but of one or more persons voluntarily chosen by the parties, who by reason of the confidence reposed in them find favour in the eye of litigants.\(^2\) Arbitration is essentially a private resolution of disputes by the parties concerned virtually appointing their own judge. They are allowed substantial leeway in determining the procedure to be employed in deciding the matter concerned often even the law applicable. An arbitrator, therefore constitutes a tribunal set up by the parties themselves, not as part of any mechanism established by the state or by a law, to adjudicate disputes. Though proceedings in arbitration are required to be organized on some systematic basis, there is a marked departure from the conventional judicial process in several aspects like hearing the parties concerned as well as deciding the dispute itself.

Arbitration\(^3\) means any arbitration whether or not administered by permanent Arbitral Institution. An Abritration is a reference to the decision of one or more persons of a particular matter in difference between parties. It is the submitting of a disputed matter to the judgement of

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2. Banerjee Durga Charan, "Law of Arbitration in India". P.1
one or more persons called arbitrators.

In its broadest sense, arbitration is a substitution, by consent of parties, of another tribunal for the tribunals provided by the ordinary process of law, a domestic tribunal as contradistinguished from a regularly organized court proceedings according to the course of law- depending upon the voluntary act of the parties disputant in the selection of judges of their own choice. Its object is the final disposition in a speedy and inexpensive way, or the matters involved so that they may not become the subject of future litigation between the parties.

Arbitration arises from the Agreement of parties in dispute. Confidentiality is no longer presumed to be an implied term of an arbitration agreement – “If you want it, you must (now) provide for it”, says Dr. Gerold Herrmann, Father of the UNCITRAL MODEL LAW\(^4\). arbitration is conducted in a judicial manner and the decision of the arbitral tribunal is binding upon the parties and is recognized and enforced by courts in arbitration, the parties are the sole source of the arbitral tribunals power and they have much control of the arbitral process than litigants have of judicial proceedings in the courts.

According to **Fali S. Nariman**\(^5\) “My exhortation to all who administer commercial arbitration is to work towards an arbitral regime, which rekindles the spirit of arbitration-The spirit that give the life.”

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\(^4\) See the Article ‘Does the World need Additional uniform Legislation on Arbitration’ in Arbitration International, Vol.15 No.3p.211 at 225.

(2) **Disputes or difference**

If there is to be a valid arbitration there must be a dispute or difference between the parties.\(^6\) Every dispute is a conflict and as such dispute settlement process vary with the nature of conflict.

Abuert\(^7\) says that the solution of a conflict may be brought about in two major ways it may be either through

(i) Bargaining compromise.

(ii) Or through application of law to facts.

There is however another kind of conflict which Aubert call dissensus or conflict of values. Such a conflict can not be compromised because scarifices and advantages can not be quantified. When a conflict of interest is handed over to law it acquires the character of conflict of values. This involves disagreement regarding certain facts or concerning the norms which apply to such facts or both. This is necessary so that a solution could be found by an outsider who knows the rules of evidence and perceive the facts through them and can handle the normative order. Therefore, in case of conflict of value only one of the parties can succeed.

The spirit—the ethos has out of commercial arbitration. It has been transformed into what Sir Michael Kerr has characterized as “International disputology”\(^8\).

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(3) **Present and Future Disputes**

An agreement to arbitrate represented a compromise on the part of the parties; and this is reflected in the language which refers to a submission agreement as a compromise\(^9\) and to an arbitration clause as a clause compromiser. An arbitration clause is like a blank cheque which may be cashed at a future (as yet known) date.

Generally National Laws are reluctant to give full effect to the future disputes but model law given full effect to both types of disputes whether existing and future disputes.\(^{10}\)

(4) **Commercial Arbitration**

Commercial Arbitration must have existed since the dawn of commerce. All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination, tacit or otherwise, to abide by the result, backed by some kind of sanction. It must have taken many forms with mediation, no doubt merging into adjudication.

Commercial arbitration is distinguished from other types of arbitration in as much as the commercial arbitrations derive their authority solely from contract, they resolve the whole dispute and, generally, do so according to law. There is a major exception to the rule that a commercial arbitrator should decide according to law. Sometime merchants insert clauses in arbitration

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\(^9\) The secondary meaning of compromise is given as ‘An Agreement under which the parties make mutual concession’, in Robert, Dictionaire de la longue francaise.

\(^{10}\) UNCITRAL Model Law Article 7(1)
agreements which authorize arbitrators to resolve disputers ex aequo et bono or as amicable compositors.

In the former case the arbitrators may depart from strict law and decide the case according to equity and good sense. In the latter case, the arbitrator will use its good officers to engineer in an amicable settlement. Strictly speaking, amicable settlement is not a determination but the conclusion of a new contract to settle the dispute. Some national laws expressly recognize this type of arbitration.\textsuperscript{11}

(5) **International Commercial arbitration**

What makes commercial arbitration international? This questions is important because there are international conventions which establish special rules for facilitating commercial arbitration and for the recognition and enforcement of international arbitral awards. There are two major conventions namely: the convention on the recognition and Enforcement of Foreign Arbitral Awards (commonly known as New York Convention, 1958) and the UNCITRAL Model Law on Commercial arbitration. The New York Convention is restricted to the imposition of duties on state parties to recognize and enforce foreign arbitral awards. The UNCITRAL MODEL LAW is more extensive code. The New York Convention, does not actually use the term ‘International’ but applies its provisions to ‘arbitral awards made in the territory of a state other than the state where the recognition and enforcement

of such awards was ‘Sought’ and to ‘arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought’. The UNCITRAL Model Law gives a more detailed account of what constitutes ‘International Arbitration’.

Under Article 1(3), an arbitration is international if at the time of the conclusion of the agreement: the parties have their place of business in the same state, the arbitration will yet be international if the designated place of arbitration, the place where a substantial part of the commercial obligations have to be performed or the place with which the subject matter of the dispute is most closely agreed that the subject matter of the arbitration agreement relates to more than one country. International commercial arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is

(i) An individual who is a national of, or habitually resident in, any country other than India.

(ii) A body corporate which is incorporated in any country other than India.

(iii) A company or an association or a body of individuals whose central management and control is exercised in any country other than India.

(iv) The government of foreign country.

12. Sec. 2(f), Arbitration and Conciliation Act, 1996
In fact, the world of commercial arbitration is not premised on its participants possessing any legal qualifications: it is only in four out of the one hundred and twenty five New York Convention countries that there is an express legal requirement that an arbitrator must be a qualified lawyer.\textsuperscript{13}

New York Convention, 1958, UNCITRAL MODEL LAW 1985, are all silent on the arbitrators qualifications: the only requirement contained in the UNCITRAL Model Law is that the person appointed (as arbitrator) should be independent and impartial.

In principle, the arbitrators can only exercise such powers as the parties by their agreement to arbitrate bestow upon them. These powers are supplemented and added by the law relating to arbitration (This is the law governing the contract or even which can be chosen by the parties concerned). The approach of the model law is also towards recognizing the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an \textit{adhoc} agreement, the procedure to be followed, subject to fundamental requirements and justice. In case the parties have not used their freedom to lay down the powers of the arbitrators, model laws provisions can be used to invest the arbitrators with requisite authority.

Several third world states were suspicious of international investment arbitration because it has given rise to a system of competing norms which favour the foreign investor to the detriment of developing states.\textsuperscript{14}

\textsuperscript{13} China, Peru, Columbia, Ukraine are the only four New York Convention Countries that have prescribed the legal qualification for arbitrators.

\textsuperscript{14} Somarajah, M., Article “International Commercial Arbitration: The Protection of State Contracts.
ARBITRATION-ELECTRONIC FORMATION OF CONTRACT  

Due to incapability of traditional law, electronic formation of contract became inevitable. The main features of the paper based regime “writing”, “signature”, and “original”. Writing given validity signature identifies signer and authenticity of document.

“Original” ensures integrity. Enforceability, authenticity and integrity of a paper document can also be achieved by an electronic document. The Information Technology Act, 2000, (which is based on UNCITRAL Model Law) provides legal recognition to electronic records and electronic signatures, their use, retention attribution and security. A message bearing digital signature, verified by a public key listed in the valid certificate is as valid, effective and enforceable as if the message had been written on paper and signed by hand.

In respect of all functions of paper writing, signature and original electronic records can provide the same level of security as paper.

The Information technology Act 2000 gives legal recognition to data message, corresponding to paper documents so that the message could serve the same function. Section 4 (writing), section 5 (signature), and section 7 (original).

The validity of the electronic contract can not be questioned in the absence of a paper document, if the agreement is enforceable in law. So we can say that some of the features of the Contract Act, 1872, are adopted to the new environment of paperless communication.

(6) CHOOSING BETWEEN ARBITRATION AND LITIGATION

The possibility of a legal dispute is never absent in international trade transactions. The reasonable exporter, in spite of the care he has taken in the preparation of the contract of sale, has to contemplate acting against the buyer who is in breach of contract.

Ideally, the exporter should consider this issue before entering into the contract of sale. When he has made his choice from the procedures available for dispute resolution, he should insist that the term giving full expression to the chosen procedure is inserted into the contract. It is common experience that agreement on this point is easier during the course of negotiation than that when a dispute has arisen, as in the latter situation. The aggrieved part has no means of compelling the other to agree to an extra judicial procedure of dispute settlement.16

If the exporter decided in favour of dispute resolution out of court, he may insert into the contract of sale an alternative dispute resolution (ADR) clause which embraces mediation and conciliation or an arbitration clause.

(7) Resolution alternative to courts (ADR) Modes

(1) Negotiation

The problem should be approached pragmatically with a view to settling the dispute to the mutual advantage of each party; in the spirit of give and take. Negotiating a dispute is the mediation between two competing interest. Negotiation is a compromise.

(2) Conciliation

Next step, when negotiation fails intervention of a conciliator becomes necessary to reconcile the competing interests. The conciliator is not an arbitrator and is not bound by law in order to do what he thinks just and reasonable.

(3) Arbitration

The aim of arbitration on the other hand, is to achieve the resolution of a dispute through the appointment by parties adopting an adversarial in stance of a private “judge” who is an arbitrator, who will decide on the matters in dispute.

Litigation in civil court is costly and time consuming and unproductive-litigation thus destroys both parties in terms of money, time, energy and good relations. If the dispute be decided after endless waiting and endless review,
endless appearance before the courts, the party would prefer to negotiate, 
renegotiate, conciliate the deal.

The Delhi High Court ordered as follows in National Thermal Power 
Corporation v. Canara Bank. 17

“I feel that it will be proper, expedient and in the interest of justice to 
refer the disputes subject matter of these appeals to the high powered 
committee” in terms of the decision in Oil and Natural Gas Commission v. Collector of Excise 18 as suggested in a report referred to by the Supreme Court 
in this case.

“I would also like to state that the government respects the views 
expressed by this Hon’ble Court and has accepted that public undertakings of 
the central government and the Union of India should not fight their litigation 
in court by spending money on fees on counsel, court fees, procedural 
expenses and wasting public time. That all disputes, regardless of the type, 
should be resolved amicably by mutual consultation or through the good 
offices of empowered agencies of the Government or through arbitration and 
resource to litigation should be eliminated.”

First parties to an international contract can remit the resolution of their 
dispute to judges of their own choice. This is a particular advantage to parties 
who reside in different countries, with different legal and cultural 
backgrounds, as they may be reluctant to submit.

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17. (1999) 97 Comp. Case., 930
Secondly, finality, rather than meticulous legal accuracy is the preference of many involved in trade. An arbitration award is final, whereas a judgement of a court may be appealed and further appealed so that considerable time lapses before the matter has been finally determined.

Thirdly, arbitration is confidential, it is clear from recent cases,\(^{19}\) that confidentiality is a term to be implied into an arbitration agreement.

Finally, an arbitration award is enforced as a judgement of the court.

(8) DISTINCTION BETWEEN INTERNATIONAL AND DOMESTIC ARBITRATION

It is important to make a distinction between International Arbitration and Domestic Arbitration. Although this module does discuss some concepts that are common to both types of arbitration, the essential thrust is to discuss commercial arbitration, since it is only this facet of arbitration that is involved in the resolution of disputes concerning international trade.

\(^{1}\) If the nature of the dispute and arbitration involve the interests of a foreign trade, it will be treated as a foreign arbitration. The Delhi High Court in *GAIL v. Spie Capag*\(^{20}\) held that an arbitration agreement, which possess the flavour of international trade and commerce, would be within the realm of the law relating to foreign arbitrations, even in fact a domestic award and not a foreign award.


\(^{20}\) AIR 1994 Del. 75.
This was widely considered to be a progressive judgement, since it brought into the realm of commercial arbitration law many more arbitration agreements, which would otherwise have been dealt with under the domestic law.

(2) Attention is also focused on the nature of the parties in order to determine whether the arbitration in which they participate can be termed as commercial arbitration. This inquiry revolves around ascertaining the nationality, the habitual place of residence or, if the party is a corporate entity, the seat of its central control and management.

The English legislation that implements New York Convention and makes an arbitration domestic, if both parties are British

Though the New York Convention and its predecessor treaties were confined almost exclusively to regulating commercial arbitration, the model law, while attempting to meet the specific needs of commercial arbitration also provides an international standard that can be adopted by the municipal laws of the states concerned with respect to conduct of even domestic arbitration. The model law can therefore, be described as presenting a special legal regime geared to commercial arbitration, without affecting any relevant treaty in force in the state adopting the Model Law.

The Arbitration and Conciliation Act 1996 though purporting to deal with both international and domestic arbitration on an equal plane, separately defines commercial arbitration. Following the pattern laid down by Article

An arbitration may be “Domestic” where all relevant factors are connected with one country only or it may be “International” in the sense that it involves a foreign element or a number of foreign elements. It is, of course, perfectly possible for the same legal regime to be applied in both domestic and international cases. Section 2(f) of Arbitration and Conciliation Act, 1996, defines commercial arbitration. The Act makes some distinction between the categories of arbitration, particularly relating to selection of the arbitrator, the law applicable as well as enforcement of the award.

It is indeed necessary to identify an award as being part of either commercial arbitration or domestic arbitration for, it is well recognized and indeed quite evident from the statutory provisions themselves, that more freedom may be allowed in an international arbitration than in domestic arbitration.

(9) Adhoc Arbitration And Institutional Arbitration

Two types of arbitration exist, ad hoc and institutional. In ad hoc arbitration, parties organize and plan their own arbitration, including the selection of arbitrators, designation of rules and applicable law, and the powers of the arbitrators. All aspects of the arbitration must be specified in the arbitration agreement.

When parties select institutional arbitration, an arbitral institution provides the rule of procedure for the arbitration and performs supervisory and
administrative functions such as keeping the proceeding on a timetable. Parties can select an international institution such as the **International Court of Arbitration** (ICC) or a national institution such as the **American Arbitration Association** (AAA) or the **London Court of International Arbitration** (LCIA).

An *Adhoc* arbitration is conducted under rules of procedure which are adopted for the purpose of the arbitration, normally after a dispute has arisen. If parties opt for *adhoc* arbitration they may agree on the identity of the arbitrator or leave his appointment to a third person, for example, the President of the law society in London. It may be advisable for the parties to provide for the application of one of the standard sets of arbitration rules. *Adhoc* arbitrations often take place under the provisions of a submission agreement which itself often established the arbitral tribunal and sets out the procedural rules upon which the parties have agreed. More usually however, an *adhoc* arbitration arises under an arbitration clause.

**Institutional Arbitration**

Disputes in international trade are normally complex and involve issues that demand considerable technical expertise. Therefore, parties are anxious to ensure that disputes between them are decided by persons who possess adequate knowledge and expertise in the field. These persons are not found readily and may not ordinarily be available to settle disputes as and when they arise. Thus parties resort to an institution that specializes in the conduct of

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21. In the event of failure of appointment. See 18(3) application to the court to give direction for making appointments or making appointment itself.
arbitration. This institution prescribes the rule of procedure that will govern the conduct of arbitration. The institution may also designate the arbitrators involved. The bodies also provide trained staff to administer the arbitration. There is also provision of facilities for the actual conduct of proceedings. Time limits are normally imposed for the speedy completion of proceedings.

(i) **International Chamber of Commerce**

An institution that is renowned worldwide for its expertise in the conduct of arbitral proceedings, it has its seat in London. The ICC has an elaborate set of rules for conducting arbitration and the parties are free to adopt them as they are with modification. Experts are normally appointed to serve on the arbitral panels constituted by the ICC, But the parties are free to choose their own.

Normally, the ICC becomes involved in the arbitration through the stipulation of a clause in the contract between the parties that any dispute arising there under would be resolved in accordance with ICC rules.

A body called court of Arbitration exists in the ICC that is primarily responsible for the conduct of Arbitration. It has various functions to perform. It examines whether there exists a proper agreement between the parties to Arbitrate under ICC auspices. Arbitrators are normally selected by this body, which will also hear any challenge preferred by a party regarding the choice of an arbitration.  

23. Supra note 6.
(ii) **Indian Council for Arbitration:**

ICA has primarily been involved in institutional arbitration in India. The ICA is essentially organized on the lines of ICC, though it has not resolved many international disputes and has mainly resolved domestic disputes. A qualified panel of personnel is maintained by the ICA from whom parties can choose arbitrators. 24

Under Section 11(2) of the Arbitration and Conciliation Act 1996, the parties are free to agree on a procedure for appointing arbitrators. This can be constructed to imply that the Act gives statutory recognition for institutional arbitration in as much as the parties may, before or after a dispute has arisen, agree to abide by the rules of procedure of an arbitral institution. Since the procedure for appointment of arbitrators is one of the most important aspects dealt with in the arbitration rules, this is an important enabling provision from the point of view of arbitral institutions.

(iii) **International Centre for Alternative Dispute Resolution (ICADR)**

In October 1995, the ICADR was inaugurated heralding a new beginning in institutional arbitration in India. ICADR is a unique Centre that makes provisions for alternative dispute resolution including arbitration. Disputes can be referred to the centre in the following two ways.

(i) By a clause in a contract providing for the reference of all future disputes under that contract.

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(ii) By a submission agreement providing for the reference of an existing dispute.

Whether the arbitration agreement provides for *adhoc* or institutional arbitration, it should always specify the seat and the language of the arbitration.

Accordingly to Mozeley and Whitely Arbitration is where two or more parties submit all matters in dispute to the judgement of arbitrators who are to decide the controversy.²⁵

In order to be treated as an agreement to refer a dispute to arbitration it is not necessary that the terms arbitration or arbitrator should have been used in it.²⁶

(10) **TREATIES AND CONVENTION**

**International and Regional Treaties and Conventions**


(b) Claims Settlement Declaration (Iran-United States Claims Tribunal) Established the Iran-United States claims Tribunal also known as part of the Algiers Declaration.²⁸

(c) General declaration (Iran-United State Claims Tribunal) General between the Islamic Republic of Iran and the United States of

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²⁵ Mozley and Whitley, 5 Concise Law Dictionary.
²⁸ 75 AJIL 422, 20 ILM 230 (1981)
America. (January 19, 1981) also known as part of the Algiers declaration. 29

(d) Convention on the Settlement of Investment Disputes between states and Nationals of Other States (Washington Convention) established the International Centre for the Settlement of Investment Disputes (ICSID). 30

(e) Convention Establishing the Multilateral Investment Guarantee Agency. 31

(f) Inter American Convention on International Commercial Arbitration (Panama Convention) Organization of American States. 32

(g) Inter American Convention of Extraterritorial Validity of Foreign Judgements and Arbitral Awards (Montevideo Convention) Organization of American States, entered into force June 14, 1980. 33

(h) Arab Convention on Commercial Arbitration entered into force June 25, 1992. Deposited with the Secretary General of the League of Arab States. 34

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29. 75 AJIL 418, 20 ILM 224 (1981)
30. 575 U.N.T.S. 159. 17 U.S.T. 1270, TIAS 6090 (March 18, 1965)
34. Signed April 14, 1987
(i) Convention for the Pacific Settlement of International Disputes. Replaced by convention of Oct. 18, 1907 as between contracting parties to the later convention.  

(j) Convention for the Pacific Settlement of International Disputes.  


(m) European Convention Providing a Uniform Law on Arbitration; has not entered into force.  


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35. Adopted July 29, 1899  
36. Adopted October 18, 1907  
37. 484 U.N.T.S. 364 (April 21, 1961)  
38. 523 U.N.T.S. 93, CETS No. 042 (Dec. 17, 1962)  
39. CETS No. 056, opened to signature January 1, 1966.  
41. 27 LNT 157.

(s) World Trade Organization (WTO). The General Agreement of Tariffs and Trade (GATT) came into being in 1948 as a multilateral instrument to promote trade. In 1993, the Uruguay Round of GATT established the World Trade Organization as an international organization. The WTO deals with the rules of trade between nations and supports the multilateral trading system through the WTO agreements.

(11) Administering Institutions

I. International Institution

   The Commercial Arbitration and Mediation Centre for the Americas (CAMCA) CAMCA is designed to provide commercial parties involved in the free trade area of NAFTA with an international forum for the resolution of private commercial disputes.

42. 1489 UNTS 3, concluded April 10, 1980.
European Court of Arbitration

The European Court of Arbitration is a private institution with its chief seat in Strasbourg and national and local departments throughout Europe.

The Inter-American Commercial Arbitration Commission (IACAC)

The IACAC established and administers a system for settlement, by arbitration or conciliation, of international commercial disputes in the Western Hemisphere.

International Centre for the Settlement of Investment Disputes

Pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other states (1966), ICSID provides facilities for the conciliation and arbitration of disputes between sovereign member countries and their official subdivisions and investors who qualify as nationals of other member countries.

International Court of Arbitration, International Chamber of Commerce (ICC)

An international arbitral institution composed of members around the world.

Permanent Court of Arbitration (The Hague)

The Permanent Court of Arbitration (PCA) is an international organization providing services for resolving disputes between states, including disputes between states and private parties and those involving intergovernmental organizations. The PCA site contains information about its services, model clauses, and rules. The parties to the 1899 and/or 1907
Conventions for the Pacific Settlement of International Disputes comprise the members of the Permanent Court of Arbitration.

II. National Institutions

Australia. Australian Centre for International Commercial Arbitration
Australia. Institute of Arbitrators and Mediators Australia (IAMA)
Austria. International Arbitral Centre of the Austrian Federal Economic Chamber (Vienna International Arbitral Centre)
Belgium. Belgian Centre for Arbitration and Mediation (CEPANI)
Bulgaria. Arbitration Court at the Bulgarian Chamber of Commerce and Industry
Canada. British Columbia International Commercial Arbitration Centre
Canada. Canadian Commercial Arbitration Centre
Chile. Santiago Arbitration and Mediation Center
China. International Economic and Trade Arbitration Commission
Croatia. Permanent Arbitration Court at the Croatian Chamber of Commerce Czech Republic. Arbitration Court Attached to the Economic Chamber of the Czech Republic
Egypt. Cairo regional Centre for International Commercial Arbitration (CRCICA)
Estonian Chamber of Commerce and Industry
France. Arbitration Chamber of Paris
France. Centre de Mediation et d’Arbitrage de Paris
German Institution of Arbitration – Deutsche Institution for Schiedsgerichtsbarkeit

Hong Kong International Arbitration Centre

India. Indian Council of Arbitration (ICA)

Indonesian National Board of Arbitration

Iran-United States Claims Tribunal

Italy. Chamber of National and International Arbitration of Milan

Japan Commercial Arbitration Association

Korean Commercial Arbitration Board

Malaysia. Kuala Lumpur regional Centre for Arbitration

Mexico-Centro de Arbitraje de Mexico

Netherlands Arbitration Institute

Poland. Court of Arbitration at the Polish Chamber of Commerce

Portugal. Centre for commercial Arbitration, Lisbon Trade Association,

Portuguese Chamber of Commerce

Romania. Court of International Commercial Arbitration Attached to the

Chamber of Commerce and Industry of Romania and Bucharest

Russia. St. Petersburg International Commercial International Arbitration Court

Singapore International Arbitration Centre

Southern Africa. Arbitration Foundation of Southern Africa

Sweden. Arbitration Institute of the Stockholm Chamber of Commerce
Switzerland. Swiss Chambers Arbitration

Tunisia. Centre for Conciliation and Arbitration of Tunis

United Kingdom. London Court of International Arbitration

United Kingdom. Chartered Institute of Arbitrators

United States. Chicago International Dispute resolution Association (CIDRA)

United States. International Centre for Dispute resolution (ICDR)

The ICDR is the international division of the American Arbitration Association (AAA) charged with the exclusive administration of the AAA’s international matters.

(12) UNCITRAL

The United Nations Commission on International Trade Law was established in December 1966, with the object of harmonizing and unifying the law of international trade. It prepares and promotes the adoption of new conventions, laws and codifications of International Trade terms, customs and practices, UNCITRAL’s functioning takes the form of working group set up to formulate principles. This group is composed of a few member states. This is done through the organization of a diplomatic conference in which all states are invited.43

Model Law : Objectives and Structure

The model law owes its origins to a request in 1977 the Asian-African legal consultative committee for a review of the operation of the New York convention, to deal with certain issues, such as judicial review of fairness and due process and the implied waiver of the state immunity. These proposals led to a report of the secretary general of UNCITRAL\(^{44}\) which concluded that harmonization of the secretary general of states, and the judicial control of arbitral procedure, could be achieved more effectively by the promulgation of model or uniform law.

The model law was more likely to lead to a realistic degree of harmonization in practice than the flexible approach of a convention or uniform law.

The policy objectives adopted by UNCITRAL in the preparation of the model law were described by the secretary general’s report as follows:

- The liberalization of commercial arbitration agreement by limiting the role of national courts, and by giving effect to the doctrine of autonomy of the will, allowing the parties freedom to choose how their disputes should be determined.
- The establishment of a certain defined core of mandatory provisions to ensure fairness and due process.
- The provision of a framework for the conduct of commercial

\(^{44}\) Entitled “Study on application and interpretation of the Convention on the recognition and enforcement of foreign arbitral awards”. UN DOC A/Cn9/168.
arbitrations, so that in the event of the parties being unable to agree on procedural matters, the arbitration would nevertheless be capable of being completed: and

- The establishment of other provisions to aid the enforceability of awards and to clarify certain controversial practical issues.

The UNCITRAL model law on Commercial arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21.06.1985, at the close of the commissions 18th annual sessions. The General Assembly, in its resolution 40/72 of 11.12.1985, recommended that all states give due consideration to the model law on Commercial arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of Commercial arbitration practice.

The form of a model law was chosen as the vehicle for harmonization and improvement in view of the flexibility it gives to states in preparing new arbitration laws. It is advisable to follow the model as closely as possible since that would be the best contribution to the desired harmonization and in the best interest of the users of international arbitrations, who are primarily foreign parties and their lawyers.

**Uncitral Model Is Used As A Base**

The act covers all stages of the arbitral process from arbitral agreement to finality and enforcement of arbitral awards. The General Assembly of the United Nation recommended that all countries should give due consideration to the said model law, in view of the desirability of uniformity of the law or
arbitral procedures and the specific needs of commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of conciliation rule. The General Assembly of the United Nations recommended the use of these rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important feature of the UNCITRAL Model Law and rules is that they have harmonized concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application. The present act is modelled on the UNCITRAL model Law and rule not only in respect of commercial arbitration, but also in respect of domestic arbitration to provide uniformity and certainly to both categories of cases.

The need for improvement and harmonization is based on findings that domestic laws are often inappropriate for international case and that considerable disparity exists between them.

In view of the wealth of expertise assembled in the conference rooms, it is small wonder that the discussions as reflected in the travaux preparatories and acknowledged by commentators, were of remarkably high quality. As an important additional asset, there was a considerable input of expertise and views from outside the conference rooms by many other experts and practitioners commenting on the draft text at various conferences and seminars in all parts of the world.
As a result, the draft text was seen and critically reviewed by many more eyes than any national bill ever was or would. The many different views, ideas and interest, combined with a wealth of experience gained in different countries and legal systems, were brought together and to bear on the emerging text, in a process and spirit which was praised by an observer as one of the best examples of constructive cooperation between North, South, East and West. This commendable spirit of cooperation and compromise helped, for example, to bridge the gap between common law and civil law in procedural matters and to reconcile position on which even countries of the same legal system differed, especially concerning the nature of the arbitral process and the role of the national courts.

**Harmonization of Domestic Laws**

The national laws of various states relating to arbitration generally have considerable disparities. While some are out dated other do not make proper conduct of arbitration and enforcement of awards in a comprehensive manner. Most laws are generally concerned with regulating domestic arbitration with very little attention to commercial arbitration. The differences in arbitral procedure and jurisprudence is a frequent sources of concern in international arbitration where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. A party may for these reasons hesitate or refuse to agree to a place which otherwise, for practical reasons, would be appropriate in the case at hand.
Thus, the aim of UNCITRAL in formulating the Model Law as to ensure the specific needs of commercial arbitration and provide an international standard with solutions acceptable to parties from different states and legal systems.

The Model Law is structured into eight separate chapters entitled:

(i) General Provisions
(ii) Arbitration Agreement
(iii) Composition of Arbitral Tribunal
(iv) Jurisdiction of Arbitral Tribunal
(v) Conduct of Arbitration Proceedings
(vi) Making of award and termination of proceedings
(vii) Recourse Against Awards
(viii) Recognition and Enforcement of Awards.

(13) SALIENT FEATURES OF THE MODEL LAW

(1) Special Procedural regime for Commercial arbitration

The Model Law presents a special legal regime geared to commercial arbitration, without affecting any relevant treaty in force in the state adopting the Model Law. While the need for uniformity exists only in respect of international cases, the desire of updating and improving. The arbitration law may be felt by a state also in respect of non international cases and could be met by enacting modern legislation based on the model law for both categories of cases.
(a) **Substantive and Territorial Scope of Application:**

The model law defines an arbitration as international if “the parties to an arbitration agreement have at the time of the conclusion of that agreement, their places of business in different states”. An arbitration is international if the place of the subject matter of the dispute situated in a state other than where the parties have their place of business or if the parties have expressly agreed that the subject matter of the arbitration agreement related to more than one country. As regards the term “commercial”, no hard and fast definition could be provided. Article 1 contains a note calling for “a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not” the word “Arbitration” is not defined in the model law.

Another aspect of applicability is what one may call the territorial scope of application. According to Article 1(2), the Model Law as enacted in a given state would apply only if the place of arbitration is in the territory of that state. However, there is an important and reasonable exception. Articles 8(1) and 9 which deal with recognition of arbitration agreement, including their compatibility within term measures of protection, and articles 35 and 36 on recognition and enforcement of arbitral awards are given global scope i.e. they apply irrespective of whether the place of arbitration is in that state or in another state and, as regards articles 8 and 9, even if the place of arbitration is not yet determined. Model Law has guaranteed a wide freedom in shaping the rules of arbitral proceeding. This includes the possibility of
incorporating into the arbitration agreement procedural provision of foreign law, provided there is no conflict with the few mandatory provision of law.

(b) **Delimitation of Court Assistance and Supervision:**

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

In this spirit, the model law envisages court involvement in the following instances.

(i) A first group comprises appointment, challenge and termination of the mandate of an arbitrator.

(ii) Jurisdiction of the arbitral tribunal.

(iii) And setting aside of the arbitral awards.

These instances are listed in Article 6 as functions, which should be entrusted, for the sake of centralization, specialization and acceleration, to a specially designated court or, as regarded articles 11,13 and 14, possibly to another authority (e.g. arbitral institution, chamber of commerce). A second group comprises court assistance in taking evidence, recognition of the arbitration agreement including its compatibility with court ordered interim measures of protection and recognition and enforcement of arbitral awards (articles 35 and 36).
The innovative article is incorporated in Article 5 – ‘no court shall intervene in matters governed by this law’. As stated earlier absolute intervention is not guaranteed.

The New law in India also makes such a stipulation but curiously limits this to the general provisions relating to Arbitration that are dealt within part I (Section 5) and part II (Section 5) and which covers enforcement of foreign award does not enjoy the benefit of this provision.

Model Law and New Law in India enumerate the various circumstances under which the court intervene.

(2) Arbitration Agreement

Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts.

(a) Definition and form of arbitration: Article 7(1) recognises the validity and effect of a commitment by the parties to submit to arbitration existing dispute (‘compromise’) or a future dispute (‘clause compromissoire’) Model Law gives full effect to both existing and future disputes.

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

(b) Arbitration agreement and the courts Article 8 and 9 deal with two important aspects of the complex issue of the relationship between the arbitration agreement and resort to courts modelled on article II(3) of the 1958, New York Convention. Article 8(1) of the Model Law obliges any court to refer the parties to arbitration if sized with a claim on the same subject matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request which a party may make not later than when submitting his statement on the substance of the dispute.

(3) **Composition of the Arbitral Tribunal**

Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the approach of the Model Law in elimination difficulties arising from inappropriate for fragmentary laws or rules. The approach consists first, on recognizing the freedom of the parties to determine, by reference to an existing subject to fundamental requirement of fairness and justice. Secondly, where the parties have not used their freedom to lay down
the procedure, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively to the resolution of disputes.

(a) **Appointment of Arbitrator**

When the parties fails to agree, then they can move the court under Article II of the Model Law. The New Law in India, however confers this jurisdiction on the Chief Justice of India who can delegate this power to an institution and formulate an appropriate scheme for the purpose (Section II).

(b) **Challenging the Mandate of an Arbitrator**

Model Law and New Law both provide for parties to agree on the manner in which an arbitrator can be challenged. If this is not agreed to the arbitral tribunal can decide. However, if the tribunal decided against upholding the challenge Model Law and New Law differ in their treatment. The model Law states that the court may decide the challenge [Article 13(3)]. On the other hand, the new law states that the arbitral tribunal can go ahead with the proceedings and make the award, but this award can later be attacked on the ground provided for in section, 34(4)

The Model Law and New Law provide that the appointment of an arbitrator can be impugned only if the :

(i) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality

(ii) He does not posses qualification agreed to by the parties.
(iii) Termination of an arbitrator – model law prescribed that if the arbitrator withdraws from his office or through an agreement if he is to resign, then his mandate is terminated. Similarly if he is unable to dejure and defecto perform his function the mandate expiries. A substitute arbitrator can be appointed. A controversy with regard to the grounds for termination is resolved by an application made to the court.

(4) Jurisdiction of Arbitral Tribunal

(a) Competence to rule on its own jurisdiction the model law provides that the arbitral tribunal itself is to be the determining authority, in the first instance of questions relating to its own jurisdiction.

Article 16(1) adopts the two important (not yet generally recognized) principles of “Kompetenz Kompetenz” and of severability or autonomy of arbitration clause. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement is of course, subject to courts control. For that purpose, an arbitration clause shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

When the arbitral tribunal rules as a preliminary questions that it has jurisdiction, Article 16(3) provides for instant court control in order to avoid unnecessary waste of time and money, however, three
procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time period for resort to court (30 days), court decision is not appeasable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending with the court. In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the questions of jurisdiction is available in setting aside proceedings under Article 34 or in enforcement proceedings under article 36.

Model law empowers arbitral tribunal unless otherwise agreed by the parties, to order any party to take an interim measure of protection in respect of the subject matter of the dispute, if so requested by party.

(5) Conduct of Arbitral Proceedings

Chapter V provides for a fair and effective conduct of the arbitral proceeding based on principle of natural justice. Article 18 embodies the basic principle that the parties should be treated equally and each party shall be given equal opportunity to present the case. Second principle is that the right of the party being heard and being able to present his case related to evidence by and expert appointed by the arbitral tribunal.

(6) Making of Award and termination of Proceedings

Article 28 grants parties the right to ensure that their dispute is decided in accordance with the rule agreed to by them. The use of the term ‘rules of law’ allows for the parties to designate rules not incorporated in any national legal forum. There is also provision to compositeurs. In all cases i.e., including
an arbitration ex aequo et bono, the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29 to 31; mainly lay down the procedure that is to be followed in the making of an award and the technicalities to be complied with therein.

Article 32; the termination of the proceedings is brought about through a final award or an order of the tribunal.

(7) Recourse against Awards

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

Model law contains an exclusive list of limited grounds on which an award be set aside. The list is somehow parallel to the Article v of New York Convention. Two practical difference can be noted firstly, the ground relating to public policy, including non arbitrarily, may be different in substance, depending on the state in questions. Secondly, or more importantly, the grounds for refusal of recognition or enforcement are valid and effective only in the state where the winning party seeks recognition and enforcement. While the grounds for setting aside have a different impact; the setting aside of an award at the place of origin prevents enforcement of that award in all countries.
by virtue of Article V (1) (e) of the New York Convention, 1958, and Article 36(1) (a) (v) of the Model Law.

(8) **Recognition and Enforcement of Awards**

(a) Towards uniform treatment of all awards irrespective of country of origin: By treating awards rendered in commercial arbitration in uniform manner irrespective of where they were made, the Model Law draws a new demarcation line between “foregoing” and “non-international” awards instead of the traditional line between “foreign” and “domestic” awards. This new line is international in view of the limited importance of the place of arbitration in international case. The place of arbitration is often chosen for reasons for convenience of the parties and the dispute may have little or no connection with state where the arbitration take place.

(b) Procedural conditions of recognition and enforcement: Under article 35(1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35(2) and of article 36 (which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrict on reciprocity is not included as a condition for recognition and enforcement.
Model Law merely sets certain conditions for obtaining enforcement: application in writing, accompanied by the award and the arbitration agreement.

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

9. Universal Origin of the Model Law

As already discussed that UNCITRAL Model Law as adopted by United Nations Commission on International Trade Law (UNCITRAL). As a characteristics of any text emanating from the work of that commission, it is truly universal in origin.

The commendable spirit of cooperation and compromise helped, for example, to bridge the gap between common law and civil law in procedural matters and to reconcile position on which even countries of the same legal
system differed, especially concerning the nature of the arbitral process and the role of the nations courts.

The Model Laws international formulation with universal participation is certainly conducive to wide acceptability. What counts is not merely the psychological point of having participated but also the experience of having joined in a search for practical and acceptable solutions in a spirit of mutual understanding and compromise.

While it is often said that the international origin of the text will contribute to its wide adherence and thus enhance the extent of harmonization. The reasons lies in the unique character of a national law governing international arbitrations. It is thus of advantage to have a model which was made primarily by foreigners reflecting the various interests and expectations.

10. Universal Design and Global Attention

Well suited to this special nature of an appropriate law for international arbitration is the universal design of the model law. Unlike any nationally formulated law, it was designed for one particular state and thus it was not written against the background of one domestic legal system and its traditional concepts. Instead, it was conceived as a true model for potentially all states of the world.

The Model Law is unlikely to contain a legal term or concept known only in certain jurisdictions (e.g., “due prices”, “natural justice”). It rather uses plain descriptive language and reflects the substance (e.g., “equal treatment” and “full opportunity to present one’s case”).
The design as a model for potentially all states was affirmed by the General Assembly of the United Nations when it recommended, in its resolution 40/172 of 11 December 1985, all states give due consideration of the UNCUTRAL Model Law on Commercial arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of commercial arbitration practice.

Harmonization and improvement of National Laws are clearly expressed here as the twin goals of United Nations appeal. The Model law cures the problems by improving those very procedural laws, which is more advantageous in terms of legal policy as well as for the individual arbitration users.

Many states will also benefit from the fact that the Model Law was established, and continuously compared and harmonised during the entire preparatory phase, in the six official language of the United Nations (i.e., Arabic, Chinese, English, French, Russian and Spanish).

Yet another advantage will be appreciated by those who view commercial arbitration as a competitive service which is helped by arbitration commercials. The adoption of the Model Law has given a clear signal of the increasingly harmonised customs and jurisprudence of Commercial arbitration.

After all, the Model Law presents a well structured international standard against which the various national laws are best measured and thereby any difference discerned. This standardising effect would obviously be
best achieved if all states were to mould their laws in the shape of the Model Law.

11. Worldwide Acceptability in Rather Different Countries

There motives have been very much on the minds of various legislatures and law reform commissions in jurisdictions with advanced legislation. In addition to Germany, a good example in point is Australia which is the first country which enacted the Model law in its original form. Law in its original form. Law reform commission of Hong Kong has also recommended the adoption of Model law within its first thirteen years, the model law has been accepted of Model Law within its first thirteen years, the Model Law has been accepted, with limited deviations, in the following states and jurisdictions, representing all regions of the worlds as well as all legal and economic systems, at diverse levels of development: Australia, Bahrain, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Germany, Guatemala, Hong Kong special Administrative region. Hungry, India, Iran, Kenya, Lithuania, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Russian Federation, Singapore, Sri Lanka, Tunisia, Ukraine, United Kingdom, Northern Ireland, Scotland, Zimbabwe. Enactments are expected soon in number on other countries e.g. Greece, Ireland, Kyrgyzstan, Mozambique, South Africa, Thailand.

In Switzerland on December, 1987, after several years of celebration, the Swiss parliament adopted the definitive text. This text was influenced by Dutch statute on arbitration July 2, 1986, Belgain reform of 1985, New Canadian statute, and Florida International Arbitration Act. The Swiss Federal
statute in many of the recent statutes and far more innovative than the UNCITRAL Model Law.

As Lord Justice Ker put it in his important Alexander Lecture 1984. “Arbitration rests on confidence in the arbitration laws of the venue, and both parties to an international contract primarily only have confidence in their own laws and misgivings about those of the other. The present result is, therefore, a tussle which is often resolved in favour of some neutral venue is a country with whose laws neither party is really familiar, the concept underlying the model law is to put an end to this, state of affairs by widening the parties choice of venue, and thus their choice of arbitration clauses for incorporation into their contracts. In so far as a country will have enacted legislation based on the model law, both parties will be able to find it easier to accept arbitration in that country, because they will known basically where they stand. This is clearly helped by the fact that the model law already today is better and more widely known then any national arbitration law”.

Adoption of Model Law harmonised in the procedural framework of the international arbitral process. One of the significant point that it has been adopted is that it is formulated by such globally representative and competent body as UNCITRAL. It is satisfactory to see that until now those responsible for preparing legislation based on the Model Law have generally followed that maxim “don’t deviate".

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