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## The UNCITRAL Framework for Arbitration in Contemporary Perspective

Alyssa A. Grikscheit  
*University of Michigan Law School*

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THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE. By *Isaak I. Dore*. London: Graham & Trotman/Martinus Nijhoff. 1993. Pp. ix, 222. \$110.

Isaak Dore<sup>1</sup> should have taken one step back or one step forward. In *The UNCITRAL Framework for Arbitration in Contemporary Perspective*, he provides a useful framework for international commercial arbitration, but one that he views from an uncertain perspective. Dore analyzes the text of both the United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules<sup>2</sup> and the UNCITRAL Model Law in detail, but his textual focus proves costly: Dore's book does not satisfy our theoretical questions, nor does it often provide answers to our most basic practical questions.

In the field of international arbitration law, a few works seek to examine the purposes of arbitration and how to achieve them.<sup>3</sup> Others provide practical advice on topics such as how to draft an arbitration clause in the context of a commercial negotiation.<sup>4</sup> *The UNCITRAL Framework* falls uneasily in between. Dore has previously addressed the "theory and practice" of multiparty arbitration,<sup>5</sup> and he proposes to take the same approach here. But while his book provides some helpful information for those using the UNCITRAL arbitration framework, as well as some answers for those wondering why the drafters constructed the framework the way they did, Dore's practical and theoretical analyses are both ultimately unsatisfying. He is at his best when he focuses on one type of analysis or the other.

The book commences with a textual comparison of the UNCITRAL rules with two other sets of rules designed to govern international commercial disputes (pp. 3-51) — those of the International

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1. Professor of Law, Saint Louis University.

2. *Arbitration Rules of the United Nations Commission on International Trade Law*, 31 U.N. GAOR Supp. (No. 17), U.N. Doc. A/31/17 (1976), reprinted in 7 Y.B. COMM. INTL. TRADE L. 22 (1976).

3. See, e.g., HORACIO A. GRIGERA NAÓN, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION I (1992) (seeking "to analyze diverse aspects of international commercial arbitration so as to determine to what extent arbitral tribunals are willing to perform the independent role assigned to them by *lex mercatoria* theoreticians, namely, the creation of an autonomous, anational and all-prevailing international commercial law"); Otto Sandrock, *How Much Freedom Should an International Arbitrator Enjoy? — The Desire for Freedom from Law v. The Promotion of International Arbitration*, 3 AM. REV. INTL. ARB. 30, 32 (1992) (discussing the danger that international commercial arbitration will become "delegalized," thereby hampering rather than promoting its own development).

4. See, e.g., MARTIN HUNTER ET AL., THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR: CLAUSES IN INTERNATIONAL CONTRACTS (1993); Markham Ball, *Just Do It — Drafting the Arbitration Clause in an International Agreement*, 10 J. INTL. ARB. 29 (1993).

5. See ISAAK DORE, THEORY AND PRACTICE OF MULTIPARTY COMMERCIAL ARBITRATION (1990).

Chamber of Commerce (ICC)<sup>6</sup> and the London Court of International Arbitration (LCIA).<sup>7</sup> Dore states his purpose for Chapter One modestly at the beginning: "to present an introductory explanation of the UNCITRAL arbitral process and to make simultaneous comparisons with the salient features of the two other arbitral regimes that are the most prominent alternatives to the UNCITRAL regime" (p. 3). At the end of the chapter, however, he suddenly shifts his purpose, gearing his argument to a definite audience: "The chief purpose of this chapter was to enable both arbitrators and lawyers to understand how arbitral practice is conducted by being able to compare how the various frameworks for arbitration would react in the same situation" (p. 46). Dore's static purpose becomes a dynamic one. Initially settling for mere "explanation," he eventually demands complete "understand[ing]." The fundamental tension between the desire to describe and the desire to transform is apparent throughout the book. Dore sets modest goals and achieves them, but he sometimes aspires even higher.

Dore's three-way comparison is quite informative, and his cross-reference table (pp. 47-51) provides a quick way to compare the various rule systems' treatment of a single issue, such as a party's right to challenge an arbitrator. This fine table partly makes up for the multi-tiered index (pp. 215-22), which is insufficiently cross-referenced and rather difficult to use.

The most serious problem with Chapter One is again one of approach. Dore chooses two rule systems — albeit important ones — that are older than the UNCITRAL rules in order to make his project easier. Without a doubt, the ICC and LCIA rules are "prominent alternatives" (p. 3); nevertheless, Dore neglects to mention other sets of rules, such as the International Arbitration Rules of the American Arbitration Association (AAA), which are modeled after, but arguably improve upon, the UNCITRAL system.<sup>8</sup>

Chapter Two concerns the Iran-United States Claims Tribunal's adoption and adaptation of the UNCITRAL rules. Once again Dore

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6. INTERNATIONAL CHAMBER OF COMMERCE, ICC RULES OF CONCILIATION AND ARBITRATION (as amended and effective on Jan. 1, 1988) (copy on file with author).

7. LONDON COURT OF INTERNATIONAL ARBITRATION, LCIA RULES (effective Jan. 1, 1985) (copy on file with author).

8. The AAA rules arguably improve upon the UNCITRAL rules by, for example, imposing an explicit confidentiality obligation, excluding arbitrators from liability, and authorizing the arbitrators to interpret the arbitration rules. See AMERICAN ARBITRATION ASSN., INTERNATIONAL ARBITRATION RULES arts. 35-37 (as amended and effective on Nov. 1, 1993) (copy on file with author). Also, the AAA offers institutional arbitration, rather than ad hoc arbitration as under UNCITRAL. Commentators tend to find institutional arbitration preferable under most circumstances. See, e.g., HUNTER ET AL., *supra* note 4, at 2-4; see also WILLIAM F. FOX, JR., INTERNATIONAL COMMERCIAL AGREEMENTS: A FUNCTIONAL PRIMER ON DRAFTING, NEGOTIATING, AND RESOLVING DISPUTES § 8.4, at 209 (1988) ("To avoid . . . problems, many contracting parties provide for, or ultimately agree to, *institutional arbitration* . . .").

defines his purpose narrowly, analyzing only the text of the rules as the tribunal adopted them and stressing that he does not intend to examine tribunal caselaw or the tribunal's contribution to international arbitration law. He concedes that J.J. van Hof achieved these two goals in another work that he urges the reader to consult.<sup>9</sup> Unfortunately, Dore continues to rely heavily on van Hof and one other source throughout the chapter.<sup>10</sup> Were it not for the insights, sprinkled throughout, of Judge Richard M. Mosk of the Iran-United States Claims Tribunal,<sup>11</sup> the reader might better consult another book to understand the tribunal's work.<sup>12</sup>

Dore next examines the Model Law on International Commercial Arbitration,<sup>13</sup> which UNCITRAL adopted in 1985 as part of its effort to promote the worldwide harmonization of international arbitration law. In Chapter Three, he proceeds to explain the Model Law article by article, using the same headings as the Model Law itself for easy cross-reference (pp. 101-27). This chapter commences with a shift in tone. Although Dore still professes to focus on text rather than *travaux* (p. 101 n.1), his textual analysis is more concise than in previous chapters and enlivened by explanations of how certain provisions promote the goals of arbitration. Perhaps this shift results from having written extensively on the subject before.<sup>14</sup> Whatever the cause, this chapter — and to an even greater extent the one that follows — bridges the gap between the practical and the theoretical much more successfully than the first half of the book does. Dore discusses at once the ultimate ends of arbitration and how to achieve them. Here, for example, in the context of a discussion of an arbitrator's duty to disclose, Dore speaks of the "search for certainty," the need for

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9. Pp. 52-53 & n.1 (citing JACOMIJN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES — THE APPLICATION BY THE IRAN-U.S. CLAIMS TRIBUNAL (1991)).

10. Pp. 52-98 (citing VAN HOF, *supra* note 9, 19 times, and Stewart A. Baker & Mark D. Davis, *Establishment of an Arbitral Tribunal Under the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal*, 23 INTL. LAW. 81 (1989), 15 times).

11. Judge Mosk's influence is apparent throughout chapter 2. Not only does Dore explicitly thank him for his help in the acknowledgments (p. vii), but he makes ample use of Mosk's separate opinions, even calling one "excellent." P. 67 n.47.

12. The reader curious about the Iran-United States Claims Tribunal should consult STEWART A. BAKER & MARK D. DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1992); RAHMATULLAH KHAN, THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1990); WAYNE MAPP, THE IRAN-UNITED STATES CLAIMS TRIBUNAL: THE FIRST TEN YEARS, 1981-1991 (1993); VAN HOF, *supra* note 9; and JOHN A. WESTBERG, INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1991).

13. *United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration*, 40 U.N. GAOR Supp. (No. 17), Annex I at 81, U.N. Doc. A/40/17 (1985) [hereinafter UNCITRAL Model Law], reprinted in 24 I.L.M. 1302 (1985).

14. Dore admits that he adapted much of this chapter from chapter 6 of ISAAK I. DORE, ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS (1986). P. 101 n.1.

“flexib[ility],” and the close connection between the Model Law and the UNCITRAL Arbitration Rules (pp. 108-09). In a typically short, two-page discussion, Dore manages to brief the reader on the requirements of article 12’s “standard of impartiality” and to tie it in to the purposes of both the Model Law and arbitration generally.<sup>15</sup>

Admittedly, Dore employs words like *certainty* and *flexibility* far more often than he explains how or why the drafters created provisions to achieve those ends.<sup>16</sup> We learn that the three goals of the Model Law are party autonomy, flexibility, and “equality and fairness.”<sup>17</sup> Dore, however, generally focuses on flexibility, with only an occasional reference to party autonomy or equality. This focus leaves the reader with the impression that the Model Law is — well — flexible. But flexibility is not always desirable. Most commentators acknowledge that the UNCITRAL Arbitration Rules are the most flexible of their kind,<sup>18</sup> and yet potential parties continue to rely heavily on other rule systems.<sup>19</sup>

Flexible *rules*, at least, may encourage the delay tactics of recalcitrant parties.<sup>20</sup> Dore himself acknowledges that they may “encourag[e] forum shopping and conflict between tribunal- and court-ordered measures” (p. 28). Furthermore, while appropriate for parties that deal with one another on a routine basis, flexible rules may not work well for those who know that they will never deal with one another again. Can similar criticisms be made of a flexible *law*? Perhaps. Some of the variations on the Model Law Dore discusses in his

15. Pp. 108-09 (discussing UNCITRAL Model Law, *supra* note 13, art. 12).

16. *See, e.g.*, p. 114 (“The general formula of ‘appropriate security’ was deliberately chosen by UNCITRAL to give flexibility to the tribunal.”). Dore merely asserts that the formula promotes flexibility, rather than explaining how it does so.

17. P. 114. Later, Dore also mentions “privacy” as a hallmark of arbitral, rather than judicial, dispute resolution. *See* pp. 144, 166.

18. *See, e.g.*, HUNTER ET AL., *supra* note 4, at 2-4 (noting that ad hoc arbitration, such as arbitration under the UNCITRAL rules, “may be shaped to meet the wishes of the parties” to a greater extent than institutional arbitration, such as arbitration under the ICC, the LCIA, or other sets of rules).

19. *See, e.g.*, FOX, *supra* note 8, § 8.5, at 210 (“The ICC was then — and remains — the preeminent international arbitral body.”); HUNTER ET AL., *supra* note 4, at 10 (noting the ICC’s “institutional cachet” and the “special credibility [given] to the awards rendered under its Rules”).

20. Martin Hunter and his coauthors note that:

The principal disadvantage of an *ad hoc* arbitration [such as one under the UNCITRAL Rules] is that its effectiveness depends on the voluntary co-operation of the parties and their lawyers in formulating and complying with procedural rules — often at a time when they are already in dispute. . . .

Furthermore, it is not difficult to delay an *ad hoc* arbitration by raising questions of jurisdiction or procedure. If one of the parties is recalcitrant from the outset of the proceedings, there will be no arbitral tribunal in existence available to deal with the situation.

Even when an arbitral tribunal is established and a set of rules has been adopted, *ad hoc* arbitrations will not proceed as smoothly as institutional arbitrations if one of the parties fails or refuses to play its part in the proceedings.

HUNTER ET AL., *supra* note 4, at 3. Dore notes the ad hoc versus institutional distinction but fails to discuss its implications. *See, e.g.*, pp. 5, 66-68.

final chapter essentially attempt to make the Model Law more rigid and more reliable. States and arbitral authorities want to ensure that a system of arbitration is workable before they worry about uniformity. Dore, however, never acknowledges that flexibility can be anything but a panacea to the arbitration world's ills. His theoretical analysis is incomplete without at least a cursory discussion of the pluses and minuses of a flexible system.

Chapter Four, entitled "International Reaction to the Model Law," is Dore's best. Unlike the two leading commentaries on the Model Law, Dore's final chapter addresses the "growing number of national enactments based in whole or in part on the Law."<sup>21</sup> Dore surveys the current state of international arbitration law in the countries in which the Model Law has had the greatest impact — the United States, the United Kingdom, the Netherlands, and Canada (pp. 128-84). It would have been interesting to learn about the Model Law's impact in other countries as well. France, Switzerland, and Belgium, for example, reportedly have "favourable legal environment[s]" for arbitration.<sup>22</sup> Although Dore need not have addressed every country's reaction to the Model Law, a brief discussion of those countries that have *considered* adopting the Model Law would have helped the reader better gauge the extent to which the arbitral world has accepted it.

That said, Dore's analysis of the countries he does discuss is insightful and well worth plodding through. For instance, he provides an excellent analysis of federalism and its dangers for a workable system of international arbitration. Dore tackles the United States first, discussing the conflict between the now out-of-date Federal Arbitration Act (FAA)<sup>23</sup> and the often more modern laws of individual states, some of which take after the Model Law, but all of which are to some degree inconsistent with both the Model Law and federal law (pp. 129-49). Dore convincingly argues for "concerted steps [to be] taken at the *federal* level to harmonize and unify the law of international commercial arbitration" (p. 132). He also manages to blend practical advice — such as when he warns of the potential for judicial interference with arbitration in Texas (p. 141) — with quite sophisticated theoretical analysis of which states' modifications of the Model Law are desirable

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21. ARON BROCHES, COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION at vii (1990); see also HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY (1989).

22. BROCHES, *supra* note 21, at 20-21. For a fairly recent and truly comprehensive work on French arbitration law, see MATTHIEU DE BOISSÉSON, LE DROIT FRANÇAIS DE L'ARBITRAGE INTERNE ET INTERNATIONAL (1990). See also ANDREAS BUCHER, LE NOUVEL ARBITRAGE INTERNATIONAL EN SUISSE (1988); MARCEL STORME & BERNADETTE DEMEULENAERE, INTERNATIONAL COMMERCIAL ARBITRATION IN BELGIUM: A HANDBOOK (1989).

23. 9 U.S.C. §§ 1-16, 201-08, 301-07 (1988 & Supp. IV 1992).

and why.<sup>24</sup> Dore's analysis of the "significant potential for non-uniform interpretation and application of community and international law on commercial arbitration" in the European Community (p. 150), as well as his revelation of the fundamental uncertainty as to whether the federal government or the provinces are responsible for treaty making in Canada (p. 171), further complicates his argument and supports his call for national and international lawmaking.

In his final chapter, Dore also illustrates the threat that historical isolationism poses to a truly uniform system. Scotland adopted the Model Law (pp. 150-51). England, however, has had a long history of arbitration and possesses a fine-tuned system of its own that it sees little reason to junk merely for the sake of world uniformity (pp. 151-58). Dore even suggests that the "historic investment" of England and other states may account for the lack of uniformity at the European level (p. 150).

Dore also highlights how rules approximating the Model Law may actually undermine its purposes. The section on the Netherlands Arbitration Act<sup>25</sup> provides — at last — an exceedingly good synthesis of theory and practice. Dore compares the Dutch Act with the Model Law, and in so doing notes the Dutch Act's areas of clarity and of confusion.<sup>26</sup> This comparison is similar to the one he makes between the different sets of arbitration rules in Chapter One. It goes much further, however. Dore truly fuses the practical and the theoretical in his discussion of the Dutch threat to party autonomy. He describes exactly which provisions — such as the court's ability to consolidate arbitrations over the opposition of the parties — threaten party autonomy, as well as why party autonomy is an important goal of arbitration: "[S]ince international arbitration is a preferred mechanism for dispute resolution only when free from unwanted national laws, these provisions may be a disincentive to non-Dutch nationals who might otherwise be willing to subject their arbitration to Dutch law" (p. 164).

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24. Dore informs us, for instance, that the Florida International Arbitration Act, despite not being patterned after the Model Law, "incorporates many of the model law's basic policies, such as enforcing arbitral agreements, minimizing judicial interference and promoting party autonomy. . . . [I]n some respects . . . [it] goes even further than the model law. For example, it does not attempt to confine the application of its provisions by defining 'international' or 'commercial.'" P. 142 (discussing Florida International Arbitration Act, FLA. STAT. ch. 684 (1993) (footnote omitted)). See also p. 135 (noting a provision in Connecticut's arbitration law, CONN. GEN. STAT. § 50a-117 (1992), that increases party autonomy, thereby taking the Model Law one step further).

25. WETBOEK VAN BURGERLUKE RECHTSVORDERING bk. IV, arts. 1020-76, translated in 26 I.L.M. 923 (J.C. Schultz trans., 1987).

26. For instance, Dore notes that an "arbitrator's appointment must be accepted by him in writing, and that once appointed he cannot withdraw without the consent of the parties, a third party appointed by them or the president of the district court," but he allows that "[i]t is unclear what the effect would be under the new Dutch law in the unlikely event that an unwilling arbitrator were not allowed to withdraw." P. 160.

Chapter Four, then, succeeds in precisely the way that the others fall short. Moreover, it is remarkably up-to-date and well informed. Unlike Dore's discussion of the rules of the Iran-United States Claims Tribunal, which drew heavily on other secondary sources, the material in the final part of the book is new and interesting to read.

Dore concludes with a plea for uniformity after only a cursory examination of the benefits of a common law.<sup>27</sup> Never mind. Most of us would probably agree that some uniformity — and certainty — is good. After all, the New York Convention, the only significant multi-lateral convention in the international arbitration area, is thirty-five years old and concerns only the recognition and enforcement of foreign arbitral awards.<sup>28</sup> Even Dore seems to distrust flexibility at the national and supranational levels.<sup>29</sup> The problem is that in his engaging final chapter Dore shows us that some jurisdictions have improved on the Model Law in certain ways. If unification is pursued, what version should we promote? Should we draft an UNCITRAL Model Law II to take into account the improvements of the last few years? Dore neither asks nor answers such questions.

This modest book achieves only modest results. It is neither the one book you should resort to in an ongoing arbitration, nor the one you should turn to in an intellectual debate. That said, its unique mix of practical advice and theoretical conjecture recommends it to the curious and to those who need not rely on a single book.

— *Alyssa A. Grikscheit*

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27. Gerold Herrmann makes a much more convincing argument for uniformity in Gerold Herrmann, *The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions*, in *ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION* 3, 16-19 (Petar Šarčević ed., 1989).

28. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, *entered into force* June 7, 1959, 21 U.S.T. 2517, 330 U.N.T.S. 38.

29. Despite Dore's belief that "normative ambiguity is perhaps helpful, indeed necessary, for the success of a flexible arbitral system" (p. 98), he apparently intends the ambiguity and flexibility to remain within a single system of arbitration law, rather than to permit the choice between rival systems. *See* pp. 182-84.