

A proposal for international arbitration law in Namibia based on the UNCITRAL Model Law on International Commercial Arbitration

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SUMMARY

International business arbitration is not covered by Namibia's present arbitration law, the Arbitration Act 42 of 1965 (the Act). There is no explicit language in the Act that addresses foreign arbitration as the Act, solely by default, covers national or domestic arbitration. When it comes to international arbitration, the Act has many flaws. Modern commercial arbitrations are increasingly being guided by the Model Law on International Commercial Arbitration (MLICA) of UNCITRAL (the United Nations Commission on International Trade Law) or by state legislation that has been influenced by it. It is undeniable that Namibia must embrace MLICA, including the majority of the 2006 revisions of the MLICA, in order to participate in the global economic village. Furthermore, Namibia has not yet ratified the 1958-adopted New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA), which has been hailed as the most effective treaty governing global trade. This article suggests that Namibia should implement both the MLICA and the CREFAA. If this strategy is not adopted, businesses in Namibia will be hesitant to engage in international business transactions due to the lack of legal certainty that the New York Convention and contemporary domestic arbitration legislation bring.

Keywords: commercial arbitration law, Arbitration Act 42 of 1965, Namibia, International Commercial Arbitration

1 Introduction

The recent growth in international commercial arbitrations has been described as rapid and/or exponential.¹ In African arbitration, a crucial milestone has been reached. Africa-related commercial arbitration disputes have long kept lawyers busy in traditional arbitration centres,

1 Rigby "The explosive growth of international arbitration" *Commercial Dispute Resolution*, 22 August 2016 <https://www.cdr-news.com/categories/arbitration-and-adr/6643-the-explosive-growth-of-international-arbitration> (last accessed 2023-07-02).

but the market is shifting.² As the continent's number of arbitral centres grows rapidly, African lawyers are developing specific arbitration abilities to meet the demand.³ The major international arbitral centres, such as those in China, Singapore, and Hong Kong, have provided statistical evidence of the global growth of commercial arbitration in the world.⁴ One of the primary causes for the global development in commercial arbitration has been linked to China's thriving economy and/or commercial growth.⁵ China's economic expansion has led to the dramatic growth of international trade and the number of trade disputes handled through commercial arbitration.⁶ Arbitration is becoming increasingly common as commercial conflicts become more common. For example, in 2012, the Beijing Arbitration Commission heard 1473 new cases.⁷ In 2013, the Singapore International Arbitration Centre received 259 new cases, representing a 62 per cent increase from 2009.⁸ In 2014, the Hong Kong International Arbitration Centre received 252 new cases, 93 per cent of which were of an international nature, a 36 per cent increase from 2013.⁹ Therefore, it is plausible to argue that the major drivers of the growth in commercial arbitrations are: economic growth and an increase in cross-border trade and commerce; dissatisfaction with court litigation; and harmonisation of arbitration laws and procedures.¹⁰ Harmonisation of arbitration laws has been made possible by the following:

- (a) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards agreed upon at the United Nations Conference on International Commercial Arbitration held in 1958 in New York (hereinafter NY Convention).¹¹ The main aim of the NY Convention is to facilitate the recognition and enforcement of foreign arbitration agreements and awards in the same way as domestic arbitration agreements and awards;

2 Ostrove, Sanderson, Veronelli and Piper "Developments in African Arbitration" 2018 <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitrationreview/2018/article/developments-in-african-arbitration> (last accessed 2023-07-02).

3 As above.

4 Rigby "The explosive growth of international arbitration" Commercial Dispute Resolution, 22 August 2016 <https://www.cdr-news.com/categories/arbitration-and-adr/6643-the-explosive-growth-of-international-arbitration> (last accessed 2023-07-02).

5 As above.

6 As above.

7 As above.

8 As above.

9 As above.

10 As above.

11 The New York Convention (hereinafter referred to as the NY Convention) was prepared and opened for signature on 10 June 1958 by the United Nations Conference on International Commercial Arbitration, which was convened in accordance with Economic and Social Council resolution 604 (XXI) adopted on 3 May 1956. The convention contributes significantly to the improvement of the legal framework for international commerce by developing international legislative texts for use by States in updating international trade law, as well as non-legislative texts for use by commercial parties in negotiating transactions.

- (b) The Model Law on International Commercial Arbitration (MLICA) of the United Nations Commission on International Trade Law (UNCITRAL) 1985 as amended in 2006; and
- (c) UNCITRAL Arbitration Rules of 1976, revised in 2010, amended by the addition of article 1, paragraph 4, in 2013.

However, arbitration in disputes involving international businesses is not governed by Namibia's Arbitration Act 42 of 1965. There is no clear wording addressing foreign arbitration in the Act. When it comes to international arbitration, the Act is simply dated. Modern commercial arbitrations are increasingly being guided by the MLICA of the UNCITRAL as amended in 2018 or by domestic legislation that has been influenced by it. Namibia signed the 1958 NY Convention but has not yet ratified it or passed local laws making it enforceable, preventing Namibia from benefiting from the Convention.¹² Namibia lags behind many countries like Angola, South Africa, Botswana, the Democratic Republic of the Congo, Lesotho, Zambia, and Zimbabwe in this regard.

The MLICA was established to assist governments in updating and changing their domestic laws governing international arbitration in order to take into account the particular features and needs of international commercial parties to the arbitration. The MLICA is a crucial tool for achieving UNCITRAL's goal of harmonising global trade disputes through arbitration. The MLICA covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, and the extent of court intervention through to the recognition and enforcement of the arbitral award.

The MLICA's application and potential domestic legislative mechanisms available to Namibia are assessed in this article, along with the question of whether accession to the NY Convention should be with or without reservations. Reference will also be made to various approaches in selected jurisdictions (amongst them Botswana, South Africa, and Zimbabwe) about the adoption of the MLICA. The permitted reservations that a state that ratified the NY Convention may make are also briefly explained. The impact of the MLICA amendment from 2006, which streamlined the procedures for enforcing foreign awards through domestic legislation to give effect to a country's accession to the Convention would be taken into consideration. Finally, the Namibian legal framework for Namibia's ratification of international agreements and its implications for Namibia's membership in the NY Convention are discussed. Following that, recommendations on the form of Namibian legislation for the implementation of the MLICA and the 2006 modifications, as well as the principles on which conciliation legislation should be based, will be made. The article also makes recommendations for steps Namibia should take to ratify the NY Convention.

12 See arts 32, 40, 63, 143, and 144 of the Constitution of Namibia of 1990.

2 Contextual background on commercial arbitration

Arbitration is an adjudicative process, pursuant to a written agreement between the parties to refer their dispute specified therein to an independent and impartial tribunal, appointed by the parties, or on their behalf according to a method agreed by them, for a final decision which is binding on the parties.¹³ Commercial arbitrations in Namibia are regulated by the Arbitration Act of 1965. The Act makes provision for an arbitration tribunal. An arbitration tribunal is neither a court nor tribunal mentioned in article 12, nor an administrative tribunal contemplated in article 18, of the Namibian Constitution.¹⁴ When compared to the MLICA, Namibian arbitration law is weak and deficient. The South African Law Reform Commission has summarised Namibia's existing Arbitration Act, which is similar to South Africa's¹⁵ as having an excessive number of chances for judicial intervention, which can be utilised to delay the arbitration process; inadequate authority allocated to the arbitral tribunal to conduct arbitrations in a timely and cost-effective manner; and a lack of respect for party autonomy (the parties to commercial arbitration refer to people or businesses that have an arbitration agreement).¹⁶

3 Why should Namibia adopt the model arbitration law?

Namibia stands to benefit from adopting the MLICA as a model law for arbitration. This is attributed to the fact that the United Nations General Assembly (UNGA) encourages the development of peaceful international trade relations through MLICA, an arbitration model law that is acceptable to states with diverse legal, social, and economic systems.¹⁷ The MLICA is the result of intensive consultations between countries, and it is a model law on commercial arbitration drafted under the auspices of UNCITRAL. Rather than an international agreement, the MLICA was regarded to be the most appropriate method for establishing consistent

13 World Intellectual Property Organisation (WIPO) "What is Arbitration" <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (last accessed 2023-03-15).

14 Constitution of the Republic of Namibia of 1990. See also *Westcoast Fishing Properties v Gendev Fish Processors Ltd* 2016 4 NR 1191 (SC) paras 36-42; *Total Support Management (Pty) v Diversified Health Systems (SA) (Pty)* 2002 4 SA 661 (SCA) paras 23-25.

15 Arbitration Act 42 of 1965.

16 South African Law Reform Commission (SALRC) "Report. Arbitration: An International Arbitration Act for South Africa" Project 94, 1998 https://justice.gov.za/salrc/reports/r_prj94_july1998.pdf (last accessed 2023-07-02) (hereinafter SALRC Report (Project 94, 1998)) at 1.

17 See General Assembly Resolution A/40/72 of 11 December 1985, quoted in Binder *International Commercial Arbitration and Conciliation in UNCITRAL Model law Jurisdictions* (2010) 7.

norms of arbitration procedure and the required level of uniformity.¹⁸ Subsequently, UNCITRAL adopted the MLICA on 21 June 1985 “after considerable thought and broad consultation with arbitral institutions and individual specialists in international commercial arbitration”.¹⁹

The MLICA significantly contributes to the development of a uniform legislative framework for commercial arbitration, enabling the fair and efficient resolution of disputes arising from international business. As such, the UNGA has urged all nations to consider MLICA and to express their support for “the necessity of uniformity of the legislation of arbitral procedures and the particular requirements of international commercial arbitration practice.”²⁰

The expectations of those who use arbitration in practice may be frustrated by a number of flaws in national arbitration rules. These flaws sometimes require arbitral tribunals to adopt a similar process to that of national courts, such as overly strict mandatory regulations that unjustly restrict party autonomy. Anecdotal evidence suggests that Namibian legal experts are dissatisfied with the current arbitration legal framework and procedure. The main criticisms of Namibia’s current commercial arbitration system include, but are not limited to, the assertions that judges lack the required commercial expertise and experience, that lengthy delays exist between the commencement of the arbitration and the decision, that high fees effectively bar the average person from accessing justice, and that judges and attorneys are unproductive as a result of case management and other issues.

3 1 The reality for Namibia regarding commercial arbitration

Namibia needs to take a different approach with regard to commercial arbitration in light of the current and upcoming major waves of global economic growth in Africa, which are characterised by the attendant increase in commercial transactions, cross-border trade, and commerce, as well as the demand for domestic and international commercial arbitration. It is time to move away from a culture where disagreements are mostly settled through court litigation. Emphasis must now be placed on alternative dispute resolution processes, notably mediation and/or arbitration when needed in order to settle commercial disputes.

18 Note by the UNCITRAL Secretariat on Further Work in respect of International Commercial Arbitration A/CN.9/169 of 11 May 1979; Binder (2010) 9.

19 Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, MLICA https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (last accessed 2022-06-13) at vii.

20 As above; General Assembly Resolution A/40/72 of 11 December 1985, quoted in Binder (2010) 7-8.

The government, businesses, the commercial legal profession, and captains of industry must adopt a strategy of trying to settle commercial disputes through mediation and, when appropriate, arbitration before turning to court litigation. Former British Prime Minister Tony Blair adopted the strategy of settling commercial disputes through arbitration in his native country, which resulted in significant savings on legal expenses.²¹ Judge Petrus Damaseb established court-related mediation in Namibia, which is said to have resulted in savings in legal costs of about N\$50 million in the first year following implementation.²²

4 Evaluation of legislative alternatives under MLICA

4.1 MLICA

The MLICA was designed to assist governments in modernising and updating their present laws governing international arbitration in order to take into account the unique characteristics and demands of international commercial arbitration. The arbitration agreement, the composition and authority of the arbitral tribunal, the extent of the court's involvement, and the enforcement and recognition of the arbitral decision are all covered in detail. It signifies the adoption of essential features of international arbitration practice by states from all areas and from all legal and economic systems around the world.²³ The MLICA is a crucial tool for achieving UNCITRAL's goal of harmonising global trade. As a result, in this article, in order to speed up and guarantee the effectiveness of commercial dispute settlement in the country, we will recommend that Namibia carefully consider the enactment of a commercial arbitration law based primarily on the MLICA.

4.2 The principles underlying MLICA

Shortcomings in national arbitration laws could frustrate the expectations of users of arbitration in practice and as a consequence, the UNCITRAL drafted the MLICA. These shortcomings included unnecessarily restrictive mandatory rules which unreasonably impinged on party autonomy, sometimes compelling arbitral tribunals to follow basically the same procedure as that used in national courts. However, some mandatory rules were clearly needed to ensure due process. The

21 Brand, Steadman and Todd *Commercial Mediation* (2012) 5.

22 Report on mediation in the High Court 5 March 2015 https://ejustice.jud.na/High%20Court/Mediation/_layouts/mobile/mblwp.aspx?Url=%2FHigh%20Court%2FMediation%2FPages%2FRegisters%2Easpx&Source=%2FHigh%20Court%2FMediation%2F%5FLayouts%2Fmobile%2Fview%2Easpx%3FList%3D66f6102a%252De739%252D4af9%252D9d6b%252D5d2f8996e3e8%26View%3Df862dc4a%252D7f18%252D4858%252D9ea6%252D9d9cb51b3273%26CurrentPage%3D1 (last accessed 2023-07-02).

23 United Nations (UN) "UNCITRAL Arbitration Rules" <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> (last accessed 2022-06-01).

arbitral tribunal should also be able to rule on its own jurisdiction. Other concerns included excessive court intervention.²⁴

Herrmann outlined three main objectives of MLICA.²⁵ The first is the improvement and harmonisation of national arbitration laws applying to international transactions.²⁶ The need for harmonising the rules that regulate international transactions is made clear by the discrepancies between the various national arbitration laws and their focus on national issues. Consequently, UNCITRAL aimed to establish a legal framework that was primarily focused on issues related to international arbitration. Once accepted by each state, its provisions would take precedence (as *lex specialis*) above any existing arbitration-related laws in that state. So, unless it were to be adopted for domestic arbitration as well, the provisions of MLICA in the context of Namibia would only be given priority for international arbitrations.

The specific scope of MLICA resulted from the recognition of two important issues.²⁷ The first is that disparities in national laws and the difficulties in acquiring adequate legal information have negative consequences in international situations. The second point to make is that rigid standards and local norms, which may appear unusual to an outsider, are less acceptable in international business arbitration. This is a field of law that can be fully effective only if it is flexible and liberalised. Yet, the MLICA's majority of provisions are also acceptable for domestic arbitration and may thus be implemented for both categories of disputes by any state desiring to avoid a dualistic arbitration system. The disadvantages of using MLICA for domestic arbitration in Namibia are discussed further below.

The second objective, according to Herrmann, is the wide freedom of parties and, failing agreement, of arbitrators to determine how the arbitration should be conducted, subject to some procedural safeguards. This freedom of the parties is known as party autonomy and is regarded as one of the guiding principles of the arbitration procedure.²⁸ In order to avoid the frustration of the parties' expectations, party autonomy is therefore a fundamental principle of the MLICA as well. The parties are able to modify the procedural rules so as to fit their specific needs, whether through reference to a proven set of standard arbitration rules or by negotiating an individual (one-off) arbitration agreement. The arbitral tribunal is also granted a wide procedural discretion, subject of course to any restrictions agreed to by the parties.²⁹

24 Herrmann "UNCITRAL's work Towards a Model Law on International Commercial Arbitration" 1984 *Pace Law Review* 541

25 Herrmann 1984 *Pace Law Review* 544-546. Compare the SALRC Report (Project 94, 1998) 16, para 2.7.

26 Herrmann 1984 *Pace Law Review* 544-545.

27 Herrmann 1984 *Pace Law Review* 545.

28 See Blackaby, Partasides, Redfern, and Hunter *Redfern and Hunter on International Arbitration* 6 ed (2009) 365.

29 See MLICA, art 19.

This means that the arbitrators need not follow the local law of procedure; including the rules of evidence. This freedom, therefore, allows the tribunal to adjust the procedure to the special needs and characteristics of the international case at hand. The liberty envisaged by the Model Law is not however absolute; it is limited by provisions designed to prevent or to remedy certain procedural injustices such as any instance of substantial procedural unfairness or violation of due process.³⁰ Such restrictions are in the interest not only of the parties, by ensuring fairness and equality, but also of the adopting state which could hardly be expected to guarantee the above flexibility and yet provide court assistance without procedural safeguards.

The third objective was to provide comprehensive default or supplementary rules where the parties have not agreed on procedural rules so that the arbitration can be conducted effectively and to clarify some controversial aspects of arbitration law.³¹ The provision of comprehensive non-mandatory rules protects those parties who have not agreed on procedural rules or who have not settled certain points relating to an unexpected and undesired provision or gap in the applicable procedural law. A basic object of the MLICA is, therefore, to make provision for a suitable “emergency kit” for the commencement of arbitration rights through to the point when the dispute is finally settled.³² The content of the non-mandatory rules was heavily influenced by the UNCITRAL Arbitration Rules of 1976.

Lastly, MLICA attempts to clarify a number of points that have created interpretive problems in the 1958 NY Convention and similar legal instruments. These issues relate to the requirement that the arbitration agreement should be in written form, the compatibility of interim measures granted by the courts with an agreement to arbitrate, along with the choice of the law to be applied to the substance of the dispute.³³

4 3 Options for the adoption of MLICA

Since 1985, many nations have thought about how to respond to MLICA, and three broad approaches have arisen. The first is to reject the MLICA as a basis for national arbitration legislation, for both domestic and international arbitration. The main examples of this approach are found in established arbitration centres like England,³⁴ France,³⁵ Switzerland,

30 See MLICA, arts 18, and 24(2)-(3).

31 Herrmann 1984 *Pace Law Review* 546-547.

32 Herrmann 1984 *Pace Law Review* 546.

33 See MLICA, arts 7, 9, and 28.

34 Although the Mustill Committee, in 1989, recommended that England should reject MLICA, the Saville Committee which was largely responsible for the final text of the English Arbitration Act of 1996 accepted a compromise and frequently incorporated principles and provisions of MLICA. See Saville “The Arbitration Act 1996 and its Effect on International Arbitration in England” 1997 *Arbitration* 110.

35 See the new French Arbitration Act of 2011, contained in Decree No 2011-48 of 13 January 2011.

the Netherlands, and Sweden.³⁶ Secondly, some jurisdictions such as Canada and Singapore followed the intention of the drafters of the Model Law and adopted it for international arbitration only. This approach has also been recommended for South Africa by the South African Law Reform Commission.³⁷ Thirdly, other jurisdictions have adopted MLICA for both international and domestic arbitration, for example, Germany, India, Kenya, and Zimbabwe. To date, ten African jurisdictions have adopted MLICA,³⁸ and of these Mauritius and Rwanda have included the 2006 amendments. In addition, two other African countries, Mozambique (1999)³⁹ and Ghana (2010)⁴⁰ have enacted arbitration laws that are largely compatible with the MLICA.

The above categorisation is concerned with the response to the MLICA and the purpose for which it was adopted. Binder states that there are some 80 jurisdictions so far which have adopted the MLICA.⁴¹ Binder nevertheless asserts that even allowing for this number, only two main methods of adoption have so far emerged.⁴² These are incorporated by reference and direct adoption.

The former method involves a general reference clause in the national arbitration laws referring to the applicability of MLICA in that state,⁴³ for example, “Subject to this Part, the Model Law has the force of law in Australia”.⁴⁴ This approach is said to best serve UNCITRAL’s aim of harmonising and unifying international trade law since the text is adopted verbatim. In all the states that have taken this approach, UNCITRAL’s *travaux préparatoires* are expressly referred to in the adopting legislation as an interpretation tool.⁴⁵

36 Butler “South African Arbitration Legislation – The need for reform” 1994 *Comparative and International Law Journal of Southern Africa (CILSA)* 132-134.

37 SALRC Report (Project 94, 1998) 3, para 1.10; and SALRC “Report on Domestic Arbitration” May 2001 https://openlibrary.org/books/OL3622687M/Domestic_arbitration (last accessed 2023-07-02) at 5-7.

38 These jurisdictions are Egypt (1994), Kenya (1995), Madagascar (1998), Mauritius (2008), Nigeria (1988), Rwanda (2008), Tunisia (1993), Uganda (2002), Zambia (2000), and Zimbabwe (1996). See UNCITRAL “Status: UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)” www.uncitral.org (last accessed 2023-07-02).

39 Butler “The State of International Commercial Arbitration in Southern Africa: Tangible Yet Tantalizing Progress” 2004 *Journal of International Arbitration* 198.

40 Onyema “The New Ghana ADR Act 2010: A Critical Overview” 2011 *Arbitration International* 102.

41 See Binder (2010) 13, where the criteria which should be satisfied before a jurisdiction can be said to have adopted MLICA are also discussed. The number of jurisdictions referred to in the text includes individual states within federal jurisdictions.

42 Binder (2010) 17.

43 As above.

44 See the Australian International Arbitration Act of 1974, as amended, s 16(1).

45 Binder (2010) 17.

The latter approach of direct adoption involves the direct insertion of the MLICA articles into the national law, as an addition to an existing statute or as an independent statute. This is the most common approach and is one which undermines uniformity by encouraging additions and alterations. The MLICA's structure is usually not retained which makes comparison more difficult.⁴⁶ The South Africa Law Commission wanted to keep changes to MLICA to a minimum and therefore recommended incorporation by reference rather than the direct approach. Moreover, because MLICA is not in the same form and language as other South African statutes, the Commission strongly advised that the text of the MLICA be inserted in a schedule to the implementing legislation to circumvent and/or avoid this difficulty.⁴⁷ Many of the "direct approach" states rarely refer to UNCITRAL's *travaux préparatoires*. Binder nevertheless submits convincingly that in cases of interpretational difficulties, the MLICA's *travaux* should still be used.⁴⁸

Butler⁴⁹ also contends that there are two basic methods,⁵⁰ which can be used for drafting legislation needed to implement the MLICA. He states that the MLICA can be in the text of the enacting legislation (the method used for example by India, Germany, Kenya, and Malaysia), or in a schedule to that legislation (the method used for example by New Zealand, Bermuda, and Zimbabwe). These two methods essentially correspond to those identified by Binder.

Butler further states that the "schedule approach" makes it possible to preserve the official English text of MLICA, which is in the interests of international harmonisation. Butler, therefore, recommends that each Southern Africa Development Community (SADC) member state should ideally adopt a common version of MLICA in a schedule which should then be annexed to the enacting legislation.⁵¹ Namibia is advised to take heed of this recommendation. Butler further asserts that for purposes of international arbitration, it is important that any changes made in the process of adopting the MLICA should be kept to a minimum.⁵² This is mainly because a goal of the MLICA was for the promotion of harmonisation; such adoption will consequently promote countries in the SADC region as suitable venues for international arbitration, in that they have appropriate legislation.

As mentioned above, in the process of adopting MLICA, some states have made it applicable to both domestic and international arbitrations while others have restricted its application to international arbitration.

46 Binder (2010) 18.

47 SALRC Report (Project 94, 1998) 16-18, paras 2.9 and 2.14.

48 Binder (2010) 18.

49 Butler *The Need for Harmonised Arbitration and ADR legislation in the SADC Region* (unpublished paper presented at the Law Teachers' Conference 2008 University of Pretoria) 5.

50 These two approaches presented by both authors are exactly the same but just reflected in different terms.

51 Butler (2008) 5.

52 Butler (2008) 6.

Zimbabwe, India, and Germany have adopted it for both international arbitrations and domestic arbitrations. Mauritius has separate laws for domestic arbitrations and international arbitrations. This is also the approach proposed for South Africa.

Several reasons have been given to justify the latter approach:⁵³ First, any changes which have to be made to the existing Act should be done without a radical departure from it, as the Act has worked well for the domestic arbitrations for which it was intended. Second, to adopt a completely new Act would undermine legal certainty considering that the current Act has seen satisfactory interpretation and application by the courts. Third, the current South African Arbitration Act is considerably more modern when compared to that which applied in New Zealand before it adopted the MLICA for both domestic and international arbitration in 1996. New Zealand nevertheless included a separate schedule in its Act of additional provisions that apply in a domestic arbitration, unless the parties agree to “contract out” of those provisions.⁵⁴ All these methods are analysed and compared in this paper so as to establish which is most suited for Namibia.

4 4 Amendments needed in order to implement the MLICA

Namibia in adopting the MLICA will have to consider whether any amendments should be made to the Model Law. In this regard, four issues have been identified as having been modified in the laws of more than one enacting state.⁵⁵ The first issue is the requirement of an arbitration agreement in writing. Notwithstanding the fact that the original article 7(2) of the MLICA of 1985 is modern and reasonably flexible, certain conditions have forced the states enacting the Model Law to modify the provision.⁵⁶ These include matters such as bills of lading as dealt with under Singaporean law.⁵⁷ New Zealand did away with the writing requirement through its recognition of agreements entered into orally in its Arbitration Act of 1996.⁵⁸ The suggested response by Namibia is discussed below.

The second deviation is from the provisions of article 28(2) regarding the tribunal’s power to designate the substantive law, where this has not been done by the parties. Article 28(2) requires the tribunal to make its choice by using the conflict of laws rules which it considers to be applicable. In some countries, this has been replaced by a choice rule

53 Butler 1994 *CILSA* 134-135.

54 The New Zealand Arbitration Act of 1996.

55 Slate, Lieberman, Weiner and Micanovic “UNCITRAL (United Nations Commission on International Arbitration): its workings in International arbitration and a new Model conciliation Law” 2005 <https://unov.tind.io/record/37227?ln=es> (last accessed 2022-06-19) 88-89.

56 This requirement has since the publication of the authority cited been dealt with in the 2006 amendments to MLICA, art 7.

57 See s 2(4) of the Singapore International Arbitration Act as amended in 2001.

58 As amended, sched 1, art 7(1).

which is direct.⁵⁹ The original more conservative approach was intended to promote greater certainty. If parties have not selected the law to be applied to the substance of the dispute, then it is recommended that Namibia follows the standard version of MLICA in relation to this issue.

The third provision which was rejected in some states is the one providing for uniform treatment in the recognition and enforcement of domestic and foreign awards, thereby eliminating the reciprocity requirement. Article 36 of the MLICA calls for a differentiation only on the basis of whether the award was granted in the context of international arbitration or a non-international one, irrespective of the place where the award was made. It is worth noting that the traditional reciprocity requirement⁶⁰ is not compatible with this provision. As a result, jurisdictions such as Australia,⁶¹ and particularly those that made the reservation of reciprocity under the NY Convention such as Hong Kong decided to keep the distinction made by the NY Convention between domestic awards and foreign awards for the purposes of recognition and enforcement.⁶² Mauritius on the other hand has left out Chapter VIII of the MLICA and the NY Convention is instead applied to international arbitration awards made in Mauritius.⁶³

A fourth issue that created a call for supplementary legislative efforts concerned the consolidation of multi-party arbitrations. What was mostly dealt with by the enacting states is the role of the courts in ordering the consolidation of proceedings, and several of these jurisdictions took different approaches in this regard. Some states such as Canada went with the solution of court-ordered consolidation;⁶⁴ New Zealand chose to go with tribunal-ordered consolidation;⁶⁵ whereas Ireland, true to the principle of party autonomy, provided that consolidation is only possible with the agreement of the parties.⁶⁶

59 For example, see s 28 of the India Arbitration and Conciliation Act of 1996.

60 A permissible reservation permitted by art I(3) of the NY Convention.

61 S 8 of the Australian International Arbitration Act of 1974, as amended, gives effect to arts III-V of the NY Convention on the recognition and enforcement of foreign arbitral awards. S 20 excludes Ch VIII (arts 35-36) of MLICA, where s 8 applies.

62 See Part 10 of the Hong Kong Ordinance of 2011.

63 Mauritius international Arbitration Act of 2008, s 40.

64 For example, s 27 of the British Columbia International Arbitration Act of 1996 empowers the Supreme Court to order consolidation of arbitration proceedings, but only with the agreement of the parties.

65 Sched 2, clause 2, of the New Zealand Arbitration Act of 1996, as amended. In terms of s 6(2), a provision of sched 2 only applies in an international arbitration if the parties so agree.

66 See, for example, s 16 of Irish Arbitration Act of 2010. See also The Mauritius International Arbitration Act of 2008, sched 1, para 3, which deals with consolidation of arbitration proceedings, but in terms of s 3(4), provisions of sched 1 only apply if the parties so agree.

4 5 Award of interim measures

This issue seems to have attracted more controversy than any of the issues referred to in the previous section. An interim measure granted by the tribunal is binding,⁶⁷ and unless the tribunal otherwise directs, is enforceable upon application to the competent court, irrespective of the country in which the tribunal's order was issued.⁶⁸ The court may refuse to enforce the interim measures on limited grounds only, which broadly correspond to the grounds on which enforcement of an award may be refused, with some refinements. The court when deciding whether or not to enforce the interim measure must not undertake a review of its substance.⁶⁹ In practice, a party will normally comply voluntarily with a tribunal's order for interim measures out of respect for the arbitrators' authority and a desire not to antagonise them.⁷⁰ A new article 17J defines the powers of the court to grant interim measures in arbitration proceedings with reference to their powers in court proceedings.

One of the most controversial aspects regarding the drafting by UNCITRAL of revised provisions on interim measures was the question of whether or not an arbitral tribunal should be able to grant interim measures *ex parte*. Ultimately, UNCITRAL adopted a compromise position: the tribunal is given a contract-out power to grant "preliminary orders" on an *ex parte* basis. The preliminary orders have a limited duration and lapse unless converted into an interim measure after the tribunal has heard both parties.⁷¹ These preliminary orders cannot be enforced by a court. As appears below, there are good reasons why Namibia should not adopt these particular provisions in the 2006 amendments.⁷²

It is anticipated that the work of UNCITRAL on interim measures in arbitration in the context of the 2006 MLICA amendments will set the standards expected from both institutional arbitration rules⁷³ and arbitral tribunals on this issue, thereby making a major contribution to the desired harmonisation of international commercial arbitration rules and practice globally.⁷⁴ A recommendation regarding Namibia's response to these provisions on interim measures is made below.⁷⁵

67 Unless modified, suspended or terminated by the tribunal under art 17D.

68 See MLICA, art 17H(1). The court may require the applicant to provide security, after first taking into account any determination by the tribunal in this regard (see MLICA, art 17 H(3)).

69 See the MLICA, arts 17I(1)-(2).

70 See UNCITRAL A/61/17 – Report of UN Commission on international Trade Law on the work of its thirty-ninth session (2006) para 114.

71 See MLICA, arts 17B-C.

72 See para 3.1 below.

73 See too the revised UNCITRAL Arbitration Rules of 2010, art 26.

74 Slate, Lieberman, Weiner and Micanovic "UNCITRAL (United Nations Commission on International Arbitration): its workings in International arbitration and a new Model conciliation Law" 2005 <https://unov.tind.io/record/37227?ln=es> (last accessed 2022-06-19) 92-93.

75 See para 3.1 below.

5 The NY Convention

The UNCITRAL was persuaded that the MLICA in concert with the NY Convention as well as the UNCITRAL Arbitration Rules of 1976, would make a significant contribution to the process of establishing universal legal standards for just and efficient settlement of international commercial disputes by arbitration.⁷⁶

The NY Convention applies

to the enforcement of arbitral awards made in a territory other than where recognition and enforcement are sought, and also in relation to awards that are not considered as domestic awards in the state where recognition and enforcement are sought.⁷⁷

Accession to the Convention is open to any state which is a member of the United Nations,⁷⁸ and Namibia, therefore, qualifies for membership. However, as stated above, Namibia has not acceded to the NY Convention.⁷⁹ In order to create a complete statute that caters to disputes arising in international commercial transactions, accession to the NY Convention by Namibia is also essential.

The principal aim of the Convention is to ensure that foreign arbitral awards will not be discriminated against and it obliges a member state to ensure that such awards are recognised and generally capable of enforcement in its jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of member states to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.⁸⁰ In this way, provision is made for common legislative standards for the recognition of agreements to arbitrate and the recognition and enforcement of foreign arbitral awards by national courts.

5.1 Reservations to the NY Convention

The application of the NY Convention extends in principle to *all* foreign and non-domestic arbitral awards.⁸¹ However, Article I(3) makes provision for two reservations that may be made by states when acceding to the Convention. To begin, a state may announce that, on the basis of reciprocity, it will apply the Convention to the recognition and enforcement of awards rendered fully inside the territory of another contracting party. Furthermore, it may say that it will only apply the

76 Compare with Binder (2010) 9-10.

77 Art 1 of the NY Convention.

78 UNCITRAL "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (last accessed 2022-06-19).

79 As above.

80 As above.

81 Art I, paras (1)-(2) of the NY Convention.

Convention to conflicts arising from legal ties, contractual or otherwise, that are considered commercial under the national law of the state making the declaration. This provision has resulted in two main reservations which are usually referred to as the “reciprocity reservation” and the “commercial reservation”.⁸² For example, Botswana, in ratifying the NY Convention, adopted both reservations.⁸³ Under the laws of Botswana, only awards regarding matters that are considered commercial are enforceable under the first reservation; as for the second reservation, enforcement is limited to awards emanating from contracting states as well as in those states in which awards made in Botswana are enforceable.⁸⁴ South Africa however acceded to the Convention in 1976 without reservation.⁸⁵

What then are the benefits of acceding to the Convention? Cole is of the opinion that the Convention creates more favourable conditions for the enforcement of awards.⁸⁶ It confers the same status on foreign awards as domestic awards; by requiring every state which is a contracting party to be aware of the binding nature of arbitral awards. In terms of the Convention, therefore, states should not impose conditions on foreign awards that are more burdensome than those placed on domestic awards.⁸⁷ The documentary requirements regarding the recognition and enforcement of awards are simplified.⁸⁸ As appears below, the formal requirements for the enforcement of awards were further eased in the 2006 amendments to the MLICA.

5 2 National procedures for implementing the NY Convention

The states that have adopted the NY Convention have done so in different ways. The Report⁸⁹ on a survey of how different states implemented the NY Convention mentions that legislative actions in some states were required at the national level, in accordance with their

82 Van den Berg “The New York convention of 1958: An Overview” https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012125884227980new_york_convention_of_1958_overview.pdf (last accessed 2022-06-19).

83 Recognition and Enforcement of Foreign Arbitral Awards Act 49 of 1971 (Cap 06:02), s 3. See also Cole *Some Reflections on International Commercial Arbitration* (LLM dissertation 2003 UNISA) 40.

84 Cole (2003) 40.

85 SALRC Report (Project 94, 1998) 110, para 3.13.

86 Cole (2003) 26.

87 Art III of the NY Convention.

88 Art IV of the NY Convention sets further requirements than art 4 of the Convention on Execution of Foreign Arbitral Awards (the Geneva Convention of 1927), which also required evidence that the award had become final in the country in which it was made.

89 UNCITRAL “Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)” 2008 <https://digitallibrary.un.org/record/632917?ln=en> (last accessed 2022-06-19) at 5.

Constitution, before expressing consent to be bound internationally. Some constitutions prescribed a variety of procedures for authorising the ratification of or accession to a treaty or a convention. Many states require, at the national level, both approval by the executive and the legislature, while in some others, a “declaration of ratification” or “proclamation” by the head of state such as the sovereign, praesidium, president, or prime minister was sufficient.

The NY Convention was considered “self-executing” and “directly applicable” by the bulk of the states surveyed which became parties to the Convention and put it in operation.⁹⁰ Most of those states mentioned that in accordance with their respective constitutions, conventions that have been acceded to are put at the top of the hierarchy, above national laws; while for others these conventions became an important part of domestic law prevailing over any contrary provision in the law. For some other states, however, conventions only have the force of law after their conclusion, ratification, and publication according to procedures established by national laws.⁹¹ For a number of states, there was a requirement to adopt implementing legislation before the Convention could gain the force of law in their internal legal order. One state responded that the text of the Convention on its own has no legal significance as it is merely an international treaty and such treaties are not self-executing but could become part of the law through actions of the executive.⁹²

In many of the states surveyed, implementing legislation had been adopted, which took various forms, such as an Arbitration Act with an additional schedule containing the Convention, or more directly the enactment of a special Act on foreign arbitral awards, or the enactment of a legislative decree. One state mentioned that subsequent to the signature by the President acceding to the Convention, a number of laws were amended to give effect to the Convention.⁹³ The procedure which would have to be followed by Namibia to give effect to the NY Convention is discussed below.

6 Article 35 of MLICA as amended in 2006 and the corresponding provisions of the NY Convention

In its 2006 amendments to the MLICA, UNCITRAL amended article 35(2) of the MLICA to simplify the formal requirements for the recognition and enforcement of an arbitral award. The amended article 35 reads:

90 As above.

91 As above.

92 As above.

93 As above.

- (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
- (2) The party relying on an award or applying for its enforcement shall supply the ~~[duly authenticated]~~ original award or a ~~[duly certified]~~ copy thereof ~~[, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof]~~. If the award ~~[or agreement]~~ is not made in an official language of this State, ~~[the party shall supply a duly certified]~~ the court may request the party to supply a translation thereof into such language.⁹⁴

It will be seen from the discussion below that “the conditions laid down” in the NY Convention, particularly in article IV as to the formal requirements, are more onerous than those in the amended article 35(2) of MLICA, quoted above.

Under article 35(1) of the MLICA, any arbitral award shall be recognised as binding and enforceable, irrespective of the country from which it originates. This in a way equates the enforcement of an international arbitration award rendered nationally and internationally to ordinary court decisions in that Model Law country.⁹⁵ This recognition and enforcement are however both subject to the provisions of article 35(2) and 36 of the MLICA. According to Binder, the MLICA appears to be more enforcement friendly than the NY Convention as reciprocity is not included as a condition for the recognition and enforcement of an award.⁹⁶

Article IV of the NY Convention, on which the original version of article 35(2) of the MLICA was based, requires both the duly authenticated original award or a duly certified copy of it and the original arbitration agreement or a duly certified copy of it to be supplied by the party seeking recognition and enforcement of the award. The procedural particulars for the enforcement and recognition are not set out in MLICA; they are left to the national procedural practices.⁹⁷ What the MLICA does is set out conditions under article 35(2) for obtaining enforcement of an award. As illustrated above, the article was then amended in 2006 in order to make the formal requirements more liberal and this therefore reflects the amendment of article 7 regarding the form of the arbitration agreement. Consequently, the requirement that a copy of the agreement to arbitrate be submitted, as under the NY Convention and the original

94 Words in square brackets and struck through indicate words deleted in 2006 from the original 1985 text and underlined words indicate words added in 2006 to the 1985 text. Compare Binder (2010) 405, where the full amendments to the last sentence are not correctly reflected. See also art III of the NY Convention which is the equivalent provision to art 35(1) of MLICA.

95 Binder (2010) 407.

96 Binder (2010) 408.

97 Binder (2010) 409.

version of article 35(2), no longer applies.⁹⁸ This is more in line with one of the grounds on which a court may refuse recognition and enforcement of the award, namely where the party resisting enforcement proves that the arbitration agreement is not valid under the law chosen by the parties, or failing such choice, the law of the place where enforcement of the award is sought.⁹⁹ The party seeking enforcement of the award must produce the award but does not bear the onus to establish the validity of the underlying agreement. Instead, the party resisting enforcement must prove the agreement's invalidity.¹⁰⁰

7 Implementation of international agreements in Namibia

There are about five provisions within the Namibian Constitution which are of relevance to international agreements, mainly: article 32(3)(e) which grants the President to negotiate and sign international agreements, and to delegate such power; article 40(1)(i) which provides a some of the functions of Cabinet, the provision of assistance to the President in the determination of which international agreements are be concluded, acceded to, after which a report should be provided to the National Assembly; article 63(2)(e) which grants the National Assembly the power to agree to the accession of international agreements that have been negotiated and signed in terms of article 32(3)(e);¹⁰¹ article 144 states which makes international law and international agreements binding to Namibia, part of Namibian law; finally, article 143 provides that existing international agreements which are binding on Namibia will remain in force until otherwise decided by the National Assembly as per article 63(2)(d).

In light of the above, it can be stated that international agreements gain binding force in Namibia, through articles 32(3)(e), read with articles 40(1)(i), and 63(2)(e). In deciding whether the NY Convention should be signed, the President does so with the assistance of the Cabinet, in terms of article 40(1)(i). Once the signature of the President has been attached to the NY Convention, and agreements have been given by the National Assembly, in terms of article 63(2)(e), the Convention then finds its place within the national law of Namibia. From the foregoing, it can be inferred that all international instruments that accede to Namibia, are directly applicable to the legal system without a need for enacting legislation. A good example of such an international agreement is the Geneva Conventions Act 15 of 2003 which was enacted in order to give effect to

98 Explanatory Note by the UNCITRAL Secretariat on MLICA available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (last accessed 2022-06-13) at 11.

99 MLICA, art 36(1)(a)(i), which follows art V(1)(a) of the NY Convention.

100 MLICA, art 36(1)(a)(i), and art V(1)(a) of the NY Convention.

101 This power and function under art 63(2)(e) is separate from the power of the National Assembly to make laws under art 63(1).

Conventions and Protocols concluded in Geneva on 12 August 1949 and 10 June 1977.

In practice, however, accession may not be sufficient because it just makes the international agreement part of Namibian law in theory. There are still several human rights instruments that Namibia ratified upon independence that have been deemed to have little impact on the domestic legal process.¹⁰²

8 Recommendations

8 1 The enactment of a new Arbitration Act for Namibia

Although MLICA is the yardstick against which arbitration legislation is measured, it merely represents a form the law on international commercial arbitration should take: the adoption of Model Law can be made verbatim or partially.¹⁰³ There is therefore a need for modern arbitration legislation complying with international standards to be implemented in Namibia. This is not only for the sake of furthering international uniformity of arbitration laws but also for the promotion of international arbitration in Namibia. Keeping in mind the two main methods of adoption identified by Binder,¹⁰⁴ it is submitted that in order to promote UNCITRAL's aim of harmonisation and unification, Namibia should follow the incorporation-by-reference approach. In addition, UNCITRAL's *travaux préparatoires* should be made an interpretation tool when difficulties in interpretation arise.¹⁰⁵ The implementation of an MLICA-informed Act must focus on international commercial arbitrations only.

8 2 Accession to the NY Convention: With or without reservations?

Namibia should adopt MLICA with most of the 2006 amendments. The reservation to the Convention on reciprocity need not be made because the reciprocity requirement is not included in the Model Law.¹⁰⁶ Although the Convention has been described as self-executing, and

102 Horn "International Human Rights Norms and Standards: The Development of Namibian case and statutory law" in Horn and Bosl *Human Rights and the Rule of Law in Namibia* (2009) 143-144, also available at <http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/horn.pdf> (last accessed 2022-06-10) at 143-144.

103 Binder (2010) 12-13.

104 Binder (2010) 17-18; and para 2.1.2 above.

105 Mauritius has made a general reference to the *travaux* in s 3(9) of the Mauritius International Arbitration Act of 2008, while the SALRC's specific reference approach which sets out the documents to which reference may be made (see sched 2 of the Draft Bill of 1998) is no longer practical in the light of the substantial number of UNCITRAL generated documents relating to the 2006 amendments.

106 Arts 35(1)-36(1) of MLICA.

Namibian law automatically incorporates international agreements upon signature,¹⁰⁷ it is submitted that the approach recommended by the South African Reform Law Commission relating to the implementation of the NY Convention by South Africa should be followed,¹⁰⁸ and that the English text of the NY Convention should be contained in a schedule to the New Act.

The MLICA conforms to the NY Convention as to the grounds on which recognition and enforcement of an award may be refused.¹⁰⁹ It is therefore important in the interests of harmonisation that these provisions too are implemented word-for-word. As regards the formalities for the enforcement of an award, it is recommended that the more liberal approach reflected by the 2006 amendment to article 35(2) of MLICA¹¹⁰ should be applied for purposes of the Convention as well. It is argued that, despite the overlap between Chapter VIII of MLICA on award recognition and enforcement and the NY Convention, Namibia should still ratify the Convention in order to benefit Namibian parties seeking to enforce awards in jurisdictions such as Botswana, which has made the reciprocity reservation.

8 3 Training of legal practitioners in arbitration law and practice

A critical mass of legal practitioners should be trained in mediation and arbitration to provide the push for the necessary cultural shift away from court litigation and toward dispute resolution through mediation and/or arbitration.

9 Conclusion

Namibia must enact a commercial arbitration statute that makes the MLICA and the NY Convention binding in the country, with the wording of both statutes and the Convention appearing as schedules to the Act. Such a commercial arbitration statute should make provision for the establishment of an arbitral tribunal to operate as the sole arbitrator or panel of arbitrators in a commercial dispute. Arbitral awards by the arbitral tribunal must be enforced by a competent court acting in accordance with the empowering provisions of Namibia's new commercial arbitration statute. This commercial arbitration statute, which could be titled the "International Arbitration Act of Namibia", would provide an all-encompassing legal framework for resolving disputes arising from international commercial transactions, from the enforcement of a settlement agreement to the recognition and enforcement of an arbitral award pursuant to an arbitration agreement.

107 See para 2.4 above.

108 SALRC Report (Project 94, 1998) 133.

109 Compare art 36 of MLICA to art V of the NY Convention.

110 See para 2.3.2 above.

Namibia will thereby get a uniform legal framework for the adjudication of international economic disputes.