Should the US FAA Follow the Example Set by Florida's Newly Enacted Arbitration Act?

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Many leading jurisdictions in international arbitration have adopted all or part of the UN Model Law on International Commercial Arbitration ("Model Law"). The question that remains is: Why Hasn't the United States?

The Federal Arbitration Act does provide many similarities to the Model Law. They both address enforcement of an arbitral award, grounds for setting aside the arbitral award, who has power to determine an arbitral tribunal's competence, etc. However, it is also within these same categories that the FAA and the Model law differ. Wouldn't aligning the FAA to the more commonly used Model Law provide greater transparency with the international community?

I have heard many arguments against aligning the FAA with the Model law. Some argue that the FAA's relationship with the several state arbitration laws make it unnecessary or even inappropriate to modify the FAA to match the Model law. Others argue that with over 80 years of case law history, why change it now? Finally, often when parties opt for institutional rules, any discrepancies are cleared out, resulting in the same or almost the same outcome.

These are viable arguments for sure. Possibly, it wouldn't be necessary to modify the FAA. However, there is still a matter of perception. Although the United States still enjoys large numbers of international arbitrations being filed here, many attorneys and their respective clients hold a fearful opinion of conducting an international arbitration within the United States. This may very well be premised on the idea of fishing discovery techniques and the fear of those practitioners who do not truly appreciate the difference between the developed hybrid international arbitration system and those more common law influenced domestic arbitration proceedings.

Nonetheless, knowing that the FAA laws also vary in several ways or even leaves items open for the attorneys/clients to then be concerned with state provisions can create a psychological negative reaction. Local counsel, of course, provides the assistance necessary in understanding and applying the FAA and, if appropriate, state laws; however, the decision to arbitrate and under what rules can be made possibly years in advance by other attorneys when the original arbitration clause is inserted in the applicable agreement.
Key areas in which the FAA and the Model Law differ are with respect to the actual grounds available for setting aside an award, who determines the tribunal's competence, the power to modify or correct an award and appointing arbitrators. Under the Model Law, there are four grounds for setting aside an award which the FAA fails to address altogether, such as when the subject matter of the dispute falls outside of the scope of the arbitration agreement or violating public policy (which has successfully

been used in some model law countries). The FAA, in turn, has grounds which the Model Law does not based on corruption and fraud or the “manifest disregard of the law” provision.

Ultimately, although I agree that utilizing institutional procedural rules can truly assist in rectifying any areas of difference, I feel that there are negative perceptions of conducting an international arbitration in the United States. Although possibly ill-founded, the opinion remains and foreign parties often work hard to navigate the choice of law and location for an arbitration agreement away from the United States. The fact that the United States has several years of history, and otherwise appears to flow well, may not greatly influence attorneys who are not comfortable with or sufficiently educated about the benefits of conducting international arbitrations in the United States.