

**The UNCITRAL Model Law on International Commercial Arbitration  
as basis for International and Domestic Arbitration in South Africa**

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## English extract

Commercial arbitration is growing in importance in the modern world. People often use arbitration to ensure adjudication by an expert in the field and although arbitration may not always be quicker, its importance continues to grow especially in international commercial disputes.<sup>1</sup> Effective arbitration procedures will have positive consequences for the economical and political relationships between countries.<sup>2</sup>

The *Arbitration Act* 42 of 1965 might have sufficed in the past, but as international commercial arbitration is ever increasing and changing, this act has become out-dated. It does not effectively facilitate international commercial arbitration. The Act was primarily designed with domestic commercial arbitration in mind and therefore it is of limited assistance in the international commercial arbitration sphere.

The United Nations Commission on International Trade Law<sup>3</sup> has developed the Model Law on International Commercial Arbitration.<sup>4</sup> This Model Law or variations thereof can be adopted by a country to regulate international commercial arbitration.<sup>5</sup> Many countries choose to adopt the Model Law. The reasons vary but some are that the country's own arbitration laws were out-dated and needed replacement. The Model Law has proved to be effective and it has become a benchmark for good arbitration legislation.<sup>6</sup> Some countries have even adopted the Model Law for use in domestic commercial arbitration disputes.

The South African Law Commission<sup>7</sup> published a report in 1998<sup>8</sup> dealing with the possible application of the Model Law on international

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1 Robine 1996 *Int'l Bus. L.J* 145-146; Griffith and Mitchell 2002 *Melbourne Journal of International Law* 184.

2 Slate *et al* 2004 *Cardozo Journal* 82.

3 Hereafter UNCITRAL.

4 Hereafter the Model Law.

5 Herrmann 1998 *Uniform Law Review* 485.

6 Model Law Explanatory Note by the UNCITRAL Secretariat.

7 Hereafter the Commission.

commercial arbitration in South Africa. It drafted a *Draft Bill on International Arbitration* (not as of yet promulgated) based on the Model Law.<sup>9</sup> One of the points of discussion in the report of the Commission was whether the Model Law should also be made applicable to domestic commercial arbitration in South Africa. The conclusion was that domestic and international arbitration should be dealt with separately and that the present Act regulating domestic arbitration should be amended but not replaced by the Model Law. This implies two arbitration regimes: the *International Arbitration Act* (dealing only with international commercial arbitration); and the *Arbitration Act* (dealing only with domestic commercial arbitration).<sup>10</sup>

After the Commission's report had been studied and South Africa's legal position had been compared with Australia's legal position,<sup>11</sup> it is concluded that Australia is a good example to follow in regard to arbitration practices. It is, however, important to keep South Africa's own background in mind. A good point made by Australia, is the fact that international commercial arbitration legislation and domestic commercial arbitration legislation, should be kept separate. This will bring about effectiveness and clarity for the users of the said legislation. Furthermore, as end conclusion, the Commission's view is not favoured in regard to the fact that South Africa's domestic arbitration legislation should not be based on the UNCITRAL Model Law. It would be a good idea to follow suit with Australia and base both South Africa's international and domestic commercial arbitration legislation on the UNCITRAL Model Law.

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8 South African Law Commission Project 94 *Arbitration: An International Arbitration Act for South Africa* Report July 1998.

9 SALC Report 1998 annexure F.

10 The issue which will be dealt with in this study is whether South Africa should base both its domestic and international commercial arbitration legislation on the Model Law or whether the Model Law should just be made applicable to international commercial arbitration.

11 The present legal position in South Africa will be discussed and compared with the legal position in Australia, as Australia is reforming both their *International Arbitration Act* 136 of 1974 and their *Uniform Acts* (each state and territory of Australia have different legislation applicable on domestic commercial arbitration).



## Afrikaanse opsomming

### **Die UNCITRAL Model Wet op Internasionale Kommersiële Arbitrasie as basis vir Internasionale en Plaaslike Arbitrasie in Suid-Afrika**

Kommersiële arbitrasie is een van die voorste alternatiewe dispuut resoluie metodes ter wêreld en dit is ook 'n metode wat nog ontwikkel, veral in die moderne wêreld van internasionale handel.<sup>12</sup> Arbitrasie word al hoe meer deur partye verkies bo litigasie aangesien dit 'n metode is waardeur 'n dispuut vinnig, goedkoper en meer effektief besleg kan word.<sup>13</sup> Ook in Suid-Afrika word arbitrasie al hoe meer verkies deur partye betrokke in 'n kommersiële dispuut.<sup>14</sup> Effektiewe arbitrasie prosedures is 'n groot voordeel vir die ekonomiese en politieke verhoudings tussen lande en dit dra dus ook by tot die algehele globale verhoudings tussen hierdie State.<sup>15</sup>

Die huidige Suid-Afrikaanse *Wet op Arbitrasie* 42 van 1965 word nie meer beskou as effektief en doeltreffend nie aangesien dit tot op hede nog nie aangepas is om sodoende tred te hou met die hedendaagse kommersiële arbitrasie tendense nie. Hierdie Wet dek net plaaslike kommersiële arbitrasie en bevat geen verwysing na internasionale kommersiële arbitrasie nie. Dus is daar 'n leemte in die Suid Afrikaanse arbitrasie wetgewing wat betref laasgenoemde.

Die "Model Law on International Commercial Arbitration",<sup>16</sup> wat bekendgestel is deur UNCITRAL,<sup>17</sup> word gebruik deur baie lande as

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12 Robine 1996 *Int'l Bus. L.J* 145-146; Griffith and Mitchell 2002 *Melbourne Journal of International Law* 184.

13 Nie alle arbitrasie is egter vinnig en goedkoop nie en dus word die eenvoudigheid van arbitrasie soms oorbeklemtoon.

14 Berger 1994 *SA Merc LJ* 251.

15 Slate *et al* 2004 *Cardozo Journal* 82.

16 UNCITRAL Model Law on International Commercial Arbitration (hierna "UNCITRAL Model Law" of Model Wet)

17 United Nations Commission on International Trade Law.

bron vir hul arbitrasie wetgewing en prosedures.<sup>18</sup> Hierdie Model Wet (of variasies daarvan) kan deur lande oorgeneem word om sodoende hul internasionale kommersiële arbitrasie te reguleer. Alhoewel die Model Wet meestal in die geval van internasionale kommersiële arbitrasie gebruik word, is daar ook lande wat dit oorgeneem en geïnkorporeer het in hul plaaslike kommersiële arbitrasie wetgewing.<sup>19</sup>

Die Suid-Afrikaanse Regskommissie het in 1998 en 2001 verslae gepubliseer wat handel oor die probleem rakende Suid-Afrika se verouderde arbitrasie wetgewing wat nie internasionale kommersiële arbitrasie dek nie.<sup>20</sup> Hierdie verslae konsentreer veral op die moontlikheid om Suid-Afrika se internasionale kommersiële arbitrasie te baseer op UNCITRAL se Model Wet. Die Regskommissie het ook nog verder gegaan en 'n *Konsep Wet op Internasionale Komersiële Arbitrasie*<sup>21</sup> voorgestel en gepubliseer. Hierdie Wet het egter tot op hede nog nie inwerking getree nie. Een van die besprekingspunte waaraan geraak word in die Regskommissie se verslae is of Suid-Afrika se plaaslike kommersiële arbitrasie wetgewing ook gebaseer moet word op UNCITRAL se Model Wet. Die bevinding was egter dat Suid-Afrika se wetgewing rakende plaaslike en internasionale kommersiële arbitrasie apart gehou moet word en dat die internasionale gedeelte alleenlik op die Model Wet gebaseer moet word. Dus word daar voorgestel dat Suid-Afrika 'n internasionale arbitrasie wet (wat net handel met internasionale kommersiële arbitrasie) aan die een kant moet hê en die huidige, maar tog 'n opgegradeerde weergawe van die *Wet op Arbitrasie* (wat net handel met plaaslike kommersiële arbitrasie) aan die ander kant.<sup>22</sup>

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18 Herrmann 1998 *Uniform Law Review* 485.

19 Daar is verskeie redes waarom sommige lande verkies om dit te inkorporeer in hul plaaslike arbitrasie, soos byvoorbeeld, die feit dat hul eie plaaslike arbitrasie wetgewing verouderd geword het.

20 Die verslae is getiteld: "South African Law Commission Project 94 *Arbitration: An International Arbitration Act for South Africa* Report July 1998" en "South African Law Commission Project 94 *Domestic Arbitration* May 2001".

21 SALC Report 1998 annexure F.

22 Die vraag wat dus in hierdie studie behandel en beantwoord gaan word, is of Suid-Afrika se internasionale en plaaslike kommersiële arbitrasie wetgewing

Nadat daar intensief gekyk is na die Regskommissie se verslae en ook na die posisie in Australië,<sup>23</sup> word die gevolgtrekking gemaak dat Australië 'n goeie voorbeeld is om na te volg betreffende arbitrasie praktyke, maar Suid-Afrika se eie agtergrond en belange moet nogsteeds in ag geneem word. 'n Goeie punt wat Australië maak, is die feit dat internasionale kommersiële arbitrasie wetgewing en plaaslike kommersiële arbitrasie wetgewing apart gehou moet word. Dit bring effektiwiteit en duidelikheid mee vir die gebruikers daarvan. Verder, as eind gevolgtrekking, word die Regskommissie se siening nie ondersteun rakende die feit dat Suid-Afrika se plaaslike kommersiële arbitrasie nie gebaseer moet word op UNCITRAL se Model Wet nie en dus, dat net internasionale kommersiële arbitrasie daarop gebasseer moet word.

Dit sal dus n goeie idee wees om Australië se voorbeeld na te volg en om die plaaslike kommersiële arbitrasie regime ook te baseer op die UNCITRAL Model Wet; met sekere veranderinge om dit meer gepas te maak vir plaaslike arbitrasie. Dus, moet beide die plaaslike en internasionale kommersiële arbitrasie regimes van Suid-Afrika gebaseer word op die UNCITRAL Model Wet.

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gebaseer moet word op UNCITRAL se Model Wet en of dit net die internasionale gedeelte moet wees (soos voorgestel deur die Regskommissie).

23 Australië word gebruik as voorbeeld in hierdie studie aangesien dit een van die lande is wat op die voor front is betreffende arbitrasie praktyke en prosedures (veral betreffende internasionale kommersiële arbitrasie).

## **List of abbreviations**

1947 IAA	<i>International Arbitration Act (Cth) 1947 (Australia)</i>
2009 IAA	<i>International Arbitration Amendment Act 2009</i> (Australia)
1984 CAAs	<i>Commercial Arbitration Acts of the States and Territories 1984 (Australia)</i>
2010 CAA	<i>Commercial Arbitration Act 2010 (Australia)</i>
SALC	South African Law Commission
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law

## **Keywords**

Australia

Domestic arbitration

International commercial arbitration

South Africa

South African Law Commission

Arbitration legislation

UNCITRAL

## CHAPTER 1

### INTRODUCTION

#### **1.1 *Arbitration: an everyday scenario***

Party A (a South African citizen) and Party B (a U.K. citizen living in London) concluded a contract for the sale of certain goods. Within their main agreement they included an arbitration agreement to govern any existing or future disputes arising from their main contract. This scenario is something that happens on a daily basis; international contracts are concluded on a daily basis. The simplicity of this scenario can, however, be misleading. When drafting an arbitration agreement certain essential factors have to be kept in mind and without an effective arbitration agreement, the arbitral process can become burdensome for the parties. Important questions arise when drafting an arbitration agreement. Where will the arbitration take place? What will be the applicable law governing the arbitration agreement and the arbitral procedures? Both parties are from foreign countries and have different legal backgrounds and this has the consequence that they will not be familiar with local legislation or practices.<sup>24</sup> It is important to consider these questions beforehand to avoid any future problems and disparities.

In this scenario, the parties are likely to choose London as the seat of arbitration and English law as the applicable law to govern the arbitral process. One has to stop and ponder why London and English law will be chosen and why not South Africa as the seat of arbitration and South African law as the applicable law system? For any arbitration expert this will be an easy answer: South Africa is simply not seen as a favourable seat of arbitration because it is not one of the top developed countries regarding international commercial arbitration; and secondly, South African arbitration legislation is outdated and does not facilitate international commercial arbitration. England, on the other hand, is one

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24 Herrmann 1998 *Uniform Law Review* 486.

of the countries on the forefront of arbitration: it has effective arbitration legislation<sup>25</sup> and it has the London Court of International Arbitration.<sup>26</sup>

Parties drafting an arbitration agreement will normally favour a neutral seat of arbitration but they will also favour a seat and an applicable legal system with which they are comfortable and familiar and which will be easily ascertainable.<sup>27</sup> Parties prefer to know what the procedures to be taken will be and also what the possible outcome of the arbitration will be. Furthermore, the parties will prefer to make use of rules and procedures that are widely or globally known and that will ensure certainty. It will also be of great advantage if both parties' States applied more or less similar laws to arbitration matters: it would contribute to the harmonization of international trade law.<sup>28</sup> It is important, especially in international matters, that the rules and procedures chosen are effective and are proven to deliver desirable results. With this in mind, it is apparent why South Africa will not be a suitable place for an international arbitration matter and why South African arbitration legislation will not suffice.

Another scenario arises: Party A (the South African citizen) and Party C (also a South Africa citizen) concluded a contract for the sale of goods and also included an arbitration agreement within their main contract. Both parties have been involved in separate international commercial arbitration disputes in the past where South African arbitration legislation was applicable. In this scenario, however, visualize that South Africa has updated international commercial arbitration legislation. Because both parties are South Africans and are familiar with the South African legislation, they now wish to apply the same legislation on their domestic dispute but according to South African law, they have to apply South African legislation applicable on domestic disputes. The question now arises whether it would be better and more effective if the legislation

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25 *Arbitration Act* 1996 (of England) Chapter 23 (17 June 1996).

26 The London Court of International Arbitration (LCIA).

27 Herrmann 1998 *Uniform Law Review* 487.

28 Herrmann 1998 *Uniform Law Review* 487.

applicable to international and domestic arbitration were based on the same principles? This would give the parties certainty and they wouldn't have to apply legislation with which they are not familiar.

Thus, it can be concluded that if South Africa were to incorporate globally accepted principles into its arbitration legislation, make it applicable on an international level and base its domestic, as well as international commercial arbitration, on more or less the same basis and principles, South Africa as a venue for international commercial arbitration and South African arbitration legislation, will become more favourable. Furthermore, any disparities and problems regarding its domestic commercial arbitration will be resolved.

## **1.2 Problem statement and research question**

Commercial arbitration is fast growing in importance in the modern world and the development of international commercial arbitration in the international trade sphere is something which should be pursued by parties.<sup>29</sup> People often use arbitration to ensure adjudication by an expert in the field and although arbitration may not always be quicker, its importance continues to grow especially in international commercial disputes. International commercial dispute resolution has also undergone some relative changes throughout the past few decades with countries and institutions developing and placing more importance on arbitration as an effective alternative dispute resolution method in the international trade sphere.<sup>30</sup> Furthermore, arbitration is seen as an effective method for resolving disputes and in particular, commercial disputes in South Africa.<sup>31</sup>

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29 Robine 1996 *Int'l Bus. L.J* 145-146; The development and evolution of arbitration can be observed from the viewpoint of domestic arbitration, institutional arbitration and the development of domestic arbitration to international arbitration; Cremades and Cairns 2002 *J.W.I.* 175.

30 Griffith and Mitchell 2002 *Melbourne Journal of International Law* 184.

31 Berger 1994 *SA Merc LJ* 251.



Although arbitration as an alternative dispute resolution method appears to be simplistic and easy, this will not always be the case. Variables such as the amount in dispute, the applicable procedures and set of rules to be followed, the number of arbitrators and the nature of the dispute, can affect whether the arbitration will be conducted on an informal or more formal basis.<sup>32</sup> This loss of simplicity can greatly affect the future of arbitration as parties will feel the need to resolve a dispute with another method that proves to be more effective and simplistic. The flexible nature of arbitration proceedings is a characteristic that is being utilised by parties on a greater scale today to ensure that arbitration is a non-expensive and quick way to settle a dispute.<sup>33</sup> The importance of effective arbitration procedures cannot be stressed enough: it contributes to the economical and political relations between States and thus it contributes to the overall global relations between States.<sup>34</sup>

The South African *Arbitration Act*<sup>35</sup> might have sufficed in the past, but as international commercial arbitration is ever increasing and changing, this act has become outdated. It does not effectively facilitate international commercial arbitration. The *SA Arbitration Act* was primarily designed with domestic commercial arbitration in mind and therefore it is of limited assistance in the international commercial arbitration sphere.

The United Nations Commission on International Trade Law<sup>36</sup> has developed the Model Law on International Commercial Arbitration.<sup>37</sup> The UNCITRAL Model Law has achieved great success with more than one quarter of the world's countries having legislation based thereon and the number of countries adopting and incorporating it into their

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32 Berger 1994 *SA Merc LJ* 251.

33 Berger 1994 *SA Merc LJ* 255.

34 Slate *et al* 2004 *Cardozo Journal* 82.

35 *Arbitration Act* 42 of 1965 (hereafter the *SA Arbitration Act*).

36 Hereafter UNCITRAL.

37 UNCITRAL Model Law on International Commercial Arbitration (hereafter the UNCITRAL Model Law).

legislation, growing every day.<sup>38</sup> This Model Law or variations thereof can be adopted by a country to regulate international commercial arbitration. Many countries choose to adopt the Model Law. The reasons vary but some are that the country's own arbitration laws were outdated and needed replacement or that their present arbitration legislation did not effectively facilitate international commercial arbitration.<sup>39</sup> The Model Law has proved to be effective and it has become a benchmark for good arbitration legislation. Some countries, for example, Kenya, Zimbabwe, New Zealand and India, have even adopted the Model Law for use in domestic commercial arbitration disputes.<sup>40</sup> The focus of the Model Law also falls on the deficiencies of the international trade law system and ways to contribute to the resolve of these deficiencies.<sup>41</sup>

UNCITRAL has played an important key role in the development of international trade as well as in alternative dispute resolution and has improved the workings of international commercial arbitration as a whole.<sup>42</sup> Furthermore, UNCITRAL was established to resolve the existing disparities between various States regarding their international trade law. With these disparities and obstacles out of the way, international trade law would be able to grow and develop and an "integrated international trade system"<sup>43</sup> could be established. The contributions of UNCITRAL regarding international arbitration have been immense and continue to be one of the most important legal bodies in the world on international trade matters.<sup>44</sup>

South African arbitration legislation has been at a standstill for the last twelve years since the South African Law Commission<sup>45</sup> published a

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38 Herrmann 1998 *Uniform Law Review* 485.

39 Herrmann 1998 *Uniform Law Review* 486, 489.

40 SALC 1998 Report 25 par 1.10.

41 Slate *et al* 2004 *Cardozo Journal* 83.

42 Griffith and Mitchell 2002 *Melbourne Journal of International Law* 184; Cremades and Cairns 2002 *J.W.I.* 175.

43 Slate *et al* 2004 *Cardozo Journal* 74.

44 Slate *et al* 2004 *Cardozo Journal* 106.

45 Hereafter the SALC.

report in 1998 dealing with the deficiencies of South African arbitration legislation: *Arbitration: An International Arbitration Act for South Africa* Report.<sup>46</sup> Thus, arbitration in South Africa has experienced little growth in the past decade.

The SALC's 1998 report deals with the possible application of the Model Law on international commercial arbitration in South Africa. The SALC drafted a *Draft Bill on International Arbitration*<sup>47</sup> (not as yet promulgated) based on the Model Law. One of the points of discussion in the report of the SALC was whether the Model Law should also be made applicable to domestic commercial arbitration in South Africa. The conclusion was that domestic and international arbitration should be dealt with separately and that the present Act regulating domestic arbitration should be amended but not replaced by the Model Law. This implies two arbitration regimes: the *International Arbitration Act* (dealing only with international commercial arbitration); and the *Arbitration Act* (dealing only with domestic commercial arbitration).

The issue which will be dealt with in this study is whether South Africa should base both its domestic and international commercial arbitration legislation on the Model Law or whether the Model Law should just be made applicable to international commercial arbitration. Thus: what is the viability of basing both international and domestic arbitration in South Africa on the UNCITRAL Model Law on International Commercial Arbitration?

### **1.3 Australia as an example**

The present legal position in South Africa will be discussed and compared with the legal position in Australia, as Australia is reforming both their *International Arbitration Act* 136 of 1974 and their *Uniform*

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46 South African Law Commission Project 94 *Arbitration: An International Arbitration Act for South Africa* Report July 1998 (hereafter the SALC Report 1998).

47 SALC Report 1998 annexure F.

Acts<sup>48</sup> and replacing them with one act that will be applicable on both domestic and international commercial arbitration. Furthermore, Australia is reforming its arbitration legislation to incorporate the UNCITRAL Model Law into both domestic and international commercial arbitration matters.

Australia will be referred to in this study as it is one of the countries on the forefront of arbitration. Although South Africa and Australia may not be in the same position regarding their arbitration legislation, it can be useful to take a subjective view regarding the manner in which Australia dealt with the issue of amending its arbitration legislation. Furthermore, the reasons why Australia incorporated the UNCITRAL Model Law into its domestic arbitration legislation and how they went about it, can be useful for South Africa to determine whether it should follow suit.

#### ***1.4 International arbitration versus domestic arbitration***

Throughout this study reference will be made to international arbitration on the one side and domestic arbitration on the other side. It is, however, important to keep in mind that this study is concerned with commercial arbitration and not non-commercial arbitration.

#### ***1.5 Outline of the study***

As arbitration is the focus point and basis of this study, Chapter 2 will deal with a discussion thereof. The distinction between domestic commercial arbitration and international commercial arbitration will also be addressed as it is of importance to understand the differences between them.

UNCITRAL and the UNCITRAL Model Law will be the focus point in Chapter 3. The discussion will first be on the establishment and the

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<sup>48</sup> Each state and territory of Australia has different legislation applicable on domestic commercial arbitration.

working of UNCITRAL and then, secondly on what a model law is and in particular, the objectives of the UNCITRAL Model Law.

Chapter 4 will focus on the Australian legal position. The previous position will be discussed to see how their arbitration legislation operated and how they distinguished between domestic and international commercial arbitration. Then the reform of their arbitration will be discussed and the present position. What the proposed reform entailed and how the UNCITRAL Model Law came into play regarding the reform will also be looked at.

In Chapter 5 a short discussion of the South African common law position and the applicable legislation will be dealt with before dealing with the SALC's 1998 report. Here the findings of the SALC regarding the incorporation of the UNCITRAL Model Law into South African international commercial arbitration legislation on the one side, and domestic commercial arbitration legislation on the other side, will be analysed. The reasons why the SALC proposed that South Africa's international and domestic commercial arbitration legislation will be kept separate will also be analysed.

Chapter 6 will focus on the differences between the primary provisions found in the UNCITRAL Model Law on the one side, and the provisions contained in the previous and present arbitration legislation of Australia. The UNCITRAL Model Law's primary provisions will also be compared against South Africa's arbitration legislation.

With all the above kept in mind, conclusions will be drawn in Chapter 7. Here the focus will fall on whether it will be to South Africa's advantage to follow the proposed reform, as suggested by the SALC in its 1998 report, or whether both domestic and international commercial arbitration legislation must be based on the UNCITRAL Model Law. Lastly, lessons to be learned from Australia's reform will also be discussed and whether South Africa should follow their example or not.

## CHAPTER 2

### ARBITRATION: AN OVERVIEW

In this chapter the nature and principles of arbitration will be discussed in depth. The primary focus will be on domestic and international commercial arbitration. Arbitration as an alternative dispute resolution method must be understood; without knowledge thereof it may be difficult to comprehend the importance and use thereof. Domestic commercial arbitration will generally be the starting point; it's something every country deals with on a daily basis and, therefore, almost every country will have legislation dealing with it. International commercial arbitration flows from domestic commercial arbitration. As a country develops, its interactions with other countries also continue to develop.

In the modern world today, a country cannot efficiently interact with other countries, whether it's directly with states, state-entities or individuals, if it does not have efficient legislation regulating these relationships and transactions that flow from the interaction between parties from different nationalities and backgrounds. Therefore, the need for effective legislation dealing with international matters continues to grow in importance. Where there are legal relationships, contracts and transactions, there will be parties whom may not agree on certain matters and this will give rise to disputes. When drafting contracts, the possibility of disputes arising must be kept in mind and made provision for.

#### ***2.1 Definition, objective and methods of arbitration***

In the seeking of a departure from the existing court based litigation,<sup>49</sup> many forms of alternative dispute resolution methods have developed,

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49 Although *prima facie* arbitration and litigation seem to be the same, they both reflect different characteristics: arbitration is a voluntary proceeding and litigation non-voluntary; with arbitration the parties have a greater degree of party autonomy and can chose the applicable proceedings to govern the arbitration, whereas litigation is based on rigid court-based proceedings;

arbitration being one of them.<sup>50</sup> Arbitration is an alternative dispute resolution method which allows the parties to settle a dispute without interference from the courts<sup>51</sup> (nationally or internationally).<sup>52</sup> Furthermore, arbitration is a procedure where the parties will refer their dispute to a third party, the arbitrator,<sup>53</sup> who will decide the matter, after he has acknowledged the parties' submissions, and give a final and binding decision.<sup>54</sup>

Arbitration is meant to be an effective, fast, informal and an inexpensive way of settling a dispute.<sup>55</sup> Its simplicity has, however, been lost and it has become more complex,<sup>56</sup> with the costs thereof increasing and delays being the result of one or more arbitrators (or the arbitral tribunal) governing the proceedings.<sup>57</sup> The agreement to arbitrate can be seen as the essence of arbitration<sup>58</sup> with the nature of arbitration itself being procedural<sup>59</sup> and contractual.<sup>60</sup>

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parties are free to choose the arbitrators whom will govern the proceedings, whereas parties will not be able to choose the judge whom will preside over the case where litigation is concerned; and lastly, the arbitrator's decision will be binding, whereas a party can take a decision made by a judge on appeal; Berger 1994 *SA Merc LJ* 252-253.

50 Griffith and Mitchell 2002 *Melbourne Journal of International Law* 2; Other methods include, for example, conciliation, mediation, assisted negotiation counselling and evaluation; When deciding which method to follow, parties will take into consideration the various advantages and disadvantages of these methods.

51 Butler & Finsen *Arbitration in SA* 45; Berger 1994 *SA Merc LJ* 255; Courts are generally reluctant to interfere with arbitration proceedings, with South African courts respecting this characteristic of arbitration; they will only interfere if it is deemed necessary.

52 The courts' jurisdiction will however not be fully excluded regarding the arbitration agreement: the relationship between the courts and the arbitration process plays an important part in arbitration law; Butler & Finsen *Arbitration in SA* 61; McNerney and Esplugues 1986 *B. C. Int'l & Comp. L. Rev.* 55; Article 5 of the UNCITRAL Model Law provides, for example: "*In matters governed by this Law, no court shall intervene except where so provided in this Law.*"

53 Or arbitral tribunal.

54 Berger 1994 *SA Merc LJ* 252.

55 Cost and time are seen as the two main factors for making use of alternative dispute resolution methods and referring a dispute to arbitration; Berger 1994 *SA Merc LJ* 254.

56 Redfern & Hunter *International Commercial Arbitration* 3.

57 Butler & Finsen *Arbitration in SA* 298.

58 Berger 2008 *JLCIA* 265.

59 Butler & Finsen *Arbitration in SA* 61.

60 Berger "Re-Examining the Arbitration Agreement" 301.

The primary objective of arbitration is to resolve a dispute by obtaining a binding decision<sup>61</sup> by the arbitrator or arbitral tribunal.<sup>62</sup> The arbitrator or arbitral tribunal will determine the relevant dispute in accordance with the parties' rights, responsibilities and liabilities regarding the arbitration agreement at the time when the arbitration proceedings will commence.<sup>63</sup> An arbitral tribunal will have jurisdiction in an arbitration matter and its jurisdiction will be based on the parties' agreement to arbitrate as stipulated in their arbitration agreement or clause in their main contract.<sup>64</sup> Arbitration gives a certain degree of party autonomy and flexibility to the parties: they are free to decide on the applicable arbitration procedure; the seat of the arbitration; the applicable law; the language in which the arbitration will be held; the confidentiality of the arbitration and they can appoint their own arbitrator(s).<sup>65</sup> Arbitration can also be seen as more favourable than litigation: the decisions are final and the arbitral awards are more easily enforced in foreign countries as opposed to foreign judgements.<sup>66</sup>

Arbitration can be conducted by one of two methods:<sup>67</sup> institutional arbitration or *ad hoc* arbitration - each with their own advantages and disadvantages.<sup>68</sup> When making use of institutional arbitration, an

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61 Redfern & Hunter *International Commercial Arbitration* 10; This binding decision will be in the form of an award made by the arbitrator or arbitral tribunal and it is this binding decision which distinguishes arbitration from other forms of litigation or dispute resolution.

62 Redfern & Hunter *International Commercial Arbitration* 4.

63 Butler & Finsen *Arbitration in SA* 46.

64 Griffith and Mitchell 2002 *Melbourne Journal of International Law* 186; Saturnino 1986 *Inter-American Law Review* 317.

65 Griffith and Mitchell 2002 *Melbourne Journal of International Law* 186.

66 Crook 1989 *AJIL* 279; Arbitral decision making is seen to be more effective than court judgements as it accommodates the different interests, expectations and cultures of the foreign parties from different legal systems.

67 Butler & Finsen *Arbitration in SA* 300.

68 Griffith and Mitchell 2002 *Melbourne Journal of International Law* 187; Butler & Finsen *Arbitration in SA* 298; A major disadvantage of institutional arbitration is that the larger the amount of the dispute; the larger the cost of the arbitration will be as institutions mostly base the calculation of their costs and fees on the amount in dispute; One of the disadvantages of *ad hoc* arbitration is the fact that there may not be a set of pre-determined rules, giving the parties leeway to delay the procedure.



arbitration institution<sup>69</sup> will be selected by the parties and that specific institution will govern the arbitration proceedings under its own rules. Moreover, the institution will make all the administrative arrangements<sup>70</sup> regarding the arbitration and the parties will not have direct contact with each other. Therefore, there will be a degree of certainty regarding the procedure. In the case of *ad hoc* arbitration, the parties are free to choose which specific set of procedural rules<sup>71</sup> will govern the proceedings.<sup>72</sup>

Whether choosing institutional or *ad hoc* arbitration, the arbitration procedure will still be subject to a certain legal system. Parties will generally choose a neutral legal system to govern the proceedings and will prefer a legal system with which they are more or less familiar. Thus it follows that a legal system, and arbitration legislation, which comprises of globally accepted rules and standards, will be more favourable than outdated arbitration legislation.

## **2.2 The arbitration agreement, applicable law and seat of arbitration**

It is the norm that parties usually include an arbitration agreement<sup>73</sup> within their main contract that sets out the applicable procedure to be followed when faced with a specific<sup>74</sup> dispute.<sup>75</sup> The arbitration

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69 Butler & Finsen *Arbitration in SA* 301; Examples of arbitration institutions include: The International Court of Arbitration of the International Chamber of Commerce (ICC); the London Court of International Arbitration (LCIA); and the American Arbitration Association (AAA).

70 The secretariat of the institution will generally perform the administrative arrangements, for example, the appointment of the arbitral tribunal.

71 This may be a set of international rules (for example, the UNCITRAL Arbitration Rules), rules drafted by the parties themselves, rules drafted by the arbitrator or a combination thereof, drafted specifically for application in arbitration matters; Butler & Finsen *Arbitration in SA* 300.

72 Lando "Law Applicable" 129.

73 An "arbitration agreement" is defined in section 1 of the *SA Arbitration Act* as: "a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not"

74 The parties will usually refer within their arbitration agreement which disputes will be governed by the arbitration agreement; Butler & Finsen *Arbitration in SA* 305.

75 Redfern & Hunter *International Commercial Arbitration* 1.

agreement or clause can, therefore, be defined as “an agreement inside an agreement”<sup>76</sup> and it has an important function: it reflects the parties’ consent<sup>77</sup> to refer their dispute to arbitration and without this consent there can be no valid agreement or arbitration.<sup>78</sup> Furthermore, this consent cannot be withdrawn unilaterally.<sup>79</sup> The parties are free to decide on the procedure to be followed (and whether they are making use of *ad hoc* or institutional arbitration).<sup>80</sup>

Substance and form comes into play here: the parties have to agree to submit a dispute to arbitration (formal validity) and there has to be consensus<sup>81</sup> between the parties regarding the agreement to arbitrate (substantive or essential validity).<sup>82</sup> There are two forms of arbitration agreements: an arbitration clause within the main contract or a separate arbitration agreement.<sup>83</sup> The latter can refer to future disputes or to an existing dispute; when referring to an existing dispute it will most likely be known as a “submission agreement”.

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76 Berger “Re-Examining the Arbitration Agreement” 302; *Union of India v McDonnell Douglas Corporation* (1993) 2 Lloyd’s L.Rep 48; Although it is seen as an “agreement inside an agreement”, the arbitration agreement functions separately from the main agreement: if the main agreement comes to an end, the parties’ obligations regarding the arbitration agreement will not.

77 Arbitration is based on a consensual basis between the parties; Berger 1994 *SA Merc LJ* 253-254.

78 Redfern & Hunter *International Commercial Arbitration* 6; Berger 1994 *SA Merc LJ* 252; Slate *et al* 2004 *Cardozo Journal* 84; The UNCITRAL Model Law, for example, does not cover the matter of the parties’ capacity to conclude an arbitration agreement and leaves it open to be decided with the applicable national law in mind.

79 Redfern & Hunter *International Commercial Arbitration* 7.

80 Parties may each have different reasons for wanting a specific procedure to be applicable on their dispute and the reasons will generally be reflected in their aims; The progressive globalization of international commercial arbitration has placed an emphasis on party autonomy and freedom of contract - factors which makes arbitration as alternative dispute resolution method even more attractive; Berger 1994 *SA Merc LJ* 257; Cremades and Cairns 2002 *J.W.I.* 181.

81 This reflects the consensual basis of the arbitration agreement: the parties have to be in agreement that the dispute will be referred to arbitration; Butler & Finsen *Arbitration in SA* 41.

82 The consensual basis of the arbitration agreement has the effect that the parties will be bound by the agreement and that it can only be set aside if both the parties have consented to the termination thereof; S 3 *SA Arbitration Act*; Butler & Finsen *Arbitration in SA* 60; Berger “Re Examining the Arbitration Agreement” 303.

83 Berger “Re-Examining the Arbitration Agreement” 308.

As a result of the international character of international commercial arbitration, there may be more than one legal system and rules of law applicable in an international arbitration dispute and, moreover, the parties are generally free to decide which law (or system of substantive law)<sup>84</sup> will be applicable in the relevant dispute which is brought before arbitration.<sup>85</sup> Parties exercise their party autonomy with a “choice of law clause” within their contract: this clause will stipulate the specific law to be applied to the main contract and also the law to be applied to the arbitration agreement.<sup>86</sup> Where there is no express choice of law by the parties, then the arbitrator (or arbitral tribunal) will take into consideration any implied choice of law made by the parties and designate an applicable law system on the basis that he, the arbitrator, believes that that is the true intention of the parties.<sup>87</sup>

Examples of the various legal systems that could be applicable are: Firstly, there is the proper law applicable to the main contract between the parties, which will determine the merits of the dispute. Secondly, there is the proper law of the arbitration agreement itself, which regulates the agreement. Thirdly, there is the proper law, which regulates the parties’ reference to the arbitration and their capacity to conclude the arbitration agreement.<sup>88</sup> Finally, there is the curial law,<sup>89</sup> which will regulate the arbitration proceedings (*lex loci arbitri*).<sup>90</sup> These legal systems may each be different or the same (depending on what the parties concluded in the arbitration agreement), for example, the curial law may be the same as the proper law of the contract or it may be

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84 Butler & Finsen *Arbitration in SA* 307.

85 Redfern & Hunter *International Commercial Arbitration* 2; Butler & Finsen *Arbitration in SA* 309; Lando “Applicable Law” 132; McNerney and Esplugues 1986 *B. C. Int’l & Comp. L. Rev.* 54; Article 28(1) UNCITRAL Model Law.

86 Lando “Applicable Law” 134.

87 Lando “Applicable Law” 137; The UNCITRAL Model Law grants the arbitrator permission and power to determine the applicable law and thus the arbitrator will have the same power as the parties in this instance.

88 Also known as “subject arbitrability”; Berger “Re-Examining the Arbitration Agreement” 303.

89 The place of the arbitration will determine the curial law to be applied and thus the curial law will be the law governing the arbitration proceedings (the national law of the place of arbitration).

90 Redfern & Hunter *International Commercial Arbitration* 2.

another set of rules that the parties agreed on to be applied specifically in regard to the arbitration agreement.<sup>91</sup> Furthermore, the proper law of the contract can be national law (thus the law of the place of the contract; the *lex contractus*); or international law; or a mixture of national and international law; or transnational law (*lex mercatoria*).<sup>92</sup> Therefore it may not always be easy to determine which law will govern the arbitration agreement.<sup>93</sup>

Parties generally decide on the substantive law to govern the dispute (in international cases)<sup>94</sup> but they may also agree that the “general principles of law” will apply to the arbitration agreement if they can’t decide on a specific legal system or don’t want a specific national law to govern the agreement.<sup>95</sup> The arbitrator will have a wider discretion as to what rules to apply but it also holds a disadvantage; there is no certainty, as opposed to the use of a standard set of rules, and the arbitrator has to determine the nature of the general principles as referenced to by the parties.<sup>96</sup>

The choice of the seat of arbitration by the parties, in an international commercial arbitration dispute, will have an important consequence: it will serve as the choice of law as chosen by the parties to govern the arbitration procedure and it will be the law that determines the substantive validity of the arbitration agreement.<sup>97</sup> Thus the choice of

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91 Redfern & Hunter *International Commercial Arbitration* 2.

92 Lando “Applicable Law” 143; The *lex mercatoria* can be defined as: the application of various customs and usages of international trade applied by States engaged in international trade. If these customs and usages are not common rules or not easily ascertained, then the laws of various legal systems will be considered. Thus, the *lex mercatoria* consists partly of the application of standard customary rules and partly of specific selected rules.

93 Berger “Re-Examining the Arbitration Agreement” 302.

94 Non-national standards, for example, general principles of law, *lex mercatoria* or other standard usages can be applied if there is an arbitration clause in an international transaction between parties, therefore the matter or dispute must have an international character; Author Unknown 1987/1988 *Harvard Law Review* 1823.

95 Author Unknown 1987/1988 *Harvard Law Review* 1816, 1821; Lando “Applicable Law” 145.

96 Author Unknown 1987/1988 *Harvard Law Review* 1821.

97 Berger “Re-Examining the Arbitration Agreement” 315-316.

the seat will serve as a direct or indirect choice of law by the parties. Although the law of the seat of arbitration will govern the procedure of the arbitration, it will mostly have a regulatory function and thereby the parties will have the freedom, to a certain degree, to make their own arrangements.<sup>98</sup>

A choice of law clause will also have an important consequence in this regard: the law of the seat will govern the arbitration procedure unless the parties expressly included a choice of law clause within their arbitration agreement stating which law will govern it.<sup>99</sup> The seat of arbitration also has an “important harmonizing effect on applicable law issues in international commercial arbitration”;<sup>100</sup> it serves to abolish the disparities and contradictions which may arise when different legal systems are applicable.<sup>101</sup> Furthermore, by conforming to the formal validity requirements applicable to the arbitration agreement, the parties shall be made aware that they are ousting the jurisdiction of the domestic courts and referring their dispute to be heard privately by the arbitral tribunal they have or will choose.<sup>102</sup>

It is important for the parties to consider certain factors when choosing the seat of arbitration: the specific place must be “accessible and convenient and offer the necessary infrastructure”<sup>103</sup> regarding the arbitration procedures to be followed. Furthermore, the seat of arbitration will determine the curial law.<sup>104</sup> Nonetheless, the parties usually prefer to choose a neutral venue and system of law, especially in

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98 Butler & Finsen *Arbitration in SA* 306.

99 Berger “Re-Examining the Arbitration Agreement” 320; *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* UN General Assembly Official Record Supp no 17 UN Doc (A/40/17) (40th Session 3-21 June 1985 Vienna) par 284 (hereafter Report UNCITRAL 1985).

100 Berger “Re-Examining the Arbitration Agreement” 316.

101 Berger “Re-Examining the Arbitration Agreement” 333.

102 Berger “Re-Examining the Arbitration Agreement” 324.

103 Butler & Finsen *Arbitration in SA* 306.

104 The curial law has its own important factors: it determines the validity of the arbitration arrangement; how the arbitration will be conducted; the powers of the arbitrator; the applicable powers of the court to assist when necessary, and the validity of the awards and in which cases the award may be set aside; Butler & Finsen *Arbitration in SA* 306.

the case of international commercial arbitration. It will, however, be of great advantage to the parties to choose a seat of arbitration, and thus the applicable curial law, with which they are more or less familiar or with which they will have a certain degree of certainty (regarding the outcome of the arbitration). With this in mind, parties also prefer to choose a set of procedural rules which are globally known, for example, the UNCITRAL Arbitration Rules, or they may choose a law system which incorporates the UNCITRAL Model Law.

## ***2.3 Domestic and international commercial arbitration***

As a result of the various different nationalities of parties concerned with arbitration, their different legal backgrounds and the different legal systems and rules of law found in the world, the distinction between domestic and international commercial arbitration plays a great part in the international trade sphere.

### ***2.3.1 Commercial arbitration***

The distinction between non-commercial arbitration and commercial arbitration is important and necessary: different rules of law and legislation may be applicable in each case.<sup>105</sup> The term “commercial” should, however, not be given a limited interpretation; it should govern all relationships with a commercial nature or character (whether contractual or not) and, moreover, it should be interpreted with the relevant national law in mind. The reason for the distinction between international arbitration and international commercial arbitration is reflected in the fact that certain countries have different applicable legislation for contracts with a commercial nature and without. Moreover, most countries have the requirement of a dispute being commercial for it to be referred to arbitration.<sup>106</sup>

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105 Butler & Finsen *Arbitration in SA* 297.

106 Redfern & Hunter *International Commercial Arbitration* 18.

A commercial contract can be defined as:

...the kind of contract made by merchants or traders in the ordinary course of their business – whether their business is to buy and sell office equipment or to rent motor cars. Such contracts are usually governed by a special code of commercial law apart from the general law of obligations.<sup>107</sup>

The UNCITRAL Model Law, for example, states in article 1(1) that it will apply to international commercial arbitration and then goes further to define the term “commercial”:

The term “commercial” should be given a wide interpretation as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.<sup>108</sup>

With the various different definitions of the term “commercial” found in domestic and international instruments, the national law relevant to the specific contract and arbitration agreement has to be taken into consideration. Arbitration is viewed as the most favourable method whereby commercial disputes are resolved: as a result of the final and binding nature of the arbitrator’s decision, disputes will not be dragged out by placing the matter on appeal; the flexibility of arbitration gives it a very attractive lure for parties wishing to mould the proceedings to their liking; and lastly, international commercial arbitration is something not made available by ordinary courts.<sup>109</sup>

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107 Redfern & Hunter *International Commercial Arbitration* 18.

108 Article 1(1) UNCITRAL Model Law, footnote 2.

109 Berger 1994 *SA Merc LJ* 254.

### 2.3.2 Domestic arbitration

The arbitrator faced with a domestic arbitration dispute will generally be in the same position as a judge, as the arbitrator will apply the domestic laws of the relevant country.<sup>110</sup> The arbitrator has the obligation to observe the public policy and mandatory rules of the forum country. Domestic arbitrations usually consist of claims brought by private individuals and the amount in dispute will be small in most cases (although not always).<sup>111</sup> With commercial arbitration evolving and the indication of progressive growth thereof, countries are adopting new arbitration legislation or amending their present outdated arbitration legislation to keep up with the development of commercial arbitration.<sup>112</sup> This ongoing reform of arbitration legislation indicates that underdeveloped or developing countries do not want to be left behind in the dark and want to compete on the same level as the developed countries, regarding up-to-date arbitration legislation.<sup>113</sup>

### 2.3.3 International arbitration

There is no internationally accepted definition of the term “international” and, therefore, it has to be interpreted in a non-restrictive manner with the relevant facts of the matter in mind as well as the provisions of the applicable legislation.<sup>114</sup> The term “international” is used to distinguish between national or domestic arbitrations and arbitrations which “transcend national boundaries”.<sup>115</sup> This contrast between domestic and international arbitration has important consequences: where international arbitration is used, its only connection with a country will be

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110 Lando “Applicable Law” 156; Arbitration proceedings are sometimes perceived as being alike to Supreme Court proceedings, although it is important to remember that arbitration is not the same as litigation; Berger 1994 *SA Merc LJ* 252.

111 Redfern & Hunter *International Commercial Arbitration* 12.

112 Robine 1996 *Int'l Bus. L.J* 146.

113 Cremades and Cairns 2002 *J.W.I.* 178.

114 Butler & Finsen *Arbitration in SA* 297; McNerney and Esplugues 1986 *B. C. Int'l & Comp. L. Rev.* 48.

115 Redfern & Hunter *International Commercial Arbitration* 12.



regarding the arbitration taking place within the territory of that country; and, in most cases, the parties involved in international arbitration can also be state entities or corporations and not just mere individuals.<sup>116</sup>

Generally speaking, two criteria are used when defining the term “international”.<sup>117</sup> The first criterion concerns the nature of the dispute that will determine if the arbitration will be international, as the nature thereof involves the interests of international trade<sup>118</sup> or if the dispute has an international character. The second criterion concerns the parties themselves, their “nationality or habitual place of residence”<sup>119</sup> or the seat of a corporate body’s “central control or management” because that (the place of arbitration) will be the factor that gives the arbitration an international character or connection.<sup>120</sup>

Different entities and institutions have adopted various criteria for determining if a dispute has an international character. The ICC,<sup>121</sup> for example, places great importance on the nature of the dispute as to cover “disputes that contained a foreign element”<sup>122</sup> and “business disputes of an international character”.<sup>123</sup> By referring to a “foreign element”, the ICC gives a wide interpretation to the term “international” and, therefore, for example, the parties do not have to have separate nationalities, the agreement then, however, has to show an international element. The UNCITRAL Model law combines the two main criteria in section 1(3) by stipulating that arbitration will be regarded as international if the parties have different nationalities or if the dispute has

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116 Redfern & *Hunter International Commercial Arbitration* 12.

117 Butler & Finsen *Arbitration in SA* 296; Redfern & *Hunter International Commercial Arbitration* 14.

118 Redfern & *Hunter International Commercial Arbitration* 14-15; Article 1492 French Code of Civil Procedure, Decree Law No. 81-500 (12 May 1981).

119 Redfern & *Hunter International Commercial Arbitration* 14.

120 Butler & Finsen *Arbitration in SA* 296; Redfern & *Hunter International Commercial Arbitration* 14.

121 The International Chamber of Commerce’s International Court of Arbitration supervises the proceedings and administration of arbitral tribunals conducting arbitration under the ICC Arbitration Rules.

122 Redfern & *Hunter International Commercial Arbitration* 14.

123 S 1(1) ICC Arbitration Rules.

an international element.<sup>124</sup> The parties' choice regarding a foreign seat of arbitration can also reflect the international element of the agreement or dispute.<sup>125</sup>

The same arbitration legislation may be applicable to both domestic and international transactions, although this may not always be the case.<sup>126</sup> Therefore certain legislation may only be applicable to international transactions as the result of certain countries adopting a separate regime for international commercial arbitration (depending on the specific State's position on various international legal instruments) and distinguishing between domestic and international arbitration within their legislation.<sup>127</sup> International commercial arbitration is private in nature<sup>128</sup> and when faced with an international business dispute (whether contractual or not) it is often used as the method to resolve the dispute.<sup>129</sup>

International commercial arbitration is a fast growing dispute resolution method used when the parties are from different nationalities. Many countries are amending their arbitration legislation to include it in their legal system, making their country more attractive as a venue for international commercial arbitration.<sup>130</sup> Many countries have also chosen to adopt the UNCITRAL Model Law into their arbitration

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124 S 1(3) UNCITRAL Model Law.

125 Redfern & Hunter *International Commercial Arbitration* 7, 17; Here the arbitration agreement plays an important part: it serves as the basis of international commercial arbitration; it reflects the consensual basis of the agreement between the parties; and it determines the procedure to be followed - it also follows that the arbitration agreement must be enforced internationally to have effect internationally.

126 Note by the Secretariat: *Unification of the Law of International Trade* UN Doc (A/C.6/L.572) (1st Session of the Commission 29 January – 26 February 1968) par 8 (hereafter Note by the Secretariat 1968).

127 Redfern & Hunter *International Commercial Arbitration* 13.

128 Griffith and Mitchell 2002 *Melbourne Journal of International Law* 195.

129 Redfern & Hunter *International Commercial Arbitration* 1.

130 Crook 1989 *AJIL* 278; Author Unknown 1987/1988 *Harvard Law Review* 1816 1817; Cremades and Cairns 2002 *J.W.I.* 208; By including international commercial arbitration within their arbitration legislation, countries are increasingly competing with one another – countries strive to be the best and offer the best and by doing so, they are securing future business for them - better and more effective arbitration legislation equals more arbitration business for the country.

legislation as it is a universally well-known set of procedural rules and was primarily designed with international commercial arbitration in mind.<sup>131</sup> The ongoing progressive interest in international commercial arbitration and adoption of the UNCITRAL Model Law is an indication that countries acknowledge the need for a uniform set of procedural arbitration rules and it indicates their willingness to submit to arbitration as opposed to court-based litigation.<sup>132</sup>

International commercial arbitration is said to have a “hybrid nature”: it evolves from a private agreement between the contracting parties and private proceedings, and ends in a public nature – the award made will have legal force, will be binding and have effect in the courts of most countries.<sup>133</sup>

#### *2.3.4 The need for uniformity and coordination*

Unification is not merely a recent trend; the earliest efforts towards unification were sought by the Scandinavian countries in the nineteenth century; then later on by the Inter-American Council of Jurists that sought uniform rules pertaining to international trade transactions, and on a more global scale there's the International Institute for the Unification of Private Law (an inter-governmental body known as the Rome Institute).<sup>134</sup> Therefore UNCITRAL took its cue from the previous actions of these institutes to further the unification of international trade law.

The progressive growth of arbitration as a preferred alternative dispute resolution method by parties creates the need for uniform arbitration laws, rules and procedures – especially in the international trade sphere.

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131 Redfern & *Hunter International Commercial Arbitration* 13.

132 Crook 1989 *AJIL* 278.

133 Redfern & *Hunter International Commercial Arbitration* 11; Cremades and Cairns 2002 *J.W.I.* 192; It is this private nature and the confidentiality of international commercial arbitration which makes it a practical and sought after dispute resolution method.

134 Note by the Secretariat 1968 par 8.

Therefore there's an increasing need to unify and coordinate the various arbitration legislations found and used in various countries. By unifying these various arbitration legislations certainty will be created where more than one legal system will be applicable in an international commercial dispute. The potential of a specific country as a venue for international arbitration will be increased if the various domestic positions of countries are coordinated and although it may not be an easy attempt, coordination can be achieved progressively over a period of time.<sup>135</sup> By coordinating the domestic positions of various States the problem may not be completely resolved, but it will help in the long run towards the unification and harmonization of international instruments and practices.<sup>136</sup>

The drafting of various rules and model laws to be used internationally cannot be seen as the end of the race towards the unification and harmonization of international practices – States have to accede to these rules or model laws and, furthermore, reflect more or less the same position towards them. The different positions of States towards international instruments can create problems, for example, it delays the development of these international instruments.<sup>137</sup> For an international instrument to be effective, it has to be accepted. Acceptance thereof will, furthermore, not be enough: it has to be accepted with little or no change. The roles of governments are important in this case as the responsibility lies with them to acknowledge an international instrument and to accede to it. A State's position on a specific instrument will be affected directly by its government's involvement and choices' regarding the instrument, as the government is responsible for the issuing of its domestic laws.<sup>138</sup>

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135 Sabo "Process and Methods of International Rule-Making" 1.

136 Sabo "Process and Methods of International Rule-Making" 3.

137 Sabo "Process and Methods of International Rule-Making" 1.

138 Sabo "Process and Methods of International Rule-Making" 2.

### CHAPTER 3

## UNCITRAL AND THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

A uniform international commercial arbitration system is something that is sought throughout the world and there is an increasing need that international arbitration be guided by a uniform set of standard rules or principles for arbitral procedures.<sup>139</sup> Before 1966, the UN General Assembly noted the differences between the various legal systems and laws of different countries and that these disparities needed to be resolved.<sup>140</sup> Only then will international trade law be able to grow and develop.

With this in mind, the UN General Assembly founded UNCITRAL and then, later on, the secretariat of UNCITRAL developed the Model Law on International Commercial Arbitration<sup>141</sup> to serve as a uniform standard of arbitral procedure.<sup>142</sup> The Model Law forms an important part of UNCITRAL's objective to harmonize international trade and can be seen as a crucial pillar in the world of international arbitration.<sup>143</sup> It offers many advantages to parties faced with a dispute: it eliminates the frustration of conforming to the national laws of different countries; it serves as a framework for international commercial arbitration; and, furthermore, it creates a favourable climate for international commercial arbitration.<sup>144</sup> Moreover, the most important characteristic of the UNCITRAL Model Law is its universality.<sup>145</sup>

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139 Mantilla-Serrano and Adam 2008 *UNSW Law Journal* 307-308.

140 Franchini 1993-1994 *Fordham L. Rev.* 2224.

141 Butler & Finsen *Arbitration in SA* 298; In 1979 the Secretariat of UNCITRAL drafted a preliminary draft of the Model Law, on 21 June 1985 the final draft and December 1985 it was finally approved by the UN General Assembly.

142 Note by the Secretariat: *Further Work in Respect of International Commercial Arbitration* (A/CN.9/169) (1979) par 6 (hereafter Note by the Secretariat 1979); Herrmann 1998 *Uniform Law Review* 487.

143 Slate *et al* 2004 *Cardozo Journal* 82; Herrmann 1998 *Uniform Law Review* 489.

144 Griffith and Mitchell 2002 *Melbourne Journal of International Law* 185; SALC 1998 Report 21.

145 Herrmann 1998 *Uniform Law Review* 487.

### 3.1 UNCITRAL

#### 3.1.1 Origin, mandate and composition

UNCITRAL (or the Commission) was established in 1966 by the General Assembly of the United Nations.<sup>146</sup> The General Assembly recognized that there was a lack in similarity between the national laws of different countries governing international trade law and that these disparities created obstacles for international traders. Furthermore, they realized that there was a need for a global set of standards or rules and an improved legal framework to further the progressive harmonization, modernization and unification of the existing national regulations that governed international trade up until then.<sup>147</sup> They saw UNCITRAL as a way to resolve these obstacles and more importantly, the UN would then be able to play a more active part in the international trade sphere.<sup>148</sup>

The establishment of UNCITRAL opened a new chapter for the harmonization and unification of international trade law,<sup>149</sup> the latter being defined as:

...the body of rules governing commercial relationships of a private law nature involving different countries.<sup>150</sup>

UNCITRAL aims to promote the use of various legislative and non-legislative texts and legal guides in certain areas of commercial law.<sup>151</sup>

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146 In accordance with resolution 2205(XXI) 17 December 1966; *Report of the United Nations Commission on International Trade Law on the Work of its First Session* UN General Assembly Official Record Supp no 16 UN Doc (A/7216) (32nd Session 29 January-26 February 1968) par1 (hereafter Report UNCITRAL 1968); Butler & Finsen *Arbitration in SA* 298.

147 UN 2004 <http://www.uncitral.org>; The UNCITRAL Guide section 1(A) par 1.

148 Anon Date Unknown <http://www.uncitral.org>; Slate *et al* 2004 *Cardozo Journal* 74; Report UNCITRAL 1968 par 4. UNCITRAL was given the mandate to promote the adoption of model laws and the codification of international trade terms, provisions, customs and practices.

149 Report UNCITRAL 1968 par 22.

150 Report UNCITRAL 1968 par 23.

151 The UNCITRAL Guide section 1(A) par 1; For example: dispute resolution (arbitration and conciliation); international contracts; insolvency; transport;

Its first major way of contributing to the international trade sphere and law, was by adopting the UNCITRAL Arbitration Rules in 1976 and then the UNCITRAL Conciliation Rules in 1980. Finally, and most importantly, the UNCITRAL Model Law was adopted and approved in 1985.<sup>152</sup>

At present UNCITRAL consists of a diverse composition of sixty (60) member States<sup>153</sup> of the UN elected by the General Assembly and these member States represent various countries and legal systems, ranging from developed to underdeveloped.<sup>154</sup> South Africa is at present one of the member States, with membership expiring in 2013.

### 3.1.2 Objective

The primary objective of UNCITRAL is to harmonize and unify international commercial trade through formulating various sets of rules and texts, for example:<sup>155</sup> conventions;<sup>156</sup> model laws;<sup>157</sup> contractual rules;<sup>158</sup> legal guides;<sup>159</sup> recommendations; the enactments of uniform commercial law; updated relevant case law;<sup>160</sup> technical assistance<sup>161</sup>

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international payments; electronic commerce; secured transactions; procurement; and the international sale of goods.

152 Butler & Finsen *Arbitration in SA* 298.

153 The 60 member States include: 14 African States; 14 Asian States; 8 Eastern European States; 10 Latin American and Caribbean States; and 14 Western European and other States.

154 Slate *et al* 2004 *Cardozo Journal* 76.

155 General Assembly Resolution 2205(XXI) section 2 par 8.

156 The UNCITRAL Guide section 3(C)(1)(a) par 30; Conventions are agreements between States that establish binding obligations upon those States that ratify and accede to it; Conventions are designed to unify law and to harmonize the law of the participating States.

157 Model laws are sets of model legislative provisions that States can adopt by enacting it into national law.

158 Contractual rules consist of standard clauses and rules designed to be included in commercial contracts.

159 Legal guides are texts designed to provide guidance for the drafting of contracts, discussing relevant issues and recommending solutions for various relevant obstacles.

160 UNCITRAL provides updated relevant case law through a system named The Case Law on UNCITRAL Texts (CLOUT) which consists of various court decisions interpreting UNCITRAL texts. The majority of reported cases found in CLOUT are relevant to the United Nations Convention for the International Sale of Goods (1980) and the UNCITRAL Model Law on International Commercial Arbitration (1985).

and seminars regarding uniform commercial law.<sup>162</sup> The unification of the law of international trade is defined as:

...the process by which conflicting rules of two or more systems of national laws applicable to the same international legal transaction is replaced by a single rule.<sup>163</sup>

The driving force behind the unification and harmonization of international trade law stems from parties faced with the disparities and difficulties of the various domestic laws of countries faced with disputes regarding international trade transactions.<sup>164</sup> A transaction may be subject to various different domestic laws and without thorough knowledge thereof the parties may be faced with certain difficulties.

UNCITRAL practises three techniques to harmonize and modernize international trade law: legislative; contractual and explanatory.<sup>165</sup> Legislative techniques include the publication of conventions, model laws, legislative guides<sup>166</sup> and provisions.<sup>167</sup> Contractual techniques include, for example, the UNCITRAL Arbitration Rules (1976) and the UNCITRAL Conciliation Rules (1980), which are seen as uniform rules. These uniform rules can be useful to parties and States when drafting contracts and certain issues can be resolved by referring to these uniform rules in the relevant contract. UNCITRAL aims to standardise these uniform rules (or clauses) as it provides certain advantages, for example, the identification of issues. Parties generally refer to a dispute resolution clause in their main contract which stipulates that rules will be

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161 UNCITRAL provides technical legislative assistance to harmonize international trade by assisting States to develop and draft laws required to implement the various texts and instruments published by UNCITRAL and thereby promoting the use of non-legislative rules.

162 UN Date Unknown <http://www.uncitral.org>; Report UNCITRAL 1968 par 4.

163 Note by the Secretariat 1968 par 5.

164 Note by the Secretariat 1968 par 6.

165 The UNCITRAL Guide section 3(C) par 28.

166 Legal guides can be useful when a State is not ready to adopt an uniform set of rules such as a model law. These guides provide various possible legislative solutions and approaches for specific matters.

167 Model provisions assist in the unification of relevant and specific matters contained and referred to in various conventions and can also supplement a provision of a convention.



applicable if a dispute should arise.<sup>168</sup> Explanatory techniques consist of legal guides and interpretative declarations and can serve as an alternative to a standard or model set of rules.<sup>169</sup>

UNCITRAL is seen as the core legal body<sup>170</sup> of the UN regarding international trade law<sup>171</sup> and it aims to be of help to organizations active in the international trade sphere and thereby, furthermore, aims to promote the use of publications it develops and completes. UNCITRAL has played an important part in the progressive growth and development of alternative dispute resolution and considers it as one of its priorities to improve international trade law.<sup>172</sup>

### *3.1.3 Trade law texts and instruments*

As stated above, UNCITRAL publishes various instruments and texts regarding international trade law with the goal to simplify international transactions.<sup>173</sup> The most important instruments and texts regarding arbitration being: The UNCITRAL Model Law on International Commercial Arbitration; the UNCITRAL Arbitration Rules;<sup>174</sup> the UNCITRAL Notes on Organizing Arbitral Proceedings;<sup>175</sup> the Recommendations to Assist Arbitral Institutions and Other Interested Bodies with regard to Arbitrations under the UNCITRAL Arbitration Rules;<sup>176</sup> and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>177</sup> The UNCITRAL Arbitration Rules are not only for use by the member States; any parties to a contract can decide to make use of them regardless of the fact that they are not part of a

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168 The UNCITRAL Guide section 3(C)(2) par 48.

169 The UNCITRAL Guide section 3(C)(3)(a) par 49.

170 Butler & Finsen *Arbitration in SA* 298.

171 UN 2004 <http://www.uncitral.org>; The UNCITRAL Guide section 1(A) par 1.

172 Griffith and Mitchell 2002 *Melbourne Journal of International Law* 184.

173 These texts are largely legislative in nature.

174 UNCITRAL Arbitration Rules (1976)

175 UNCITRAL Notes on Organizing Arbitral Proceedings (1996).

176 Recommendations to Assist Arbitral Institutions and Other Interested Bodies with regard to Arbitrations under the UNCITRAL Arbitration Rules (1982).

177 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), also known as the New York Convention.

member State. Therefore parties are free to refer to the UNCITRAL Arbitration Rules in their arbitration agreement to govern their dispute and it is directed at parties to a dispute. These Rules are a “form of contractual trade law dispute resolution”<sup>178</sup> and operate on a private rather than public basis. Although the UNCITRAL Model Law is loosely based on the UNCITRAL Arbitration Rules, it is distinguished from the Rules: the Model Law is a legal framework which governments can choose to adopt and incorporate into their national law and thus into their legislation on arbitration (domestic or international) and it is directed at States.<sup>179</sup>

### *3.1.4 Settlement of disputes in accordance with UNCITRAL*

Parties wishing to settle a dispute in accordance with, for example, the UNCITRAL Arbitration Rules<sup>180</sup> must make a reference in their arbitration agreement<sup>181</sup> to these rules, for example, “UNCITRAL arbitration”, which indicates that the parties want to refer any existing or future dispute regarding their main contract to arbitration under UNCITRAL.<sup>182</sup> UNCITRAL itself, however, does not get involved in the disputes by offering assistance with the interpretation of the instruments or by giving legal advice, as it is not within the mandate<sup>183</sup> of the Commission. Therefore UNCITRAL does not administer the arbitration proceedings, act as the arbitral tribunal or assist in the interpretation of national law.

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178 Griffith and Mitchell 2002 *Melbourne Journal of International Trade Law* 185.

179 See Chapter 3 for further discussion on the UNCITRAL Model Law; Slate *et al* 2004 *Cardozo Journal* 82.

180 Slate *et al* 2004 *Cardozo Journal* 78-79; The UNCITRAL Arbitration Rules was developed with the settlement of international commercial disputes between States in mind; Opinions of various arbitration institutions and legal experts from various legal systems (ranging from underdeveloped and developing countries to developed countries) were taken into account during the drafting process; Although the Rules were primarily drafted with *ad hoc* arbitration in mind, it can also be used in institutional arbitration matters.

181 Franchini 1993-1994 *Fordham L. Rev.* 2241.

182 The UNCITRAL Arbitration Rules are seen as a favourable set of rules for resolving an international trade dispute between countries with different legal systems and backgrounds; Franchini 1993-1994 *Fordham L. Rev.* 2223.

183 UNCITRAL's mandate is set out in the General Assembly resolution 2205(XXI) section 2 par 8.

For the UNCITRAL Model Law to have effect, a country has to adopt and ratify it into their domestic arbitration laws. The court located at the seat of arbitration can then apply the Model Law in accordance with its domestic laws if the specific dispute falls within the scope of the Model Law.<sup>184</sup>

### **3.2 Definition of “model law”**

Model laws are used as a vehicle to harmonize the national laws of States and have been used for more than a century on a regional and global basis as a basis for the unification of international law.<sup>185</sup> It is in the form of a legislative text, which States may choose to adopt to form part of its national law and legal system.<sup>186</sup> Model laws are seen as more flexible than, for example, conventions, making them easier to adopt, adjust and negotiate according to the wishes of the specific State. States are, however, encouraged to make as few alterations as possible to model laws as the primary objective of a model law is to create uniformity and certainty.<sup>187</sup>

Uniformity creates predictability for practitioners, arbitrators and contracting parties and when faced with a dispute to be referred to arbitration, a model law can avoid many problems that can exist, for example, the use of unfamiliar national laws of different countries.<sup>188</sup> International arbitration laws are directed at foreign parties who want a clear and easy-to-work-with arbitration law for their dispute.<sup>189</sup> Therefore it will be useful if the arbitration law and practice to be used is familiar to the foreign practitioner and parties; it will create a great deal of certainty

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184 Berger “Re-Examining the Arbitration Agreement” 307.

185 Note by the Secretariat 1968 par 8.

186 The UNCITRAL Guide section 3(C)(1)(b) par 34.

187 The UNCITRAL Guide section 3(C)(1)(b) par 35; Lando “Applicable Law” 131; When a country enacts a model law it will apply the model law’s rules pertaining to international commercial arbitration to the degree as stipulated in that country’s legislation.

188 Mantilla-Serrano and Adam 2008 *UNSW Law Journal* 308.

189 Berger *An Outside Perspective* 2.

in regard to the procedure to be followed and the outcome of the arbitration.

### **3.3 Model Law on International Commercial Arbitration: objective and principles**

The UNCITRAL Model Law<sup>190</sup> is procedural in nature as it provides various procedures and articles to be followed. It also has a comprehensive nature as it follows the normal phases and basic principles found in arbitration.<sup>191</sup> Amendments, however, to the UNCITRAL Model Law by States are not encouraged by UNCITRAL and there should only be departure from the language of the UNCITRAL Model Law if and when it is deemed essential and necessary.<sup>192</sup> By not making great changes to the UNCITRAL Model Law, a step towards the unification and harmonization of international trade law and a universally accepted framework will be taken.<sup>193</sup>

The UNCITRAL Model law is seen as a widely accepted set of rules and forms a basis for international commercial arbitration. Moreover, the UNCITRAL Model Law serves to unify international trade law and has inspired various countries to reform their arbitration legislation and to incorporate the Model Law within their domestic laws.<sup>194</sup> The Model Law allow the parties to choose the rules of law that will be applicable regarding the substance or merits of the dispute and, therefore, they do not have to choose a specific national legal system.<sup>195</sup> This reflects the party autonomy and freedom which the Model Law embodies.<sup>196</sup> Parties

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190 It was the first Model Law adopted by UNCITRAL.

191 Herrmann 1998 *Uniform Law Review* 490.

192 The UNCITRAL Guide section 3(C)(1)(b) par 38; Slate *et al* 2004 *Cardozo Journal* 88; Herrmann 1998 *Uniform Law Review* 491; If States were to modify the Model Law to a great degree, the main purpose of the Model Law will be lost together with the goal of harmonizing national laws of States regarding international trade law; States are however allowed to make small modifications to conform the Model Law to their specific needs.

193 Herrmann 1998 *Uniform Law Review* 493.

194 Note by the Secretariat 1968 par 7; Robine 1996 *Int'l Bus. L.J* 146.

195 Lando "Applicable Law" 133, 154.

196 McNerney and Esplugues 1986 *B. C. Int'l & Comp. L. Rev.* 47.

are given a maximum degree of freedom when making use of the Model Law: they can conduct the arbitration proceedings in accordance with their own needs and expectations and, furthermore, this freedom will only be limited when circumstances deem it necessary, for example, to ensure a fair dispute.<sup>197</sup>

One of the most important features of the UNCITRAL Model Law is the fact that it limits the involvement of national courts in the arbitration proceedings.<sup>198</sup> The Model Law can be utilized by a “Model Law State”: a State which has based its arbitration legislation on the UNCITRAL Model Law.<sup>199</sup>

The various reasons for the establishment of the Model Law were: the various national laws of countries were drafted with domestic arbitration in mind and not international arbitration and are outdated; a model law can take into account the specific needs and features of international commercial arbitration and, lastly, there is a “need for greater uniformity of national laws on arbitration”.<sup>200</sup> Further reasons are, for example: the great difference between the existing arbitration rules and national laws,<sup>201</sup> the establishment of a global “standard of fairness”<sup>202</sup> and due process by establishing a core legal-framework containing mandatory provisions; to aid in the enforcement of foreign awards resulting from arbitration, and to limit the role of the courts and thereby placing an emphasis on party autonomy and the consensual basis of the arbitration agreement.<sup>203</sup>

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197 Saturnino 1986 *Inter-American Law Review* 322; McNerney and Esplugues 1986 *B. C. Int'l & Comp. L. Rev.* 47-48.

198 Redfern & Hunter *International Commercial Arbitration* 13.

199 Article 1(2) UNCITRAL Model Law.

200 Note by the Secretariat 1979 par 7.

201 Note by the Secretariat 1979 par 8.

202 Note by the Secretariat 1979 par 9.

203 Butler & Finsen *Arbitration in SA* 299.

The Model Law was drafted in a way as to assure the global use thereof.<sup>204</sup> No distinct legal jargon of specific countries or legal systems was used; instead generally recognised principles and phrases were used making the Model Law user-friendly and more flexible.<sup>205</sup> Moreover, the Model Law was not designed with a particular State in mind and thus it was not designed against the background of a particular legal system.<sup>206</sup> This results in the universal acceptance of the Model Law and the use thereof by any State throughout the world.<sup>207</sup> The UNCITRAL Model Law can also serve as a good framework for domestic arbitration as it embodies all the necessary and relevant provisions required to ensure that arbitration proceedings run effectively.<sup>208</sup>

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204 Herrmann 1998 *Uniform Law Review* 492; A State considering whether to adopt the Model Law should bear in mind that it was primarily designed with international disputes in mind where the parties are both from foreign countries.

205 Slate *et al* 2004 *Cardozo Journal* 84.

206 Herrmann 1998 *Uniform Law Review* 489.

207 See "Appendix 1" for the list of States that have adopted the UNCITRAL Model law.

208 See Chapter 6, in general, regarding of the provisions.

## CHAPTER 4

### AUSTRALIAN LEGAL POSITION

#### **4.1 Position before 2010**

##### *4.1.1 Australia's arbitration acts*

Until recently Australia's arbitration legislation functioned on a dual basis. This meant that there was an arbitration act that governed international commercial arbitration in Australia (the *International Arbitration Act* (Cth) 1974),<sup>209</sup> and the commercial arbitration acts of the specific territories that governed domestic commercial arbitration (the *Commercial Arbitration Acts of the States and Territories* 1984).<sup>210</sup>

The 1984 CAAs, together with the Australian common law, formed the basis for resolving domestic commercial disputes by way of arbitration. The 1984 CAAs implied that each state or territory in Australia had their own CAA and together (there are eight) they were known as the *Uniform Acts*.<sup>211</sup> Therefore, each State was bound by its own CAA and although each CAA governed a different jurisdiction, they all had similar provisions and features.<sup>212</sup> The 1974 IAA, which was based upon the UNCITRAL Model Law,<sup>213</sup> formed the basis for resolving international commercial disputes by way of arbitration.<sup>214</sup> As there was only one IAA, all the States were bound by it. If an arbitration matter fell within the

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209 Known as the Commonwealth or Federal legislation governing international commercial arbitration (hereafter the IAA).

210 Hereafter the CAAs; The CAA's of the different states or territories are largely uniform and therefore they are also known as the Uniform Commercial Arbitration Acts; The CAA's are based (to some extent) on the English *Arbitration Act* 1996; Sturzaker & Middleton 2009 *Global Arb Rev* 20; Nottage "Teaching Arbitration in Australia" 3.

211 The CAAs included the following: *Commercial Arbitration Act* 1984 (NSW) (CAA(NSW)); *Commercial Arbitration Act* 1984 (Vic); *Commercial Arbitration Act* 1990 (Qld); *Commercial Arbitration Act* 1985 (WA); *Commercial Arbitration and Industrial Referral Agreements Act* 1986 (SA); *Commercial Arbitration Act* 1986 (Tas); *Commercial Arbitration Act* 1985 (NT); *Commercial Arbitration Act* 1986 (ACT).

212 Jones "Adopting the UNCITRAL Model Law" 7.

213 The 1985 version of the UNCITRAL Model Law.

214 Croft & Fairlie "The New Framework" 1.

ambit of what was considered to be “international arbitration”<sup>215</sup> according to the 1974 IAA, then the IAA’s provisions would apply. Where the arbitration considered was deemed not to be “international arbitration”, the provisions of the applicable 1984 CAAs would apply.

The courts would only interfere in arbitration proceedings in certain circumstances, as stated in the 1974 IAA or the 1984 CAAs. Unless these circumstances existed the courts would not interfere as they were very supportive of arbitration as dispute resolution method.<sup>216</sup> Judicial intervention would happen especially where the 1984 CAAs were applicable.<sup>217</sup> The 1984 CAAs conferred the same powers on the courts to make interim orders in arbitration as would be the case in court proceedings. This reflected one of the main differences between the 1984 CAAs and the UNCITRAL Model Law.<sup>218</sup>

#### *4.1.2 The UNCITRAL Model Law and opt-out/opt-in provisions*

Section 16 of the 1974 IAA stipulated that the UNCITRAL Model Law would have force of law in Australia.<sup>219</sup> Although the 1974 IAA was based upon the UNCITRAL Model Law (with a few modifications), parties had an opt-out choice, in accordance with section 21 of the 1974 IAA, and could choose that the UNCITRAL Model law be excluded from their arbitration agreement and proceedings.<sup>220</sup> This had the effect that the 1984 CAAs<sup>221</sup> governed the procedural aspects of the arbitration (unless otherwise chosen by the parties) and the 1974 IAA was seen as

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215 The term “international arbitration” was however not expressly defined in the IAA.

216 Norton Rose Group 2010 <http://www.nortonrose.com>.

217 S 47 CAAs.

218 A further difference included, for example, the limited possibility of appeals regarding awards made under the CAAs; Sturzaker & Middleton 2009 *Global Arb Rev* 20.

219 S 16(1) IAA.

220 This would be the case where parties chose institutional- or *ad hoc* arbitration rules to govern their arbitration; S 21 IAA; Norton Rose Group 2010 <http://www.nortonrose.com>; Jones “The Challenges for International Arbitration in Australia” 4.

221 This would be the applicable CAA of the state or territory in which the arbitration took place.



the curial law in the specific matter.<sup>222</sup> The courts also generally regarded any reference to the 1984 CAAs as an exclusion of the UNCITRAL Model Law. The requirements of, for example, the validity of arbitration agreements, depended on whether the arbitration was deemed domestic or international.<sup>223</sup> If it was in fact deemed international, then the formal requirements were stipulated by the UNCITRAL Model Law (unless otherwise chosen by the parties).<sup>224</sup>

Parties also had the choice to make the 1974 IAA as well as specific arbitration rules, for example, the ACIA's rules, applicable to their arbitration. In regard to this latter route, they, in effect, made use of an opt-in provision. It was essential for the parties to include a provision in their arbitration agreement that stated that they did not intend to opt-out of the UNCITRAL Model Law.<sup>225</sup> Party autonomy was, therefore, a very attractive characteristic of Australia's arbitration legislation; it gave the parties the freedom to decide how they wanted to conduct their arbitration. It was, however, not essential that the parties included a provision in their arbitration agreement that stated which rules or procedures would be applicable.<sup>226</sup>

## **4.2 Reform of arbitration legislation**

### **4.2.1 Proposed reform of the IAA**

On 21 November 2008 it was announced that there would be a review of Australia's 1974 IAA. The review was published before the end of 2009

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222 Sturzaker & Middleton 2009 *Global Arb Rev* 20.

223 This included requirements in regard of the validity of the arbitration agreement and also in regard to the formal requirements.

224 A 7(2) UNCITRAL Model Law requires that an arbitration agreement be in writing.

225 Rule 2.3 ACIA Arbitration Rules; Thereby the parties made it clear that the UNCITRAL Model Law was applicable.

226 Party autonomy was also extended to the use of split clauses in Australia and therefore the parties were free to include a split clause within their agreement stating whether they will refer the dispute to arbitration or litigation; Norton Rose Group 2010 <http://www.nortonrose.com>.

and was finally debated before the end of 2010.<sup>227</sup> This review was based on the fact that the development of international arbitration is important to Australia. This country is seen as an important economic centre and the maintenance of Australia as a centre for international commercial arbitration is important for the development of the country as a venue for international commerce.<sup>228</sup>

The main issues (or reasons) for the review were the following: whether the 1974 IAA should be amended to allow an appointed arbitral institution to perform certain functions stipulated in the UNCITRAL Model<sup>229</sup> Law; whether the Federal Court should have jurisdiction in certain international arbitration matters;<sup>230</sup> whether the 1974 IAA should be amended to provide a clearer and more detailed framework concerning international arbitration in Australia; and whether Australia should adopt “best practice” developments concerning arbitration proceedings taking place outside of Australia.<sup>231</sup>

Furthermore, an important issue was whether the 1974 IAA should be amended to expressly provide that only the IAA would have force of law to govern international commercial arbitration matters (subject to the UNCITRAL Model Law).<sup>232</sup> If the 1974 IAA could be amended in this way, the 1984 CAAs would expressly be excluded in the case of international commercial arbitration matters that were subject to the IAA.<sup>233</sup> This would have the effect that there would be a clear difference between the IAA and the CAAs and that the laws governing international

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227 Ong 2009 *ICLG to: International Arbitration* 7; Norton Rose Group 2009 <http://www.nortonrose.com>; Jones “Reform of the IAA” 52; Review of the International Arbitration Act 1974 *Discussion Paper* (November 2008).

228 Jones “The Challenges for International Arbitration in Australia” 2.

229 The reform of the IAA is based on and incorporates the 2006 version of the UNCITRAL Model Law; Therefore the new IAA is based on the 2006 UNCITRAL Model Law; Croft & Fairlie “The New Framework” 3; The other four countries are: Peru; Mauritius; New Zealand; Slovenia.

230 Albeit it not being exclusive jurisdiction.

231 Ong 2009 *ICLG to: International Arbitration* 7.

232 For a complete list of the proposed amendments to the IAA, see Jones “Reform of the IAA” 52-55.

233 Jones “The Challenges for International Arbitration in Australia” 3.

commercial arbitration would be contained in one, clear and effective statute.

The benefits of the proposed reform included the following: Australia would be in line with important developments in the international commercial arbitration sphere by adopting the 2006 amendments of the UNCITRAL Model Law; confusion would be avoided as to whether the IAA or the CAAs will be applicable; parties would be able to obtain interim measures from arbitrators; the confidentiality nature regarding all aspects of the arbitration would be reinforced; the Federal Court and the State and Territory Supreme Court would have concurrent jurisdiction regarding the application of the IAA.<sup>234</sup>

An important section that was to be repealed was section 21 of the 1974 IAA which stated the following:

If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.<sup>235</sup>

The proposed amendment *International Arbitration Amendment Bill*<sup>236</sup> proposed to replace the previous section 21 with a new section 21.<sup>237</sup> This had the implication that the parties would no longer have the option to decide that an alternative arbitral institution would govern the arbitral proceedings, that the UNCITRAL Model Law would have exclusive force of law in terms of international commercial arbitration and that the CAAs would not be applicable in these circumstances.<sup>238</sup> Thus, the parties would not have the power anymore to stipulate that an alternative arbitral

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234 Smith, Bolster & Hui 2010 *International Arbitration Update*.

235 S 21 IAA.

236 Of 2009 (hereafter the 2009 IAA).

237 Croft & Fairlie "The New Framework" 6; The new section 21 does away with any confusion as well as with any previous existing conflict with the domestic arbitration legislation.

238 Norton Rose Group 2009 <http://www.nortonrose.com>; Croft & Fairlie "The New Framework" 5.

law would be applicable in an international commercial arbitration matter. This amendment served as a solution in regard to certain difficulties encountered in Australia's federal system, for example, the fact that the CAAs did not always provide and achieve the certainty and finality, which the UNCITRAL Model Law had proved to achieve.<sup>239</sup> Moreover, it removed the confusion that the previous section 21 created. The framework used for conducting international commercial arbitration would therefore be more streamlined and effective.

#### *4.2.2 IAA: present position*

The 2009 IAA was passed into law on 6 July 2010.<sup>240</sup> The reform has increased certainty and a degree of effectiveness with regard to the conducting of international commercial arbitration in Australia.<sup>241</sup> Certain key changes and amendments have been made to the new IAA, which include the following: the new IAA is the exclusive act to govern all international commercial arbitration matters in Australia; the IAA (based on the 2006 UNCITRAL Model Law) now exclusively governs all international commercial arbitration proceedings in Australia; limited grounds to refuse enforcement of foreign arbitral awards are available; available interim measures are enhanced;<sup>242</sup> arbitrators have increased powers;<sup>243</sup> the relevant arbitral tribunals now have the power to grant certain interlocutory orders and several optional provisions may now by agreement be excluded or included by the parties.<sup>244</sup>

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239 This was based on the fact that judicial intervention was something which was generally encountered with the application of the CAAs which had the effect that the courts would have the power to grant appeals or reviews and this in turn counteracted the primary goals of arbitration; Norton Rose Group 2009 <http://www.nortonrose.com>.

240 Kalderimis 2010 <http://www.chapmantripp.com>; Buchanan 2010 Arbitration in Focus.

241 Brabant, Fleming & Day 2010 <http://www.martindale.com>.

242 Parties may request that interim measures be made with regard to, for example, the protection of assets or evidence.

243 These powers include, for example, to order a party to give security for costs, to limit the costs and to order that interest be paid.

244 Brabant, Fleming & Day 2010 <http://www.martindale.com>.

#### 4.2.3 Proposed reform of the CAAs

It was argued that reform should take place of the CAAs to follow suit with the reform of the IAA, as this would bring the domestic arbitration in line with the amendments to the IAA.<sup>245</sup> Moreover, it was argued that the UNCITRAL Model Law should be adopted for Australia's domestic arbitration legislation as the previous legislation was perceived to be outdated and was also perceived to be too similar to commercial litigation.<sup>246</sup> With these arguments taken into consideration, the Standing Committee of Attorneys-General of each state or territory of Australia announced in 2002 that a new domestic arbitration act<sup>247</sup> would be drafted that would be based upon the UNCITRAL Model Law (with a few modifications to conform to domestic provisions and circumstances).<sup>248</sup>

The primary reason for the proposed reform was to ensure that arbitration became a more sought-after and efficient alternative resolution method used by parties in domestic commercial disputes.<sup>249</sup> Other reasons for the proposed reform included giving effect to certain principles of arbitration: the primary purpose of arbitration – to provide a quick, cheap and informal way to resolve a dispute; to provide a fair and final resolution method; and, the promotion of party autonomy.<sup>250</sup>

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245 Jones "Adopting the UNCITRAL Model Law" 1; Smith, Bolster & Hui 2010 *International Arbitration Update*.

246 Jones "Adopting the UNCITRAL Model Law" 1, 8; Litigation has developed throughout the past years opposed to domestic arbitration which has become stagnant and which has struggled to keep up with the improvements of litigation; Therefore, it has become important that domestic arbitration is reformed as this will have the effect of more efficiency with regard to the system.

247 *Commercial Arbitration Act 2010* (hereafter the 2010 CAA).

248 Jones "Adopting the UNCITRAL Model Law" 1; The Bill was said to be completed by April 2010; For a detailed list of the proposed modifications of certain provisions of the UNCITRAL Model Law see Jones "Adopting the UNCITRAL Model Law" 12-20 ("Necessary amendments to the Model Law" par 5); Monichino "Reform of the Australian Domestic Arbitration Acts" 83.

249 Jones "Adopting the UNCITRAL Model Law" 10,

250 Jones "Adopting the UNCITRAL Model Law" 2.

The objectives of the reform included the following: to bring Australian jurisdictions in line with the international standards with regard to commercial arbitration; to lessen or diminish the problems<sup>251</sup> found in the application of two different arbitration systems with regard to international and domestic arbitration; and, to deliver a uniform system for international and domestic arbitration.<sup>252</sup>

By basing the new domestic commercial arbitration regime on the UNCITRAL Model Law, uniformity would be created with a new international commercial arbitration regime. International trends indicated that more and more jurisdictions favour a single legislative framework to govern their arbitration (both international and domestic).<sup>253</sup> Therefore, although Australia's arbitration legislation would be divided between international and domestic commercial arbitration, both of them would be based on the UNCITRAL Model Law.

#### *4.2.4 CAAs: present position*<sup>254</sup>

On 7 May 2010 the Standing Committee of Attorneys-General of the States and Territories agreed on the adoption of the 2010 CAA.<sup>255</sup> The previous CAAs were replaced by the 2010 CAA that reflects a significant departure<sup>256</sup> from the previous CAAs.<sup>257</sup> Moreover, the 2010 CAA applies to all domestic commercial arbitration matters instituted by an arbitration agreement.<sup>258</sup> As the IAA was reformed, simultaneous reform of the domestic arbitration legislation contributed to the harmonisation

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251 The application of two different arbitration systems can create confusion and uncertainty for the parties or the practitioners involved in the arbitral proceedings, for example, regarding the relevant statute to be applied in a certain matter.

252 Staugas 2010 <http://www.jws.com.au>.

253 Victorian Bar Submission *Reform of the Commercial Arbitration Acts* par 3.

254 The main differences between the 1984 CAA and the 2010 CAA are discussed at par 6.3.

255 Hui & Lees 2010 *International Arbitration Update*.

256 This departure is reflected in the fact that the 2010 CAA is based on the UNCITRAL Model Law.

257 Hui & Lees 2010 *International Arbitration Update*.

258 Staugas 2010 <http://www.jws.com.au>.

and efficiency of Australia's arbitration legislation as a whole.<sup>259</sup> On 1 October 2010 New South Wales became the first State in Australia to adopt and enforce the new 2010 CAA.<sup>260</sup> The most important change the new 2010 CAA, brought about by adopting the UNCITRAL Model Law, is the fact that it "brings the domestic arbitration regime more in line with the international arbitration regime".<sup>261</sup>

### ***4.3 The UNCITRAL Model Law as basis for both international and domestic arbitration***

#### *4.3.1 Reasons why domestic arbitration should or should not be based on the UNCITRAL Model Law*

Although the UNCITRAL Model Law was not primarily designed with domestic commercial arbitration in mind, it served as an effective benchmark and framework for the reform of the CAAs. Moreover, with the adoption of the UNCITRAL Model Law, with a few modifications to conform to the domestic arbitration landscape of Australia, it also served as a good standard to be used in the domestic sphere.<sup>262</sup> Adoption of the UNCITRAL Model Law ensured that a harmonised system was created for both international and domestic regimes. Moreover, the reform of the previous CAA ensured that Australia's domestic commercial arbitration became more effective as an alternative dispute resolution method.<sup>263</sup> The 2010 CAA contains certain additional provisions that make it more applicable or relevant to domestic commercial arbitration in Australia.<sup>264</sup> These additional provisions were

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259 This in turn contributes to UNCITRAL's goal: to harmonise international trade law; Jones "Adopting the UNCITRAL Model Law" 8.

260 Hui & Lees 2010 *International Arbitration Update*; Each state/territory has to adopt the new 2010 CAA.

261 Hui & Lees 2010 *International Arbitration Update*.

262 Jones "Adopting the UNCITRAL Model Law" 12.

263 Jones "Adopting the UNCITRAL Model Law" 10.

264 Jones "Adopting the UNCITRAL Model Law" 10.

taken from the previous CAAs, the 1974 IAA and the Australian common law.<sup>265</sup>

Adoption of the UNCITRAL Model Law has a few benefits: parties have greater autonomy and more freedom to determine the applicable arbitral procedure; there is a distinct difference between arbitration and litigation; arbitrators can order interim orders to protect the rights of the parties; and, grounds for setting aside awards are more limited.<sup>266</sup>

As the 1984 CAAs have become stagnant and outdated, the adoption of the UNCITRAL Model Law has ensured a way out of the impasse. This action also helps Australia to show the rest of the world that it takes its arbitration matters seriously and that it must still be considered as one of the top arbitration facilities and centres in the international commercial arbitration sphere.<sup>267</sup>

#### *4.3.2 Reasons why international arbitration should or should not be based on the UNCITRAL Model Law*

As Australia is considered as one of the most advanced arbitration countries, it has to take bold measures to ensure that its arbitration legislation is up to date.<sup>268</sup> International commercial arbitration is conducted on a daily basis in Australia and involves parties from all over the world. As such, these foreign parties have the expectation that Australia's international arbitration legislation will conform to international standards and practices. The adoption of a globally used standard, such as the UNCITRAL Model Law, ensures that Australia will be seen as a

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<sup>265</sup> The additions include, for example: rules regarding the stay of litigation as opposed to arbitration; obtaining subpoenas from the courts; mediation, which will be compulsory before the commencing of arbitration proceedings; an obligation to comply with the arbitrator's final decision; an obligation to avoid delay of the arbitration proceedings; an implied duty of confidentiality regarding the arbitration agreement; a requirement that the arbitral proceedings be conducted in private; Darian-Smith & Devenish 2010 <http://www.mallesons.com>.

<sup>266</sup> Darian-Smith & Devenish 2010 <http://www.mallesons.com>.

<sup>267</sup> Nottage 2009 <http://www.eastasiaforum.org>.

<sup>268</sup> Nottage 2009 <http://www.eastasiaforum.org>.



more attractive venue for future international commercial arbitration matters.<sup>269</sup>

#### *4.3.3 Reasons why there should or should not be two arbitration acts when both international and domestic arbitration are based on the UNCITRAL Model Law*

One might ask the question why Australia chose to have two separate arbitration acts, one relating to international and the other relating to domestic commercial arbitration, when both of these acts will be based upon the UNCITRAL Model Law. Why have two of the same acts when both can be embodied in one act? The main reason for this action is based on the fact that, in essence, international and domestic commercial arbitration have characteristics differentiating them from one another. Thus, although both acts are based upon the UNCITRAL Model Law, they both have different key features and characteristics that make them more applicable to international commercial arbitration matters on the one side and domestic commercial arbitration matters on the other side.

The present (new) 2010 CAA, which replaced the previous CAAs, adopts the UNCITRAL Model Law with more alterations to the UNCITRAL Model Law than is the case with the new IAA. The reason therefore, is based on the fact that the UNCITRAL Model Law was designed with international commercial arbitration in mind and is in essence not tailored for domestic commercial arbitration. Therefore, some alterations had to be made to tailor the UNCITRAL Model Law to suit domestic matters. A further argument may be that although international and domestic commercial arbitration differs from one another, they could still be joined in one act with different provisions pertaining to each one. This would, however, not be advisable as it

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<sup>269</sup> Nottage & Garnett 2009 <http://ssrn.com/abstract=378722>.

might create confusion among the users of the acts.<sup>270</sup> Having two separate acts, separating international and domestic commercial arbitration from one another, will create harmonisation and clarity as parties would only have to look to one specific act applicable to their arbitration dispute.

#### **4.4 Conclusion**

The reform of Australia's arbitration legislation included the following: firstly, update thereof and modification of some provisions,<sup>271</sup> which reflect the provisions of the UNCITRAL Model Law; secondly, reform of the CAAs by replacing them with one uniform act, applicable to domestic arbitration and based upon the UNCITRAL Model Law (with modification of a few provisions). Thus, in the end, Australia's arbitration legislation consists of two arbitration acts: one for use in international commercial arbitration, and one for use in domestic commercial arbitration. With the amendment of section 21 of the 1974 IAA, the parties involved in an international commercial arbitration dispute will benefit from the greater certainty regarding the role of the courts in arbitration matters, which arbitral law will be applicable, whether or not the UNCITRAL Model Law will be applicable and which procedure is to be followed. This in return will benefit Australia as a leading international commercial arbitration venue.

Many jurists may wonder why a country such as Australia would want to amend their arbitration legislation. Why fix something that isn't broken? The answer lies in the fact that Australia is considered to be an advanced country with regard to international commercial arbitration and as such is wise to update its law and keep abreast with the modern

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270 The parties and practitioners may be uncertain whether a certain provision applies to international or domestic commercial arbitration.

271 The update is in regard to the use of the 2006 UNCITRAL Model Law (the 1974 IAA was based on the 1985 UNCITRAL Model Law.)

tendencies of international trade law.<sup>272</sup> If Australia was to wait too long before upgrading its international commercial arbitration, it could fall behind other countries and not be considered as one of the foremost internationally advanced countries. To be considered as a competitive contender in the international commercial arbitration sphere, reform is considered to be a necessity.<sup>273</sup> Thus, the entire world would take notice that Australia takes its role as contender in the international trade sphere seriously. Moreover, it is important that in updating its arbitration legislation, preference is given to globally accepted solutions (such as the UNCITRAL Model Law) as well as solutions that have shown to be efficient throughout recent years.<sup>274</sup>

By complementing each other, the international and domestic commercial arbitration acts will contribute to Australia's dramatic transformation of its arbitration legislation, both on an international and domestic level.<sup>275</sup> The reform will be beneficial to Australia's arbitration sphere on a domestic level and it will contribute to the country's standing in the international commercial arbitration sphere.<sup>276</sup>

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272 Review of the International Arbitration Act 1974 *Discussion Paper* (November 2008).

273 Jones "Adopting the UNCITRAL Model Law" 1.

274 Nottage *Sydney Working Paper* 6 4.

275 Jones "Adopting the UNCITRAL Model Law" 2; Croft & Fairlie "The New Framework" 20.

276 Jones "Adopting the UNCITRAL Model Law" 21.

## CHAPTER 5

### SOUTH AFRICAN LEGAL POSITION

This chapter deals with the present South African legal position regarding arbitration. At present, the only relevant legislation which deals with arbitration in South Africa is the South African *Arbitration Act*.<sup>277</sup> It is important to keep in mind that this Act only refers to domestic commercial arbitration and makes no reference to international commercial arbitration. Thus it can be said that there's a void in South African arbitration legislation regarding international commercial arbitration. This void becomes more substantial and clearer as international commercial arbitration is fast progressing as an alternative dispute resolution method used by contracting parties in international transactions.

After the SALC investigated arbitration legislation in South Africa, they published a report in 1998, Project 94 *Arbitration: An International Arbitration Act for South Africa* Report,<sup>278</sup> which dealt with certain problems and proposed certain solutions. Back in 1998 when the SALC published its report, it was argued that South African law did not contribute to international commercial arbitration and as such, the SA *Arbitration Act* did not deal with international arbitration. The SALC's report came four years after the apartheid era ended in 1994. As South Africa was not isolated from the rest of the world anymore it would now have the opportunity to participate in the international trade sphere. However, foreigners would likely ask the question whether South Africa had efficient and sufficient legislation dealing with international trade matters before getting involved in trade in this country.<sup>279</sup> With the lack of effectiveness regarding South Africa's international arbitration legislation in mind, the SALC proposed that an effective framework be

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<sup>277</sup> 42 of 1965 (hereafter the *SA Arbitration Act*).

<sup>278</sup> South African Law Commission Project 94 *Arbitration: An International Arbitration Act for South Africa* Report (July 1998) (hereafter the SALC 1998 Report).

<sup>279</sup> SALC 1998 Report 23.

created for use in international trade matters and disputes and they drafted the *Draft International Arbitration Bill*.<sup>280</sup> With regard to South Africa's present position it is sufficient to say that not much has changed in the past 12 years as the bill has not been enacted.

In 2001 the SALC published another report: Project 94 *Domestic Arbitration*.<sup>281</sup> This report dealt with South Africa's domestic commercial arbitration regime. The reason for this additional or further report was the fact that the SALC wanted to institute a separate investigation with regard to South Africa's domestic arbitration regime. As of yet, nothing more has been done after the SALC 2001 Report was published.

The SALC reflected on the UNCITRAL Model Law and recommended firstly, that the Model Law be applied to international commercial arbitration and secondly, that South African legislation dealing with international arbitration be embodied in one act.<sup>282</sup> This would ensure that South African legislation dealing with international commercial arbitration would be readily available for use by foreign parties.

### **5.1 Legislation and common law**

The *SA Arbitration Act* is the most important piece of legislation regarding arbitration in South Africa as it forms the basis for both domestic and international commercial arbitration in South Africa. The *SA Arbitration Act* will only apply where there is a written arbitration agreement. In the absence thereof (and thus in the case of oral submissions to arbitration), the South African common law will be applicable.<sup>283</sup> The influence of English law is still seen throughout South

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280 SALC 1998 Report 20-22 (hereafter the *Draft Bill*).

281 South African Law Commission Report Project 94 *Domestic Arbitration* (May 2001) (hereafter the SALC 2001 Report).

282 At present the SA Arbitration Act is not based on the UNCITRAL Model Law; The SALC has, however, submitted two proposed bills to the Parliament, one for international arbitration and one for domestic arbitration – although both of these have not been enacted as of yet.

283 Anon 2007 <http://www.nortonrose.com>.

African law, as the *SA Arbitration Act* is partly based on a previous *English Arbitration Act*.<sup>284</sup> The *SA Arbitration Act* serves as the general basis for arbitration founded in South Africa and stipulates important features and principles regarding, for example, definitions<sup>285</sup> and applicable procedures to be followed. The term “arbitration” is however not defined in the Act.

As seen in the definition of an “arbitration agreement”<sup>286</sup> in section 1 of the Act, this Act will only apply to written<sup>287</sup> arbitration agreements wherein a reference to arbitration is made by the parties.<sup>288</sup> Furthermore, the arbitration agreement must concern the relevant parties<sup>289</sup> pertaining to the main agreement (contract) between them and relate to a dispute arising between them regarding this agreement.<sup>290</sup> The reference in the main contract or arbitration agreement to refer a dispute to arbitration may not always be clear. Therefore the courts have stipulated certain guidelines to be followed when faced with this problem, as seen in the case of *Schuldes v Compressor Valves Pension Fund*.<sup>291</sup> For example: the appointed arbitrator cannot be a party to the dispute between the contracting parties; the contract should refer to arbitration as the applicable dispute resolution method to be used; whether there is a strong and conclusive indication and intention to refer

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284 The present *SA Arbitration Act* is partly based on the principles of the *English Arbitration Act* of 1950; Berger 1994 SA Merc LJ 251-252.

285 S 1 *SA Arbitration Act*.

286 See Chapter 2 (2.2 *The arbitration agreement, applicable law and seat of arbitration*) for a discussion on the “arbitration agreement”.

287 Although oral arbitration agreements will also be valid, it is regulated by the common law and therefore will not fall within the ambit of the *SA Arbitration Act*; If it is required by law that an agreement has to be in written form as to be valid and have effect then, to promote certainty, any variation of the agreement also has to be in written form; There are however various definitions of the term “writing” found in international and domestic instruments; Butler & Finsen *Arbitration in SA* 38.

288 S 1 *SA Arbitration Act*; Butler & Finsen *Arbitration in SA* 38; s 39 *SA Arbitration Act* also states that the Act will bind the State and not just natural persons; thus in the case where the State is one of the parties regarding the main contract and the arbitration agreement.

289 S 1 *SA Arbitration Act* defines a “party” as: “in relation to an arbitration agreement or a reference, means a party to the agreement or reference, a successor in title or assign of such a party and a representative recognised by law of such a party, successor in title or assign”.

290 Butler & Finsen *Arbitration in SA* 40.

291 *Schuldes v Compressor Valves Pension Fund* 1980 (4) SA 576 (W).

the dispute to arbitration; and, the nature of the dispute should be taken into consideration. Thus, it can be argued that, for the sake of certainty and clarity, the parties should make a clear reference to arbitration and to the *SA Arbitration Act* within their arbitration agreement if they wish to subject the dispute and arbitration procedures to this Act.<sup>292</sup>

An important factor to be taken into consideration are the specific matters that will not be subject to arbitration under the *SA Arbitration Act* as stipulated in section 2 namely matrimonial matters<sup>293</sup> (or any incidental case thereto) and matters relating to status.<sup>294</sup> Therefore a party who wants to refer a dispute to arbitration bears the onus of proving firstly, that there is indeed a valid arbitration agreement and secondly, that the dispute falls within the ambit of the relevant arbitration agreement.<sup>295</sup> If the other party argues that the arbitration agreement is invalid, then he has the right to obtain an interdict to prevent the arbitration proceedings from taking place.<sup>296</sup> Therefore, as stated in section 3(2) the court may set the arbitration agreement aside, order that the agreement has no effect or that the dispute shall not be referred to arbitration.<sup>297</sup>

## **5.2 South African Law Commission Report**

### **5.2.1 The SALC's 1998 Report: a brief history**

The SALC's 1998 Report focuses primarily on international commercial arbitration and only makes certain submissions regarding domestic commercial arbitration. The process began when the Executive Director

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292 Butler & Finsen *Arbitration in SA* 41.

293 For example, a clause contained in a divorce settlement that stipulates that any matter incidental to the divorce should be referred to arbitration, will be invalid and not have effect.

294 S 2 *SA Arbitration Act*; Butler & Finsen *Arbitration in SA* 52 - 53; Although the term "status" is not defined by the Act, Butler and Finsen argues that the term should be interpreted as "to minimise its limiting effect on the use of arbitration".

295 Butler & Finsen *Arbitration in SA* 56.

296 Butler & Finsen *Arbitration in SA* 57–58, 63.

297 S 3(2) *SA Arbitration Act*.

of the Association of Arbitrators of South Africa submitted a draft domestic arbitration bill to the SALC in 1994.<sup>298</sup> The SALC then began its investigation into South Africa's arbitration legislation and the possible reform thereof.<sup>299</sup>

As the submissions and comments of the Association of Arbitrators were only directed at domestic arbitration and the reform thereof, it may be argued that they didn't see the need for introducing international commercial arbitration legislation in South Africa. The SALC, however, concluded that the appropriate way to go about the reform of South Africa's arbitration legislation was to conduct an investigation regarding possible adoption of the UNCITRAL Model Law for South African international arbitration.<sup>300</sup> They concluded that one of the following suggestions should be followed: the rejection of the inclusion of the UNCITRAL Model Law for both international and domestic arbitration in South Africa; the adoption of the UNCITRAL Model Law for both international and domestic arbitration in South Africa; the adoption of the UNCITRAL Model Law for only international arbitration and thus keeping international and domestic arbitration legislation separate in South Africa.<sup>301</sup> Comments on why a particular route should be followed were also encouraged, what modifications should be made and the inclusion of an opt-in or opt-out clause.

In 1996 the SALC decided to appoint a Project Committee which would deal with the arbitration project and investigation. The elected Project Committee held various meetings and decided that it would be best if the investigation into international commercial arbitration could be kept

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298 The Executive Director of the Association of Arbitrators submitted this draft bill on 1 August 1994 to the SALC; SALC 1998 Report 29.

299 This investigation began on 29 August 1994.

300 The investigation as to the response of South Africa to the UNCITRAL Model Law was done by way of circulating SA Law Commission *Arbitration* Working Paper 59 (September 1995); There were only twelve responses to Working Paper 59 and only one of these responses favoured the adoption of the Model Law for domestic arbitration and the rest favoured the adoption of the Model Law for only international arbitration; SALC 1998 Report 31 par 1.31 1.32.

301 SALC 1998 Report 29, 30 par 1.25.



separate from the investigation into domestic commercial arbitration.<sup>302</sup> The investigation into the possible reform of South Africa's domestic arbitration is an investigation that should be dealt with separately as it would include the investigation of a range of topics that would be more drawn out by the Project Committee, it would be more extensive and it would focus on other topics that would not be considered when investigating international commercial arbitration.<sup>303</sup>

In 1996 the Project Committee published Discussion Paper 69<sup>304</sup> which contained the Committee's responses and commentary and was circulated at an international conference held in Johannesburg.<sup>305</sup> It was well received by various international delegates, by the Minister of Justice and by the Minister of Trade and Industry who supported the view that South Africa should adopt the UNCITRAL Model Law for international commercial arbitration.<sup>306</sup> By circulating Discussion Paper 69 (which contained a draft of the *Draft Bill*) the Project Committee could establish if the draft legislation would be accepted by foreign and local users thereof and they could make sufficient changes to the draft legislation (as proposed by the readers of Discussion Paper 69).

### 5.2.2 Proposed alterations and additions

The SALC proposed that the UNCITRAL Model Law be applied with minimum alterations as this would ensure that the international commercial arbitration legislation of South Africa would be user-friendly,

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302 The SALC's investigation into South Africa's domestic arbitration regime is discussed and referred to in the South African Law Commission Project 94 *Domestic Arbitration* Discussion Paper 83 (1999) (hereafter Discussion Paper 83).

303 SALC 1998 Report 30 par 1.29.

304 South African Law Commission Arbitration: *A Draft International Arbitration Act for South Africa* Project 94 Discussion Paper 69 1996 (hereafter Discussion Paper 69).

305 The conference was presented by the Association of Arbitrators (Southern Africa), the International Court of Arbitration of the International Chambers of Commerce (ICC), the London Court of International Arbitration (LCIA) and the International Centre for Settlement of Investment Disputes (ICSID): *The Resolution of International Trade and Investment Disputes in Africa* 6-7 March 1997 Sandton, Johannesburg.

306 SALC 1998 Report 32 par 1.34 - 1.35.

encourage foreign parties to make use of it and promote uniformity with regard to other foreign countries' international commercial arbitration legislation that have also adopted the UNCITRAL Model Law.<sup>307</sup> The SALC proposed that only two minor changes should be made to the UNCITRAL Model Law: firstly, that the definition of an "arbitration agreement" be changed as to resolve certain difficulties experienced in international practice and, secondly, where the UNCITRAL Model Law states that the arbitral tribunal should consist of three arbitrators, the SALC proposed that it should only consist of one arbitrator.<sup>308</sup>

Although the SALC proposed only two changes to the UNCITRAL Model Law, it proposed certain additions be made regarding costs, interest, arbitral immunity and conciliation.<sup>309</sup> The main reason for these additions was to enable the UNCITRAL Model Law to function more properly and effectively in South Africa.<sup>310</sup> Alteration of the national law on arbitrability was not intended by the UNCITRAL Model Law and therefore the SALC proposed that this aspect be clarified more.

Important to keep in mind, however, is the fact that the proposed international arbitration act would not be applicable to domestic arbitration (and it would not be available on an opt-in basis).<sup>311</sup> Focus was thus placed on the word "international" and that the definition thereof in the UNCITRAL Model Law must be referred to when

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307 SALC 1998 Report 24 par 1.8, 26 par 1.13, 40 par 2.14, 41 par 2.16; The SALC proposed that the UNCITRAL Model Law should be contained in a schedule to the international arbitration legislation of South Africa as The UNCITRAL Model Law is not in the same form or language of South African legislation; It is important not to defer to much from the language used in the UNCITRAL Model Law as this would change the goals of the Model Law and influence the application thereof; Furthermore, if the original language of the UNCITRAL Model Law was to be changed the value of the *travaux préparatoires* would be lost and the international jurisprudence regarding the application and interpretation of the Model Law would create uncertainty for users when they have to apply the local version thereof.

308 SALC 1998 Report 26 par 1.13.

309 SALC 1998 Report 26 par 1.14.

310 SALC 1998 Report 26 par 1.14.

311 SALC 1998 Report 21-22.

determining whether a dispute will be regarded as international.<sup>312</sup> Moreover, the SALC also proposed that the UNCITRAL Model Law must be consolidated with the *Recognition and Enforcement of Arbitral Awards Act* 40 of 1977 and that the *Draft Bill* should contain provisions implementing the 1965 Washington Convention. These actions would ensure that all of South Africa's legislation pertaining to international arbitration would be contained in one statute, contributing to its user-friendly status.<sup>313</sup>

The SALC considered the use of opt-in and opt-out provisions<sup>314</sup> if the UNCITRAL Model Law was to be adopted only for international commercial arbitration in South Africa. An opt-in provision would then entail that parties to an arbitration matter would be able to decide that the UNCITRAL Model Law will be applicable to their domestic arbitration proceedings. An opt-out provision would entail that the parties in an international arbitration matter would be able to decide that the UNCITRAL Model Law would not be applicable to their arbitration and that they would rather apply the relevant domestic legislation.<sup>315</sup>

Originally the SALC recommended that an opt-in provision be included. This was based upon a practical consideration: it would avoid any possible disputes relating to article 1(3)(c) of the UNCITRAL Model Law, which states that an arbitration matter would be deemed international if the parties expressly intended it to be (even in the case of a clearly domestic dispute).<sup>316</sup> However, after careful reconsideration of the possible dangers thereof<sup>317</sup> they concluded that it would be undesirable to include this provision.<sup>318</sup> These dangers are reflected in certain policy and practical considerations and include the following:<sup>319</sup> firstly, the fact

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312 See article 1(3) UNCITRAL Model Law for definition of "international arbitration".

313 SALC 1998 Report 41 par 2.17.

314 Also known as contracting in and contracting out provisions.

315 SALC 1998 Report 120 par 2.270.

316 SALC 1998 Report 121 par 2.272.

317 SALC 1998 Report 122 par 2.275.

318 SALC 1998 Report 123 par 2.276.

319 SALC 1998 Report 122 par 2.275.

that an opt-in clause could be included in the arbitration clause of standard-form contracts, which would deny parties a certain degree of court supervision; secondly, if a dual system would be applicable to the domestic regime (as a result of an opt-in provision), it would create difficulty for the practitioners applying it; and, thirdly, a separate investigation, revision and reform of the domestic regime was already underway. Thus the SALC argued that this important issue would be touched upon further in the separate investigation regarding the domestic regime.

The SALC also concluded that the use of an opt-out provision would also not be desirable as it would be counter-productive and as South Africa's domestic arbitration legislation was considered to be outdated.<sup>320</sup> The reason why it would be counter-productive is the fact that the purpose of the *Draft Bill* was mainly to ensure that the UNCITRAL Model Law be applied to all international commercial disputes. By including an opt-out provision and giving the parties the choice to exclude the provisions of the UNCITRAL Model Law, this purpose of the *Draft Bill* would be counteracted.

### *5.2.3 The proposed Draft International Arbitration Bill*

The proposed *Draft Bill* aimed to introduce the UNCITRAL Model Law for use in international arbitration matters.<sup>321</sup> Although the *Draft Bill* contains certain provisions encouraging parties to consider conciliation to resolve their disputes as opposed to arbitration, it also contains provisions referring to difficulties when making use of conciliation.<sup>322</sup>

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320 SALC 1998 Report 124 par 2.280.

321 The Draft Bill further aims to implement the changes made to the *Recognition and Enforcement of Foreign Arbitral Awards Act* 40 of 1977 and to promote the accession to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the Washington or ICSID Convention); These further aims will, however, not be discussed in this study.

322 SALC 1998 Report 25 par 1.12.

To ensure that the *Draft Bill* would be user-friendly, certain provisions clarified problems encountered in international practice that include, for example, the following: that both parties' consent is needed to consolidate the arbitral proceedings; that the court's powers are made clear with regard to interim measures and the taking of evidence; the meaning of "public policy" as sufficient ground for the setting aside of an arbitral award and the grounds for the court to refuse an application to enforce an arbitral award; the period in which the latter named application has to be brought are extended in the case of fraud or corruption; and lastly, two additions were proposed regarding the power of the arbitral tribunal when ordering interim measures.<sup>323</sup> These alterations and additions were made with international standards in mind and, with regard to international commercial arbitration, to ensure the growth of South Africa in the international trade sphere and, furthermore, to promote South Africa as a preferred venue for international arbitration.<sup>324</sup>

#### *5.2.4 South Africa's response to the UNCITRAL Model Law*

The SALC concluded in Discussion Paper 69 that the UNCITRAL Model Law should be adopted for use in international commercial arbitration in South Africa and that there should be separate legislation dealing with domestic commercial arbitration.<sup>325</sup> The urgency regarding the implementation of the UNCITRAL Model Law was also stated. This urgency was the result of the outdated status of South Africa's arbitration legislation as well as its defective and insufficient status pertaining to international arbitration standards. Many of South Africa's trading partners (as well as various other African countries)<sup>326</sup> have already

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323 These two additions are: the power of the arbitral tribunal to appropriate security costs and regarding the order of interim measures by the tribunal, that it has the status of an award and enforced as so; SALC 1998 Report 26, 27 par 1.14.

324 SALC 1998 Report 29 par 1.20.

325 SALC 1998 Report 35 par 2.1.

326 Countries include, for example, Canada, Australia, Hong Kong, Scotland, Mexico and Egypt; African countries include, for example, Kenya and Zimbabwe whom have both adopted the UNCITRAL Model Law into their

implemented the UNCITRAL Model Law into their arbitration legislation. This has the effect that South Africa does not conform to the international commercial arbitration standards.

Although most respondents to Discussion Paper 69 favoured the adoption of the UNCITRAL Model Law for international commercial arbitration, there were two respondents who favoured its adoption for domestic arbitration as well and one respondent who submitted that the latter option be evaluated only after the issue of international arbitrations had been dealt with.<sup>327</sup> As the respondents to Discussion Paper 69 were not asked to consider whether the UNCITRAL Model Law should be adopted for domestic arbitration as well, the SALC concluded that this was an issue which would be dealt with at a later stage when they would investigate the possible reform of South Africa's domestic arbitration legislation.<sup>328</sup>

As certain South African law principles are based upon English Law, the SALC proposed that the important provisions in the *Arbitration Act* of 1996 of England<sup>329</sup> be kept in mind when reforming the South African domestic arbitration. The SALC submitted that the domestic arbitration legislation of South Africa would benefit more with the inclusion of certain provisions of the English *Arbitration Act* than it would by adopting the UNCITRAL Model Law for domestic arbitration.<sup>330</sup> The reason for this submission is the fact that the English *Arbitration Act* is tailored to address relevant and specific problems that may be envisaged in both English and South African practice.<sup>331</sup> South Africa would benefit more by keeping the familiar provisions contained in the English *Arbitration*

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domestic and international arbitration legislation; SALC 1998 Report 35 par 2.3.

327 SALC 1998 Report 36, 37 par 2.5.

328 SALC 1998 Report 37 par 2.5.

329 The *English Arbitration Act* of 1996 is not wholly based upon the UNCITRAL Model Law but rather it is influenced by it.

330 SALC 1998 Report 37 par 2.6.

331 This is based on the fact that South African law is still largely based on English law and, therefore, the possible problems that can be encountered in the United Kingdom will be similar to those encountered in South Africa.

*Act*, in the reformed *SA Arbitration Act*, as these provisions have shown to be effective in the past.

### **5.3 The UNCITRAL Model Law as basis for both international and domestic arbitration**

#### *5.3.1 SALC's reasons for not adopting the UNCITRAL Model Law for domestic arbitrations*<sup>332</sup>

Some developed and developing countries have adopted the UNCITRAL Model Law for both domestic and international arbitrations in the past.<sup>333</sup> It has been submitted that the benefits of adopting the UNCITRAL Model Law for both regimes entails the avoidance of the complexity of a dualistic arbitration system as well as avoiding the need to define when arbitration should be subject to domestic arbitration on the one hand and international arbitration on the other hand. Although some countries have chosen to adopt the UNCITRAL Model Law for both regimes, it would still be necessary to define the word "international" and to make a clear distinction between the two regimes. The reason for the distinction is the fact that different provisions will be applicable to international commercial arbitration as opposed to domestic commercial arbitration.

The SALC argued that the alleged difficulties in applying a dual arbitration legislation system are exaggerated and, moreover, that it would actually have the opposite effect: more clarity would be created and confusion avoided as the parties to a domestic arbitration would only need to the domestic arbitration legislation, and parties to an international arbitration would only need to apply the international arbitration legislation.<sup>334</sup> The SALC did not spend much time on this topic, as they submitted that they would focus thereon in the next phase

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332 Contained in both the 1998 and 2001 Reports of the SALC.

333 SALC Discussion Paper 83 par 2.3.

334 SALC 1998 Report 36 par 2.5.

of their investigation pertaining to the domestic arbitration regime and the reform of the present *SA Arbitration Act*.<sup>335</sup>

### *5.3.2 SALC's reasons for not adopting the UNCITRAL Model Law for both domestic and international arbitration*

The SALC firstly argued that the *SA Arbitration Act* has had a positive impact on the development of arbitration law and practice in South Africa.<sup>336</sup> The various developed and developing countries who have adopted the UNCITRAL Model Law for both domestic and international arbitration, have done so because of the fact that their arbitration legislation has been of little or no use, the fact that their arbitration legislation was outdated or because of the fact that their arbitration legislation was seen to be largely inadequate and ineffective. The *SA Arbitration Act* on the other hand has proven to be of great use and relatively well known in South Africa. By replacing the *SA Arbitration Act* wholly with the UNCITRAL Model Law would create uncertainty within the country and would undermine the influence it has had in the past.<sup>337</sup>

Secondly, the SALC argued that the recommended modified text of the UNCITRAL Model Law would create difficulty for South African practitioners in the application thereof. As previously stated, the UNCITRAL Model Law should be adopted with minimum change to adhere to the goal thereof to promote the uniformity and harmonisation of various national arbitration laws. As it was submitted that the UNCITRAL Model Law be applied in the South African courts in the same way as it is applied in the various courts throughout the world, reference would have to be made to various foreign jurisprudence, which will entail its own difficulties.<sup>338</sup> Therefore, the SALC proposed that the UNCITRAL Model Law be applied and implemented with as few alterations and modifications as possible.

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335 See par 5.4 below; SALC 1998 Report 36-37 par 2.5.

336 SALC Discussion Paper 83 8 par 2.5.

337 SALC Discussion Paper 83 8 par 2.5.

338 SALC Discussion Paper 83 9 par 2.6.



The UNCITRAL Model Law also has certain gaps and it would be necessary to fill these gaps if it would be applied to domestic arbitration.<sup>339</sup> If the alterations and modifications made to fill these gaps were to be applied to international arbitration as well, then even more difficulties would be created. Thus, the only way to ensure that these difficulties are not experienced by parties in arbitration proceedings, is to keep domestic and international arbitration separate.<sup>340</sup> Furthermore, the SALC argued that as a reform of the domestic arbitration legislation in South Africa was also underway, it was deemed inappropriate to also touch thereon while the international regime is being dealt with. Thus, the SALC proposed that the investigations into the two regimes be kept separate.<sup>341</sup>

Therefore the focus should fall on the reform of the *SA Arbitration Act* to update it, which would ensure that it will be in line with South Africa's present position regarding domestic arbitration procedures. New developments in arbitration should be kept in mind as well as what procedures would be effective and which not. As stated above, the *SA Arbitration Act* is not ineffective as a whole; it's just not effective in terms of international commercial arbitration.

### *5.3.3 Reasons why domestic arbitration should or should not be based on the UNCITRAL Model Law*

It would seem not to be wise to do away with the entire *SA Arbitration Act* which regulates and governs domestic commercial arbitration in South Africa. The Act has been proven to be effective in regard to domestic arbitration. It would be wiser to keep the form of the present domestic arbitration regime, although it is still essential that it is reformed and modernised. This will ensure that the *SA Arbitration Act's* provisions will be more in line with, and reflect the present position in South Africa

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339 These gaps are with regard to, for example, the provisions pertaining to the powers of the arbitral tribunal; SALC 2001 Report par 2.08.

340 SALC Discussion Paper 83 9 par 2.7.

341 SALC 1998 Report 25 par 1.10.

pertaining to, domestic commercial arbitration. Moreover, it will also reflect the global position regarding domestic arbitration.

#### *5.3.4 Reasons why international arbitration should or should not be based on the UNCITRAL Model Law*

By not keeping pace with the rest of the world's international trade advancements, South Africa has fallen behind with the modern practices pertaining to international arbitration. This in turn deters foreign parties as they expect international standards to be applicable to international commercial dispute resolutions. The fact that South Africa has not yet adopted the UNCITRAL Model Law creates a gap between it and the other countries and it furthermore contributes to the outdated standard of South African arbitration legislation. By adopting the UNCITRAL Model Law for international commercial arbitration, South Africa will be in line with some of the most developed countries pertaining to arbitration practices. This will in turn make South Africa a more favourable international arbitration centre, it will ensure certainty for practitioners and parties regarding the use of a global standard in arbitration practice (the UNCITRAL Model Law) and it will also contribute to the purpose of the UNCITRAL Model Law to harmonise international trade law.

#### *5.3.5 Reasons why South Africa should have two separate arbitration acts*

By having two separate arbitration acts, it would be ensured that more certainty and efficiency for the parties and practitioners are achieved. With a separate domestic arbitration act, relevant and important provisions as well as certain elements contained in the English *Arbitration Act* can be incorporated in the reformed *SA Arbitration Act*.<sup>342</sup> This would contribute to the effective reform of the South African domestic arbitration legislation. The reasons given above, with regard to

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342 As discussed above in par 5.2.4; SALC 1998 Report 37 par 2.6.

the effectiveness of Australia's two separate arbitration acts, will clearly also be applicable here.<sup>343</sup> One of the reasons is, for example, the fact that confusion among the users of the acts will be avoided and that more clarity will be created with regard to which act will be applicable in certain circumstances.

#### **5.4 The SALC 2001 Report**

As referred to above, the SALC commenced the next phase of their investigation, with regard to domestic arbitration, by publishing the SALC 2001 Report. The SALC recommended one of the following three options: to improve (or reform) the present *SA Arbitration Act* and retain its basic provisions; to adopt the UNCITRAL Model Law for both international and domestic commercial arbitration; to adopt a new statute that contains the most important provisions of the UNCITRAL Model Law and the *English Arbitration Act* of 1996 and retaining certain provisions of the present *SA Arbitration Act*.<sup>344</sup> Both the first and second options were deemed by the SALC not to be practical.<sup>345</sup> The fact, that the UNCITRAL Model Law should not be adopted for domestic commercial arbitration in South Africa, was also emphasised by the SALC.<sup>346</sup> Therefore, it was recommended that the present SA Arbitration Act should be updated and replaced with a new statute (option number three). Furthermore, it should contain certain specific provisions to reflect the objects of arbitration and the specific needs of the users thereof in a South African context.<sup>347</sup>

The SALC argues that the present SA Arbitration Act has had a positive influence in South African arbitration sphere and that by replacing it (or a

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343 See par 4.3.3.

344 SALC 2001 Report "Summary of Recommendations".

345 The first option was deemed inappropriate as, for example, it doesn't take sufficient notice of the UNCITRAL Model Law; SALC 2001 Report par 1.22.

346 The SALC emphasised their reasons, found in the 1998 Report, for not adopting the UNCITRAL Model Law for domestic arbitration; See par 5.3.1 above.

347 SALC 2001 Report par 1.02.

substantive part of it) with the UNCITRAL Model Law, it would undermine legal certainty.<sup>348</sup>

## **5.5 Conclusion**

If South Africa wants to be more frequently selected as the seat for arbitration in an international commercial arbitration matter, then it has to ensure that the applicable law and procedures are relatively well known to foreign practitioners. By basing both its international and domestic commercial arbitration legislation on the UNCITRAL Model Law, certainty will be created. The UNCITRAL Model Law is well known all over the world and other parties will then be attracted to South Africa as a venue for international arbitration.<sup>349</sup>

Generally speaking, the future of South Africa's arbitration legislation is in the hands of the government. If no action is taken with regard to the SALC's recommendations, then the position will remain the same, which is undesirable. The only way to know if the SALC's recommendations will be effective is to put it to the test. As South Africa is still relatively a developing country concerning international trade law, now will be the time to test certain theories and benefit from them.

It can also be argued that as the recommendations of the SALC were made back in 1998 (and 2001), it may be necessary for the SALC to conduct a follow-up investigation. This will ensure that new arbitration practices and South Africa's present position are taken into consideration. Many countries have adopted the UNCITRAL Model Law for their domestic commercial arbitration regimes and this fact could be used to the advantage of the SALC. The SALC will be able to determine if the adoption of the UNCITRAL Model Law has been effective in the domestic arbitration sphere or not. Lastly, it would also be wise for the SALC to look at Australia's reform as it can be a good indication of how

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348 SALC 2001 Report par 2.05.

349 Berger *An Outside Perspective* 29.

one of the world's leading arbitration venues reformed their arbitration legislation and how they adopted the UNCITRAL Model Law for both their domestic and international commercial arbitration regimes.

## CHAPTER 6

### COMPARISON

In this chapter the primary important provisions of the UNCITRAL Model Law will be compared to the provisions pertaining to the Australian and South African arbitration legislation. Therefore, this chapter is based on information contained in the previous chapters pertaining to the UNCITRAL Model Law, Australian commercial arbitration legislation and South African commercial arbitration legislation. By firstly comparing the UNCITRAL Model Law with the previous or former international and domestic commercial arbitration legislation of Australia, it will become clear whether the reform was effective and whether the problems found in the previous legislation have been resolved by basing the legislation on the UNCITRAL Model Law. The UNCITRAL Model Law provisions will then be compared with the South African arbitration legislation. Firstly, it has to be determined what problems exist in South African arbitration legislation. Secondly, the *Draft International Arbitration Act* has to be viewed subjectively to determine whether these problems found in the present *SA Arbitration Act* have been resolved. Thirdly, consideration has to be given to whether the primary provisions of the UNCITRAL Model Law contributed to the resolve of the previous problems.

A conclusion can then be drawn on the question whether South Africa should base both its international and domestic commercial arbitration legislation on the UNCITRAL Model Law. Moreover, a conclusion can also then be drawn to determine whether South Africa will benefit from the inclusion of the UNCITRAL Model Law in its commercial arbitration legislation. Lastly, a distinction between the international and domestic regimes will be kept in mind throughout this chapter.

## **6.1 Primary provisions of the UNCITRAL Model Law**

UNCITRAL's main goal is to harmonise international trade. This goal is achieved through the implementation of the UNCITRAL Model Law's primary provisions.<sup>350</sup> The UNCITRAL Model Law also eliminates various problems such as conforming to various national laws of different countries and it creates a favourable climate for international commercial arbitration.<sup>351</sup> The UNCITRAL Model Law was drafted in such a way as to ensure global adoption and application thereof, thereby making it universal.<sup>352</sup> The provisions that cover the key steps in the arbitral process are accordingly discussed below.

### **6.1.1 Clarity and certainty**

Firstly, the Model Law clearly states when arbitration will be international and, moreover, it places an emphasis on the international origin thereof.<sup>353</sup> Secondly, the Model Law creates certainty for the parties as it stipulates the requirements in terms of the arbitration agreement, for example, that it must be in writing.<sup>354</sup> Thirdly, clarity and certainty are also created and ensured as the Model Law covers all stages of the arbitration proceedings.<sup>355</sup> Arbitration as an alternative dispute resolution method is meant to be fast and effective and as such, the Model Law was designed in such a way to ensure that these two characteristics will remain important and in the foreground of any arbitration dispute.

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350 Slate *et al* 2004 *Cardozo Journal* 82; Herrmann 1998 *Uniform Law Review* 489.

351 Griffith and Mitchell 2002 *Melbourne Journal of International Law* 185; SALC 1998 Report 21.

352 Herrmann 1998 *Uniform Law Review* 492.

353 A 1(3)(a), 2A UNCITRAL Model Law.

354 A 7 UNCITRAL Model Law.

355 Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 (hereafter Explanatory Note by the Secretariat) par 2.

The Model Law may also be utilised by any country other than a Contracting State, irrespective of that country's legal or economic system.<sup>356</sup> As the Model Law can be applied in any country and can be utilised by any party subject to an international commercial arbitration matter, the parties need not have in depth knowledge of the legal systems of the various applicable countries. This in turn contributes to the "certainty factor" of the Model Law. Moreover, the application of the Model Law does away with the problem of disparities often found between various national laws.<sup>357</sup>

#### *6.1.2 Limited court intervention*

The Model Law expressly states that no court may intervene in arbitration proceedings unless in situations where it is stipulated by the Model Law.<sup>358</sup>

#### *6.1.3 Interim measures*

The Model Law stipulates that a party has the right to order interim measures regarding protection from a court and therefore that court may then grant the interim measure.<sup>359</sup> Moreover, a party may also request that the arbitral tribunal must grant interim measures.<sup>360</sup> The arbitral tribunal may request that a party take interim measures of the protection with regard to a specific subject matter in the dispute.<sup>361</sup>

#### *6.1.4 Arbitrators and arbitral tribunal*

Parties are free to determine the number of arbitrators to be included in the arbitration proceedings. If the parties have not agreed thereon, there

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356 Explanatory Note by the Secretariat par 2.

357 Explanatory Note by the Secretariat par A(2)(8).

358 A 5 UNCITRAL Model Law.

359 A 9, 17J UNCITRAL Model Law.

360 A 17(1) UNCITRAL Model Law; The conditions for granting interim measures are set out in article 17A UNCITRAL Model Law.

361 A 17 UNCITRAL Model Law.



shall be three arbitrators.<sup>362</sup> An arbitrator can be challenged on the grounds of “justifiable doubts” with regard to their impartiality and independence.<sup>363</sup> Furthermore, the Model Law stipulates that the arbitral tribunal shall have the power to rule on its own jurisdiction.<sup>364</sup>

#### *6.1.5 The arbitration agreement and referral to arbitration*

The arbitration agreement found in the contract between the relevant parties shall be treated as independent of that contract.<sup>365</sup> If the arbitration agreement is deemed valid, the court must refer the matter to arbitration.<sup>366</sup>

#### *6.1.6 Party autonomy*

The parties are free to determine which rules of procedure are to be followed during the arbitration proceedings and<sup>367</sup> the place of the arbitration.<sup>368</sup>

#### *6.1.7 Issue, recognition and enforcement of awards*

Irrespective of where (in which country) an award is made, the award will be binding, final and enforceable in any competent court.<sup>369</sup> The grounds for refusing recognition<sup>370</sup> or enforcement<sup>371</sup> of an award are

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362 A 10 UNCITRAL Model Law.

363 A 12(2) UNCITRAL Model Law.

364 A 16(1) UNCITRAL Model Law.

365 A 16(1) UNCITRAL Model Law.

366 Furthermore, the subject matter must be governed by the arbitration agreement.

367 A 19(1) UNCITRAL Model Law.

368 A 20(1) UNCITRAL Model Law; Where parties do not agree on the place, the relevant circumstances of the case and the convenience of the parties must be taken into consideration.

369 A 35(1) UNCITRAL Model Law.

370 Recognition deals with the issue where a court is asked to grant a remedy with regard to a dispute that has been the subject of a previous arbitration matter; Trone & Moens 2007 *MqJBL* 310.

371 Enforcement takes place where the court is asked to ensure that the award made is carried out; Trone & Moens 2007 *MqJBL* 310.

also expressly stipulated in the Model Law.<sup>372</sup> The Model Law does away with the terms “foreign” and “domestic” in terms of awards made and rather applies the terms “international” and “non-international”. Therefore all awards are treated the same irrespective of their origin. This also has the effect that the enforcement of “international” awards are treated the same irrespective of the fact whether they are of “foreign” or “domestic” nature.<sup>373</sup> When the final award is issued, this will bring an end to the arbitral proceedings.<sup>374</sup>

## **6.2 UNCITRAL Model Law versus Australian international position**

### *6.2.1 Previous position: 1974 IAA*

As the 1974 IAA was already based on the UNCITRAL Model Law, the reform thereof was based on the fact that it only needed to be updated to conform to the 2006 UNCITRAL Model Law amendments. Some of the major amendments were the following: the term “writing”<sup>375</sup> has been defined more widely; the specific grounds on which a court may refuse to enforce a foreign arbitral award were made clearer;<sup>376</sup> a provision stating that the IAA (which is based on the UNCITRAL Model Law) will have exclusive application in matters subject to international commercial arbitration (the 1974 IAA did not contain a provision stipulating this); and lastly, the opt-out provision found in section 21 was repealed.

### *6.2.2 Present position: 2009 IAA*

The 2009 IAA was designed to facilitate international trade and to encourage the use of arbitration as an alternative dispute resolution method in the international commercial arbitration sphere.<sup>377</sup> This contributes to UNCITRAL’s goal to harmonise and unify international

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372 A 36 UNCITRAL Model Law.

373 Explanatory Note by the Secretariat par 49.

374 A 32(1) UNCITRAL Model Law.

375 S 3(1) 1947 IAA.

376 These grounds are stipulated in sections 8(5), (7), (8) 2009 IAA.

377 S 2D(a) 2009 IAA.

trade law. It furthermore has an entire part dedicated to the enforcement of foreign awards.<sup>378</sup> This shows the importance of provisions pertaining to the enforcement of foreign awards. It also contained relevant definitions in this regard – something which is not found in all arbitration acts.

The 2009 IAA is based on the UNCITRAL Model Law, with a few changes to the Model Law. Section 16 expressly stipulates that the UNCITRAL Model Law has force of law in Australia.<sup>379</sup> Many foreign parties have made use of the UNCITRAL Model Law and by expressly stipulating that the Model Law is incorporated into Australia's law, any possible confusion or uncertainty is removed for the foreign parties. Sections 2A and 20 of the 2009 IAA stipulate that the 2009 IAA and the UNCITRAL Model Law will be applicable in an arbitration matter (as referred to in the act) in Australia.<sup>380</sup> Section 23C makes reference to the confidentiality of information regarding the arbitral proceedings.<sup>381</sup> This can be considered as an important provision for parties, especially for foreign parties, and may also attract more parties to conduct their arbitration in Australia.

One of the most important changes in the 2009 IAA is the fact that interim measures will be regarded as binding and will be enforced by the Australian courts. A second important change (or addition) relates to the enforcement of foreign arbitral awards. It lists a comprehensive list of grounds on which foreign arbitral awards can be challenged, for example, if the arbitral agreement was not valid under the governing law or if the challenging party was not given proper notice of the arbitration in the relevant circumstances.<sup>382</sup>

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378 Part II, s 7 2009 IAA; Important to notice is the fact that this Act expressly makes reference to "electronic communication" – this is an important factor as e-commerce is becoming more and more relevant today.

379 S 16 2009 IAA.

380 S 2A, 20 2009 IAA.

381 S 23 2009 IAA.

382 Brabant, Fleming & Day 2010 <http://www.martindale.com>.

The 2009 IAA fills in the gaps that the 1974 IAA contained. It contains some of the most important provisions envisaged in the UNCITRAL Model Law regarding the steps in an arbitration proceeding. For example, provisions regarding the place of arbitration and provisions regarding the requirements for hearings. The new IAA furthermore contains provisions not mentioned in the UNCITRAL Model Law, for example, section 9 relates to “evidence of awards and arbitration agreements”.<sup>383</sup> Section 27 relates to the costs of the arbitration and stipulates, for example, how the arbitral tribunal will determine which party will be held liable therefore.

### **6.3 UNCITRAL Model Law versus Australian domestic position**

As New South Wales (NSW) is to date the only State in Australia which has adopted and enforced the 2010 IAA and as each state in Australia has its own 1984 CAA, NSW’s legislation will be used in this case.

#### *6.3.1 Previous position: 1984 CAAs*

The 1984 CAAs had express provisions regarding the following: application of the CAA;<sup>384</sup> jurisdiction of the court and party autonomy;<sup>385</sup> the number of arbitrators;<sup>386</sup> interim awards made by arbitrators;<sup>387</sup> finality and enforcement of awards.<sup>388</sup> The 1984 CAA however contained no provisions regarding the following: the definition of “arbitration”; interim measures;<sup>389</sup> and lastly, limited court intervention.<sup>390</sup>

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383 S 9(1) relates to the specific requirements for when a party wants to enforce a foreign arbitral award.

384 S 3(2) 1984 CAA.

385 S 4(2)(b) 1984 CAA states that parties may stipulate in the arbitration agreement that a court (the District Court) will have jurisdiction regarding the arbitration proceedings; Court intervention is therefore not excluded in the 1984 CAA; The parties were also free to request consolidation of arbitration proceedings; S 26 1984 CAA.

386 S 6 1984 CAA; There shall be one arbitrator, unless otherwise stipulated by the parties.

387 S 23 1984 CAA.

388 S 28, 33 1984 CAA.

389 As stated above, the arbitrator had the power to order an interim award; S 47 makes reference to the court’s power to grant interlocutory orders; No

### 6.3.2 *Present position: 2010 CAA*

The 2010 CAA contains a greater degree of party autonomy as it includes certain additional provisions which parties may choose to include or exclude in their arbitration proceedings.<sup>391</sup> The 2010 CAA main goal is

...to facilitate the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense.<sup>392</sup>

This places an emphasis on the fact that arbitration is meant to be fast and effective.<sup>393</sup> Section 1A Preliminary states that the 2010 CAA is based on the UNCITRAL Model Law and that a few modifications have been made to accommodate the specific characteristics of domestic commercial arbitration. The 2010 CAA will also apply to all domestic commercial arbitration matters<sup>394</sup> and, therefore, arbitration matters that are not subject to the 2009/1974 IAA.<sup>395</sup> It also expressly stipulates when an arbitration matter will be considered as “domestic”.<sup>396</sup> These provisions therefore provide clarity and certainty to the relevant parties regarding which legislation will be applicable and when the specific legislation will be applicable.

Party autonomy is regarded as an important factor in the 2010 CAA as section 1C(2) stipulates that parties are free to determine how their disputes shall be resolved. Court intervention is also limited in the 2010 CAA as stipulated in section 5. This differs from the previous position of

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express reference to interim measures are however made elsewhere in the 1984 CAA.

390 In terms of the 1984 CAA the court had almost unlimited intervention as it could intervene in certain circumstances; S 38 1984 CAA.

391 Party autonomy is further emphasised as the parties are free to choose the number of arbitrators; S 10(1) 2010 CAA.

392 Explanatory Note contained in the 2010 CAA.

393 S 1C(2)(b) 2010 CAA furthermore states that it shall provide arbitration proceedings which are meant to aid the cost effective nature of arbitration which in turn will also contribute to the informal and quick nature thereof.

394 This creates more clarity for the users of the Act as they will now know in what circumstances the Act will be applicable.

395 S 1(1) 2010 CAA.

396 S 1(3) 2010 CAA.

the 1984 CAAs as the latter contained no express provision stipulating that intervention by the court will be limited. Section 9 also stipulates that the court may grant interim measures as requested by a party in certain circumstances.<sup>397</sup> Sections 16 and 17 stipulate that the arbitral tribunal will have the power to rule on its own jurisdiction and that it will also have the power to grant interim measures. Section 35 stipulates that an award will be recognised and enforced irrespective of the State or Territory in which it was made. Furthermore, the 2010 CAA stipulates that the arbitration agreement may be in the form of a separate clause in the contract between the parties and that the parties will be treated equally during the arbitral proceedings.<sup>398</sup>

The 2010 CAA reflects a number of significant changes to the past domestic commercial arbitration regime.<sup>399</sup> Parties have a greater degree of flexibility and party autonomy with regard to the appointment of the arbitral tribunal.<sup>400</sup> Parties also have the freedom to determine how the arbitral proceedings should be conducted.<sup>401</sup> The arbitral tribunal may determine whether it has jurisdiction or not and to secure that a party has the right to seek a court ruling if and where jurisdiction has been determined. Parties can determine which substantive law will be applicable to their arbitration proceedings. Lastly, the 2010 CAA contains a greater degree of provisions with regard to interim measures.<sup>402</sup>

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397 S 9 2010 CAA.

398 S 7, 18 2010 CAA.

399 Staugas 2010 <http://www.jws.com.au>.

400 This includes the process of selection of the arbitral tribunal, the challenging of selections and to provide default selections in the case where parties cannot come to an agreement.

401 Where the parties cannot come to an agreement, the arbitral tribunal shall have the power to determine the process to be followed.

402 This includes interim measures with regard to the preservation of evidence, the preservation of assets and cost, and with regard to the disclosure of information.

## **6.4 UNCITRAL Model Law versus South African international position**

### *6.4.1 Present position*

At present there is no statute which expressly governs and regulates international commercial arbitration in South Africa. Therefore the parties normally choose to make the UNCITRAL Model Law applicable on their arbitration.

### *6.4.2 Possible future position: Draft International Arbitration Bill*

The SALC has drafted the *Draft Bill on International Arbitration* which, when it is promulgated, will govern and regulate international commercial arbitration in South Africa. The *Draft Bill* has expressly stipulated provisions regarding the following:<sup>403</sup> the application thereof;<sup>404</sup> party autonomy;<sup>405</sup> and the recognition and enforcement of foreign arbitral awards.<sup>406</sup> Furthermore, the *Draft Bill* aims to encourage the use of arbitration as an alternative dispute resolution method in the international commercial arbitration sphere.<sup>407</sup> This in turn will contribute to the goal of UNCITRAL to harmonise and unify international commercial arbitration. The *Draft Bill* creates more clarity and certainty for parties as it stipulates when it will be applicable. Moreover, it expressly stipulates that the *SA Arbitration Act* (regarding domestic arbitration) will be based on the UNCITRAL Model Law and will not be applicable to any arbitration matter which will be subject to the *Draft Bill*.<sup>408</sup> Thus, the parties will have clarity as to the relevant legislation that will be applicable.

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403 When compared to the UNCITRAL Model Law.

404 S 1 *Draft Bill*.

405 S 10 *Draft Bill* stipulates, for example, that parties will be free to agree that the arbitral proceedings will be consolidated.

406 S 18 *Draft Bill*.

407 S 1(a) *Draft Bill*.

408 S 1(b), 3(1), 6 *Draft Bill*.

The Draft Bill, however, does not contain all of the above mentioned provisions of the UNCITRAL Model Law. Provisions regarding, for example: interim measures, court intervention, the number of arbitrators and provisions regarding the arbitral tribunal. It could, therefore, be advised that the SALC look further into the composition of the *Draft Bill* to ensure that it contains all the important provisions that will in turn contribute to the effectiveness of the *Draft Bill*.

## **6.5 UNCITRAL Model Law versus South African domestic position**

### **6.5.1 Present position: SA Arbitration Act**

The domestic regime doesn't place a great degree of importance on a clear "reference to arbitration" - which should be contained within the arbitration agreement found between the parties. The UNCITRAL Model Law places great importance thereon that consent should be reached between the parties regarding the dispute resolution method and applicable law to govern the arbitration procedure.<sup>409</sup> Furthermore, the term "arbitration" is not defined in the *SA Arbitration Act*, whereas the UNCITRAL Model Law expressly defines it in article 2(a). The fact that this term is expressly defined in the Model Law ensures that there is no confusion for the parties involved in a possible arbitration dispute. Moreover, the UNCITRAL Model Law's provisions contain more detail as opposed to the *SA Arbitration Act*.<sup>410</sup>

Regarding application of the *SA Arbitration Act*, the Act stipulates the circumstances when it will not be applicable (matters which will not be subject to arbitration).<sup>411</sup> The Act also has expressly stipulated provisions regarding the following:<sup>412</sup> the independence of the

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409 The UNCITRAL Guide section 3(C)(2) par 48.

410 The UNCITRAL Model Law refers to a greater deal of provisions that relates to the most essential key factors and steps in arbitration proceedings.

411 S 2 *SA Arbitration Act*.

412 When compared to the UNCITRAL Model Law.



arbitration agreement, including its binding effect;<sup>413</sup> the number of arbitrators;<sup>414</sup> the powers of the arbitral tribunal;<sup>415</sup> and lastly, the binding effect of the award made.<sup>416</sup>

#### *6.5.2 Possible future position*

For the *SA Arbitration Act* to be more effective it is clear that certain changes have to be made. Furthermore, these changes have to be made irrespective whether the *SA Arbitration Act* will or will not be based on the UNCITRAL Model Law. Firstly, a greater degree of clarity and certainty must be created in terms of the application of the Act (will it be applicable on international and domestic commercial arbitration or just on the latter). It will be important that the Act expressly defines certain terms, for example, “arbitration”. Although the Act stipulates the powers of the arbitral tribunal, it does not contain provisions regarding the power of the arbitral tribunal to rule on its own jurisdiction. Moreover, the present Act also does not make any express and clear reference to the power to provide interim measures by the arbitral tribunal or the court.<sup>417</sup> The Act does not contain any provisions regarding the enforcement of awards. It does, however, stipulate that the award must be in writing and that it will be binding. Therefore the Act needs to have provisions stipulating when and how awards can be enforced.

Limited court intervention is a factor which is considered to be of great importance concerning arbitration. The Act, however, does not contain a provision which limits the intervention of the court. For the Act to be considered more attractive by parties, it can be suggested that such a provision be added to it. One of the key factors of arbitration is that it is

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413 S 3 *SA Arbitration Act*.

414 S 9 *SA Arbitration Act*; The number of arbitrators shall be one, unless otherwise stipulated by the parties in the arbitration agreement.

415 S 14 *SA Arbitration Act*.

416 S 28 *SA Arbitration Act*.

417 S 21(1)(f) *SA Arbitration Act* does make reference to the court’s power to grant an “interim interdict or similar relief” but no specific reference is made to the granting of interim measures.

different from litigation, but if the court has unlimited intervention this distinction is lost. Another important factor, embodied in the UNCITRAL Model Law which is not referred to in the Act, is party autonomy.

The SALC proposed in its 2001 Report that a statutory duty should be imposed on the arbitral tribunal that should be contained in the new *Draft Bill*. This statutory duty will have the effect that the tribunal will have the duty to adopt procedures that will be fair, cost-effective and will avoid unnecessary delay during arbitration proceedings.<sup>418</sup> Therefore, the arbitral tribunal will have increased powers to perform their duties.<sup>419</sup>

## **6.6 Conclusion regarding Australia**

### *6.6.1 International regime*

The simultaneous reform of Australia's international and domestic commercial arbitration legislation contributes to UNCITRAL's main goal of harmonising international trade. The 1974 IAA was already considered to be an effective international arbitration act. With the reform and update thereof (in accordance with the 2006 UNCITRAL Model Law), it is now even more effective. This contributes to the fact that Australia is a country that wants to be taken seriously with regard to international commercial arbitration practice.

### *6.6.2 Domestic regime*

The 2010 CAA is a great improvement on the 1984 CAAs as the former is based on the UNCITRAL Model Law. Although the 2010 CAA is based on the UNCITRAL Model Law, it contains provisions that differ from the Model Law, which ensure that it's more appropriate to domestic

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418 SALC 2001 Report "Summary of Recommendations".

419 These powers include to rule on own jurisdiction, to depart from the ordinary rules pertaining to evidence, to decide if an oral hearing should take place and limited powers to order interim measures in certain circumstances; SALC 2001 Report "Summary of Recommendations".

commercial arbitration. It therefore also contains all the relevant important provisions found in the Model Law. The 2010 CAA also includes provisions that state in what manner certain Model Law provisions differ from provisions found in the 2010 CAA.

## **6.7 Conclusion regarding South Africa**

### *6.7.1 International regime*

By basing the *Draft Bill* on the UNCITRAL Model Law, this will enhance South Africa's position as a venue for international commercial arbitration. More clarity and certainty will also be created for foreign parties as they will be familiar with the UNCITRAL Model Law. Certain provisions contained in the Model Law are, however, not contained in the *Draft Bill*.

### *6.7.2 Domestic regime*

For arbitration to be considered as fast and effective there have to be clear rules of procedure that will govern the arbitration proceedings. The *SA Arbitration Act* does not embody all the necessary provisions, as embodied in the UNCITRAL Model Law, to ensure that arbitration governed by this Act will indeed be fast and effective. Therefore, although the SALC does not wish to base the domestic arbitration regime on the UNCITRAL Model Law, it will be wise to use the Model Law as a reference point to ensure that all the important provisions will be contained in the reformed *SA Arbitration Act*. This will ensure that South Africa's domestic arbitration will be more effective.

## CHAPTER 7

### FINAL CONCLUSIONS

#### ***7.1 The progressive growth of international trade***

With the increase of globalisation in the world and the development of international commerce and trade, arbitration, as an alternative dispute resolution method, has flourished. However, to date there are still many developing countries with reservations as to the development of international trade and international arbitration. Their reasons may not all be known and some may even be reasonable, for example, the fact that they do not have sufficient resources, information or knowledge to accommodate this development. Even so, none of them can argue and fight against the ongoing change and development of international trade as it is a process that will continue to develop as the world as a whole develops and this cannot be stopped. Countries wishing not to acknowledge this fact will soon come to realise that they are being left behind and that the rest of the world will choose not to have international relations with them.

The UNCITRAL Model Law has shown to have had a considerable impact and favourable improvement on international commercial arbitration throughout the world.<sup>420</sup> This in turn contributes to the harmonisation of international law as parties have been shown to be open to the idea of utilising so-called “soft law” such as the UNCITRAL Model Law.

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420 Nottage *Sydney Working Paper* 6 2.

## **7.2 Expectations of good international commercial arbitration legislation**

For international commercial arbitration to be considered good, acceptable and effective, certain conditions have to be met.<sup>421</sup> First of all, it has to be of good quality and should offer effective and suitable solutions for arbitration matters. Secondly, it has to meet international expectations regarding international commercial arbitration and thus, it has to cater for the needs of parties flowing out of international trade.<sup>422</sup> Thirdly, it has to be easily recognised and understood by the foreign parties. Lastly, it will also be of great advantage if a country's international commercial arbitration is more or less similar to the arbitration legislation used by other countries: if globally accepted principles are used by many countries, it will contribute to the uniformity and harmonization of international trade law.

Modern arbitration legislation contains certain characteristics: a provision that the dispute must be heard and resolved by an impartial arbitral tribunal; provisions pertaining to the balanced powers of the courts subject to limited interference; and provisions pertaining to the powers of the arbitral tribunal to resolve the reference to arbitration effectively.<sup>423</sup> The primary objectives of modern arbitration legislation are considered to be the following: fair resolution of disputes; an impartial and independent arbitral tribunal; party autonomy; fast and inexpensive dispute resolution; balanced (and somewhat limited) powers pertaining to the courts and adequate powers pertaining to the arbitral tribunal.<sup>424</sup>

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421 Herrmann 1998 *Uniform Law Review* 487.

422 These expectations include the fact that foreign parties will expect a country's arbitration legislation to be up to date and to reflect the present global standard pertaining to international commercial arbitration.

423 SALC Discussion Paper 83 3.

424 SALC 2001 Report "Summery or Recommendations".

### **7.3 South Africa as favourable international arbitration venue**

It has been submitted that it would be unsafe to select South Africa as the venue for an international commercial arbitration dispute as “arbitration undermines judicial transformation in South Africa”<sup>425</sup> and the fact that the South African government has been lax regarding the SALC’s 1998 Report, which contains recommendations as to the reform of South Africa’s domestic and international arbitration legislation. Many parties are also of the opinion that the South African courts are likely to interfere with the arbitral process if the arbitration is to be conducted in South Africa, as the government has not been eager to adopt the UNCITRAL Model Law, which only permits interference from the courts in certain limited circumstances.<sup>426</sup>

The adoption of the UNCITRAL Model Law for international commercial arbitration in South Africa will not ensure that South Africa will become a favourable venue for international arbitration matters – more has to be done. South Africa as a favourable venue also depends on the country’s physical infrastructure and the availability of skilled legal practitioners who are experts in the field of international commercial arbitration.<sup>427</sup> Moreover, skilled arbitrators will also be needed.

### **7.4 Lessons to be learned from Australia**

Australia is a good example to follow for South Africa with regard to arbitration matters as Australia is considered to be one of the leading countries in the world regarding arbitration practice. One good point of view to be taken (and utilised) from Australia’s reform, is the fact that they maintain that as they are reforming their international arbitration legislation, it would be wise to reform their domestic arbitration

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425 Brand & Wewege 2009 *PLC Arbitration* 1.

426 Brand & Wewege 2009 *PLC Arbitration* 5-6.

427 SALC 1998 Report 123-124 par 2.279.

legislation at the same time as well.<sup>428</sup> This contributes to the harmonisation of Australia's arbitration legislation.

Australia has years of experience regarding arbitration practices and as such, has taken into consideration what practice is efficient and what not. Although it would be wise to learn from a developed country as Australia, South Africa's own background and characteristics should be taken into consideration. A good practice to follow is the fact that Australia puts an emphasis on the fact that international commercial arbitration legislation should be kept separate from domestic commercial arbitration legislation. It would be more efficient to have separate arbitration legislation, each containing specific provisions relating to the different spheres.

As stated in Chapter 6, the positive influence the UNCITRAL Model law has had on the reform of Australia's domestic commercial arbitration must be kept in mind during the reform of South Africa's domestic commercial arbitration legislation.

### ***7.5 The possibility of reform and adoption of new legislation in South Africa: the path which South Africa should follow***

It has been suggested that the reform of arbitration procedure should focus more on the role of the arbitrator and the nature of arbitration than the role of the courts and possible changes of court-based procedures.<sup>429</sup> Reform reflects the competitive side of countries: countries are reforming and amending their national and international commercial arbitration disputes so as to be the more favourable choice of seat of arbitration and legal system and, furthermore, to attract more arbitration matters and business.<sup>430</sup>

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428 Jones "Adopting the UNCITRAL Model Law" 8.

429 Berger 1994 *SA Merc LJ* 256.

430 Cremades and Cairns 2002 *J.W.I.* 178.

It is all well and good that numerous countries are reforming their arbitration legislation and adopting and incorporating new practices, principles and rules into their arbitration legislation, domestically and internationally, but this leaves certain problems, for example, diversity and non-conformity.<sup>431</sup> Even with the UNCITRAL Model Law's progressive growth, these disparities and problems are not easily overcome. Even though adaptation is something positive and reflects a growing economy.<sup>432</sup>

The adoption of some of the SALC's recommendations (not all of the recommendations) will be beneficial to both domestic and international arbitration in South Africa.<sup>433</sup> The one recommendation that is supported is the recommendation that there should be separate legislation with regard to South Africa's international and domestic arbitration legislation. By containing all South African legislation applicable to international commercial arbitration in one statute and all South African legislation applicable to domestic commercial arbitration in another statute, it will ensure clarity and certainty for users as they will only have to refer to one statute and not worry about any other possible pitfalls in other legislation.<sup>434</sup> Therefore, the suggestion of the SALC that South Africa's domestic and international arbitration legislation should be kept separate can be seen as wise as this would exclude any possible confusion.<sup>435</sup> The recommendation that is, however, not supported, is the recommendation that South Africa's domestic arbitration should not be based on the UNCITRAL Model Law.

Although the SALC's view is supported with regard to the fact that South Africa's domestic arbitration legislation should be investigated and reformed separately from its international commercial arbitration, it would be wise to reform both regimes (international and domestic) at the same

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431 Robine 1996 *Int'l Bus. L.J* 163.

432 Cremades and Cairns 2002 *J.W.I.* 209.

433 Brand & Wewege 2009 *PLC Arbitration* 5.

434 SALC 1998 Report 45 par 2.32.

435 SALC 1998 Report 45 par 2.32.



time. It would not be considered to be efficient if one part of South Africa's arbitration legislation is reformed to conform to international arbitration practices and the other part is left behind to be deemed outdated. If the reform of both spheres of legislation is undertaken in one action, they could contribute to the reform of one another.

Therefore, after careful consideration of the SALC's 1998 Report, South Africa's present position, international practices and Australia's reform, the appropriate path for South Africa to follow with regard to the reform of its arbitration legislation is considered to be the following: the adoption of the UNCITRAL Model Law for both international and domestic commercial arbitration legislation and keeping the international and domestic regimes separate in separate legislation. This will have the effect that South Africa will have a dualistic system regarding arbitration legislation.

The reformed *SA Arbitration Act* will thus be based upon the UNCITRAL Model Law, with certain modifications and will be subject only to domestic commercial arbitration matters. Therefore, the legislation pertaining to international commercial arbitration will exclusively be applicable to international commercial arbitration matters, which in turn will also be based on the provisions of the UNCITRAL Model Law. Lastly, it is important that South Africa does not deviate from the UNCITRAL Model Law to much as it can harm South Africa's standing and status in the international trade sphere and this could negatively influence South Africa as a venue for international commercial arbitrations.<sup>436</sup>

## **7.6 End conclusions**

It is time for a reform of South Africa's arbitration legislation. It is time for South Africa to develop into the economic hub which it is meant to be

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436 SALC 1998 Report 40 par 2.12.

and to open its doors to international trade. By acknowledging globally accepted practices and rules, South Africa will contribute to the harmonisation and unification of international trade law. Reform of its arbitration legislation will improve its arbitration landscape on a domestic as well as international level. The UNCITRAL Model Law is considered as the standard against which other arbitration legislation in the world is evaluated.<sup>437</sup> Therefore, it is a good model and standard on which arbitration legislation can be based.

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<sup>437</sup> SALC 2001 Report par 1.18.

## APPENDIX 1 UNCITRAL MEMBER STATES

Algeria (2010)	Gabon (2010)	Nigeria (2010)
Armenia (2013)	Germany (2013)	Norway (2013)
Australia (2010)	Greece (2013)	Pakistan (2010)
Austria (2010)	Guatemala (2010)	Paraguay (2010)
Bahrain (2010)	Honduras (2013)	Poland (2010)
Belarus (2010)	India (2010)	Republic of Korea (2013)
Benin (2013)	Iran (Islamic Republic of) (2010)	Russian Federation (2013)
Bolivia (Plurinational State of) (2013)	Israel (2010)	Senegal (2013)
Bulgaria (2013)	Italy (2010)	Serbia (2010)
Cameroon (2013)	Japan (2013)	Singapore (2013)
Canada (2013)	Kenya (2010)	South Africa (2013)
Chile (2013)	Latvia (2013)	Spain (2010)
China (2013)	Lebanon (2010)	Sri Lanka (2013)
Colombia (2010)	Madagascar (2010)	Switzerland (2010)
Czech Republic (2010)	Malaysia (2013)	Thailand (2010)
Ecuador (2010)	Malta (2013)	Uganda (2010)
Egypt (2013)	Mexico (2013)	United Kingdom of Great Britain and Northern Ireland (2013)
El Salvador (2013)	Mongolia (2010)	United States of America (2010)
Fiji (2010)	Morocco (2013)	Venezuela (Bolivarian Republic of) (2010)

France (2013)	Namibia (2013)	Zimbabwe (2010)
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The above countries are the present sixty member States of UNCITRAL, as from 25 June 2007, and whose membership expires respectively in 2010 or 2013.<sup>438</sup>

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<sup>438</sup> See <http://www.uncitral.org>.

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