

Michigan Journal of International Law

Volume 15 | Issue 3

1994

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Recommended Citation

James H. Carter, *The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?*, 15 MICH. J. INT'L L. 785 (1994).

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THE INTERNATIONAL COMMERCIAL ARBITRATION EXPLOSION: MORE RULES, MORE LAWS, MORE BOOKS, SO WHAT?

ISAAK I. DORE, *THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE*. London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff, 1993. ix + 222 pp.

*Reviewed by James H. Carter**

Two complementary phenomena are reshaping the traditionally rather closed world of international commercial arbitration. First, as the popularity of arbitration as the preferred international dispute resolution mechanism grows, the circle of participants is widening rapidly: new arbitral institutions have arisen in previously unexplored locations, and many more individuals are becoming active as arbitrators, counsel, or professional arbitration administrators or trainers. Second, there is a marked trend toward relative standardization of a number of aspects of transnational arbitration law and procedure. Due to both of these developments, international arbitration is becoming less of an arcane art practiced only by an inner "club" of specialists.

At the same time, the canon of international arbitration literature is undergoing its own explosive growth. Practitioners now cannot consider themselves current in this field without acquiring familiarity with several authoritative treatises¹ and paying regular attention to at least three international periodicals devoted entirely to this subject,² two similarly specialized commercial looseleaf services,³ and a number of occasional publications of specialist professional organizations and bar association committees.⁴

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1. In particular, W. LAURENCE CRAIG ET AL., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* (2d ed. 1990); ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* (2d ed. 1991).

2. The leading publications in English are *Arbitration International*, affiliated with the London Court of International Arbitration; *Journal of International Arbitration*, published in Switzerland; and *The American Review of International Arbitration*, affiliated with the Parker School of Foreign and Comparative Law at Columbia University. Even more specialized arbitration periodicals include *ICSID Review-Foreign Investment Law Journal*, published by the International Centre for Settlement of Investment Disputes, and *The ICC International Court of Arbitration Bulletin*.

3. *World Arbitration & Mediation Report* and *International Arbitration Report*.

4. Leading specialist groups include the American Arbitration Association (whose Corporate Counsel Committee specializes in international commercial matters) and the

Specialized books on discrete aspects of international commercial arbitration have also become more numerous. One type is the comparative study of potential international arbitration sites and organizations, reviewing such things as the national law, relevant arbitral institutions, support facilities, and even ease of travel.⁵ Another is the comparative evaluation of various sets of international arbitration rules.⁶ Most of this literature is practice-oriented: varieties of "how to" information on the arbitration process, plus descriptions of new developments. In addition, some books and articles synthesize trends in arbitration law and practice, usually relying on a mixture of published materials and unpublished documents and lore.

But the field has grown so popular that more specialized works are appearing, and they are rather different in nature from these other publications. One international publisher, Graham & Trotman/Martinus Nijhoff, has commissioned an "International Arbitration Law Library" of detailed studies of particular issues. The most recent entry in this series is a 1993 volume containing four separate but related essays by Professor Isaak I. Dore of Saint Louis University School of Law, entitled *The UNCITRAL Framework for Arbitration in Contemporary Perspective*.⁷

The audience for this dense, technical volume is not the same as that for most of the modern commercial arbitration literature. The book is unlike the works addressed to practitioners or other users of arbitration and seems essentially unconnected to that world; it does not contain advice to the arbitration party or counsel and does not even refer to the leading practical works in the field of arbitration. Instead, this book appears to be addressed to an audience already familiar with its subject, for it does not explain what UNCITRAL is or include the texts of the two

American Bar Association Section of International Law and Practice's International Commercial Arbitration Committee. These two associations have promulgated the CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, reprinted in Howard M. Holtzmann, *The First Code of Ethics for Arbitrators in Commercial Disputes*, 33 BUS. LAW. 309 (1977).

5. See, e.g., SURVEY OF INTERNATIONAL ARBITRATION SITES (J. Stewart McClendon ed., 3d ed. 1993); Richard J. Graving, *The International Commercial Arbitration Institutions: How Good a Job Are They Doing?*, 4 AM. U. J. INT'L L. & POL'Y 319 (1989). More detailed country-by-country studies include HANS SMIT & VRATISLAV PECHOTA, WORLD ARBITRATION REPORTER (1990) and INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (Albert Jan van den Berg & Pieter Sanders eds., 1990) [hereinafter INTERNATIONAL HANDBOOK].

6. See, e.g., Steven J. Stein & Daniel R. Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685 (1983); Robert B. von Mehren, *Rules of Arbitral Bodies Considered from a Practical Point of View*, 9 J. INT'L ARB. 105 (1992).

7. ISAAK I. DORE, *THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE* (1993).

basic documents on which UNCITRAL centers. One may fairly ask why this book takes the approach that it does.

UNCITRAL, the United Nations Commission on International Trade Law, is a U.N. organ based in Vienna and charged with the drafting of model statutes and other materials in various areas related to international trade. Its two major contributions to international commercial arbitration are the UNCITRAL Arbitration Rules (the Rules), adopted with the approval of the U.N. General Assembly in 1976,⁸ and the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), adopted in 1985.⁹ The Rules are designed for use by parties engaged in *ad hoc* arbitration proceedings, in which no organization is specified to administer the case and the parties and arbitrators must themselves determine the procedures to be followed.¹⁰ The Rules have become the most widely accepted set of procedures for these *ad hoc* arbitration proceedings.¹¹ The Model Law serves a different purpose: it was prepared for enactment as a statute by nations seeking to establish a modern legal framework to encourage commercial arbitration, particularly international arbitration. The Model Law governs all types of arbitration to which it is made applicable, whether *ad hoc* or agency-administered, but it allows the parties wide discretion to vary its procedures by agreement. Although originally envisaged as a model for nations relatively new to international arbitration practice and having little or no modern arbitration law, it has increasingly been enacted — with a wide variety of modifications — by nations and jurisdictions wishing simply to conform their statutes to what is becoming recognized as the international norm.¹²

8. G.A. Res. 31/98, *reprinted in* 15 I.L.M. 701 (1976).

9. U.N. GAOR, 40th Sess., Supp. No. 17, Annex I, at 81-93, U.N. Doc. A/40/17 (1985), *reprinted in* 24 I.L.M. 1302 (1985). The leading authority on the "legislative" history of the Model Law is HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY* (1989); *see also* ARON BROCHES, *COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* (1990); Michael F. Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration*, 20 INT'L LAW. 327 (1986).

10. Various arbitration organizations nevertheless serve on request as "appointing authorities" under the UNCITRAL Rules, appointing arbitrators if necessary and considering challenges to their serving. *See, e.g.*, AMERICAN ARBITRATION ASSOCIATION PROCEDURES FOR CASES UNDER THE UNCITRAL ARBITRATION RULES, *reprinted in* THE INTERNATIONAL ARBITRATION KIT 197 (Laura F. Brown ed., 4th ed. 1993).

11. A more recent *ad hoc* alternative is the CENTER FOR PUBLIC RESOURCES RULES FOR NON-ADMINISTERED ARBITRATION OF INTERNATIONAL DISPUTES, *reprinted in* Robert H. Smit, *The Center for Public Resources Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary*, 2 AM. REV. INT'L ARB. 411 (1991) [hereinafter *Center for Public Resources Rules*].

12. Non-U.S. jurisdictions that have enacted some version of the Model Law now include Australia, Bermuda, Bulgaria, Canada, Cyprus, Finland, Germany, Hong Kong, Mexico, Nigeria, Russia, Scotland, and Tunisia, among others.

These two UNCITRAL “products,” which have a number of similar features and were drafted to be complementary, were prepared by experts representing all of the world’s major arbitration organizations and traditions and were intended to reflect a sort of international consensus. They seek to accommodate both common law and civil law approaches to the litigation process — of which arbitration is a subspecies — and to chart a middle course between the need to provide guidance on procedural details and the sometimes contradictory benefit of ambiguity intended to give arbitral tribunals flexibility. The UNCITRAL drafters have not held the Rules or the Model Law out as the only or even necessarily the best solutions to the many procedural issues which they address, but the UNCITRAL models are widely accepted by practitioners as comprehensive efforts to deal with the issues most frequently encountered in arbitration and as valid consensus summaries of answers. They serve as excellent tools for drafters of both *ad hoc* rules and statutory reforms.

There has been little or no discussion in the arbitration literature, however, of any particular UNCITRAL “approach” or “framework” beyond the above philosophy. It is therefore not immediately clear what Professor Dore means when he refers in his title to “the UNCITRAL framework for arbitration,” nor is the “contemporary perspective” of his work self-evident. In fact, the title seems to mean “a report to date (or thereabouts) on similarities between the UNCITRAL Rules and other sets of arbitration rules and on some jurisdictions’ implementation (or not) of the Model Law.”

The UNCITRAL Rules are now almost two decades old, and in recent years other sets of (competing) rules have been proposed, adopted, or amended. A number of modifications or divergences from individual UNCITRAL Rule details have been promulgated or proposed by arbitration organizations, practitioners, and academic commentators. These might provide the basis for an analysis of the success of the UNCITRAL Rules and the ways in which they could be updated or elaborated to flesh out the UNCITRAL arbitral skeleton. (For example, UNCITRAL now is addressing a project to promulgate “Guidelines for Prehearing Conferences” in international commercial cases, a possible extension of the UNCITRAL “framework.”¹³)

13. An initial draft, U.N. GAOR, Comm. on Int’l Trade Law, 26th Sess., U.N. Doc. A/CN.9/378/Add.2 (1993), was issued May 6, 1993; for a report of this draft, see 4 *WORLD ARB. & MEDIATION REP.* 243 (1993). Although UNCITRAL has not addressed this subject, a set of rules of evidence for international arbitrations has been promulgated separately by the International Bar Association, *INTERNATIONAL BAR ASSOCIATION SUPPLEMENTARY RULES GOVERNING THE PRESENTATION AND RECEPTION OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION*, reprinted in D.W. Shenton, *An Introduction to the IBA Rules of Evidence*,

Similarly, new arbitration statutes have been enacted since 1986 at the rate of a dozen or so each year by jurisdictions as diverse as individual U.S. states and Canadian provinces, major trading nations such as Germany, Switzerland, Mexico, and Russia, and smaller jurisdictions such as Cyprus and Bermuda.¹⁴ Virtually all such statutes, in recent years, either have been patterned to a substantial extent on the UNCITRAL Model Law or have been the result of serious studies of the Model Law that resulted in decisions to take somewhat different approaches. The arguments for and against adopting the Model Law in an advanced trading nation that is already equipped with a generally appropriate statute have been considered by authors in many countries, and a synthesis might provide a useful subject for consideration in a specialized book. Such a study might seek to identify common aspects of the Rules and the Model Law that constitute a "framework" and could evaluate the wisdom of deviating from it in light of this body of experience.

But Professor Dore's book is not such a study. Although it alludes to some of these issues, this book consists of what appropriately would form four quite useful technical appendices to such a work. Professor Dore makes clear that what he has written is only a comparative "textual analysis" of the Rules and the Model Law in relation to other selected arbitration materials, which is thorough and quite comprehensive in its reading of the words of those documents but draws few conclusions. The book also generally disavows any serious reliance on either the "legislative" history of the UNCITRAL documents or (with one exception, involving the Iran-U.S. Claims Tribunal) their practical application by arbitrators and counsel in arbitrations.

This work is therefore an entirely academic study of two international commercial arbitration texts and a few related matters, and it highlights a problem for the study and teaching of this subject in the traditional law school format. Unlike court decisions, most international arbitral awards are not published. Still more important is the fact that the majority of international arbitrations are resolved by settlement. As a result, most of the positions advanced in regard to procedural matters, as well as the arbitrators' rulings on them, remain unknown to anyone other than the participants and the other practitioners who learn of them through the network of symposia and other programs at which "war stories" are

1 ARB. INT'L 118, 124 (1985). The International Bar Association also has issued a set of international arbitrator ethics standards, INTERNATIONAL BAR ASSOCIATION: ETHICS FOR INTERNATIONAL ARBITRATORS, *reprinted in* 26 I.L.M. 583 (1987).

14. For citations to a large number of foreign arbitration laws and a useful country-by-country bibliography, see THE INTERNATIONAL ARBITRATION KIT, *supra* note 10, at 115.

processed into systematic commentary. This group, expanding though it is, includes only a handful of legal academicians, and these typically are persons who serve regularly as arbitrators themselves. It is significant that virtually all of the authors of and regular contributors to the core literature in the field (referred to in this review) are full-time arbitration practitioners or academics with extensive experience in the trenches.

Does this inevitably make the most relevant parts of the subject inaccessible to the library-bound academic? The answer seems likely to be yes. Eventually, more arbitration awards may be published, but this is unlikely to produce a body of *procedural* law that is accessible to legal academicians or law students. Those teachers who are not among the group that can cross the line also to function as practitioners may find themselves talking primarily only to one another. A principal issue posed by this book, albeit implicitly, is whether traditional legal scholarship is likely to be of much relevance in this field. Fortunately, the alternative practice-oriented scholarship is thriving.

Professor Dore has, in any event, limited himself to a discussion of materials that have been published elsewhere, and he has been rather selective even among those. His first two essays address the Rules. Chapter one is a comparison, virtually line by line, of the UNCITRAL Rules (the text of which surprisingly is not included in the book) with two other leading sets of international arbitration rules (also not included): the London Court of International Arbitration (LCIA) Rules, revised most recently in 1985, and the International Chamber of Commerce Court of International Arbitration (ICC) Rules, the current version of which was revised in 1988. The second chapter of the book then considers the modified version of the UNCITRAL Rules promulgated in 1981 by the Iran-U.S. Claims Tribunal that was set up to resolve disputes as part of the transaction that freed U.S. hostages in Iran and that dealt with the multibillion dollar commercial consequences of the Shah's fall. It examines in detail the imaginative ways in which that body adapted the UNCITRAL Rules, designed for the typical two-party dispute, to a much more complex situation involving two governmental parties and hundreds of separate individual arbitrating parties with private claims against Iran.

The third and fourth chapters of the book address the Model Law. Chapter three simply summarizes the Model Law, subsection by subsection, progressing through it in order, while chapter four — entitled "International Reaction to the Model Law" — looks at the texts of a limited selection of international arbitration statutes (enacted up to 1989) and the extent to which they have used, rejected, or otherwise modified the Model Law's provisions. Here the book's only express thesis emerges, fleetingly: the Model Law is a good thing and should be enacted widely.

Few if any readers are likely to proceed through this volume by reading continuously from the beginning to the point at which this view is expounded, since the foregoing textual analysis is suitable only for episodic consultation. It is not light reading. The UNCITRAL/LCIA/ICC rules chapter, for example, involves comparison of one set of rules designed for *ad hoc* arbitration with two other sets used by arbitral administration organizations. The LCIA and ICC have long histories and their own special internal procedures, which exert a heavy influence on the way in which arbitrations under their jurisdictions actually operate. Professor Dore acknowledges this as a general proposition and makes occasional references to ICC practice, but the textual comparison is otherwise an entirely academic project devoid of practical advice. This is not a work to be consulted by parties or counsel seeking to decide which type of arbitration might be most appropriate for their dispute, but a compendium of specific rule discussions that might be a research tool when a dispute arises over a particular UNCITRAL Rules provision upon which a comparative rules examination could shed light.

Chapter four, like the book as a whole, is also limited by the fact that its writing evidently was completed in 1989, the last date of the materials it addresses (although Professor Dore does make a few footnote references to secondary sources as late as early 1991). The opening chapter of this 1993 book thus fails to refer at all to one of the most interesting subjects of comparison to the UNCITRAL Rules: the American Arbitration Association's March 1991 International Commercial Arbitration Rules,¹⁵ which were designed to modify the UNCITRAL Rules for use in administered rather than *ad hoc* arbitration. While LCIA and ICC rules changes after 1975 reflect and react to some aspects of the UNCITRAL Rules, they have been built upon the historic practices of those institutions and thus inevitably differ from the Rules for reasons more complex than can be covered easily in a simply textual comparison of rules language.

The second essay in Professor Dore's book reviews a pioneering project to adapt the UNCITRAL Rules to a multiparty, long-running multiple case setting: the rules structure of the Iran-U.S. Claims Tribunal.

15. AMERICAN ARBITRATION ASSOCIATION INTERNATIONAL COMMERCIAL ARBITRATION RULES, reprinted in Hans Smit, *The New International Arbitration Rules of the American Arbitration Association*, 2 AM. REV. INT'L ARB. 1 (1991); see also Pierre Cournot, *The New International Arbitration Rules of the American Arbitration Association and the UNCITRAL Model Law: A Comparative Overview*, 6 INT'L L. PRACTICUM 20 (1993). Professor Dore's book also makes no reference to the principal competing set of international rules for *ad hoc* arbitration, those of the Center for Public Resources. See *Center for Public Resources Rules*, *supra* note 11.

Professor Dore sets forth the changes that the Tribunal made in the Rules for its purposes and examines the secondary literature¹⁶ and some of the decisional law (which, in the case of the Tribunal, has been published)¹⁷ that addresses procedural matters. While this discussion thus benefits from its consideration of practical applications, the significance of the matters involved is of doubtful relevance to most practitioners today. The Iran-U.S. Claims Tribunal has completed much of its work and has not been emulated in the thirteen years since its creation in 1981; indeed, the Iraq Claims Commission established by the United Nations in 1991 was developed on entirely different procedural foundations.¹⁸ It would be useful, of course, to examine the "framework" most appropriate to such an international claims setting, as others have done.¹⁹ This work instead is limited to a historic study of the Iran-U.S. example.

The third chapter is a truncated version of a textual analysis of the Model Law published elsewhere by Professor Dore²⁰ and is presented, the author states, simply as "background" to the final chapter, the most original part of the book. In the fourth chapter, the author reviews the texts of Model Law-inspired legislation enacted by several U.S. states as of 1989 (there were five more by 1993)²¹ and Canada, as well as different approaches considered by an authoritative study of English arbitration

16. There is a substantial body of this secondary literature, written mostly by arbitration practitioners, including STEWART A. BAKER & MARK D. DAVIS, *THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1992); JOHN A. WESTBERG, *INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES—CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1991); Karl-Heinz Bockstiegel, *Applying the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal*, 4 *INT'L TAX & BUS. LAW* 266 (1986); Michael Straus, *The Practice of the Iran-U.S. Claims Tribunal in Receiving Evidence from Parties and from Experts*, 3 *J. INT'L ARB.* 57 (1986).

17. For example, the *Iran-U.S. Claims Tribunal Reports* consists of 27 volumes covering awards through 1991.

18. See, e.g., Arthur W. Rovine, *An Iraq Claims Process: Where and How?* (pts. 1 & 2), 1 *AM. REV. INT'L ARB.* 411 (1990), 2 *AM. REV. INT'L ARB.* 102 (1991); Charles N. Brower, *Lessons to Be Drawn from the Iran-U.S. Claims Tribunal*, 9 *J. INT'L ARB.* 51 (1992); Bachir G. Affaki, *The United Nations Compensation Commission: A New Era in Claims Settlements?*, 10 *J. INT'L ARB.* 21 (1993).

19. See sources cited *supra* note 18.

20. ISAAC I. DORE, *ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS* ch. 6 (1986).

21. The state laws discussed by Professor Dore are those of Connecticut, California, Texas, Florida, Georgia, and Hawaii. Other states with international arbitration statutes of various sorts are Colorado, Maryland, North Carolina, Ohio, and Oregon. For citations to all 11 laws, see *THE INTERNATIONAL ARBITRATION KIT*, *supra* note 10, at 85. See generally J. Stewart McClendon, *State International Arbitration Laws: Are They Needed or Desirable?*, 1 *AM. REV. INT'L ARB.* 245, 253-57 (1990).

law²² and a new Dutch arbitration statute enacted in 1986 that does not follow the Model Law pattern.²³

In this chapter the author goes beyond textual analysis and expresses his own views, most notably his opinion about the desirability of U.S. federal enactment of some version of the Model Law, which he favors. Professor Dore is persuasive, in my view, in outlining the currently confusing U.S. regime and calling for its replacement.²⁴

U.S. international arbitration law is currently three-tiered and requires its users to try to decipher how the Federal Arbitration Act (FAA),²⁵ state international arbitration laws in selected jurisdictions, and basic (non-uniform) domestic arbitration law in each state²⁶ relate to one another and to find the cases that fill in the blanks in the statutory structure. As Professor Dore puts it, the statutory law of many states "does not provide the systematic and comprehensive regime of arbitral procedure necessary to attract international arbitrations."²⁷ He states that "[t]he present haphazard development of the law of international commercial arbitration in the United States, including laws of individual states jockeying to attract international arbitrations to their jurisdictions, promotes overall uncertainty and may do more to discourage than attract such arbitrations to the United States."²⁸ Professor Dore further notes that U.S. state variations of the Uniform Arbitration Act differ from one another, and that foreign parties find it difficult to unearth the cases that supplement gaps in the statutes.²⁹

This is entirely correct, as far as it goes. One could also say that the Model Law provides solutions to some of the procedural issues (such as what court will hear challenges to arbitrators, when this will occur, and

22. The Rt. Hon. Lord Justice Mustill, *A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law*, reprinted in 6 *ARB. INT'L* 3, 4 (1990) (known as the "Mustill Report," after its chairman, Lord Mustill).

23. NETHERLANDS CODE OF CIVIL PROCEDURE, Book IV, arts. 1020-76 (1986), reprinted in *INTERNATIONAL HANDBOOK*, supra note 5, vol. II, "The Netherlands," Annex I.

24. The most comprehensive authorities on this subject, not cited by Professor Dore, are Daniel M. Kolkey, *Reflections on the U.S. Statutory Framework for International Commercial Arbitrations: Its Scope, Its Shortcomings, and the Advantages of Federal Adoption of the UNCITRAL Model Law*, 1 *AM. REV. INT'L ARB.* 491 (1990) and David W. Rivkin & Frances L. Kellner, *The United States Should Not Adopt the UNCITRAL Model Law: An Argument in Support of the Federal Arbitration Act*, 1 *AM. REV. INT'L ARB.* 535 (1990).

25. 9 U.S.C. §§ 1-15 (1947).

26. For citations to state laws, see *THE INTERNATIONAL ARBITRATION KIT*, supra note 10, at 103.

27. DORE, supra note 7, at 134.

28. *Id.* at 132.

29. *Id.* at 133.

whether appeals will be permitted)³⁰ that are simply superior to the present mishmash of U.S. law. One also might add that as the Model Law becomes the international standard — as it seems well on the way to doing now — the nations that hang back and insist on the virtues of their own peculiarities because they are the product of many years of history may find themselves viewed as rather more quaint than forward-looking.

Why all of this is relevant to the future of international arbitration in the United States requires some explanation. Parties to international transactions usually decide where to arbitrate on the basis of a combination of factors, beginning with the nationality of the various interested entities, the governing law, and the language of the contract, and extending to convenience and traditions in particular industries. There is no single “best” place, and foreign parties transacting with U.S. parties historically have been reluctant to agree that the site of arbitration in the event of a dispute will be at the home location of the U.S. participant, particularly if the U.S. party has greater bargaining leverage in the transaction generally. Parties nevertheless do choose the United States in many cases because they are comfortable doing business here and do not fear any improper “home field advantage.” In such instances, hospitability of the forum to international arbitration (with judicial support for arbitration but no undue judicial interference) is a factor; and at present, the United States has a well-deserved reputation as one of the more favorable sites in spite of its rather confusing laws. Parties rarely take the time to study U.S. arbitration law before making a site decision, and it overstates the case for reform to suggest that they do or should.

The necessary forum hospitality will become suspect over time, however, if the statutory scheme is not sufficiently transparent to make possible the participation of more lawyers and arbitrators who are not experts. Foreign parties may not want to read the U.S. laws before deciding to arbitrate here, but they do seek assurance that their non-U.S. arbitrator appointees and counsel would find, if the time came to arbitrate, that the terrain contains no booby-traps. Parties want to avoid finding themselves the captives, in the United States or in any other jurisdiction, of a small group of local arbitration experts who are the only reliable guides to an arcane subject.

Without an expansion of the circle of practitioners beyond those who can fit together the pieces of our overly intricate U.S. statutory and case law puzzle, casual users of the process — which include foreign parties and also a number of U.S. judges called upon infrequently to rule on

30. UNCITRAL ARBITRATION RULES, arts. 6, 13 (1976).

procedural issues related to international arbitrations — will consider the reputation of the United States as a “good” site diminished. We also may see more “bad” law made than otherwise would be the case. Adoption of the Model Law would not do substantive harm to the favorable U.S. arbitration law but would make it more visible.

Those who oppose adoption of the Model Law basically argue, “if it isn’t broken, don’t fix it.” U.S. courts at all levels continue to uphold rather than interfere unduly with the arbitral process, and further experimentation in the fifty state laboratories of federalism might be a good thing, some say. In addition, enacting a special U.S. statute solely for international cases might cut this law off from the rich and continually developing body of case law created in domestic commercial, maritime, and labor arbitrations. Nevertheless, the nay-sayers do tend to agree that the present confusion is not optimal and suggest that one or another “patches” be put on the system through amendments to the FAA.

This is the same conclusion that was reached in England when possible adoption of the Model Law was considered there in 1989.³¹ The leading commentators rejected the Model Law and instead suggested consolidation of and amendments to the existing statutes. But that proved easier said than done. Naturally there were differing views about what details should be changed, and the political process of effecting new legislation proved more complicated than had been anticipated. Five years later, in 1994, the process of “fixing” the English arbitration process drags slowly on. At the present writing, no bill has yet been introduced, much less enacted. In the meantime, the Model Law marches forward as the law of the British Commonwealth (now enacted, for example, in Australia, Bermuda, Canada, Hong Kong, and Scotland), *excepting* England.

A similar problem may exist in the United States. As in England, the amendment of deficient commercial arbitration laws is not a topic of wide public or legislative interest. The basic portion of the FAA (chapter 1) was last amended in 1988 to add two new provisions that had the uniform support of interested bar groups and were entirely uncontroversial politically: a clarification of the types of interlocutory court orders from which appeals could be taken³² and a statement that the act of state doctrine is not a bar to enforcement of an agreement to arbitrate or enforcement of an award.³³ Nevertheless, Congress had difficulty rousing sufficient interest to add even these two relatively straightforward

31. See Johan Steyn, *Towards a New English Arbitration Act*, 7 *ARB. INT’L L* 17 (1991).

32. 9 U.S.C. § 16 (1988).

33. *Id.* § 15.

sections, allowing the legislation to languish before eventually passing it as part of a term-end miscellaneous omnibus bill, *with both parts numbered as section 15*. (A while later, after a certain amount of ridicule, the numerical confusion was straightened out, so that we now have sixteen discretely numbered sections in chapter 1 of the Act.)

This leaves observers with justifiable concern about what harm the U.S. Congress might do if it were offered an opportunity to rewrite international arbitration law in this country. If the Model Law were proposed for U.S. enactment, would the bill be amended to do more ill than good, such as by restricting the presently very broad range of matters that can be made arbitrable by agreement? This is a regrettable but very real issue. As arbitration statutes became identified as “user friendly” based on whether they can be classified broadly as Model Law-inspired or not, the position of the United States as a leading arbitration center will be threatened if our ability to reform is frozen by undue fear of the whims of our legislative masters.

Here, the legal academics and a good number of practitioners find common ground. Professor Dore considers, albeit summarily, the arguments for and against cutting through the existing confusion with preemptive enactment of a federal statute of the Model Law variety, which would provide more specific guidance than does a bare-bones law such as the FAA. His is a useful voice added to the debate on this subject.