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to Support Innovation and Sustainable Development**

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**Model Laws as Instruments for Harmonization and Modernization**

**I. Introduction**

UNCITRAL's mission is to promote the progressive harmonization and unification of the law of international trade.<sup>1</sup> It has been entrusted with this task because divergences in national trade laws have been recognized as impediments to the development of world trade.<sup>2</sup> World trade, in turn, has been considered an important factor in the promotion of friendly relations between States and, consequently, the maintenance of peace and security.<sup>3</sup> Harmonization has traditionally gone hand in hand with modernization as anachronistic trade law will never facilitate international trade. Modernization also sets the stage for innovation<sup>4</sup> and sustainable development.

In its 50 years of existence, UNCITRAL has significantly contributed to the harmonization and modernization of various areas of international trade law. Over five decades UNCITRAL has created texts in areas as diverse as international commercial arbitration, procurement, insolvency, online dispute resolution, the international sale of goods and security interests.

Among UNCITRAL's texts are several whose dissemination is truly global. Examples of groundbreaking pieces that harmonized and modernized international trade law include the New York Convention (NYC, with 157 Contracting States<sup>5</sup> at the time of writing) and the UNCITRAL Model Law on International Commercial Arbitration (ICA-ML, adopted in 75 States and a total of 106 jurisdictions<sup>6</sup>).<sup>7</sup> These texts have been so successful that they have indeed become cornerstones in their field, even having an impact on jurisdictions that did not adopt them.

Other texts created by UNCITRAL have been blessed with less success. The UN Convention on International Bills of Exchange and International Promissory Notes, for example, has only managed to attract five Parties in almost 30 years, despite requiring ten in order to actually enter into force.<sup>8</sup> The UN Convention on the Liability of Operators of Transport Terminals in International Trade is likewise still waiting to enter into force with the receipt of the fifth action it requires since it has not been able to amass more than four instruments of ratification, accession, approval, acceptance or succession since 1991.<sup>9</sup>

Why do some harmonizing texts virtually reshape the landscape of international trade law while others turn out to have no effect on harmonization and modernization at all? This question is vital for a law-making institution like UNCITRAL, even more so since its resources (and the resources of its Member States) are limited<sup>10</sup> and texts that ultimately remain little more than drafts do not advance UNCITRAL's mission to promote harmonization of international trade law.

Success has many faces and the search for success factors does not yield simple answers. The need for reform and the substantive quality of proposed rules are obvious factors for success. Other factors for the success of a

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<sup>1</sup> General Assembly resolution 2205 (XXI), sub I.

<sup>2</sup> General Assembly resolution 2205 (XXI), fifth recital.

<sup>3</sup> General Assembly resolution 2205 (XXI), third recital.

<sup>4</sup> For an example, see *Cohen*, Unif. L. Rev. 325, 327 (2010); more generally *Basedow*, *RebelsZ* 81 (2017), 1, 9.

<sup>5</sup> See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited May 26, 2017).

<sup>6</sup> See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (last visited May 26, 2017).

<sup>7</sup> Cf. *Kronke*, *JZ* 2001, 1149, 1150: two of six "true success stories of global private law harmonization."

<sup>8</sup> See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/payments/1988Convention\\_bills\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1988Convention_bills_status.html) (last visited May 26, 2017).

<sup>9</sup> See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/1991Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/1991Convention_status.html) (last visited May 26, 2017).

<sup>10</sup> For that aspect, see *Knieper*, in: *Liber amicorum Knežević*, 2016, pp. 654, 668 *et seq.*

legal text are less obvious but no less decisive. A notable inclusion in these less obvious factors is the proper choice of instrument, i.e. the technique employed to harmonize and modernize the law.

This paper attempts to shed light on one of these instruments that has been neglected almost completely thus far, namely the model law. Before going on to discuss the success factors for model laws (below IV), this paper will elaborate on where model laws are located in the system of available instruments for harmonization (below II) and on how they operate (below III).

## II. The Model Law Within the System of Instruments

Traditionally, harmonization and modernization was achieved through conventions. While conventions are still an important instrument for harmonizing and modernizing international trade law, alternative harmonization instruments have entered the stage over the last few decades and have been receiving more and more attention. Before turning to one of these instruments (the model law) in detail, it is worthwhile to provide a quick overview of the available instruments. These instruments can be divided into three classes: legislative, contractual and explanatory instruments.<sup>11</sup>

### 1. Legislative Instruments

Legislative instruments either have force of law (conventions) or are addressed to legislatures to enact national laws accordingly (model laws, legislative guides).

#### a) Conventions

Conventions are concluded between States, usually at a diplomatic conference or in the United Nations General Assembly,<sup>12</sup> and require States to express their consent to be bound by the convention (Art. 11 *et seq.* of the 1969 Vienna Convention on the Law of Treaties). If it is self-executing, a convention creates uniform law that directly governs the transactions that fall within its scope of application.<sup>13</sup> Technically, this method of unification results in the highest degree of harmonization that can be achieved.<sup>14</sup>

#### b) Model Laws

The model law is an alternative legislative instrument. It is a “best practice law” which is suggested for adoption, i.e. for incorporation into the national laws of the States.<sup>15</sup> Upon adoption, the model law provisions become part of the State’s domestic law.

While a convention can generally only be ratified in its entirety or not at all,<sup>16</sup> the States are free to adopt a model law in parts or with modifications.<sup>17</sup> A model law can, however, only achieve its harmonizing effect to the extent that its provisions are adopted by the States. It therefore does not come as a surprise that UNCITRAL regularly encourages States to adopt its model laws in full.<sup>18</sup>

#### c) Legislative Guides

The softest of the legislative instruments is the legislative guide. These guides restrict themselves to setting out policy considerations for the benefit of national legislatures.<sup>19</sup> This allows for utmost flexibility when it comes to the transformation into national law.

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<sup>11</sup> A Guide to UNCITRAL, 2013, paras 32 *et seq.* (available at <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>, last visited May 26, 2017).

<sup>12</sup> A Guide to UNCITRAL (fn. 11), para. 39; UNCITRAL Secretariat, A/CN.9/204, para. 11.

<sup>13</sup> UNCITRAL Secretary-General, A/CN.9/203, para. 117.

<sup>14</sup> A Guide to UNCITRAL (fn. 11), para. 35.

<sup>15</sup> A Guide to UNCITRAL (fn. 11), para. 37; *Boele-Woelki*, *Recueil des Cours* 271 (2009), 2010, pp. 271, 327 para. 54; *Cohen*, 36 *Brook. J. Int'l L.* 567, 582 (2011).

<sup>16</sup> *Boele-Woelki* (fn. 15), p. 338 para. 68 (“all boils down to the motto: ‘Take it or leave it!’”).

<sup>17</sup> A Guide to UNCITRAL (fn. 11), para. 38; *Herrmann*, *Unif. L. Rev.* 483, 484 *et seq.* (1998); *Herrmann*, *Bus. L. Int'l* 249, 252 (2001).

<sup>18</sup> A Guide to UNCITRAL (fn. 11), para. 38; UNCITRAL Secretary-General, A/CN.9/207, para. 26; *Herrmann*, *Unif. L. Rev.* 483, 493 (1998); see also *Boele-Woelki* (fn. 15), p. 328 para. 54.

<sup>19</sup> A Guide to UNCITRAL (fn. 11), paras 43 *et seq.*

## 2. Contractual Instruments

While legislative instruments address legislatures, the addressees of contractual instruments are the parties to a contract, i.e. businesses. Examples of contractual instruments include the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules. Since contractual instruments address businesses, it is hardly surprising that such instruments have also been developed by private organizations which do not have the standing to create legislative instruments.<sup>20</sup> Prominent examples include the International Chamber of Commerce (ICC), which provides model contracts and model clauses like the Incoterms, as well as the International Federation of Consulting Engineers (FIDIC) with its standard contracts.

Since contractual instruments have different addressees than legislative instruments, they function in a fundamentally different way. On the one hand, contractual instruments are limited in their potential scope of application. Contracts can only operate within the framework of the legal systems to which they are subordinated. Standard contracts will inevitably fail where the governing law's mandatory provisions do not leave room for party-autonomous stipulations. Contractual instruments can also never entail mandatory provisions that limit the parties' contractual freedom.<sup>21</sup> As a result, only legislative instruments are available where the legal area that is in need of harmonization entails issues that are not to be left up to the parties.

On the other hand, being located on the contractual level allows contractual instruments to operate largely independently of the applicable legislative framework.<sup>22</sup> Since mandatory statutory rules only limit the parties' contractual freedom in exceptional situations, standard contracts may establish a de facto uniform legal framework that works even in legal environments that are neither harmonized nor modernized. Contractual instruments moreover have the advantage of greater adaptability: standard contracts can be adapted to changed circumstances more easily than laws that need to undergo an elaborate revision process.

## 3. Explanatory Instruments

The last class of instruments for the harmonization and modernization of law are explanatory instruments.<sup>23</sup> Contrary to the other two classes of instruments, explanatory instruments operate as guidelines or general advice but do not result in standardized legal texts.

In light of their limited effect on harmonization, explanatory instruments will usually only be considered where stronger instruments fail for specific reasons. The UNCITRAL Recommendation on the Interpretation of Art. II(2) and VII(1) of the New York Convention<sup>24</sup> (which undertook the modernization of the 1958 New York Convention's in-writing requirement) provides for a characteristic example: in terms of the number of its Contracting Parties, the New York Convention has been considered too successful to be amended or supplemented by another convention. Amending the Convention was considered likely to exacerbate the existing lack of harmony since adoption of a binding instrument would have taken several years. In light of these circumstances, an interpretative declaration has been identified as the proper instrument for modernizing the New York Convention.<sup>25</sup>

## III. Implementation and Application Issues for Model Laws

Before the success factors for model laws can be discussed (below IV), it is worthwhile to take a closer look at how this instrument functions.

### 1. Methods of Model Law Adoption

Model laws, unlike conventions, can neither be acceded to nor can they assume force of law. Indeed, model laws are ultimately nothing more than templates for domestic legislation to be enacted in their image. In most

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<sup>20</sup> *Boele-Woelki* (fn. 15), p. 341 para. 72.

<sup>21</sup> Cf. UNCITRAL Secretary-General, A/CN.9/203, para. 115; *Herrmann*, *Unif. L. Rev.* 483, 484 (1998).

<sup>22</sup> On harmonization through standard contracts, see, e.g., the contributions of *Collins, Ackermann* and *Möslein*, in: *Eidenmüller, Regulatory Competition in Contract Law and Dispute Resolution*, 2013.

<sup>23</sup> *A Guide to UNCITRAL* (fn. 11), paras 19 *et seq.*

<sup>24</sup> Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session, Issued in Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17), annex II.

<sup>25</sup> For a summary of this discussion, see *Wolff*, in: *Wolff, New York Convention, Commentary*, 2016, Art. II paras 18 *et seq.*

cases, model laws are translated into the enacting jurisdiction's official language (if need be) and their text goes through the usual legislative procedure in the same way as any other bill.

UNCITRAL's model laws are designed to be fully incorporated into bodies of statutory law. They are drafted as fully-fledged statutes while consistently using placeholders like "this State" (e.g. Art. 1 ICA-ML) or gaps as in Art. 6 ICA-ML ("The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]").

Model laws can, however, also be incorporated by reference. Art. 16(1) of the Australian International Arbitration Act, for example, provides that "[s]ubject to this Part, the Model Law has the force of law in Australia." If this approach is selected, placeholders need to be defined ("The following courts are taken to have been specified in Article 6 of the Model Law ...", Art. 18(3) of the Australian International Arbitration Act) and gaps filled in the referencing law: "'this State' means Australia (including the external Territories)" (Art. 16(1) of the Australian International Arbitration Act). Legally, both methods of adoption are equivalent.

## 2. Unified Interpretation and Application

Model laws, unlike conventions, do not remain self-contained bodies of autonomous law but become fully integrated parts of the national legal system upon adoption. This specific feature gives rise to both legal and factual difficulties in achieving harmonization and modernization.

### a) Legal Difficulties

The legal difficulties that can arise in relation to the unified interpretation and application of model-law-based provisions can be explained best in comparison to conventions. Conventions can create autonomous law, the interpretation and application of which should not depend on which court interprets and applies it.<sup>26</sup> Autonomous law is not subjected to domestic rules of interpretation. The criteria for interpretation are rather to be derived only from the law itself. In practice there is always the possibility that different courts will not reach the same results when applying the same rules to the same facts,<sup>27</sup> but in theory they should.

Model law provisions, conversely, become part of national law once they are adopted.<sup>28</sup> Although they can all be traced back to the same model, similar provisions under several different national laws cannot be interpreted uniformly due to a lack of an autonomous legal text.<sup>29</sup> The standard for interpretation for model-law-based national provisions is therefore to be determined under the national law of the State that has adopted the model law. This finding is crucial from a harmonization perspective since only the way in which the law is applied is relevant for harmonization at the end of the day; merely having uniformity of wording is useless.<sup>30</sup>

Applying a domestic standard of interpretation when interpreting model-law-based provisions does not, however, necessarily result in the application of exactly the same methods of interpretation that apply to any other domestic law of that State. Whether or not the international origin of model-law-based provisions is to be taken into account depends solely on the rules of interpretation of the respective State.

In fact, all of the traditional means of interpretation allow for the consideration of the model-law-based provisions' origin:<sup>31</sup> when exploring the meaning of a term, specifically its legal meaning, the literal interpretation may treat the model-law-based provisions as a self-contained body of law, the terminology of which is uncoupled from the remaining legal order. The historical interpretation may include the model law's drafting history. The systematic interpretation may again treat the model-law-based provisions as a self-contained body of law and construe it from within itself. The teleological interpretation may take the purpose of implementing harmonized law into account and therefore reference the purpose attached to the respective provision of the model law. A comparative interpretation (in the manner in which it is recognized as a means for interpretation of uniform law) may call for consideration of foreign case law and legal writing on model-law-based provisions (or on the model law itself) and a comparative examination of model-law-based provisions with

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<sup>26</sup> *Kropholler*, Internationales Einheitsrecht, 1975, pp. 235 *et seq.*, 240 *et seq.*

<sup>27</sup> *Boele-Woelki* (fn. 15), p. 299 para. 16.

<sup>28</sup> *Linhart*, Internationales Einheitsrecht und einheitliche Auslegung, 2005, p. 253.

<sup>29</sup> *Wolff*, AYIA 2014, 51, 56 *et seq.*; dissenting *Bachand*, in: *Bachand/Gélinas*, The UNCITRAL Model Law after 25 Years: Global Perspectives on International Commercial Arbitration, 2013, pp. 242 *et seq.*

<sup>30</sup> *Bachand* (fn. 29), pp. 231 *et seq.*; *Gebauer*, Unif. L. Rev. 683, 691 (2000); see also *Schmitthoff*, 17 Int'l & Comp. L.Q. 551, 566 *et seq.* (1968).

<sup>31</sup> For details, see *Wolff*, AYIA 2014, 51, 63 *et seq.*

non-unified national law that can contribute to identifying a suitable understanding of the model-law-based provisions.

Taking into account the origin of model-law-based provisions can promote unified interpretation – provided that the rules of interpretation in the State adopting the model law so permit. To facilitate such permission, it is advisable to include provisions like Art. 2 A(1) ICA-ML (“In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.”) in model laws.<sup>32</sup> Even in jurisdictions in which such provision was not needed, its presence serves to remind judges and other users of the special traits of rules that only appear to be an indistinguishable part of the national body of law at first glance.

The States are, however, free to screen out such provisions when adopting a model law and to decouple their national law from its model law background. This approach may be taken by States that intend to implement a modern and well-drafted law while keeping full control over its interpretation. However, cutting the model-law-based provisions off from their international origin comes at the price of cropping their harmonizing and trade-promoting effect. As this outcome will usually not be in the State’s best interest, this step should not be taken without careful consideration.

### **b) Factual Difficulties**

Even if the legal tools which allow for unified interpretation are available, applying them properly remains a challenge. The consideration of foreign decisions and legal literature in particular – which is essential for unified interpretation – may require intensive research and extensive efforts that a state court judge may not be able to make,<sup>33</sup> at least not in courts of lower instance.<sup>34</sup> This holds particularly true in States that can only provide their courts with very limited resources.

To facilitate this task, UNCITRAL supplies multiple tools, including case law digests<sup>35</sup> and the case law on UNCITRAL texts (CLOUT) database.<sup>36</sup> The (ongoing) legal education of judges likewise remains essential. Although these steps are valuable, they cannot guarantee unified interpretation and application. Apparently, however, not much can be done beyond the aforementioned to facilitate unified interpretation of model-law-based provisions. The only exception would be the establishment of an international court that holds exclusive jurisdiction over the interpretation of harmonized law.<sup>37</sup> Being required to delegate sovereignty in this manner would, however, most likely diminish the States’ willingness to adopt harmonized law.

## **3. Interaction with Other Areas of Law**

An area closely related to unified interpretation is the interaction of model-law-based provisions with other domestic provisions of the State which has enacted the model law.

### **a) Interaction with Non-harmonized National Law**

The interaction of model-law-based provisions with non-harmonized provisions merits discussion in two respects.

First, it is irreconcilable with an interpretation of model-law-based provisions as a self-contained body of law (above 2) to assign legal terms in such provisions the same meanings they hold in other areas of law of that State. National legislatures should therefore avoid using legal terms that have a pre-defined meaning in their legal order (including when translating the model law into the State’s official language).<sup>38</sup>

Second and more importantly, model-law-based provisions may be inconsistent with other national law. For example, national non-harmonized law may allow judges to be challenged on grounds that do not justify challenging an arbitrator under Art. 12 ICA-ML. This result is inconsistent since impartiality and independence

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<sup>32</sup> For details, see *Wolff*, AYIA 2014, 51, 69 *et seq.*

<sup>33</sup> Cf. *Magnus*, in: Janssen/Meyer, CISG Methodology, 2009, pp. 33, 57 and the delegate of the United Kingdom’s remark in A/CONF.89/C.1/SR.7: “If that second clause was addressed to judges required to hear cases concerned with carriage by sea, they might become confused as to the what extent they should refer to decisions taken by the courts of 100 or so other countries before rendering their own judgement.”

<sup>34</sup> Cf. *Gruber*, Methoden des internationalen Einheitsrechts, 2004, p. 200.

<sup>35</sup> A Guide to UNCITRAL (fn. 11), para. 59.

<sup>36</sup> A Guide to UNCITRAL (fn. 11), paras 56 *et seq.*

<sup>37</sup> See *Basedow*, *RabelsZ* 81 (2017), 1, 26.

<sup>38</sup> For an example, see *Wolff*, AYIA 2014, 51, 63.

cannot be less essential for arbitrators (if for no other reason than that they are solely appointed by the parties) than it is for judges. Given that the ICA-ML relies on an international consensus, judgments that diverge therefrom can likely be traced back to idiosyncratic domestic rules on challenging judges that can only be revised by the national legislature.

#### **b) Interaction with Otherwise Harmonized Law**

While the interpretation of model-law-based provisions should not take inspiration from national law, it may well take inspiration from other harmonized provisions, be it conventions or other model-law-based provisions. One example is taking recourse to Option I Art. 7 ICA-ML for interpreting the in-writing requirement in Art. II NYC.<sup>39</sup> In such cases several harmonized provisions may jointly form a self-contained body of law. Again, however, the adopting State has the final say on the applicable rules of interpretation.

#### **c) Interaction with National Modifications to the Model Law**

Model laws can be enacted with modifications. Such modifications do not raise specific interpretative issues as long as they remain separable – these modifications are to be interpreted under domestic law only.

Modifications are less easy to handle if they are inseparably intertwined with national law, for example if they extend the scope of application of a model law. While the ICA-ML is restricted to international commercial arbitration, some States have adopted it as their only arbitration law that also regulates domestic and consumer arbitration. However, rules that are suitable for international commerce (which is UNCITRAL's mandate) are not necessarily viable for domestic consumer disputes to the same extent.

Where there is a dispute involving such inseparably intertwined modifications, it must be determined whether the national legislature intended for the modified provisions to be governed by the same rules in harmonized interpretation in both international commercial and purely domestic cases. This will often be the case since a split interpretation of one and the same set of rules depending on whether the case lies within the originally intended scope of application of the model law is not sensible. Even harmonized interpretation would not, however, disallow taking into account the individual circumstances of each case, even where they are rooted in an extended scope of application. Conversely, caution is advisable if case law from beyond the original scope of the model law is used for comparative interpretation of model-law-based provisions.

### **IV. Success Factors for Model Laws**

Having discussed the place they occupy within the system of available instruments for harmonization (above II) and how they function (above III), this paper can now turn to a more detailed analysis of the success factors for model laws.

Success always relies on multiple factors whose identity and interaction cannot be determined with mathematical precision.<sup>40</sup> Success factors can, however, be distinguished by the level on which they take effect: some are of a general nature and apply regardless of which instrument has been chosen for harmonization (below 1), while others are specific to the choice of a suitable instrument, i.e. a model law, as opposed to another instrument (below 2). The third group consists of factors that may contribute to the success of a model law on the level of its implementation (below 3).

#### **1. Instrument-unrelated Factors**

Since the model law is a specific instrument for the harmonization and modernization of law, it shares some success factors that all instruments have in common. Although these general criteria are of considerable weight, they can only be summarized in a cursory manner as this paper's focus is not on law-making in general.

##### **a) Need for Reform**

Since UNCITRAL lacks the power to impose its texts on the States, any harmonizing and modernizing text – regardless of the instrument chosen for it – requires the States' consent. The starting point of any national law reform is therefore the State's perception that the current legislation is in need of reform.<sup>41</sup>

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<sup>39</sup> For details, see *Wolff*, in: *Wolff* (fn. 25), Art. II para. 114.

<sup>40</sup> For an empirical approach, see *Efrat*, 60 *International Studies Quarterly* 624 (2016).

<sup>41</sup> *Boele-Woelki* (fn. 15), p. 336 para. 65.

## **b) Persuasiveness of the Harmonized Regulation**

States will adopt the harmonizing instrument only if doing so promises to yield greater benefits than its alternatives, i.e. enacting non-harmonized law or abstaining from reform altogether.

### **aa) General Criteria for “Good Law”**

A harmonized law will be perceived as good law if its rules honor the legitimate interests of the parties, work in practice and are consistent. A clear and transparent structure contributes to better law to the same extent as simple and clear-cut provisions. For this reason the complexity and length of the provisions on interim measures and preliminary orders in Art. 17 *et seq.* ICA-ML 2006 are not amongst the selling points of this model law.

### **bb) Non-national Character of the Regulation**

While the creation of harmonized law naturally entails a comparative element, the most practical of pre-existing solutions should not simply be identified and adopted. The more easily the harmonized law can be attributed to one specific legal order or tradition, the lower its acceptance by other States is likely to be. This factor contributed to the limited success of the Uniform Law on the International Sale of Goods (ULIS), the CISG’s predecessor, which was perceived as a predominantly Western European instrument.<sup>42</sup>

## **c) Competitive Effects of Harmonized Law Adoption**

In line with the assumptions on which the establishment of UNCITRAL is based (above I), the enactment of harmonized law by a State will usually be accompanied by the expectation that harmonized law will promote international trade and that international trade will contribute to the State’s wealth. Two examples of where the adoption of harmonized law is perceived as providing a competitive advantage are the adoption of the ICA-ML by Germany and Austria in the hopes of becoming more attractive as venues for international arbitral proceedings.<sup>43</sup>

For some States, conversely, competitive advantage is the reason for not adopting harmonized law. Switzerland, France and the United Kingdom, for example, which are frequently chosen as venues for international arbitration, did not adopt the ICA-ML and do not plan to do so. Notably, the strength of these venues is owed more to traditional connotations as a neutral (Switzerland) or business-friendly (United Kingdom) seat than to the content of their national arbitration laws.

## **2. Choice of Instrument Factors**

Apart from the general factors for harmonizing texts, the success of a model law also hinges on a number of instrument-specific factors. A model law is likely to be more successful if this instrument in particular is the best choice for a given harmonizing endeavor.

### **a) Need for Flexibility**

The need for flexibility is the single most frequently cited reason for choosing the form of a model law: “The form of a model law was chosen as the vehicle for harmonization and modernization in view of the flexibility it gives to States in preparing new arbitration laws.”<sup>44</sup> This likewise applies to model laws in other areas of law.

#### **aa) Actual Need for Flexibility**

An actual need for flexibility exists where States are likely to want to make various modifications to the uniform text in order to make it fit into their respective legal orders and where States may not be willing to accept uniform binding solutions.<sup>45</sup> Such modifications are typical where the model law provisions relate to other critical areas of law like the national court system.<sup>46</sup> One example that illustrates this is Art. 8(1) ICA-ML; according to this provision, a court before which an action covered by an arbitration agreement is brought shall “refer the parties to arbitration.” This legal consequence was transformed into “reject the action as inadmissible”

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<sup>42</sup> *Knieper* (fn. 10), p. 665.

<sup>43</sup> Germany: Government bill, BT-Drucks. 13/5274, p. 1; Austria: Nationalrat, XXII. Gesetzgebungsperiode, Regierungsvorlage No. 1158, p. 2.

<sup>44</sup> Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, para. 3; similar UNCITRAL Model Law on Electronic Signatures, Guide to Enactment, para. 27.

<sup>45</sup> *Gopalan*, L. & Com. 117, 152 (2003–2004); see also A Guide to UNCITRAL (fn. 11), para. 35.

<sup>46</sup> UNCITRAL Model Law on Electronic Signatures, Guide to Enactment, para. 27.



in sect. 1032(1) of the German Code of Civil Procedure since German law does not provide for referral to arbitration.

While States can make reservations when acceding to conventions, such reservations are only permitted under certain restrictive circumstances (Art. 19 of the 1969 Vienna Convention on the Law of Treaties). Permitted reservations are often already specified in the convention, which requires a high degree of foresight at the time the convention is drafted. Since such foresight is not always at hand, model laws have an advantage where the uniform text later needs adjusting in order for it to fit into national law.

#### bb) Perceived Need for Flexibility

Another more psychological factor may be the opportunity to amend the model law text before or after adoption regardless of whether such amendments are needed and of whether they are indeed implemented. Simply having full ownership over the enacted law may in and of itself enhance willingness to adopt harmonized and modernized law and may make it more attractive to implement model laws rather than to accede to conventions. Indeed, amendments to model laws are said to often be made for their own sake.<sup>47</sup>

### b) Need for Formulated Rules and Standards

If flexibility were the key advantage of model laws, legislative guides – which are even more flexible – would seem to be the better choice in most cases. However, the desire for flexibility is in fact counterbalanced by the need for formulated rules and standards. While model laws are preferable to conventions where flexibility is needed, they are also preferable to legislative guides where formulated rules and standards are essential.

#### aa) Harmonizing Effect of Rules

In sharp contrast to the emphasis on flexibility, UNCITRAL and other law-making organizations should strive to replace legislative guides with model laws or conventions wherever possible – provided, of course, that the conditions for model laws are met. The downside to full flexibility in transformation is the often lesser degree of harmonization that such an instrument can actually effect. Given that legislative guides do not provide precisely worded rules to be enacted, their unifying effect is necessarily limited to the underlying policy decisions. This is only of limited assistance for international trade: certainly businesses' costs for adjusting their transactions to the requirements of several jurisdictions will decrease if these jurisdictions follow the same policies, but transaction costs would be significantly lower still if harmonized law were in effect in these jurisdictions.<sup>48</sup>

Precisely worded provisions should only be abstained from for good reasons. Such reasons include if States use disparate legislative techniques and approaches for solving a given issue.<sup>49</sup> Model law provisions in such cases would often be subject to complete revision before their adoption by a State, which would render the creation of fully-worded provisions as a one-size-fits-all uniform solution useless.

#### bb) Efforts of Formulating Rules

Fully-worded provisions are also preferable for another reason, namely that they save the States the efforts of formulating their own bespoke provisions. An example of this is the sanctions regime for businesses that fail to comply with the business register regulations: while it is true that “(t)he Regulation should establish and ensure wide publication of sanctions (including fines, deregistration and loss of access to services) that may be imposed on a business for a breach of its obligations under the Regulation,”<sup>50</sup> the effort to identify the best practice for such sanctions and to draft appropriate regulations remains with the individual State.

If States have to transform several interdependent policy considerations into national legislation, they moreover run the risk of unintended or incoherent results.<sup>51</sup> Being aware of such risk may also prevent States from adopting harmonized law.

These effects are even more pronounced where the State lacks the experience or resources to create and implement proper provisions that meet the requirements of international trade.<sup>52</sup>

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<sup>47</sup> Herrmann, *Bus. L. Int'l* 249, 252 (2001).

<sup>48</sup> See Knieper (fn. 10), p. 666.

<sup>49</sup> A Guide to UNCITRAL (fn. 11), para. 43.

<sup>50</sup> UNCITRAL Secretariat, A/CN.9/WG.I/WP.96, Recommendation 41.

<sup>51</sup> Cohen, *Unif. L. Rev.* 325, 330 (2010).

<sup>52</sup> See Cohen, *Unif. L. Rev.* 325, 329 (2010).

### cc) Need for Standardization or Otherwise Uniform Solutions

The general preference for fully-formulated provisions in conventions and model laws becomes a must where the issues at stake require standardization or otherwise uniform solutions. The current discussion on the structure of a unique business identification number may serve as an example: upon request by Working Group I, the Secretariat has prepared “an instrument along the lines of a concise legislative guide on business registration.”<sup>53</sup> While this draft instrument refrains from proposing an internationally standardized unique business identifier, UNCTAD submits that “(i)t would simplify registration and cross border trade and investment if all governments were to agree on a common alphanumeric system for registering businesses that would facilitate identification of a company’s ultimate beneficiary ownership by country.”<sup>54</sup> While this is certainly true, international trade (and the community of States) would be much better served if such system was directly set up in a model law (or convention).

### c) Self-contained Area of Law

Model laws require a confined and self-contained area of law with a limited number of interfaces with other legal areas. This largely follows from the reflections on flexibility (above a) and fully-worded rules (above b): if an area of law is embedded in a larger legal context or closely interwoven with several other areas of law, adopting States would regularly need to make numerous adjustments to the model law provisions. A set of fully-worded provisions is of little use in such a setting. If an area of law of that kind is suitable for harmonization at all, a legislative guide is the preferable instrument.

### d) Irrelevance of a State’s Legal Obligation

States can autonomously adopt model laws and reverse their adoption at any time. The model law is therefore not the proper instrument if other States need legal certainty that a given State will adopt and remain true to a specific set of harmonized rules. One example of this is where regulations are adopted on the basis of reciprocity.

### e) Efforts for Setting up the Instrument

A final argument for favoring model laws over conventions is the effort required to develop the instrument. Conventions are usually concluded at a diplomatic conference or in the United Nations General Assembly,<sup>55</sup> which has proven to be time-consuming and costly.<sup>56</sup> Model laws, on the other hand, do not require such an involved conclusion procedure.

### f) Final Remark: the Political Factor

It is one thing to have a clear understanding of the factors for a proper choice of instrument and another to make a choice according to these insights.

The choice of instrument is not imposed by the UNCITRAL Secretariat or any other administrative body. It is rather the result of what the States represented in UNCITRAL and its Working Groups could agree on. Since decisions are usually taken by consensus,<sup>57</sup> the process inherently runs the risk of ending up with the smallest common denominator in terms of the instrument’s harmonizing effect.

This risk is increased by the fact that the choice of instrument is often only discussed at a relatively late stage. States that do not feel comfortable with the substance of the proposed harmonizing rules can still easily opt for an instrument with a lesser harmonizing effect at this stage.

## 3. Model Law Implementation Factors

The final group of success factors for model laws relates to their technical implementation.

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<sup>53</sup> UNCITRAL Secretariat, A/CN.9/WG.I/WP.96 para. 1.

<sup>54</sup> UNCTAD, A/CN.9/WG.I/WP.98, p. 5.

<sup>55</sup> See fn. 12.

<sup>56</sup> UNCITRAL Secretary-General, A/CN.9/203, para. 119; UNCITRAL Secretary-General, A/CN.9/207, para. 26; *Cohen*, 36 *Brook. J. Int’l L.* 567, 582 (2011); *Gopalan*, L. & Com. 117, 152 (2003–2004).

<sup>57</sup> *Knieper* (fn. 10), pp. 662 *et seq.*

### **a) Interfaces with Other Areas of Law**

Since model laws require a confined and self-contained area of law with a limited number of interfaces with other legal areas (above 2. c), care should be taken when tailoring a model law's scope of regulation. Interfaces with other areas of law should be small in number and clear in demarcation. For this reason, it was a wise decision not to go into the details of court proceedings in the ICA-ML but to restrict the rules to the absolute minimum in this respect. The same would hold true for a model company law and its interfaces with regulations on business registers. Indeed, as long as the aforementioned interfaces are kept to a minimum, the ability to make minor modifications to model laws is one of their best features (above 2. a) aa).

### **b) Use of Neutral Legal Terminology**

Legal terms in model-law-based provisions should not be assigned the meaning they have in other areas of law of that State. Not only States enacting model laws (above III. 3. a) but also the makers of model laws must be aware of this risk. The makers can minimize it by avoiding terms that are likely to have a specific legal meaning (e.g. "due process") and instead making use of non-technical terms (e.g. "full opportunity to present one's case").<sup>58</sup>

### **c) Reconciliation with Otherwise Harmonized Law**

New model laws should, to the extent possible, be reconciled with pre-existing harmonized texts to allow for harmonic interaction (above III. 3. b).

## **V. Conclusion**

The model law is a relatively new legislative instrument. Its characteristic features are that States are free to adopt it fully or in part and that it becomes part of the State's domestic law once it is adopted. A convention, conversely, cannot be modified by the States (apart from reservations under strict conditions) and remains autonomous law. Since model laws do not create autonomous law, it is difficult to ensure uniform interpretation and application of model-law-based provisions. This difficulty can, however, be overcome by the States in large part since the available means of interpretation can be adjusted accordingly. Provisions like Art. 2 A ICA-ML can assist in this task.

Success factors for model laws include instrument-unrelated factors, factors that make model laws a superior choice to other types of instrument for a given regulation and factors relating to the implementation of the model law. Among the most important factors for choosing the proper instrument is the weighing of a real or perceived need for flexibility against the need of States and businesses for uniform rules. The area of law dealt with in a model law should be self-contained with a limited number of clearly defined interfaces with other legal areas.

Model laws have not been subject to extensive research to date. A better understanding of this instrument is, however, vital for the successful creation of further model laws and for the effective use of UNCITRAL's resources. This paper has attempted to undertake a first step to further such understanding.

## **VI. Abstract**

Why do some harmonizing texts virtually reshape the landscape of international trade law while others turn out to have no effect on harmonization and modernization at all? Among the less obvious but no less decisive success factors is the proper choice of instrument, i.e. the technique employed to harmonize and modernize the law. The model law is a "best practice law" which is suggested to States for adoption. Together with conventions and legislative guides, it belongs to the category of legislative instruments. Since model laws become fully integrated parts of a national legal system upon adoption, their interpretation follows the standards of the adopting State. These standards can (and should) allow for the consideration of the origin of the model-law-based provisions. Success factors for model laws include instrument-unrelated factors (like the need for reform and the persuasiveness of the harmonized regulation), factors that make model laws a superior choice to other types of instrument for a given regulation (like the need for flexibility, the need for formulated rules and standards and the self-contained nature of the area of law to be harmonized) and, finally, factors relating to the implementation of the model law (like interfaces with other areas of law and neutral terminology).

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<sup>58</sup> Herrmann, *Unif. L. Rev.* 483, 489 (1998).