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Arbitration has evolved as a preeminent conflict resolution process in international commerce, largely because it affords some escape from uncertainty for the foreign trader faced with the diversity of national legal systems. There have existed for many years nongovernmental institutional systems for international arbitration, and they have been widely utilized. However, a major evolution occurred when the United Nations Commission on International Trade Law (UNCITRAL) developed a Model Law on Commercial Arbitration. This Model Law offers a universal law of arbitration. It is designed for incorporation into the municipal law of the nation state and offers the greatest promise to date that international arbitration will be respected by local courts as an independent dispute resolution process.

This promise is important. Local arbitration laws and procedures have varied considerably among different nations and different institutional systems and are often obscure or unexpected to a foreign party. Furthermore, local courts have not always been friendly to international arbitration. The UNCITRAL Model Law, echoing the purposes of UNCITRAL itself, is designed to promote uniformity of international trade law on a global basis, affording a special avenue of predictability by establishing enforceable uniform practices and procedures.

On December 11, 1985, the United Nations General Assembly urged members to give serious thought to adopting the Model Law.[1] In the United States, however, quite apart from questions of specific amendment of the Model Law, the question of adoption of the Model Law meets the somewhat unique, but inevitable, issues posed by our federal system. Fundamental to the question of adoption of the Model Law in the United States is whether the adoption should be through state or federal law or through some parallel of state and federal law.

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1. G.A. Res. 40/71, 1985 U.N.Y.B. 1191.

As the Model Law begins to find its way into U.S. law, the state law model is the one that has been adopted. The Legislature of California put itself at the forefront of the legal market for international arbitration when it enacted, in March 1988, a law modeled on the UNCITRAL Model Law on International Commercial Arbitration.[2] Florida had already used the UNCITRAL Model Law as a partial source for the Florida International Arbitration Act.[3] A Connecticut law became effective on October 1, 1989,[4] Texas adopted its version on September 1, 1989,[5] and other states are considering adoption of the Model Law. California, however, was the first state to undertake a wholesale adoption. This new law (CIACC or the California International Arbitration and Conciliation Code), supersedes most provisions of California's general arbitration law[6] with respect to international commercial arbitrations. The new law does not supersede preexisting provisions of California law relating to enforcement of awards.[7]

The state law approach, now established in California and other states, has been encouraged and endorsed in a study by a committee of the Washington Foreign Law Society.[8] The Foreign Law Society specifically considered the question of whether the Model Law should be enacted on a state or federal level. The study recommended that, while some amendments to the Federal Arbitration Act (FAA) incorporating a handful of provisions of the UNCITRAL Model Law would be desirable, Congress should not consider general adoption of the UNCITRAL Model Law.[9] Foreign Law Society committee further recommended that the Model Law should be adopted through state law.[10] Other comment has not been significantly different. In a report to the Association of the Bar of the City of New York, the New York Association's Committee on Arbitration and Alternative Dispute Resolution recommended only minor amendment of federal law in relation to the Model Law.[11] While not directly addressing the question of state versus federal adoption, the committee indicated no particular concern about adoption of the Model Law through state law, except to question the usefulness of state adoption as a means of attracting international arbitrations.[12]

2. The Act adds title 9.3 to part 3 of the CAL. CIV. PROC. CODE commencing with § 1297.11.

3. 39 FLA. STAT. § 684.01 (1986).

4. 1989 Conn. Acts 89-179 (Reg. Sess.).

5. The Act amends title 10 by adding part 3 to TEX. REV. CIV. STAT. ANN. arts. 249-1 to -43.

6. CAL. CIV. PROC. CODE §§ 1280–1284.2 (West 1982).

7. *Id.* §§ 1285–1289.

8. Hunnicutt, Boyd, Stevenson, Juster, Hershey, Broches, Deming, Hudes, Menefee, Shely & Labat, *Report to the Washington Foreign Law Society on the UNCITRAL Model Law on International Commercial Arbitration*, 3 OHIO ST. J. DISPUTE RESOLUTION 303–60 (1988) [hereinafter Hunnicutt].

9. *Id.* at 311–17.

10. *Id.* at 326.

11. *Adoption of the UNCITRAL Model Law on International Commercial Arbitration as Federal or State Legislation, Report of the Committee on Arbitration and Alternative Dispute Resolution of the Association of the Bar of the City of New York*, ARB. & L. 250 (1988–89) [hereinafter *Alternative Dispute Resolution Report*] (nothing in the report suggests that New York should adopt the Model Law).

12. *Id.* at 260.

All in all, the fundamental question of whether state law adoption is the right or wrong direction has received negligible consideration in these reports or elsewhere. California's adoption indicates a national choice to frame the regime of international arbitration through state law rather than federal law. This appears to be the choice notwithstanding existence within the FAA (originally enacted in 1925) of a substantial body of federal arbitration law that touches on international arbitration. Also included at the federal level is the multilateral treaty known as the New York Convention.[13]

The provisions of this Convention are implemented as chapter 2 of the FAA,[14] which ensures the recognition and enforcement of most international commercial arbitral agreements and awards by the courts of any signatory State.

The thesis of this article is that the law regulating international arbitration in the United States should be federal law. To the extent state enactment of the Model Law is pursued, it creates a federal-state duality in the law of international arbitration that significantly undermines the purposes of uniformity and predictability that the Model Law is designed to achieve. It gives rise to a variety of complex, litigation-generating problems.

I. The Rationale (or Lack Thereof) for the State Law Approach

The committee of the Washington Foreign Law Society, while purporting to examine the merits of a state or federal approach, offers little in the way of explanation for its conclusion that state enactment is the appropriate route. Its report simply concludes, in summary fashion, that existing federal law is adequate to support international arbitration and that "there is no perceived need for adoption of the entire Model Law at the federal level." Consequently, the committee reasons, Congress cannot be expected to enact the Model Law.[15]

Even in conjunction with state enactment, the question of state versus federal adoption has not been well examined or subjected to much question. The reason is evident. The incentive for state enactment has little, if anything, to do with the merits of a state law approach as distinguished from a federal approach. Appar-

13. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997.

14. 9 U.S.C. §§ 1–14 (1988), first enacted Feb. 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended Sept. 3, 1954 (68 Stat. 1233); chapter 2 was added July 31, 1970 (84 Stat. 692).

15. The Committee elaborated as follows:

> The Committee does not recommend that Congress adopt the UNCITRAL Model Law in its entirety, at least at this time. Existing federal arbitration law is strongly supportive in its enforcement of international arbitration agreements and recognition and enforcement of foreign arbitral awards. Furthermore, the provisions of the FAA and federal case law are adequate to support arbitration in general and international commercial arbitration law in particular. Thus, there is no perceived need for adoption of the entire Model Law at the federal level, and without a clearly perceived need, it would be politically unrealistic to expect that Congress could be persuaded to enact the Model Law.

Hunnicutt, *supra* note 8, at 311.

ently the bar and legislature of California as well as other states perceive a strong economic incentive to offer a local forum to international business disputants. This explains both the lack of examination of the merits of a state versus federal approach and the reason why the state law approach has so far prevailed.

II. The Domestic Federal-State Arbitration Law Regime and International Arbitration

The question for the future of international arbitration in the United States is not simply federal versus state enactment. If the choice is state law, the question becomes one of the relationship of the state enactment to a substantial body of federal arbitration law and the federal interest implicit in international dispute resolution. This question is naturally posed because international arbitration usually involves diversity of parties and federal interests and typically finds its way to federal rather than state court.

The relationship of federal and state law in arbitration has never been easy. Federal arbitration statutes and treaties may preempt state law, but federal law does not occupy the field.[16] Repeatedly, issues of conflict between state law and federal law are raised. Thus, the Supreme Court has ruled that a California statute prohibiting arbitration in certain categories of disputes must yield to the FAA, which specifically provides for enforcement of arbitration agreements and awards.[17] But a state law providing for the taking of depositions or other forms of discovery in arbitration proceedings would probably not be in conflict with federal arbitration law and, unless in conflict with a treaty restricting discovery,[18] would not be preempted. Courts have held that the FAA does not preempt all state law, but only those laws that override the parties' choice to arbitrate rather than litigate and that therefore are in direct conflict with the federal statute's primary purpose of ensuring the enforcement of privately negotiated arbitration agreements.[19]

There may be a point at which a state law that is purely procedural and does not conflict with any specific provision of federal law nevertheless would be so burdensome as to effectively frustrate the agreement to arbitrate. However, in a recent controversial decision, *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University,*[20] the Supreme Court significantly narrowed the scope of this position by upholding a stay of arbitration by a

16. "The FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ., 109 S. Ct. 1248, 1254 (1989).

17. Southland Corp. v. Keating, 465 U.S. 1, 10–15 (1984).

18. *See, e.g.*, Convention on the Taking of Evidence Abroad, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231, containing restrictive provisions for discovery.

19. Keystone Shipping Co. v. New England Energy, Inc., 855 F.2d 1 (1st Cir. 1988); Société Générale de Surveillance v. Raytheon European Management & Sys. Co., 643 F.2d 863 (1st Cir. 1981).

20. 109 S. Ct. 1248 (1989).

California court under California Code of Civil Procedure section 1281.2(c) pending resolution of related litigation between one party to the arbitration and third parties not bound by the arbitration agreement. After the majority opinion in *Volt*, to which there were only two dissents, it must be assumed that most procedural aspects of arbitrations not addressed in federal statutes or treaties can be regulated by state or other local (domestic or foreign) law deemed by the finder of fact to be applicable by reason of choice by the parties, or absent such choice, choice of law principles. This assumption is valid only to the extent that a regulation is not so extreme as to effectively deprive (not just delay) the right of a party to avail itself of its contractual right to arbitration.[21] The Foreign Law Society Report notes, for instance, that section 3 of the FAA, which provides for stay of proceedings to compel arbitration, and section 4, which provides for orders compelling arbitration, would probably preempt inconsistent state court procedures.[22] The rationale is that these provisions are integral to the federal policy favoring arbitration.

But *Volt* does not dispose of the preemption issues raised so naturally by international arbitration. International arbitration, like international adjudication, typically involves parties of diverse nationality and international commerce and is therefore rife with federal interest.[23] Moreover, insofar as international arbitration is related to domestic litigation, it most likely occurs in conjunction with federal rather than state court proceedings. *Volt* was a domestic arbitration in state court, raising the issue of preemption of state law by the FAA. Its essentially choice of law rationale may not apply to give deference to state law where the parties to an arbitration in a U.S. state did not expressly select that state forum, but are there under a broad jurisdictional provision such as article 1 of CIACC, which is even broader than proposed in the Model Law.[24]

It can be argued, with some foundation, that where federal law does speak, federal law is preemptive on all procedural inconsistencies affecting international arbitration. Though the United States Supreme Court has said that the FAA does not create any independent federal jurisdiction,[25] the holding involved chapter 1 of the FAA and not chapter 2, which implements the New York Convention on enforcement of arbitral awards.[26] Section 203 expressly provides that in arbitrations governed by the Convention federal district courts do have original jurisdiction regardless of the amount in controversy, and section 205 provides for the

21. *Id.* at 1255.

22. Hunnicutt, *supra* note 8, at 325.

23. Such as equal treatment for foreign nationals; *see, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 711(b), (c) (1987); *id.* § 722 (rights of aliens). Numerous treaties guarantee civil, economic, and other rights to aliens. *See* Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552 (2d Cir. 1981), *rev'd on other grounds*, 457 U.S. 176 (1982).

24. *See infra* text section III.A.

25. Southland Corp. v. Keating, 465 U.S. 1, 12 (1984); Perry v. Thomas, 462 U.S. 483, 489 (1987); Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983).

26. 9 U.S.C. §§ 202–205 (1988).

removal of such actions to a federal court.[27] These provisions indicate congressional recognition of the strong federal interest in international arbitration, as opposed to domestic arbitrations, and could imply preemption of state arbitration law pertaining to international arbitrations.

A question arises, for example, as to state arbitration laws with provisions relating to recognition and enforcement of awards that differ from those set forth in the FAA or the New York Convention.[28] It can be argued that federal jurisdiction established by the FAA for enforcement of agreements and awards under the Convention evidences an intent by Congress that only federal law should apply to such enforcement actions. If so, actions for enforcement, correction, or vacation of such awards, whether brought in state or federal courts, should be governed exclusively by provisions of the federal law. If this was not the intent of the Congress, then only the "outcome determinative" provisions of the federal law, such as time limitations,[29] should be applied by both state and federal courts, and state courts should apply those provisions of state law that are not "outcome determinative" to the process of confirming or objecting to an award. The difficulty is in determining what is or is not "outcome determinative." Differences in language contained in state law, the FAA, and the Convention pertaining to the grounds for refusing recognition and enforcement, as interpreted by diverse courts, could mean significant differences in result.[30] Accordingly, this creates significant uncertainty. Similar questions of preemption appear, for instance, in connection with "interim measures of protection," which are expressly provided for by article 11 of the Model Law, but not in the FAA. Uncertainty already exists among the federal courts as to whether the FAA allows or precludes interim measures.[31]

27. There are currently eighty-one countries that are parties to the New York Convention. *See* M. BOWMAN & D. HARRIS MULTILATERAL TREATIES (Sixth Supp. 1989). It follows that a very high percentage of international commercial arbitrations will fall under its provisions.

28. California did not adopt chs. VII or VIII of the Model Law, nor any other new law governing the confirmation or review by any court of awards in international commercial cases. Applications to California courts to confirm, correct, or vacate such awards would, to the extent not preempted by federal law, be governed by title 9, CAL. CIV. PROC. CODE, chs. 4 & 5, the same law that governs in domestic cases.

29. Under ch. 1 of the FAA, there is a one-year period of limitation on petitioning the court for confirmation of an award and a three-month period of limitation on requesting correction or vacation. 9 U.S.C. §§ 9, 12 (1988). Under ch. 2, the period of limitations for both confirmation and vacation is three years. 9 U.S.C. § 207 (1988). Under title 9, CAL. CIV. PROC. CODE ch. 4, § 1288, a petition to confirm must be filed no later than four years after the award, and a petition to correct or vacate must be filed not later than 100 days after the award. CAL. CIV. PROC. CODE § 1288 (West 1982).

30. For a comparison of the grounds for setting aside an award under the Model Law with those of the FAA and The Uniform Arbitration Act, see the *Report to the Washington Foreign Law Society,* 2 INT'L ARB. REP. (Meally) 772, apps. E & F (1987).

31. *See* McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032 (3d Cir. 1974); Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977); Cooper v. Ateliers de la Motobecane, S.A., 57 N.Y.2d 408, 442 N.E.2d 1239 (1982).

Whatever the scope of federal preemption in international arbitration, a shared purview of state and federal arbitration law generates such uncertainties, though the parties, in choosing arbitration, have sought predictability. To the extent state jurisdiction is found and state law prevails, and to the extent there are ambiguities and inconsistencies from state to state and between federal and state laws concerning international arbitration, arbitration in the United States is rendered less viable as a dispute resolution mechanism for international parties.

III. The Disharmony of Current Federal Law and State Enactment of the Model Law

State enactment of a Model Law of international arbitration superimposed on the shifting sands of federal-state demarcation of international arbitration law and procedure only adds to arbitral uncertainty. This can be demonstrated in several areas.

A. State Law Enlargement of the Model Law

Problems not contemplated by the draftsmen of the Model Law or the commentators occur when the state enactment is more ambitious than, or otherwise modifies, the Model Law. For instance, this occurs in the most basic respect under the California law. The CIACC asserts a broader coverage than the Model Law. The scope of application of the CIACC is covered in article I, commencing with section 1297.11. It initially provides that the CIACC applies to "international commercial arbitration and conciliation" and is subject to any treaty to which the United States is a party. It specifies that most provisions of the new law apply only if the place of arbitration is in California. The article then defines "international" and "commercial" more broadly than these terms are defined in the Model Law.[32] The result is that the CIACC purports to apply to virtually every arbitration in California that is commercial in nature and that has any international character, in terms of places of business, place of performance, or subject matter. Thus, although arbitration must be based on consent of all parties, the CIACC might apply without the parties having knowingly specified the application of California law. If the arbitration clause or system adopted by the parties leaves the place of arbitration to the arbitrators or to another third person, the parties might not even have agreed to California as the place of arbitration.

32. Cal. Civ. Proc. Code § 1297.13(b), (d) (West Supp. 1990) deems "international" to be any place that is in a state other than the parties' place of business, where a substantial part of the obligations of the commercial relationship is to be performed; the place with which the subject matter is most closely related; or when the subject matter of the arbitration agreement is otherwise related to commercial interests in more than one state. Cal. Civ. Proc. Code § 1297.16 (West Supp. 1990) includes the following as commercial, if arising out of a relationship of a commercial nature: construction; insurance; licensing; factoring; consulting; the transfer of data or technology; trademarks, patents, and copyrights. The Code, however, does not *limit* jurisdiction to these items.

This broad application may not "shock the conscience," but might, under the choice of law rationale of the *Volt* case, limit the extent to which a federal court sitting in California in a diversity case would permit application of California law or permit California to impose its statutory procedures on an arbitration governed by the FAA. It certainly creates uncertainty as to applicable law.

CIACC defines "court," "superior court," and "supreme court" as referring to the California court system,[33] and all provisions that apply to intervention by a court[34] specifically permit California superior court intervention. However, most cases that are governed by the CIACC will be subject to federal court jurisdiction by reason of diversity of citizenship or because an issue of federal law is involved or because the case falls under the New York Convention.[35] In some cases a federal court may already have assumed jurisdiction and ordered the arbitration. Quite apart from any question of preemption, the further question naturally arises as to whether or to what extent a federal district court will apply the CIACC.

A federal court will have little guidance in determining whether it should apply CIACC provisions absent any facts indicating a choice of California law by the parties. This absence of positive choice of California law would seem to weigh the determination in favor of federal law. However, the court may decide that the parties, by choosing California as the place of arbitration (a matter that may itself be highly uncertain given the broad claim of article I), signified an intention that California's law of arbitration should apply.[36]

Finally, even if the parties to the arbitration have agreed to California law, *Volt* leaves open the question as to what extent the chosen law will impair the arbitral process. For example, even before *Volt* federal circuit court opinions differed in considering the issue whether the FAA bars a federal court from consolidating arbitrations under state law when no provision of the arbitration agreement or of federal law provides for such consolidation.[37]

B. Problems of Federal/State Interaction

Not only do the grounds and process for challenge of arbitrators vary significantly between California's version of the Model Law and federal law; these

33. Cal. Civ. Proc. Code § 1297.21(f), (h), (i) (West Supp. 1990).

34. *Id.* § 1297.61.

35. 9 U.S.C. § 203 (1988).

36. Domke, Com. Arb. (Callaghan) § 25:02 (rev. ed. 1984) [hereinafter Domke].

37. In New England Energy Co. v. Keystone Shipping Co., 855 F.2d 1 (1st Cir. 1988) the First Circuit ruled that the FAA does not bar a federal court from consolidating two arbitrations under state law when no provision of the arbitration agreement or federal law provides for such consolidation. The Courts of Appeals of the Fifth and Ninth Circuits had held that federal district courts had no power to order consolidation in similar circumstances. *See* Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987); Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir. 1984). The Supreme Court denied the petition for certiorari in *Keystone*, 109 S. Ct. 1527 (1989), in the same term of its decision in *Volt*, 109 S. Ct. 1248 (1989). In *Keystone*, as in *Volt*, the parties had agreed to the application of state law, or so the Court found.

provisions of California's enactment of the Model Law also differ significantly from other arbitral regimes, such as the UNCITRAL rules and the rules administered by the American Arbitration Association. For example, under section 1297.121 of the CIACC a prospective arbitrator must disclose whether he or she has served as arbitrator or conciliator in another proceeding involving one or more parties to the proceeding. The disclosure requirements cannot be waived as to the neutral arbitrator even by the agreement of all interested parties.[38] If an arbitrator is challenged, the arbitration tribunal decides on the challenge. If the tribunal does not sustain the challenge, the matter goes for decision, on request of the challenging party (which request must be made within thirty days after notice of the panel's decision), to the appropriate California superior court.[39] The decision of the superior court is final and is not subject to appeal.[40]

This procedure raises at least two questions of federal-state interaction, since the FAA does not contain provisions similar to those contained in chapter 3 of the CIACC. Although federal precedents have made it clear that failure to disclose even the slightest pecuniary interest of an arbitrator is sufficient to void an award,[41] it is not at all certain that the federal standard includes all of the grounds for challenge that are found in CIACC section 1297.121.[42] Secondly, federal courts have held that under the FAA the courts' power to deal with arbitrator bias is limited to setting aside the award after it has been rendered.[43] Will federal courts apply any or all provisions of the CIACC relating to challenge of arbitrators? If the arbitration tribunal decides against the challenge and the challenger requests a decision by a California court, can the other party insist on removal to a federal court? If the challenger does not request decision by a court after an adverse decision by the tribunal, can the challenger nonetheless raise the issue in federal court after the award has been rendered? None of these issues would arise if the Model Law had been enacted at a federal level instead of by way of state law.

C. The Proposed Amendments of Federal Law

It is myopic to conclude, as the Foreign Law Committee concluded in rejecting federal enactment of the Model Law, that federal law is presently adequate to support international arbitration. The committee study virtually admits the con-

38. Cal. Civ. Proc. Code § 1297.122 (West Supp. 1990).
39. *Id.* § 1297.134.
40. *Id.* § 1297.135.
41. Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 148 (1968).
42. Cal. Civ. Proc. Code § 1297.121(c) (West Supp. 1990) requires disclosure of information when the person submitted for appointment or designation as arbitrator or conciliator served as an arbitrator or conciliator in another proceeding involving one or more of the parties to the proceeding.
43. *See* Conley v. San Carlo Opera Co., 163 F.2d 310 (2d Cir. 1947); Catz Am. Co. v. Pearl Grange Fruit Exchange, 292 F. Supp. 549, 551 (S.D.N.Y. 1968); *In re* Dover Steamship Co., 143 F. Supp. 738, 742 (S.D.N.Y. 1956); *see also* Domke, *supra* note 36, § 22:03.

trary by suggesting significant amendments to harmonize federal law with the Model Law. The suggestion of these amendments also belies the second justification given by the committee for not endorsing a federal law approach: that Congress perceives no need for such action. If this is correct, why should Congress look with any greater favor on the significant amendments of federal arbitration law that the committee concluded are needed to reconcile state enactment with current federal law? Indeed, one would think that, politically, promotion of a change in federal law would come more easily in the form of the Model Law, as a single important step in the evolution of international dispute resolution, than in the complicated and less attractive adjustment of disjunctive parts of the Model Law to existing and disparate federal law.

The amendments to federal law proposed by the Washington Foreign Law Society include adoption at the federal level of article 9 of the Model Law providing for "interim measures ordered by a court," article 12, concerning "challenge of arbitrators," article 20, concerning "tribunal authority to name the place of arbitration if the parties have not done so," and article 28, providing guidelines for the arbitral tribunal to use in deciding what rules are to apply to the substance of a dispute.[44] The Society also noted a number of other areas of disharmony with current federal law, including article 16, which provide for "appeal to court of tribunal's ruling that it has jurisdiction," article 17, which provides for the power of a tribunal to order interim measures, and article 26(1), which authorizes "independent experts appointed by tribunal."[45] Similarly, the Committee of the Association of the Bar of the City of New York, while rejecting any major modification of federal law, recommended, at the very least, federal adoption of legislation reflecting the principles in article 9 of the Model Law, which provide for interim measures of protection in aid of arbitration. The Committee also recommended that U.S. courts designate the venue for an international commercial arbitration when the parties have not established a venue in their agreement.[46]

It is accordingly clear that without the amendments of federal law, adoption of the Model Law by the states will result in significant disharmony between state and federal law. This disharmony has already been struck between California law and federal law. The problem is demonstrated, for instance, by the matter of "Competence of Tribunal to Rule on Its Jurisdiction," which is contained in chapter 4, article 1, of the Model Law and which was enacted as section 1297.161 of the CIACC. The concept that the tribunal may rule on its own jurisdiction appears at first blush to be consistent with federal policy. However,

44. Hunnicutt, *supra* note 8, 312–17.

45. *Id.* at 316.

46. *Alternative Dispute Resolution Report, supra* note 11, at 259. The proposed amendment of federal law for court-determined venue is intended to reflect art. 20(2) of the Model Law, though art. 20(2) leaves the determination of venue for the arbitral tribunal to decide, where the parties have not agreed on the place of arbitration.

the decision of the arbitral tribunal on its jurisdiction must not conflict with any court order. Herein lies the problem. Section 1297.166 provides that a party may ask the appropriate California superior court to decide the matter if the tribunal has ruled that it does have jurisdiction, though a party is deemed to have waived any objection unless it has made the request to the court within thirty days after receiving notice of the ruling. Certainly, these provisions can have no effect on the power of a federal court under the FAA to issue an order compelling arbitration. But the FAA does not include any similar provision for interlocutory reexamination by a court of the tribunal's ruling affirming its jurisdiction, while it does provide for vacating an award where the arbitrators have exceeded their powers.[47] Will a federal court enforce the waiver provision of section 1297.166? Case law suggests that lack of timely objection, under certain circumstances, does constitute a waiver of this issue, and the thirty-day requirement may, therefore, be enforced as not inconsistent with federal policy.[48] The difficult question is whether a federal court will be willing to examine the tribunal's ruling on jurisdiction prior to the rendition of the award, and if the federal court is not, will it be bound by the California decision on the subject? Thus state court enactment of the Model Law here creates a serious disjunction and confusion between federal and state procedure. It forces the federal court either to claim an exclusive jurisdiction that would be difficult to justify or to adopt the procedure of state law, or to allow by default important decisions to be effectively preempted by state courts.

The disharmony is not only the disharmony of confusion. There are clear inconsistencies between federal arbitration law and the Model Law as adopted in California. A major inconsistency, for example, is the matter of reasoned awards. Section 1297.313 of the California statute requires that an arbitral award shall state "the reasons on which it is based unless the parties have agreed that no reasons are to be given." The FAA has no such requirement. While the laws of many other countries require arbitrators to state the reasons for their awards, this has not been the practice in the United States, at least not in commercial arbitrations. The rules of the major U.S. arbitral organizations such as the American Arbitration Association do not provide for opinions by arbitrators in domestic commercial cases.[49]

The provision concerning reasoned awards is especially problematical because of its ambiguity. It fails to provide any guidelines as to how detailed and com-

47. 9 U.S.C. § 10(d) (1982).

48. Comprehensive Accounting Corp. v. Rudell, 760 F.2d 138, 141 (7th Cir. 1985).

49. Domke, *supra* note 36, § 29:06; *see also* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956). The conventional theory in the United States is that the provision of reasons defeats the finality of arbitration, in that an arbitration award is more vulnerable to attack in the courts if reasons for it are given. Another rationale may be that the giving of reasons can inhibit the arbitral process where arbitrators in a complex case, though perhaps expert, are not trained in the law and are not professionally adept at protective articulation of their awards.

plete the stated reasons must be, and does not state the consequences of an inadequate statement. It is possible, but not at all certain, under section 1297.331(b), that a party may request the correction of any inadequacy within thirty days after receipt of the award. However, failure to do so may constitute a waiver under section 1297.41. Though the Model Law and state enactments, such as the CIACC, require a reasoned award, it seems highly unlikely that the absence of adequately stated reasons would constitute grounds for vacating the award under section 10 of the FAA, though this, too, is uncertain. Even the New York Convention, to which the United States is a party, does not require reasoned awards unless such are required by party agreement. If a state court were to deny enforcement of an unreasoned award, as is apparently required by the CIACC and the Model Law, this would probably violate the federal policy favoring the enforcement of awards. The conflict, at least, is certain.

D. State Ambitions Going Beyond the Model Law

Finally, it is also apparent from a review of state adoption, such as the CIACC, that the promotional impetus that inspires state enactment of the Model Law may be dangerously unrestrained and may result in modifications of the Model Law that further undermine the uniformity and predictability that it was designed to bring to international arbitration. A gratuitous and egregious addition in the California enactment demonstrates this tendency. California added a provision permitting the arbitration tribunal to include attorney's fees in its award, unless otherwise agreed by the parties.[50] This heretofore unobtrusive provision of the CIACC is likely to come as an unpleasant shock to the party that was not especially well advised in agreeing to arbitration in California or that entered into the agreement before the CIACC was enacted. Indeed, the shock will be severely compounded, given the broad scope of article I of the CIACC as discussed above, for the party already surprised to find itself arbitrating in California when California was not even specified in the contract as the place of arbitration.

A similar provision for awarding attorney's fees can be found in the UNCITRAL arbitration rules. However, the UNCITRAL rules apply only by express agreement of the parties. If parties to a dispute have simply agreed to California as the place of arbitration, they likely have done so for reasons of convenience that are unrelated to the contacts with the state, if any, or their relationship with the state, or the substantive law governing such relationship. Moreover, the place of arbitration may be, and often is, determined by the arbitrators for their own convenience. If two foreign parties simply choose to arbitrate in the United States, without specifying the state, they are even more unlikely to contemplate that legal fees will be awarded. A federal law would obviate this uncertainty and this surprise, which directly undercuts the purposes

50. Cal. Civ. Proc. Code § 1297.318 (West Supp. 1990).

the Model Law was created to achieve and which creates serious disincentive to the use of international arbitration.

IV. Conclusion

The evolution of international arbitration law in the United States is at one of those junctions in legal history where the road not taken may be forever forsworn. State enactment of the UNCITRAL Model Law has proceeded to the point where it is apparent, upon close examination, that disjunctions between state and federal law and between different state enactments threaten to undermine the uniformity and predictability essential to international arbitration and the principal objectives of the Model Law. As state adoption proceeds, and economic interests and related bureaucracies coalesce around the state law model, the possibility and advantage of a uniform federal arbitration law will recede further into the distance, to the point of disappearance.

Sufficient reason already exists to make the turn to a federal adoption, with appropriate amendment, of the Model Law. The apparently conventional conclusion, appearing in the principal published study,[51] that Congress has not perceived the need for adoption of the Model Law at the federal level, is a poor excuse for the failure of the bar and legal scholarship to provide some direction for the legislators. With the states proceeding apace to adopt significantly varying commercial arbitration statutes to bring the business of international arbitration to their respective jurisdictions, the irony is that foreign parties are likely to be discouraged from using a balkanized U.S. forum. The federal interest in a uniform and predictable legal environment for the foreign trader, still compelling, is certainly threatened. It is time to turn away from the unpromising state-by-state adoption of international arbitration law to a unified, consistent, and predictable federal law.

51. Hunnicutt, *supra* note 8, 311–17, 330.