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Note, International Commercial Arbitration in the United States: Considering Whether to Adopt UNCITRAL's Model Law

Patrick John Potter*

INTRODUCTION

In 1986, the Washington Foreign Law Society established the Committee to Study the United Nations' Model Law (the "Model Law") on International Commercial Arbitration.¹ In 1988, the Committee recommended that Congress not adopt the Model Law *en bloc*.² To justify its position, the Committee summarizes recent Supreme Court decisions exemplifying the present environment in the United States favoring international arbitration.³ The Committee further argues that some Model Law articles⁴ should be appended to the Federal Arbitration Act (FAA)⁵ while other articles⁶ should be excluded. In sum, the Committee suggests that "[e]xisting federal arbitration law is stongly supportive in its enforcement of international agreements and recognition and enforcement of foreign awards." They believe, however, that adoption of some Model Law provisions is more appropriate than adoption of the whole Model Law.⁷

The Committee, however, fails to provide satisfactory arguments in its report. The Committee assumes a weak and often flawed position toward the Model Law, making its conclusions largely unfounded.⁸ A more comprehensive study and report of the issues involved must be compiled before Congress will be able to decide

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1. The Model Law is the product of the United Nations Commission on International Trade ("UNCITRAL"). 40 G.A.O.R. Supp. No. 17, U.N. Doc. A/40/17, Annex I, at 81-93 (1985). See *infra* notes 11-23 and accompanying text.

See *Report to the Washington Foreign Law Society on The UNCITRAL Model Law on International Commercial Arbitration*, 3 OHIO ST. J. DISPUTE RES. 303 (1988) [hereinafter Report]. In the Report, the Committee to study the Model Law [hereinafter Committee] argues against adopting the entire Model Law. Alternatively the Committee recommends amending present domestic law to include three of the Model Law articles. See *infra* notes 2-8 and accompanying text.

2. Report, *supra* note 1, at 311.

3. *Id.* at 309.

4. Model Law, *supra* note 1, arts. 9, 12, 20, & 28. Report, *supra* note 1, at 312-316.

5. United States Arbitration Act, 9 U.S.C. §§ 1-14, 61 Stat. 669 (1947) (originally enacted Feb. 12, 1925, ch. 1, 43 Stat. 883) (amended by 68 Stat. 1233, Sept. 3, 1954) (Ch. 2 added July 31, 1970, 84 Stat. 692).

6. Model Law, *supra* note 1, arts. 16, 17, & 26. Report, *supra* note 1, at 316-317.

7. Report, *supra* note 1, at 311.

8. See *infra* pt. IV.

whether or not to adopt the Model Law.⁹

This Note will explore some of the areas overlooked by the Committee, including the benefits and burdens which adopting the Model Law would involve. Part One briefly describes the Model Law's background and provides a summary of its articles. Part Two discusses some factors that should be considered when Congress decides whether or not to adopt the Model Law. Part Three summarizes the present status of international commercial arbitration law in the United States, and recommends *en bloc* adoption of the Model Law. Enacting a separate international arbitration law that is familiar to foreigners will facilitate arbitration with U.S. parties. Additionally, parties will be able to draft international arbitration agreements more competently. As a result, arbitration will better serve its function as an efficient alternative to litigation. Part Four follows with a discussion of the Committee's analysis and recommendations. Part Five analyzes the Model Law articles in light of the criteria used by the Committee in its rejection of certain provisions. Part Six provides a reason for rejecting the Model Law which, alternatively, is not based upon its internal flaws.

I. THE MODEL LAW

A. *Background*

The Model Law's roots begin with the Asian-African Legal Consultative Committee ("AALCC") recommending the review and possible amendment of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards.¹⁰ The AALCC abandoned this project, however, and in 1981 UNCITRAL, envisioning a more comprehensive project, began preparing a draft of the Model Law.¹¹ UNCITRAL approved the final version on June 21, 1985. On December 11, 1985, the U.N. General Assembly recommended that states seriously consider adopting the Model Law.¹²

The Model Law was designed to cure problems in national arbitration laws which frustrate the operation of international arbitration agreements. A major concern was that the law applicable to arbitration agreements implicates mandatory provisions which frustrate the expectations of the parties.¹³ Another concern involves problems re-

9. See *The United Kingdom and the UNCITRAL Model Law*, 3 *ARB. INT'L* 278 (1987), for a complete analysis of British arbitration and the UNCITRAL Model Law. An explanation of numerous options in terms of adoption are provided.

10. See Herrmann, *UNCITRAL'S Work Towards a Modern Law on International Commercial Arbitration*, 4 *PACE L. REV.* 537, 539 (1984).

11. In preparing the Model Law, the drafters took into account the 1958 New York Convention and the UNCITRAL Arbitration Rules. *Id.* at 540.

12. Report, *supra* note 1, at 305. The United States was represented in the drafting project and was generally satisfied with the final product.

13. The drafters were concerned with mandatory provisions which (1) restricted party free-

sulting from non-mandatory or non-existent provisions.¹⁴ In some cases, parties might not have the foresight to opt out of unfavorable non-mandatory provisions which frustrate their intentions. In other situations, the law provides no answer to questions left open by the parties in their agreement.¹⁵ Moreover, UNCITRAL focused especially on the harsh consequences arising from these obstacles as they arise in international commercial arbitrations.¹⁶ National arbitration laws differ widely, and quite often parties are unfamiliar with the applicable national laws. As a result, pitfalls in international arbitration procedures are bound to occur.¹⁷

The Model Law attempts to overcome these pitfalls in international commercial arbitration. It seeks to improve and harmonize national laws to facilitate international transactions.¹⁸ In an effort to avoid frustrating parties' expectations, the Model Law recognizes their freedom to determine how the arbitration will be conducted.¹⁹ The Model Law also provides supplementary rules for the parties.²⁰ "[A] basic objective of the Model Law is to provide a suitable 'emergency kit' for getting an arbitration started and proceeding to the final settlement of the dispute."²¹ Finally, the Model Law tries to clarify New York Convention provisions which, prior to the Model Law's adoption, had been either disputed or confusing.²²

B. Summary of the Model Law

The Model Law contains eight separate chapters dealing with the various stages of arbitration procedures, entitled:

- I. General Provisions
- II. Arbitration Agreement

dom to submit future disputes to arbitration or appoint arbitrators of choice, (2) prevented arbitral tribunals from ruling on the issue of jurisdiction, and (3) restricted the tribunal from conducting the proceedings according to the agreement of the parties.

14. Herrmann, *supra* note 10, at 542.

15. Lack of supplementary rules can create uncertainty, controversy, delay and additional costs. *Id.*

16. *Id.*

17. *Id.*

18. In order to achieve harmonization, adopting states are to give priority (as *lex specialis*) to the Model Law over their own arbitration provisions. Contrary to the belief by some that the drafters settled on the "lowest common denominator," the Model Law is the product of extensive deliberation which resulted in workable solutions. *Id.* at 544-545.

19. Any agreement, however, is limited to provisions designed to prevent or remedy procedural injustices or violations of due process of law. *Id.* at 546.

20. Note that with only a few exceptions, the Model Law articles setting forth the methods by which arbitration will be run, and what rules will apply, carry the phrase "Unless otherwise agreed by the parties."

21. Herrmann, *supra* note 10, at 546.

22. The Model Law tries to clarify issues under the New York Convention regarding the written form of the arbitration agreement, interim measures by courts, and choice of substantive law. *Id.* at 546-547.

- III. Composition of Arbitral Tribunal
- IV. Jurisdiction of Arbitral Tribunal
- V. Conduct of Arbitration Proceedings
- VI. Making of Award and Termination of Proceedings
- VII. Recourse Against Award
- VIII. Recognition and Enforcement of Awards

Chapter I. *General Provisions*

Model Law article 1 addresses the terms "international," "commercial," and "arbitration." Article 1(3) defines "international" as applying to arbitrations where (1) the parties are of different nationalities, (2) the parties' places of business are located in different countries, or (3) the nature of the transaction is essentially international in character.²³ The Model Law contains no specific definition of "commercial," but a footnote in article 1(1) indicates that it should be given wide interpretation.²⁴ Nor does the Model Law specifically define "arbitration." Experts generally agree, however, that the Model Law is intended to apply only to consensual arbitrations.²⁵

Other chapter I provisions include article 2 (providing additional definitions), article 4 (permitting waiver of the right to object), and article 6 (allowing the designation of a specific court to perform the permitted judicial functions). Article 5, which limits judicial intervention to those instances where the Model Law so provides, is a more controversial provision. Although more expansive interpretations have been suggested, the article 5 limitation on court intervention presently relates only to a limited number of specific topics in the Model Law.²⁶

Chapter II. *Arbitration Agreement*

Article 7 broadly defines "arbitration agreement." Under the Model Law, an arbitration agreement may cover both existing and future disputes. Like the New York Convention, article 7 requires that

23. A. REDFERN & M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 390 (1986) [hereinafter REDFERN & HUNTER].

24. The article 1(1) footnote states:

The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

25. REDFERN & HUNTER, *supra* note 23, at 390.

26. *Id.* at 391.

all agreements be in writing.²⁷

Article 8 requires a stay of judicial proceedings if a valid arbitration agreement exists.²⁸ Article 9 further indicates that a party may seek interim measures of protection from a court before or during the arbitral proceedings.

Chapter III. *Composition of the Arbitral Tribunal*

Articles 10 through 15 provide rules for the appointment, challenge, and replacement of arbitrators. The parties may appoint as many arbitrators as they wish, if their agreement so stipulates. Otherwise, the number shall be limited to three arbitrators.²⁹ The parties also may agree on the methods by which the arbitrators will be appointed.³⁰ Absent such agreement, the article 6 court will appoint the arbitrator.³¹

Under the Model Law, a party may challenge the appointment of an arbitrator "only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties."³² Any potential arbitrator also must disclose any circumstances likely to give rise to "justifiable doubts" as to his impartiality or independence.³³ Moreover, unless the parties agree otherwise, a party wishing to challenge the appointment of an arbitrator must do so within fifteen days of either the creation of the arbitral tribunal, or the time of their becoming aware of circumstances giving rise to justifiable doubt as to the arbitrator's impartiality or independence.³⁴ These articles allow the parties to ferret out all challenges at an early stage, and limit their ability to disrupt the arbitral proceeding with unmeritorious challenges.³⁵

Articles 14 and 15 apply to the appointment of substitute arbitrators. Unless the parties agree otherwise, a replacement arbitrator will be appointed in accordance with the same rules applied to the original arbitrator.³⁶ Additionally, if the parties agree, they can remove an arbitrator for failing to perform his functions.³⁷

27. The writing, however, can be in the form of a telex, telegram, letter, or any other documented form. Model Law, *supra* note 1, art. 7.

28. Article 8 follows the wording of the New York Convention by permitting the court to determine whether the arbitration agreement is null and void, inoperative, or incapable of being performed.

29. Model Law, *supra* note 1, art. 10.

30. *Id.* art. 11. Moreover, the parties are free to select the nationalities of their arbitrators.

31. *Id.* art. 11(2).

32. *Id.* art. 12(2).

33. *Id.* art. 12(1).

34. *Id.* art. 13(2).

35. REDFERN & HUNTER, *supra* note 23, at 393.

36. Model Law, *supra* note 1, art. 15.

37. *Id.* arts. 14 & 15.

Chapter IV. *Jurisdiction of the Tribunal*

Under the Model Law, the arbitral tribunal initially determines its own jurisdiction.³⁸ The tribunal, however, does not always have the final word on its jurisdiction.³⁹ Whenever the tribunal rules that it has jurisdiction, a party may appeal the decision to the article 6 court.⁴⁰ The party challenging jurisdiction, however, must raise the issue by the time of filing the defense statement or directly after the tribunal decides that it has jurisdiction.⁴¹ A party objecting to jurisdiction is permitted to participate in the arbitration, up to the statement of defense, without prejudicing its case.⁴²

Article 17 provides for interim protection measures by the tribunal. The tribunal, however, is limited to granting protection relating to the subject matter of the dispute and to security for costs in relation to such measures.

Chapter V. *Conduct of Arbitration Proceedings*

Articles 18 through 27 govern the conduct of the arbitral proceedings. Article 18 guarantees the parties' fundamental expectation that they receive equal treatment and are given a full opportunity to present their cases. The parties are free to determine the procedures to be followed by the arbitral tribunal.⁴³ For instance, the parties may specify the place and time for the arbitration.⁴⁴ Absent an agreement, however, the tribunal will determine the location. If the parties fail to set a time for the commencement of arbitration, it is deemed to begin when a party requests referral to arbitration. The parties may also specify the languages to be used for the proceedings.⁴⁵ Absent such agreement, the tribunal will specify the language(s) to be used.

Article 23 requires that a party "state the facts supporting his claim, the points at issue and the relief or remedy sought."⁴⁶ The parties may not contract out of this provision, but are permitted to determine the means by which to accomplish this. For instance, they may agree to dispense with a hearing.⁴⁷ Moreover, when a party fails to

38. *Id.* art. 16. See *infra* at pt. IV for an analysis of this article.

39. If the tribunal rules that it has no jurisdiction, this decision is not appealable. However, the losing party could go to court to get enforcement through a different arbitral tribunal under article 8(1). I have not seen anything in the literature addressing this issue.

40. Model Law, *supra* note 1, art. 16(3).

41. *Id.* art. 16(2).

42. *Id.*

43. *Id.* art. 19. However, in this instance, the requirements of article 18 are a limitation. See *id.* art. 19(1).

44. *Id.* arts. 20 & 21.

45. *Id.* art. 22.

46. *Id.* art. 23(1).

47. *Id.* art. 24(1). However, if the parties do not agree that no hearings will be had, "the arbitral tribunal shall hold such hearings . . . if so requested by a party." *Id.*

comply with article 23, the tribunal may nevertheless continue the proceedings and issue an award upon the claims presented.⁴⁸

Finally, under a procedural heading, articles 26 and 27 regulate expert witness testimony and evidence admissibility. Article 26 permits the tribunal to appoint an independent qualified expert to render opinions.⁴⁹ Both parties may cross-examine any appointed expert witness. Article 27 provides that the tribunal, or any party with tribunal approval, may apply for court assistance in compelling witness testimony or production of evidence.⁵⁰

Chapter VI. *Making of Award and Termination of Proceedings*

Under the Model Law, the parties may determine the applicable substantive law.⁵¹ If the the parties do not agree, the tribunal will specify the applicable substantive law. In all cases the tribunal must consider trade usages, and may act as *amiable compositeur* only if the parties expressly authorize it to do so.⁵² Where the arbitral tribunal is composed of more than one arbitrator, decisions are made by the majority of the arbitration.⁵³ Procedural questions, however, may be decided by an appointed presiding arbitrator.

Articles 30 through 32 govern the conclusion of the arbitration by award or otherwise. The parties may settle the dispute, and thus end the arbitration proceeding.⁵⁴ Alternatively, the tribunal may terminate the arbitral proceedings if a party withdraws his claim, or continuation is unnecessary or impossible.⁵⁵ If the proceeding continues, however, and an award is made, such an award must be in writing, and signed by the majority of the arbitrators, stating the date and location of the arbitration.⁵⁶ Absent agreement to the contrary, the award also must state the tribunal's reasoning.⁵⁷

Article 33 governs correction of awards. The tribunal, on its own initiative or on that of a party, may correct clerical or typographical errors. A party also may request an additional award for claims presented to the tribunal, but not considered in the award. The tribunal, however, may not interpret the meaning of its award unless the

48. *Id.* art. 25. This is not a default power, but rather a ruling on that which is presented to the tribunal. *See* art. 25(b). The result, however, seems to be the same.

49. *See infra* pt. IV.

50. The *travaux préparatoires* indicate that this provision applies to oral evidence of a witness, documents, and other property. U.N. Doc. A/CN.9/246 paras. 90-101, and U.N. Doc. A/40/17 para. 228.

51. Model Law, *supra* note 1, art. 28.

52. *Id.* art. 28(4).

53. *Id.* art. 29

54. *Id.* art. 30.

55. *Id.* art. 32.

56. *Id.* art. 31.

57. *Id.* art. 31(2).

parties agree otherwise. That is to say, assuming the parties agree that the tribunal may not interpret its award, a party may not, after the award has been made, seek interpretation by the tribunal.

Chapter VII. *Recourse Against the Award*

Article 34 provides the sole mechanism by which the losing party, on its own initiative, may set aside the award. It excludes any additional forms of recourse otherwise available in the state where arbitration occurs. By adopting the Model Law, states are able to assure foreigners that article 34 will be the only possible means for setting aside an award in that particular jurisdiction.⁵⁸ Taken largely from article V of the New York Convention, permissible grounds for setting aside an award are:

- lack of the parties' capacity to conclude an arbitration agreement, or lack of a valid arbitration agreement;
- where the aggrieved party was not given proper notice of the appointment of the arbitral tribunal or the arbitral proceedings, or was otherwise unable to present his case;
- where the award deals with matters not covered by the arbitration clause or submission agreement, thereby rendering the arbitral tribunal incompetent for lack of jurisdiction;
- where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or where it was not in accordance with the mandatory provisions of the Model Law itself;
- non-arbitrability of the subject matter of the dispute;
- where the award (or any decision in it) conflicts with the public policy of the state where the arbitration takes place.⁵⁹

An aggrieved party's application to set aside an award must be made to the article 6 court within three months after the party receives notice of the award. However, even where one of the parties discovers a defect in the judgment, the court may suspend proceedings to permit the arbitral tribunal to remedy the award.⁶⁰

Chapter VIII. *Recognition and Enforcement of Awards*

Articles 35 and 36 govern recognition and enforcement of awards. The losing party may decide not to use article 34 to set aside the judgment, but rather seek to avoid recognition of the award when the winner tries to enforce it in another jurisdiction. Valid grounds for avoiding recognition of the award largely parallel those for setting aside the award.⁶¹ However, a very significant difference emerges be-

58. REDFERN & HUNTER, *supra* note 23, at 400.

59. Model Law, *supra* note 1, arts. 34(2) & (3); see also REDFERN & HUNTER, *supra* note 23, at 400.

60. Model Law, *supra* note 1, art. 34(4).

61. *Id.* art. 36.

tween the two procedures in their application. Under the Model Law, set-aside actions can occur only in the country where the award was made, while avoiding recognition and enforcement may occur in any country upon compliance with certain requirements.⁶² This suggests that a party may prefer a set-aside action in the arbitration tribunal's jurisdiction. By preventing the winning party from enforcing the award in a second country, the losing party will not destroy the award. The winners will be free to go to yet a third country for recognition and enforcement.

II. HOW A STATE SHOULD GO ABOUT MAKING THE DECISION TO ADOPT THE MODEL RULES

If U.S. courts honor and enforce international arbitration decisions according to the terms of the parties' agreement, then one might infer that no valid reason exists to justify adoption of the Model Law. One might presume that, at most, bits and pieces of the Model Law should be adopted to fill any gaps in existing law. States that have adopted the Model Law, as well as commentators in states considering adoption, however, have responded to this line of reasoning by indicating that adopting selected articles is not an option.⁶³

The idea that the Model Law should be adopted as a package to avoid disturbing its balance has prevailed. The Canadian jurisdictions,⁶⁴ Cyprus, and Nigeria have adopted legislation which closely follows the Model Law. Adoption of the Model law *en bloc* in Australia and Hong Kong is imminent.⁶⁵ Egypt, England,⁶⁶ and Scotland are among the countries presently considering adoption of some form of the Model Law. Other states, however, have chosen not to adopt the Model Law.⁶⁷

62. The party seeking enforcement must supply (1) the authenticated award or copy, (2) the original arbitration agreement or copy, and (3) a certified translation of the award and agreement if necessary. *Id.* art. 35.

63. However, this is not to say that there was or is not a conflict on this issue. Two theories on the adoption of the Model Law have developed: the "anthology" view and the "package" view. The "anthology" view subscribes to the idea that adopting states could adopt the text in altered form and make what use of it they wish, without violating the spirit of the effort.

Alternatively, the "package" view holds that substantial changes or omissions in the text would disturb the balance of the Model Law. Moreover, such changes would reduce the Model Law's value as a harmonizing agent. To date, the "package" view has prevailed in the states which have adopted the Model Law. Herrmann, *For an UNCITRAL Model Restatement of Arbitration Law in the United Kingdom*, 4 *ARB. INT'L* 62, 64 (1988).

64. The federal government and all the provinces and territories except Quebec have adopted the Model Law. Graham, *The Internationalization of Commercial Arbitration in Canada: A Preliminary Reaction*, 13 *CAN. BUS. L.J.* 2, 3 (1987-1988).

65. Herrmann, *supra* note 63, at 64.

66. *The United Kingdom and the UNCITRAL Model Law*, *supra* note 9, at 285.

67. Both The Netherlands and Switzerland have declined adoption of the Model Law. However, a number of the new Dutch Arbitration Act's provisions correspond to Model Law articles. See *NETHERLANDS CODE OF CIVIL PROCEDURE (WETBOEK VAN BURGERLIJKE RECHT-*

The decision to adopt the Model Law in whole or in part is a function of a state's assessment and categorization of its own domestic arbitration law.⁶⁸ For a state with no developed arbitration law, adoption of the Model Law presents an opportunity to gain a ready-made law having the "international hallmark of approval derived from UNCITRAL."⁶⁹ Adoption of the Model Law for a state with preexisting but unsatisfactory arbitration law⁷⁰ brings not only the UNCITRAL stamp of approval, but also assurances to foreign parties that agreements based on the Model Law will be enforced.⁷¹ Other states may adopt the Model Law in an attempt to present an attractive locale for international arbitration procedures and to demonstrate their leadership in international cooperation.⁷² When a state believes, however, that its arbitration laws are developed and not "unsatisfactory," the decision to accept or reject the Model Law involves more complicated rationales.⁷³

Although many would argue that U.S. international commercial arbitration law falls within the last category,⁷⁴ this is not an obvious assumption. In fact, all of the categories likely apply to the United States' situation. Certainly American arbitrators want to attract international arbitration proceedings to United States territories.⁷⁵ Moreover, most American parties to international agreements would rather arbitrate in the United States than in a distant country. Finally, there are foreigners and non-foreigners who find the international arbitration laws in the United States inadequate for some reason or another.⁷⁶

International arbitration law in the United States does contain an element of each of these categories. Any decision to accept or reject the Model Law should be made against the backdrop of such consider-

SVORDERING) Bk. IV, arts. 1020-1076 (Neth. 1986); see also Sanders, *The New Dutch Arbitration Act*, 14 N. KY. L. REV. 41, 44 (1987).

68. See Herrmann, *supra* note 63, at 64.

69. Davenport, *The UNCITRAL Model Law on International Commercial Arbitration: the User's Choice*, 4 ARB. INT'L 69, 70 (1988).

70. By "unsatisfactory" it is meant that the system of arbitration laws is "obsolete, incomplete or not impartial." *Id.* at 71.

71. Where the existing law is or appears to be unsatisfactory to the potential buyer or seller, negotiations may come to a halt. At this point, the deal will either be lost or the opposing party will agree to dispute resolution elsewhere or in another manner. *See Id.*

72. Given the recent opening of the British Columbia International Commercial Arbitration Centre in Vancouver, see generally Thompson, *A British Columbia Perspective On International Arbitration*, 13 CAN. BUS. L.J. 70 (1987-1988), Canada is properly classified as a state attempting to attract arbitration through use of the Model Law.

73. Davenport, *supra* note 69, at 73.

74. Based on its recommendations, the Committee seems to subscribe to this view. Report, *supra* note 1, at 311.

75. Some states, in an effort to attract international arbitration, have taken it upon themselves to adopt international arbitration legislation. See, e.g., FLA. STAT. ANN. § 684 (Supp. 1988); see also CAL. GEN. LAWS ANN. tit. 9.3, §§ 1297.11 - 1297.432 (Deering 1988).

76. See Sanders, *supra* note 67.

ations. Congress should consider factors such as the need to attract more international arbitration to the United States and the need to make foreign parties feel comfortable with the American system. Moreover, Congress' decision regarding adoption or rejection of the Model Law should also take into account the developments in other common law jurisdictions. For example, the reasons for adoption of the Model Law in Canada may support adoption in the United States as well.

III. ASSESSING INTERNATIONAL ARBITRATION LAW IN THE UNITED STATES

A. *The Current State of American International Arbitration Law*

The United States offers a hospitable climate for the growth of international arbitration. This is largely due to legislation favoring arbitration,⁷⁷ and a judiciary supportive of arbitration.⁷⁸

In recent cases, the Supreme Court has indicated its willingness to enforce arbitration agreements, and has demonstrated its understanding that international arbitration is a special animal. In *Scherk v. Alberto-Culver Co.*,⁷⁹ the Court enforced an agreement to arbitrate disputes arising from an international transaction involving corporate securities. The Court favored arbitration, despite federal securities law which granted an absolute right to a judicial determination of claims.⁸⁰ The Court recognized the uniqueness of international transactions:

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a

77. See generally Hoellering, *International Commercial Arbitration: The United States Perspective*, in *UNCITRAL ARBITRATION MODEL IN CANADA* 17 (Paterson and Thompson ed. 1986) [hereinafter Hoellering].

78. See, e.g., *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), where the court states, "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."

79. 417 U.S. 506 (1974).

80. 417 U.S. at 513.

legal no-man's land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.⁸¹

By recognizing the importance of honoring the agreement which the parties made between themselves, the Court broke important ground for the growth of international commercial arbitration in the United States.

The Court further displayed its favorable attitude toward international arbitration agreements in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁸² The Court determined that where a transnational agreement containing a broad arbitration clause exists, anti-trust claims are arbitrable, despite a domestic public policy proscribing future agreements to arbitrate such claims. Relying heavily on *Scherk*, the Court stated:

[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.⁸³

Once again, the Court recognized the uniqueness of international commercial dispute resolution and the importance of enforcing the parties' agreement to arbitrate.

The most recent example of the Court's general willingness to enforce arbitration agreements came in *Shearson/American Express, Inc. v. McMahon*.⁸⁴ There, the Court went so far as to state that domestic section 10(b) securities claims,⁸⁵ and claims under section 1964(c) of the Civil Racketeer Influenced and Corrupt Organizations Act ("RICO"), are arbitrable.⁸⁶

In sum, party autonomy appears to be motivating judge-made international arbitration law in the United States.⁸⁷ Barring an overriding public policy, courts will continue to enforce the parties' agreement to arbitrate. If the arbitration agreement is valid, courts generally will refrain from interfering in arbitration disputes beyond enforcement of the agreement or award.⁸⁸

81. 417 U.S. at 516-517.

82. 473 U.S. 614 (1985).

83. 473 U.S. at 629.

84. 55 U.S.L.W. 4757 (1987).

85. 55 U.S.L.W. at 4762.

86. 55 U.S.L.W. at 4763.

87. Hoellering, *supra* note 77, at 18.

88. *Id.*

B. *Does American International Arbitration Law Need Reform?*

Before asking whether Congress should adopt the Model Law, one must determine whether the United States presently needs a new international arbitration statute. The answer to this question partially lies in the demands presently placed on available statutes. A partial answer also lies in the desirability of arbitration, especially from the view-point of international parties, as a method of dispute resolution.

Arbitration offers a number of advantages over litigation for parties involved in international commercial transaction disputes. Under the FAA or the Model Law, arbitration allows the parties to select the number and identity of the arbitrators.⁸⁹ This allows parties to choose arbitrators who have a particular expertise or background necessary to settle the dispute. Moreover, to the extent that parties appoint arbitrators from different countries, an unduly nationalistic decision-making panel will be avoided. Finally, arbitrators of different nationalities are inclined to make decisions that will receive a greater measure of acceptance and enforcement at the transnational level.⁹⁰

Arbitration also offers a speedy and less expensive alternative to the burdensome litigation process in the United States. Parties to arbitration may select procedural rules which will enable them to limit the time within which the dispute must be resolved. Arbitration procedures generally are flexible, avoiding undue emphasis on technical matters like pleadings and the introduction of evidence.⁹¹ Finally, arbitration can offer foreign parties the benefit of not having to hire additional counsel.⁹²

Moreover, an increasing number of international companies and individuals are turning to arbitration as a tool for dispute resolution. Parties to international business transactions prefer arbitration to litigation, because of arbitration's intended efficiency.⁹³ If parties to an agreement, however, anticipate that they will encounter difficulties in determining the law within a particular jurisdiction, they will arbitrate elsewhere, or resort to expensive and time-consuming litigation.⁹⁴

89. In most cases, the parties generally feel more confident if there are three arbitrators. Helal, *International Commercial Arbitration*, 53 *ARBITRATION* 258 (1987).

The Model Law permits parties to choose who and how many arbitrators there will be. Model Law, *supra* note 1, art. 10. If the parties fail to decide, the number of arbitrators will be three. *Id.* art. 10(2).

For a discussion of the advantages in international dispute resolution of choosing the decision-makers, see Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 *COLUM. J. TRANSNAT'L L.* 9, 15 (1986).

90. Smit, *supra* note 89, at 10.

91. *Id.* at 12 n.11.

92. Foreign parties would not need to hire an American attorney to represent them in court. However, if the arbitration law is seen as being too complicated, a party forced to arbitrate here may well have to hire additional counsel.

93. See Smit, *supra* note 89, at 11.

94. Until 1986, the Dutch had in place an arbitration act dating back to 1838. The act went

Parties familiar with the Model Law through its use in other jurisdictions, however, will presumably be more comfortable arbitrating in the United States should Congress choose to adopt it.

The present U.S. arbitration statute, the FAA, is, however, an inadequate solution to many of the problems encountered by international parties wishing to arbitrate their claims in the United States. Congress enacted the statute in 1925. Since then the courts have struggled to sculpt U.S. arbitration law in an effort to maintain pace with the increasingly complex demands that parties have placed on the procedures.⁹⁵ Modern day questions continue to arise in the context of international arbitrations that the FAA simply cannot answer.⁹⁶ If the statutory language provides no answer to a party's question, that party then must employ a lawyer to investigate the law.⁹⁷ This increases costs and delays, thereby undermining many of the fundamental goals of arbitration. Adopting the Model Law, however, will relieve many foreign parties of the need to hire an additional attorney. The party's domestic attorney, if versed on the Model Law, will draft a reliable arbitration agreement.

Moreover, congress enacted the FAA during a time when arbitration procedures were viewed as usurping the court's power.⁹⁸ Attitudes changed as the legal community realized that arbitration provided an efficient, agreeable means to settle disputes. Many also correctly anticipated that arbitration would reduce court backlog. The Act, however, was created primarily as a mechanism to enforce arbitration agreements.⁹⁹

Looking at the Act's core sections confirms that it is a mechanism to enforce arbitration agreements. Section 2 provides that written agreements to arbitrate in "any maritime transaction or a contract evidencing a transaction involving commerce" are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity

virtually unchanged for 150 years. In order for the act to function and survive, the courts broadly interpreted its provisions. "[B]y 1986, a reliable picture of arbitration practice in the Netherlands could not be gained by consulting the language of the 1838 Act alone. The vast body of case law that had developed over 150 years had grown to be equally important, and had to be consulted as well. This situation had become rather cumbersome, especially for foreigners." Sanders, *supra* note 67, at 41.

Moreover, even where a state does not have as troublesome a system as did the Dutch, it is the parties' perceptions that are important. If a state's arbitration rules appear unsatisfactory to a potential user, then they will be avoided. See Davenport, *supra* note 69, at 71.

95. See generally *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

96. For example, the FAA is silent about fees, consolidation of cases, governing procedures, as well as a number of other issues.

97. If the party is a foreigner with foreign counsel not versed in American law, he will be forced to employ one who is, in order to find the answer.

98. For a history of arbitration and the FAA, see Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985).

99. See Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137 (Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)).

for the revocation of any contract."¹⁰⁰ Section 3 declares that if the issue before a court is provided for in the arbitration agreement, a party may obtain a stay of litigation "in any of the courts of the United States."¹⁰¹ Assuming an arbitration agreement exists, section 4 allows the aggrieved party to "petition any United States district court, which save for such agreement, would have jurisdiction . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."¹⁰²

Designed as an enforcement mechanism, the FAA provides little guidance to the drafter of an arbitration agreement. Beyond suggesting that arbitrator selection be agreed upon before arbitration,¹⁰³ the FAA offers virtually no guidance in drafting the agreement. As a result, both international and domestic parties contemplating arbitration are without a federal statute indicating what provisions of an arbitration agreement would be useful and honored. The implications, however, are likely to be more serious for parties involved in international transactions. If an arbitration breaks down between domestic parties, they are assured at least that a U.S. court will be deciding issues. The problem for international arbitrations is furthered by the fact that the drafter (usually a lawyer) is often unsure how to approach the problem of creating the arbitration agreement. Some lawyers are unaware that the Model Law is not U.S. law. They make the mistake of confusing the UNCITRAL Rules, which are U.S. law, with the Model Law. Confusion on the part of the drafters, of course, is not, in itself, a reason for the United States to adopt the Model Law. Some of this confusion, however, should certainly be eliminated if the Model Law is adopted.

Additionally, adopting the Model Law will provide parties with law that is useful in drafting better international arbitration agreements. The key here is that the Model Law, or some form of it, would be law. To be sure, if international parties presently agreed to be bound by the provisions of the Model Law, section 4 of the FAA would say that the agreement must be enforced. For that matter, no obvious reason exists why domestic parties could not agree to be bound by the Model Law.

Enacting the Model Law, however, will force drafters to look at its provisions in order to decide numerous questions that might otherwise go unasked.¹⁰⁴ Without the Model Law, "[a] company that desired arbitration in London in the language of Shakespeare may instead end up with French proceedings in Toulon in the language of Molière, or

100. 9 U.S.C.A. § 2 (West 1982).

101. *Id.* § 3.

102. *Id.* § 4.

103. *Id.* § 5.

104. *See infra* note 146.

proceedings before Saudi courts in Riyadh in the language of the Prophet Mohammed."¹⁰⁵ By enacting the Model Law, sophisticated and unsophisticated lawyers alike will have in place a drafting aid. Working with the Model Law, drafters will be alerted to issues such as the language to be used,¹⁰⁶ the arbitration's locale,¹⁰⁷ the applicable substantive and procedural laws,¹⁰⁸ and the use of expert witnesses.¹⁰⁹ In short, the U.S. will have a law which notifies a drafter of alternative provisions, most of which are universally incorporated into successful international arbitration agreements.

Strong arguments support this Note's recommendation that Congress adopt the Model Law. By doing so, foreign parties will be more comfortable arbitrating with U.S. parties in the United States. Additionally, drafters will be able to draw up arbitration agreements competently, furthering the parties' best interest. The net result is that arbitration agreements will be better able to serve their intended purposes.

To achieve these results, Congress should adopt the Model Law essentially *en bloc*. Admittedly, some provisions of the FAA and the adopted Model Law will be duplicative.¹¹⁰ This, however, is a small price to pay for the benefits that will be derived from adopting a complementary set of rules for international arbitration. Moreover, the spirit of the Model Law¹¹¹ is not violated if Congress slightly alters the law to make it suitable for adoption.¹¹²

IV. ANALYSIS OF THE COMMITTEE'S CRITICISMS

In the leading article analyzing the pros and cons of adoption of the Model Law by the United States, the Committee recommends against *en bloc* adoption. Alternatively, the Committee recommends that only some Model Law articles are ripe for amendment to the FAA. One reason for the Committee's recommendation against *en bloc* adoption is that the Model Law supposedly contains flawed provisions. The Committee attacks three articles: Articles 16, 17, and 26.

A. Article 16

The Committee first recommends against amending Model Law,

105. Park, *Arbitration of International Contract Disputes*, 39 BUS. LAW. 1783, at 1784 (1984).

106. Model Law, *supra* note 1, art. 22. See *infra* notes 145-6 and accompanying text.

107. Model Law, *supra* note 1, art. 20.

108. *Id.* arts. 19 & 28.

109. *Id.* art. 26. See *infra* notes 124-133 and accompanying text.

110. See *infra* notes 138-144 and accompanying text.

111. See *supra* notes 63-67 and accompanying text.

112. For a side-by-side comparison of the Model Law and the Arbitration Act of British Columbia, see Hoellering, *supra* note 77, at 174.

article 16.¹¹³ Under article 16(3), if the arbitration tribunal preliminarily decides that it has jurisdiction over a claim, a party has thirty days to appeal to the article 6 court, whose decision is unappealable. The Committee argues that such a provision should not be adopted because (1) it may encourage frivolous appeals burdening the arbitration process with wasted effort and expense, and (2) a party can achieve the same goal by submitting the issue to a domestic court in a suit to enjoin the arbitration.¹¹⁴

The Committee itself notes the argument that "an immediate appeal would avoid the time and expense of conducting an arbitral proceeding in cases where the tribunal erroneously decides that it has jurisdiction."¹¹⁵ There is, however, no other appeal under 16(3) which is relevant. Article 16(3) does not authorize an appeal from a tribunal's decision that it does not have jurisdiction. Where the article 6 court affirms the tribunal's jurisdictional decision, no appeal is available. As a result, the arbitration can proceed with little or no worry that the jurisdiction issue will be reversed in a subsequent proceeding to enforce or vacate the award.

The frivolous appeals argument is even less convincing. If one party unnecessarily appeals a tribunal's finding of jurisdiction, the other may resort to FAA section 4.¹¹⁶ Moreover, it is probable that the party appealing such a decision will be more cautious than the Committee suggests because the arbitration may, notwithstanding appeal, proceed.¹¹⁷

Finally, the Committee argues, without citing supporting authority, that 16(3) is "unnecessary" because parties can sue to enjoin the arbitration. While it may be common practice for courts to use their equity powers to enjoin arbitration, neither the FAA¹¹⁸ nor the New York Convention¹¹⁹ explicitly permit this remedy. If the Committee argues that article 16(3) should be rejected as cumulative, it is clearly mistaken.

113. This article is entitled, "Competence of arbitral tribunal to rule on its jurisdiction."

114. Report, *supra* note 1, at 316.

115. *Id.*

116. Section 4 states in pertinent part: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." FAA, *supra* note 5, as referenced in text.

117. Parties will be cautious not to appeal unnecessarily when it may offend an arbitrator or when the arbitration appears likely to continue.

118. Section 3 governs stays of judicial proceedings, and section 4 involves proceeding to arbitration. FAA, *supra* note 5.

119. The New York Convention governs the recognition and enforcement of awards, not stays of arbitration.

B. Article 17

The Committee also recommends that Congress reject article 17.¹²⁰ This provision authorizes the arbitration tribunal, unless the parties agree otherwise, to order interim protection measures, and requires any party to provide adequate security in connection with such measures. The Committee recommends rejecting this article because "at least one U.S. district court¹²¹ has recognized that arbitrators have an implied or inherent power to order interim measures . . . ," and "section 34 of the American Arbitration Association ("AAA") Rule contains an express, though limited, provision on this subject."¹²²

This argument fails to withstand scrutiny. Unless the Committee can cite more than one supporting U.S. district court decision, it remains unclear whether United States law dictates that arbitrators may grant interim relief. Moreover, section 34 of the AAA Rules provides assistance only to the extent that the parties have agreed to be bound by such rules, or that a particular court is willing to look at such rules for guidance.¹²³ Finally, the Committee ignores the fact that if the parties do not want an arbitrator to have such powers, they can agree, under article 17, to remove them.

C. Article 26

Third, the Committee criticizes article 26.¹²⁴ Article 26 provides that, unless the parties otherwise agree, the tribunal may appoint experts to report on specific issues,¹²⁵ and requires parties to provide information to expert witnesses.¹²⁶ Such expert witnesses shall also participate in the hearings and be examined by the parties.¹²⁷ The Committee cites four problems caused by this article: (1) the ability of arbitration tribunals to select truly qualified, independent experts, (2) the unnecessary use of experts, (3) undue delay, and (4) increased expense.¹²⁸

Arbitration tribunals are unlikely to abuse the power to appoint

120. Article 17 is entitled, "Power of arbitral tribunal to order interim measures," Model Law, *supra* note 1.

121. *Park City Ass'ns v. Total Energy Leasing Corp.*, 58 A.D.2d 786 (N.Y.App.Div. 1977).

122. Under the AAA's section 34, "[T]he arbitrator may issue such orders for interim relief as may be deemed necessary to safeguard the property that is the subject matter of the arbitration . . ." Article 17 appears to be less narrow in that the tribunal may take such measures of protection "in respect of the subject matter of the dispute."

123. If parties agree to be bound by the AAA rules then such rules will be applied. However, a court will be hard pressed, especially in the international context, to justify application of institutionalized domestic arbitration rules.

124. Article 26 is entitled, "Expert appointed by arbitral tribunal," Model Law, *supra* note 1.

125. *Id.* art. 26(1)(a).

126. *Id.* art. 26(1)(b).

127. *Id.* art. 26(2).

128. Report, *supra* note 1, at 317.

expert witnesses. If arbitrators misuse or abuse such powers, parties will habitually agree beforehand that no tribunal experts be appointed. Similar results will arise if expert selection by arbitrators unduly increases costs and causes delays. Moreover, since parties to international arbitration agreements favor appointing three arbitrators,¹²⁹ only rarely would a majority agree to call unnecessary or unqualified experts.

In addition to the criticisms of article 26, the Committee further argues that "such a provision would be unlikely to win the support of the legal profession."¹³⁰ Assuming the importance of lawyers' sentiments in this regard,¹³¹ that argument inadequately supports rejection of article 26. Courts already have the authority to actively participate in the expert testimony process.¹³²

When confronted with a battle between expert witnesses, clear value exists in allowing the court to select a neutral expert witness. Even absent such a battle, court power to select a neutral expert witness still serves a useful purpose. Although judges seldom appoint experts, "[t]he ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services."¹³³

In summary, the Committee's recommendations remain unsatisfactory. Its analysis of articles 16, 17, and 26 of the Model Law does not withstand close scrutiny. These particular provisions add flexibility to the Model Law, and to that extent are useful. If parties wish to exclude these articles from their arbitration agreement, they may contract out of them. Moreover, the Committee ignores the remaining Model Law articles, except to recommend amending the FAA by adding articles 9, 12, 20 and 28. If there is something internally wrong with the Model Law which calls for its rejection, the Committee fails to identify it.

V. CRITIQUE OF OTHER MODEL LAW ARTICLES

The Committee criticizes the Model Law for its internal flaws and inconsistencies. In its report, however, the Committee fails to demonstrate adequately those flaws. Other articles, upon which the Commit-

129. See Helal, *supra* note 89, at 258.

130. Report, *supra* note 1, at 317.

131. The view of the parties themselves — the international businessmen — is what should rule, not the American legal community.

132. Under FED. R. EVID. 706: "[T]he court may appoint any expert witness agreed upon by the parties, and may appoint expert witnesses of its own selection A witness so appointed shall advise the parties of his finding if any . . . and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness."

133. See Notes Of Advisory Committee On Proposed Rules To FED. R. EVID. 707.

tee did not focus, may perhaps contain flaws that should cause Congress to hesitate before adopting the Model Law *en bloc*.

The Committee offers three primary reasons for recommending non-adoption of certain articles.¹³⁴ The articles are: (1) duplicative of existing law,¹³⁵ (2) subject to tribunal abuse,¹³⁶ and (3) susceptible to causing undue delay.¹³⁷ These bases for rejection may be employed to test the suitability of each of the remaining Model Law articles.

A. *Duplicative of Existing Law*

Several Model Law articles duplicate existing arbitration law under the FAA sections ("sections"). Article 5, concerning the extent of court intervention, parallels section 6: that parties are limited in their ability to apply for judicial relief by the arbitration statute. Article 7 contains a somewhat expanded version of the section 2 requirement that the arbitration agreement be in written form. Article 8, concerning the arbitration agreement and substantive claims before the court, and section 4 both require the court to refer the parties to arbitration unless a fatal defect appears in the agreement. Section 5 of the FAA largely overlaps four of the Model Law articles. Article 10 and section 5 are duplicative in that they let the parties determine the number of arbitrators.¹³⁸ Similarly, article 11 and section 5 both indicate that the parties may specify the individuals who will be the arbitrators or the methods by which they will be chosen.¹³⁹ Moreover, articles 14 and 15 duplicate section 5; both indicate that the original method of appointment be used to replace an arbitrator unable to continue his duties.

Articles 18 and 27 also duplicate FAA sections. Article 18 and section 10(b) both indicate that impartial treatment shall be accorded each party.¹⁴⁰ Finally, article 27 and section 7 both call for the court to assist in the acquiring of evidence and securing of witnesses.

The final set of articles which largely duplicate FAA sections involve making the award. Both laws, with minor deviations, require

134. If an article has flaws which would prevent it from being amended, the same flaws would likely support any argument that the Model Law should not be adopted in its present form.

135. *See supra*, pt. IV on art. 16.

136. *Id.* on article 26.

137. *Id.* on Article 17.

138. However, article 10 calls for three arbitrators when the parties fail to determine the number, and section 5 calls for one.

139. Both provisions also indicate that, absent an agreed method of naming arbitrators, the court will do the appointing. Article 11(5) states that if the court makes this decision no appeal can be taken. Alternatively, section 5 does not indicate whether a court's decision to designate a particular arbitrator is subject to appeal.

140. However, to the extent that section 10(b) indicates that this is a ground for vacation it does go further than the language of article 18.

the award to be in writing.¹⁴¹ Each permits the arbitrators to correct typographical errors in the award.¹⁴² Permissible reasons for setting aside the award are largely identical.¹⁴³ Moreover, similar conditions justify recognition and enforcement under both laws.¹⁴⁴

B. *Articles Not Subject to Abuse or Causing Delay*

A number of Model Law provisions are designed such that they cannot cause delay or significantly increase arbitration costs. Articles 1 and 2 merely contain definitions.¹⁴⁵ Article 3 establishes the time at which communications are deemed received.

Similarly, article 22 will not be subject to abuse. Article 22 contains the rules governing the language to be used at the arbitration. The parties are free to agree on the language to be used. Failing such an agreement, the tribunal will decide the language to be used. One can imagine that problems could be encountered where there are numerous foreign parties and arbitrators involved. The parties were able, however, to communicate in order to create an arbitration agreement and it is likely that they will do the same if the need to arbitrate arises.¹⁴⁶ Moreover, if the parties or arbitrators require a translation, only a marginal delay will result and party satisfaction will outweigh the burden involved.

C. *Provisions Which Are Designed to Expedite Arbitration*

Many Model Law provisions will expedite the arbitration process. The Model Law recognizes that the parties themselves are in the best position to decide which procedures will facilitate a speedy resolution. It therefore provides them with the power to decide such issues. Articles 19, 21, 23, and 24 allow the parties to decide when arbitration begins, what procedural law will apply, and whether hearings will be conducted.

Two final provisions which facilitate arbitration are articles 25 and 29. By permitting the tribunal to render an award where a party fails to make a claim or defense, article 25 prevents a party from stalling

141. Art. 31(1) & § 13. However, note that article 31(2) requires that the arbitrators state the reasons upon which the award is based, unless the parties otherwise agree.

For permissible reasons for setting aside the award, see *supra* notes 58-60 and accompanying text.

142. Art. 33 & § 11.

143. Art. 34 & § 10.

144. Art. 35 & § 207, ch. 2.

145. See *supra* pt. I.

146. Professor Whitmore Gray argues that generally no more than a procedural "shell" exists under statutory schemes and that an agreed-to procedure will be enforced. Agreement, however, is usually put off until a problem to be arbitrated arises. At this point, Gray argues, parties will be unwilling to agree. One party will try putting up barriers to arbitration to force a compromise or settlement.

the proceedings by failing to act. Assuming there is an odd number of arbitrators, article 29 facilitates arbitration by requiring all non-procedural questions to be decided by a majority of the arbitrators.

VI. AN ALTERNATIVE ARGUMENT AGAINST ADOPTION OF THE MODEL LAW

An argument against adoption of the Model Law exists and should not go unnoticed. Rejection of *en bloc* adoption, however, should not be founded on any internal flaws attributed to the Model Law. The Committee fails to adequately justify such a conclusion. A better argument against adoption may be grounded in the suggestion that a better alternative does or will exist. For instance, Professor Smit argues for a single transnational arbitration institution.¹⁴⁷ He notes that numerous arbitration institutions currently operate and compete with one another:

The needs of international intercourse cannot effectively be served by the rapidly increasing number of international arbitration institutions with different rules and processes administered by persons of different training and competence at greatly differing costs. Businessmen and their lawyers cannot make a reasoned choice from among the many alternatives offered them. Moreover, as long as there is no institution that offers optimum flexibility, their choices remain unduly limited. The appropriate solution is to create a single international institution that would offer all possible advantages of institutional arbitration anywhere in the world.¹⁴⁸

With this in mind, the Model Law may only present parties with another means by which to settle their disputes. Efforts might be better aimed at creating a global arbitration institution and away from adopting the Model Law. If our goal is to create a single world institution, then that goal may be stifled by adopting a statute to compete with already existing institutions.

CONCLUSION

The United States presently faces the question of whether to adopt the UNCITRAL Model Law on International Arbitration. To date, American journals have provided no answers to this question. The Washington Foreign Law Society's Committee which studied the Model Law takes the position that the Model Law contains flaws, and conflicts in several ways with United States' present arbitration law. Consequently, the Committee recommends that Congress avoid adopting the Model Law *en bloc*, and instead amend the FAA to include only certain Model Law provisions.

The Committee's arguments, however, provide only inadequate so-

147. Smit, *supra* note 89.

148. *Id.* at 29.

lutions. The Model Law is designed to permit party autonomy, and to facilitate a speedy, efficient, and satisfactory dispute resolution process. The three articles attacked by the Committee¹⁴⁹ are necessary parts of this scheme.

Moreover, the Committee's suggestion that international arbitration law in the United States is adequate merely begs the question. The Committee fails to address foreign parties' inability to gain access to one comprehensive source of United States law for answers to a number of important arbitration questions. Other than mentioning that some states have adopted the Model Law, the Committee fails to mention the factors that these states considered in making such decisions.

Reasons to justify rejection of the Model Law may exist. Adoption of the Model Law *en bloc* may be inconsistent with some higher international goal, such as the one suggested by Professor Smit. At this time, however, these reasons do not adequately justify a rejection of *en bloc* adoption.

Adoption of the Model Law *en bloc*, however, is justified on grounds of its uniformity and its usefulness.¹⁵⁰ Drafters of arbitration who are presently confused will be given a guide to aid them in drafting arbitration agreements that serve the interests of their clients as well as the policies of arbitration itself.

149. Model Law, *supra* note 1, arts. 16, 17, & 26.

150. *See supra* notes 93-112 & accompanying text.