

# UNCITRAL Gives International Trade Law CLOUT

*The United Nations Commission on International Trade Law (UNCITRAL) is establishing a system for collecting and disseminating information on arbitral awards and court decisions rendered on UNCITRAL conventions and model laws. The system, styled CLOUT (case-law on UNCITRAL texts), is intended to enhance awareness of UNCITRAL legal texts and promote their uniform interpretation and application. This article examines the general features of CLOUT and its significance for the unification of the law of international trade.*

## Introduction

Unification of international trade law can be achieved through the adoption of uniform normative texts such as conventions and model laws. But the efficacy of a uniform text can be diminished as a result of divergencies in interpretation and application by judges, arbitrators and practitioners.<sup>1</sup> This problem will never be completely resolved while there remain different legal systems and traditions; the ultimate solution, unattainable for the foreseeable future, would be the creation of some international court able to make definitive rulings for the uniform operation of uniform laws.<sup>2</sup> Much of the problem, however, results from a lack of information rather than from over-attachment to local attitudes or doctrines: there is often unfamiliarity with the uniform text, its policies and objectives, and insufficient awareness of foreign judicial decisions and arbitral awards rendered on it. Recognising this, the United Nations Commission on International Trade Law (UNCITRAL) is now establishing a system for the collection and dissemination of information on judicial decisions and arbitral awards relating to the conventions and model laws that have been elaborated under its auspices.<sup>3</sup>

Given the acronym of "CLOUT" (case-law on UNCITRAL texts), the system is intended to promote international awareness of UNCITRAL legal texts and the uniform interpretation and application of those texts. A draft User Guide for the CLOUT system<sup>4</sup> has been prepared by the UNCITRAL Secretariat, outlining the nature of the system and its method of operation.

## The System in Outline

Under CLOUT,<sup>5</sup> States that have adopted UNCITRAL conventions or model laws designate national correspondents, who collect relevant judicial decisions and arbitral awards, and prepare abstracts of them in an official language of the United Nations.<sup>6</sup>

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<sup>1</sup> There is a large literature on the subject of the interpretation and application of uniform law. For a recent discussion, see F Enderlein, "Uniform Law and Its Application by Judges and Arbitrators" in *International Uniform Law in Practice*, Acts and Proceedings of the Third Congress on Private Law held by the International Institute for the Unification of Private Law (UNIDROIT, Rome, 7-10 September 1987) (1988), UNIDROIT, Rome, p 329.

<sup>2</sup> K Zweigert and H Kötz, *Introduction to Comparative Law* (2nd rev ed, 1987), OUP, Vol 1, p 26.

<sup>3</sup> Though still receiving finishing touches, the system was declared "established" by UNCITRAL at its 25th session in 1992: see "Report of the United Nations Commission on International Trade Law on the work of its twenty-fifth session (New York, 4-22 May 1992)", *Official Records of the General Assembly, Forty-Seventh Session, Supplement No 17* (A/47/17), pars 162-163. For an explanation of the citation system used by UNCITRAL, refer to J Honnold, "UNCITRAL Documents: Research Sources, Style, Citation" (1979) 27 *Am J Comp L* 217.

<sup>4</sup> The draft to which recourse was had in preparing this article is the May 1992 draft, "Case Law on UNCITRAL Texts: User Guide: Note by the Secretariat" (A/CN.9/SER.C/GUIDE/1) (hereafter "draft User Guide").

<sup>5</sup> The outline of the system presented in this article draws on the draft User Guide, and the following UNCITRAL documents:

(a) "Dissemination of decisions concerning UNCITRAL legal texts and uniform interpretation of such texts: note by the secretariat" (A/CN.9/267) *UNCITRAL Yearbook 1985*, Vol XVI, Pt 2, Ch IX (hereafter "1985 Secretariat Note").

(b) "Collection and dissemination of information on interpretation of UNCITRAL legal texts: note by the secretariat" (A/CN.9/312) *UNCITRAL Yearbook 1988*, Vol XIX, Pt 2, Ch VII, s C (hereafter "1988 Secretariat Note").

(c) "Report of the United Nations Commission on International Trade Law on the work of its twenty-first session (New York, 11-20 April 1988)" (A/43/17) *UNCITRAL Yearbook 1988*, Vol XIX, Pt 1, s A, pars 98-109 (hereafter "1988 Commission Report").

<sup>6</sup> The official languages of the United Nations are Arabic, Chinese, English, French, Russian and Spanish.

Copies of the decisions and awards, and the abstracts, are forwarded to the UNCITRAL Secretariat.

The Secretariat will make translations of the abstracts into the other five official United Nations languages and will from time to time (that is, once enough abstracts have been received to justify publication) publish compilations of abstracts as part of the regular documentation of UNCITRAL. As appropriate, indices to the abstracts will be issued by the Secretariat for each of the texts covered by CLOUT.

The decisions and awards sent to the Secretariat will be stored in the form in which they have been received by the national correspondents. Copies of these decisions and awards will be made available by the Secretariat upon request, subject to any copyright restrictions and payment of a fee to cover copying and mailing costs.

For administrative reasons, the Secretariat prefers that users of the system adopt a subscription-type procedure<sup>7</sup> when making their first request for copies of decisions and awards: it is suggested that users make a down payment of \$US30 and further payments as moneys are expended. Any person or body adhering to the procedure will be accorded the status of a "CLOUT-user" and will receive all documents that are published as part of the system, including compilations of abstracts, indices and materials giving general information about the system.

The basic features of CLOUT had been determined by UNCITRAL at its 21st session in 1988, after discussion at previous sessions.<sup>8</sup> The Secretariat, however, had then to establish the practical details and arrangements required to make the system operative. There was the task of engaging the commitment of States to CLOUT, even though its establishment would hardly be a priority concern of government. The draft User Guide reveals that national correspondents have been appointed by 25 States, giving CLOUT a viable level of international coverage.<sup>9</sup> Since 1989, meetings of national correspondents have usually taken place in conjunction with the annual sessions of UNCITRAL. National correspondents have been introduced to the nature and purposes of CLOUT, a standard format and structure for the abstracts has been agreed upon, and arrangements made as to the working relationship between the national correspondents and the Secretariat.

The first compilation of abstracts is now being finalised by the Secretariat. At this stage, CLOUT covers the following three texts: *UN Convention on the Limitation Period in the International Sale of Goods 1974 and Protocol of 1980* (Limitation Convention); *UN Convention on Contracts for the International Sale of Goods 1980* (Vienna Sales Convention); *UNCITRAL Model Law on International Commercial Arbitration 1985* (Model Arbitration Law). It may be recalled that Australia has already adopted the Vienna Sales Convention<sup>10</sup> and the Model Arbitration Law,<sup>11</sup> and is giving consideration to adopting the Limitation Convention.<sup>12</sup>

CLOUT will be extended to the following, and any future, UNCITRAL Conventions and Model Laws as they enter into force or are adopted by States: *UN Convention on the Carriage of Goods by Sea 1978* (Hamburg Rules);<sup>13</sup> *UN Convention on International Bills of Exchange and International Promissory Notes 1988*; *UN*

<sup>7</sup> The procedure is set out in the draft User Guide, op cit, n 4, pars 25-27.

<sup>8</sup> See 1985 Secretariat Note, op cit, n 5, pars 1-2.

<sup>9</sup> The draft User Guide, op cit, n 4, in Annex 1 lists the following States which have appointed national correspondents: Argentina, Australia, Austria, Barbados, Botswana, Burkina Faso, Canada, China, Cyprus, Denmark, Dominican Republic, Egypt, Finland, France, Germany, Ghana, Italy, Mexico, Morocco, Nigeria, Norway, Sierra Leone, Sweden, Switzerland and the United States of America. Australia's national correspondent is now Mr Warrick Smith, Principal Legal Officer in the International Trade Law Section within the Commonwealth Attorney-General's Department.

<sup>10</sup> The Vienna Sales Convention was implemented in Australia by a uniform *Sale of Goods (Vienna Convention) Act or Ordinance* in each State and Territory, and entered into force in Australia on 1 April 1989.

<sup>11</sup> The Model Arbitration Law was implemented in Australia by Commonwealth legislation, the *International Arbitration Amendment Act 1989*. The Act came into operation on 12 June 1989; it amended the *Arbitration (Foreign Awards and Agreements) Act 1974*, renaming it the *International Arbitration Act 1974*.

<sup>12</sup> The Law Council of Australia has also recommended that Australia should become a party to this Convention.

<sup>13</sup> The Hamburg Rules are in force internationally from 1 November 1992. A mechanism for the future implementation by Australia of the Hamburg Rules is contained in the *Carriage of Goods by Sea Act 1991* (Cth).

### Collection of Materials

Any international system for the collection of judicial decisions and arbitral awards faces the problem of accessibility of materials.<sup>14</sup> Many States do not have in place developed mechanisms for the retrieval and reporting of the decisions of their courts. In some States only a small number of decisions are reported. The extent of reporting tends to reflect (and reinforce) particular attitudes to the judicial process: thus, the civil law tradition, with its analytical approach based on the work of legal scholars, has not valued case reporting anywhere near as much as the common law tradition, founded as it is on "judge made" law.<sup>15</sup> Even among States where the judicial contribution to law-making is emphasised, reporting systems can vary to a considerable extent in their scope, regularity and efficiency of operation. In many States, where judicial decisions remain unpublished, such decisions can be very difficult to locate independently. The reporting position is, of course, worse with arbitral awards, access to which is usually limited. Arbitration is a private means of dispute resolution, and requirements of confidentiality often result in arbitral awards being unavailable or available at best in only a partial form.<sup>16</sup> Arbitral institutions can, as a matter of practice, restrict the information they allow out regarding arbitration proceedings they administer. It is even less probable that awards which emanate from ad hoc arbitration proceedings (unadministered by an arbitral institution) will be known of in many quarters. Aware of the special considerations affecting arbitration, CLOUT concedes that national correspondents are not obliged to ferret out arbitral awards: awards will be collected "only in so far as they come to the attention of national correspondents and in the form in which they are made available to them".<sup>17</sup>

How can the national correspondents effectively discharge their collecting role in the light of the difficulties faced? It is clear that national correspondents will need to have wide contacts with judges, practitioners, academics, arbitrators and public servants, so as to be informed of, or provided with, out-of-the-way decisions and awards. CLOUT will have to receive well-directed publicity in the relevant legal and business circles in each State. Much will depend on the commitment of the particular national correspondents and the support and resources accorded to them by their governments. The national correspondents appointed to date are suitably placed and experienced for their task, having been drawn from the ranks of judges, law professors, members of councils of law reporting, and officials in Ministries of Justice or Attorney-General Departments.

### Publication of Decisions and Awards

Ideally, the relevant decisions and awards would have been disseminated by UNCITRAL publishing a system of law reports containing the full texts, as received from national correspondents, and equipped with headnotes, indices and the like. It is to be

<sup>14</sup> See generally 1985 Secretariat Note, op cit, n 5, par 2.

<sup>15</sup> "The teacher-scholar is the real protagonist of the civil law tradition. The civil law is a law of the professors": J Merryman, *The Civil Law Tradition* (1969) Stanford Univ Press, pp 52-53.

<sup>16</sup> A discussion of the "curious and interesting" conflict between the inherent confidentiality of awards and the desirability of publication is found in M Hunter, "Publication of Awards" (1987) LMCLQ 139. See also J D M Lew, "The Case for the Publication of Arbitration Awards" in J C Schultz and A J Van Den Berg (Eds), *The Art of Arbitration* (1982), Kluwer, Deventer, p 223.

<sup>17</sup> Draft User Guide, op cit, n 4, par 9.

anticipated, however, that CLOUT will amass a considerable amount of materials from diverse sources. Also, UNCITRAL does not have the resources to sustain the work involved in translating and publishing law reports in the six official languages of the United Nations.<sup>18</sup> CLOUT thus opts for the less ambitious goal of publishing abstracts prepared by national correspondents. There are, however, other avenues through which CLOUT decisions and awards could be published or publicised.

A commercial publisher might find it feasible to publish full law reports, at least in one language. UNCITRAL has observed that it would be desirable if commercial publishers in various countries were prepared to publish original decisions in full, whether in one of the official languages of the United Nations or otherwise.<sup>19</sup> If a publisher were interested in publishing full law reports, the Secretariat could work out a relationship in order to facilitate publication and increase the benefit of that publication to the international community.<sup>20</sup>

Journals with an international and comparative perspective on law will inform readers about CLOUT decisions and awards, though probably this would in the main be by way of summaries or commentaries. There are a few journals, however, which already publish full or edited decisions relating to international conventions on aspects of international trade law: a notable instance is the *Uniform Law Review*, published by the International Institute for the Unification of Private Law (UNIDROIT).<sup>21</sup> Selected awards rendered in international commercial arbitrations are also being published, in the form available, in various journals, yearbooks and occasional collections.<sup>22</sup>

### Preparation of Abstracts

In the development of CLOUT, the suggestion was made that UNCITRAL itself, perhaps by means of an editorial board, could prepare the abstracts of the decisions and awards.<sup>23</sup> Much effort, however, would be entailed in properly preparing abstracts of reports from many legal systems, and UNCITRAL's preference for national correspondents is understandable: "They know the local language, are familiar with the style of the local decisions and would have access to any other legal texts cited in the decisions".<sup>24</sup> Even so, the use of national correspondents entails its own difficulties. With a large and various group of national correspondents, there is the need to secure a uniform, systematic approach to the preparation of abstracts. Accordingly, a standard format and structure has been worked out for the CLOUT abstract.<sup>25</sup>

At the minimum, CLOUT format requirements will afford full reference information for a user of the system. Each abstract will be assigned a case number and, crucially, will then list the provisions of the convention or model law dealt with in the decision or award. Usual identifying information will be provided, such as the date of the decision or award, the court or arbitral body involved, names of the parties (if available) and sources of publication. Further information about the decision or award will relate to storage in databases, translations and reproductions and published commentaries.

<sup>18</sup> See 1988 Commission Report, op cit, n 5, par 103.

<sup>19</sup> Ibid.

<sup>20</sup> 1988 Secretariat Note, op cit, n 5, par 20.

<sup>21</sup> UNIDROIT's *Uniform Law Review* has appeared since 1973. Before then, UNIDROIT also published decisions in its *Uniform Law Cases* (from 1960) and its *Yearbook* (from 1956).

<sup>22</sup> For a useful list of such publications, see M Rubino-Sammartano, *International Arbitration Law* (1990), Kluwer, Boston, p 47. The International Chamber of Commerce (ICC) is publishing collections of awards (in note and extract form) rendered by its Court of Arbitration; the first volume in the series: S Jarvin and Y Derains (Eds), *Collection of ICC Arbitral Awards: 1974-1985*, ICC Publication No 433 (1990), Paris.

<sup>23</sup> 1985 Secretariat Note, op cit, n 5, par 6.

<sup>24</sup> 1988 Secretariat Note, op cit, n 5, par 23.

<sup>25</sup> See, for the full details, draft User Guide, op cit, n 4, pars 12-15.



The substantive content of a CLOUT abstract is less easy to regulate. The preparation of any abstract very much depends upon the exercise of individual skill and discernment in extracting relevant details from a text. Approaches inevitably differ: some correspondents may incline to speculating upon broad principles, others to recounting fine detail. The abstracts will also be affected by the need for brevity: in view of the expected large number of decisions and awards and the costs of publication, the abstracts are usually to be no longer than one half of a page. Might not a CLOUT abstract be so summary as to be uninformative, or so discursive as to be misleading?

UNCITRAL recognises the limitations of an abstract by narrowly defining the purpose it is to serve. The CLOUT abstract is designed only to provide enough information for readers to decide if they require a complete decision or award.<sup>26</sup> The substantive part of the abstract will usually not be a complete summary, but instead a “pointer” to the relevant issues. Nonetheless, CLOUT does attempt to deliver a summary which is informative, each abstract usually to include

“the reasons for applying or interpreting the provision of the UNCITRAL text in the way that it is interpreted, including any specific reliance on a principle or other provisions of that text, on previous case law, on relevant contract clauses and particular facts; the claim or relief sought by the claimant and any other factor describing the procedural context within which the case was decided; the countries of the parties and the type of trade or other transactions involved.”<sup>27</sup>

Headnotes containing the propositions of law to be found in a case may also be provided.

However one looks at it, the effectiveness of CLOUT will very much depend upon the skill and diligence of the national correspondents. It is inevitable that some national correspondents will be less comfortable with the composition of abstracts than will others. Hopefully, though, the problems of maintaining the desired quality in abstracts can be mitigated by the format and guidelines set by CLOUT, and by UNCITRAL carefully supervising the operation of the system. There will need to be close, co-operative relationships between the national correspondents and the Secretariat, yet it is too much to expect that difficulties associated with abstracts can be eliminated entirely in practice.

### Concluding Remarks

Judges, arbitrators and practitioners, faced with a specific legal question, are understandably reluctant to engage in open-ended researches in realms of foreign and comparative law. CLOUT will expedite any inquiry about foreign judicial and arbitral attitudes to UNCITRAL texts: the abstracts will focus research, to allow ready identification of decisions and awards relevant to the question posed. In some instances the decisions and awards may be obtainable at less inconvenience and expense from sources other than UNCITRAL. CLOUT, however, still enables any interested person to request copies of required materials which may otherwise be difficult to access.

<sup>26</sup> Ibid, par 16.

<sup>27</sup> Ibid, par 17.

Apart from the issuing of abstracts, UNCITRAL can itself publicise important outcomes of CLOUT through its general activities in dissemination of information, such as its publication of other UNCITRAL documentation (reports, studies, explanatory notes) in the *UNCITRAL Yearbook*, its programme of training and assistance (through seminars, symposia and internships) and the technical assistance it provides to governments.<sup>28</sup> The lack of a CLOUT service for the translation of the decisions and awards does dilute the user benefits to be derived from the system. It is to be hoped that the user will be assisted to some extent, though, by translations and commentary emanating from other sources. Information about, and sometimes the texts of, decisions and awards held by CLOUT will no doubt be disseminated through the activities of intergovernmental agencies, professional associations, research institutions and legal commentators active in the field of international trade law.

Organisations other than UNCITRAL are also undertaking new initiatives in respect of collection, storage and retrieval of international trade law materials: again one may refer to UNIDROIT, which is endeavouring to establish an information system or data bank for uniform law.<sup>29</sup> All such systems will be assisted in their operations by the materials which CLOUT will accumulate and make more accessible. In turn these other systems, through their own work of classification and analysis, will enhance the usefulness of the CLOUT materials. This supplementary work could aid in opening the way to further development of the CLOUT system itself. UNCITRAL has envisaged that another organisation might be entrusted with the task of operating a CLOUT documentation centre, which would improve storage of and access to materials, and which might develop into a facility for training and research on UNCITRAL texts.<sup>30</sup>

CLOUT has to be approached with an awareness of its limitations, but no international system of reporting decisions and awards, however well constructed, will be free of problems. A more elaborate system could not be realistically achieved at this time, given the resource implications it would have for UNCITRAL or for individual States, or for both. As experience is gained of CLOUT in operation, the system will doubtless be able to be refined in matters of detail. It may also be possible to work gradual extensions of the system within prevailing organisational and financial restraints. Enough, however, has already been said to show that, all in all, CLOUT represents a worthwhile initiative in the unification of the law of international trade and will be welcomed by all with an interest in international trade law matters.

<sup>28</sup> On UNCITRAL's role in dissemination of information and training, see G Herrmann, "The Contribution of UNCITRAL to the Development of International Trade Law" in N Horn and C M Schmitthoff (Eds), *The Transnational Law of International Commercial Transactions* (1982), Kluwer, Deventer, p 49.

<sup>29</sup> See UNIDROIT's *Report on the Activity of the Institute 1991* (CD(71)2) (1992), UNIDROIT, Rome, p 10.

<sup>30</sup> 1988 Secretariat Note, op cit, n 5, par 18; 1988 Secretariat Note, op cit, n 5, par 102.