

Institution: University of Nottingham
Unit of Assessment: 20
Title of case study: Influencing the content of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement 2011
<p>1. Summary of the impact</p> <p>Professor Sue Arrowsmith's research significantly influenced UNCITRAL's revised 2011 Model Law on Public Procurement. This is a model regulatory framework of global relevance that aims to help national governments avoid waste, secure adequate public services, and fight corruption in procurement. The UNCITRAL Secretariat's presentation of reform options to the Model Law Working Group was based directly on both the novel analytical templates and the detailed recommendations developed by Arrowsmith, and many of the revised Model Law's provisions on both existing and new subjects of regulation follow directly the specific recommendations in Arrowsmith's research.</p>
<p>2. Underpinning research</p> <p>An UNCITRAL Model Law on procurement was first adopted in 1993, with an extended version then adopted in 1994 (the 1994 Model Law). Arrowsmith's extensive works on procurement regulation have included assessing the 1994 Model Law in comparison with other systems: item 3/1 below. Hers was the first work to examine procurement regulation from a principled and comparative perspective and is cited by many authors on specific systems (e.g. Quinot (South Africa)) as well as in later general/comparative works (e.g. Gordon; Evenett & Hoekman). From 2000 she published on new practices, notably e-procurement (including electronic auctions) and framework agreements. This work analysed how these phenomena might be regulated in EU law, but was done prior to actual legislation in the EU or elsewhere, and focused on developing analytical templates and identifying possible regulatory approaches that are of global relevance for addressing these new phenomena through legal rules: see items 3/2 and 3/1. The utility and broad relevance of these templates and associated recommendations is shown, for example, by the fact that the templates developed in item 3/3 were used by Prof Yukins (Professor of Law, member of UNCITRAL Experts Group and adviser to the US delegation at the Working Group meetings) in published work analysing the US and UNCITRAL systems prior to the UNCITRAL reforms (see item 5/4 below, which evidences research quality as well as impact on the UNCITRAL reform process of 2003-11).</p> <p>This work led to UNCITRAL approaching Arrowsmith in 2003 for a paper proposing reforms to the Model Law, which would draw on her research on how to regulate the new practices (see item 3/4). As stated by the UNCITRAL Secretariat in item 5/4: "<i>she was selected for this request on the basis of the breadth and quality of her published work on procurement regulation, including her innovative work on how to regulate new areas of procurement practice ...which were only just coming to the attention of regulators</i>". The resulting paper formed the direct basis of the material presented by the Secretariat to UNCITRAL, which was then adopted as the basis of a formal review of the Model Law (see item 5/1). Contemporaneously, Arrowsmith published in the world's leading comparative law journal explaining her recommendations in light of her conception of the role and nature of the Model Law (item 3/6).</p> <p>UNCITRAL then asked her to develop a further paper detailing precise options and recommendations for reform (see item 3/5). This drew on her earlier analytical templates: in many areas these provided the foundations for a comparative study, allowing diverse national practical approaches and legal concepts to be analysed within a common framework, and also provided a basis for outlining regulatory options.</p> <p>At all relevant times, Arrowsmith was (and is) Professor in the School of Law.</p> <p>Citations of item 3/1 referred to above: Quinot, <i>State Commercial Activity: A Legal Framework</i> (2008) Juta & Co: Cape Town e.g. pp 12, 40, 220, 252, 269; Gordon, 35 Pub. Cont. L.J. 427 (2005-2006) p.48; Evenett and Hoekman, <i>International Cooperation and the Reform of Public Procurement Policies</i> 2005 www.ycsg.yale.edu/focus/gta/international_cooperation_reform.pdf.</p>

3. References to the research

- 3/1. Sue Arrowsmith, John Linarelli and Don Wallace, *Regulating Public Procurement: National and International Perspectives*, 856pp (Kluwer International, 2000) [available on request]
- 3/2. Sue Arrowsmith, 'Framework Purchasing and Qualification Lists under the European Procurement Directives' (1999) 8 *Public Procurement Law Review* 115-46 and 168-86 [available on request]
- 3/3. Sue Arrowsmith, 'Electronic Reverse Auctions under the EC Public Procurement Rules' (2002) 11 *Public Procurement Law Review* 299-330 [available on request]
- 3/4. Sue Arrowsmith, *Reform of the UNCITRAL Model Law on Procurement of Goods, Construction and Services* (2003) (42 pages); paper submitted on request of UNCITRAL secretariat [available on request]
- 3/5. Sue Arrowsmith, *Possible Reform of the UNCITRAL Model Law on Procurement of Goods, Construction and Services* (2004) (87 pages); paper for United Nations circulated 1 Feb 2004 to UNCITRAL Expert Group on Procurement Law. (This includes the synthesis of an extensive comparative study). [available on request]
- 3/6. Sue Arrowsmith, 'Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard' (2004) 53 *International and Comparative Law Quarterly* 17-46 [DOI: 10.1093/iclq/53.1.17]

4. Details of the impact

The research had a significant impact on the 2011 Model Law on Public Procurement of UNCITRAL, - a substantially revised version of the 1994 Model Law.

UNCITRAL is a UN agency concerned with trade. Inter alia, it adopts 'model' laws on commercial matters for use in national laws: governments simply copy the UNCITRAL text (suitably adapted) into national legislation. The model laws' purpose is to help states adopt sound regulatory frameworks without unnecessary effort, whilst also promoting standardised rules to assist trade (since companies find it easier to operate abroad if the legal framework is familiar).

The Model Law on procurement deals with regulatory rules on public procurement – that is, the acquisition of goods, works and services by governments (from simple items such as furniture to complex infrastructure such as power stations). A sound regulatory framework is considered important to avoid wasting resources; ensure high-quality infrastructure; secure adequate services in areas such as transport and health; and fight corruption. Procurement is also a vehicle to achieve other policies, such as reducing environmental damage, promoting competitive markets and encouraging e-commerce. UNCITRAL's Model Law on procurement provides a template that aims to help states to achieve and balance these objectives whilst also facilitating trade. Intended ultimate beneficiaries are those affected by the above interests including governments; taxpayers; citizens and businesses using government services; suppliers, including those in international markets and small businesses; and beneficiaries of social programmes implemented through procurement (such as minority groups).

In 2003 UNCITRAL launched a review of the 1994 Model Law to: i) adapt it to new practical and technological phenomena; and ii) improve its existing rules. The resulting new Model Law was adopted in July 2011. New phenomena addressed include matters essential for an effective modern purchasing system, in particular e-procurement - including electronic auctions - and framework agreements (sophisticated methods for procuring repeat needs, such as maintenance and consultancy). Arrowsmith's research as described in section 2 above substantially influenced the 2011 Model by analysing precisely both *which* issues to address and *how* to address them. As stated by the UNCITRAL Secretariat in item 5/3 (which confirms the statements below): "..... [the] short description of her work [below] does not do justice to the very significant influence that her research has had on both the initial choice of issues for reform and in the nature and quality of the final outputs". Arrowsmith was also appointed a member of UNCITRAL's Experts Committee on procurement, responsible for advising the UNCITRAL Secretariat throughout the reform process (2003-2011).

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More specifically, the 2011 Model includes:

i) Extensive provisions on the “new” areas analysed by Arrowsmith in items 3/2, 3/3, 3/4 and 3/5.

As recommended in these items, the Model authorises broad use of new mechanisms (see item 5/2). These are found in Article 7 (e-communications), Articles 53-57 (electronic reverse auctions), and Articles 58-63 (framework agreements, authorising certain categories of framework agreements, but not others, as per recommendations in item 3/5). The templates developed in Arrowsmith in research items 3/2, 3/3, and 3/5 - based on her analysis of the complex practical phenomena involved and her comparative research into regulation and practice - formed the basis of the Secretariat’s presentation of these novel issues to the Working Group, to ensure the Group’s understanding of the practical situations, policy options and regulatory distinctions: see items 5/3 and 5/4. As the Secretariat states in item 5/3:

“[Item 3/5] was particularly significant in dealing with those areas such as electronic communications, electronic auctions and framework agreements in which very few states had actually adopted regulatory rules. Without Professor Arrowsmith’s research in carefully classifying the variations in the phenomena to be regulated, identifying the issues for regulators, and explaining the options to address them, it would have been impossible for the Secretariat to draft comprehensive material for consideration by the Working Group...; for the Working Group to engage in focused discussion; and for the Group and the Secretariat to produce the final high-quality text that was adopted by the Commission in 2011.....the contents of the Model Law reflect many of the specific recommendations made in the papers, both on matters of principle and matters of regulatory detail”.

The above Articles of the 2011 Model Law also include numerous controls and other detail on the new mechanisms, based on recommendations in items 3/4, 3/5 and 3/6. A couple of examples (amongst many) are inclusion of specific controls over communications which, as recommended, do not explicitly distinguish between electronic and other means (Article 7(4)-(5)); and regular publication of aggregate information on awards under frameworks (Article 23) (not found in existing regulatory systems but recommended in the above work to fill a gap in transparency).

ii) Reforms on other areas, as specifically recommended or identified for consideration, in items 3/4, 3/5 and 3/6 (see item 5/2 for corroboration). A few examples are: a standard approach to services and goods/works, instead of provision of different procurement methods specifically for goods/works, on the one hand, and services on the other (Articles 27 and 28(1)); explicit provision for social and environmental award criteria (previously absent) but accompanied, as recommended by Arrowsmith, by control through specific authorisation in national regulations (Article 11); removal of previous exclusions from supplier review (exclusion existing in the 1994 version are no longer found in the 2011 version); and new provision for an independent body to review supplier complaints in all systems.

The Model Law is an international regulatory model of global relevance, designed for use in any country (with options within it to take account of differing national conditions). To give just a few examples, the 2011 Model has already been used:

- by Mauritius in enacting its latest revisions to the Public Procurement Law 2006 (2010-2011) (these were based on the draft 2011 Model Law): see <http://ppo.gov.mu/Englis/documents/ppo2006.pdf> e.g. s.2 definition of “framework agreement” and s.29, introducing provision for frameworks for the first time, based on the 2011 Model Law
- as the basis of the Bill currently before Parliament for the first comprehensive procurement law in India (see the first draft by Planning Commission of India, preface, s.6 stating “The Public Procurement Bill 2011 draws substantially from the UNCITRAL Model Law of July 2011” (<http://infrastructure.gov.in/pdf/public-procurment-bill.pdf>)) and the final Bill http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/58_2012_LS_EN.pdf (which is modelled on the 2011 version of UNCITRAL in most of its rules, and includes electronic auctions as added by the 2011 Model Law);

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- for an UNCITRAL-EBRD joint reform project for the Commonwealth of Independent States and Mongolia (see generally www.ppi-ebd-uncitral.com/index.php/en/the-initiative). The UNCITRAL Secretariat has already commented on draft legislation prepared by the Kyrgyz Republic and Tajikistan, and legislative revisions are currently being drafted by Armenia with the Secretariat's assistance (item 5/6)
- to draft reform proposals for the Public Procurement Law of Ghana (currently based on the 1994 Model), including to add new provisions on remedies and social/environmental issues from the 2011 Model and introduce measures on e-procurement and frameworks (currently before the Cabinet in a Cabinet Memorandum): see item 5/5.
- to draft legislation for several Caribbean countries e.g. new legislation based on the Model Law is before the Legislative Review Committee of Trinidad and Tobago for 19 Aug 2013: for details of this and other Caribbean reforms see corroborating item 5/6.
- The 2011 Model is also being used by OECD in revising its methodology for assessing systems for development aid, and in assessing compliance with Art.9 of UN Convention on Corruption: item 5/6.

Given that the 2011 Model Law referred to here was only adopted two years ago and the length of legislative processes, it is too soon for the changes to the Model Law to be reflected even more extensively in national legislation. However, its inherent importance can be gauged from the fact that the 1994 Model Law was used as the main basis for procurement legislation of more than 30 countries (para.226 in item 5/1 below) and to some degree in many more (e.g. in Africa in Botswana and Zimbabwe). Use of the Model Law's provisions is a World Bank requirement for Bank-funded reform of states' own procurement systems (World Bank, *Note for drafting public procurement regulations* (March 2002)); this means that although it is not legally binding on states, developing countries are often effectively required to use it given that the World Bank provides or contributes to procurement reform programmes. The 2011 Model is likely to be similarly influential.

5. Sources to corroborate the impact

5/1. Report of the United Nations Commission on International Trade Law on its 36th session, 30 June-11 July 2003, paras 225-230, referring in para.230 to documents A/CN.9/539 and Add.1 as the basis for the reform programme. All documents at www.uncitral.org

5/2. UNCITRAL Model Law on Public Procurement 2011:
(http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html)

5/3. Statement 1 by Caroline Nicholas, Senior Legal Officer, UNCITRAL secretariat

5/4. C.R. Yukins, "A Case Study in Comparative Procurement Law: Assessing UNCITRAL's Lessons for U.S. Procurement" (2006) 3 *Public Contract Law Journal* 457, pp.469-472 (citing item 3/3 above and explaining the influence of its models on the discussions in UNCITRAL).

5/5. Statement by L. Dodoo, Legal Director, Public Procurement Authority of Ghana

5/6. Statement 2 by Caroline Nicholas, Senior Legal Officer, UNCITRAL secretariat