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Article

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George A Bermann*

The arbitration law of the United States remains, regrettably, the Federal Arbitration Act (FAA), enacted in 1925 and essentially unchanged. Despite its age, it has been significantly amended only once, in order to transpose into law the New York and Panama Conventions. Otherwise, it reads just as it did when enacted almost a century ago. Given its age and the remarkable developments in the law of arbitration over past decades, the FAA unsurprisingly fails to address a very large number of issues that have arisen in arbitral proceedings and judicial decisions on arbitration in the many intervening years. Even the solutions to the issues the FAA does address are to a great extent outdated or otherwise inadequate.

Rusty Park is among those most alert to the deficiencies of the FAA and has shown himself over decades especially well equipped to suggest how they might best be addressed. I do not mean by focusing in this article on the UNCITRAL Model Law to suggest that Rusty particularly favours its adoption at either the federal or state level in the United States. But since at least some US states have viewed adoption of the Model Law as a useful way to enhance the governance of international arbitration in the United States, examining their attempts at improvement seems an exercise especially suitable for a work in Rusty's honour.

The FAA's serious shortcomings as a *lex arbitri* are one of the reasons that led the American Law Institute to commission and adopt in 2019 a Restatement of the US Law of International Commercial and Investor-State Arbitration, the purpose being to address the countless issues on which the FAA is silent, and to bring clarity and coherence to US law. Even so, the Restatement is essentially a soft law instrument, meant as guidance to courts and counsel, and cannot perform the proper functions of a *lex arbitri*.

That said, neither arbitration nor even international arbitration is an exclusively federal matter in US law. According to the United States Supreme Court, US states are free to enact legislation and develop case law on arbitration, including international arbitration, provided they are not 'preempted' by federal law.[1] State law is preempted only when it 'stands

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[1] See generally Christoper R Drahozal, Federal Arbitration Act Preemption, 79 Ind. L. J. 393 (2004); Note, State Courts and the Federalization of Arbitration Law, (2021) 134 Harv L Rev 1184.

as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'.[2] In the arbitration context in particular, state law is preempted when the measure '(a) does not apply to contracts generally or (b) substantially interferes with fundamental attributes of arbitration'.[3]

US states have not in fact been inactive in the arbitration field. The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Arbitration Act (UAA) in 1955, updated by a Revised Uniform Arbitration Act (RUAA) in 2000.[4] A key purpose of the UAA was 'to insure [sic] the enforceability of agreements to arbitrate in the face of oftentimes hostile state law'.[5] It operates as a model law on the recognition and enforcement of both arbitration agreements and arbitral awards. The RUAA has been enacted by 21 states, while the UAA remains on the books in twelve others. Such significant adoption at the state level shows that the Uniform Law is viewed as a considerable improvement over the FAA as a codification of the law of arbitration. (That the states have legislated in the field of arbitration is unsurprising. The FAA applies only where interstate or foreign commerce is involved. Intra-state arbitration is necessarily governed at the state law level.) Both the UAA and the RUAA apply to all arbitration in the United States, whether domestic or international in character. Yet, it should not be supposed that those model laws were drafted with the particular characteristics of international arbitration in mind.

Seven states, seeking to focus especially on international arbitration, have enacted into law the UNCITRAL Model Law on International Commercial Arbitration, an obvious advantage of their doing so being that it aligns their law of international commercial arbitration with the law of a very sizeable number of jurisdiction world-wide. Doing so also presumably heightens the enacting state as a prospective arbitral situs. The Georgia legislature described the enactment's purpose as 'to encourage international commercial arbitration in this state [and] to provide a conducive environment for international business and trade'.[6] The fact remains, however, that the UNCITRAL Model Law does not form part of federal law in the United States and remains applicable in only a small number of US states.

The state of Florida distinguished itself by becoming the first state in the United States to enact in 1986 an international arbitration statute, the Florida International Arbitration Act,[7] which was indeed closely patterned upon the then-newly minted UNCITRAL Model Law. Again, in 2010, it became the first state to enact the Model Law with its 2006 Amendments, changing the statute's title to Florida International Commercial Arbitration Act (FICAA). As pioneer, Florida was distinctly faithful to the Model Law, choosing not to significantly vary any of its provisions. Since then, six other US states have enacted the Model Law, albeit with modest modifications.[8]

The states enacting the UNCITRAL Model Law are not a cross-section of the US states. Four of them view their largest cities as promising arbitration sites: San Francisco and Los Angeles in California; Atlanta in Georgia; Chicago in Illinois; Miami in Florida, and Houston in Texas. The only possible exceptions are Connecticut and Oregon. (The latter's participation may be explained by the state's outstanding record in legislating in the private international law sphere.

[2] *Hines* v *Davidowitz*, 312 U.S. 52, 67 (1941).
[3] Restatement of the US Law of International Commercial and Investor-State Arbitration, s 1.6.
[4] UNIF. ARBITRATION ACT, 7 Pt. IAU.L.A. 1–98 (2009 & Supp. 2015).
[5] Prefatory Note to the Uniform Arbitration Act, National Conference of Commissioners on Uniform State Laws (Dec. 13, 2000) 1.
[6] Ga. Code Ann., § 9-9-20(b).
[7] F.S.A., §§ 684.0001 et seq.
[8] These other states are California, Connecticut, Georgia, Illinois, Oregon, and Texas.

Oregon's conflicts of law statute is regarded as the foremost codification of the law in the field in the United States[9]) New York and the District of Columbia are prominent outliers in not having specific international arbitration statutes notwithstanding their position as prominent international arbitration hubs. Fortunately, no provision of the UNCITRAL Model Law, as adopted by the states, has been found sufficiently at odds with the FAA to warrant preemption.

As is well known and easily documented, States around the world are free to modify the UNCITRAL Model Law as they see fit on the occasion of enacting it into law, and that is true of US states as well. Such modifications presumably reflect ways in which it was thought that the Model Law, for all its virtues, might be improved or better adapted to the enacting jurisdiction. However, to the author's knowledge, no comprehensive study has been made of the ways in which state legislatures in the United States, or legislatures around the world for that matter, have chosen to modify the UNCITRAL Model upon adopting it. This article seeks to perform that function, at least as regards US states that have seen fit to adopt the Model Law.

The modifications to the UNCITRAL Model Law introduced by the US state legislatures may be placed in a small number of categories, namely: (i) those that seek greater clarity, precision, or detail, (ii) those that are thought to better align with certain features of US or State law, (iii) those that reflect policy preferences, (iv) those that address the unaddressed, and (v) those that innovate. The sections below illustrate, for each of these purposes, the principal changes that US state legislatures have introduced into the Model Law. This account necessarily disregards the extremely large number of ways in which state legislatures have rephrased or reorganized the Model Law without introducing changes of any substance.

The fact that this article focuses on divergences between the UNCITRAL Model Law and the state statutes adopting it must not obscure the fact that in all essential respects those statutes leave the Model Law intact. For the most part, the deviations are marginal only. Anyone familiar with the UNCITRAL Model Law would immediately recognize, upon reading the statutes enacting it at the US state level, that they have their genesis in the UNCITRAL Model Law. Even so, it remains of interest that the state legislatures enacting the Model Law chose to adapt it in the ways they have done.

GREATER CLARITY, PRECISION, AND DETAIL

As in the case of many modifications to the UNCITRAL Model Law made by foreign States, some changes have no purpose other than to lend a Model Law rule, to one degree or another, a greater measure of clarity or precision. Several examples of such modifications follow.

Definitions

Some US states, while of course confining the act to international arbitration, have altered the definition of 'international', and in more ways than one. For example, under the Illinois statute, it is not enough, in order for arbitration to qualify as international, that a *substantial* part of the obligations in a commercial relationship be performed outside the country or countries in which the parties have their places of business, as under the Model Law.[10] Rather, the *predominant* part of those obligations must be performed outside the country or countries in which the parties have their places of business.[11]

The Illinois legislature also saw fit, in the interest of greater clarity, to identify the time at which the international character of an arbitration or award is to be determined. The statute

[9] O.R.S., §§ 15.300–15.380.
[10] Model Law, Art 1 (3)(b)(ii).
[11] 710 ILCS § 30/1-5(c)(2)(ii).

specifies that the question whether an arbitration does or does not have an international character is determined at the conclusion of execution of the arbitration agreement.[12]

It is commonly noted that instruments like the UNCITRAL Model Law and the New York Convention do not undertake to meaningfully define the term 'commercial' for purposes of these instruments' applicability, thus leaving its definition to the law of the country before whose courts the issue arises. However, California,[13] Oregon,[14] and Texas[15] have sought to measurably improve on that by setting out a non-exclusive list of relationships that qualify as 'commercial'. The Texas statute identifies as among relationships of a commercial character: (i) a transaction for the supply or exchange of goods or services, (ii) a distribution agreement, (iii) a commercial representation or agency, (iv) an exploitation agreement or concession, (v) a joint venture or other related form of industrial or business cooperation, (vi) the carriage of goods or passengers by air, sea, rail, or road, (vii) a relationship involving construction, insurance, licensing, factoring, leasing, consulting, engineering, financing, banking, professional services or intellectual or industrial property, including trademarks, patents, copyrights, and software programs, or (viii) the transfer of data or technology.[16] The UNCITRAL Model Law makes a similar effort, but only in the form of a footnote.[17]

Refusal to refer the parties to arbitration

Article 8(1) of the Model Law requires a court to withhold enforcement of an arbitration agreement if it finds the agreement to be 'null, void, inoperative or incapable of being performed'. It does not indicate whether a court may do so on its own motion. The Georgia legislature chose to expressly exclude that possibility. A court may not dismiss a case on the basis of a deficiency in an arbitration agreement without a party having requested it to do so.[18] California has recast the Model Law's formulation from a *duty* on the part of a tribunal to a *right* of a party to an arbitration agreement: 'When a party to an international commercial arbitration agreement … commences judicial proceedings seeking relief with respect to a matter covered by the agreement, any other party to the agreement may apply to the superior court for an order to stay the proceedings and to compel arbitration'.[19]

Receipt of written communications

When Connecticut adopted the 1985 version of the UNCITRAL Model Law, it did so practically verbatim. However, the one change it saw fit to make concerns receipt of written communications. Article 3 of the Model Law provides that a written communication is deemed to have been received if delivered to the addressee personally or at his or her place of business, habitual residence, or mailing address. If, upon reasonable efforts, these cannot be identified, the communication may be sent to the addressee's last-known place of business, habitual residence, or mailing address by registered letter or other means providing a record that delivery was attempted. Connecticut

[12] 710 ILCS § 30/1-5(c)(1). The Model Law refers in Art 1(3)(a) only to 'the time of the conclusion of that agreement'.
[13] Cal.C.C.P., § 1297.16.
[14] O.R.S., § 36.450.
[15] Civ. Prac. & Remed. C., § 172.004.
[16] Ibid.
[17] Footnote 2 states: 'The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road'.
[18] Ga. Code Ann., § 9-9-29.
[19] Cal.C.C.P., § 1297.81.

specifically requires that the substitute be 'reasonably calculated to give the addressee actual notice'.[20]

Judicial appointment of arbitrators

The Model Law provides that any decision by a court on the appointment of an arbitrator shall be non-appealable.[21] However, the Illinois statute seeks to dispel any doubt that the inability to appeal such a decision 'shall not preclude the parties from raising any ground for setting aside or refusing to recognize or enforce an arbitral award to the extent otherwise permitted under applicable federal law'.[22] This clarification is a useful one. The fact that an arbitral appointment is not immediately appealable does not, and should not, mean that the appointment cannot give rise to a ground for setting aside or denying enforcement of the resulting award.

Review of finding of jurisdiction by tribunals

Among the Model Law's most significant provisions is Article 16, according to which:

> If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of the ruling, the court…to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

This provision allows, in situations in which the respondent contests a tribunal's finding of jurisdiction, for an early and presumably binding judicial determination of the matter. If the jurisdictional challenge is successful, the proceedings may end there. Notably, this provision is found in the statutes of every US state adopting the Model Law.[23]

However, in the apparent interest of clarity, the Illinois legislature has added language specifying that a party, by not availing itself of this provision, does not waive or otherwise lose its right to challenge arbitral jurisdiction in a post-award action. The statute states squarely that the availability of this remedy 'shall not preclude the parties from raising any ground for setting aside or refusing to recognize or enforce an arbitral award to the extent otherwise permitted under applicable federal law'.[24] This represents a useful addition to Article 16.

Interim measures

In its 2006 version, the Model Law not only authorizes interim arbitral measures, but goes some distance in Articles 17 through 17J to indicate the forms they may take and the conditions to be met before they are to be granted. With regard to forms, Article 17 contemplates orders designed to maintain or restore the status quo, prevent action detrimental to the arbitral process itself, preserve assets for satisfying an eventual award, or preserve evidence for use in the proceedings. Article 17A goes on to require that the party requesting an interim measure satisfy the arbitral tribunal that:

[20] C.G.S.A., § 50a-103 (2020).
[21] Model Law, Art 11(5).
[22] 710 ILCS, § 30/10-10(f).
[23] Cal.C.C.P., § 1297.161; C.G.S.A., § 50a-116; F.S.A., § 684.0017; Ga. Code Ann., § 9-9-37; 710 ILCS, § 30/15-5; O.R.S., § 36.484; Civ. Prac. & Remed. C., § 172.082.
[24] 710 ILCS, § 30/15-5.

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

The Model Law importantly provides in Article 17H that interim measures are entitled to judicial recognition and enforcement, irrespective of the country in which they are issued. However, recognition and enforcement may be denied if any one of the grounds set out in Article 17I is established—grounds that largely mirror those on the basis of which an award may denied recognition or enforcement under Article 36 of the Model Law and the New York Convention. Recognition and enforcement may also be denied if (i) the requesting party fails to comply with tribunal's requirement that security be posted, (ii) the interim measure has been suspended or terminated, or (iii) the measure is incompatible with the powers of the requested court.

Only Florida[25] and Georgia[26] have included Articles 17A-17J in their legislation. The other five states have not done so, largely because they enacted their statutes prior to the 2006 amendments. They, like the 1985 Model Law itself, clearly authorize the issuance by tribunals of interim measures, though only in the most general of terms. California allows parties to request enforcement of an arbitral interim measure 'pursuant to the law applicable to the granting of the type of interim measure relief requested',[27] a condition whose import is not immediately apparent.

A pro-arbitration philosophy

The case law of the US Supreme Court on matters of arbitration, whether domestic or international, is replete with references to a substantive federal policy in favour of arbitration,[28] which is manifested in many ways, such as a policy favouring broad interpretations of the scope of application of agreements to arbitrate.[29] The Oregon legislature saw fit to literally build this philosophy into its enactment of the Model Law, stating:

> It is the policy of the Legislative Assembly to encourage the use of arbitration and conciliation to resolve disputes arising out of international relationships and to assure access to the courts of this state for legal proceedings ancillary to or otherwise in aid of such arbitration and conciliation…[30]

Oregon also requires both courts and tribunals to interpret the arbitration law in good faith in accordance with the ordinary meaning to be given to their terms in their context and in light of their object and purpose, allowing recourse as necessary not only to ordinary canons of interpretation but specifically also to 'the documents of [UNCITRAL] and its working group respecting the preparation of the UNCITRAL Model Law…and give those documents the weight that is appropriate in the circumstances'.[31]

[25] F.S.A., §§ 684.0018–684.0027.
[26] Ga. Code Ann., §§ 9.9.38–9.9.39.
[27] Cal.C.C.P., § 1297.92.
[28] See, eg, *Moses H. Cone Mem. Hosp.* v *Mercury Const. Co.*, 460 U.S. 1 (1983).
[29] See, eg, *Lamps Plus, Inc.* v *Varela*, 587 U.S. ___, 139 S. Ct. 1407, 1417 (2019).
[30] O.R.S., § 36.452.
[31] O.R.S., § 36.526.

Treatment of counterclaims

The foregoing is not to suggest that all clarifications introduced by states enacting the UNCITRAL Model Law bring great value. Consider, for example, the California provision to the effect that '[w]here this title … refers to a claim, it also applies to a counterclaim, and where it refers to a defense, it also applies to a defense to that counterclaim'.[32] This provision reflects common sense and courts would almost certainly, where appropriate, apply to counterclaims the same rules as apply to claims, and apply to defenses to counterclaims the same rules as apply to defenses to claims. On the other hand, inclusion of a provision to this effect does serve to eliminate any imaginable doubt as to the matter.

BETTER ALIGNMENT WITH US LAW

The UNCITRAL Model Law, having been crafted for the generality of jurisdictions, may need a specific adjustment here and there to suit the particularities of the law and practice of any given jurisdiction enacting it. Many of the examples given thus far illustrate the point to some degree, and so too will others to come. But two changes made by US states enacting the Model Law fall squarely in this category.

Non-justiciability

In enacting the Model Law, the Georgia legislature took the step of barring courts from declining to enforce an agreement to arbitrate on the ground that the underlying controversy is a non-justiciable one:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit any controversy thereafter arising to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.[33]

Non-justiciability is an important doctrine in US law. A non-justiciable dispute is one that is deemed not, for one reason or another, a proper subject for judicial determination. There is surely value in ensuring that courts do not decline to enforce an arbitration agreement because it considers the underlying claim to be non-justiciable under US or State law.

Limitation on court intervention

Among the most central provisions of the 2006 Model Law is Article 5, according to which 'in matters governed by this Law, no court shall intervene except where so provided in this Law'. This reflects the widely held view that judicial intervention in arbitral proceedings should be subject to clearly defined limits. It is difficult to imagine that any enacting State would omit this provision, but they may of course allow a form of court intervention that Article 5, as drafted, would not permit if there is reason to do so. In consideration of the federal structure of the United States, the California legislature thought it necessary to allow state courts to involve themselves in an arbitral proceeding in a way other than those indicated by Article 5 where federal law, for any reason, requires it.[34]

[32] Cal.C.C.P., § 1297.24.
[33] Ga. Code Ann., § 9-9-3.
[34] Cal.C.C.P., § 1297.51.

ADDRESSING THE UNADDRESSED

Unsurprisingly, in some respects the drafters of state legislation did not seek merely to clarify a provision of the Model Law or adapt it to US law, but rather to address some of the many questions that the Model Law does not.

Disclosures and challenges to arbitrators

The UNCITRAL Model Law requires persons nominated as arbitrators to disclose any and all circumstances that may give rise to justifiable doubts as to their independence and impartiality,[35] and subjects such persons to challenge on those grounds.[36] It also establishes a challenge procedure.[37] However, it says nothing particular about what must be disclosed or what may give rise to justifiable doubts. That is not altogether surprising, because arbitrator independence and impartiality is the subject of important soft law[38] and often of institutional rules,[39] and the Model Law is not alone among arbitration laws in leaving the matter to other sources. Nevertheless, a legislature may seek to fill that gap, and several US states enacting the Model Law have done so.

For example, the Texas Arbitration Act specifies items of information that prospective arbitrators must disclose to the parties and that may cause an arbitrator's impartiality or independence to be called into question. The information required to be disclosed by the Texas law includes (a) the individual's personal bias or prejudice against a party; (b) personal knowledge of a disputed evidentiary fact in the proceeding; (c) prior service as an attorney in the matter in controversy; (d) association with a person who during the association participated in the matter; (e) status as a material witness concerning the matter; (f) prior service as an arbitrator or conciliator in another proceeding involving a party to the proceeding; (g) a close personal or professional relationship to another person related to a party; and (h) a financial interest on the part of the person, individually or as a fiduciary, or the person's spouse or minor child residing in the person's household, or a person 'within the third degree of relationship to' a party, spouse of a party, or a person having certain relationships with a party or the dispute.[40]

[35] Model Law, Art 12(1).
[36] Model Law, Art 12(2).
[37] Model Law, Art 13.
[38] These include the IBA Guidelines on Conflicts of interest in International Arbitration.
[39] Article 11 of the ICC Rules states as follows:

1. Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.
2. Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
3. An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.

Article 14 adds that:

1. A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.
2. For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.
3. The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

[40] Civ. Prac. & Remed. C., § 172.056 of the Texas Arbitration Act. The Texas Arbitration Act permits a person of any nationality to be appointed as an arbitrator. Civ. Prac. & Remed. C., § 172.052. See Handbook of Texas Lawyer and Judicial Ethics, Vol 48-48B (Texas Practice Series, 2013) s 10:5.

Oregon has enacted a broadly similar provision setting out a similar list of circumstances that may give rise to doubt over the independence and impartiality of an arbitrator.[41] The California provision is even more comprehensive.[42] As to the grounds and procedures for challenge of an arbitrator, the state statutes mostly do not differ materially from Articles 12 and 13 of the Model Law; the Illinois statute, for example, copies them verbatim.[43] As under the Model Law, under all the statutes under consideration here a party intending to challenge an arbitrator must do so in writing to the tribunal within a short period (typically 15 days) of becoming aware of the circumstances creating justifiable doubts as to the arbitrator's impartiality or independence. However, as already observed,[44] the Illinois statute establishes that a court decision regarding a challenge to arbitrators is non-appealable 'shall not preclude the parties from raising any ground for setting aside or refusing to recognize or enforce an arbitral award to the extent otherwise permitted under applicable federal law'.[45]

Appointment or replacement of an arbitrator

An important question of practice that generally goes unanswered, not only in arbitration laws but also in arbitral rules, is the impact on arbitral procedure of replacement of an arbitrator, and more particularly the necessity, or not, of recommencing the hearing in the event that a new arbitrator is, for some reason, appointed after the arbitral proceeding is already well underway. The Texas statute addresses the matter squarely, providing that if a sole or presiding arbitrator needs to be replaced, the hearing, if previously held or underway, must begin anew. If the

[41] Section 36.476 of the Oregon International Commercial Arbitration and Conciliation states that an arbitrator must disclose that he or she (a) has a personal bias or prejudice toward a party or personal knowledge of the disputed evidentiary facts; (b) served at one point as counsel in the matter in controversy or was associated with a person who participated in the matter during their association; (c) served as an arbitrator or conciliator in another proceeding involving one or more of the parties to the proceeding; (d) individually or as a fiduciary, or whose spouse or minor child, or anyone residing in the person's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

[42] The California statutes requires disclosure within 15 days of any information suggesting the following:

(a). The person has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
(b). The person served as a lawyer in the matter in controversy, or the person is or has been associated with another who has participated in the matter during such association, or he or she has been a material witness concerning it.
(c). The person served as an arbitrator or conciliator in another proceeding involving one or more of the parties to the proceeding.
(d). The person, individually or [as] a fiduciary, or such person's spouse or minor child residing in such person's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.
(e). The person, his or her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person meets any of the following conditions:

(i). The person is or has been a party to the proceeding, or an officer, director, or trustee of a party.
(ii). The person is acting or has acted as a lawyer in the proceeding.
(iii). The person is known to have an interest that could be substantially affected by the outcome of the proceeding.
(iv). The person is likely to be a material witness is the proceeding.

(f). The person has a close personal or professional relationship with a person who meets any of the following conditions:

(i). The person is or has been a party to the proceeding, or an officer, director or trustee of a party.
(ii). The person is acting or has acted as a lawyer or representative in the proceeding.
(iii). The person or expects to be nominated as an arbitrator or conciliator in the proceeding.
(iv). The person is known to have an interest that could be substantially affected by the outcome of the proceeding.
(v). The person is likely to be a material witness in the proceeding.

Cal.C.C.P., § 1297.121.

[43] 710 ILCS, § 30/10-20.

[44] n 21 above.

[45] 710 ILCS § 30/10-20(c).

tribunal member replaced is neither sole nor presiding, the arbitral tribunal may resolve the question as it deems best.[46] The California[47] and Oregon[48] statutes are nearly identical in their details.

Consolidation

A few of the US statutes include a provision on consolidation that is absent from the UNCITRAL Model Law. Of course, in the years since the Model Law was adopted, issues related to multiple parties and multiple proceedings have come very much to the fore, so much so that were the Model Law to be again amended at the present time, such provisions would very likely be included. The Georgia law addresses consolidation as follows:

> (d) Unless the parties agree to confer such power on the tribunal, the tribunal shall not have the power to order consolidation of proceedings or concurrent hearings; provided, however, that the parties shall be free to agree:
>
> (1) That the arbitral proceedings shall be consolidated with other arbitral proceedings; or
> (2) That concurrent hearings shall be held, on such terms as may be agreed.[49]

The Oregon statute goes into still greater detail, for example by providing that the court may in addition '(d) order the arbitration proceedings … to be held at the same time or one immediately after the other' and '(e) order any of the arbitration proceedings … to be stayed until the determination of any other of them.'[50]

Attorney representation

The California statute distinguishes itself from the others by specifically addressing the capacity of attorneys who are not admitted or otherwise authorized to practice in the state to represent parties in arbitration. It states that an individual not admitted to practice in the state may represent a party in an arbitration provided he or she is deemed to be a 'qualified attorney', by which is meant that he or she (a) is admitted to practice in another state (or the District of Columbia) or territory or a foreign country, (b) is subject to effective regulation and discipline by a duly constituted professional body, and (c) is in good standing in every jurisdiction in which he or she is admitted or authorized to practice law.[51] However, subject to certain exceptions, even if

[46] Civ. Prac. & Remed. C., § 172.063.

[47] Cal.C.C.P., § 1297.153. The California statute adds that '[u]nless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator … is not invalid because there has been a change in the composition of the tribunal'. Ibid., §1297.154. Presumably an exception would be made where the prior order or ruling was tainted by misconduct of the arbitrator being replaced.

[48] Section 36.482 of the statute provides as follows:Unless otherwise agreed by the parties:

> (a). Where the number of arbitrators is less than three and an arbitrator is replaced, any hearings previously held shall be repeated;
> (b). Where the presiding arbitrator is replaced, any hearings previously held shall be repeated; and
>
> Where the number of arbitrators is three or more and an arbitrator other than the presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.

[49] Ga. Code Ann., § 9-9-46. The Texas statute places the decision to consolidate in the hands of a district court, authorizing it to consolidate claims if the parties agree. If the parties cannot agree on a tribunal for the consolidated arbitration, the court may itself appoint a tribunal or take other action it deems necessary. Civ. Prac. & Remed. C., § 172.173.

[50] O.R.S., § 36.506.

[51] Cal.C.C.P., § 1297.185.

all of these conditions are met, such an individual still may not represent a party in an arbitration, conciliation, mediation, or other alternative dispute resolution proceeding unless he or she satisfies at least one of a number of additional stated conditions.[52] Unsurprisingly, such an attorney is subject to the jurisdiction of the California courts and the disciplinary authorities of California. The California State Bar is also invited to report any complaints or disciplinary violations to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted or authorized to practice law.

Issuance of interim measures by a court

The Model Law usefully authorizes parties in an arbitration to seek interim relief from a court[53] and declares that having resort to a court is not inconsistent with an intention to arbitrate.[54] However, some states have chosen to regulate judicial interventions more closely. Thus, the California,[55] Oregon,[56] and Texas[57] statutes go into greater detail on the subject. They specifically authorize, non-exhaustively, attachments, and preliminary injunctions. They go on to provide that, in considering a request for interim relief, 'the court shall give preclusive effect to a finding of fact made by the tribunal in the arbitration', including the probable success of the claim. Interestingly, they further specify that if the tribunal has not yet ruled on an objection to its jurisdiction, the court may not grant preclusive effect until the court makes its own independent finding of jurisdiction. There is nothing in the Model Law itself to suggest that, absent a tribunal ruling on jurisdiction, a court must independently determine arbitral jurisdiction before affording interim relief.

Discovery and subpoenas

Absent from the Model Law is the important question of access to evidence (other than the general right to request judicial assistance in the gathering of evidence, as provided for by Article 27 of the Model Law[58]). This is a matter that US state legislatures enacting the Model Act are unlikely to overlook. The Georgia statute provides as follows:

> (a) The arbitrators may issue subpoenas for the attendance of witnesses and for production of books, records, documents, and other evidence. Subpoenas shall be served and, upon application to the court… by a party or the arbitrators, enforced in the same manner provided by law for the service and enforcement of subpoenas in a civil action.

[52] It is sufficient if any of the following circumstances are present:

(a). the services are undertaken in association with an attorney admitted to the bar of California and actively participates in the matter;
(b). the services are reasonably related to the attorney's practice in a jurisdiction in which he or she is admitted;
(c). the services are performed for a client who resides in or has an office in the jurisdiction in which the attorney is admitted or authorized to practice;
(d). the services are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted or authorized to practice;
(e). the services arise out of a dispute governed primarily by out-of-state, foreign or international law.

[53] Model Law, Art 17 J.

[54] Model Law, Art 9.

[55] CA § 1297.94., 1297.95.

[56] O.R.S., § 36.470.

[57] Civ. Prac. & Remed. C., § 172.175.

[58] Article 27 provides:The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. Part One. UNCITRAL Model Law on International Commercial Arbitration 17 The court may execute the request within its competence and according to its rules on taking evidence.

(b) Notices to produce books, writings, and other documents or tangible things, depositions, and other discovery may be used in the arbitration according to procedures established by the arbitrators.
(c) A party shall have the opportunity to obtain a list of witnesses and to examine and copy documents relevant to the arbitration.[59]

The Illinois[60] and Texas[61] statutes contain a similar provision, though the enactments differ in some details. Thus, Illinois statute limits the obtaining of evidence to document production, witness testimony, and depositions. 'No other discovery shall be permitted unless otherwise agreed by the parties'.[62] The Georgia statute goes on to prescribe the amount and manner of witness compensation.[63]

Interim awards

Similarly, while the Model Law does not specifically address interim awards (as distinct from interim measures), the Texas statute expressly states that a tribunal may at any time make an interim award on any matter on which it could make a final award and such an interim award is enforceable to the same degree as a final award.[64]

Interest, costs, and fees

The UNCITRAL Model Law very summarily prescribes the form and content of an award. Article 31 provides:

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms ….
(3) The award shall state its date and the place of arbitration …. The award shall be deemed to have been made at that place.
(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

[59] Ga. Code Ann., § 9-9-49.
[60] 710 ILCS, § 30/20-50 of the statute provides:

(a) The arbitral tribunal may issue subpoenas to parties or third parties for the attendance of witnesses and for the production of books, records, documents, and other evidence and shall have the power to administer oaths. The production will be for the purpose of presenting evidence at the arbitration hearing and will not include pre-trial discovery as known in common law countries. Subpoenas so issued shall be served and, upon application to the court by a party or the arbitral tribunal, enforced, in the manner provided by law for the service and enforcement of subpoenas in civil cases.
(b) All provisions of law compelling a person under subpoena to testify are applicable.
(c) On application of a party and for use as evidence, the arbitral tribunal may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

[61] Civ. Prac. & Remed. C., §§ 171.051, 172.105.
[62] 710 ILCS, § 30/20-50(d).
[63] Ga. Code Ann., § 9-9-49(d).
[64] Civ. Prac. & Remed. C., § 172.143.

No reference is made in the Model Law to interest, costs, or fees. These are matters that the drafters of the Model Law most likely thought could and should be left to the institutional rules adopted by the parties. However, several US states have decided otherwise. The Illinois version of the Model Law specifically authorizes the tribunal, unless otherwise agreed by the parties, to award interest as well as allocate costs at its discretion, specifying that costs may include administrative fees, arbitrator and expert fees and expenses, counsel fees and expenses. It states:

(g) Unless otherwise agreed by the parties, the arbitral tribunal may award interest.
(h) Unless otherwise agreed by the parties, the costs of an arbitration are at the discretion of the arbitral tribunal.
(i) In making an order for costs, the arbitral tribunal may include as costs any of the following:

(1) the fees and expenses of the arbitrators and expert witnesses;
(2) legal fees and expenses;
(3) any administration fees of the institution supervising the arbitration; and
(4) any other expenses incurred in connection with the arbitral proceedings.

(j) In making an order for costs, the arbitral tribunal may specify:

(1) the party entitled to costs;
(2) the party who shall pay the costs;
(3) the amount of costs or method of determining that amount; and
(4) the manner in which the costs are to be paid.[65]

Other state statutes do much the same.[66]

Personal jurisdiction

While the Model Law provides the grounds for set aside of an award or denial of its recognition and enforcement, it avoids altogether issues related to the jurisdictional and procedural aspects of set aside or enforcement actions in national courts. It most likely viewed doing so as impermissibly entering into civil procedure territory. Notably, Article III of the New York Convention similarly leaves the procedural rules governing the enforcement of awards to the law of the place where enforcement is sought.

With one important exception, state statutes enacting the Model Law in the United States. likewise do not venture into this area. But the Florida legislature, concerned about the uncertainty that surrounds personal jurisdiction in the United States, undertook to address the question. It included in the legislation a provision that explicitly makes consent an adequate basis of personal jurisdiction, specifying that agreeing to arbitrate or engaging in arbitration constitutes consent to the jurisdiction of the Florida courts in any action arising out of the arbitration or the award.[67] Unfortunately, as drafted, the arbitration must have taken place in Florida. It would thus appear that agreeing to arbitrate or arbitrating in a foreign country is not to be regarded as consent to jurisdiction of the Florida courts in an action to enforce an award made abroad.

[65] 710 ILCS § 30/25-20. To much the same effect, see Civ. Prac. & Remed. C., §172.145; O.R.S., § 36.514.

[66] The Georgia statute provides:The arbitrators may award reasonable fees and expenses actually incurred, including, without limitation, fees and expenses of legal counsel, to any party to the arbitration and shall allocate the costs of the arbitration among the parties as it determines appropriate. OGCA, sec. 9-9-53.See also Civ. Prac. & Remed. C., §§ 172.144–172.145.

[67] F.S.A., § 684.0049.

Arbitrator immunity

The Model Law is silent on the matter of arbitrator immunity. The drafters of the Model Law may have reasoned that the concept of arbitrator immunity was already sufficiently established in national law, or they may also have considered the matter too debatable to 'legislate' on it in a Model Law. But given the sensitivity of the arbitration community in the United States to the liability of arbitrators, it comes as no surprise that some state legislators in the United States have chosen to address it in enacting the Model Law. Those that do address do not all do so in the same way. By providing that '[n]o person who serves as an arbitrator… shall be held liable in an action for damages resulting from any act or omission in the performance of their role as an arbitrator… in any proceeding [subject to this statute], the Oregon statute effectively confers on arbitrators an absolute immunity.[68] This is what the California[69] and Florida[70] legislatures also sought to achieve by extending to arbitrators the immunity enjoyed by judges. The Florida law provides that '[a]n arbitrator serving under this chapter shall have judicial immunity in the same manner and to the same extent as a judge'.

Georgia does not immunize arbitrators to that extent:

> (f) An arbitrator shall not be liable for:
>
> (1) Anything done or omitted in the discharge or purported discharge of arbitral functions, unless the act or omission is shown to have been in bad faith; or
> (2) Any mistake of law, fact, or procedure made in the course of arbitration proceedings or in the making of an arbitration award.
>
> (g) Subsection (f) of this Code section shall apply to an employee or agent of an arbitrator and to an appointing authority, arbitral institution, or person designated or requested by the parties to appoint or nominate an arbitrator or provide other administrative services in support of the arbitration.

The Georgia law essentially codifies what is commonly known as qualified immunity.

POLICY DIFFERENCES

On some matters, drafters of the state laws appear to have made a conscious decision to replace a specific provision of the Model Law with one it deems superior in one respect or another. These must be regarded as expressing policy differences vis-à-vis the Model Law.

Number of arbitrators

A good example concerns the constitution of a tribunal. Like the Model Law, the US enactments leave parties free to determine the number of arbitrators. But, in the absence of agreement between the parties on the matter, the majority of states enacting the Model Law—California,[71] Georgia,[72] Illinois,[73] Oregon,[74] and Texas[75]—have determined that a tribunal will consist, not

[68] O.R.S., § 36.544(2).
[69] Cal.C.C.P., § 1297.119.
[70] F.S.A., § 684.0045.
[71] Cal.C.C.P., § 1297.101.
[72] Ga. Code Ann., § 9-9-31.
[73] 710 ILCS § 30/10-5.
[74] O.R.S., § 36.472.
[75] Civ. Prac. & Remed. C., §172.051.

of three arbitrators, as under the Model Law, but rather of a sole arbitrator. Only Connecticut[76] and Florida[77] have adopted the Model Law's default rule of a tripartite tribunal. The preference among the US states for a sole arbitrator may well reflect nothing more than the prevalence of single member tribunals in domestic arbitration in the United States or an attempt to make arbitration less costly in time and expense.

Preliminary orders

An innovation of the UNCITRAL Model Law, as amended in 2006, was the introduction of a new form of interim relief. Article 17B authorizes a tribunal, albeit within fairly strict limits, to consider and grant an award of interim relief on an *ex parte* basis—a so-called 'preliminary order'.[78] Article 17C sets out a specific regime for preliminary orders, requiring subsequent notice to the other party and an opportunity for that party to argue against its issuance, expiration. It also makes preliminary orders non-enforceable. Florida is the exception among US states enacting the Model Law in embracing the preliminary order mechanism.[79] All the other enacting States chose to omit Articles 17B and 17C in their entirety.[80] Presumably they found the *ex parte* feature troublesome.

Grounds for post-award relief

Several states—Connecticut,[81] Florida,[82] and Oregon[83]—have adopted without change Article 34 of the Model Law on the set aside of awards. The Georgia statute, however, while adopting Article 34, expressly allows parties to agree in writing to eliminate or curtail any of the statute's grounds for vacatur (other than violation of public policy), provided none of the parties is domiciled or has its place of business in the state.[84] By contrast, the California, Illinois, and Texas statutes omit Article 34 altogether, a step that cannot be considered an accident. Vacatur

[76] C.G.S.A. § 50a-110.
[77] F.S.A., § 684.0011.
[78] Articles 17 B and C read as follows:Article 17B: *Applications for preliminary orders and conditions for granting preliminary orders*

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.
(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.
(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

Article 17C: *Specific regime for preliminary orders*

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.
(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.
(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.
(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case. (5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

[79] F.S.A., § 684.0020.
[80] Ga. Code Ann., §9-9-38.
[81] CT § 50a-134.
[82] F.S.A., § 684.0046.
[83] O.R.S., § 36.520.
[84] Ga. Code Ann., § 9-9-56(e).

of awards in those jurisdictions consequently remains governed by the residual provisions of domestic arbitration.

As for Article 36 on the recognition and enforcement of foreign awards, the Connecticut,[85] Florida,[86] Georgia,[87] and Oregon[88] statutes again faithfully follow the Model Law, including the provision authorizing the court to adjourn enforcement proceedings if an action for set aside or suspension of an award is pending in a competent court and to require that security be posted. By contrast, the California, Illinois, and Texas statutes again contain no such provision. However, the absence of Article 36 from these state statutes is of little consequence, inasmuch as, whatever their international arbitration statutes may say or not say, all US states are bound by the New York Convention whose limitative grounds for denying recognition and enforcement of foreign awards are identical to the grounds under Article 36.

INNOVATIVE MEASURES

Most of the measures introduced by the state legislatures into the Model Law consist of clarifications of Model Law provisions, modest adaptations to the US scene, treatment of matters on which the Model Law is silent, and an occasional policy position at variance with the one reflected in the Model Law. None of this is surprising. Of greater interest are provisions in state legislation enacting the Model Law that can genuinely be viewed as innovative. The state statutes enacting the Model Law do not include many such measures. Three, however, are potentially of interest.

Preclusion in connection with interim measures

An innovation already alluded to is reflected in the provisions of California, Oregon, and Texas law concerning the impact of tribunal findings on a request for an interim measure from a court.[89] Those statutes require the court from which an order of interim relief is sought to defer to prior findings the tribunal may have made that are relevant to the court's decision. They stipulate that, in considering a request for interim relief, a court must give preclusive effect to any relevant finding of fact made by the tribunal over the course of the arbitral proceedings (including in acting on earlier requests for provisional relief addressed to the tribunal).[90] An example specifically pointed to by both the California and Texas legislatures is a finding by the tribunal on a claim's probable success on the merits.

Delegation of determinations

In what appears to be an innovation, the California,[91] Oregon,[92] and Texas[93] statutes expressly authorize parties by agreement to authorize a third party, at a tribunal's invitation, to determine any issues that the tribunal would otherwise determine. By way of example, the California statute provides that 'where [the law of arbitration] leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination.'[94] Thus, parties to an arbitration may decide that certain

[85] C.G.S.A., § 50a-136.
[86] F.S.A., § 684.0048.
[87] Ga. Code Ann., § 99-58.
[88] O.R.S., § 36.524.
[89] n 56–58 above.
[90] Civ. Prac. & Remed. C., § 172.175.
[91] Cal.C.C.P., § 1297.22,
[92] O.R.S., § 36.456 (1).
[93] Civ. Prac. & Remed. C., § 172.007.
[94] Cal.C.C.P., § 1297.22.

issues in their dispute are best determined by a person or institution outside the tribunal, hence the term 'expert determination'. They may then authorize that person or institution to make the relevant determination, and commence or continue the arbitral proceeding for decision only after the presumably binding determination is made. The third party may be the arbitral institution under whose aegis the arbitration is taking place, in which case the issue that is contemplated is very likely procedural in nature. However, one can imagine more far-ranging, including substantive, uses of this device, such as the possibility of enabling the parties to commit certain technical or highly specialized issues to an individual or body, whether governmental or not.

Conciliation

The Oregon[95] and Texas[96] statutes expressly announce a policy favouring conciliation. They both read as follows: 'It is the policy of this state to encourage parties to an international commercial agreement or transaction that qualifies for arbitration or conciliation under this chapter to resolve disputes arising from those agreements or transactions through conciliation'. Depending on the particular statute, there may follow in the statutes provisions on the principles governing various aspects of conciliation, such as waiver of rights of appointment of conciliators, conflicts of interest, conduct of conciliation procedures, representation in conciliation, tolling of limitation periods, stay of arbitration, termination, costs, participation as conciliator in subsequent arbitral proceedings, and settlements based on conciliation, including their enforceability, and even immunity.[97] The Oregon[98] and Texas[99] statutes focus specifically on the use in arbitration of information obtained during conciliation, among other things barring use in any arbitral or judicial proceeding documents made available in connection with conciliation. More generally, absent agreement to the contrary, any evidence or admission made available in conciliation shall be inadmissible in those proceedings.[100]

Non-arbitrability

The UNCITRAL Model Law, like most arbitration laws, steers clear of indicating what categories of claims are not subject to arbitration. If a statutory claim is not arbitrable in a given jurisdiction, that will most likely be indicated in the statute itself rather than in the jurisdiction's *lex arbitri*. Unsurprisingly, none of the state statutes enacting the Model Law enters into that subject either. However, the Oregon statute takes the precaution of making it clear that the pro-arbitration philosophy it embodies is without prejudice to the legislature's determination that a particular category of claims is non-arbitrable.

> Except as [otherwise] provided, [this statute] shall not affect any other law of [this state] by virtue of which certain disputes may not be submitted to arbitration or conciliation or may be submitted to arbitration or conciliation only according to provisions other than those [provided for by this statute].[101]

California legislation is to the same effect.[102]

The position taken by California and Oregon seems reasonable, since any statute can be overridden by a subsequent one. But the Oregon legislature evidently did not want to leave anything

[95] O.R.S., §§ 36.528–36.552.
[96] Civ. Prac. & Remed. C., §172.201.
[97] O.R.S., §§ 36.530, 36.532, 36.534, 36.538, 36.540, 36.542, 36.544, 546, 36. 548, 36. 550, 36. 552, 36.554; Civ. Prac. & Remed. C., §§ 172.202–172.215.
[98] O.R.S., § 36.536.
[99] Civ. Prac. & Remed. C., § 172.206.
[100] O.R.S., § 36.536.
[101] O.R.S., § 36.454(6).
[102] Cal.C.C.P., § 1297.17.

to chance. However, the fact remains that, under solid Supreme Court case law, states are not in fact permitted to recognize or create causes of action and declare them to be non-arbitrable; they are preempted from doing so on the basis of a strong substantive federal policy in favour of arbitration.[103] To that extent, the reservation announced in these statutes is without practical effect.

CONCLUSION

There is no strong movement among US states to adopt international arbitration legislation on the basis of the UNCITRAL Model Law. It may be supposed that state legislatures consider the widely-adopted statutes based on the UAA and RUAA as no less adequate for dealing with international arbitration cases than for domestic arbitration cases. That more US states are not adopting the Model Law cannot be viewed as a great cause for concern. More concerning is Congress's complete inattention to the matter.

No US state has altered the Model Law in a major way. The changes made are highly discrete. Some seek only to give greater clarity and detail to what the Model Law already says. Others seek to make minor adjustments to better adapt the Model Law to what may be concerns particular to the United States. On several matters, the state statutes have obviously made a conscious decision to favour a position at variance to that of the Model Law, though in no cases are the differences highly consequential. On a small number of matters, the states can even fairly be regarded as innovative. Whether any of the changes that the states have introduced into the UNCITRAL Model Law might be taken up in a future set of amendments to the Model Law of course remains to be seen.

A striking feature of the pieces of state legislation examined here is the considerable extent to which the same change is reflected, in some cases verbatim, in the legislation of the other jurisdictions. It appears that state legislatures poised to adopt the Model Law are inclined to look at the changes that sister state legislatures have introduced in adopting it. By contrast, there is little to suggest that the legislatures have been heavily influenced in their modifications of the Model Law by provisions contained in the UAA or RUAA.

It should be apparent from the preceding that the adaptations of the UNCITRAL Model Law introduced by US states do not all have the same value or utility. Each must be assessed on its own terms. On occasion, the value is questionable. As earlier noted,[104] the California, Oregon, and Texas statutes provide that, in considering a request for interim relief, 'the court shall give preclusive effect to a finding of fact made by the tribunal in the arbitration', including the probable success of the claim. They further specify that if the tribunal has not yet ruled on an objection to its jurisdiction, the court may not grant preclusive effect until the court makes its own independent finding of jurisdiction. Naturally, if the court finds that the tribunal lacks jurisdiction, the application for interim relief will be denied, but if the court finds that the tribunal has jurisdiction, it will proceed to rule on the application. Yet, the California and Oregon statutes go on to say that if the court rules that the tribunal lacks jurisdiction, that ruling 'is not binding on the arbitral tribunal or subsequent judicial proceeding'.[105] The soundness of this last provision is very much open to question.

It is worth considering to what extent state legislators choosing to deviate from the Model Law have taken the occasion to remedy what may be regarded as generally recognized weaknesses of the law. In fact, while all would concede that the Model Law could be marginally

[103] See, eg, *Southland* Corp. v *Keating*, 465 U.S. 1 (1984). For a very recent example, see *Viking River Cruises, Inc.* v *Moriana*, 596 U.S. ___, 142 S. Ct. 1906 (2022).

[104] n 56–58 above.

[105] Cal.C.C.P., § 1297.95; O.R.S., § 36.470(5).

improved in one respect or another (in particular by addressing matters that are currently unaddressed), there are no voices suggesting that the Model Law is in serious need of reform.

That said, one of the Model Law's undoubted weaknesses is its failure to meaningfully define the grounds on which an arbitration agreement may be denied enforcement, contenting itself, as does the New York Convention, with the simple formula of 'null and void, inoperative or incapable of being performed'. Not only could those terms use some unpacking, but even as they stand, they give no indication of the body of law by which to determine whether an agreement is in fact 'null and void, inoperative or incapable of being performed'. In this respect, the Model Law's treatment of the grounds for denying enforcement of an arbitration agreement may be contrasted with the evident effort the drafters made to give choice of law guidance in Articles 34 and 36, on set aside and enforcement actions, respectively.