A new ‘UNCITRAL Model Law on International Commercial Adjudication’…. How beneficial could it be?

Abstract

The United Nations Commission on International Trade Law (UNCITRAL) has promoted Alternative Dispute Resolution (ADR) as an alternative to litigation, being the traditional method of resolving disputes. The Commission has discussed, and continues to discuss, the development of a UNCITRAL Model Law on International Commercial Adjudication, for in particular the international construction industry. This paper seeks to consider what benefit this additional Model Law could provide.

Peter O'Malley - November 2020

1. Introduction

In 1966 the United Nations General Assembly, as the central legal body of the United Nations (UN), founded the United Nations Commission on International Trade Law (UNCITRAL),[1] comprising 60 member states on a rotational membership basis. UNCITRAL (the Commission) was established in recognition that the ódisparities in national laws governing international trade created obstacles to the flow of tradeô[2] In response to an increasing expansion of the global economy, the mandate of the Commission is to ófurther the progressive harmonisation and modernisation of the law of international tradeô[3]

The Commission has promoted Alternative Dispute Resolution (ADR) as an alternative to litigation, which is considered to be time consuming, expensive and exposed to public scrutiny. Litigation has limited effect in international disputes, in the absence of any bilateral or multi-lateral enforcement treaties, because any judgment will only be enforceable within the state of the litigation.

ADR has been described as the órange of dispute resolution processes that may be used as an alternative to litigationô[4] The motives for pursuing ADR, instead of litigation, can be summarised as ó(a) finding more efficient ways of resolving disputes, (b) finding processes where parties have more control of the process and the outcome, (c) finding ways to relieve court congestion, (d) finding more ñjustòways of resolving disputes than the traditional adversarial system and (e) finding ways of involving the community to a greater extent in conflict settlementô[5] The range of ADR processes includes Negotiation, Mediation, Conciliation, Ombudsman, Expert Determination, Early Neutral Evaluation, Mini-Trial, Dispute Boards, Adjudication and Arbitration,[6] together with sub-variants such as Med-Arb.[7]

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1 UNCITRAL was established on 17 December 1966 through Resolution 2205(XXI) of the United Nations General Assembly.

2 https://uncitral.un.org/en/about at ôOrigin, Mandate and Compositionô, accessed 13.09.2020.

3 n2 at ôAbout UNCITRALô.

4 Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* 5th edition, (2018) Oxford University Press, at Preface.

5 *ADR, Arbitration and Mediation – A Collection of Essays*, edited by Julio Betancourt and Jason Crook (2014), Chartered Institute of Arbitrators, at Chapter 1, Karl J.Mackie, p. 29.

6 The necessity for brevity in this paper precludes explanation of the characteristics of each dispute resolution process. There are many papers, reports, books and references for this information available from authorities such as the Chartered Institute of Arbitrators at https://www.ciarb.org/disputes/ accessed 24.09.2020.

7 Med-Arb is the process of first seeking a facilitated settlement between the parties. If this fails the dispute continues to arbitration where the parties submit their dispute to a binding decision imposed by the arbitrator.

All of these methods and their sub-variants can be divided into two categories. The first category is characterised as a consensual decision determined by the parties. The second category is characterised as a decision imposed upon the parties by a third-party neutral. These two distinct categories of dispute resolution are already facilitated by the Commission through the UNCITRAL Model Law on International Commercial Mediation (2018)[8] and the UNCITRAL Model Law on International Commercial Arbitration (2006).[9] Common to both Model Laws is the agreement between the parties to determine their disputes within the bounds of private contract, rather than availability by right through state legislation. Because the two primary categories of decision making, consensual between the parties or imposed by a third party are already available, what further benefit could be derived through a new UNCITRAL Model Law on International Commercial Adjudication?

2. Discussion

Adjudication, apart from its generalised meaning of 'the legal process of resolving a dispute'[10] is seen as an expedient dispute resolution process specific to the construction industry, particularly in common law jurisdictions.[11] The Commission recognises that adjudication 'is a mechanism whereby parties can refer a dispute to an independent party who is then required to make a decision in a limited time frame'[12] where the decision 'remains binding until any further consideration of the matter in dispute in subsequent arbitration or litigation'[13]

The popularity of adjudication in a limited number of jurisdictions is generally credited to the UK Latham Report of 1994[14] where the recommended principles of

[8] UNCITRAL, *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* (2018) amending the Model Law on International Commercial Conciliation 2002.

[9] UNCITRAL, *Model Law on International Commercial Arbitration* (1985), with amendments as adopted in 2006.

[10] Black's Law Dictionary, editor in chief Bryan Garner, 5th pocket edition, Thomson Reuters, at p. 17.

[11] Malaysia, 'The Construction Industry Payment and Adjudication Act 2012'; Australia, 'Building and Construction Industry Security of Payment Act' 1999 to 2009; New Zealand, 'Construction Contracts Act 2002'; Singapore, 'Building and Construction Industry Security of Payment Act (Cap 30B) 2004'; Ireland 'Construction Contracts Act 2013'; Canada 'Construction Act and Ontario Regulation 306/18. In addition, statutory adjudication has been actively considered in Hong Kong, South Africa and Germany.

[12] UNCITRAL, *Working Group II (Dispute Settlement)* 69th Session at 2. Adjudication 38 at p. 10.

[13] n12 at p. 10.

[14] Sir Michael Latham, *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry*, Final Report (1994), HMSO.

adjudication were integrated into the HGCRA 1996.[15] In this regard the Commission has acknowledged that ócertain States have developed legislation on adjudication, in order to establish a right to adjudicateô[16]

The Commission defines a Model Law as being óa legislative text that is recommended to States for enactment as part of their national lawô[17] It considers a Model Law to be óan appropriate vehicle for modernization and harmonization of national laws when it is expected that States will wish or need to make adjustments to the text of the model to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary or desirableô[18]

The Commission has considered developing Model Law provisions on adjudication in recognising the need for ósurgent resolution of disputes through summary proceedingsô[19] and ón particular with respect to the enforcement of the interim decision by the adjudicatorô[20] In 2018 the Commission, with reference to the construction sector, further noted that óadjudication would facilitate use of a particular tool that had demonstrated its utility in efficiently resolving disputes in a specific sectorô[21] Later in 2019 the Commission again considered that ócontractual clauses could be developed to facilitate the broader use of adjudicationô[22]

It is clear that the Commission, in being consistent with its mandate, considers there could be future benefit in the development of adjudication on an international basis. In this regard the Commission has identified the need for the urgent and efficient resolution of disputes, particularly in the international construction sector, which could be met through a new Model Law on International Commercial Adjudication.

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[15] More correctly being the Housing Grants, Construction and Regeneration Act 1996 as amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009 and the Scheme for Construction Contracts (England and Wales) Regulations 1988 (Amendment) (England) Regulations 2011.

[16] n12 at p.10.

[17] *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (2013), UNCITRAL Secretariat, United Nations, Vienna at S. 37, p. 14.

[18] n17 at S.38, p.14.

[19] UNCITRAL *Report of the United Nations Commission on International Trade Law,* 50th Session at 265, p. 47.

[20] n19 at p. 47.

[21] UNCITRAL *Report of the United Nations Commission on International Trade Law,* 51st Session at 245, p. 42.

[22] n12 at p. 10.

Contractual adjudication was established in the UK from the late 1970ôs onwards,[23] but ôthe extent to which these provisions had been used is unknownô[24] The later and more modern form of statutorily imposed adjudication has grown in popularity across a number of jurisdictions since its introduction in the UK through the HGCRA 1996 nearly 25 years ago. Adjudication has been described as a ôtemporary resolution of disputes by one, or more, adjudicators, such that it is binding upon the relevant contract parties, until it is finally resolved by the partiesô chosen method of final dispute resolution, usually arbitration or litigationô[25] Adjudication has attracted criticism due to a ôstatistical bias in favour of claimants in adjudication and the difficulty of achieving fairnessô[26] in the short period in which the decision is made, usually 28 days.

The essential difference between arbitration and adjudication is that whilst both have the common attribute of a decision being imposed by a neutral third party, the former is binding whilst the latter is only temporarily binding. That is to say that upon the issue of an adjudicatorôs decision the unsuccessful party has an obligation to perform in accordance with the decision, but also has the right to challenge the decision. The temporarily binding nature of adjudication, whilst allowing for speed, also provides the safety valve to correct what could be an unjust decision without recourse, in order to avoid ôrough justiceô[27]

Further commentary on adjudication was provided in 2005 when Chadwick LJ stated that ôthe adjudicatorôs task was simply to find an interim solution that met the needs of the case, and that the need to have the ñright answerò had been subordinated to the need to have the right answer quicklyô[28] Notwithstanding differing opinions on the success or efficacy of adjudication, it is recognised in all jurisdictions where it is established as being an expedient method of resolving construction disputes. At the beginning of the process the end is within sight with a decision made in a short time, which is rarely the case in arbitration. Being primarily imposed by statute through

[23] It is considered that the first introduction of adjudication into a standard construction contract was in the Joint Contract Tribunal (JCT) óGreen formô of Nominated Sub-Contract in 1978 under the 1963 main contract, previously known as the RIBA Contract. A new Clause 13B was added óContractors claims not agreed by the Sub-Contractor ï appointment of an Adjudicatorô.

[24] John Riches and Christopher Dancaster, *Construction Adjudication*, 2nd edition (2004) at p.2.

[25] Andrew Burr, *International Contractual and Statutory Adjudication* (2017) at p.xv.

[26] n35 at p.xvi.

[27] A term originally used in the context of adjudication by Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] 23 EWHC Technology 254.

[28] *Carillion Construction v Devonport Royal Navy Dockyard* [2005] EWCA Civ.1538 [2006] BLR 15.

the right to adjudicate, the majority of adjudication cases rely on statutory, rather than party-agreed provisions. It follows that adjudication requires the domestic courts in the jurisdiction that the dispute takes place to support the process.

It has been said of adjudication in the UK that 'the mandatory and expedited nature of the process were the principal reasons why it was catapulted to the number-one method of dispute resolution in the construction industry no more than a year after the 1996 Act was passedô[29] In jurisdictions where adjudication has become established [30] the construction industry and the courts have made an investment of up to 20 years, or more, through the continued development of jurisprudence.[31] As statutory adjudication has been implemented within individual jurisdictions, the same principle of a temporarily binding decision has been consistently established, with minor differing provisions.[32] These minor differing provisions reflect the degree of control that each state has sought to exert over the adjudication process or the industry representations that took place during the passage of the legislation.[33]

For those jurisdictions that have yet to implement adjudication a new UNCITRAL Model Law on International Adjudication, adopted either in part or in whole, will assist in providing a template for national legislation. It is likely that any new Model Law on International Commercial Adjudication would seek to follow the same international principle as the Model Law on International Commercial Arbitration which makes no distinction between óforeignôand ódomesticôprocedures. The Model Law on arbitration states that óthe recognition and enforcement on óinternationalô awards, whether ñforeignòor ñdomesticò, should be governed by the same provisionsô,[34] thus being beneficial in both consistency and clarity.

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[29] James Pickavance, *A Practical Guide to Construction Adjudication* (2016) at p.3.

[30] England, Wales and Scotland, 1 May 1998; Northern Ireland, 1 June 1998; Australia, between 1999 and 2009; New Zealand, 1 April 2003; Singapore, 1 April 2005; Malaysia, 15 April 2014; Ireland, 25 July 2016; Canada in the State of Ontario, 1 October 2019.

[31] The investment in Statutory Adjudication in the UK is illustrated in the opinion that ó in the first 10 years from enactment it generated the equivalent of roughly 100 years of case lawô, attributed to Coulson J in James Pickavance, *A Practical Guide to Construction Adjudication* (2016) at p.7.

[32] For example in the HGCRA 1996 Act at Section 108(1) includes ó the right to refer a dispute arising under the contractô, whereas the Irish Construction Contracts Act 2013 is more restrictive at Section 6.-(1) where there is ó the right to refer for adjudication in accordance with this section any dispute relating to payment arising under the construction contractô.

[33] As illustrated by the exemptions in the HGCRA 1996 at Section 105(2) in respect of the exclusion of the production of chemicals, pharmaceuticals, oil, gas, steel or food and drink.

[34] Explanatory note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration, as amended in 2006, at note 50 at p. 36.

Notwithstanding the availability of statutory adjudication in a limited number of jurisdictions, contractual adjudication may be available to parties internationally through their contractual agreement, as in the International Federation of Consulting Engineers (FIDIC) standard construction contract forms.[35] The concept of a Dispute Adjudication Board (DAB), as a dispute resolution mechanism, was first introduced in the FIDIC Orange Book in 1995 and then across the 1999 Red, Yellow and Silver books.[36]

However, the DAB process in the 1999 FIDIC suite received criticism because it could be manipulated by a recalcitrant party to its benefit, usually the employer. This occurs where a Notice of Dissatisfaction (NOD) is served and as a result the DAB decision becomes binding but not final.[37] Dispute Boards are not derived from statute but from the contract between the parties. Therefore, the decisions arising from these adjudications will be "grounded in the law of the country in which the contract is executed".[38] As a result, the "law of the relevant country ultimately governs the execution of the DAB's decision".[39]

Contractual adjudication in the event of non-compliance is limited in recourse to the support of the court of a single jurisdiction. Reflecting the difference in law between jurisdictions it is not surprising that there have been differences and inconsistencies in how adjudication decisions have been treated. Where court support has been sought there have been differing interpretations of contractual clauses[40] "leading to jurisdictional pitfalls and enforcement difficulties".[41]

There has been and continues to be debate as to the enforceability of a DAB adjudication decision, particularly in the absence of clear contractual provision.

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[35] For example the FIDIC (Federation Internationale des Ingenieurs-Conseils) Red Book: Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, 1st edition (1999)

[36] The 1999 FIDIC suite of contracts comprises four different contract choices known as the Red Book for Building and Engineering works designed by the employer, The Orange Book for design and build works, the Green Book as the short form of contract and the Silver Book for turnkey contracts, where the Dispute Adjudication Board is included at Clauses 20.2 to 20.8.

[37] For a detailed explanation refer to the paper by Nael Bunni, "The Gap in Sub-Clause 20.7 of the 1999 FIDIC Contracts for Major Works" (April 2005).

[38] Nicholas Gould Nicholas and Christina Lockwood, "Dispute Boards", Renato Nazzini (ed.), *Transnational Construction Arbitration* 1st Edition (2018) at Chapter 13, p. 193.

[39] n38 at p. 193.

[40] In particular Clauses 20.4, 20.6 and 20.7 of the FIDIC 1999 first edition suite of contracts. Clause 20.4 states that prompt effect should be given to a DAB decision but it does not provide any clear enforcement mechanism to address non-compliance.

[41] n38 at p. 212.

Much of the continuing commentary on enforceability has been in connection with the Persero cases in Singapore (2010ï 2015) which have provided some guidance.[42] However, it has been said of the Singapore Courtôs majority, rather than unanimous, decision in support of adjudication decision enforcement that while ôthe ruling of the Court of Appeal may be binding in Singapore, its findings are certainly not definitive outside Singaporeô,[43] where ôfundamental issues remain open to debateô[44] and ôit is likely that other jurisdictions may well come to the opposite viewô[45] This has led to ôa multitude of competing options as to the correct way, if at all, to enforce a not final DAB decisionô[46]

In response FIDIC issued a guidance memorandum[47] in April 2013 with an amended Clause 20.7 that expressly provides for not final DAB decisions to be enforced through arbitration, being consistent with the temporarily binding decision of adjudication. The 2017 edition of the FIDIC suite of contracts,[48] whilst incorporating the April 2013 guidance wording, has sought to further rectify this situation through the introduction and emphasis on dispute avoidance.[49] This emphasis on avoidance is facilitated by a Dispute Avoidance and Adjudication Board (DAAB) as a first priority in seeking an amicable settlement to disputes without recourse to adjudication. The more considered approach to dispute avoidance, and adjudication if necessary, of the FIDIC 2017 edition seeks to ensure that parties are more likely to accept an adjudication decision as a final solution.

Whilst in the majority of contracts the unsuccessful party will comply with an adjudicatorôs decision, in accordance with procedures such as those promoted by FIDIC, this is not always the case. Where the parties to a contract are from two

[42] The ôPerseroô cases are *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202 and *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33, known as Persero 1, then *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2014] SGHC 146 and *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGHC 30, known as Persero 2.

[43] Taner Dedezade, ôEnforcement of DAB decisions under the FIDIC 1999 Forms of Contractô, Renato Nazzini (ed.), *Transnational Construction Arbitration* 1st Edition (2018) at Chapter 14, p. 247.

[44] Gerlando Butera, ôThe Persero Sagaô, *DRBF Forum*, Volume 19, Issue 2, June/July 2015, at p. 14.

[45] Nael Bunni, Colin Ong and Michael OôReilly, ôThe Enforcement of Dispute Adjudication Board Decisions: *Persero* and the FIDIC Standard Form of Contractô, Arbitration (2015), at p. 374.

[46] Fenwick Elliott, *The 2017 FIDIC dispute resolution procedure: Part 2*, at p. 3.

[47] FIDIC (Federation Internationale des Ingenieurs-Conseils), *Guidance Memorandum to Users of the 1999 Conditions of Contract,* dated 1st April 2013.

[48] FIDIC (Federation Internationale des Ingenieurs-Conseils) Red Book: Conditions of Contract for Construction, 2nd edition (2017).

[49] The FIDIC 2017 second edition suite of contracts at Clause 21.3.

different jurisdictions and the project is being undertaken in a third jurisdiction the risk of non-compliance with an ADR decision, as in adjudication, will increase.

It has been said that compliance depends on the ódesire to resolve the dispute and the cultural context of the projectô[50] This position, shared with statutory adjudication being specific to a single jurisdiction, illustrates the difficulties that have arisen in cross jurisdictional interpretation, resultant lack of consistency and limited ability for court support in enforcement outside the jurisdiction of the contract. A new Model Law would provide a more consistent approach to statutory adjudication, where not currently available. In addition, a new Model Law could provide a more consistent approach to contractual adjudication, but it is unlikely to be able to provide certainty of cross-jurisdictional enforcement.

In a recent 2019 survey, respondents confirmed that parties did not voluntarily comply with pre-arbitral decisions in over 40% of instances,[51] representing a significant proportion. Furthermore, the óvast majority of respondents (67%) showed support for mandatory compliance with pre-arbitral decisions as a pre-condition to arbitrationô[52] where the respondents further expressed that ót is non-compliance which causes arbitrations to continueô[53]

An earlier 2018 survey confirmed that arbitration continues to be the ópreferred dispute mechanism for cross-border commercial disputesô[54] The survey advises that óparties are increasingly resorting to various forms of ADR in the hope that a swifter and more cost-efficient resolution can be found to disputes before having them resolved by arbitrationô[55] However, for arbitration it remains that ócost continues to be its worst featureô,[56] together with a ólack of speedô[57] A survey in 2011, albeit now dated, confirmed that the average cost for an international

[50] Queen Mary University of London and Pinsent Masons, *International Arbitration Survey – Driving Efficiency in International Construction Disputes* (2019), School of International Arbitration, at p. 18.
[51] n51 at p. 18.
[52] n51 at p. 19.
[53] n51 at p. 20.
[54] White & Case and Queen Mary University of London, *International Arbitration Survey: The Evolution of International Arbitration* (2018), at p. 5. At p.8 the survey confirms that 67% of respondents considered ócostô to be the worst characteristic of international arbitration with lack of speed cited by 34%.
[55] n54 at p. 5.
[56] n54 at p. 2.
[57] n54 at p. 2.

commercial arbitration, across all business sectors, was circa £1.35m, of which 63% was spent on external legal costs and 11% on the cost of barristers.[58] There is no reason to think that international commercial arbitration is any less expensive today. An indication of current cost can be determined using the International Chamber of Commerce (ICC) Cost Calculator.[59] The calculator advises that for a disputed amount of US$2,000,000, with one arbitrator and 2,000hrs of legal work, the Estimated Total Cost is likely to be circa US$613,000 for each party. Using the calculator for a disputed amount of US$20,000,000, with three arbitrators and 4,000hrs of legal work, the Estimated Total Cost increases to circa US$1,640,000 per party. This indicates that there is a minimum level of dispute where the cost of an international commercial arbitration may be justified.

The 2011 survey confirmed that the average time for an international commercial arbitration was 'between 17 and 20 months, depending on the nature of the dispute'[60] The London Court of International Arbitration (LCIA) reported in 2017 that the total average duration of an arbitration procedure was 16 months.[61] In 2019 the ICC reported that the average duration of arbitration proceedings was 26 months.[62] Given the correlation between time and cost, it is understandable that in the minds of many users international commercial arbitration has now outpriced itself.

It has been said that it is 'an expensive way of resolving disputes'[63] where it 'might not be commercially sensible to pursue disputes below a minimum threshold of US$ 11m'[64] There is now an established body of opinion that believes international commercial arbitration is now of a scale of cost and duration where it is only the very largest of disputes that can justify the associated level of expenditure. In this context there is a clear case for UNCITRAL considering adjudication to supplement arbitration as a further choice of Model Law in resolving small to medium-scale construction disputes.

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[58] *CIArb Costs of International Arbitration Survey 2011*, at p. 2, 10 and 15. The average cost being £1,348,000 in common law jurisdictions and £1,521,000 in civil law jurisdictions with claimants spending 12% more than respondents. The survey sample was from 254 international arbitrations where 25% of the disputes were in the construction and engineering sector.

[59] See https://www.international-arbitration-attorney.com/icc-arbitration-cost-calculator/ by the International Chamber of Commerce, for the 'Total ICC Cost Calculator', accessed 06.10.2020

[60] n58 at p. 12.

[61] London Court of International Arbitration (LCIA), *Facts and Figures, Costs and Duration*: 2013-2016

[62] International Chamber of Commerce (ICC), *2019 ICC Dispute Resolution Statistics*, at p. 17.

[63] n50 at p. 15.

[64] n50 at p. 15.

Whilst there is an increasing preference for pursuing ADR, this would seem conditional on the availability of arbitration as last resort. The 2018 survey confirmed that the two most valuable characteristics of international arbitration are enforceability of awards and avoiding specific legal systems/national courts.[65] These characteristics, although related to, are not derived from the UNCITRAL Model Law on International Commercial Arbitration, but from the unique presence of the New York Convention (the Convention),[66] for the enforcement of arbitral awards. The influence of the Convention cannot be overstated where it has been said that it is 'the touchstone of the entire system of international commercial arbitration. It is in practice the one truly international source of law in arbitration'[67]

The primary objective of the Convention is to provide 'common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards'[68] Accordingly, recognition and enforcement under the Convention 'applies to all foreign awards, that is, all awards made outside a treaty country, thus anywhere else in the world'[69]

The Convention is rendered more remarkable because its implementation, over a period of more than 60 years, is wholly reliant upon local courts in the 165 signatory states,[70] all of whom have 'diverse legal and cultural perspectives'[71] A fundamental tenet of the success of the Convention has been its narrow construct and interpretation by individual state courts, which cannot be underestimated.

This narrow interpretation allows justice to be dispensed and upheld where it is most appropriate, 'in order to ensure the efficacy and enforceability of international arbitral awards'[72] Although there is no single agreed definition of an award it is now well established internationally that an 'award' can only be made by an arbitral tribunal.

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[65] n54 at p. 7.
[66] United Nations Secretary General, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 1958.
[67] Pierre Karrier, *Enforcement of Arbitral Awards Globally*, 2005, International Arbitration Group, Littleton Chambers, London, at p. 1.
[68] n67 at p. 1.
[69] n67 at p. 2.
[70] Ethiopia has become the 165th state signatory to the New York Convention where the Convention will come into force on 22 November 2020.
[71] Berg, Albert Jan van den, *Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few* (1999) at p 75.
[72] n71 at p 94.

Accordingly, a ódecisionômade by an adjudicator or a DAB can never avail of the international, or cross-jurisdictional, enforcement capability of the Convention.

A possible solution to allow for adjudication enforcement could be to amend the Convention to provide for international adjudication. This approach is likely to be problematic in undermining the clarity of the existing Convention, as much of its success is accorded to its brevity, where the operative part of the Convention comprises only 16 Articles over 6 pages.[73] For the Convention signatories there is little incentive to complicate what is widely considered to be the continued success of the Convention in its present form. Furthermore, the securing of agreement for what would be a significant amendment to the Convention across the 165 state signatories could be considered to be almost impossible.

A second alternative would be to establish an additional convention to support a new Model Law on International Commercial Adjudication. This approach has been adopted for mediation[74] where the Singapore Convention[75] has sought to create a harmonised framework for the enforcement of international mediation settlement agreements. In 2014 UNCITRAL decided to consider the enforcement of settlement agreements in recognition that enforcement was difficult across international jurisdictions.[76] It took a further five years to develop the Singapore Convention to the point of being available for signature on 7 August 2019. Despite significant early interest only three nations have ratified the Singapore Convention.[77] The more nations that ratify the convention the more effective it will be in supporting the swift enforcement of cross-jurisdictional mediation settlement agreements. However, its successful widespread effect may be some way into the future.

It should be appreciated that mediation prior to the Singapore Convention already had the benefit of worldwide interest and was previously promoted through the UNCITRAL Model Law on International Commercial Conciliation (2002). This Model Law was then amended to become the UNCITRAL Model Law on International

[73] n66 at pp. 8-13.
[74] n.8.
[75] UNCITRAL, *United Nations Convention on International Settlement Agreements Resulting from Mediation* (2019), otherwise known as the Singapore Convention.
[76] UNCITRAL, *Report of the United Nations Commission on International Trade Law,* 47th Session, at p. 22.
[77] Although by January 2020 a total of 53 states including China and the United States had signed up for the convention it remains that only Singapore, Qatar and Fiji have ratified the convention as coming into force on 12 September 2020; neither the EU nor any of its member states have signed-up yet.

Commercial Mediation (2018). Thus the concept of a consensual decision made between parties in dispute, as opposed to being imposed by a third party neutral as in arbitration, had already been well established as a global dispute resolution process.

Adjudication in comparison is presently limited in use, or consideration of implementation, to less than ten nation states. It is unlikely that a new convention for the international enforcement of adjudication decisions would have the benefit of the same impetus for progress that was present for the Model Law on mediation. This is particularly so where the two concepts of consensual and third-party imposed decision making appear to be already adequately catered for. Even if widespread support could be secured with the development of a new Model Law for International Commercial Adjudication, it could take in excess of ten years to establish a new convention to support the enforcement of international adjudication.

In the absence of a new Model Law on International Commercial Adjudication the criticisms over time and cost with regard to arbitration remain, and it may be here that attention and resource should be directed. In the absence of an agreed resolution, arbitration provides an imposed solution that can be availed of by parties in dispute. Furthermore, in an international context, arbitration is critically supported by the New York Convention in providing for cross-jurisdictional enforcement.

However, arbitration is now a dispute resolution method that has become increasingly distant from those parties with small or modest claims. It has been said that ón recent years there has been a growing sense of frustration amongst businessmen involved in international arbitration, because of the lengthy delays involved in obtaining the hoped-for promised land of the arbitral tribunalôs awardô[78] For many users of international commercial arbitration the preference is to utilise arbitration in conjunction with another dispute method.[79] This approach is promoted in the FIDIC suite of contracts through their stepped dispute resolution clauses, where the objective is to secure resolution without the necessity for arbitration.

[78] Redfern, Alan and Hunter, Martin, *International Arbitration,* 6th edition (2015), at p. 361.
[79] n54 at p. 7.

There are already significant changes being implemented by arbitral institutions to acknowledge and accommodate the demand for small claims resolution.[80] The International Chamber of Commerce (ICC) has reported óthe increasing number of cases with an amount in dispute not exceeding US$2mô[81] In response the new ICC procedure referred to as óstreamlined arbitrationô[82] seeks to issue an arbitral award within six months of the first case conference.[83]

But in many cases six months will still be considered too long and remains an extended duration that demands considerable commitment and commensurate cost. It has been demonstrated that other dispute resolution methods such as mediation and conciliation can regularly reach decisions in much shorter periods of time, where the default decision time for adjudication in many jurisdictions is 28 days.[84] There are established methods to reduce the procedural time in arbitration, such as ówithout hearingôor ódocuments onlyô In this context it is not unrealistic to have, and to promote, an arbitral process conducted over 56, 84 or 120 days. These are substantially lesser time periods than 180 days, or six months, as presently provided by many leading arbitral institutions.

3. Conclusion

It is clear that adjudication has become a very successful dispute resolution mechanism within the context of primarily state legislation, or contract law, in a limited number of almost exclusively common law jurisdictions. Whilst the legislation differs between these jurisdictions a degree of consistency could be introduced by a new UNCITRAL Model Law on International Commercial Adjudication. The extent of adoption of the new Model Law where adjudication is already well established would depend on the identification of a compelling need to change existing legislation.

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[80] For example the ICC has established the Expedited Procedure Provisions (EPP) in seeking a proportionate resolution to the increasing number of cases with an amount in dispute of less than US$2m. ICC Dispute Resolution, 2019 Statistics at p.14.

[81] n62 at p. 12.

[82] n62 at p. 15.

[83] The UNCITRAL draft provisions on expedited arbitration where the overall period of time of arbitral proceedings under Expedited Arbitration Provisions shall be no longer than [12 months], 71st Session Working Group II (Dispute Settlement) 3-7 February 2020, Section 1 at p. 3. A similar provision of seeking to publish the award within six months has been adopted through the Hong Kong International Arbitration Centre (HKIAC), whilst the Dubai International Financial Centre (DIFC) is seeking to introduce expedited procedures in 2021. Most arbitral institutions now have an expedited procedure in place.

[84] In the UK, 53% of adjudication decisions were made within the 28-day period, with a further 33% issued within 42 days where the 14% remaining decisions were issued within 7 weeks, all within 6 months. Adjudication Society Report no. 18, *Construction Dispute Resolution*, at 2.6, p. 28.

Given the continued success of adjudication in these jurisdictions this compelling need for change may be difficult to identify. However, a new Model Law could be immediately beneficial for those jurisdictions that are presently considering statutory adjudication, but have yet to pass legislation, to assist in facilitating domestic adjudication as a further choice in dispute resolution.

Contractual adjudication, as promoted by the FIDIC suite of construction contracts, is presently available to parties in any jurisdiction. However, there continues to be doubt about the available remedy for non-compliance with an adjudication decision on a cross-jurisdictional basis. There is uncertainty about how effective the international enforcement objective of a new Model Law on adjudication could be.

Accordingly, it could be said that the possibility of amending the New York Convention to allow enforcement of adjudication decisions or the establishment of a new convention for adjudication would appear to be highly unlikely. This negative view of the reality of effective international adjudication is further accentuated by the context that the international legal and enforcement framework for the two concepts of consensual decision making [85] and imposed decision making [86] is already available. In the absence of a framework for international enforcement there is a risk that any new UNCITRAL Model Law on International Commercial Adjudication may in practical terms only serve to add further to the continually evolving body of disputology.[87]

Alternatively, a greater commitment by arbitral institutions to streamlined or fast-track arbitration, as a primary dispute mechanism, would meet the clearly expressed demand of the international construction industry for expedient dispute resolution. This demand could be accommodated within the framework of the Model Law on International Commercial Arbitration. In addition, parties in dispute would have the benefit of the overarching capability for international enforcement through the New York Convention, where this can be provided with the preservation of party

[85] n8.
[86] n9.
[87] ôStandard forms of international contracts produce a second layer of legal principles through their standard forms of contract, which are superimposed on the applicable law of the contract between the employer and the contractor. It is difficult and unhelpful for anyone to be involved in the solution of disputes arising from such contracts unless the person is very familiar with, if not an expert in, the areas and forms of disputology incorporated in them.ô Nael Bunni, ôRecent Developments in Construction Disputologyô, Journal of International Arbitration, 17 (2000) at pp. 105-115.

autonomy. There would be a clear benefit for parties in submitting to arbitration as an already established dispute resolution mechanism for international construction if it were made ómore fit for purposeôthrough greater expediency and reduced cost.

A new Model Law on International Commercial Adjudication would be beneficial to those jurisdictions that are considering its future introduction in reducing inconsistency and promoting good practice. However, a new Model Law for adjudication is likely to fall short in offering certainty of cross-jurisdictional enforcement as a fundamental requirement of international trade. This deficiency of benefit is apparent in consideration of the established presence of the existing Model Laws for International Commercial Mediation and Arbitration, together with their supporting Convention frameworks.

End.

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