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Unity and Diversity in the Adoption of the Model Law

Pieter Sanders (*)

Author

Pieter Sanders

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THE WORK done by the UNCITRAL in the drafting of the Model Law has borne fruit in many countries, so much so that a first comparative survey of the manner in which it has been adopted by States from different regions and the changes and additions made by them when doing so may be deemed worthwhile.

The legislative history of the Model Law and its 36 articles has been extensively dealt with by Holtzmann and Neuhaus. (1) The present survey starts from the point where the legislative history left off, *i.e.* the adoption of the Model Law itself in 1985. For the period thereafter, 1986-1994, a broad outline has been sketched of which articles underwent changes in the adoption process, and for which subjects – not dealt with in the Model Law – States deemed it appropriate to add provisions. These aspects are dealt with respectively in Sections II and III. This is preceded in Section I by a review of the differing manner in which States have introduced it into their national legislation.

Which countries may be regarded as Model Law countries? No official criterion exists for qualifying a country as a Model Law country. In the period 1986-1994 many new arbitration laws have been enacted. In all these new laws, the influence of the Model Law can be observed. In fact, the impact of the Model Law is such that no State, modernizing its arbitration law will do so without taking it *inter alia* into account. But this is not enough for the qualification as a Model Law country and for inclusion in the present study. A distinction therefore had to be made between laws which may have been inspired by the Model Law and those where the new law states in so many words that it is based on the Model Law or where a considerable number of its provisions repeat the articles of the Model Law. This criterion may itself be the subject of discussion and referring to a considerable number of Model Law-based *page "1"* provisions may be regarded as rather vague. With this *caveat* the following list of Model Law countries is presented:

- Canada adopted the Model Law in 1986 (2)
- Cyprus followed in 1987 (3)
- Bulgaria and Nigeria in 1988 (4)
- Australia and Hong Kong in 1989 (5)

Scotland followed in 1990 (6)

Peru in 1993 (7)

Bermuda, the Russian Federation, Mexico and Tunisia adopted the Model Law in 1993 (8)

Egypt and Ukraine in 1994 (9)

The text of the new arbitral legislation of all these 14 countries has been published in the *International Handbook* of ICCA, accompanied by – or soon to be accompanied by – a Report written by an arbitration expert from the country concerned. (Arbitration is an ongoing process. See my Concluding Observations (p. 36) for a list of newcomers added since I completed this article.)

Eight States of the USA have adopted the Model Law for international commercial arbitration. For the text of these new laws I cannot refer to the Handbook of ICCA. However several texts are reproduced in the Annual Report of the AAA: *page "2"*

California (10)

Connecticut (11)

Florida (12)

Georgia (13)

North Carolina (14)

Ohio (15)

Oregon (16)

Texas (17)

The List of Model Law countries thus comprises at the time of writing 22 States, counting Canada and its provinces and territories for this purpose as one State. The adoption by so many States, belonging to different regions and different cultural backgrounds, may be regarded as an impressive record for the first nine years of the Model Law's existence.

I. Differing Manner of Introduction

States may follow different ways of introducing the Model Law regime into their national arbitration legislation.

(a) Assimilation of the Model Law

States may enact a new law for international commercial arbitration which is identical with the Model Law or almost identical. Cyprus's law of 1987 contains 36 articles, corresponding with the 36 articles of the Model Law. Only the first six have been rearranged in a different manner. Connecticut totally incorporated the Model Law in its new law while adding a s. 37: 'This Act may be cited as the UNCITRAL Model Law on International Commercial Arbitration.'

Other States annexed the Model Law in a Schedule. In Canada this has been done in the Commercial Arbitration Act (Federal) as well as in all the International *page "3"* Arbitration Acts of the ten

common law Provinces and two Territories. The Schedules reproduce the Model Law unchanged. Changes or additions are made in the Acts themselves. Changes in the text of the Model Law concern Article 28(2) (see Section II below); additions were made in respect of Conciliation and Consolidation (see Section III). The civil law province of Quebec followed another road. Its new Book VII on Arbitration is Model Law-based and in addition states in Article 940.6 that in international trade arbitration the Model Law 'shall be taken into consideration'. Australia annexed the Model Law in a Schedule. Part III of its International Arbitration Act contains in ss. 16-22 some special provisions in respect of the Model Law and in ss. 22-27 some optional provisions. Hong Kong annexed the Model Law in the Fifth Schedule to its 1989 Arbitration Ordinance. The Ordinance itself contains in s. 2 some provisions on interpretation of the Model Law and in Part IIA (ss. 34A-34E) some additional provisions. Bermuda annexed the Model Law to its International Conciliation and Arbitration Act 1993 in Schedule 2. Part III of this Act dealing with 'International Arbitration' contains additional provisions for the interpretation and application of the Model Law. Scotland in its 1990 Law Reform (Miscellaneous Provisions) Scotland Act annexed the Model Law in Schedule 7 'with certain modifications to adapt it for application in Scotland'. Section 66 of the Act contains a provision on the interpretation of the Model Law and the possibility to opt into the Model Law regime as discussed hereafter.

(b) Model Law Regime also for Domestic Arbitration

Although the Model Law has been conceived for international commercial arbitration this possibility has been admitted from the beginning. Already when UNCITRAL discussed its future work it was agreed that, if a Model Law for international commercial arbitration were to be presented for use by States in their arbitration legislation, 'this would ... not prevent States ... from adopting the model provisions also for domestic arbitrations'. (18) This was repeated at the end of the road, in the Analytical Commentary by the Secretary-General: 'However, ... any State is free to take the model law, whether immediately or at a later stage, as a model for legislation on domestic arbitration and, thus, avoid a dichotomy within its arbitration law.' (19) Indeed, if two regimes apply, one for international arbitration and the other for domestic arbitration, questions may arise as to which of the two applies. (20) *page "4"*

Adoption of the Model Law for both international and domestic arbitration has taken place in Bulgaria, (21) Mexico (22) and Egypt. (23) For Canada this applies on the federal level (24) and for Quebec. (25)

(c) Opting into the Model Law Regime

States may also, when adopting the Model Law, create the possibility for the parties to opt into its regime for domestic arbitration by agreement. This possibility differs from the opportunity the Model Law itself offers in Article 1(3)(c). The Model Law limits this possibility to an express agreement by the parties stating that

the subject matter of the arbitration agreement ‘relates to more than one country’. These words contain a certain restriction of opting-in (*see, infra* II.a at p.7). This possibility of opting-in is found in the arbitration law of Hong Kong which, in domestic arbitration permits the parties, when a dispute has arisen, to agree subsequently that Part IIA of the law (Model Law regime) is to apply. (26) Scotland permits the parties, without requiring that a dispute should have arisen, to agree that the Model Law as set out in Schedule 7 shall apply ‘notwithstanding that the arbitration would not be an international commercial arbitration within the meaning of Article 1 of the Model Law’. (27) Nigeria changes, in its definition of ‘international’, the provision of Article 1(3)(c) quoted above. The parties may expressly agree ‘despite the nature of the contract’ that the dispute shall be treated as an international arbitration. (28)

(d) Opting-out of the Model Law Regime

The opposite may also be provided. Parties to an international arbitration may be permitted to agree on *opting-out* of the Model Law regime and to have their international arbitration governed by the rules for domestic arbitration. This possibility of fall-back on the rules for domestic arbitration may be formulated differently.

In Australia parties to an international arbitration held in Australia can exclude the application of the Model Law by an agreement in writing. (29) Bermuda states the same in more detail: Parties may agree ‘in the arbitration agreement or any other document in writing ... that any dispute that has arisen or may arise between them is *page "5"* not to be settled in accordance with the Model Law. (30) Hong Kong's Ordinance also provides for the possibility of opting-out. Parties to an international arbitration agreement may agree in writing ‘that the agreement is, or is to be treated as, a domestic arbitration agreement’. (31)

(e) Relationship Between Domestic and International

States which introduce the Model Law for international commercial arbitration in their arbitration legislation may, when doing so in one law, refer in the international part of the law to the application of Rules contained in the domestic part.

In Nigeria the Model Law has been introduced in Part III of its arbitration law which bears the Title ‘Additional Provisions Relating to International Commercial Arbitration and Conciliation’. Part III applies ‘in addition to the other provisions of this Decree’. (32) Peru's new law of 1992 is divided in two Sections. Section Two introduces the Model Law for International Arbitration with the words ‘the provisions contained in the First Section hereof shall be applicable to this Section on a supplementary basis’. (33) Tunisia's law of 1993 is divided into three Chapters. Chapter One contains Common Rules (*Dispositions communes*) (Articles. 1-15). Chapter Two deals with domestic arbitration (Articles. 16-46). Chapter Three introduces the Model Law for international arbitration (Articles. 47-82). This last Chapter refers in many articles to provisions contained in the

preceding two Chapters. (34) Also in the USA such a reference may be found. Georgia's Statute, Part 2 on Arbitration on International Transactions, starts in s. 9.9.30 with: '[T]his part supplements Part 1 ... and shall be used concurrently with the provisions of Part 1 ... whenever an arbitration is within the scope of this part.'

Reference to rules which also apply in domestic arbitration may be understandable from a legislator's viewpoint. However it does not facilitate getting a complete view of the rules governing an international commercial arbitration. (35) This may apply in particular to the international business world when arbitration for the resolution of disputes which may arise out of their business relations has been provided for. Application of rules for domestic arbitration on an additional or supplementary basis may even create problems of interpretation for those who are legally trained. When two regimes are referred to, one in principle and the other (domestic regime) on a supplementary basis, interpretation difficulties may increase.
page "6" Therefore, if States adopt the Model Law (with the adaptations they may wish to make) for international commercial arbitration, one law without reference to the domestic regime, would in the author's opinion, from a methodological point of view be preferable.

II. Articles Modified on Adoption

States may, when introducing the Model Law into their legislation, modify the text. It would go beyond the scope of this article to refer to every change made on this occasion. In what follows a survey is given of what may be regarded as the more important changes that were made, starting with changes made as to the scope of application. Some of the changes dealt with in this Section such as provisions on interpretation of the Model Law may be qualified as additions as well (see Section III). However, when following the sequence of the Articles of the Model Law, I preferred to deal with them in Section II when they are connected with the text of the Model Law as conceived by UNCITRAL and to reserve Section III for pure additions on topics discussed at UNCITRAL but consciously left out.

(a) Article 1

This article deals with the scope of application of the Model Law, conceived for international commercial arbitration. The legislative history of this article is the longest of all articles of the Model Law. (36) The Working Group, constituted at UNCITRAL for drafting the Model Law, decided not to adopt a general definition as France did in Article 1492 of its new CCP: 'An arbitration is international when it involves the interests of international trade.' Instead it adopted a more detailed definition of 'international' and described 'commercial' in a footnote.

'International'

Under (a-c) of the third paragraph of this article reference is made to several factors which qualify the arbitration as international.

According to factor (a) an arbitration is international if the parties at the time of the conclusion of their arbitration agreement had their place of business in different States. This in itself is a first and obvious criterion for 'international'. In para. 4 of Article 1 it is elaborated further in case a party has more than one place of business, or in case a party has no place of business at all.

According to factor (b) an arbitration is also international if one of the following places is situated outside the State in which parties have their place of business. This may either be the place of arbitration or any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with page "7" which the subject matter of the dispute is most closely connected. Factor (c) finally extends the scope of application if parties expressly agree that the arbitration agreement relates to more than one country.

As a rule States adopting the Model Law followed the definition under (a) and (b) of Article 1(3) of the Model Law. Some States did so in different wording which, in practice, may not lead to an essential difference in the scope of application.

The Russian Federation (Law of 14 August 1993) and Ukraine (Law of 24 February 1994) both formulated (a) and (b) as follows in Article 1: [*] Paragraph 3 above corresponds with para. 4 of Article 1 of the Model Law, while para. 2 above deviates in wording but, not essentially from (a) and (b) of Article 1(3) of the Model Law.

Bulgaria's law on international commercial arbitration as amended in 1993 applies to arbitrations taking place in the Republic of Bulgaria if: [*] This formulation differs considerably from Article 1(2) of the Model Law. In fact only (a) is repeated, but this contains – as already observed above – the most obvious criterion for 'international'.

Emphasis on types of disputes is found in some of the States of the USA adopting the Model Law. Georgia's law of 1993 states in s. 9.9.31: [*] These exceptions are contained in s. 9.9.2. These ten exceptions, which are not repeated here, range from medical malpractice claims to claims arising out of personal injury or wrongful death based on tort.

Florida also defines the scope of application in its s. 684.03 differently: [*] Article 1(3)(c) creates the possibility for the parties to opt-into the application of the Model Law. An arbitration is also international if '(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country'. Several States, adopting the Model Law changed the wording of this opting-in clause, contained in the Model Law, or deleted this possibility.

California, Ohio, Oregon and Texas further specified (c) by stating 'That the subject matter of the arbitration agreement relates to *commercial interests* in more than one state'. All four added a para. (d) stating, with minor variations, 'The subject-matter of the arbitration agreement is *otherwise* related to commercial interests in more than one state'. At UNCITRAL the Commission rejected this

formulation as too vague and therefore unworkable. (37)

Tunisia, after repeating in Article 48 of its new law of 1993 Article 1(3) of the Model Law added under (d): 'Generally, if the arbitration concerns international trade.' It thus added to the Model Law definition of international the French definition of Article 1492 CCP: 'An arbitration is international when it involves the interests of international trade.' In fact its law thus contains two definitions of 'international': the Model Law definition and the French CCP definition, rejected by the Working Group of UNCITRAL.

On the other hand the Russian Federation and Ukraine when adopting the *page "9"* Model Law refrained from taking over the possibility of (c) to opt-into the application of the Model Law. (38)

The changes made so far do not clarify the conditions under which the express agreement may be concluded. Such agreement may be concluded if 'the subject-matter of the arbitration agreement relates to more than one country'. UNCITRAL's Secretary-General observed in respect of this clause that 'it is apparent that the wide scope' of this 'residual' text of 'international' is 'accompanied by a large degree of imprecision'. (39) This requirement that the arbitration agreement must relate to more than one country excludes an opting-into the Model Law regime for a purely domestic arbitration. It is interesting to note that the Canadian province of Ontario, in adopting the Model Law, states in its law: 'despite Article 1(3)(c) of the Model Law, an arbitration conducted in Ontario between parties who all have their place of business in Ontario is not international only because the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country'. (40)

A State wanting to create this possibility of bringing a purely domestic arbitration under the Model Law regime, has to provide a special opting-in provision.

Nigeria's law in its s. 57, faithful to the text of the Model Law maintained Article 1(3) under (c) but added to it under (d) the possibility for the parties to agree expressly *'despite the nature of the contract'* that the dispute 'shall be treated as an international arbitration'. This addition in fact makes (c) superfluous. The provision under (d) brings Nigeria on to the same level as Hong Kong and Scotland.

On the one hand it is, in the author's opinion, clear that Article 1(3)(c) cannot be used to bring a purely domestic arbitration under the Model Law regime (see Ontario) but on the other hand we are still confronted with the rather vague requirement that 'the subject-matter of the arbitration agreement relates to more than one country'. It seems to me that this requires in any case some international factor. However, which factors justify the opting-in of Article 1(3)(c) remains uncertain. The validity of the express agreement could thus be the subject of subsequent court proceedings. (41)

'Commercial'

The Model Law enumerates in a footnote under Article 1 in one long

sentence transactions which are to be considered as ‘commercial’.

Some countries, when adopting the Model Law, were not satisfied by this solution and preferred to insert the footnote in the text. This was done by the Canadian province of British Columbia, Cyprus, Egypt, Nigeria, Scotland and Ukraine. Apart page "10" from British Columbia all other laws of Canada omit the footnote and did not insert a description of ‘commercial’ in the text. The same applies to Peru. Tunisia's Code of Arbitration 1993 adds to its definition of ‘international’, that an arbitration is deemed to be international ‘generally, if the arbitration *concerns international trade*’. With this addition, borrowed from Article 1492 of the French CCP, ‘commercial’ is introduced as well.

Whether it is found in a footnote or in the text or even without any further explanation, the term ‘commercial’ will hardly give rise to problems in practice. As far as arbitrability is concerned Article 1(5) refers to the law of the Model Law State. This law may exclude certain disputes from being submitted to arbitration under the Model Law regime or may provide that certain disputes may only be submitted to arbitration according to other provisions than those of the Model Law. ‘International commercial arbitration’, for which the Model Law has been conceived, and in particular ‘commercial’ does not interfere with the domain of arbitration, *i.e.* whether a dispute is arbitrable or not.

(b) Interpretation of New Laws, Based on the Model Law

Reference has already been made in respect of Article 1 to the preparatory work done at UNCITRAL, when the Model Law was being drafted. Several States, when adopting the Model Law, deemed it useful, in respect of the interpretation of their new law, to refer to the *travaux préparatoires* at UNCITRAL. Although in fact this is an addition, it is preferable to deal with this reference here.

When the General Assembly of the U.N. approved the Model Law in its Resolution of 11 December 1985, it requested the Secretary-General to transmit the text together with the *travaux préparatoires* from the Eighteenth Session of the Commission to Governments and to arbitral institutions and other interested bodies. These documents consist of the Report of the Commission on its Eighteenth Session [42] and the Analytical Commentary of the Secretary-General of the Commission. [43] . In Canada, the first country to adopt the Model Law, the Federal Act and the Acts of all provinces and territories refer to these documents or generally to the *travaux préparatoires* of UNCITRAL for the interpretation of the law. Other countries followed the Canadian example, namely Australia, Bermuda, Hong Kong and Scotland. Even when the new law does not make a special reference to the *travaux préparatoires*, they play an important role in the interpretation of the new law.

(c) State as a Party to Arbitration (Article 7)

Article 7 on ‘Definition and form of arbitration agreement’ does not deal with States or governmental agencies concluding an arbitration agreement, nor with the issue of page "11" State immunity.

Several States deemed it useful to insert a provision in respect of the capacity of the State or a State agency to enter into an arbitration agreement.

Bulgaria added a specific provision that a State or State agency can be a party to arbitration (Article 3 LCIA). Peru's new arbitration law contains a similar provision authorizing the State and governmental entities to submit disputes to arbitration based on international agreements to which Peru is a party, and allowing privately managed or mixed economy State-owned companies to arbitrate in or outside of Peru (Article 85 Decree no. 25935).

Egypt states in Article 1 of its new law on arbitration of 1994 that the law applies ‘to all arbitrations between public law or private law persons, whatever the nature of the legal relationship around which the dispute revolves’. To this is added: ‘when such an arbitration is conducted in *Egypt* or when an international commercial arbitration is conducted *abroad* and its parties agree to submit it to the provisions of this Law’ (emphasis added). In Tunisia, an exception is made from the general prohibition forbidding the State to arbitrate, allowing the State, public entities and local communities to submit to arbitration disputes governed by Chapter Three on international arbitration (Article 7(5) Law no. 93-42).

Canada in its federal Act authorizes federal departments and Crown corporations to enter into commercial arbitration agreements in both domestic and international cases (s. 5(2) CAA). All International Commercial Arbitration Acts of the common law provinces and territories contain the provision that the Crown is bound by the Act. The Hong Kong and Bermuda Acts similarly provide that the Crown is bound in international arbitration (s. 2-1 Arbitration Ordinance Hong Kong and s. 49 of the Bermuda Act). The issue of State immunity, whether immunity from jurisdiction or immunity from execution, is not provided for in these Acts. A reference to immunity from execution can be found in the International Conciliation and Arbitration Act 1993 of Bermuda. Its s. 49 adds to ‘This Act binds the Crown’ the words ‘except Part IV’. This Part deals with enforcement of awards under the New York Convention.

(d) Number of Arbitrators (Article 10)

The Model Law states in Article 10(1) that parties are free to determine the number of arbitrators. Parties may therefore also agree on an even number of arbitrators. However, failing such determination by the parties, there shall be three arbitrators (Article 10(2)).

Mexico and Scotland are apparently of the opinion that, if parties are silent on the number of arbitrators, one arbitrator would be more appropriate. In the USA also Florida (s. 648.09), North Carolina (s. 1-567.40) and Ohio (s. 2712.17) provide for one arbitrator, unless the parties agree to another number.

The Model Law does not provide for a solution in case the parties use the freedom provided by Article 10(1) and determine the number of arbitrators to be even, for example two, and these two arbitrators cannot agree on the decision. Article 11 of the Model Law (appointment of arbitrators) only regulates, ‘failing such agreement’

of the parties on the appointment procedure, the obstacles which may page "12" arise in case three arbitrators or a sole arbitrator has to be appointed. Egypt (Article 15(2)) and Tunisia (Article 55(1)) avoid the difficulty by requiring the arbitral tribunal to consist in any case of an uneven number of arbitrators. In the domestic part of its arbitration law Tunisia states that, in case parties agreed on an even number, the composition of the arbitral tribunal will be completed by the appointment of an arbitrator who will act as chairman (Article 18(2)). In the international part of the law this solution is not repeated.

(e) Challenge Procedure (Article 13)

The Model Law leaves the parties free to agree on the procedure for challenging an arbitrator (para.1). Parties mostly do so by reference to arbitration rules. The Model Law adds in para. 1 that this freedom is subject to the provisions of para. 3. If the parties have not agreed on a procedure, first of all the arbitral tribunal (which includes the challenged arbitrator) shall decide on the challenge (para. 2). If the challenge, either under the procedure agreed upon by the parties or under the procedure of para. 2 (decision by the arbitral tribunal), is not successful the challenging party may request the court to decided on the challenge, which decision shall be subject to no appeal. Pending this request the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award (para. 3).

Several States, when adopting the Model Law, made changes. Nigeria, in its Arbitration and Conciliation Decree 1988 (s. 45(9)) does not involve the arbitral tribunal in deciding on the challenge but has entrusted this task to the appointing authority. If not designated by the parties, the Secretary-General of the Permanent Court of Arbitration, The Hague, acts as Appointing Authority (see s. 54(2)). This procedure may have been inspired by the UNCITRAL Arbitration Rules under which the decision on the challenge is entrusted to the Appointing Authority (Article 12). However, the Secretary-General of the P.C.A. does not, under the Rules of UNCITRAL, appoint an arbitrator but only designates an Appointing Authority. Nigeria therefore goes one step further by charging the Secretary-General with the task of appointing an arbitrator if parties failed to agree on an Appointing Authority.

In Peru, the challenge procedure is governed by the Part of the Arbitration Act dealing with domestic arbitration, the provisions of which Part apply on a supplementary basis (Article 82). If there is one arbitrator the judge or the arbitral institute organizing the arbitration decides on the challenge. If there is more than one arbitrator, the arbitral tribunal decides on the challenge without the vote of the challenged arbitrator (Article 25). In case there is a tie the chairman or, if he is challenged, the most senior member of the tribunal decides. In all these cases the decision is final.

In Tunisia the 1993 Law on Arbitration regulates the challenge in Article 58. Parties are free to agree on a challenge procedure, for example to entrust the challenge to an Arbitral Institute ‘subject to the provisions of paragraph 3’. This paragraph provides for the decision on the challenge by the Court of Appeal of Tunis in case

the challenged arbitrator does not withdraw from his office or the page "13" other party does not agree to the challenge. Tunisia deviates from the Model Law as a decision on the challenge to be taken by the arbitral tribunal (including the challenged arbitrator) failing an agreement on the challenge procedure by the parties (Article 13(2) Model Law) is omitted.

Egypt (1994) adds to Article 19 of its new law, which virtually corresponds with Article 13 of the Model Law, a fourth paragraph in which it is stated that 'if the arbitrator is successfully challenged, whether by a decision of the arbitral tribunal or by the court reviewing the challenge, the arbitral proceedings already conducted shall be considered null and void, including the arbitral award'. This deviates from the Model Law which provides in such case for the appointment of a substitute arbitrator (Article 15, Model Law).

In the Canadian province of British Columbia s.13 of the ICAA is virtually the same as Article 13 Model Law. However, according to para. 5 of the Act, the court 'may refuse to decide on the challenge if it is satisfied that, *under the procedure agreed upon by the parties, the party making the request had an opportunity to have the challenge decided upon by other than the arbitral tribunal*' (para. 5). The Court may thus refuse to decide on the challenge in case the parties have entrusted the decision to an Arbitral Institute.

In the USA several States adopted the challenge procedure of the Model Law virtually without modification, namely California in ss. 1297.132-136. Connecticut in s. 13; North Carolina in s. 1-567.43 and Texas in s. 249-13. Oregon deviates from Article 13 of the Model Law in so far as s. 36.478 adds the possibility for the court to refuse to decide on the challenge if the party making the request had an opportunity to have the challenge decided upon by other than the arbitral tribunal (compare the Canadian province of British Columbia referred to above). This may be the case if parties agreed upon a decision on the challenge by an Arbitral Institute. The law of Florida on the other hand does not contain a provision on challenge comparable with Article 13 of the Model Law. A final award, may, however, be vacated, *inter alia*, on the ground that a neutral arbitrator had a material conflict of interest with a party unless that party had timely notice of the conflict and proceeded without objection (s. 648.25(e)).

(f) Competence of the Arbitral Tribunal to Rule on its Jurisdiction (Article 16)

Paragraph 1 of Article 16 contains two principles. The principle of separability: 'an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract' and the principle of 'Kompetenz-Kompetenz': 'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.' Paragraph 2 states, *inter alia*, that 'a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence'. According to para. 3, the arbitral tribunal may rule on this plea either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction any party may request

within 30 days the court to decide the matter, which decision is subject to no appeal. Pending such a page "14" request the arbitral tribunal may continue the arbitral proceedings and make an award.

The system of Article 16, a result of in-depth discussion at UNCITRAL, has been called 'an innovative and sensible compromise' (44) . In the adoption process only a few States deviated in some respects from this system.

In Bulgaria the arbitral tribunal decides 'with a ruling or with the award' on the plea that the arbitral tribunal does not have jurisdiction (Article 20). This provision omits the possibility for immediate review by the court as provided for in Article 16(3) of the Model Law. If the arbitral tribunal rejects the plea and renders a final award, this award may be set aside on the ground that 'there was no arbitration agreement or not a valid arbitration agreement' (Article 47(1) under 2).

Tunisia omits in Article 16(3) the provision of para. 3 that the arbitral tribunal, pending court appeal, may continue the proceedings. Instead it stipulates that the court shall give its decision in any case within three months.

In the USA Florida approaches the issue of jurisdiction of the arbitral tribunal from another angle. A person may apply to the court for an order compelling arbitration if that person claims that arbitration was agreed by the parties. The court may refuse this order on several grounds – which is followed by: 'All other questions, including whether the dispute is arbitrable or whether the written undertaking to arbitrate is subject to defenses or is otherwise invalid or unenforceable *shall be for the arbitral tribunal to decide*' (s. 648.22(1)(c) (emphasis added). Therefore, arbitrators decide on these issues, which concern the jurisdiction of the arbitral tribunal. To this extent this corresponds with Article 16 of the Model Law. The court may review this decision of the arbitral tribunal in setting aside proceedings (s. 648.25). Georgia only repeats para. 1 of Article 16 of the Model Law in s. 9.9.34, by stating that the arbitrators may rule on their own jurisdiction including any objections in respect to existence or validity of the arbitration agreement and confirming the independence of the arbitration clause. Paragraphs 2 and 3 of Article 16 are omitted. On the other hand California (ss. 1297.161-163), Connecticut (s. 16 of its 1989 Act incorporating the Model Law), North Carolina (s. 1-567.46), Ohio (ss. 2713.31-35), and Oregon (s. 36-484) repeated Article 16 of the Model Law.

(g) Interim Measures of Protection (Article 17)

Article 17 deals with interim measures ordered by the arbitral tribunal: unless otherwise agreed by the parties, the arbitral tribunal may order interim measures of protection as considered necessary by it and may require any party to provide appropriate security in connection with such measures.

Interim measures of protection are, according to Article 17, granted 'by order' of the arbitral tribunal. As the Model Law does not provide for the execution of orders several States, adopting the Model Law, regulated this aspect.

Egypt in its new arbitration law reversed the rule of Article 17 of the Model Law. page "15" Instead of 'unless otherwise agreed by the parties' the arbitral tribunal may order interim or conservatory measures if both parties 'agree to confer upon the arbitral panel' this power (Article 24(1)). If the party against whom the order was issued fails to execute it, the arbitral tribunal may authorize the other party to undertake the procedures necessary for its execution, without prejudice to the right of the other party to apply to the President of the Court for an execution order. This seems to equate the order to an award.

Australia includes in its optional provisions that parties may agree to apply Chapter VIII to 'orders. .. under Art. 17 of the Model Law'. Chapter VIII of the Model Law (on enforcement of awards) has thus been made applicable to orders of the arbitral tribunal under Article 17 (see s. 23 of the Australian Arbitration Act). Bermuda simply makes Chapter VIII applicable to orders under Article 17 Model Law including orders to provide security in connection with such measures (s. 26 Bermuda's International Conciliation and Arbitration Act 1993).

In Canada the province of British Columbia inserted in s. 2 of its International Commercial Arbitration Act (Model Law) a definition of award: For the purpose of this Act 'arbitral award' means any decision of the arbitral tribunal on the substance of the dispute 'including an interim award made for the preservation of property'. Ontario states in s. 9 of its International Commercial Arbitration Act that an order under Article 17 Model Law is treated 'as if it were an award'. Quebec on the other hand reserves in Article 940.4 provisional measures 'before or during arbitration proceedings' to the Court.

Scotland introduced another solution. To Article 17 of the Model Law is added a second paragraph: 'An order under paragraph (1) of this article shall take the form of an award.' Tunisia maintained 'order' in its Article 62 corresponding with Article 17 Model Law but added that, if a party does not comply with the order, 'the arbitral tribunal may require the assistance of the First President of the Court of Appeal of Tunis'. The Tunisian approach can also be noted in the USA where the law of California in s. 1297.171 repeats Article 17 of the Model Law while in s. 1297.92 the court may be requested to enforce interim measures of protection ordered by an arbitral tribunal.

Most States of the USA do not deviate from Article 17 of the Model Law. This applies to Connecticut (s. 17), Georgia (s. 9-9-35), North Carolina (s. 1-67.47), Ohio (s. 2712.36 under A), Oregon (s. 36.486) and Texas (s. 249-17). Florida gives in s. 648.16 an extensive regulation of interim relief, not only interim relief granted by the arbitral tribunal but also interim relief requested directly from the court. In respect of the former, para. 2 entitles the arbitral tribunal to apply to the court or to authorize a party to do so for assistance. Paragraph 3 authorizes the arbitral tribunal to make its decision without notice to another party if it 'determines that participation by one or more parties in its review of an application for interim relief might jeopardize the effectiveness of the relief required'. Ohio deals with this concern in s. 2712.36. After repeating under A the provision

of Article 17 of the Model Law it is stated under B that a party may request interim measures directly from the court to which is added: 'However no measure of protection shall be granted by a court of this state unless the party shows that an application to the arbitral tribunal for the page "16" measure of protection would prejudice the party's rights and that an interim measure of protection from the court is necessary to protect those rights.'

(h) Rules Applicable to Substance of Dispute (Article 28)

This article states in the first sentence of the first paragraph that the arbitral tribunal shall decide the dispute in accordance with such 'rules of law' as are chosen by the parties as applicable to the substance of the dispute. (45) . To this is added in the second sentence that any designation of the law of a given State shall be construed, unless otherwise expressed, as 'directly referring to the substantive law of that State and not to its conflict of laws rules'. According to para. 2 the arbitral tribunal shall, failing any designation by the parties of the rules of law applicable to the substance of the dispute, apply 'the law determined by the conflict of laws rules which it considers applicable'.

These paragraphs have been subject to several changes by States adopting the Model Law. Bulgaria in Article 38(1) of its Law on International Commercial Arbitration provides that the arbitral tribunal shall decide in accordance with 'the law' chosen by the parties but does not deviate further from paras. 1 and 2 of the Model Law. Tunisia (Article 73 of its 1993 law) simply states that the arbitral tribunal decides the disputes in accordance with 'the law' designated by the parties and, failing such designation, by 'the law it deems appropriate'. In Canada, Quebec makes no reference to 'failing any indication by the parties' and reduces Article 28 to: 'The arbitrators shall settle the dispute according to the rules of law which they consider appropriate' (Article 944-10, para. 1).

The second paragraph

The changes made by other States mostly concern the reference made in the second paragraph to 'the law designated by the conflict of laws rules' in case parties failed to make any designation. Egypt changed this rule into: 'If the two parties have not agreed on the legal rules applicable to the substance of the dispute, the arbitral tribunal shall *apply the substantive rules of the law it considers most closely connected with the dispute*' (emphasis added, Article 39(2)).

In Canada, all Arbitration Acts of the common law provinces contain a similar provision: *'Notwithstanding Art 28(2)* [of the Model Law], if the parties fail to make a designation pursuant to Art. 28(1), the arbitral tribunal shall apply the *rules of law it considers to be appropriate* given all the circumstances of the case.' Quebec states in Article 944.10 the same without 'given all the circumstances of the case'. Also Mexico changed the reference to the conflict of laws rule of the Model Law. Instead the arbitral tribunal decides, failing any designation by the parties, 'taking regard to the characteristics and connections of each case' (Article 1445(2)). page "17"

The other countries adopting the Model Law – USA being dealt with

separately hereafter – made no changes in respect of the law applicable to the substance of the dispute. Thus Australia, Bermuda, Cyprus, Hong Kong, Nigeria, Peru, Russian Federation, Scotland and Ukraine.

In the USA California repeats the first paragraph of Article 28 of the Model Law in ss. 1297.281-282 and states in the next section (s. 1297.283) that, failing such designation, the arbitral tribunal shall apply 'the rules of law it considers to be appropriate given all the circumstances surrounding the dispute'. The same is done by Ohio in s. 2712.53 and Oregon in s. 36.508. This thus deviates from Article 28(2) of the Model Law which refers in the case of failing any designation by the parties to the 'conflict of laws rules which the arbitral tribunal considers applicable'. Connecticut, on the other hand maintains the text of Article 28(2) Model Law and so do North Carolina in s. 1-567.58 and Texas in Article 249.28(3). Georgia is silent on the subject. Florida provides in s. 684.17 a formulation of its own. Failing any stipulation by the parties in their arbitration agreement, the tribunal decides the merits of the dispute 'according to the law, including equitable principles, which it determines should control'. To this is added that 'in making that determination, the tribunal shall be free to employ the conflict of laws principles which it deems most appropriate to the circumstances of the arbitration'.

The third paragraph

Article 28(3) stating that the arbitral tribunal shall decide *ex aequo et bono* or as *amiables compositeurs* only if parties have expressly authorized it to do so, gave rise to fewer deviations. However, this paragraph may be omitted when adopting the Model Law. This, for example, was done by Bulgaria and the Russian Federation. However, Ukraine, the law of which is almost identical to the law of the Russian Federation, maintains Article 28(3).

Generally speaking civil law countries will have no difficulty in accepting 'amiable composition' together with arbitration according to the rules of law. Both types of arbitration are well known. In countries adhering to the common law concept, it may be doubted whether arbitrators can be authorized to decide *ex aequo et bono*. Nevertheless common law countries, adopting the Model Law did not exclude the possibility to authorize arbitrators to decide as '*amiables compositeurs*'. This applies to Australia, Bermuda, Canada, common law provinces and territories, Hong Kong and Scotland.

In the USA, States adopting the Model Law as a rule maintain the possibility of Article 28(3) to authorize arbitrators to decide *ex aequo et bono*. See, for example California (s. 1297.284), Florida (s. 684.17), North Carolina (s. 1-567.58), Ohio (s. 2712.54) and Oregon (s. 36.508 under 4).

(i) Reasons for the Award (Article 31, para. 2)

The Model Law requires the award to state the reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is an award on *page "18"* agreed terms. The latter exception, which is borrowed form the Arbitration Rules of

UNCITRAL (Article 34, para. 1) seems obvious.

Whether reasons for the award were to be given is one of the issues on which, generally speaking, a difference exists between the civil and the common law system of arbitration. Under the civil law system a non-motivated award may be set aside as rendered in violation of rules of public policy. However, in international arbitration, an award rendered under the law of a country in which non-reasoned awards are permitted, may nevertheless be enforced by application of the more restricted criterion of 'international' public policy.

Egypt's new law of 1994 states in Article 43(2): 'The arbitral award *shall* include the reasons upon which it is based *unless* the parties to arbitration have agreed otherwise or *the law applicable to the arbitral proceedings does not require* the award to be supported by reasons.'

The Russian Federation and Ukraine deviate from Article 31(2) Model Law by omitting 'unless otherwise agreed by the parties' and requiring that an award shall always be motivated (Article 31(2)). This applies even to an award on agreed terms as Article 30(2) states that such an award shall be made in accordance with the provisions of Article 31.

Peru's law distinguishes between awards *de jure* and awards *ex aequo et bono*. The first must contain the grounds (Article 44), for the latter it is stated that it is not required to give reasons unless the parties agreed otherwise (Article 45). Among the Model Law countries Peru is the only one to make this distinction. (46) . As a rule the giving of reasons is dealt with equally for both types.

Under the common law system of arbitration unmotivated awards were common. This custom changed after the English Arbitration Act 1979. It has become the general practice to motivate awards. (47) Although the English Arbitration Acts have radiated throughout the world, non-reasoned awards are still found in common law countries. However, it may be interesting to note that this did not cause deviations from Article 31(2) when adopting the Model Law.

Also in the USA California, Connecticut, Ohio, Oregon and Texas accepted Article 31(2) as such. However, in the three remaining Model Law States some changes were made. Both Florida (s. 648.19(3)) and Georgia (s. 9.9.39 under *a*) provide that reasons should only be given if all the parties agree 'or the tribunal determines that a failure to do so could prejudice recognition or enforcement of the award'. North Carolina reverses the rule of Article 31(2) Model Law by stipulating: 'The award shall not state the reasons upon which it is based, unless the parties have agreed that reasons are to be given' (s. 1-567.61).

(j) Chapter VII Recourse against Award (Article 34)

According to Article 34 recourse to a court against an arbitral award can only be made in the form of an application for setting aside (para. 1). The grounds on which *page "19"* this application can be made are enumerated in para. 2. The time-limit for introducing the action for setting aside is fixed in para. 3. Finally para. 4 opens the

possibility for the court to suspend setting aside proceedings in order to give the arbitral tribunal an opportunity to eliminate the grounds for setting aside.

Comparing the adoption of Article 34 in the countries which are the subject of this study is in particular complicated with regard to the USA States which adopted the Model Law. The Statutes of California, Georgia and Texas do not contain provisions comparable to Article 34. Only Connecticut and Oregon adopted Article 34 as such. In Florida (s.684.25), North Carolina (s. 1-567.64, juncto 13), Ohio (s. 2712.70) deviations can be noted.

To deal with all aspects of Article 34 would go beyond the scope of this article. (48) . From the grounds for setting aside mentioned under (a) and (b) of Article 34(2) the four grounds for setting aside enumerated under (a) are left aside for the reason just mentioned. However, these grounds, *i.e.* incapacity of a party or invalidity of the arbitration agreement (ground 1), a party not being able to present his case (ground 2), the award *ultra* or *infra petita* (ground 3) and irregular composition of the arbitral tribunal or the procedure not in accordance with the agreement of the parties (ground 4) are all, in some way or other, covered by the laws introducing the Model Law in national arbitration legislation.

With respect to the grounds for setting aside I will deal only with changes made in respect of violation of public policy mentioned under (b) of Article 34(2). Thereafter some procedural aspects of setting aside will be discussed.

Violation of public policy as ground for setting aside

If the court finds that 'the award is in conflict with the public policy of this State' the award may be set aside. Violation of public policy covers fundamental principles of law and justice regarding the substance as well as procedure. (49) . It is the second ground the court may apply *ex officio*, the first being that the court finds that 'the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State'. In the process of adoption several States made changes.

Australia states that 'for the avoidance of any doubt' an award is in conflict with the public policy of Australia if the making of the award was 'induced or affected by fraud or corruption or a breach of the rules of natural justice occurred in the making of the award' (s. 19 International Arbitration Act). Bermuda did the same in s. 27 of its 1993 Act by stating that 'for removing doubts' in Article 34 'an award is in conflict with the public policy of Bermuda if the making of the award was induced or affected by fraud or corruption'.

The Act of Scotland maintains (under b) 'in conflict with public policy' as a ground which the court may apply *ex officio*, but adds to the grounds which a party page "20" must prove a fifth ground: 'if the award was procured by fraud, bribery or corruption'. Article 34(3) contains the addition that the time-limit of three months from receipt of the award, within which a party should make its application for setting aside, does not apply to the new fifth ground.

Some other changes in respect of public policy may also be noted. Tunisia restricts in Article 78(2) of its new law of 1993 the grounds the court may apply *ex officio* to violation of public policy. It may indeed be argued that 'not capable of settlement by arbitration' (the first ground of Article 34(2) of the Model Law) is covered by 'in conflict with public policy'. To the latter is added 'as understood in private international law' which may point to the restrictive notion of international public policy. On the other hand Peru transferred para. 2 to para. 1 bringing 'not capable of settlement by arbitration and contrary to public policy' both under the grounds a party should prove. It thus excludes the court from dealing *ex officio* with these grounds (Article 106).

In the Model Law, the ground of violation of public policy is the only ground for setting aside on which the court may exercise control on the merits. This control on the merits is inherent to the nature of an examination of a violation of public policy. The Model Law does not, *expressis verbis*, exclude control on the merits. Quebec inserted a provision to this effect: 'The court ... cannot enquire into the merits.' (50)

Procedural aspects

Remission to the Arbitral Tribunal

In the framework of setting aside proceedings the Model Law introduces in Article 34(4) the possibility to remit the award to the arbitral tribunal: 'The court when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take some other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.'

In common law countries remission to arbitrators is well known but this is not the case in civil law jurisdictions. Nevertheless Cyprus, Peru, Russian Federation, Tunisia and Ukraine introduced this novelty when adopting the Model Law. Only Bulgaria omitted para. 4 of Article 34. Also Egypt's law of 1994 does not provide for remission.

Under Article 34(4) the award is remitted to the tribunal which rendered the award. UNCITRAL's Secretary-General commented on this provision as follows: [(*)] [(51)] The procedure of remission has only found a rather rudimentary form in the Model Law. To my knowledge no cases of remission under the Model Law regime have been reported so far but I could imagine that in practice several questions may arise. For example, whether the arbitral tribunal 'whose continuing mandate is confirmed by the remission' is still in a position to resume the arbitral proceedings.

In the USA, Ohio regulated this matter further by stating (in s. 2712.70(C)): 'A court ... may also order that *all or part* of the dispute between the parties be resubmitted to the *same or a new arbitral tribunal* as it finds appropriate' (emphasis added). The same wording is found in Article 684.25(3) of Florida's Act. North Carolina states in

s. 1.567.13(c), excluding the case that there was no valid agreement to arbitrate: 'The court may order a rehearing before new arbitrators or [in cases specified] before the arbitrators who made the award or their successors.'

The English Arbitration Act 1979, followed by many other common law countries, contains in the framework of an appeal on a question of law, the possibility of remitting the award to the arbitrators 'together with the court's opinion'. Under the English Act we are confronted with a remission during arbitration. If under Article 34(4) the dispute is remitted after the award has been made I could imagine that the remission would also be accompanied by the court's opinion as to how the award could be amended or supplemented in order to avoid setting aside.

The remission provision of Article 34(4) Model Law is to be welcomed as it introduces a method to limit the *ultimum remedium* of setting aside. In practice, however, it seems to raise several questions such as those mentioned above, for which no answer can be found, either in the Model Law or in its legal history.

After Setting Aside

The Model Law does not contain a provision about the consequences in case the application to set aside has been successful. [52] . In arbitration laws this issue has not received much attention. The Model Law is certainly not the only law which is silent on the subject. Only a few of the States adopting the Model Law entered into this issue.

Tunisia adopting the Model Law for international arbitration in 1993 provided in Article 78(5): 'if the court, which has been requested to set aside the award, sets aside the award either wholly or partially' the court may, as the case may be and on application of all the parties, 'decide on the merits'. To this is added that the court in such a case shall decide as *'amiable compositeur'* if the arbitral tribunal was authorized to do so.

On the other hand, North Carolina (USA) states in s. 1.567.64 of its 1993 Statute *page "22"* that, in case the award has been set aside the court 'shall not engage in *de novo* review of the subject-matter of the dispute giving rise to the arbitration proceedings'.

In the case of North Carolina as well as under Tunisian law, if not all the parties agree, the question remains whether, after the award has been set aside, a new arbitration can be started. Has the arbitration agreement been exhausted or is it still in existence? In arbitration, domestic as well as international, the post-setting aside situation is an underdeveloped area.

Exclusion of Setting Aside

This again is a subject on which the Model Law is silent but which, in recent amendments of arbitration laws (not Model Law countries), has received attention. Mention may be made of the amendment of the Belgian arbitration law of 1985, excluding setting aside if none of the parties, arbitrating in Belgium, can be regarded as Belgian and

the Swiss Private International Law Act of 1987 permitting parties, if none of them has its domicile, habitual residence or business establishment in Switzerland, expressly to agree in writing to exclude setting aside or to limit setting aside proceedings to one or several of the grounds cited in Article 190 of this Act.

It is submitted that an exclusion of setting aside by agreement of the parties, whether totally or only in respect of some of the grounds for setting aside, needs to be recognized by law. If the law is silent, parties cannot agree to any exclusion of the court control. Such an agreement would be in violation of rules of public policy.

Tunisia in Article 78(6) of its Arbitration Code of 1993 opted for the Swiss solution: 'The parties who have neither domicile, principal residence nor a business establishment in Tunisia, may expressly agree to exclude totally or partially all recourse against an arbitral award.' On the other hand Egypt, states in Article 54(2) of its new law that an applicant cannot renounce of 'its right to request the setting aside of the award prior to the making of the arbitral award'. This prohibits a waiver of the right to institute setting aside proceedings prior to the making of the award. Thereafter this waiver seems to be permitted.

(k) Chapter VIII Recognition and Enforcement (Articles 35-36)

The Model Law regime for enforcement is borrowed from the New York Convention (NYC). Article 35(2) Model Law repeats Article V of the NYC: an application for enforcement shall be accompanied by the award and the arbitration agreement or a duly certified copy thereof, if necessary with a translation. Article 36(1) repeats the grounds for refusal of enforcement as contained in Article V of the Convention. Article 36(2), dealing with the coincidence of an application for setting aside or suspension of the award with a request for enforcement, repeats Article VI. The similarity of these provisions goes 'a long way towards securing the uniform treatment of all awards in international commercial arbitration irrespective of where they happen to be made'. [53]

According to Article 35(1) the enforcement regime applies 'irrespective of the *page "23"* country in which [the award] was made'. According to Article 1(2) the Model Law only applies if the place of arbitration is in the territory of the Model Law State, but an exception is made for Articles 35 and 36. These enforcement provisions therefore also apply to awards made abroad, irrespective whether the foreign country is a Model Law country or not.

In the adoption process several States made changes. Egypt, for example, did not make the exception for Articles 35 and 36 just mentioned. Its enforcement proceedings thus only apply to domestic awards or an award made outside Egypt but under Egyptian law (see Article 1 of the Model Law as adopted by Egypt). Egypt limits in Article 58 the grounds for setting aside in principle to violation of public policy to which ground are added two other grounds: the award contradicts a judgment previously made by an Egyptian Court, or the award was not properly notified to the party against whom the award was rendered. On the other hand foreign awards will have to be enforced under the Conventions in force.

Several countries made the radical change of omitting Chapter VIII (Articles 35 and 36) from adoption. The similarity with the New York Convention, widely adhered to by States from all parts of the world, induced Australia, Bermuda and Hong Kong to adopt this solution. Australia states in Article 20 of its International Arbitration Act that where 'both Chapter VIII of the Model Law and Part II of this Act [the NYC 1958] would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award'. Bermuda does the same in Article 28 of its 1993 Act: 'Where, but for this section, both Chapter VIII of the Model Law and Part IV of the Act [the NYC 1958] would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award.'

Hong Kong states in s. 34C of its Ordinance: 'An arbitration agreement and an arbitration to which this Part [Part IIA on International Arbitration] applies are governed by Chapters I to VII of the UNCITRAL Model Law.' Chapter VIII is thus excluded. But, does the NYC 1958 apply? This Convention only applies to foreign awards and not to domestic awards. *A fortiori* this question arises when the possibility of opting-in has been used and a domestic award has been brought under the regime of Part IIA (international). Similar questions do not arise, in my opinion, under the formulation of Australia and Bermuda, which Acts provide for opting-out of the Model Law regime. In their formulation the exclusion of Chapter VIII is restricted to the situation in which both Chapter VIII and the NYC 1958 would apply.

Also in the USA many States adopting the Model Law abstained from inserting Articles 35-36 as they felt that their Arbitration Act would be pre-empted by the Federal Arbitration Act, which implements in Chapter 2 (ss. 201-208) the New York Convention 1958, acceded to by the USA in 1970. (54) . From the eight States, surveyed here, Connecticut has included Chapter VIII with no changes. Oregon repeats Articles 35 and 36 in ss. 36.522 and 36.524 (grounds) but adds a third page "24" paragraph to s. 36.522 regulating in further details the enforcement action. On the other hand California, which otherwise follows the Model Law, does not contain Articles 35 and 36. Its Act only contains provisions on enforcement of interim awards in ss. 1297.92 and 171. The Texas statute contains no provision whatsoever on enforcement of awards.

The remaining States deviate from the Model Law, in particular from a systematic point of view. Georgia's statute adds, in s. 9.9.42, to the provision of Article 35(1) 'on the basis of reciprocity'. According to the same s. 9.9.42, enforcement may be refused if the award is contrary to public policy or subject to the grounds for vacating an award under Part 1. These grounds, enumerated in s. 9.9.13, partly correspond with the Model Law and partly deviate. North Carolina states in s. 1.567.65 that 'the superior court shall confirm an arbitral award unless it finds grounds for modifying or vacating the award under 1-567.64'. This repeats again the link between the grounds for refusal of enforcement and the grounds for setting aside as found in the Model Law regime. However, the grounds for vacating the award as formulated in 64 with reference to 1-567.13 and 14 differ in several aspects from the grounds of the Model Law. Ohio's International Commercial Arbitration Act 1993 provides a combined regulation for vacating and confirming (enforcement) of awards. Section 2712.69 states that the court shall confirm the award unless one of the

grounds of 70 is established. Section 70 contains the grounds for setting aside or refusal of enforcement which partly correspond with the Model Law (where the grounds for setting aside and refusal of enforcement are virtually the same) and partly deviate. A similar system has been provided in for Florida in ss. 684.24-25.

Peru, in Article 109 of its new law, retains the grounds for refusal as contained in Article 36(1) Model Law, but omits Article 36(2) on the coincidence of setting aside and enforcement proceedings. Mexico has retained the provision on coincidence, but states in Article 1463(2) that the procedure shall be as provided in Article 360 CCP. This article introduces an accelerated procedure and a court decision without appeal.

III. Additions Made on Adoption

At UNCITRAL several matters were discussed which ultimately did not lead to a provision in the Model Law. (55) States, when adopting the Model Law, may nevertheless deem some of these matters worthy of being included in their arbitration legislation. Under the present Section of our comparative survey these additions are discussed. page "25"

(a) Conciliation

At UNCITRAL the suggestion was made to refer in a preamble of the Model Law to conciliation as an additional method of settling disputes or even to include some provisions on conciliation. The idea of a preamble was abandoned and the suggestion to include some provisions on conciliation was not followed. However, several States refer to conciliation in their Model Law-based new arbitration legislation. The manner in which this is done differs. Some make this reference only in one provision, others insert a complete regulation of conciliation and include conciliation also in the Title of the Statute.

In Canada all International Arbitration Acts contain what seems to be a standard formula: (*) This provision uses the term 'mediation' together with 'conciliation' as will also be seen in the later citations from American legislation. In my opinion the terms are interchangeable. In any case, so far as I know, no clear distinction, in dispute settlement literature, has ever been formulated. (56) . On the one hand the Conciliation provision cited above enables all arbitrators 'at any time during the arbitral proceedings' to conciliate and on the other hand, if conciliation fails, it entitles arbitrators 'with the agreement of the parties' to resume their role as arbitrator. Peru is less detailed by providing only: 'The arbitrators have authority to promote a conciliation at any time ...' (57) This leaves many questions unanswered, including whether arbitrators themselves may initiate an attempt to conciliate.

Hong Kong's Arbitration Ordinance contains in its General Part Two provisions on this topic: s. 2A deals with the appointment of a conciliator in case the arbitration agreement provides for conciliation; s. 2B deals with the power of an arbitrator to act as conciliator. Section 2B may be cited as it deals with several questions which

may arise in case an arbitrator, with consent of the parties, puts on the hat of conciliator: (*) Bermuda and Nigeria regulate conciliation in still further detail in their Statutes which include Conciliation also in their Title. The Bermuda 'International Conciliation and Arbitration Act 1993' regulates conciliation in ss. 3-21 of Part II 'Conciliation'. International arbitration follows in Part III, ss. 22-38. Part II starts with: 'Parties to an international arbitration are hereby encouraged to resolve any dispute between them through conciliation' (s. 3) followed by: 'The provisions of this Part shall apply to the extent that the parties have not otherwise agreed in writing' (s. 4). They may do so by reference to the UNCITRAL Conciliation Rules of 1980, the text of which is annexed in Schedule 1. Nigeria in its 'Arbitration and Conciliation Decree 1988' stipulates in Part III 'Additional provisions relating to international commercial arbitration and conciliation' that the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be settled by conciliation under the Conciliation Rules set out in Schedule 3 (s. 55). These Rules are again the UNCITRAL Conciliation Rules 1980.

In the USA conciliation generally has been referred to when adopting the Model Law. Only the Statutes of Connecticut which adopted the Model Law as such and Georgia do not contain such reference. North Carolina states that the arbitral tribunal 'may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement' (s. 1-567.60). Florida's International Arbitration Act also contains a reference to conciliation and mediation. If during arbitration a party claims that the other party did not comply with an agreement to submit a dispute to mediation or conciliation, 'the arbitral tribunal shall determine the validity and timeliness of that claim'. If it finds the claim valid and timely the tribunal shall suspend the arbitral proceedings and shall proceed with the arbitration 'when the attempt at mediation or conciliation has failed' (s. 648.10).

The Statutes of California, Ohio, Oregon and Texas all contain a complete set of Conciliation Rules. These Rules reveal a considerable consensus on the principles which should govern conciliation proceedings. In California Chapter 7 of Title 9.3 of the CCP, entitled 'Arbitration and Conciliation of International Commercial Disputes' is entirely devoted to conciliation. This Chapter 7 contains 19 sections and starts with a policy declaration: It is the policy of the State of California to encourage parties to an international commercial agreement or transaction ... to resolve disputes arising from such agreements or transactions through conciliation (s. 1297.341). From the sections that follow I paraphrase s. 393: No person who served page "27" as conciliator may be appointed as arbitrator or take part in any arbitral or judicial proceedings concerning the same dispute unless all parties agree or the rules adopted for arbitration or conciliation provide otherwise. Section 432 offers the conciliator immunity from liability: the conciliator shall not be held liable in any action for damages resulting from any act or omission in the performance of his duties. Conciliation also appears in other Chapters of Title 9.3. The definition of 'international' in Chapter 1 applies to both arbitration and conciliation (s.1297.13). In Chapter 3 the disclosure provision in s. 121 applies equally to arbitration and conciliation (the selection of conciliators is regulated in s. 341 of Chapter 7). Therefore, for

conciliation not only Chapter 7 but also previous chapters should be consulted.

Ohio's law on International Commercial Arbitration also contains detailed provisions on conciliation (ss. 2712.74-90). In the first section we encounter the same policy declaration – to encourage resolution of disputes through conciliation – as in California (s. 74). The conciliation agreement shall be deemed an agreement between the parties to stay all judicial or arbitral proceedings from the commencement of conciliation until the termination of the conciliation proceedings (s. 81). The same provision is also found in Chapter 7 of the California Statute (s. 1297.381). If a settlement is reached the result of the conciliation is reduced to writing and signed by the conciliator and the parties or their representatives. This written agreement shall be treated as an arbitral award and shall have the same force and effect as a final award in arbitration (s. 87). Again, the same provision is contained in s. 1297.401 of the California Statute. The same similarity can be noted regarding the exclusion of the conciliator from being appointed later on as an arbitrator or taking part in any arbitral or judicial proceeding on the same dispute (s. 85) and for the immunity of the conciliator from liability in an action for damages resulting from any act or omission in the performance of his duties (s. 89).

Oregon's Act also contains a separate set of rules governing conciliation (ss. 36.528-558). It stipulates that the agreement of the parties to conciliate shall be deemed an agreement to stay all judicial or arbitral proceedings (s. 538) and in s. 542 that no person who has served as conciliator may be appointed as an arbitrator unless all parties consent or the rules for conciliation or arbitration provide otherwise. The settlement agreement, signed by the conciliator and the parties, shall be treated as an arbitral award (s. 546). The same provisions on immunity of the conciliator, contained in Californian law, are found in s. 554: no person who served as a conciliator shall be held liable in an action for damages resulting from any act or omission in the performance of the role as conciliator.

Texas's law, bearing the title 'Arbitration and Conciliation of International Commercial Disputes', also contains a separate set of rules for conciliation in the first part of the law (Articles 249-34 to 249-43) entitled: 'Provisions relating solely to conciliation.' Without going into further detail also here we find *inter alia* that the agreement of the parties to conciliate is considered an agreement to stay all judicial and arbitral proceedings (Article 38) and that a person who served as conciliator may not be appointed as arbitrator (Article 39(3)). The immunity of the conciliator is stipulated in Article 43(2). *page "28"*

In conclusion, it may be stated that in particular common law countries when adopting the Model Law were not satisfied with adopting only Article 30 of the Model Law which deals with a settlement reached by the parties themselves during the arbitral proceedings, which settlement may, on request of the parties be recorded in an award on agreed terms. Instead several States of the USA used the adoption of the Model Law to incorporate at the same time in the same new law a set of rules regulating conciliation. Of course, this may be done, but I do not expect it to be followed by

many other countries. Drawing attention to conciliation as another means of settling disputes, quite distinct from arbitration, is one thing. Regulating this alternative in a law is another. It may have some advantages to stipulate in a law the principles which govern conciliation proceedings but, so far, a reference to carefully drafted conciliation rules has, in practice, proved to be enough.

When UNCITRAL introduced it successful Arbitration Rules in 1976, they were followed, in 1985 by the Model Law on Arbitration, the drafting of which profited in many aspects from the previous work on the Rules. The Arbitration Rules of UNCITRAL were followed in 1980 by its Conciliation Rules. I do not expect a similar development as in the case of arbitration, *i.e.* a follow-up by a Model Law on Conciliation.

(b) Consolidation

The Working Group of UNCITRAL from the beginning was of the view ‘that there was no real need to include a provision on consolidation in the model law’ (58) . Several countries, belonging again – as in respect of conciliation – to the common law group of countries were of a different opinion and inserted provisions on consolidation when adopting the Model Law. This was done in several ways.

Australia's International Arbitration Act contains a number of optional provisions which apply if the parties so agree in writing. One of these concerns consolidation, regulated in s. 24. The application for consolidation is not made to the court – as is the case in domestic arbitration under the Commercial Arbitration Act (s. 26) – but to the arbitral tribunals concerned, which deliberate jointly on the application. If the tribunals are unable to agree, the related proceedings proceed as if no application has been made. (59)

In Canada the International Commercial Arbitration Acts of the common law provinces and territories contain a provision on consolidation of arbitration proceedings. They all use the same standard formula which may be summarized as follows. On application of all the parties to two or more arbitral proceedings the court may order consolidation on the terms it considers just. However, if all the parties to the consolidated arbitration proceedings are in agreement as to the choice of the arbitral tribunal, the court appoints the arbitral tribunal chosen by the parties. *page "29"*

It is added in these Acts that nothing prevents parties from agreeing on a consolidation of arbitral proceedings in the manner they prefer. The law of Quebec is silent on the matter of consolidation. (60) The standard formula, summarized above contains some further details which may justify reproducing the text: (*) In Hong Kong, consolidation is not provided for in Part IIA of the Arbitration Ordinance where international arbitration is regulated. However, Part II on domestic arbitration contains a provision on consolidation of arbitrations by the Court in s. 6B. As s. 2M permits the parties to an international arbitration to agree in writing that Part II applies, the parties may opt-into the domestic regime, including its possibility for consolidation. Unlike the regulations mentioned above the consent of all parties is not required for the Court's order to consolidate. If the

parties cannot agree on the choice of arbitrators in the consolidated proceedings, they will be appointed by the Court (s. 6B(2)).

In the USA all the States which adopted the Model Law added provisions for consolidation with the exception of Connecticut which adopted the Model Law as such. The manner in which those States provide for consolidation differs:

In California, on application of any party with the consent of all the other parties the court may order consolidation 'on terms the court considers just and necessary'. To this is added that when parties cannot agree, the court will appoint arbitrators and, when they cannot agree on any other matter necessary for the conduct of the consolidated arbitration, will make any other order it considers necessary (s. 1297.272).

In Florida disputes may be consolidated and determined by one arbitral tribunal if all the affected parties agree to the consolidation and the tribunal determines that consolidation will serve the interests of justice and the expeditious solution of the disputes. The proceedings are conducted under such rules as the parties agree upon or, in the absence of an agreement, as determined by the arbitral tribunal (s. 684.12). *page "30"* This provision does not provide for an appeal to the court but leaves the decision to the arbitral tribunal, without stating clearly which arbitral tribunal. Is the arbitral tribunal chosen by the parties the one to make the decision on consolidation and on the rules under which the consolidated proceedings will be conducted?

Georgia's Statute states in s. 9.9.6, which applies on a supplementary basis to international transactions as well (s. 9.9.30), that unless otherwise provided in the arbitration agreement a party may petition the court to consolidate arbitration proceedings under the conditions as mentioned under *e* of this section. In the absence of agreement of the parties the court appoints the arbitrators (under *f*). If the arbitration agreements, in consolidated proceedings, contain inconsistent provisions, the court shall resolve such conflicts and determine the rights and duties of various parties (under *g*). The court may exercise its discretion to deny consolidation as to certain issues (under *h*).

North Carolina provides for consolidation, if the parties agree in their arbitration agreement or otherwise, by order of the court 'on terms the court considers just and necessary'. The court will appoint an arbitral tribunal if the parties cannot agree. The court may also make any other order it considers necessary if parties cannot agree on any other matter necessary to conduct the consolidated arbitration (s. 1-567.57). An almost identical provision is found in s. 2712.52 of Ohio, in s. 36.506 of Oregon and in s. 249.27 of Texas.

All these provisions start with consolidation by the court 'on terms the court considers just and necessary' followed by orders of the court for the appointment of the arbitral tribunal and on matters necessary for the conduct of the consolidated arbitration, if parties cannot agree.

(c) Costs of the Arbitration

This again is an item not dealt with in the Model Law although the Secretariat suggested in its first Note to the Working Group to consider the inclusion of the possibility for the arbitrators to request a deposit from the parties for fees and costs and an authorization of the arbitrators to fix their own fees, subject to any rule adopted by the parties and, as the case may be, court review. The Working Group did not follow this suggestion. (61) However, several States, when adopting the Model Law, inserted provisions on the subject.

Australia, in its International Arbitration Act, inserted in Division 3, dealing with optional provisions to which the parties may agree, that, unless the parties in the arbitration agreement have agreed otherwise, 'the costs of an arbitration (including the fees and expenses of the arbitrator or arbitrators) shall be in the discretion of the arbitral tribunal' (s. 27). Bermuda's Arbitration Act 1993 contains a similar provision in s. 32. This time, however, as an addition to the Model Law as adopted and not as an optional provision. The costs of an arbitration are in the discretion of the arbitral page "31" tribunal. This includes not only the fees and expenses of the arbitrators, but also the legal fees and expenses of the parties, their representatives, witnesses and expert witnesses and the administrative fees and expenses of arbitration institutions. The Canadian province of British Columbia has inserted in Article 31 of its International Commercial Arbitration Act dealing with Form and Contents of the Arbitral Award a similar provision in para. 8 of this article.

Hong Kong's Arbitration Ordinance declares in s. 34D, para. 1, 'for the avoidance of doubt' that, in the case of an arbitration governed by the UNCITRAL Model Law, unless it is otherwise agreed by the parties 'the costs of the reference and award shall be in the discretion of the arbitral tribunal which may make such orders for the assessment and payment of those costs as it thinks fit'. (62)

Nigeria extensively regulates in Part III of its Arbitration and Conciliation Decree 1988 dealing with Additional Provisions, both the fixing by the arbitral tribunal in its award of the costs of the arbitration (s. 49) and the deposit of costs the arbitral tribunal may request on its establishment or during the course of the arbitral proceedings (s. 50). These sections are modelled along the lines of Articles 38 and 39 of the UNCITRAL Arbitration Rules and refer, under circumstances, to the assistance of the Secretary-General of the Permanent Court of Arbitration at The Hague.

Mexico, when adopting the Model Law, inserted an additional chapter, Chapter VII, on the costs of Arbitration (Articles 1454-1456). The arbitral tribunal fixes the fees for each arbitrator separately. If a party so requests this is done only after consultation with the court (Article 1454). For the costs of representation and legal assistance the arbitral tribunal is free to determine which party shall bear such costs or to apportion such costs between the parties (Article 1455(2)). No additional fee may be charged in case of interpretation, correction or completion of the award (Article 1455(4)). The arbitral tribunal may, on its establishment, request each party to deposit an equal amount as an advance for its fees and expenses (Article 1456(1)) and may during the course of the arbitral proceedings request supplementary deposits from the parties.

The Russian Federation and Ukraine added to Article 31(2) of the Model Law that the award shall contain 'the amount of the arbitrator's fee and costs and their apportioning'.

In the USA all States adopting the Model Law deemed it appropriate to include provisions on the costs of arbitration with the exception of Connecticut, which State adopted the Model Law as such. These provisions on costs of arbitration deal not only with fees and expenses of arbitrators but also, as a rule, refer to fees and expenses of legal counsel of the parties, to compensation of witnesses and expert witnesses and to the administration fee of the institute supervising the arbitration. page "32" Without going into details I refer to s. 1297.318 of California; s. 684.19(4) of Florida; s. 9.9.39 of Georgia; s. 2712.61 of Ohio; s. 36.514 under (7) of Oregon and s. 249.41 of Texas.

North Carolina deserves special mention. In s. 1-567.61 it is stated that, unless otherwise agreed by the parties the awarding of costs shall be at the discretion of the arbitral tribunal. However s. 1-567.41 contains a provision not found in the other Statutes. In this section it is stated under (h) that, unless otherwise agreed 'an arbitrator shall be entitled to compensation at an hourly or daily rate which reflects the size and complexity of the case and the experience of the arbitrator. If the parties are unable to agree on such a rate, the rate shall be determined by the arbitral institution chosen pursuant to subsection (g) of this section or the arbitral tribunal' in either case subject to Court review upon motion by the dissenting party.

(d) Interest

Most of the States which added provisions on Costs at the same time added a provision on Interest. This may be done in a simple form: 'Unless otherwise agreed by the parties, the arbitral tribunal may award interest.' The Canadian province of British Columbia does so in s. 31(7) of its International Commercial Arbitration Act. In the USA this is to be found in s. 1297.317 of California's Statute; s. 1-567.61 of the Statute of North Carolina states this under (f); the same is done in s. 2712.61 of the Statute of Ohio, s. 36.514 under (6) of Oregon and Article 249-31 under (7) of Texas.

The Statute of Georgia is silent on the subject. Florida in s. 684.18 uses a different formulation: The arbitral tribunal may award interest as agreed to in writing by the parties or, in the absence of such agreement, as the tribunal deems appropriate.

Australia contains in its International Arbitration Act two optional provisions in respect of interest. Section 25 deals with interest up to the making of the award which may be awarded 'at such reasonable rate as the tribunal determines', excluding interest on interest (compound interest). According to s. 26, the tribunal may award interest 'from the day of the making of the award or such later day as the tribunal specifies' at the rate it deems reasonable. Bermuda's International Conciliation and Arbitration Act 1993 contains in one section (s. 31) virtually the same interest provision as Australia, distinguishing between interest payable up to the date of the award and interest payable from the date of the award. In para. 4 of this section reference is made to the Interest Credit Charges

(Regulations) Act 1975. This Act does not apply ‘if the award is made in a currency other than the currency of Bermuda’. However, if the award is made in the currency of Bermuda, this Act applies.

Hong Kong's Arbitration Ordinance states in s. 34D ‘for the avoidance of doubt’ that ‘unless it is otherwise agreed by the parties’, the arbitral tribunal, in an arbitration governed by the UNCITRAL Model Law, may ‘if it thinks fit, award interest at such rate as it thinks fit’ (a double fitness!). page "33"

(e) Awards in Foreign Currency

Costs of the Arbitration and Interest both gave rise to additional provisions, in particular by countries adhering to the common law concept of arbitration. These two items concern additions to the provisions dealing with the contents of the award. The Model Law deals in Article 31 with Form and Contents of the Award: signatures (para. 1), reasons (para. 2), date and place (para. 3), notification of the award to the parties (para. 4). In this comparative survey I deal only with reasons, leaving out the other three items, although also in respect of these more formal requirements differences can be noted.

However, a further provision, added in fewer cases than provisions on Costs and Interest, may still be mentioned: A few States in the USA deemed it appropriate to add a provision on awards rendered in foreign currency. Georgia's Statute contains in s. 9.9.40 the provision that the court ‘shall confirm or vacate a final award *notwithstanding* the fact that it grants relief in a currency other than United States dollars’. Ohio's Statute also states in s. 2712.71 that the courts ‘shall confirm a final award, *notwithstanding* the fact that it grants relief in a currency other than United States dollars’. This provision continues by stating: (*)

(f) Liability of Arbitrators

The question whether a provision on this subject should be included in the Model Law was already raised by the Secretariat at an early stage in a Note to the Working Group in which doubts were expressed: ‘In view of the fact that the liability process is not widely regulated and remains highly controversial, it may seem doubtful whether the model law could provide a satisfactory solution.’ (63) The First Working Group joined this opinion: ‘There was general agreement that the question of liability of an arbitrator could not appropriately be dealt with in a model law on international arbitration.’ (64)

However, during recent years liability of arbitrators has received more attention than previously. It is therefore interesting to note that some States when adopting the Model Law used the opportunity to insert a provision on liability.

In Australia, the Act provides in s. 28 that the ‘arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator, but is liable for *fraud* in respect of anything done or omitted to be done in that capacity’. The Bermuda Act contains a more embracing formulation in s. 34: page "34"

'An arbitrator is not liable for any act or omission in the capacity of arbitrator in connection with any arbitration conducted under this Act except that he may be liable for the consequences of *conscious* and *deliberate wrongdoing*.'

In the USA Florida inserted in s. 684.35 a provision on immunity of the arbitrator: 'No person may sue in the court of this state or assert a cause of action under the law of this state against any arbitrator when such suit or action arises from the performance of such arbitrator's duties.' Ohio states in s. 2712.68: 'No person who serves as an arbitrator shall be liable in an action for damages resulting from any act or omission in the performance of his duties as an arbitrator in any proceedings subject to this chapter.'

Here again it is in particular States adhering to the common law concept of arbitration, which inserted a provision on Liability of the arbitrator. Only in Peru Article 16(2) of its new law (domestic part, which applies on a supplementary basis) states that 'the acceptance of the appointment by the arbitrators ... entitles the parties to compel them to discharge their responsibilities within the fixed period of time, under penalty of being liable for the damages caused by delay or failure to comply with their obligations'.

(g) Filling of Gaps

Whether arbitrators are entitled or can be authorized to adapt or supplement a contract has been discussed in depth at UNCITRAL. This issue was already raised in the First Secretariat Note of 1981 under the heading Domain of Arbitration. (65) On request of the Working Group the Secretariat produced draft provisions for discussion in the Working Group. (66) Thereafter the Working Group requested the Secretariat to prepare a revised draft, which was produced in July 1983. (67) The Working Group Report of September 1983 states: 'After extensive discussion, the view prevailed that adaptation and supplementation of contracts should not be dealt with in the model law.' (68)

The proposals made by the Secretariat and the discussions in the Working Group on this interesting issue thus resulted in an '*in dubiis abstine*'. From the countries adopting the Model Law only Bulgaria by its amendment of 1993 has brought the filling of gaps within the domain of arbitration. Article 1(2) of its Law on International Commercial Arbitration states: 'The international commercial arbitration resolves civil property disputes arising from foreign trade relations *as well as disputes about filling of gaps in a contract or its adaptation to newly arisen circumstances* if the domicile or the seat of at least one of the parties is not in the Republic of Bulgaria' (emphasis added). *page "35"*

IV. Concluding Observations

The present survey, comparing 22 versions of the adoption of the Model Law by States from different parts of the world, seems to justify the conclusion that this initiative of UNCITRAL in the arbitration field, like the introduction of the UNCITRAL Arbitration Rules, has been favourably received. There have been changes in

the text as adopted. However, this is inherent when a model is presented. The success of the Model Law as a whole may be seen in the fact that there is no one particular article which generally has been deviated from. Nor has this been the case with the additions discussed in Section III: there is no particular addition which has been generally made.

Common law countries were the first to adopt the Model Law. By now, the common law and civil law countries have adopted the Model Law in more or less equal numbers. This general acceptance is rather remarkable as the Model Law contains several principles which correspond more with the civil law concept of arbitration than with the common law concept. As examples I may refer to arbitration by '*amiables compositeurs*', recognized under the Model Law, and to the restriction in the Model Law of the means of recourse to one action: setting aside. The Model Law thus may have a harmonizing effect and this effect will increase as the number of States adopting the Model Law is still growing. Moreover, this effect is not restricted to adoption of the Model Law. As observed in the Introduction, the impact of the Model Law is broader as States, even when modernizing their arbitration laws without adopting the Model Law, will take the Model Law into account.

The addition of subjects not dealt with in the Model Law, dealt with separately in Section III, may also be interesting as these subjects reflect issues which may no longer be ignored in current arbitration law and practice. This Section draws attention to subjects States deem worth while to add when modifying their law by adopting the Model Law, whether it be conciliation or liability of arbitrators, just to mention some of the additions dealt with in Section III. In particular, conciliation may be mentioned as it appears to be a subject which, so far, has been frequently added. A number of States used the opportunity to add rules on conciliation and some of them even mentioned Conciliation together with Arbitration in the title of their new law. In the past, conciliation was associated in particular with the Far East where, as a means of dispute resolution, it is still preferred to arbitration or litigation. Paradoxically, although its drafters abstained from doing so, the Model Law inspired legislators to include provisions on conciliation when adopting the Model Law.

Modernizing arbitration laws is an ongoing process. At the time of writing, several States were in the process of doing so, for example, Germany, Japan, Malta, New Zealand, Poland, Singapore, England and Wales, and Zimbabwe. Adoption of the Model Law is one of the alternatives and as such, so far as I know, seriously considered by almost all of them. Since the completion of this article, Bahrain has joined the group of Model Law countries by enacting Decree-Law No. 9/1994 of 16 August 1994 which adopted the Model Law without any changes. It was soon followed by Singapore's enactment of the Model Law by its International Arbitration *page "36"* Act, passed on 31 October 1994 and in force 27 January 1995. A week later, Hungary on 8 November 1994, enacted new arbitration legislation, Act No. LXI on Arbitration, based on the Model Law and applying to both domestic and international arbitration. It may be that this survey, presenting in broad outline what has occurred so far, contains some useful information for those involved in the drafting of a new arbitration law. *page "37"* *page "38"*

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[*] Emeritus Professor, Erasmus University Rotterdam. This comparative survey has been written in close collaboration with Mrs Judy Freedberg, Head of the Arbitration Department of the T.M.C. Asser Institute, The Hague.

[1] *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1989) (p. 1307) – hereafter cited as *Guide to the Model Law*. Each of the 36 articles is preceded by a Commentary, followed by the entire legislative history relating to that article.

[2] Canada: Federal Commercial Arbitration Act, in force 10 August 1986. The Canadian provinces and territories soon followed suit and adopted the Model Law as well. A list of these statutes can be found in 'National Report Canada' by Marc Lalonde in ICCA's *International Handbook on Commercial Arbitration*. Reproduced in *ICCA Handbook* are the text of the Federal Act and the text of the International Commercial Arbitration Acts of British Columbia, (Annex V to the National Report Canada), Ontario, (Annex VII) and Quebec (Annex III).

[3] Cyprus: International Commercial Arbitration Law, 1987, dated 29 May 1987.

[4] Bulgaria: Law on International Commercial Arbitration, 5 August 1988, amended 2 November 1993; Nigeria: Arbitration and Conciliation Decree 1988, Decree no. 11, 14 March 1988.

[5] Australia: International Arbitration Amendment Act 1989, assented to 15 May 1989 incorporating the Model Law into the International Arbitration Act 1974; Hong Kong: Arbitration Ordinance (Amendment) (No. 2) Ordinance 1989, in force 6 April 1990.

[6] Scotland: Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, in force 1 January 1991.

[7] Peru: Decree Law No. 25935 of 7 November 1992 enacting the General Arbitration Law, in force 11 December 1992.

[8] Bermuda: International Conciliation and Arbitration Act, 29 June 1993; Law of the Russian Federation on International Commercial Arbitration, enacted 7 July 1993; Mexico: Decree 22 July 1993 containing amendments and diverse additional provisions made to the Commercial Code and the Federal Code of Civil Procedure, introducing in Book Five of the latter a new Title Four comprising Arts. 1415-1463; Tunisia: Law no. 93-42 of 26 April 1993 on the Enactment of the Arbitration Code, in force 27 October 1993.

[9] Egypt: Law 27 of 1994 enacting a Law concerning Arbitration in Civil and Commercial Matters, in effect 22 May 1994; Ukraine: Law on International Commercial Arbitration, enacted 24 February 1994 and in force 20 April 1994.

[10] California: Arbitration and Conciliation of International Commercial Disputes, Cal. Div. Proc. Code ss. 1297.11-1297.432 (Deering 1988) effective 7 March 1988.

[11] Connecticut: UNCITRAL Model Law on International Commercial Arbitration, Publ. Act. No. 89-179, 1989 Conn. Legis. Serv. 261 (West) approved 1 June 1989 and in force as amended 1 October 1991.

[12] Florida: Florida International Arbitration Act, Fla. Stat. ss. 684.01-684.35 (1988). Text reproduced in Annual Report AAA 1986, at pp. 241-255.

[13] Georgia: Georgia Arbitration Code, Ga. Code Ann. ss. 9-9-1 to 9-9-43 (1989), effective 1 July 1988.

[14] North Carolina: International Commercial Arbitration Act, Chapter 1, Art. 45B Gen Stats., effective 13 June 1991.

[15] Ohio: Ohio Code Chap. 2712, International Commercial Arbitration, in force 23 October 1991. Text reproduced in Annual Report AAA 1992-1993, at pp. 203-226.

[16] Oregon: International Commercial Arbitration and Conciliation Act, H.B. 2381 (June 1991) in effect 29 September 1991.

[17] Texas: Arbitration and Conciliation of International Disputes, Tex. Rev. Civ. Stat. Ann. Arts. 249-1 to 249-43 (Vernons 1989), effective 1 September 1989. Text reproduced in Annual Report AAA 1988-1989, at pp. 301-319.

[18] Commission Report of 15 August 1979, *Guide to the Model Law* p. 40.

[19] Analytical Commentary 25 March 1985, *Guide to the Model Law* pp. 71-72.

[20] Under the Model Law the question, whether an arbitration is international or domestic, has already arisen on several occasions. *See* for example, Supreme Court of Hong Kong 29 October 1991, *ICCA Yearbook* 1992, 289-303. Both parties had their place of business in Hong Kong (test of Art. 1(3) under a). However, the Court found it clear that a substantial part of the obligations was to be performed in China (test of Art. 1(3) under *b* ii). The Court concluded that it was an international arbitration to which the Model Law applied (see nos. 10-22 of the excerpt of the decision in *Yearbook*.

[21] 'National Report: Bulgaria' by Stalev, *ICCA Handbook* Ch. I.1 and Annex I, Final Provisions para. 3(1): 'This law is applied also when parties to the arbitration have their domicile or seats in the Republic of Bulgaria ...'.

[22] 'National Report: Mexico' by Siqueiros and Haagland Ch. I.1, and Annex I, Art. 1415.

[23] Article 1, Law Concerning Arbitration in Civil and Commercial Matters.

[24] 'National Report: Canada' by Lalonde, *ICCA Handbook* Ch. I.1 and Annex I, Commercial Arbitration Code Art. 1 'Scope of Application', deleting the word 'international' from Art. 1 of the Model Law.

[25] 'National Report' by Lalonde, Chapter I *sub voce* Quebec.

[26] S. 2L of the Arbitration Ordinance of Hong Kong.

[27] S. 66(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

[28] S. 57(2)(*d*) of the 1988 Nigeria Arbitration and Conciliation Decree.

[29] 'National report: Australia' by Pryles Ch. I.1 and s. 21 of International Arbitration Act in Annex I, *ICCA Handbook*.

[30] S. 29 of Bermuda's International Conciliation and Arbitration Act 1993. It is added in this section that 'in such a case unless

otherwise agreed by the parties in writing the Arbitration Act 1986 shall apply'. Australia's Act does not contain such addition but if such opting-out has been agreed upon by the parties, according to Pryles, the relevant State or Territorial legislation will apply.

31 S. 2M of Hong Kong's Arbitration Ordinance.

32 S. 43 of the 1988 Decree of Nigeria.

33 Art. 82 of the Arbitration Act of Peru.

34 Tunisia's Law of 26 April 1993, enacting the Arbitration Code.

35 The same observation may be made in respect of France. When this country (not a Model Law country) modernized its arbitration law in 1980 and 1981 it distinguished in Book IV of the new CCP between domestic (First Part) and international arbitration (Second Part). The latter refers on several occasions to articles contained in the First Part on domestic arbitration.

36 123 pages in *Guide to the Model Law.*

* (2) Pursuant to an agreement of the parties, the following may be referred to international commercial arbitration:

– disputes resulting from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad; as well as

– disputes arising between enterprises with foreign investment, international associations and organizations established in the territory of the Russian Federation; disputes between the participants of such entities; as well as disputes between such entities and other subjects of the Russian Federation law.

(3) For the purpose of para. 2 of this Article:

– if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

– if a party does not have a place of business, reference is to be made to his permanent residence.

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– The international commercial arbitration resolves civil property disputes arising from foreign trade relations as well as disputes about filling gaps in a contract or its adaptation to newly arisen circumstances if the domicile or the seat of at least one of the parties is not in the Republic of Bulgaria (Art. 1(2)).

– Disputes about real rights on, or possession of immovables or rights originating from a labour relation cannot be subjected to arbitration (Art. 2).

* (b) this part shall apply only to the arbitration of disputes between:

(1) Two or more persons at least one of whom is domiciled or established outside the United States; or

(2) Two or more persons all of whom are domiciled or established in the United States if the dispute bears some relation to property, contractual performance, investment, or other activity outside

the United States. page "8"

(3) Notwithstanding the provisions of subsection (b) of this Code section, this part shall not apply to the arbitration of any of the exceptions set forth in Part I of this article.

* (1) This chapter shall only apply to the arbitration of disputes between:

(a) Two or more persons at least one of whom is a nonresident of the United States; or

(b) Two or more persons all of whom are residents of the United States if the dispute:

1. Involves property located outside the United States;
2. Relates to a contract or other agreement which envisages performance or enforcement in whole or in part outside the United States;
3. Involves an investment outside the United States or the ownership, management, or operation of a business entity through which such an investment is effected, or any agreement pertaining to any interest in such an entity; or
4. Bears some other relation to one or more foreign countries.

(2) Notwithstanding the provisions of subsection (1), this chapter shall not apply to the arbitration of:

(a) Any dispute pertaining to the ownership, use, development, or possession of, or a lien of record upon, real property located in this state, unless the parties in writing expressly submit the arbitration of that dispute to this chapter; or

(b) Any dispute involving domestic relations or of a political nature between two or more governments.

37 Commission Report of 21 August 1985, *Guide to the Model Law*, p. 96 at no. 30.

38 Countries adopting the Model Law for domestic arbitration as well could omit the opting-in of Art. 1(3) under c.

39 Analytical Commentary 25 March 1985 (U.N. DOC.A/CN.9/264) para 31. *Guide to the Model Law*, pp. 73-74.

40 Ontario International Commercial Arbitration Act 1990, Art. 2 under (3). *Handbook*.

41 Broches, in his 'Commentary on the UNCITRAL Model Law', *ICCA Handbook*, p. 20, states that as long as the express agreement 'does not represent an egregious attempt to evade the law' it will be respected by the courts.

42 Commission Report of 21 August 1985, U.N. Doc.A/40/17.

43 U.N. Doc.A/CN.9/264 of 25 March 1985: Report of the Secretary-General containing the Analytical Commentary.

44 Commentary on Art. 16 in *Guide to the Model Law*, p. 486.

45 'Rules of law' gives a broader freedom than 'law' as discussed in depth at UNCITRAL. *See Guide to the Model Law*, Commentary on pp. 766-769. Compare with 'regles de droit' instead of 'loi' in Art. 1496 CCP of France (non-Model Law country)

[46] In Spain (not a Model Law country) the law of 1988 only requires reasons for a *de jure* award (Art. 32).

[47] 'National Report: England' by Steyn and Veeder, *ICCA Handbook*, Ch. V.3.

[48] The legal history of Art. 34 is, with the exception of Art. 1, the longest in *Guide to the Model Law*, pp. 910-1003.

[49] UNCITRAL Commission Report August 1985, *Guide to the Model Law*, p. 1002 at no. 297.

[50] Art. 947.2 juncto 946.2 of the Quebec's C.C.P.

* The court, where appropriate and so requested by a party, would invite the arbitral tribunal, *whose continuing mandate is thereby confirmed*, to take appropriate measures for eliminating a certain remediable defect which constitutes a ground for setting aside under paragraph (2). Only if such 'remission' turns out to be futile at the end of the period of time determined by the Court, during page "21" which recognition and enforcement may be suspended under Article 36(2), would the Court resume the setting aside proceedings and set aside the award.

[51] Analytical Commentary 25 March 1985, *Guide to the Model Law* p. 967.

[52] The effect of setting aside on the arbitration agreement has been submitted for consideration in the Fourth Secretariat Note of 16 December 1989 (*Guide to the Model Law* p. 943), but was not discussed by the Working Group or the Commission in subsequent sessions.

[53] Analytical Commentary by the Secretary-General, 25 March 1985, *Guide to the Model Law*, p. 1040 at 3.

[54] For the Federal Arbitration Act of the USA see Annex I to 'National Report: USA' in *ICCA Handbook*.

[55] The *Guide to the Model Law* deals on pp. 1116-1158 with 'Matters Not Addressed in the Final Text'.

* For the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure.

[56] *See also* the Study of the ILO (International Labour Office) on *Conciliation and Arbitration Procedure in Labour Disputes* (3rd ed., 1989) p. 15. It considers the distinction between conciliation and mediation to be only a difference of degree in respect of the initiative taken by the third party and not a difference in kind. It discusses conciliation and mediation together as one type of procedure.

[57] Peru: Art. 38 (domestic Part of the law) which applies on a supplementary basis to international arbitration (Art. 82).

* (1) If all parties to a reference consent in writing, and for so long as no party withdraws in writing his consent, an arbitrator or umpire may act as a conciliator.

(2) An arbitrator or umpire acting as conciliator–

(a) may communicate with the parties to the reference collectively

or separately;

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(b) shall treat information obtained by him from a party to the reference as confidential, unless that party otherwise agrees or unless subsection (3) applies.

(3) Where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall, before resuming the arbitration proceedings, disclose to all other parties to the reference as much of that information as he considers is material to the arbitration proceedings.

(4) No objection shall be taken to the conduct of arbitration proceedings by an arbitrator or umpire solely on the ground that he had acted previously as a conciliator in accordance with this section.

[58] First Working Group Report A/CN.9/216 (23 March 1982), *Guide to the Model Law*, p. 312.

[59] 'National report: Australia' by Pryles, Ch. II.2 under c and Annex I and II. *Handbook*.

[60] 'National Report: Canada' by Lalonde, Ch. IV.3 and Annexes. *Handbook*.

[*] (1) The Court [specified differently], on application of the parties to 2 or more arbitration proceedings, may order

(a) *the arbitration proceedings to be consolidated, on terms it considers just*,

(b) the arbitration proceedings to be heard at the same time, or one immediately after another or,

(c) any of the arbitration proceedings to be stayed until after the determination of any other of them.

(2) Where the Court orders arbitration proceedings to be *consolidated pursuant to subsection (1)(a)* and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of the arbitral tribunal for that arbitration proceeding, the arbitral tribunal shall be appointed by the Court, but if all the parties cannot agree, the Court may appoint the arbitral tribunal for that arbitration proceeding.

(3) Nothing in this section shall be construed as preventing the parties to 2 or more arbitration proceedings from agreeing to consolidate those arbitration proceedings and to take such steps as are necessary to effect that consolidation.

[61] *See*'Commentary on Matters not Addressed in the Final Text' by Holtzmann and Neuhaus, *Guide to the Model Law*, at pp. 1118-1119.

[62] In the General Part of Hong Kong's Arbitration Ordinance s. 2G states that the provision of the Legal Practitioners Ordinance which provides that no cost in respect of anything done by 'an unqualified person acting as solicitor' shall be recoverable, does not apply to

the recovery of costs directed by an award. The purpose of this provision is to make the costs of an overseas lawyer recoverable. *See*'National Report: Hong Kong' by Kaplan and Bunch, *ICCA Handbook*, Ch. IV.6.

* In such a case, the court, in addition to entering the order in a foreign currency designated by the award, upon application by a party also shall enter that order in United States dollars determined by reference to the market rate of exchange prevailing in this state on the date the award was issued, unless the award itself fixes some other date. If no such market rate of exchange is available, the court shall fix the rate it determines to be appropriate.

63 First Secretariat Note 14 May 1981, *Guide to the Model Law*, at p. 1148.

64 First Working Group Report 23 March 1982, *Guide to the Model Law*, at p. 1149.

65 First Secretariat Note 'Possible Features of a Model Law', 14 May 1981, *Guide to the Model Law*, p. 1123.

66 Third Secretariat Note 12 January 1983, *Guide to the Model Law*, pp. 1125-1128.

67 Draft 5 July 1983, *Guide to the Model Law*, pp. 1129-1134.

68 Fourth Working Group Report 22 September 1983, *Guide to the Model Law*, p. 1135.

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