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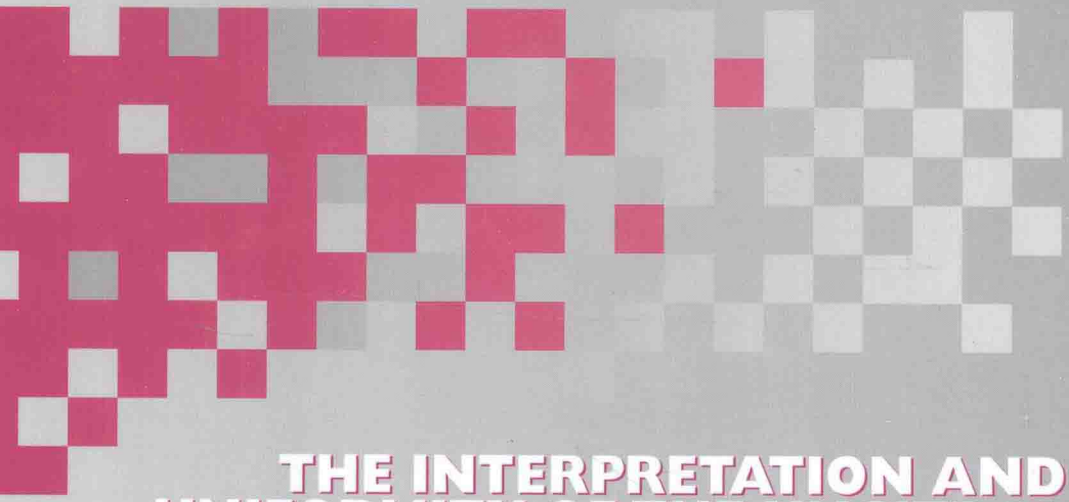

THE INTERPRETATION AND UNIFORMITY OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

FOCUSING ON AUSTRALIA, HONG KONG AND SINGAPORE

DEAN LEWIS

Wolters Kluwer

The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration

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VOLUME 36

Editor

Professor Julian D.M. Lew QC has been involved with international arbitration for more than 40 years as counsel, as arbitrator and as an academic. He has held the position of Professor and Head of the School on International Arbitration, Centre for Commercial Law studies, Queen Mary University of London since its creation in 1985. He is now an independent arbitrator at 20 Essex Street, London.

Introduction

Since its first volume published in 1993, this authoritative practitioner-oriented series has published in-depth and analytical works on niche aspects of international arbitration, authored by specialists in the field.

Objective

This authoritative and established series covering in-depth analyses of niche areas appeals to both practitioners and academics.

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A volume is published whenever an interesting topic presents itself.

The titles published in this series are listed at the end of this volume.

About the Author

Dean Lewis has lived and worked in Hong Kong for thirty-two years, since 1987 with Pinsent Masons, for whom he has been a partner since 1990, specialising in construction and engineering which inevitably involves all forms of dispute resolution but particularly commercial arbitration. This book is based on a thesis, the result of a PhD carried out part time at the University of Leicester.

Foreword

It is exactly thirty years since the General Assembly of the United Nations recommended the UNCITRAL Model Law to Member States. The aim was to harmonise the diverse laws relating to international arbitration.

The Model Law has been a great success and now stands next to the New York Convention as one of the twin pillars upon which the great advances of commercial arbitration have been based over the last thirty years.

Dean Lewis has been practicing in the field of commercial arbitration in Hong Kong during all of this period. Somehow he has found time to obtain the degree of Doctor of Philosophy. His subject was the Interpretation and Uniformity of the Model Law. That industry has now been made available to us all by the production of this book based on his doctoral thesis.

It is unusual for a senior and experienced practitioner to give up so much time to obtain this degree. Usually doctoral theses are written by younger people. But the advantage in this case is that Dean Lewis brings to bear on his subject the accumulated wisdom and experience that can only come with age.

This book considers whether the Model Law has succeeded in its aim of achieving harmonisation. It considers this issue in the context of three jurisdictions, Hong Kong, Singapore and Australia. Each of these jurisdictions adopted the Model Law at an early stage and thus Dean Lewis has had access to numerous cases over many years.

Thirty years is a goodly period over which to conduct this research. The suspicion that surrounded the Model Law during the discussion period has rightly dissipated and even for those jurisdictions that could not bring themselves to embrace the Model wholeheartedly many of them have amended their arbitral legislation to incorporate the core elements such as minimal court intervention, competence/competence and separability.

It is not easy to convert a thesis into a book but the industry that has gone into this work will repay the reader. Not only is it replete with case citations but it refers to many useful articles and comments over the years that it covers.

Dean Lewis deserves to be congratulated for his industry and courage on taking on this herculean task.

Neil Kaplan CBE QC SBS
November 2015

Preface

[T]he widespread adoption of the UNCITRAL Model Law has promoted unprecedented harmonisation of national laws governing international arbitration.[1]

This book will test the accuracy of the above statement by Chief Justice Menon of Singapore in his Keynote address to the ICCA Congress in Singapore in 2012. This harmonisation, it is suggested 'will be effected through reliance on the Model Law and the development of its principles when necessary through the courts of Model Law countries. This will result in conformity in legal application and understanding among its adopters'.[2] In testing the achievement of harmonisation consideration will be given to both legislative and judicial approaches in selected jurisdictions which have adopted the UNCITRAL Model Law on International Commercial Arbitration ('UML').[3]

The transnational benefit of the harmonisation of international commercial arbitration was recognised many years ago and in furtherance of this it was felt worthwhile to regulate the more important transnational aspects concerning the sanctity of party autonomy in the selection of the arbitral process and the requirement of an enforceable award. Thus, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('NYC')[4] was adopted by the United Nations in 1958. This Convention has been adopted by 156 jurisdictions[5] and though not the first attempt at promoting harmonisation in international commercial arbitration,[6] it

1. S Menon, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)' in Van den Berg (ed), *International Arbitration: The Coming of a New Age* (Wolters Kluwer 2013) 6 para. 12.
2. J Lew, 'Increasing Influence of Asia in International Arbitration' (2014) Asian DR 4, 6.
3. Available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf accessed 7 Mar. 2015.
4. Available at http://www.newyorkconvention.org/texts accessed 7 Mar. 2015.
5. As at 1 Nov. 2015 the list of which is available at http:www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html accessed 1 Nov. 2015.
6. That was the Protocol on Arbitration Clauses of 1923 (Geneva Protocol) which has been ratified by numerous countries and obliges recognition of an arbitration agreement but enforcement only in the State in which the award is rendered available at http://www.interarb.com/vl/g_pr1923 accessed 7 Jan. 2014; see also P Tercier, 'The 1927 Geneva Convention and the ICC Reform Proposals' (2008) DRI 2, 19.

was the first significant and 'most effective instance of international legislation in the entire history of commercial law'.[7] However the NYC's harmonisation objectives were limited in scope to recognition of arbitration agreements and enforcement of arbitral awards.

Almost thirty years after the NYC the second significant attempt at harmonisation of international commercial arbitration came into being, this time not a Convention but a model law, adopted by the international body specifically formed to promote harmonisation of international trade laws, UNCITRAL. This model law, the UML, is the focus of this book. The UML has been adopted by seventy States and a total of 100 jurisdictions.[8]

UNCITRAL's overall objective is the development of 'harmonious international economic relations' and with the UML it seeks to do this by establishing 'a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations'.[9] The UML is a model law which countries can adopt in full or in part or adopt in full and add to it. Countries can also promulgate legislation which is in part inspired by the UML but is not sufficiently based on the law to be able to be considered a UML jurisdiction.[10]

The key concept in this book is uniformity and the key aim is to test the extent to which this concept has been recognised and promoted by selected jurisdictions which have adopted the UML and in particular the legislators and courts of those jurisdictions. The focus of this book will be on Article 2A (interpretation) and Article 34 (setting aside) of the UML. The objectives of this book is, first to identify a standard or benchmark for the UML objective of uniformity including to identify the approach to interpretation that courts should adopt in dealing with applications made under the UML. Second, to examine whether the legislatures and the courts of Hong Kong, Singapore and Australia have adopted a uniform or harmonious approach to implementation of the UML and its interpretation. To aid this analysis various methodological tools will be developed that could be used to consider similar questions with other jurisdictions.

This study is highly selective, both in targeting only limited UML articles and in focusing on a limited number of jurisdictions. The reasons for this are as follows.

An initial global ambition for this book has given way to some realism. It would not be feasible to research all of the ninety-seven jurisdictions that have adopted the UML in the depth of analysis in this book. A selection had to be made. This could have been done based on a broad global coverage with jurisdictions from each continent. Alternatively an approach based on jurisdictions from the same part of the world could

7. M Mustill, 'Arbitration: History and Background' (1989) 6 J. Int'l Arb. 43.
8. As at 1 Nov. 2015 the list of which are available at ttp://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html accessed 1 Nov. 2015.
9. General Assembly Resolution 40/72 11 Dec. 1985 available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/477/79/IMG/NRO47779.pdf?OpenElement accessed 13 Sep. 2014.
10. For example, England and Wales adopted parts of the UML and the Saudi Arabian Arbitration Law of 2012 appears to have been inspired by the UML but neither yet appear on the UNCITRAL website as having legislation based on the UML.

be adopted and this is the selection made. The Asia-Pacific region is a vast area covering numerous jurisdictions with increasing influence in international arbitration.[11] However the adoption of the UML is not so extensive in this area and with twelve relevant jurisdictions a comparative analysis is potentially feasible. The jurisdictions potentially available for selection were: Australia, New Zealand, Indonesia, Singapore, Malaysia, Thailand, Viet Nam, Macau, Hong Kong, Japan, South Korea and the Philippines. Some of these jurisdictions are new to adopting the UML and the scope they provide for analysis is thus very limited. Others present linguistic and/or research difficulties with very limited access to court decisions or court decisions in English. However, there are more than enough mature English language UML jurisdictions for a robust in-depth analysis.[12] The jurisdictions which are mature and provide reasonable opportunity for study are Hong Kong (the UML adopted in 1990), Singapore (the UML adopted in 1994), New Zealand (the UML adopted in 1985) and Australia (the UML adopted in 1989). These jurisdictions all have common law legal systems based on the English legal system. This enhances their comparability and reduces the range of variables requiring investigation. Of these four it is considered that an in-depth study of three is sufficient to test the aims of this book. Hong Kong, Singapore and Australia have been selected. These represent three quite different jurisdictions (in terms of geography, culture and methods and details of the UML adoption), which will therefore provide a useful and valid cross section of common law jurisdictions. In addition these jurisdictions 'offer some of the most up-to-date and progressive arbitration legislation in the world'[13] providing a similar legislative base from which to make comparison.

The UML has thirty-six articles covering every aspect of international commercial arbitration. To try to reach a conclusive position on interpretation and uniformity by analysing each of the UML articles would have been self-defeating for the depth of analysis in this book. This book therefore covers just two: Article 2A and Article 34. However, these articles were carefully selected to ensure that the analysis would yield meaningful results: given the importance of the ability to set aside an arbitral award and the body of case law on setting aside and the directly related area (and articles) of enforcement (which is directly relevant because the wording of the articles empowering a court to set aside an arbitral award were copied from the NYC grounds for resisting enforcement of an arbitral award),

Much of the UML requires interpretation and application by arbitrators. This makes a study very difficult as there is little in the way of published decisions of arbitrators (other than ICC Awards on a selective basis). For published materials

11. Lew (n. 2).
12. Some consider Asia to have the highest concentration of countries that have based their laws on the UML: L Nottage & J Weeramantry, 'Investment Arbitration in Asia: Five Perspectives on Law and Practice' Paper for Panel B-1 (Investment Treaty Arbitration) at the Asian Society of International Law Conference Tokyo 1–2 Aug. 2009 available at http://asiansil-jp.org/wp/wp-content/uploads/2012/07/weeramantry.pdf accessed 31 Mar. 2014; Lew (n. 2) 6. However, most of them have little relevant case law. For example, F Simoes, 'Recognition and Enforcement of Foreign Arbitral Awards in Macau' (2014) 44 HKLJ 563, 584 describing case law in Macau on arbitration as 'Inexistent'.
13. M Moser, 'Introduction' in M Moser (ed), *Arbitration in Asia* (2nd edn, juris 2013) xxiii (R 6: December 2014).

therefore recourse must be had to court decisions. This limits the number of articles that could be studied, as there are only ten instances in the UML where the courts may intervene.[14] Article 34 is arguably the most important one. Article 2A is a core article of the UML directing the manner of interpretation of the UML and therefore is potentially critical to how Article 34 is to be interpreted and applied.

14. Articles 8 (court to refer court action to arbitration), 9 (interim measures of protection), 11 (default appointment of arbitrator), 13 (arbitrator challenge), 14 (replacement of arbitrator), 16 (challenge to jurisdiction), 17H (enforcement of interim measures), 27 (assistance in taking evidence), 34 (setting aside of award), 35 (enforcement of award).

List of Abbreviations

AGP	World Trade Organization, Agreement on Government Procurement
CISG	Convention on the International Sale of Goods
CLOUT	Case Law on UNCITRAL Texts
Digest	UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration
FIDIC	International Federation of Consulting Engineers
HKAO	Hong Kong Arbitration Ordinance Cap. 341
HKNAO	Hong Kong Arbitration Ordinance Cap. 609
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IAA	International Arbitration Act (Australia)
Mainland	The Peoples Republic of China (excluding the Hong Kong and Macau Special Administrative Regions)
NGO	Non-government Organisation
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
SIAA	Singapore International Arbitration Act Cap. 143A
UML	UNCITRAL Model Law on International Commercial Arbitration
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
VLCT	Vienna Convention on the Law of Treaties

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