INTERNATIONAL ARBITRATION LAWS OF STATES IN U S A

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About a dozen states in the USA have passed international arbitration statutes. This paper will explain why those laws were proposed and passed, whether they were necessary, and what the relevance may be to foreign lawyers who arbitrate international cases in those jurisdictions. In alphabetical order, the states that have passed such laws are California, Colorado, Connecticut, Florida, Georgia, Hawaii, Maryland, North Carolina, Ohio, Oregon and Texas. A list of those statutes is appended.

Some, but not all of these laws are based, wholly or in part, on the UNCITRAL Model Law, approved and recommended by that organization on June 21, 1985, in order to provide an appropriate modern arbitration statute for countries that did not already have modern arbitration legislation.

The UNCITRAL Model Law was carefully drafted by leading experts in the field, has been studied and analyzed by experts in the United States and elsewhere, and is believed to be appropriate for the purpose for which it was designed. The fact that it has been adopted in Egypt, as well as in Canada and Mexico in North America, would indicate that the UNCITRAL Model Law is serving that purpose in international circles. The UNCITRAL Model Law is highly praised, and deservedly so.

1. Why did U.S. states pass international arbitration legislation?

In every state that passed such legislation, the law was sponsored by an international law committee of a state or local Bar association, and at least one of the expressed goals was to encourage the business of international arbitration in that state, by encouraging foreign lawyers to arbitrate there. Other goals, sometimes expressed, were to fill gaps in the Federal Arbitration Act and to encourage uniformity in international arbitration.

In the opinion of J. Stewart McClendon, a leading expert on the subject, none of these reasons were justified, and most of these state laws may actually add to the confusion and reduce uniformity. In his opinion, there "does not appear to be a need for such State international arbitration legislation". He also pointed out that state laws on arbitration are preempted to the extent that they conflict with the FAA.

The FAA has been compared to the Model Law by two authoritative study committees, one sponsored by the Association of the Bar of the City of New York, and the other by the Foreign Law Association of Washington. Both studies concluded that both laws satisfied the objectives of a modern arbitration law. These studies were intended to determine whether the FAA should be replaced by the Model Law. The conclusion was that there was no need to do so, although minor problems were identified in the FAA relating to provisional remedies and giving courts more defined powers to order arbitration hearings to be held in foreign jurisdictions. Both of those areas can be resolved by agreement of the parties or by authorizing administrative agencies to take appropriate action. Both reports pointed out that in the U.S., it is customary for parties to refer to institutional rules in their agreements.

2. Why are some such laws not justified?

The United States already has a particularly hospitable environments for international arbitration. As a signatory to the New York Convention, the U.S. passed Part II of its Federal Arbitration Act, which does everything that a modern international arbitration act is expected to do: arbitration clauses in international contracts are enforced in accordance with their terms, litigation on the same subject is stayed by the courts, arbitrators are appointed by the courts if the parties are unable to agree on their appointment, reluctant parties are compelled to provide testimony or documents in aid of arbitration, awards are enforced, even ex parte awards, or awards are set aside if there was no agreement to arbitrate or due process, as defined in the law, was not observed. The FAA encourages party autonomy, deferring to the parties' contract or mutual agreement at every stage of the proceeding.

Here, some historical background may be helpful. Before the 1920s, courts in the U.S. did not generally enforce arbitration clauses in business contracts. Thereafter, responding to pressure from the business community and the American Arbitration Association, legislation was passed to enforce such clauses and provide appropriate support to business arbitration, both on the federal level, as reflected in the FAA, and in almost every state, based on a Uniform Arbitration Act, similar in most respects to the FAA.

When the U.S. subscribed to The New York Convention, it added Part II to the FAA to clarify that both state and federal courts were obliged to enforce arbitration clauses in international contracts, broadly defined, to confirm international arbitration awards, and to provide other appropriate assistance to that process. Courts in the U.S. have complied with their obligations under that law and have encouraged the use of arbitration in international trade and investments.

3. What is the relevance of state international arbitration laws to foreign lawyers?

The various state international arbitration laws differ as to how they might apply to international arbitration being held in that particular state. In general, they create additional complications that must be considered by local counsel

One of the earlier state laws on this subject , passed in 1988, was in Florida, where the Florida Bar Association had long yearned to capture arbitration business coming from South and Central American business transactions, an area where arbitration has not flourished in the past, because of the Calvo doctrine and some suspicion of arbitration as a European or North American system. The Florida law, based on the UNCITRAL Model Law, was justified on the basis that gaps existed in the FAA, specifically that the FAA did not cover foreign parties not engaged in U.S. commerce or contracts with firms in countries that had not adopted the New York Convention. According to McClendon, "these gaps did not exist". The Florida Act was sponsored by the Florida Bar to make Florida a popular place to arbitrate, by drawing attention to it in Latin American business circles.

California also passed international arbitration legislation in 1988. It adopted the first six chapters of the Model Law, but not the provisions on recourse to awards. It added a chapter on conciliation. The intention of the sponsoring Bar Association Committee was to indicate that California was a hospitable state for international arbitration, but the somewhat divergent provisions in the law may actually complicate things for a foreign lawyer. For example, the California statute contains specific disclosure criteria applicable to an arbitrator serving on an international case, in contrast to the Model Law's more general language.

My own home state, Connecticut in 1989 passed a similar statute, based on the Model Law, contrary to my advice. Again, the intention was based, primarily, on marketing. Little has

come of it. Texas, likewise, adopted a similar statute for much the same reasons in 1989, at a time when the Texas State Bar was becoming enthusiastic about ADR, alternative dispute resolution, installing a mandatory mediation program in Texas state courts for all civil disputes.

In 1990, the state of Maryland passed a unique law, that simply precludes the application of Maryland law to international arbitration held within the state, making the FAA the sole applicable law. The purpose of this law, as was true of the others mentioned was to popularize the state as a locale for such arbitration. In my view, this is the state law most likely to accomplish its objectives. A law passed in Hawaii in 1985 also steers clear of any conflict with the FAA.

In 1991, Ohio enacted an international arbitration law that gives courts the power to grant interim orders in connection with such an arbitration, provides procedural rules where the parties have been unable to agree on such procedures, contains a section on consolidation, giving authority to the courts to order certain claims consolidated, authorizes the use of mediation and other forms of ADR, and confirms that arbitrators and mediators are immune from suit.

Finally, in 1993, Colorado adopted an Act that creates a broad new definition of international agreements and transactions, provides that international disputes are subject to all U.S. treaties and agreements, that parties are free to select the language of their arbitration and grants immunity from service of process to all persons while participating in international dispute resolution in Colorado, including parties, witnesses, neutrals and the parties' representatives.

In summary, the dominant purpose of those states that passed versions of the UNCITRAL Model Law for international arbitration cases has been to encourage arbitration in their situs, However, the effect of such laws, with the exception of Maryland and Hawaii, may be to create additional confusion and lack of uniformity. According to both McClendon and two committees that have studied the question, there is really little reason for states to pass such legislation, since the FAA already provides an adequate system of international arbitration la applicable throughout the United States. Foreign lawyers should be aware, however, that such local laws do exist, but should know that they will almost never create barriers to arbitration, since, in every case, they were intended to encourage the use of arbitration. Local counsel should be consulted, however, as to the specifics of each such law.

Recent List of International Arbitration Statutes by State

California	Arbitration and Conciliation of International Commercial Disputes, Cal.Div.Proc.Code Secs. 1297.11 to 1297.432 (Deering 1988)
Colorado	Colorado International Dispute Resolution Act. Rev.Stat.Secs.13-22-501 to 13-22-505 (April 1993), effective 4/12/93.
Connecticut	UNCITRAL Model Law on International Arbitration Publ,Act. No, 89-179, 1989 Conn. Legis. Serv. 261(West)
Florida	Florida International Arbitration Act. Fla.Stat.Secs. 684.01-684.35(1988).
Georgia	Resolution of Conflicts Arising Out of International Transactions Ga. Code Ann. Secs. 7.201-7.204 (1989).
Hawaii	Hawaii International Arbitration, Mediation and Conciliation Act. Haw. Rev. Sta. Secs. 658D-1 to 658D-9 (1988).
Maryland	Maryland International Commercial Arbitration Act.

	Md.Cts.& Jud.Proc. Code Ann. Secs.3-2B-01 to3-2B-09 (1990).
N.Carolina	Chapter 1, Art. 45B Gen. Stats.
Ohio	Ohio Code, Chap. 2712.
Oregon	H. B. 2381 (June 1991)
Texas	Arbitration and Conciliation of International Disputes. Tex Rev.Civ Stat. Ann. Arts. 249-1 to 249-43 (Vernon 1989).

Articles on State International Arbitration Laws

Kolkey, International arbitration and conciliation in California, Whittier Law Review, Vol.10,pp.181-187(1988).

Wilner, Overview of new Georgia arbitration code, Inst. Cont. Leg, Ed.Ga. Vol2 pp 1-53 (1989)

McClendon, State international arbitration laws, Amer.Rev. Int. Arb. Vol.1 pp. 245-260 (1990).

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