

The United States Federal Arbitration Act and the UNCITRAL Model Law: How and Why are They Different?



Besides setting out some notable differences between the UNCITRAL Model Law and the United States Federal Arbitration Act, this article also discusses why the Model Law has not been adopted in the United States

Dana H Freyer¹

**Skadden, Arps, Slate, Meagher & Flom LLP
New York, United States**

Email: dfreyer@skadden.com

Introduction and Overview

Unlike many other countries that are major venues for international arbitration, the United States has not enacted the UNCITRAL Model Law. In the US, the 80-year old Federal Arbitration Act ('FAA')² provides the legislative framework for virtually all domestic and international commercial arbitration. Chapter 2 of the FAA³ implements the New York Convention. Chapter 3,⁴ added in 1990, implements the Inter-American Convention on International Commercial Arbitration 1975 ('Panama Convention'). Chapter 1 of the FAA⁵ covers domestic arbitration and, to the extent that it does not conflict with Chapters 2 and 3, international arbitration as well. In practice, this means that the grounds set forth in Chapter 1 for setting aside a domestic arbitration award apply also to an international arbitration award rendered in the US.

Like the Model Law, the FAA supports the principles of party autonomy and limited local curial involvement in the arbitration. Under the FAA, like the Model Law, arbitration agreements

are to be enforced in accordance with their terms and arbitral awards shielded from judicial review on the merits.

Nonetheless, the FAA and the Model Law differ in several ways, most notably with respect to the following:

- 1 the basis for setting aside an award;
- 2 the power to modify or correct an award;
- 3 the procedure for appointment of arbitrators; and
- 4 the arbitral tribunal's power to rule on its own jurisdiction.

In addition, there are many important steps in the arbitration proceedings that the Model Law addresses explicitly but the FAA does not. I discuss these below. Of course, a well-drafted arbitration agreement that incorporates recognized arbitration rules will render most, if not all, of these differences academic, as the parties' agreement (including the arbitration rules incorporated by reference into the agreement) will generally trump or supplement the default provisions of the FAA and the Model Law. It is rather with poorly drafted or 'pathological' clauses, which fail to address key aspects of the arbitration process, that these differences may prove to be significant.

This paper also addresses some of the reasons why the UNCITRAL Model Law has not been adopted in the US and the status of the debate on that issue.

Differences Between the FAA and the Model Law

Grounds for Setting Aside Award

One of the major differences between the Model Law and the FAA are the specific grounds for setting aside an award although there is some overlap. For example, both provide that an arbitration award may be set aside if the parties' due process rights have been violated. The Model Law ground (Article 34) is that a party did not receive proper notice or an opportunity to present its case. The comparable FAA ground (Article 10) is that the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. Another ground found in both statutes is if, as stated in the Model Law, the award deals with a dispute outside the scope of the arbitration clause. The corresponding FAA ground is that the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The remaining four Model Law grounds for setting aside an award have no explicit FAA counterpart. These are:

- 1 a party was under some incapacity or the arbitration agreement was invalid under applicable law;
- 2 the composition of the arbitral tribunal was not in accordance with the parties' agreement or the Model Law;
- 3 the subject matter of the dispute could not be arbitrated under the law of the place of arbitration; or
- 4 the award violates the public policy of the state in which the arbitration is being held.

The two FAA grounds for vacating an award not found in the Model law are: (a) the award was procured by corruption, fraud, or undue means; (b) there was evident partiality or corruption in the arbitrators.

Additionally, an award subject to the FAA can be set aside on the ground of 'manifest disregard of law' which was added by the US Supreme Court in *Wilko v Swan*.⁶ Although the manifest disregard of the law standard has been applied extremely sparingly by the US courts, it has been used to vacate a number of domestic arbitral awards

rendered in the US.⁷ Several courts have indicated that the standard is, in theory, applicable to international arbitration awards rendered in the US although it has not yet been applied to vacate an international award.⁸

Modification or Correction of Award

The two statutes also differ in their approaches to modifying and correcting an award. Under the Model Law, an application to set aside the award is the only available recourse to a court against an arbitral award. Article 33 of the Model Law contemplates that correction and interpretation of an award can be obtained from the arbitral tribunal only. Section 11 of the FAA, in contrast, permits a party to apply to the court to modify or correct an award and specifies the limited grounds for obtaining such relief.

Kompetenz-Kompetenz—Arbitral Tribunal's Power to Rule on its Own Jurisdiction

Article 15 of the Model Law incorporates the *Kompetenz-Kompetenz* principle—the arbitral tribunal has the power to rule on its own jurisdiction—and provides for court review of such a decision within 30 days after the ruling. In contrast, the US Supreme Court has interpreted the FAA to require that a court shall rule in the first instance on the jurisdiction of an arbitral tribunal unless there is clear and unmistakable evidence that the parties have agreed to submit the issue of arbitrability to the arbitrator.⁹ Such unmistakable evidence can be found where the parties have designated arbitration rules that provide that the issue of arbitrability shall be decided by the arbitrator.¹⁰ The tribunal's decision on that issue may then be reviewed by the courts using the deferential standard set forth in Section 10 of the FAA that is used to review other decisions of the arbitrator.¹¹

Selection of the Arbitrators and Number of Arbitrators is the Last Major Area of Difference

Article 10(2) of the Model Law provides that if the parties fail to designate the number of arbitrators there shall be three, and Article 11 provides a detailed procedure for arbitrator appointment, which includes party selection. Court assistance for appointment of arbitrators if the parties fail to agree or act is available under Article 11 of the Model Law. In contrast, Section 5 of the FAA provides that if the number of arbitrators is not specified, there shall be one arbitrator and if no method of arbitrator appointment is provided, 'then upon the application of either party to the controversy the court shall designate or appoint an arbitrator or arbitrators or umpire, as the case may require ...'.

Areas Addressed by the Model Law but Not by the FAA

The FAA is silent on certain key issues which are addressed in the Model Law. These areas include:

- 1 the availability of provisional measures from a court;
- 2 an arbitrator's disclosure obligations;
- 3 the procedures for challenging an arbitrator's impartiality;¹²
- 4 the tribunal's right to determine the venue and language of the arbitration and the governing law for the dispute (if the parties fail to do so);
- 5 the tribunal's right to appoint experts;
- 6 the procedures to be followed if a party defaults; and
- 7 the form of the arbitration award.¹³

Provisional Remedies

With respect to the availability of provisional remedies, Article 17 of the Model Law gives arbitrators the power to order such interim relief 'as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute'. Article 9 recognizes that it is not incompatible with an arbitration agreement for a party to request interim measures of protection from a court and for a court to grant such measures before or during arbitral proceedings.

The FAA, in contrast, is completely silent on the subject of the availability of provisional remedies—both from the arbitral tribunal and a court. Some US courts have granted provisional relief in international arbitration cases both before and after ordering parties to arbitrate.¹⁴ Other courts have taken the position that when parties have elected international arbitration, the New York Convention deprives the courts of jurisdiction to grant provisional remedies and the courts' only option is to order the parties to arbitrate.¹⁵ In some federal circuits, this problem may be eliminated when parties agree to arbitration rules that specifically authorize the parties to seek preliminary injunctive relief from a national court or provide for such relief in the arbitration agreement.¹⁶ Although the issue is still unsettled and the outcome may vary among the federal circuits, the trend is for US federal courts to order provisional remedies where such remedies are warranted. The US Supreme Court has not yet ruled on the issue.

Arbitrator Disclosure Obligations and Procedures for Challenging Arbitration

Articles 12 and 13 of the Model Law set forth the disclosure obligations of a proposed arbitrator and the grounds and procedure for challenging an arbitrator during the arbitration proceeding. The FAA does not address arbitrators' disclosure



Photo: Kenneth Sponsler

obligations; nor does it specify grounds or a procedure for challenging an arbitrator's impartiality until after an award has been made.¹⁷ Although most international arbitral rules contain disclosure and challenge standards and procedures, parties to certain ad hoc arbitrations venued in the US, who have not agreed to any such standards or procedures, may have no choice but to wait until a final award has been issued to challenge an arbitrator's impartiality.

Venue of the Arbitration

Article 20 of the Model Law provides that where the parties have not designated the place of arbitration, such determination will be made by the arbitral tribunal 'having regard to the circumstances of the case, including the convenience of the parties'. The scope of the US courts' power to determine the site of an arbitration when the parties have not designated one is unclear under the FAA. Section 206 of the FAA, which covers arbitrations that fall under the New York Convention, provides that: 'A court having jurisdiction under this Chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.' However, some US courts have held that in an international arbitration falling under the New York Convention, when the parties have not designated a *situs* for the arbitration (or arbitration rules that provide for a method of site selection), a US court may order the parties to arbitrate under Section 4 of Chapter 1 of the FAA 'but only within the district in which the petition for an order directing such arbitration is filed.'¹⁸ For arbitrations without a designated venue that fall under the Panama Convention, Section 303(b) of the FAA provides that 'the court will direct that the arbitration shall be held ... in accordance with Article 3 of the Inter-American Convention,' which in turn refers the parties to the Commercial Arbitration and Mediation Center for the Americas, whose arbitration rules provide a method of site selection.¹⁹

Choice of Law

Article 28 of the Model Law provides: 'Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.' The FAA is silent on this issue. In practice, however, US courts will generally leave the choice of law to the arbitral tribunal. Thus, the result under either law would likely be the same. Moreover, as with other areas on which the FAA is silent, the rules selected by the parties to govern the arbitration usually direct how this issue is to be handled.

Language of the Arbitration

Article 22 of the Model Law provides that failing agreement on the language of the arbitration, 'the arbitral tribunal shall determine the language or languages to be used in the arbitration'. Again, while the FAA is silent on this issue, most arbitration rules leave this issue to be determined by the tribunal failing agreement by the parties.

Other Procedural Issues

The Model Law contains detailed procedures regarding statements of claim and defense (Article 23), the arbitration hearing (Article 24) and the appointment of experts by the arbitral tribunal (Article 26). The FAA contains no such provisions which again are usually covered by the applicable rules.

Default

Article 25 of the Model Law contains detailed provisions for dealing with the default of a party to an arbitration while the FAA is silent on this issue.

Form of Award

Article 31 of the Model Law provides for a written, reasoned award. Although the FAA is silent on the issue of the form of the award, it appears to assume that the award will be in writing as it provides in Section 13 that when a party moves to confirm an award it will file the award with the court. The New York Convention, incorporated into Chapter 2 of the FAA also provides for a written award by implication,²⁰ but does not provide for any particular form of award.

The FAA and the Laws of the 50 States

Another unique and often puzzling feature of the arbitration legislative scheme in the US is the relation between the FAA and the arbitration laws of the 50 US states. Certain provisions of the arbitration law of a state in which an arbitration is located may, in some circumstances, also be applicable in an international arbitration governed by the FAA.

Although the FAA applies to all international arbitrations, the FAA does not pre-empt state arbitration laws with respect to matters on which the FAA is silent. As a practical matter, state arbitration laws typically will not be applicable to international arbitrations because the arbitration rules chosen by the parties will likely address all relevant procedural issues. However, if the FAA and the designated arbitration rules are silent on a particular issue that is addressed in the arbitration law in the state where the arbitration is venued, that state's law could impact the procedure to be followed in the arbitration. For example, Florida provides for non-consensual consolidation of

disputes by the arbitral tribunal where disputes to be arbitrated under its international arbitration act have common questions of law or fact or arise out of a single transaction or enterprise.²¹ Georgia also has a non-consensual consolidation provision in its Arbitration Code, which applies to both domestic and international arbitrations and which authorizes the court to resolve any conflicts between different arbitration agreements that are being consolidated.²²

Why Has the Model Law not been Adopted in the United States?

Despite the fact that a number of Bar Association committees and commentators have advocated replacing the FAA with the Model Law (or amending the FAA with selected provisions of the Model Law), there has been no broad support for such action. Those who advocate replacing or amending the FAA claim it is not sufficiently comprehensive and creates uncertainty because of the interaction between the FAA and various state laws, which the FAA does not completely pre-empt.²³

Supporters of the FAA argue that since it's not broken, why fix it?²⁴ They contend that most of the nations which have adopted the Model Law had limited experience and history with arbitration and, prior to adopting the Model Law, played a minor role in the international arbitration community. They also note that the United States now has over 80 years experience using, and case law interpreting the FAA, which could be lost if it was replaced with the Model Law. In the words of

one commentator, 'adoption of the UNCITRAL Model Law is not only unnecessary to maintain the United States' leading position in international arbitration, but would be detrimental to the effectiveness of international arbitration in the United States'.²⁵ These proponents of maintaining the FAA as is have even argued that in certain areas, the perceived gaps in the FAA are improvements over the Model Law. For example, since challenges to arbitrators are rarely successful, they consider the Model Law's procedure for arbitrator challenges at the beginning of the case to be a waste of time.²⁶ They contend that the FAA's approach of allowing a court to determine an arbitrator's jurisdiction is also more efficient, as the determination can be made in a court while the parties are choosing an arbitral tribunal.²⁷ Supporters of the FAA also note that most of the remaining gaps in the FAA have been filled by case law and practice—or are filled by rules.²⁸

In the opinion of many US arbitrators and practitioners, the FAA is working—an observation that is bolstered by the steadily increasing number of international arbitrations filed in the US. According to the 2005 Annual Report of the American Arbitration Association, the number of international cases filed with its International Centre for Dispute Resolution continues to increase significantly. It is hard to argue with success. Therefore, absent a dramatic change in the current perception of the US as a hospitable forum for international arbitration, it seems unlikely that momentum will build for replacing the FAA with the Model Law.

Notes:

¹ Dana H Freyer is a partner and head of the arbitration and alternative dispute resolution practice at Skadden, Arps, Slate, Meagher & Flom LLP in New York. This article is based upon a presentation made at the IPBA/ICC Arbitration Conference in Sydney on 2 May 2006. The views expressed are those of the author and not necessarily the view of her firm.

² 9 USC Sections 1–307.

³ 9 USC Sections 301–208.

⁴ 9 USC Sections 301–307.

⁵ 9 USC Sections 1–16.

⁶ *Wilko v Swan* 346 US 427 (1953) overruled on other grounds, *Rodriguez de Quijas v Shearson/American Exp, Inc* 109 SCt 1917

(1989). 'The two-prong test for ascertaining whether an arbitrator has manifestly disregarded the law has both an objective and a subjective component. We first consider whether the "governing law alleged to have been ignored by the arbitrators [was] well defined, explicit, and clearly applicable". We then look to the knowledge actually possessed by the arbitrator. The arbitrator must "appreciate ... the existence of a clearly governing legal principle but decide ... to ignore or pay no attention to it". Both of these prongs must be met before a court may find that there has been a manifest disregard of law.' *Westerbeke Corp v Daihatsu Motor Co, Ltd* 304 F3d 200, 209 (2nd Cir 2002)

(citations omitted) (alterations in original); see, also, *Wallace v Buttar* 378 F3d 182 (2nd Cir 2004).

- ⁷ See *Patten v Signator Ins Agency, Inc* 441 F3d 230, 235 (4th Cir 2006) (arbitrator disregarded the language of the arbitration agreement in concluding that it contained an implied time limitation); *Mo River Serv, Inc v Omaha Tribe of Neb* 267 F3d 848, 855 (8th Cir 2001) (award vacated because it awarded damages in contravention of express contractual provisions); *Halligan v Piper Jaffray, Inc* 148 F3d 197 (2nd Cir 1998) (arbitrator ignored clear principles of law that were presented to him).
- ⁸ *Jacada (Europe) Ltd v International Marketing Strategies, Inc* 401 F3d 701 (6th Cir. 2005); *Bluebell, Inc v Western Glove Works Ltd* 816 F Supp 236 (SDNY 1993); see, also, *Westerbeke Corp v Daihatsu Motor Co, Ltd* 304 F3d 200, 209 (2nd Cir 2002).
- ⁹ *First Options of Chicago, Inc v Kaplan* 514 US 938, 946 (1995).
- ¹⁰ See, eg *Terminix Intern Co, LP v Palmer Ranch Ltd Partnership* 432 F3d 1327, 1332 (11th Cir 2005) (arbitrator shall decide arbitrability where parties have agreed that “arbitration shall be conducted in accordance with the Commercial Arbitration Rules ... of the American Arbitration Association” (‘AAA’) ... Rule 8(a) [of which] provides that “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”); *Contec Corp v Remote Solution, Co* 398 F3d 205, 208 (2nd Cir 2005) (‘when ... parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator’); *Apollo Computer, Inc v Berg* 886 F2d 469, 473 (1st Cir 1989) (‘By contracting to have all disputes resolved according to the Rules of the ICC ... , Apollo agreed to be bound by Articles 8.3 and 8.4. These provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate whose continued existence and validity is being questioned.’).
- ¹¹ 514 US at 943. ‘That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. See, eg 9 USC Section 10.’ *Id.*
- ¹² See, generally, Kolkey, DM, (1990) ‘Reflections on the US Statutory Framework

for International Commercial Arbitrations: Its Scope, Its Shortcomings, and the Advantages of US Adoption of the UNCITRAL Model Law’ *Amer J Int Arb* Vol 1, 491.

- ¹³ *Id.*
- ¹⁴ See *PMS Distributing Co v Huber & Suhner, AG* 863 F2d 639, 642 (9th Cir 1988) (upholding district court’s grant of provisional relief relating to international arbitration); *Alvenus Shipping Co Ltd v Delta Petroleum Ecuatoriana* 876 F Supp 482 (SDNY 1994) (ordering provisional relief); see also, *Borden, Inc v Meiji Milk Products Co, Ltd* 919 F2d 822, 826 (2nd Cir 1990) (New York Convention does not deprive court of jurisdiction to order provisional remedies); *China National Metal Products Import/Export Company* 155 F Supp 2d 1174, 1179 (CD Cal 2001) (same).
- ¹⁵ See *McCreary Tire & Rubber Co v CEAT SpA* 501 F2d 1032, 1038 (3rd Cir 1974) (in an international arbitration, New York Convention deprives court of jurisdiction to order provisional remedies); *ITAD Associates v Podar Brothers* 636 F2d 75, 77 (4th Cir 1981) (same).
- ¹⁶ See *Sauer-Getriebe KG v White Hydraulics, Inc* 715 F2d 348, 350 (7th Cir 1984). The court held that ‘a party’s right to seek injunctive relief in court and its right to arbitrate are not incompatible’, noting that the parties had adopted the Arbitration Rules of the International Chamber of Commerce that specifically authorized the parties to seek interim relief or conservatory measures from a court.
- ¹⁷ Section 10 of the FAA provides in pertinent part: ‘In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award 2. Where there was evident partiality or corruption in the arbitrators. ...’ 9 USC Section 10.
- ¹⁸ *Bauhinia Corp, v China National Machinery & Equipment Import & Export Corp* 819 F2d 247 (9th Cir 1987); *Jain v Mere* 51 F3d 686 (7th Cir 1995), cert denied, 516 US 914 (1995); *Clarendon Nat Ins Co v Lan* 2001 WL 849383 (SDNY 2001) (Under the FAA, if agreement to arbitrate does not specify location of arbitration, district court may only order that arbitration be conducted in its own district).
- ¹⁹ Article 14 of the CAMCA Arbitration Rules provides:
If the place where the arbitration is to be held is not designated in the contract, or the parties fail to agree in writing on such

place, the party demanding arbitration shall give notice to the administrator of the desired place of arbitration. The administrator shall notify the parties that they have a period of twenty (20) days to submit their arguments and reasons for preference regarding the place of arbitration to a neutral locale committee. The committee shall be representative of the nationalities of the parties and shall be chaired by a national of a country other than that of any of the parties. The committee's determination shall be made with due regard for the contentions of the parties and the circumstances of the arbitration. The determination of the place of arbitration by the committee shall be final and binding upon the parties. <http://www.sice.oas.org/dispute/comarb/camca/cammar1e.asp>.

²⁰ Article IV of the New York Convention requires that to obtain recognition and enforcement of an award, a party must file '[t]he duly authenticated original award or a duly certified copy thereof' with the court.

²¹ FLA STAT ANN Section 684.12, West's FSA (2003), provides in pertinent part:

**Chapter 684. Arbitration:
International Relationships**

684.12. Consolidation of arbitrations:

(1) If two or more disputes have common questions of law or fact or arise out of a single transaction or enterprise and if at least one of those disputes is to be arbitrated under this chapter, the disputes may be consolidated and determined by one arbitral tribunal if consolidation is not prohibited by the arbitral law or the rules otherwise applicable to the separate disputes and: (a) All affected parties agree to the consolidation; or (b) All of the disputes are to be submitted to the same tribunal, and the tribunal determines that consolidation will serve the interests of justice and the expeditious resolution of the disputes. (2) The consolidated proceedings shall be conducted under such rules as the parties agree upon or, in the absence of agreement, as determined by the arbitral tribunal.

²² GA CODE ANN Section 9-9-6(e) West's CGA (2004) provides in pertinent part:

(e) Unless otherwise provided in the arbitration agreement, a party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order

consolidation of separate arbitration proceedings when:

- (1) Separate arbitration agreements or proceedings exist between the same parties or one party is a party to a separate arbitration agreement or proceeding with a third party;
 - (2) The disputes arise from the same transactions or series of related transactions; and
 - (3) There is a common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.
- (f) If all the applicable arbitration agreements name the same arbitrator, arbitration panel, or arbitration tribunal, the court, if it orders consolidation under subsection (e) of this Code section, shall order all matters to be heard before the arbitrator, panel, or tribunal agreed to by the parties. If the applicable arbitration agreements name separate arbitrators, panels, or tribunals, the court, if it orders consolidation under subsection (e) of this Code section, shall, in the absence of an agreed method of selection by all parties to the consolidated arbitration, appoint an arbitrator.
- (g) In the event that the arbitration agreements in proceedings consolidated under subsection (e) of this Code section contain inconsistent provisions, the court shall resolve such conflicts and determine the rights and duties of various parties.
- ²³ See, *eg* (1990) 'A Report of the New York State Bar Association International Litigation Committee, Commercial and Federal Litigation Section: The UNCITRAL Model Law on International Commercial Arbitration' 23 *NYUJ Int'l L & Pol* 87; (1990) 'Report of the Committee on State International Arbitration Statutes (A Subcommittee of the ABA Section on International Law and Practice, International Arbitration Committee)'; Kolkey, D M (1998) 'It's Time to Adopt the UNCITRAL Model Law on International Commercial Arbitration' 8 *Transnat'l L & Contem Prob* 3, Spring 1998.
- ²⁴ Rivkin, D W et al (1990) 'In Support of the FAA: An Argument Against US Adoption of the UNCITRAL Model Law' *Amer Rev Int Arb*, Vol 1, 535.
- ²⁵ *Id* at 536.
- ²⁶ *Id* at 547.
- ²⁷ *Id* at 548.
- ²⁸ *Id*.