

**LEGAL HARMONIZATION THROUGH MODEL LAWS :
THE EXPERIENCE OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW (UNCITRAL)**

*by José Angelo Estrella Faria, Legal Officer
United Nations Office of Legal Affairs
Secretary of the UNCITRAL Working Group
on Electronic Commerce**

INTRODUCTION

“There is a new global deal on the table: When developing countries fight corruption, strengthen their institutions, adopt market-oriented policies, respect human rights and the rule of law, and spend more on the needs of the poor, rich countries can support them with trade, aid, investment and debt relief.” (Kofi Annan, *“Help by Rewarding Good Governance”*, International Herald Tribune, Wednesday, 20 March 2002, p. 8.)

The growth in international trade and commerce brought about by developments in technology in the last ten to fifteen years – commonly referred to by the now ubiquitous term “globalization” – has revived the interest of governments and businesses and legal harmonization.

This is not, however, a new phenomenon. Efforts to harmonize laws across nations through negotiation of bilateral and multilateral treaties of unification or harmonization, some of which still in force, can in fact be traced back to the 19th century.¹ In the words of Lord Justice Kennedy, the “certainty of enormous gain to civilised mankind from the unification of law”, needed “no exposition.”³

Of course, times have since changed. One of the most obvious differences between the current harmonization process and earlier efforts is the existence nowadays of a number

* The views expressed in this article are those of the author. They do not necessarily reflect the views of the United Nations.

¹ One example of early international harmonization is the Paris Convention for the Protection of Industrial Property, which was concluded on 20 March 1883 (see <http://www.google.com/url?sa=U&start=2&q=http://www.wipo.org/treaties/en/ip/paris/&e=8092>).

² See Jean Louis Bergel, “Principal Features and Methods of Codification,” *Louisiana Law Review*, vol. 48 (May 1988), pp. 1073 et seq..

³ “Conceive the security and the peace of mind of the shipowner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of moveable property, and of civil wrongs is practically identical with that of his own country . . .” (Kennedy, *The Unification of Law, Journal of the Society of Comparative Legislation*, vol. 10 (1909), pp. 212 et seq., 214-15).

⁴ One example of early international harmonization is the Paris Convention for the Protection of Industrial Property, which was concluded on 20 March 1883 (see <http://www.google.com/url?sa=U&start=2&q=http://www.wipo.org/treaties/en/ip/paris/&e=8092>).

of both governmental and business organizations dedicated to this work – sometimes even exclusively. Another distinct feature of contemporary harmonization is the wide range of tools used to formulate and implement uniform rules. The aim of enhancing legal certainty and predictability is still the main driving force of international harmonization efforts. Experience with legal harmonization and the growing interest in legal writings for the relationship between law and economics have however produced additional arguments. In particular, arguments relating to the positive role of legal harmonization in reducing transaction costs and facilitating business worldwide.

This paper discusses the use of model laws as instruments of legal harmonization. It focuses on the experience of the United Nations Commission on International Trade Law (UNCITRAL) in the area of uniform commercial law. Part One briefly describes the purposes, methods and areas of work of UNCITRAL. Part Two discusses common instruments for legal harmonization developed by UNCITRAL. Part Three summarizes the experience with implementation of UNCITRAL model laws.

I. THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary organ established by the General Assembly of the United Nations in 1966,⁵ with the general mandate to further the progressive harmonization and unification⁶ of the law of international trade.⁷ In the years since its establishment, UNCITRAL has become the core legal body of the United Nations system in the field of international trade law.

Obviously, UNCITRAL was not the first international organization to act in the field of harmonization of commercial and private law. Other prestigious organizations, such as the Hague Conference on Private International Law and the Institute for the Unification of Private Law (UNIDROIT), or non-governmental institutions such as the International

⁵ General Assembly resolution 2205(XXI), of 17 December 1966 (reproduced in United Nations Commission on International Trade Law, Yearbook (hereafter “UNCITRAL Yearbook”), vol. I: 1968-1970, part one, chap. II, sect. E; digitalized copies of UNCITRAL Yearbooks are available at <http://www.uncitral.org/english/yearbooks/yearbook-index-e.htm>).

⁶ While the terms are closely related, “unification” may be seen as the adoption by States of a common legal standard governing particular aspects of international business transactions while “harmonization” may conceptually be thought of as the process through which domestic laws may be made more similar. A model law or a legislative guide is an example of a text which is drafted to harmonize domestic law, while a convention is an international instrument which is adopted by States for the unification of the law at an international level.

⁷ Progressive development of the law of international trade: report of the Secretary-General, *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 88, U.N. document A/6396 (also published in *UNCITRAL Yearbook* vol. I: 1968-1970, part one, chap. II, sect. B); *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 88, U.N. document A/6594 (reproduced in *UNCITRAL Yearbook 1968-1970*, part one, chap. II, sect. D); The relevant summary records of the proceedings of the Sixth Committee are contained in *Official Records of the General Assembly, Twenty-first Session, Sixth Committee*, 947th-955th meetings (excerpts appear in *UNCITRAL Yearbook 1968-1970*, part one, chap. II, sect. C).

Chamber of Commerce (ICC) or the *Comité Maritime International* (CMI) had been active long before the United Nations was established, in 1945.

However, the work of those other organizations had two important limitations: uniform rules and standards produced by non-governmental organizations could only achieve the expected harmonization effect to the extent that private parties agreed to use them and courts upheld that agreement; as regards intergovernmental organizations, their membership was typically limited to the developed economies of the West, with little involvement by developing or socialist countries.

Those were two of the main reasons that led member States to see a role for the United Nations, as the one truly universal organization, in the area of trade law harmonization. In the United Nations, arguments for unification have tended to emphasize the economic benefits to be gained by the unification of trade law, especially for the developing nations. Yet member States have also recognized that the activity of international trade could itself provide a basis for friendly relations if it were structured by a common set of rules, informed by the principles of equality and mutual respect. Business and political representatives alike have recognized the relationship between trade promotion and facilitation – two of the aims of legal harmonization – and the broader goals of the United Nations, such as promotion of world peace and human development.⁸

A. MANDATE OF UNCITRAL

Under the terms of reference laid down by the General Assembly, UNCITRAL gives effect to its mandate by:

(a) Co-ordinating the work of organizations active in this field and encouraging cooperation among them;

(b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;

(c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field;

(d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;

(e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;

(g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade;

⁸ Thus, for example, in a joint statement issued on 5 July 1999 by the U.N. Secretary-General and the President of the International Chamber of Commerce (ICC), the United Nations and business representatives reaffirmed their belief that “there is great potential for the goals of the United Nations – peace and development – and the goals of business – wealth creation and prosperity – to be mutually supportive”(http://www.iccwbo.org/home/statements_rules/statements/1999/joint_statement_on_global_ompact.asp).

(f) Taking any other action it may deem useful to fulfil its functions.

The work programme of UNCITRAL therefore covers three general lines of activity: legislative or rule-making activities; support to law reform and technical assistance; information activities (including dissemination of information aimed at promoting awareness and uniform interpretation of international instruments).

1. Legislative and rule-making activities

At its first session in 1968, after considering a number of suggestions by member States, the Commission adopted nine subject areas as the basis of its work programme: international sale of goods; international commercial arbitration; transportation; insurance; international payments; intellectual property; elimination of discrimination in laws affecting international trade; agency; and legalization of documents.⁹ Priority status was accorded to international sale of goods, international commercial arbitration and international payments. Additional subject areas, including international legislation on shipping and liability for damage caused by products intended for or involved in international trade, were subsequently added to the initial work programme.

In considering whether particular topics should be added to the programme, factors such as global significance, special interest to developing countries, developments in technology; and changing trends in commercial practice are taken into account. Priority has been accorded to a number of broad subject areas including international trade and trade financing contracts; international payments; international commercial dispute resolution; transportation; electronic commerce; government contracts; and insolvency.¹⁰

2. Training and technical assistance

The work of UNCITRAL does not end with the finalisation and adoption of a text, but includes raising awareness of and promoting the adoption of that text. The growing awareness of UNCITRAL texts in many countries, in particular developing countries, has been accompanied by increasing requests for technical assistance in the adoption of those texts from individual Governments and regional organizations. This assistance can be provided directly to the officials and legislators of individual countries through briefing missions, provision of general explanatory material on the texts under consideration, advice on the advantages of adoption of a particular text, examination and comment on reports and draft legislation. Assistance may be provided through sponsorship of, and participation in, symposia and seminars, which may be organized in conjunction with or by international or regional organizations or Governments.¹¹

⁹ *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (U.N. document A/7216), paras. 40 and 48 (reproduced in UNCITRAL Yearbook, vol. I: 1968-1970, part two, chap. I, sect. A).

¹⁰ Some current topics have previously been considered by the Commission as not susceptible of productive work, but developments in international trade law and practices, as well as the successful conclusion by UNCITRAL of work on related topics have later created a demand for work to be done and made that work feasible (e.g. interim measures in arbitration; harmonization of national insolvency laws; secured transactions).

¹¹ A summary of the training and technical assistance activities conducted each year is included in the annual report of UNCITRAL (for the latest report, see U.N. document A/CN.9/560, available at <http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0452913>)

3. Information activities to support legal harmonization

In 1988, the Commission decided to establish a system for the collection and dissemination of court decisions and arbitral awards relating to UNCITRAL texts¹² to assist in achieving uniformity in the interpretation and application of those texts. The system, known as Case Law on UNCITRAL Texts (CLOUT), is intended to provide information for use by judges, arbitrators, lawyers, parties to commercial transactions, academics, students and other interested persons. CLOUT makes available abstracts of decisions and awards in all of the official languages of the United Nations (Arabic, Chinese, English, French, Russian and Spanish).¹³ Upon request, texts of decisions and awards are available in the original language from the Secretariat.

B. ORGANIZATION, STRUCTURE AND WORKING METHODS

Although UNCITRAL's original membership comprised 29 States (selected from amongst member States of the United Nations), it was expanded by the General Assembly of the United Nations to 36 States in 1973¹⁴ and to 60 States in 2002¹⁵ to reflect the broader participation and contribution by States beyond the existing member States and to stimulate interest in the expanding work programme. The General Assembly elects members for terms of six years; every three years the terms of half of the members expire. Membership of UNCITRAL is structured to ensure that the various geographic regions and the principal economic and legal systems of the world are represented. Thus, the 60 member States¹⁶ include 14 African States, 14 Asian States, eight East European States, 10 Latin American States and 14 from the group of West European and other States.

UNCITRAL's work is organized and conducted at three levels. The first level is the Commission itself, which holds an annual plenary sessions alternately in New York and

¹² *Official Records of the General Assembly, Forty-third Session, Supplement No. 17* (U.N. document A/43/17), paras. 98-109 (reproduced in *UNCITRAL Yearbook*, vol. XIX: 1988, part one, sect. A); "Collection and dissemination of information on UNCITRAL legal texts: note by the Secretariat" (U.N. document A/CN.9/312) (ibid., part two, chap. VII, sect. C).

¹³ The CLOUT system is also available free of charge on the UNCITRAL web site (<http://www.uncitral.org/english/clout/abstract/index.htm>).

¹⁴ General Assembly resolution 3108 (XXVIII), para. 8 (reproduced in *UNCITRAL Yearbook*, vol. V: 1974, part one, chap. I, sect. C).

¹⁵ General Assembly resolution 57/20 of 19 November 2002, para. 2 (reproduced in *UNCITRAL Yearbook*, vol. XXXIII:2002, part one, sect. B).

¹⁶ The current members of UNCITRAL, and the years when their memberships expire, are: Algeria (2010), Argentina (2007), Australia (2010), Austria (2010), Belarus (2010), Belgium (2007), Benin (2007), Brazil (2007), Cameroon (2007), Canada (2007), Chile (2007), China (2007), Colombia (2010), Croatia (2007), Czech Republic (2010), Ecuador (2010), Fiji (2010), France (2007), Gabon (2010), Germany (2007), Guatemala (2010), India (2010), Iran (Islamic Republic of) (2010), Israel (2010), Italy (2010), Japan (2007), Jordan (2007), Kenya (2010), Lebanon (2010), Lithuania (2007), Madagascar (2010), Mexico (2007), Mongolia (2010), Morocco (2007), Nigeria (2010), Pakistan (2010), Paraguay (2010), Poland (2010), Qatar (2007), Republic of Korea (2007), Russian Federation (2007), Rwanda (2007), Serbia and Montenegro (2010), Sierra Leone (2007), Singapore (2007), South Africa (2007), Spain (2010), Sri Lanka (2007), Sweden (2007), Switzerland (2010), Thailand (2010), The former Yugoslav Republic of Macedonia (2007), Tunisia (2007), Turkey (2007), Uganda (2010), United Kingdom of Great Britain and Northern Ireland (2007), United States of America (2010), Uruguay (2007), Venezuela (2010), Zimbabwe (2010).

Vienna.¹⁷ The work at these sessions typically includes consideration of draft texts referred to the Commission by working groups for finalisation and adoption; consideration of progress reports of the working groups on their respective projects; selection of topics for future work or further research; and various other matters. The bureau of the Commission for the duration of each annual session is constituted by a chairperson, three vice-chairpersons and a rapporteur who represent each of the five regions from which the members of the Commission are drawn¹⁸ and who are elected by the member States. The proceedings at annual sessions are set forth in a report prepared by the Secretariat and formally adopted by UNCITRAL for submission to the General Assembly.

The second level is the working groups which to a large extent undertake the substantive preparatory work on topics on UNCITRAL's work programme. Working Groups generally hold one or two sessions per year and report on the progress of its work to the Commission.¹⁹ Membership of working groups currently includes all States members of UNCITRAL.²⁰ Once a topic has been assigned to a working group, it is generally left to complete its substantive task without intervention from the Commission, unless the working group asks for guidance or requests the Commission to make certain decisions with respect to the work.²¹ At each working group session, a chairperson and rapporteur are selected by members from amongst member delegations to preside over the work.

In 2005, there are six UNCITRAL working groups: I (Procurement);²² II (Arbitration);²³ III (Transport Law);²⁴ IV (Electronic Commerce);²⁵ V (Insolvency);²⁶ and VI (Security

¹⁷ Report of the Committee on Conferences, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 32* (U.N. document A/34/32), para. 32 (e) (iii). Prior to the transfer of the UNCITRAL Secretariat from New York to Vienna, in 1979, sessions of the Commission alternated between New York and Geneva; see General Assembly resolution 2205 (XXI), sect. II, para. 6 (reproduced in *UNCITRAL Yearbook*, vol. I: 1968-1970, part one, chap. II, sect. E); General Assembly resolution 31/140, sect. I, para. 4 (c) (1976); General Assembly resolution 40/243, part one, para. 4 (c) of 18 December 1985.

¹⁸ *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), para. 14 (reproduced in *UNCITRAL Yearbook*, vol. I: 1968-1970, part two, chap. I, sect. A).

¹⁹ *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), para. 67 (reproduced in *UNCITRAL Yearbook*, vol. IX: 1978, part one, chap. II, sect. A).

²⁰ Exceptions to this practice were the drafting of the UNCITRAL Arbitration Rules (1976) and the Legal Guide on Electronic Funds Transfers (1986).

²¹ *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 92(1)(c), (reproduced in *UNCITRAL Yearbook*, vol. II: 1971, part one, chap. II, sect. A). In 2002, for example, Working Group V requested the Commission to, *inter alia*, approve in principle the draft text of the Legislative Guide on Insolvency Law, see *Official Records of the General Assembly, Fifth-eighth Session, Supplement No. 17* (U.N. document A/58/17), paras. 172-197, (reproduced in *UNCITRAL Yearbook*, vol. XXXIII: 2002, part one, sect. A).

²² After having completed the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003), Working Group I (renamed "Procurement"), has taken up a review of possible amendments to the UNCITRAL Model Law on procurement of Goods, Construction and Services (1994).

²³ Working Group II (International arbitration and conciliation) has recently completed the UNCITRAL Model Law on International Commercial Conciliation (2002) and is currently working on the

Interests).²⁷ Each working group is served by a secretary who is a professional member of the UNCITRAL secretariat. The secretary is responsible for the preparation of working papers for working group meetings, the administrative services provided by the Secretariat to that working group and reporting on working group sessions. Reports of working group sessions are formally adopted at the end of each session for submission to the annual session of UNCITRAL.

Both annual and working group sessions are conducted on the basis of documentation prepared by the UNCITRAL secretariat and made available to participants in all six official United Nations languages before each session to allow time for consideration. Sessions are facilitated by simultaneous interpretation in all six official languages.

In addition to its sixty member States UNCITRAL, also invites as observers other Member States of the United Nations, as well as international and regional organizations (both intergovernmental and non-governmental) with an interest in the topics under discussion at annual sessions and working groups.²⁸ Observers may participate in discussions to the same extent as members. Discussion takes place in a formal manner; the chair of the meeting accords delegations the opportunity to speak in order of request. By tradition, decisions taken by UNCITRAL and its working groups reconcile the different positions represented by its members and other participants by way of consensus, not by vote.²⁹

The third level is the Secretariat, which assists the Commission and the working groups in the preparation and conduct of their work. The International Trade Law Division (ITLD) of the United Nations Office of Legal Affairs provides the secretariat for UNCITRAL. The Division is located at the United Nations Office at Vienna (UNOV). Its professional members include a small number of qualified lawyers from different

topics of interim measures of protection and the requirement of a written form for the arbitration agreement.

²⁴ Working Group III (Transport law) is currently in the process of preparing a draft instrument on the international carriage of goods.

²⁵ Working Group IV (Electronic commerce) has recently completed its work on a new draft Convention on the use of electronic communications in international trade, which is intended to remove legal barriers to the development of electronic commerce in international instruments relating to international trade.

²⁶ Working Group V (Insolvency law) has recently completed a legislative guide on insolvency law, designed to assist States in establishing a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring.

²⁷ Working Group VI (Security interests) is currently preparing a legislative guide on security interests, designed to assist States in adopting modern secured transactions legislation, in order to enhance access to low-cost credit, thereby facilitating the cross-border movement of goods and services.

²⁸ General Assembly resolution 31/99, para. 10(c) (reproduced in *UNCITRAL Yearbook*, vol. VIII: 1977, part one, chap. I, sect. C); see also General Assembly resolution 36/32, para. 9 (reproduced in *UNCITRAL Yearbook*, vol. XII: 1981, part one, sect. D).

²⁹ *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (U.N. document A/7216), para. 18 (reproduced in *UNCITRAL Yearbook*, vol. I: 1968-1970, part two, chap. I, sect. A). The basis of consensus is that efforts are taken to address all concerns so as to make the final text acceptable to all. It should not be understood as giving any State the power to veto what is otherwise the prevailing view of the meeting.

countries and legal traditions, with the Director of the Division serving as the Secretary of UNCITRAL.

II. TECHNIQUES OF HARMONIZATION AND UNIFICATION

When discussing techniques used for legal harmonization, it is essential to distinguish between supranational organizations, such as the European Union, and classical international organizations, such as the United Nations. The European Union has itself the power to promulgate texts that have the force of law in all its member States without the need for any act of acceptance or incorporation into the domestic legal order,³⁰ the EU may bind the member States to achieve a certain legislative objective, leaving them only the choice of implementation for that purpose.³¹

In contrast, instruments produced by UNCITRAL may only become binding law after a State has decided to adopt it – either by ratification or by domestic enactment – but no State is obliged to do so. Thus, the entire work of harmonization done by UNCITRAL is of voluntary nature and takes full account of State sovereignty. This characteristic explains the continuous and often difficult search for consensus in the work of UNCITRAL, which relies only on the acceptability of its texts to achieve wide adoption.

A. GENERAL PROBLEMS IN INTERNATIONAL RULE-MAKING

The search for consensus between different legal traditions is not an easy enterprise level, and international uniform rules are often subject of criticism by domestic readers, who point out the superiority of national law over the product of international negotiations³² – if not in substance, at least in style.³³ As any other product of human labour, international

³⁰ A regulation issued by the Council and Parliament of the European Union, for example, has “general application”, is “binding in its entirety” and “directly applicable in all Member States” (Treaty Establishing the European Community (Consolidated Version), article 249 (Official Journal C 325, 24 December 2002)).

³¹ E.U. directives are “binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods” (ibid.)

³² “These conventions are inevitably and confessedly drafted as multi-cultural compromises between different schemes of law. Consequently they will normally have less merit than most of the individual legal systems from which they have been derived” (J.S. Hobhouse, “International Conventions and Commercial Law: the Pursuit of Uniformity”, *The Law Quarterly Review*, vol. 106 (1990), pp. 530 et seq., at 533).

³³ In the words of an experienced commentator: “[...] those who pick to pieces the open texture or verbal infelicities of an international convention rarely pause to consider how, when legislation prepared in a single legal system is generally so verbose, obscure and generally badly drafted, one can reasonably expect more of the product of many hands drawn from widely differing legal systems with different cultures, legal structures, and methods of legal reasoning and decision making, entailing maximum flexibility, co-operation and compromise” (Roy Goode, “Reflections on the Harmonisation of Commercial Law”, *Uniform Law Review*, 1991, vol. 1, pp. 54 et seq., at 73).

conventions are often imperfect³⁴ and indeed the circumstances under which the harmonization process takes place are not ideal.

At the domestic level, legislation is drafted in the national language system, in the context of the domestic legal system and by persons who are knowledgeable about it. It usually provides an opportunity for taking into account and solving possible problems of coordination or conflict with existing law either in the drafting of the new law or by amending the pre-existing law. That is not the case when a legal text is prepared at the international level for introduction into domestic legal systems. Those negotiating the legal text are usually experts in the area of law in question and are aware of the problems of coordination that may be encountered in many legal systems. However, the legal text is to a large extent drafted in the abstract, i.e. in a generic form that may have to be adapted to local circumstances. If it is done well, it will be drafted in clear language, will not use words with particular meanings in specific legal systems and will be easy to translate with a low likelihood of error.³⁵ The result will almost assuredly be a style of drafting unfamiliar to many versed in the national legislation of their own country.

These are general problems faced by international legal harmonization, irrespective of the subject matter and the form of the instrument. Particular subject matters raise their own difficulties, or on occasion render the task easier. One area of particular difficulty is the operation of the judicial system and although there are a number of conventions on judicial cooperation, but none that attempts to unify the procedure in the courts.³⁶ It is generally easier to prepare a legal text for activities that take place entirely or primarily in the international sphere,³⁷ although this is by no means an assurance of speedy or smooth negotiations.³⁸

Another difficulty of international legal harmonization is that the search for compromise often means that the preferred rule in a given legal system may be eventually mitigated or

³⁴ "... of necessity unification and harmonization proceed slowly, by small steps, with imperfect achievements. It is unrealistic to expect anything approaching perfection" (E. Allan Farnsworth "Unification and Harmonization of Private Law," *Canadian Business Law Journal*, vol. 27 (1996), pp. 48-et seq., at 62).

³⁵ Texts negotiated at the international level are typically adopted in one or more languages used by the relevant organization (in the case of UNCITRAL, Arabic, Chinese, English, French, Russian and Spanish). The rule is that each is an original text and that they are equally authentic. In practice, however, the text is usually drafted in the working language most widely used among government delegates and the secretariat of the organization in question. The other texts are in most cases translations and their accuracy depends largely on the skills of the translators and the scrutiny of government delegates participating at the meetings.

³⁶ The American Law Institute and the International Institute for the Unification of Private Law (UNIDROIT) have undertaken a joint product to develop "Principles and Rules of Transnational Civil Procedure", <http://www.unidroit.org/>; <http://www.ali.org/>.

³⁷ Early examples include as the "Convention for the Unification of Certain Rules Relating to International Carriage by Air", done at Warsaw on 12 October 1929 ("the Warsaw Convention"); and the "International Convention for the Unification of Certain Rules of Law relating to Bills of Lading", done at Brussels, on 25 August 1924 ("Hague Rules").

³⁸ As can be seen from the lengthy negotiations needed at various forums to produce what eventually became the United Nations Convention on Contracts for the International Sale of Goods ("U.N. Sales Convention" or "CISG": United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3).

abandoned altogether, especially when it is unlikely that it will obtain support of other legal systems.³⁹ Countries considering adoption of internationally negotiated instruments have to be aware of reasons leading to such deviations from rules familiar to them and be ready to accept the possibility of having to apply different rules depending on whether a particular transaction is governed by purely domestic or by uniform law.⁴⁰

These difficulties are well known. Yet the challenging question is still open: what to do where disharmony is not acceptable?⁴¹ In the ambit of organizations such as UNCITRAL (and also UNDRIT and the Hague Conference) all stages of the preparation, negotiation and adoption of an international instrument depend exclusively on the will of States. One must assume that States make decisions to undertake work and to carry it through despite the difficulty, length, cost and uncertainty inherent to the process because they have concluded that a certain degree of harmonization in a given area is desirable. Once States have decided that harmonization is necessary or desirable, they have to use the tools available to them.

B. CHOICE OF INSTRUMENT FOR HARMONIZATION

The factors discussed above affect the form in which the international legislator will draft the resulting text. Treaties have been the traditional vehicle for legal relations between States and have been the primary vehicle for the international unification of domestic law. Model laws and other forms of legal unification have been a more recent innovation.

³⁹ One prominent example is the adoption of the “receipt” rule as the basis for the formation of international sales contract under the U.N. sales convention (see articles 14 and 15), instead of the dispatch rule, which is favoured in common law jurisdictions. Conversely, the same Convention upholds the common law principle of the revocability of contract offers, even if they are said to be irrevocable (see article 15, paragraph 2), thus deviating from established principles in civil law countries (which is mentioned as an example of unacceptable compromise in the eyes of opponents to the harmonization process, such as Arthur Rosett, “Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods”, *Ohio State Law Journal*, vol. 45 (Spring, 1984), p. 265 et seq., at 291).

⁴⁰ This is generally the situation for sales contracts in countries that have ratified the U.N. Sales Convention, which only applies where the parties to a contract have their places of business in different States and both those States are contracting Parties to the Convention.

⁴¹ Some, such as Paul. Stephan, who propose, as a better alternative, to allow business people to “elect in and out of national commercial law systems” so that “States thus could compete for legal business on the basis of the attractiveness of their rules and dispute resolution procedures, rather than coerce their subjects to follow any one system of commercial law” (“The Futility of Unification and Harmonization in International Commercial Law”, *Virginia Journal of International Law Association*, vol. 36 (Spring, 1999), p. 743 et seq., at 789). The narrow limits of this paper do not allow for a full reply to this proposition. For the moment, it may be enough to point out that it would provide no solution for the vast number of contracts entered without expert legal advice. Moreover, such a solution would only be politically acceptable if it could be generally assumed that contract partners in different countries are always on an equal footing when establishing contract terms.

UNCITRAL has adopted a flexible approach with respect to the techniques it uses to perform its mandate.⁴² These techniques operate at different levels and involve different types of compromise or acceptance of difference. They fall into three broad categories: legislative (conventions, model laws and model legislative or treaty provisions), contractual (standard contract clauses and rules) and explanatory (legislative guides and legal guides for use in legal practice).⁴³ To some extent, the techniques used by UNCITRAL also show the process of harmonization occurring at different stages of business development. While in most cases the process of harmonization works to bring long-established practices closer together, there are cases that might be seen as examples of “preventive” harmonization. This involves establishing new principles and practices that minimize divergence when national laws on new issues are developed. This has been typical in areas of commerce affected by new technology or new business practices, such as electronic commerce.

1. Conventions

A convention is a multilateral treaty designed to unify law in the States parties to it by establishing international obligations that a State adhering to the convention must observe. States that decide to adopt a convention are required to formally deposit a binding instrument of ratification or accession with the depository (for conventions prepared by UNCITRAL, the Secretary-General of the United Nations).

Conventions prepared by UNCITRAL are: Convention on the Limitation Period in the International Sale of Goods (1974);⁴⁴ United Nations Convention on the Carriage of Goods by Sea (1978);⁴⁵ United Nations Convention on Contracts for the International Sale of Goods (1980);⁴⁶ United Nations Convention on International Bills of Exchange

⁴² In this connection see also “Question of co-ordination: direction of the work of the Commission: Report of the Secretary-General” (U.N. document A/CN.9/203), paras. 99-122 (reproduced in UNCITRAL Yearbook, vol. XII: 1981, part two, chap. V, sect. 8); “Alternative methods for the final adoption of conventions emanating from the work of the Commission: Note by the Secretariat” (U.N. document A/CN.9/204) (reproduced in UNCITRAL Yearbook, vol. XII: 1981, part two, chap. VIII).

⁴³ The full text of the instruments adopted by UNCITRAL is available at <http://www.uncitral.org/english/texts/index.htm>. The lists of the States that have ratified or otherwise implemented the conventions and model laws prepared by UNCITRAL is available at <http://www.uncitral.org/english/status/index.htm>.

⁴⁴ The “U.N. Limitation Convention” (United Nations, *Treaty Series*, vol. 1511, No. 26119, p.1) establishes uniform rules governing the period of time within which legal proceedings arising from an international sales contract must be commenced. It has been amended by a Protocol adopted in 1980 when the United Nations Sales Convention (see below) was adopted. Both the original Convention and the Convention as amended entered into force on 1 August 1988.

⁴⁵ Also known as the “Hamburg Rules” (United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3. *UNCITRAL Yearbook*, vol. IX 1978, part three, chap. I, sect. B)). This Convention establishes a uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract of carriage of goods by sea. The Convention entered into force on 1 November 1992.

⁴⁶ *Supra*, note 37. The U.N. sales Convention establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract. The Convention entered into force on 1 January 1988

and International Promissory Notes (1988);⁴⁷ United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991);⁴⁸ United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995);⁴⁹ and the United Nations Convention on the Assignment of Receivables in International Trade (2001).⁵⁰

The entry into force of a convention is usually dependent upon the deposit of a specified minimum number of instruments of ratification.⁵¹

A convention is often used where the objective is to achieve a high degree of uniformity of law among signatory States, thus reducing the need for a party to undertake research of the law of another State party. The international obligation is assumed by a State upon adoption of the convention, is intended to provide an assurance that the law in that State is in line with the terms of the convention.⁵²

⁴⁷ The “U.N. Bills and Notes Convention” (General Assembly resolution 43/165, annex, also published in *UNCITRAL Yearbook*, vol. XIX:1988, part three, chap. I) provides a comprehensive code of legal rules governing new international instruments for optional use by parties to international commercial transactions. It is designed to overcome the major disparities and uncertainties that currently exist in relation to instruments used for international payments. The Convention was adopted and opened for signature by the General Assembly at its 43rd session in December 1988. 10 ratifications or accessions are necessary for the Convention to come into force.

⁴⁸ The “U.N. Terminals Operators Convention” (not yet in force, published in U.N. document A/CONF.152/13, reproduced in *UNCITRAL Yearbook*, vol. XXIII: 1992, part three, chap. I) sets forth uniform legal rules governing the liability of a terminal operator for loss of and damage to goods involved in international transport while they are in a transport terminal, and for delay by the terminal operator in delivering the goods. The draft Convention was adopted by a diplomatic conference and opened for signature, ratification and accession on 19 April 1991. The Convention will enter into force upon the deposit of 5 instruments of ratification, acceptance, approval or accession.

⁴⁹ The “U.N. Guarantees Convention” (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* and corrigendum (U.N. Document A/50/640 and Corr.1, annex), reproduced in *UNCITRAL Yearbook*, vol. XXVI: 1995, part one, sect. D Annex) is designed to facilitate the use of independent guarantees and stand-by letters of credit, in particular where only one or the other of those instruments may be traditionally in use. The Convention also solidifies recognition of common basic principles and characteristics shared by the independent guarantee and the stand-by letter of credit. It entered into force on 1 January 2000.

⁵⁰ The main objectives of the “U.N. Receivables Convention”, which is not yet in force include the following: removing legal obstacles to certain international financing practices (e.g. by validating assignments of future receivables and bulk assignments, and by partially invalidating contractual limitations to the assignment of receivables); enhancing certainty and predictability with respect to the law applicable to key issues (e.g. such as priority between competing claims); and harmonizing domestic assignment laws by providing a regime governing priority between competing claims for States to opt-into. The Convention will enter into force upon the deposit of five instruments of ratification, acceptance, approval or accession (*UNCITRAL Yearbook*, vol. XXXIII: 2002, part three, also available at <http://www.uncitral.org/english/texts/payments/ctc-assignment-convention-e.pdf>).

⁵¹ The U.N. Sales Convention required 10 (article 99(1)); the Hamburg Rules required 20 (article 30(1)); the U.N. Guarantees Convention required 5 (article 28(1) and the U.N. Receivables Convention requires 5 (article 45).

⁵² See for example, the joint project with Committee D of the International Bar Association to monitor legislation giving effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958), *Official Records of the General Assembly, Fiftieth Session*,

It should be noted, however, that conventions sometimes allow States parties to make reservations to specified provisions, although the conventions completed by UNCITRAL generally do not allow reservation or only permit limited variation. In some cases, this represents a compromise that will enable some States to become a party to the convention without being obliged to incorporate the provision to which the reservation relates into their national laws. Except to the extent that they permit reservations, conventions afford little flexibility to adopting States.⁵³ Where States have objections to particular provisions of a convention, States may decide they cannot participate in that convention.

While the advantages of having a uniform text in force in all Contracting States is obvious, there is a risk that the typically technical instruments in the commercial law area may receive low attention by domestic legislators – usually charged with attending more immediate needs of their constituencies – and often take several years to enter into force or be ratified by a sufficiently significant number of a countries. Typical limitations of international conventions include the difficulty of amending them in instances requiring accommodation of economic changes or evolution of practice or technology, as well as the risk that amending protocols may not be ratified by all the original signatory States, resulting in a sometimes complex patchwork of Contracting Parties.⁵⁴

If a greater degree of flexibility is desired and is appropriate to the subject matter under consideration, a different technique of unification might be used.

2. Model laws

A model law is a legislative text that is recommended to States for enactment as part of their national law. A model law is an appropriate vehicle for modernization and unification of national laws when it is expected that States will wish or need to make adjustments to the text of the model to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary. It is precisely this flexibility which makes a model law potentially easier to negotiate than a text containing obligations that cannot be altered and promotes greater acceptance of a model law than of a convention dealing with the same subject matter.

Supplement No. 17 (U.N. document A/50/17) paras 401-404 (reproduced in UNCITRAL Yearbook, vol. XXVI: 1995, part one, sect. A).

⁵³ It is well known, however, that “even where the text is uniform, the decisions of the courts tend over time to bring significant variations of the law in practice from one State to another. It should also be evident that this process is reinforced by the fact that in some countries it is the treaty itself that is law in the domestic order while in others the text of the treaty has been transformed into a domestic statute” (Eric E. Bergsten, “Implementation of the UNCITRAL Model Law on International Commercial Arbitration into National Legislation”, *Croatian Arbitration Yearbook*, vol. 10, pp. 101 et seq. at 104).

⁵⁴ This has become a serious problem, for instance, in the area of maritime transport, as each of the amending protocols to the 1924 Hague Rules (the 1968 Visby Protocol, and the 1979 “Special Drawing Rights-SDR” Protocol) has its own group of signatory States, and they are not identical with the signatories of the original Hague Rules (for the lists of ratifying States of each of these texts, see <http://www.comitemaritime.org/ratific/brus/bruidx.html>). This disparity has serious consequences when determining the carrier’s limits of liability (see Rosario Espinosa Calabuig, “Las Divergencias Existentes en los Sistemas de limitación de la Deuda del porteador Marítimo: Problemas Prácticos”, *Anuario de Derecho Marítimo*, vol. XV, pp. 350 et seq.; see also John O. Honnold, “Ocean Carriers and Cargo: Clarity and Fairness – Hague or Hamburg?” *Tulane Maritime Law Journal*, vol. 23 (Spring 1999) pp. 75 et seq..

Notwithstanding this flexibility, and in order to increase the likelihood of achieving a satisfactory degree of unification and to provide certainty about the extent of unification, States are encouraged (e.g. by a resolution of the General Assembly) to make as few changes as possible when incorporating a model law into their legal systems.

Model laws are generally finalized and adopted by UNCITRAL, as opposed to a convention which requires the convening of a diplomatic conference. This factor may make preparation of a model law less expensive than the preparation of a convention, unless the convention is adopted by the U.N. General Assembly (as in the case of the most recent conventions prepared by UNCITRAL).

The UNCITRAL Model Law on International Commercial Arbitration (1985)⁵⁵ was the first model law adopted by UNCITRAL and was followed by the UNCITRAL Model Law on International Credit Transfers (1992),⁵⁶ the UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment (1994),⁵⁷ the UNCITRAL Model Law on Electronic Commerce, with Guide to Enactment (1996),⁵⁸ the UNCITRAL Model Law on Cross-Border Insolvency, with Guide to Enactment (1997),⁵⁹ the UNCITRAL Model Law on Electronic Signatures, with Guide to Enactment (2001),⁶⁰

⁵⁵ See *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (U.N. document A/40/17) Annex I (reproduced in UNCITRAL Yearbook, vol. XVI:1985, part three, chap. I). The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.

⁵⁶ See *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (U.N. document A/47/17), Annex I (reproduced in UNCITRAL Yearbook: vol. XXIII: 1992, part three, chap. II). The Model Law deals with operations beginning with an instruction by an originator to a bank to place at the disposal of a beneficiary a specified amount of money. It covers such matters as the obligations of a sender of the instruction and of a receiving bank, time of payment of a receiving bank and liability of a bank to its sender or to the originator when the transfer is delayed or other error occurs.

⁵⁷ See *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (U.N. document A/49/17 and Corr.1), annex I (reproduced in *UNCITRAL Yearbook*, vol. XXV:1994, part three, annex I). The Model Law is designed to assist States in reforming and modernizing their laws on procurement procedures. The Model Law contains procedures aimed at achieving the objectives of competition, transparency, fairness and objectivity in the procurement process, and thereby increasing economy and efficiency in procurement.

⁵⁸ See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (U.N. document A/51/17), Annex I (reproduced in UNCITRAL Yearbook, vol. XXVII: 1996, part three, chap. D). The Model Law is intended to facilitate the use of modern means of communications and storage of information, by providing standards by which the legal value of electronic messages can be assessed.

⁵⁹ See *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (U.N. document A/52/17), Annex I (reproduced in UNCITRAL Yearbook, vol. XXVIII: 1997, part three, chap. D). The purpose of the Model Law is to promote modern and fair legislation for cases where the insolvent debtor has assets in more than one State. The text deals with conditions under which the person administering a foreign insolvency proceeding has access to the courts of the State that has enacted the Model Law, determines conditions for recognition of a foreign insolvency proceeding and for granting relief to the representative of such foreign proceeding, permits courts and insolvency administrators from different countries to cooperate more effectively, and contains provisions on coordination of insolvency proceedings that take place concurrently in different States.

⁶⁰ See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* (U.N. document A/56/17), Annex II (reproduced in UNCITRAL Yearbook, vol. XXXII 2001, part three). The Model Law is intended to bring additional legal certainty regarding the use of electronic signatures.

and the UNCITRAL Model Law on International Commercial Conciliation, with Guide to Enactment (2002)⁶¹

3. Legislative guides and recommendations

It is not always possible to draft specific provisions in a suitable or discrete form, such as a convention or a model law, for incorporation into national legal systems. There are many reasons for that. National legal systems may use widely disparate legislative techniques and approaches for solving a given issue. States may not yet be ready to agree on a single approach or common rule. There may not be consensus on the need to find a uniform solution to a particular issue, or there may be different levels of consensus on what constitute the key issues of a particular subject and how they should be addressed. In such cases, UNCITRAL has found it appropriate not to attempt to formulate a uniform text, but to limit its action to a set of principles or legislative recommendations.

In order to advance the objective of harmonization, and offer a legislative model, the principles or recommendations would need to do more than simply state general objectives. The text would typically provide a set of possible legislative solutions to certain issues, but not necessarily a single set of model solutions for those issues. By discussing the advantages and disadvantages of different policy choices, the text would assist the reader to evaluate different approaches and choose the one most suitable in a particular national context. It could also be used to provide a standard against which governments and legislative bodies could review and update existing laws, regulations, decrees and similar legislative texts in a particular field or develop new ones.

UNCITRAL's first legislative recommendation was adopted in 1985 to stimulate review of legislative provisions on the legal value of computer records.⁶² In 2000, UNCITRAL adopted the Legislative Guide on Privately Financed Infrastructure Projects⁶³ and decided to undertake work on two further legislative guides on insolvency law and secured

Building on the flexible principle contained in article 7 of the UNCITRAL Model Law on Electronic Commerce, it establishes a presumption that, where they meet certain criteria of technical reliability, electronic signatures shall be treated as equivalent to hand-written signatures. The Model Law follows a technology-neutral approach and avoids favouring the use of any-specific technical product. In addition, the Model Law establishes basic rules of conduct that may serve as guidelines for assessing possible responsibilities and liabilities that might bind upon the various parties involved in the electronic signature process: the signatory, the relying party and trusted third parties that might intervene in the signature process.

⁶¹ See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (U.N. document A/57/17), Annex I (reproduced in UNCITRAL Yearbook, vol. XXXIII: 2002, part three). The purpose of this Model Law is designed to assist States in creating new, or enhancing existing, legislation governing the use of conciliation or mediation conducted by a neutral third party (or parties) in order to amicably settling disputes which may arise in the course of international commercial relations.

⁶² Recommendations to Governments and international organizations concerning the legal value of computer records (1985).

⁶³ UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (U.N. document A/CN.9/SER.B/4), United Nations sales publication No. E.01.V.4. The purpose of the Guide is to assist in the establishment of a legal framework favourable to private investment in public infrastructure. The advice provided in the Guide aims at achieving a balance between the desire to facilitate and encourage private participation in infrastructure projects, on the one hand, and various public interest concerns of the host country, on the other.

transactions. In 2003, UNCITRAL adopted its Model Legislative Provisions on Privately Financed Infrastructure Projects (2003),⁶⁴ as a supplement to the earlier Legislative Guide.

4. Model provisions

When a number of conventions deal with a particular question in a way that is considered to require unification or modernization, model provisions can be developed and recommended for use in future conventions and in revisions of existing ones. In 1982, UNCITRAL formulated a model provision establishing a universal unit of account of constant value that can be used in international transport and liability conventions, for expressing amounts in monetary terms.⁶⁵ Model provisions may also assist in supplementing a provision of a convention. The United Nations Convention on the Assignment of Receivables in International Trade (2001) contains an annex of optional substantive law provisions supplementing the conflicts of laws rules of the Convention that deal with priority issues.

5. Contractual technique

In the drafting of contracts there are issues which can be resolved by reference to a standard or uniform clause or set of clauses or rules. Standardization of these clauses or rules has a number of advantages. It can identify all of the issues that parties should address in such clauses or rules; ensure that clauses are effective and provide internationally recognized and up-to-date solutions to specific issues. One common example is in the field of dispute resolution where a standard dispute resolution clause referring to the use of internationally recognized rules for conduct of dispute resolution proceedings could be included in a contract. The UNCITRAL Arbitration Rules (1976)⁶⁶ and the UNCITRAL Conciliation Rules (1980)⁶⁷ are examples of such internationally recognized uniform rules.

⁶⁴ UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003) (*Official Records of the General Assembly, Fifth-eighth Session, Supplement No. 17* (U.N. document A/58/17) Annex I (reproduced in UNCITRAL Yearbook, vol. XXXIV: 2003, part three)). They are intended to supplement the UNCITRAL Legislative Guide

⁶⁵ Provisions on a universal unit of account and on adjustment of the limit of liability in international transport conventions (1982), "Report of the Working Group on International Negotiable Instruments on the work of its twelfth session" (U.N. document A/CN.9/215), para. 97 (reproduced in UNCITRAL Yearbook, vol. XIII: 1982, part two, chap. II, sect. B.1); *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17* (U.N. document A/37/17), para. 63 (reproduced in UNCITRAL Yearbook, vol. XIII: 1982, part one, sect. A).

⁶⁶ UNCITRAL Arbitration Rules (1976) (*Official Records of the General Assembly, Thirty-first Session, Supplement No. 17* (U.N. document A/31/17), chap. V, sect. C, para. 57 (reproduced in UNCITRAL Yearbook, vol. VII: 1976, part one, chap. II, sect. A)) Adopted in 1976, the UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship. The Rules are widely used in ad hoc arbitrations as well as administered arbitrations.

⁶⁷ UNCITRAL Conciliation Rules (1980) (*Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (U.N. document A/35/17) chap. V, sect. A, para. 106 (reproduced in UNCITRAL Yearbook, vol. XI: 1980, part three, chap. II)) When parties to a commercial dispute wish to settle their disputes amicably through conciliation, they may agree upon this set of procedural rules to govern the conciliation proceedings.

6. Explanatory technique

When it is not feasible or necessary to develop a standard or model set of contract rules, an alternative may be a *legal guide* giving explanations concerning contract drafting. Model contract clauses may also be included in such a legal guide to illustrate some solutions. The first legal guide was the UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works (1987),⁶⁸ which was followed by the UNCITRAL Legal Guide on International Countertrade Transactions (1992)⁶⁹ and, in 1996, the UNCITRAL Notes on Organizing Arbitral Proceedings.⁷⁰

The focus of a legal guide may not be exclusively on contract drafting, but may have a broader purpose of discussing issues that would also be of interest to legislators and regulators. One example is the UNCITRAL Legal Guide on Electronic Funds Transfers (1986) which discusses issues relating to the use of electronic means of communication in making international payments.

III. EXPERIENCE WITH UNCITRAL MODEL LAWS

As indicated above, model laws are a relatively new addition to the traditional tools used in international legal harmonization. Nevertheless, nearly twenty years after the adoption of its first model law, it is possible to make an assessment of UNCITRAL's experience with this technique.

A comparison of two texts, the Model Law on International Commercial Arbitration (1985) and the Model Law on Electronic Commerce (1996), illustrates how the model law form can be adapted to the subject matter under consideration and to the degree of flexibility sought by the drafters.

A. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

The UNCITRAL Model Law on International Commercial Arbitration (henceforth: the UNCITRAL Model Arbitration Law) has been a very successful example of international

⁶⁸ UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987) (U.N. document A/CN.9/SER.B/2). The Legal Guide discusses the many legal issues that arise in connection with the construction of industrial works, covering the pre-contractual, construction and post-construction phases, and suggests possible ways in which the parties may deal with these issues in their contracts. It was prepared with the special problems of buyers from developing countries in mind.

⁶⁹ UNCITRAL Legal Guide on International Countertrade Transactions (1992) (U.N. document A/CN.9/SER.B/3) The purpose of the Legal Guide, adopted in 1992, is to assist parties negotiating international countertrade transactions. It identifies legal issues involved in such transactions and discusses possible contractual solutions.

⁷⁰ UNCITRAL Notes on Organizing Arbitral Proceedings (1996) (reproduced in UNCITRAL Yearbook, vol. XXVII: 1996, part three, chap. II) The Notes are designed to assist arbitration practitioners by providing an annotated list of matters on which the arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings. The text, which is in no way binding, may be used whether or not the arbitration is administered by an arbitral institution.

preparation of a legal text in the private law area. To date, 44 countries⁷¹ and non-sovereign jurisdictions⁷² have adopted the Model Law.

1. Origin and main features

The origin of the Model Law can be traced back to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The fundamental rule of that Convention is laid down in its Art. III, which provides that “each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon (...) and that “(t)here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” The New York

⁷¹ Australia (*International Arbitration Amendment Act 1989*); Azerbaijan (*Law on International Arbitration 1999*); Bahrain (*Decree Law No. 9 of 1994 with Respect to Promulgation of International Commercial Arbitration*); Bangladesh (*Arbitration Act 2001*); Belarus (*International Arbitration Law – Law No. 279-3 of 9 July 1999*); Bulgaria (*Law Amending the Law on International Commercial Arbitration 1993*); Canada (*Federal Commercial Arbitration Act 1985*); Chile (*Ley n° 19.971 of 2004 – Ley de arbitraje comercial internacional*); Croatia (*Arbitration Law 2001*); Cyprus (*International Commercial Arbitration Law 1987*); Egypt (*Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters*); Germany (*Code of Civil Procedure 1998, Tenth Book*); Greece (*Law No 2735 of 1999- International Arbitration Law*); Guatemala (*Decreto n° 67-95 - Ley de Arbitraje*); Hungary (*Act LXXI of 1994 On Arbitration*); India (*Arbitration and Conciliation Ordinance, No. 8 of 1996*); Islamic Republic of Iran (*Law on International Commercial Arbitration, of 5 November 1997*); Ireland (*Arbitration (International Commercial) Act 1998 (No. 14 of 1998)*); Japan (*Law No. 138 of 2003 – Law of Arbitration*); Jordan (*Law No. 31 of 2001 – Arbitration Law*); Kenya (*Arbitration Act 1995 (No. 4 of 1995)*); Lithuania (*Law on Commercial Arbitration 1996 (No. 1-1274)*); Madagascar (*Code de procédure civile, Livre quatrième: de l’arbitrage (Loi 98-019 du 11 novembre 1998)*); Malta (*Arbitration Act 1996 (No. 11 of 1996)*); Mexico (*Código de Comercio: Título IV, Libro V – Del Arbitraje Comercial (1993)*); New Zealand (*Arbitration Act 1996*); Nigeria (*Arbitration and Conciliation Decree 1988 (Decree No. 11 of March 14, 1988)*); Oman (*Act on Arbitration in Civil and Commercial Matters (Sultanate Decree No. 47/97 issuing the Act in Civil and Commercial Matters)*); Paraguay (*Código de Procedimiento Civil, Libro V – Del proceso arbitral (Ley n° 1.337/88)*); Peru (*Ley n° 26572, 1996 – Ley General de Arbitraje*); Republic of Korea (*Arbitration Act - Amended by Act No.6083 as of 31 December 1999*); Russian Federation (*Law of the Russian Federation on International Commercial Arbitration 1993*); Singapore (*International Arbitration Act 1994*); Spain (*Ley 60/2003, de 23 de diciembre, de arbitraje*); Sri Lanka (*Arbitration Act (No. 11 of 1995)*); Thailand (*Arbitration Act 1987*); Tunisia (*Loi 93-42 du 26 avril 1993 - Code de l’arbitrage*); Ukraine (*Law on Commercial Arbitration 1994*); Zambia (*Arbitration Act 2000*), Zimbabwe (*Arbitration Act 1996 (No. 6 of 1996)*).

⁷² In China, by the Hong Kong Special Administrative Region (*Arbitration Ordinance 1996*) and the Macau Special Administrative Region (*Decreto-Lei No. 55/98/M*); Within the United Kingdom, by Scotland (*Law Reform (Miscellaneous Provisions) (Scotland) Act 1990*) and in the U.K. overseas territory of Bermuda (*Bermuda International Conciliation and Arbitration Act 1993*); within the United States, California (*Code of Civil Procedure*); Connecticut (*An Act Concerning the UNCITRAL Model Law on International Commercial Arbitration 1989*); Illinois (*International Commercial Arbitration Act 1998*); Oregon (*International Commercial Arbitration and Conciliation Act 1991*); Texas (*An Act Relating to the Arbitration or Conciliation of International Commercial Disputes 1989, Title 10*)

Convention has been a remarkable success⁷³ in achieving that basic rule, but its ambit is limited.

Indeed, a party wishing to enforce an award under the Convention will have to be informed of a number of matters not dealt with in the Convention, such as whether the award will be enforced by a court or by another authority, or which court or which other authority; the procedure to be followed; the conditions or fees that may be charged and how they relate to those imposed on the recognition or enforcement of domestic awards in the country of enforcement. All those important details are found in the statutes of the country of enforcement.

UNCITRAL recognized those difficulties, but was not willing to embark upon amending an instrument as successful as the New York Convention. Instead, UNCITRAL undertook the preparation of what became the UNCITRAL Model Arbitration Law.

The main purpose of the Model Law is to reduce the discrepancy between domestic procedural laws affecting international commercial arbitration. The UNCITRAL Model Arbitration Law deals with the essential elements of a favourable legal framework for the conduct of arbitration proceedings, such as: arbitration agreement; composition of arbitral tribunal (including appointment, substitution and challenge of arbitrators); jurisdiction of arbitral tribunal (including its competence of arbitral tribunal to rule on its own jurisdiction and its power to order interim measures); conduct of arbitral proceedings (treatment of parties, determination of rules of procedure, hearings and written proceedings, party default, appointment of experts, court assistance in taking evidence); making of award and termination of proceedings (settlement, form and contents of award; its correction and interpretation); setting aside and arbitral award; conditions for recognition and enforcement of awards and grounds for refusing recognition or enforcement

2. Implementation of the Model Law

When preparation of the UNCITRAL Model Arbitration Law first began it was thought that it would be primarily useful for the developing world. Industrialized countries believed that their law of arbitration was adequate, if not much better than whatever UNCITRAL might produce. Interestingly, the past twenty years have shown that the UNCITRAL Model Arbitration Law has indeed been highly useful for developing countries, but also for many industrialized countries which have also reformed their law by adopting the Model Law.⁷⁴

UNCITRAL has not established fixed criteria or minimum requirements for determining when a country can be regarded as having enacted the Model Law. Nevertheless, it could be said that generally domestic arbitration statutes are considered to be enactments of the Model Law when it is clear that the legislator took the Model Law as a basis and made certain amendments and additions, but did not simply take the Model Law as one

⁷³ As of March 2005, the Convention has been ratified by 135 States (the full list can be found in [http://www.uncitral.org/english/status/status-e.htm#Convention on the Recognition and Enforcement of Foreign Arbitral Awards \(New York, 1958\)](http://www.uncitral.org/english/status/status-e.htm#Convention%20on%20the%20Recognition%20and%20Enforcement%20of%20Foreign%20Arbitral%20Awards%20(New%20York,%201958))).

⁷⁴ E.g. Australia, Canada, Germany, Ireland, New Zealand.

amongst various models or follow only 'its principles'.⁷⁵ This usually means also that the bulk of the provisions of the Model Law have been enacted and that the domestic statute does not contain any provision incompatible with the basic philosophy of the Model Law. Within those general parameters, a certain degree of adaptation is admissible and indeed necessary, as are certain deviations, in particular where they are intended to adjust the Model Law to the local context. Many of the decisions that need to be made by an enacting State were anticipated by UNCITRAL, while others may be particular to the country concerned, or at least to the group of countries with similar legal systems.⁷⁶

(a) Form of enactment

UNCITRAL prepared the Model Arbitration Law as a freestanding arbitration statute. That fits the legislative structure of many countries, but in many others the legislative provisions on arbitration are to be found in the Code of Civil Procedure.⁷⁷ While it is certainly possible for all the legislative provisions concerning arbitration to be contained in a separate book or chapter of the Code of Civil Procedure, it is less likely that this will be so than if the arbitration law is freestanding. The nature of a Code suggests that some issues may be considered to be better treated in another book or chapter of the Code where a similar issue is already treated.

Some common law countries have arbitration laws based on the UNCITRAL Model Arbitration Law that are peculiar in appearance to lawyers from civil law jurisdictions in that the UNCITRAL Model Arbitration Law was incorporated in its entirety (including the footnote to Article 1 describing what should be considered commercial) as a schedule to a domestic act.⁷⁸ This technique is similar to the technique used in those jurisdictions to promulgate a treaty as positive law. In those jurisdictions, all the changes to the UNCITRAL Model Arbitration Law as well as all additional provisions appear in the basic statute.

(b) Scope of application

The main focus of UNCITRAL when preparing the Model Arbitration Law was to harmonize and modernize the law governing the settlement of international commercial disputes, rather than the conduct of domestic arbitrations. Nevertheless, it was obvious that a State could easily adapt the UNCITRAL Model Arbitration Law to domestic arbitrations and a significant number of States have done so.⁷⁹

Consistent with its mandate to promote the harmonization of the law of international trade, UNCITRAL conceived its Model Law for use in commercial arbitrations. The difficulty however was in determining what matters should be regarded as

⁷⁵ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed. (Sweet & Maxwell, London, 1990), p. 642.

⁷⁶ The best overall description of the choices made both at UNCITRAL and by States in their adoption of the UNCITRAL Model Arbitration Law is Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (London, Sweet & Maxwell 2000).

⁷⁷ Germany, Mexico and – within the United States – California.

⁷⁸ Such as Hong Kong, New Zealand, Singapore and Zambia.

⁷⁹ E.g. Bulgaria, Canada, Egypt, Germany, Hungary, India, Kenya, Lithuania, Mexico, New Zealand, Nigeria, Oman, Sri Lanka, Zimbabwe.

“commercial”.⁸⁰ UNCITRAL eventually adopted the footnote to art. 1(1) that lists a large number of activities of an economic nature that should be considered as “commercial” in the context of the UNCITRAL Model Arbitration Law.⁸¹ Inevitably, not all of them necessarily coincide with what individual States traditionally regard as “commercial”.

Those States that have adopted the UNCITRAL Model Arbitration Law in a schedule to a new national arbitration law had an easy way to include the footnote. In other countries, the essentials of the footnote have been included in the main text of the arbitration law.⁸² In many other cases the footnote has been left out and there is no indication in the text of the arbitration law as to what is commercial.⁸³

In some countries the answer is provided by the use of general provisions aimed at both defining the material scope of the arbitration act and determining the types of disputes that are capable of settlement by arbitration (“arbitrability”).⁸⁴ Article V(2) of the New York Convention recognizes that arbitrability is to be defined by each State when it provides that recognition and enforcement of an arbitral award may be refused if the subject matter of the difference “is not capable of settlement by arbitration under the law of that country.” The UNCITRAL Model Arbitration Law adopts the same provision, not only for recognition and enforcement of an award in article 36(1)(b)(i), but also as grounds for setting aside in article 34(2)(b)(i). Nevertheless, there is no indication in the UNCITRAL Model Arbitration Law as to what disputes are not, or should not be, capable of settlement by arbitration.

(c) Additions, deletions and variations

One of the basic concerns during the preparation of the UNCITRAL Model Arbitration Law was to devise a system that preserves as much as possible the parties’ agreement to arbitrate and the conduct of arbitration proceedings from extraneous interference. Therefore, one of the more important features of the Model Arbitration Law is article 5, which provides that in matters governed by the Model Law, no court shall intervene except where so provided in the Model Law. While this provision was adopted in most

⁸⁰ The same difficulty had been faced at the negotiation of the New York Convention. Its art. 1(3) authorizes a State to declare “that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the State making such declaration.” If the matter is in question, such a declaration requires an inquiry into the domestic law of the relevant State.

⁸¹ The footnote reads: “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.”

⁸² E.g. Cyprus, Egypt, Islamic Republic of Iran, Nigeria, Oman, Russian Federation.

⁸³ E.g. Australia, Bahrain, Canada, Bulgaria, Guatemala, Hungary, Germany, India, Ireland, Kenya, Lithuania, Malta, Mexico, New Zealand, Peru, Sri Lanka, Tunisia, Zimbabwe.

⁸⁴ Germany, for example, admits arbitration for any “claim involving an economic interest (*‘vermögensrechtlicher Anspruch’*)” whether or not the subject matter at issue is a “commercial” one. Furthermore, an arbitration agreement concerning claims not involving an economic interest has legal effect “to the extent that the parties are entitled to conclude a settlement on the issue in dispute”.

jurisdictions that have implemented the UNCITRAL Model Arbitration Law, some countries apparently felt that the provision went too far and preferred not to adopt it.⁸⁵

Closely related to article 5 is article 6, which lists provisions in the UNCITRAL Model Arbitration Law that call on the courts to perform some function in aid of arbitration and calls on the adopting State to specify the court or other authority that is to perform them. This is not a complete list of provisions in which the UNCITRAL Model Arbitration Law anticipates the involvement of a court in the arbitration. In particular, article 9 anticipates that parties may request a court for an interim measure of protection and article 27 authorizes “a competent court of this State” to give assistance in the taking of evidence on the request of the arbitral tribunal or a party with the approval of the arbitral tribunal. Evidently, the drafters of the UNCITRAL Model Arbitration Law could not say much more on matters of internal judicial competence, and nearly all enacting States filled these gaps by indicating the competent courts to act under those provisions.

A similar situation arises under article 9, which recognizes the right of the parties to request a court for interim measures of protection “before or during arbitral proceedings”. A number of jurisdictions found it appropriate to list the details and types of interim measures that may be requested.⁸⁶

One area where enacting States have often elaborated on the provisions contained in the UNCITRAL Model Arbitration Law relates to the application for setting aside an arbitral award. Some States have attempted to define the notion of “public policy” as a grounds for avoiding an arbitral award,⁸⁷ other have reduced the time-limit for application to set aside an award.⁸⁸ A few countries have even added additional ground for setting aside an award.⁸⁹

3. Assessment

Despite the adjustments and adaptations made by various enacting jurisdictions, it can be said that there is a high degree of substantive uniformity in the implementation of the UNCITRAL Model Arbitration Law. The success of this Model Law can be explained by a number of reasons. The first of them is timing. The increasing adherence to the New York Convention and the spreading influence of the UNCITRAL Arbitration Rules had encouraged the international arbitration community to look for ways to reduce the remaining obstacles to the effective use of arbitration in international commercial disputes. But timing is not everything. The drafters of the UNCITRAL Model Arbitration Law were also sensitive to what could and what could not be done by way of unifying the law of arbitration. Arbitration practitioners in enacting jurisdictions did also their part by raising awareness among policy makers and judicial authorities as to what are the essential needs of a functioning system of commercial arbitrations. This led to a growing acceptance of some fundamental features of modern international arbitration, such as respect for party autonomy, freedom to agree on the conduct of arbitration proceedings,

⁸⁵ E.g. Egypt, Islamic Republic of Iran, Oman, Sri Lanka.

⁸⁶ E.g. Hungary, India, New Zealand and Zimbabwe; within the United Kingdom, in Scotland; within the United States, California, Oregon, Texas.

⁸⁷ E.g. Australia, India, Malta, New Zealand, Zimbabwe; within the United Kingdom, in Bermuda.

⁸⁸ E.g. Guatemala, Hungary, Sri Lanka.

⁸⁹ E.g. Islamic republic of Iran, Nigeria, Oman; within the United Kingdom, in Scotland.

competence of arbitral tribunals to decide on their own jurisdiction, judicial support to arbitration coupled with restraint from undue interference.

B. THE UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE (1996)

Electronic commerce may be a challenge to the operation of traditional legal concepts such as “document” or “instrument”, “written” contract, “signed” or “sealed” record, or the distinction between original and copy, which have been traditionally used in various legal systems in a manner that implies the existence of a tangible medium for recording, retaining and displaying information. Against that background, and in the interest of promoting legal certainty, the UNCITRAL Model Law on Electronic Commerce offers guidance to domestic legislators wishing to adapt existing law to accommodate electronic commerce.

In less than ten years since its adoption in 1996, the Model Law on Electronic Commerce has been extremely successful. It has influenced existing electronic commerce legislation, and legislation being developed around the world. It has been enacted in national legislation,⁹⁰ uniform acts intended for adoption by sub-sovereign jurisdictions⁹¹ and legislation passed by non-sovereign jurisdictions enjoying legislative autonomy.⁹²

⁹⁰ As of January 2005, legislation implementing provisions of the Model Law has been adopted in (at least) the following countries: Australia (*Electronic Transactions Act 1999*); Colombia (*Ley Número 527 de 1999: “Ley de comercio electrónico”*); Dominican Republic (*Ley n° 126-02, de 4 de septiembre del 2002*); Ecuador (*Ley de comercio electrónico, firmas electrónicas y mensajes de datos* of 2002); France (*Loi n° 2000-230 du 13 mars 2000 portant adaptation du droit de la preuve aux technologies de l’information et relative à la signature électronique*); India (*Information Technology Act 2000*); Ireland (*Electronic Commerce Act 2000*); Jordan (*Electronic Transactions Law (No.85) of 2001*); Mauritius (*Electronic Transactions Acts 2000*), Mexico (*Decreto por el que se reforman y adicionan diversas disposiciones del código civil para el distrito federal, of 26 April 2000*); New Zealand (*Electronic Transactions Act 2002*); Pakistan (*Electronic Transactions Ordinance 2002*); Panama (*Ley 43 de firma digital de Panamá, de 31 de julio de 2001*); the Philippines (*Electronic Commerce Act 2000*); Republic of Korea (*Framework Law on Electronic Commerce 1999*); Singapore (*Electronic Transactions Act 1998*); Slovenia (*Zakon o elektronskem poslovanju in elektronskem podpisu (Electronic Commerce and Electronic Signature Act) 2000*); South Africa (*Electronic Communications and Transactions Act 2002*); Thailand (*Electronic Transactions Act 2002*); and Venezuela (*Decreto n° 1024 de 10 de febrero de 2001 - Ley sobre mensajes de datos y firmas electrónicas*).

⁹¹ In the *United States*, the National Conference of Commissioners on Uniform State Law (NCCUSL) used the Model Law as a basis for the preparation of the *Uniform Electronic Transactions Act (UETA)*, which was adopted by the NCCUSL at its 108th annual conference (Denver, Colorado, 23-30 July 1999) and has since been enacted by the (44) States of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming and the District of Columbia, with other States likely to adopt implementing legislation in the near future, including the State of Illinois, which had already enacted the UNCITRAL Model Law through the *Electronic Commerce Security Act 1998* (Updated information on the enactment of UETA may be found at <http://www.nccusl.org/nccusl/DesktopDefault.aspx> (last visited on 20 August 2003).

A similar exercise has been conducted in *Canada*, where the Uniform Law Conference adopted in 1999 the *Uniform Electronic Commerce Act (UECA)*, which was since been enacted in a number of Provinces and Territories, including British Columbia, Manitoba, New Brunswick, New Foundland and

1. Origin and main features

The original choice of a model law on electronic commerce, rather than, for example, an international convention or model contractual clauses, can be explained by a number of reasons. The work of UNCITRAL was focused on promoting the modernization of *statutory* requirements that existed under domestic law. Already an earlier text, the 1985 UNCITRAL Recommendation on the Legal Value of Computer Records was addressed to governments.⁹³ However, uniform rules intended to adjust existing laws to modern technology need to be flexible enough to take into account the great variety in the nature, type and magnitude of statutory obstacles to electronic commerce in different legal systems.

UNCITRAL felt that it would have been premature, in the early stages of wider use of electronic commerce, to prepare binding standards in the form of an international convention. Nevertheless, it was clear that the work to be done by UNCITRAL had to aim at promoting the enactment of new legislation. It is true that some legal issues associated with electronic communications could be addressed by contractual arrangements between the parties to the electronic commerce relationship, such as trading partner agreements.⁹⁴ However, it was clear that contractual frameworks that were then being proposed for users of electronic commerce relied to a large extent upon the structures of local law, which made them inadequate for international use. Moreover, a purely contractual framework would not be sufficient to address mandatory requirements

Labrador, Nova Scotia, Prince Edward Island, Ontario, Saskatchewan and Yukon. The Province of Quebec enacted specific legislation (*Act to Establish a Legal Framework for Information Technology 2001*) which, although being broader in scope and drafted very differently, achieves many objectives of UECA and is generally consistent with the UNCITRAL Model Law (Updated information on the enactment of UECA may be found at <http://www.chlc.ca/en/cls/index.cfm?sec=4&sub=4b>).

⁹² For example, the Bailiwick of Guernsey (*Electronic Transactions (Guernsey) Law 2000*), the Bailiwick of Jersey (*Electronic Communications (Jersey) Law 2000*) and the Isle of Man (*Electronic Transactions Act 2000*), all Dependencies of the British Crown; the UK overseas territories of Bermuda (*Electronic Transactions Act 1999*), Cayman Islands (*The Electronic Transactions Law, 2000*) and Turks and Caicos (*Electronic Transactions Ordinance 2000*); and the Hong Kong Special Administrative Region of China (*Electronic Transactions Ordinance 2000*).

⁹³ See the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (Vienna, 3-21 June 1985), *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (U.N. document A/40/17), para. 360 (reproduced in *UNCITRAL UNCITRAL Yearbook*, vol. XVI:1985, part one, chap. I, sect. A).

⁹⁴ A trading partner agreement is an agreement used by parties that agree to exchange information electronically which is used to “structure the electronic communications relationship” by dealing with various issues that arise in the course of such communications, such as business issues that need to be made in structuring the communications relationship and a number of legal issues that are ordinarily addressed by the communications agreement (see Amelia Boss. “Electronic Data Interchange Agreements: Private Contracting Toward a Global Environment”, *Northwestern School of Law Journal of International Law & Business*, vol. 13 (Spring/Summer 1992), pp.31 et seq., at 37-38 and the discussion of issues typically covered in trading partner agreements beginning at p. 45).

in national legislation relating to hand-written signatures, written records or form of legal acts, or to effectively provide rules enforceable against third parties.⁹⁵

The Model Law is based on three basic principles: functional equivalence; technology neutrality and party autonomy.

(a) *Functional equivalence.* The basic assumption of the Model Law is that traditional legal notions (such as “document” or “instrument”, “written” contract, “signed” or “sealed” record) need not be replaced by entirely new ones. Instead, the Model Law identifies the circumstances under which the same function envisaged by the law for, say, a “written contract” may be fulfilled by the exchange of communications in electronic form. The approach taken by the Model Law has been called a “functional equivalence approach”;

(b) *Media/technology neutrality.* The rules of the Model Law are “neutral” rules; that is, they do not depend on or presuppose the use of particular types of technology and could be applied to communication and storage of all types of information, which is particularly important in view of speed of technological innovation and development;

(c) *Party autonomy* The Model Law recognizes the importance of contract and “party autonomy”. On the one hand, its non-mandatory provisions leave the parties free to organize the use of electronic commerce among themselves. On the other hand, some of the Model Law's mandatory provisions allow agreements concluded between the parties to be taken into consideration in assessing whether the nature of the methods used to ensure, for example, the security of messages, is reasonable or “appropriate for the purpose”.

In the light of those basic principles, the Model Law elaborates on requirements such as “writing”, “signature”, “original”, retention of data and other matters, such as attribution of data messages, time and place of dispatch and receipt of data messages.

2. Implementation of the Model Law

The Model Law can be regarded as embodying a set of principles formulated in legislative language that are intended to provide a basic legal framework for electronic commerce, with focus upon what is needed to *facilitate* rather than *regulate* electronic commerce. Unlike the UNCITRAL Model Arbitration Law, the Model Law on Electronic Commerce is a more conceptual text. Legislation adopting or proposing to “enact” this Model Law largely reflects the principles of the text, but may depart from it in terms not only of drafting, but also in the combination of provisions adopted or proposed for adoption.⁹⁶

(a) *Form of enactment*

The Model Law on Electronic Commerce can be regarded as establishing a set of model principles, which are drafted in the form of legislative provisions to facilitate

⁹⁵ See the summary of early international e-commerce initiatives and contractual standards in Eric A. Caprioli and Renaud Sorieul, “Le commerce international électronique: vers l’émergence de règles juridiques transnationales”, *Journal du Droit International*, No. 2, 1997, pp. 323 et seq..

⁹⁶ Ibid.

consideration by legislators and assist in the development of laws. Those principles do not necessarily form a discrete set in the same way as the Model Law on International Commercial Arbitration, but address a number of existing rules which may be scattered throughout various parts of different national laws in a typical enacting State. Accordingly, an enacting State may not necessarily incorporate the text as a whole into a free-standing law, but may adopt appropriate provisions into existing legislation. Legislation enacting the Model Law is both free-standing law (as is most often the case) and legislation amending existing codes (France, Mexico).

(b) Scope of application

Article 1 of the Model Law provides that it applies to “any kind of information in the form of a data message used in the context of commercial activities”. Footnotes to this article indicate that enacting States may wish to limit it to “international” commercial activities, expand it to other areas beyond the definition of “commercial” (which is similar to the definition contained in the Model Arbitration Law) or expressly exclude consumer transactions from its scope of application.

(c) Additions, deletions and variations

In those countries that have adopted the Model Law as a single piece of legislation, most of its articles have been retained. Common exclusions, however, are the “best evidence rule” in article 9(1)(b),⁹⁷ which has been adopted nearly exclusively by common law jurisdictions, and the provisions on the use of data messages in connection with the carriage of goods (articles 16 and 17), which has only been implemented by a few countries.⁹⁸

One area where the enacting States have shown a tendency to elaborate upon the provisions of the Model Law concerns electronic signatures. The Model Law contains a general provision on the matter that sets out the basic requirements for the equivalence between electronic and hand-written signatures. The Model Law requires generally that electronic signatures should be capable of identifying the signatory and indicating its approval of the information contained in the relevant data message. The Model Law does not prescribe the use of any particular method, admitting any procedure that is as reliable “as was appropriate for the purpose for which the data message was generated.”

This provision was kept deliberately flexible, so as to preserve technological neutrality. The impossibility of guaranteeing absolute security against fraud and transmission error is not confined to the world of electronic commerce, but is also found in the world of paper documents. When legal rules for electronic commerce are prepared, the often stringent security measures, which are possible and necessary in communication between

⁹⁷ According to this rule, which is known in several common law jurisdictions, in order to prove what is said or pictured in a writing, recording, or photograph the original must be provided unless the original is lost, destroyed, or otherwise unobtainable. With a view to removing obstacles to the evidentiary value of data messages in jurisdictions that apply that rule, article 9(1)(b) of the UNCITRAL Model law on Electronic Commerce provides that in any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

⁹⁸ E.g. Australia, Colombia, the Philippines.

computers, certainly can be applied. The drafters of the Model Law felt that it would be more appropriate, however, to graduate security requirements in steps similar to the degrees of legal security encountered in the paper world, and to respect the gradation, for example, of the different levels of hand-written signature seen in documents of simple contracts and notarized acts. A number of jurisdictions have retained this general formulation and refrained from introducing more specific requirements.⁹⁹ However, a number of countries have added provisions on electronic signatures, some of which are quite extensive, which either prescribe a specific method of electronic signatures (typically digital signatures within a public-key infrastructure)¹⁰⁰ or contemplate more than one method of electronic signature, but usually attach certain legal value to one particular method.¹⁰¹ In some countries, provisions on electronic signatures follow the 2001 UNCITRAL Model Law on Electronic Signatures.¹⁰²

One area that has been the subject of some domestic adjustment – without substantive deviation – relates to the rules in article 15 of the Model Law on time and place of dispatch and receipt of data messages.

Except for France,¹⁰³ the more than 20 countries and non-sovereign jurisdictions that have thus far adopted the Model Law have included provisions on time and place of dispatch and receipt of data messages. Without exception, all enactments of the Model Law have adopted the distinction between designated and non-designated systems.¹⁰⁴ This is also the case in those countries in which uniform law has been prepared on the basis of the Model Law, such as Canada¹⁰⁵ and the United States of America.¹⁰⁶ That distinction, however, is not explicit in the United States Uniform Electronic Transactions Act (UETA). UETA contemplates, in addition to a “designated” information system, an information system that the recipient “uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record”.¹⁰⁷ Notwithstanding that the language used in UETA differs from article 15 of the Model Law, both instruments distinguish between a system that was positively chosen by a party for the receipt of a particular message or type of message and other (non-designated) information systems merely used by the recipient. The latter category, in much the same way as the non-designated system under article 15 of the UNCITRAL

⁹⁹ E.g. Australia, Canada, New Zealand, United States.

¹⁰⁰ E.g. Colombia, Dominican Republic, Ecuador, India, Panama, South Africa.

¹⁰¹ E.g. Pakistan, Slovenia, Singapore, Venezuela. France and Ireland also follow the same approach (however in a separate piece of legislation), by virtue of their membership in the European Union, which has its own rules on electronic signatures.

¹⁰² E.g. Mexico and Thailand.

¹⁰³ The French enactment of the Model Law deals essentially with recognition and evidentiary legal value of electronic records, but does not deal with their communication.

¹⁰⁴ Australia, Colombia, Ecuador, India, Ireland, Jordan, Mauritius, Mexico, New Zealand, Pakistan, Philippines, Republic of Korea, Singapore, Slovenia, Thailand, and Venezuela. The same rules are also contained in the laws of the Bailiwick of Jersey and the Isle of Man, in the British overseas territories of Bermuda and Turks and Caicos and in the Hong Kong Special Administrative Region of China.

¹⁰⁵ Uniform Electronic Commerce Act (UECA), sect. 23 (2).

¹⁰⁶ Uniform Electronic Transactions Act (UETA), sect. 15 (b).

¹⁰⁷ This formulation is also used in section 23 (b) of the Electronic Communications and Transactions Act 2002 of South Africa.

Model Law, was included in UETA out of a concern to “(allow) the recipient of electronic records to retain control over where they would be sent and received”.¹⁰⁸

Domestic enactments of the Model Law are also remarkably uniform in defining the time of receipt of data messages sent to a designated system. Nearly all enactments reproduce the rule of paragraph 2 (a) (i) of article 15 of the Model Law, namely, that a message sent to a designated system is received when it enters that system.

Minor domestic variations exist with regard to cases in which either the addressee has not designated a particular information system or the originator sends the message to a system other than the designated system. Most domestic enactments of the Model Law make that distinction.¹⁰⁹ In those countries, the consequences are generally the same as in article 15 of the Model Law, that is, a message sent to an information system other than the designated one is only deemed to be received upon retrieval by the addressee,¹¹⁰ whereas a message sent in the absence of a designated system is deemed to be received upon entry into an information system of the addressee. However, in two countries in that group¹¹¹ the law explicitly requires retrieval in both situations.

The laws of other countries contemplate only cases where an addressee has not designated an information system.¹¹² In those countries, receipt normally occurs once the message is “retrieved” or “comes to the attention” of the addressee, but in one country¹¹³ receipt occurs upon entry in a system “regularly used by the addressee”. Two countries contemplate only the hypothesis of a message being sent to an information system other than the designated system, in which case receipt occurs upon retrieval.¹¹⁴ It is not clear, for that group of countries, whether a message sent to one particular system despite an express designation of another system would follow the same rule. Arguably, both situations would be treated in the same manner, as is suggested by the law of one country,¹¹⁵ which expressly provides that for all cases other than designated systems, the message is received when it comes to the addressee’s attention.

3. Assessment and subsequent work of UNCITRAL on electronic signatures

¹⁰⁸ The drafters of UETA recognized the fact that “many people have multiple e-mail addresses for different purposes. (Subsection 15 (b) of UETA) assures that recipients can designate the e-mail address or system to be used in a particular transaction. For example, the recipient retains the ability to designate a home e-mail for personal matters, work e-mail for official business, or a separate organizational e-mail solely for the business purposes of that organization. If A sends B a notice at his home which relates to business, it may not be deemed received if B designated his business address as the sole address for business purposes. Whether actual knowledge upon seeing it at home would qualify as receipt is determined under the otherwise applicable substantive law” (Amelia H. Boss, “The Uniform Electronic Transactions Act in a global environment”, *Idaho Law Review*, vol. 37, 2001, p. 329).

¹⁰⁹ E.g. Bermuda, Colombia, Ecuador, India, Jordan, Mauritius, Mexico, Pakistan, the Philippines and the Republic of Korea.

¹¹⁰ Some enactments, as in Bermuda, require, instead of “retrieval”, that the message “come to the attention of the addressee”. This does not, in practice, alter the substance of the rule.

¹¹¹ Mauritius and Mexico.

¹¹² E.g. Australia, Canada, Ireland and Venezuela.

¹¹³ Venezuela.

¹¹⁴ E.g. Slovenia and Thailand.

¹¹⁵ New Zealand.

At the time it was completed, the Model Law was a unique instrument in a legal landscape where there was no existing body of law, whether uniform international law or national law, which comprehensively addressed the issues raised by electronic commerce. To the extent that the Model Law aimed at avoiding the enactment or conflicting domestic legislation, it could be described as an instrument of “preventive” or “pre-emptive” harmonization.¹¹⁶ Of course that was by itself a delicate task, as it involved anticipating the types of issues that might arise in the future, in areas yet largely unexplored even in technologically advanced and legally sophisticated countries.

Despite the wider scope for domestic adjustment, as compared to the UNCITRAL Model Arbitration Law, the UNCITRAL Model law on Electronic Commerce was also quite successful. Not only is there a high level of adherence to its principles – despite significant differences in expressing them in domestic legislation – but there is also a noticeable effect on regional harmonization, with both Asia¹¹⁷ and North America¹¹⁸ taking the lead in using the Model Law as a basis for regional legal harmonization.

The UNCITRAL Model Law on Electronic Commerce was followed in 2001 by another model law dealing specifically with issues related to electronic signatures, such as their legal effect, rules of conduct for the parties involved and cross-border issues.

The negotiation of the second model law proved to be more difficult, as member States could not easily reach a common understanding of the legal issues relating to various electronic signature techniques. While some of the signature legislation around the world had initially focused upon digital signature techniques used in the context of Public Key Infrastructures (PKI),¹¹⁹ it became increasingly clear that PKIs would be only one of several possible methods for electronic authentication. However, PKI models had strong supporters in governments more concerned with prescribing certain security levels than with preserving party autonomy. There were also differing views between the United States and members of the European Union (EU), but also between other States, as regards the adequate level of regulation of electronic signatures. The resulting consensus of the UNCITRAL Model Law on Electronic Signatures was a flexible set of rules to ensure the continuing usefulness and applicability of the Model Law and not to hinder the development of new techniques. The Model Law affirms the principle of party autonomy,

¹¹⁶ The Model Law thus “led the process of development of law by providing universally acceptable solutions to the issues likely to arise, rather than being negotiated after practices and usage had already resulted in disparate laws and regulations” (Renaud Sorieul, Jennifer R. Clift and José Angelo Estrella Faria, “Establishing a Legal Framework for Electronic Commerce: The Work of the United Nations Commission on International Trade Law”, *The International Lawyer*, vol. 35, No. 1 (Spring 2001), pp. 107 et seq., at 109).

¹¹⁷ In Asia, legislation has been passed in Australia, India, New Zealand, Pakistan, the Philippines, Republic of Korea, Singapore, Thailand. Draft legislation is currently being considered in Cambodia, Laos, Samoa and Vietnam.

¹¹⁸ The three member States of the North-American Free Trade Agreement (NAFTA) (Canada, Mexico and United States) have enacted the Model Law..

¹¹⁹ Such as the Utah *Digital Signature Act 1995* (Utah Code Annotated, §§ 46-3-101 to 46-3-504, the German *Digital Signatures Act 1997* (*Gesetz zur Digitalen Signatur* or *Signaturgesetz*, enacted as § 3 of *Gesetz zur Regelung der Rahmenbedingungen für Informations- und Kommunikationsdienste* or *Informations- und Kommunikationsdienste- Gesetz*, 13 June 1997); or the Malaysian *Digital Signature Act 1997*.

and allows private agreements to be taken into account in assessing whether the nature of the authentication methods used is reasonable or “appropriate for the purpose” of the particular transactions to which they relate. The Model Law also offers basic provisions on cross-border recognition that aim at ensuring legal interoperability.

World-wide implementation of common standards will be essential for the smooth and seamless operation of electronic authentication. Within the EU, a high level of harmonization has been achieved by the EU Directive on Electronic Signatures,¹²⁰ which member States are enacting into domestic legislation. This, however, underscores once more the central difference between harmonization in the EU and global harmonization. Unlike the EU directives, UNCITRAL model laws are not binding upon States, which remain free to adopt them or not, or to expand or shorten their scope. Cross-border recognition of signatures and their supporting devices remains a largely unsettled issue.

CONCLUSION

There are various reasons why countries use UNCITRAL model laws as a basis for the development of domestic legislation. Some countries may adopt a model law because its legal community and policy makers regard it as a good step to further the unification of the law in the relevant area. For a number of other countries, UNCITRAL model laws serve as convenient first drafts of modern statutes, with or without regard for the legal harmonization argument. For other States, adoption of an UNCITRAL model law may be seen as an important factor in publicizing to the international legal community – which knows these texts and usually trusts them – the desirability of doing business in that country. Or, States may simply conclude that, from a substantive point of view, the solutions recommended in a given model law will effectively improve the domestic environment for the types of transactions covered by it.

Whatever the reason is, the decision to adopt a model law is always voluntary and in no way forced upon States. This is an important point, as it usually means that those in charge of drafting domestic legislation to enact a model law will be more personally involved in the process and may become instrumental in raising knowledge about the new law. This level of engagement may be very useful for the success of legal harmonization, and, more generally, of any law reform effort.

The drafting style of an UNCITRAL model law, as with of all legal texts adopted at international level, will be different, sometimes radically different, from the style of drafting in some countries. The importance of that fact in the politics of adoption of a new law will depend in part on the strength of the local drafting tradition. The entire law may be resisted by lawyers, legislative draftsmen, professors of law and ministry officials simply because the law does not look the way their laws look. The temptation to improve on the drafting of the text is obvious. No one would challenge a legislator’s legitimate right to improve things that deserve improvement. It is important, however, to study carefully the reasons why an international text is formulated in a certain way and the

¹²⁰ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (*Official Journal of the European Communities*, vol. L 13, 19 January 2000, p. 12).

rationale for the policy choices it makes. A certain level of variation – for instance to ensure conformity with the local drafting style or to better reflect local economic conditions or legal tradition – may be appropriate, or even necessary, where the primary purpose of adopting an international model is to modernize the law. Changing the text of a model law to conform to the local style of drafting or to fit squarely the legal status quo may be rather counter-productive, however, if one of the purposes of the new law is to make business in the country more attractive to the foreign lawyer.