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State Legislative Update

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STATE LEGISLATIVE UPDATE

Benjamin Angulo
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I. STATE LEGISLATIVE FOCUS

A. A State Trend of Prohibiting the Application of Foreign Law in Arbitration and Mediation Proceedings

Bill Numbers: Arizona House Bill 2064, Alabama House Bill 607, Georgia House Bill 45, Michigan House Bill 4769, South Carolina House Bill 3490.

Summary: These bills propose to prohibit the use of foreign law in their respective state courts if such use would violate the constitutional rights of the citizens of their states. Unless the bills' drafters excluded businesses from the bills' scope, the bills are not clear on whether they regulate business-to-business international commercial contracts. As such, the bills' ambiguous application to such contracts would result in lack of nationwide uniformity.

Status: Arizona House Bill 2064—signed by Governor Brewer on April 12, 2011;¹ Alabama House Bill 607— as of May 4, 2011, the bill is in the House Committee on Judiciary;² Georgia House Bill 45—since January 24, 2011, the bill sits in the House Committee on Judiciary;³ Michigan House Bill 4769—as of June 21, 2011, the bill is pending the House Judiciary Committee;⁴ South Carolina House Bill 3490—the bill was referred to the Committee on Judiciary on January 27, 2011.⁵

1. H.B. 2064, 50th Leg., 1st Reg. Sess. (Az. 2011), *available at* <http://www.azleg.gov/legtext/50leg/1r/bills/hb2064s.pdf>.

2. H.B. 607, 2011 Leg., Reg. Sess. (Al. 2011), *available at* <http://alisondb.legislature.state.al.us/acas/ACTIONViewFrameMac.asp?TYPE=Instrument&INST=HB607&DOCPATH=searchableinstruments/2011RS/Printfiles/&PHYDOCPATH=//alisondb/acas/searchableinstruments/2011RS/PrintFiles/&DOCNAMES=HB607-int.pdf>.

3. H.B. 45, 151st Leg., Reg. Sess. (Ga. 2011), *available at* http://www1.legis.ga.gov/legis/2011_12/fulltext/hb45.htm.

4. H.B. 4769, 96th Leg., Reg. Sess. (Mich. 2011), *available at* <http://www.legislature.mi.gov/documents/2011-2012/billintroduced/House/pdf/2011-HIB-4769.pdf>.

5. H.B. 3490, 119th Leg., Reg. Sess. (S.C. 2011), *available at* http://www.scstatehouse.gov/ sess119_2011-2012/bills/3490.htm.

1. Introduction

During 2011, state legislators proposed bills prohibiting the application of foreign law to arbitration, mediation, and litigation⁶ in twenty-two states.⁷ Similar bills were proposed during 2010 in Oklahoma, Tennessee and Louisiana. In Oklahoma, legislators proposed legislation banning the use of Sharia law⁸ in Oklahoma courts.⁹ Tennessee and Louisiana, on the other hand, introduced bills that did not mention Sharia law, but instead limited the application of foreign law, if doing so would violate their citizens' rights as guaranteed under their respective constitutions or the United States Constitution.¹⁰ Continuing the trend into 2011, state legislators proposed anti-foreign law legislation prohibiting the application of foreign law in arbitration, mediation, and litigation.¹¹ Out of the twenty-two states, Alabama, Arizona, Iowa, Missouri, New Mexico, and Wyoming mentioned Sharia law in their ban on foreign law.¹² Although, on their face, the 2011 bills are similar in their efforts to prevent the application of foreign law in non-commercial matters,¹³ the bills differ on whether they govern international commercial contracts.

Because the twenty-two state bills differ on whether they regulate international commercial contracts, the bills by de facto create a patchwork of ambiguity in the U.S. about how they will affect arbitration and mediation provisions in international commercial contracts. Some key differences among the bills include: 1) whether the bills apply to businesses that are parties to business-to-business international commercial contracts, and 2) whether the bill's definition of foreign law includes institutional organizations and tribunals such as the International Chamber of Commerce (ICC). Because the twenty-two states differ in these areas, the difference in the bills' prohibition of applying foreign law to arbitration

6. The bills also attempted to prohibit agencies or enforcement authorities from applying foreign law if doing so would violate rights guaranteed by state constitutions. See generally Bill Raftery, *Bans on Court Use of Sharia/International Law: ABA House of Delegates Opposes "Blanket Prohibitions," State Legislatures Out of Session*, GAVEL TO GAVEL (Aug. 8, 2011), <http://gaveltogavel.us/site/2011/08/08/bans-on-court-use-of-shariainternational-law-aba-house-of-delegates-opposes-blanket-prohibitions-state-legislatures-out-of-session/>.

7. The twenty-two states are Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Maine, Michigan, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wyoming. *Id.* In total there were 49 state bills introduced to prohibit the use of foreign law in state courts, arbitration, and mediation. *Id.* Some bills proposed to amend their states' constitution in their effort to prohibit the use of foreign law while others were not as extreme. *Id.*

8. For a general understanding about Sharia law see generally MOHAMMAD HASHIM KAMALI, *SHARI'AH LAW: AN INTRODUCTION* (2008); see also RODOLPHE J.A. DE SEIFE, *THE SHAR'IA: AN INTRODUCTION TO THE LAW OF ISLAM* (1994).

9. Oklahoma's bill was titled *Save Our State Amendment*. John T. Parry, *Oklahoma's Save Our State Amendment: Two Issues for the Appeal*, OKLA. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1919782. The bill intended to amend Oklahoma's constitution to prevent claimants from using Sharia law in Oklahoma courts. *Id.* Although the bill passed with a 70% margin, the Oklahoma chapter of the Council on American-Islamic Relations has locked the bill up in federal court on Free Exercise and Establishment Clause claims. *Id.*

10. See Jacob A. Kramer, *Controversy Erupts Over Foreign Law and International Law in U.S. Courts*, INSTITUTE FOR U.S. LAW (Feb. 1, 2011), <http://www.iuslaw.org/news2111.php>.

11. Raftery, *supra* note 6.

12. *Id.*

13. *Id.*

and mediation proceedings in international commercial contract disputes could influence whether foreign businesses conduct business in some of the twenty-two states.

This legislative update will examine how the twenty-two proposed bills would regulate international commercial contracts that incorporate foreign law in their choice of law provisions, if such bills were to become state law. It will do so by selecting five bills from five states as a sample of the twenty-two proposed bills. The sample will consist of bills from Arizona, Alabama, Georgia, Michigan, and South Carolina because each state has a bill that exemplifies the key differences amongst the proposed bills in the twenty-two states. By looking at a sample of the twenty-two proposed state bills, the legal and business communities will have an understanding about how the differences in the bills' plain language create a lack of uniformity in the U.S. for international commercial contracts.

This analysis will examine the sample of bills in four parts. Because some of the proposed state bills are silent on whether their respective bills are reserved for non-commercial matters, Part II examines whether the bills apply to businesses that are parties to business-to-business international commercial contracts. Part III assesses the bills' definition of foreign law to better understand the scope of the anti-foreign law bans. Because each anti-foreign law bill initially defines foreign law as one that is created outside the U.S., Part III analyzes whether the bills' foreign law definitions include international organizations and tribunals. It is important to determine whether international organizations and tribunals are included in the bills' definition of foreign law because the bills could preclude parties from utilizing arbitration and mediation procedures from international institutions, such as the ICC. Part IV consists of conclusive remarks regarding state legislative attempts to balance the desire to ban foreign law from state arbitration, mediation, and litigation, and to protect their citizens' constitutional rights, while not deterring international businesses from conducting business in their states.

2. *Business Entities*

An examination of the states' bills show that the bills differ on their application to businesses that are parties to business-to-business international commercial contracts. The difference in the bills' plain language effectively creates three categories: (1) bills that exclude businesses; (2) bills that exclude businesses if the businesses apply foreign law in a foreign court; and (3) bills that implicitly include businesses by referencing contracts in general. One bill is examined for each category to illustrate how the bills, as a whole, create a lack of uniformity for businesses that are parties to international commercial contracts.

a. State Bills That Exclude Businesses

Arizona's House Bill 2064¹⁴ (HB 2064) highlights anti-foreign law legislation that excludes businesses from its scope.¹⁵ HB 2064 prohibits the application of

14. H.B. 2064, *supra* note 1.

15. States that have bills similar to Arizona are Alaska, Arkansas, Florida, Indiana, Iowa, Maine, and West Virginia.

foreign law in Arizona courts if doing so would violate an Arizonan's state constitutional right.¹⁶ The bill explicitly states that it does not apply to "a corporation, partnership, or other form of business association," however.¹⁷

For Alaska House Bill 88's exclusion of businesses see H.B. 88, 27th Leg., Reg. Sess. (Alaska 2011) § 3(f), available at http://www.legis.state.ak.us/basis/get_bill_text.asp?hsid=HB0088C&session=27. Representative Gatto introduced the bill on January 18, 2011 and the bill was referred to finance on April 4, 2011. See *Bill History/Action for 27th Legislature*, THE ALASKA STATE LEGISLATURE, http://www.legis.state.ak.us/basis/get_bill.asp?session=27&bill=HB88 (last visited Nov. 19, 2011).

For Arkansas Senate Bill 97's exclusion of businesses see S.B. 97, 88th Leg., Reg. Sess. (Ark. 2011) § 2(e), available at <http://www.arkleg.state.ar.us/assembly/2011/2011R/Bills/SB97.pdf>. Republican Senator Bledsoe introduced the bill on January 20, 2011. *Id.* Since April 27, 2011, the bill has died in the Senate Committee Judiciary. *Id.*

For Florida House Bill 1273's exclusion of businesses see H.B. 1273, 2011 Leg., Reg. Sess. (Fla. 2011) § 5, available at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1273_.docx&DocumentType=Bill&BillNumber=1273&Session=2011. Republican Representative Metz introduced the bill on March 8, 2011. *Id.* Since May 7, 2011, the bill has been dead in the House Committee. See *H.B. 1273 – Application of Foreign Law*, FLORIDA HOUSE OF REPRESENTATIVES, <http://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=46437&SessionIndex=-1&SessionId=66&BillText=&BillNumber=&BillSponsorIndex=0&BillListIndex=0&BillStatuteText=&BillTypeIndex=0&BillReferredIndex=0&HouseChamber=H&BillSearchIndex=12> (last visited Nov. 19, 2011). Republican Senator Steinberg also introduced an identical bill, Senate Bill 1294, on March 7, 2011. See S.B. 1294, Reg. Sess. (Fla. 2011), available at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_s1294_.DOCX&DocumentType=Bill&BillNumber=1294&Session=2011. The bill died in the Senate Committee on March 11, 2011. See *H.B. 1273 – Application of Foreign Law*, *supra* at note 15.

Unlike the other states, Indiana House Bill 1078 excludes businesses or individuals if one or more of the parties to a contract is "not a natural person." See H.B. 1078, 117th Leg., Reg. Sess. (Ind. 2011) § 1, available at <http://www.in.gov/legislative/bills/2011/IN/IN1078.1.html>. Representative Noe introduced the bill on January 5, 2011 and the bill was referred to the Committee on Judiciary on January 5, 2011. See <http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2011&request=getActions&doctype=HB&docno=1078>. For additional proposed Indiana bills regarding foreign law see Raftery, *supra* note 1.

For Iowa House Bill 489's exclusion of businesses see H.B. 489, 84th Leg., Reg. Sess. (Iowa 2011) § 7, available at <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=hf489>. Republican Representative Alons introduced the bill on March 2, 2011. *Id.* Since March 3, 2011, the bill died in the House Committee on Judiciary. *Id.* Republican House Representative Pearson also introduced an identical bill, House Bill 575, on March 8, 2011, available at <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&ga=84&hbill=HF575>. Since March 9, 2011, the bill has been in the House Subcommittee. *Id.*

For Maine House Bill 811's exclusion of businesses see H.B. 811, 125th Leg., Reg. Sess. (Me. 2011) § 356(1), available at http://www.mainelegislature.org/legis/bills/bills_125th/billpdfs/HP081101.pdf. Republican House Representative Waterhouse's bill died in the Senate on May 26, 2011. See http://www.mainelegislature.org/legis/bills/display_ps.asp?num=125&paper=HP0811&PID=1456.

For West Virginia House Bill 3220's exclusion see H.B. 3220, 80th Leg., Reg. Sess. (W. Va. 2011) § 2-1-3(f), available at http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=hb3220%20intr.htm&yr=2011&sesstype=RS&i=3220. Republican Representative Miller introduced the bill on February 21, 2011 and the bill was referred to the Committee on the Judiciary. *Id.*

16. H.B. 2064, *supra* note 1, § 12-3102(A).

17. *Id.* § 12-3102(B).

b. State Bills That Exclude Business Entities if the Business Applies Foreign Law in a Foreign Court

Alabama House Bill 607¹⁸ (HB 607) represents the bills¹⁹ that exclude business entities from their anti-foreign law legislation as long as the businesses do not attempt to enforce foreign law in a state court. HB 607 prohibits the application of foreign law in state matters if such law violates rights guaranteed by the Alabama and U.S. Constitutions.²⁰ Because the drafters of HB 607 acknowledge Alabama attracts international business, the drafters exclude businesses from the bill's scope as long as businesses use foreign law in foreign courts.²¹ HB 607 applies to businesses if businesses attempt to enforce foreign law in an Alabama court, however.²²

c. State Bills That Include Businesses By Referencing Contracts In General

Georgia's *American Laws for Georgia Courts Act*, also known as House Bill 45 (HB 45), is silent on whether it applies to business entities.²³ HB 45 protects

18. H.B. 607, *supra* note 2, § 6.

19. Senator Ward introduced Senate Bill 61 on March 1, 2011. *See* S.B. 61, 2011 Leg., Reg. Sess. (Al. 2011), available at <http://e-lobbyist.com/gaits/text/203723>. Senate Bill 61 is similar to House Bill 607, and the bill has been indefinitely postponed since June 1, 2011. *See Legislative Detail: AL Senate Bill 61 – Regular Session 2011*, E-LOBBYIST, <http://e-lobbyist.com/gaits/view/292407> (last visited Nov. 19, 2011).

20. H.B. 607, *supra* note 2, § 6.

21. *Id.*

22. *Id.*

23. H.B. 45, *supra* note 3.

Republican Senator Judson Hill introduced an identical bill, Senate Bill 51, on February 3, 2011. *See* S.B. 51, 151st Leg., Reg. Sess. (Ga. 2011), available at http://www1.legis.ga.gov/legis/2011_12/fulltext/sb51.htm. The bill was sent to the Senate Committee on Judiciary on February 27/2011. *Id.*

States that have a similar bill are Kansas, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, South Carolina, and South Dakota.

For Kansas House Bill 2087, *see* H.B. 2087, 2011 Leg., Reg. Sess. (Kan. 2011), available at http://www.kslegislature.org/li/b2011_12/year1/measures/documents/hb2087_02_0000.pdf. Republican House Representative Mast jointly introduced the bill on January 25, 2011. *Id.* The bill has been in the Senate Committee on Judiciary since March 31, 2011. *See* H.B. 2087, KANSAS LEGISLATURE, http://www.kslegislature.org/li/b2011_12/year1/measures/hb2087/ (last visited Nov. 19, 2011).

For Mississippi House Bill 301, *see* H.B. 301, 2011 Leg., Reg. Sess. (Miss. 2011), available at <http://billstatus.ls.state.ms.us/documents/2011/pdf/HB/0300-0399/HB0301IN.pdf>. Republican House Representative Moore introduced the bill on January 4, 2011. The bill died in the House Committee on February 1, 2011. *See* House Bill 301, MISSISSIPPI LEGISLATURE, <http://billstatus.ls.state.ms.us/2011/pdf/history/HB/HB0301.xml> (last visited Nov. 19, 2011).

For Missouri House Bill 708, *see* H.B. 708, 96th Leg., Reg. Sess. (Mo. 2011), available at <http://www.house.mo.gov/billtracking/bills111/biltxt/senate/1642S.02C.htm>. Republican Representative Curtman introduced the bill on February 28, 2011. *Id.* The bill has been in the House Committee on Judiciary since March 3, 2011. *See* H.B. 708, MISSOURI HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/billssummary.aspx?bill=HB708&year=2011&code=R> (last visited Nov. 19, 2011).

Republican Representative Bahr introduced an identical bill, House Bill 768, on March 3, 2011. *See* H.B. 768, 96th Leg., Reg. Sess. (Mo. 2011), available at <http://www.house>.

Georgians from foreign laws when such laws would violate their rights under state or federal constitutions.²⁴ Although the bill's drafters intend to protect their fellow Georgians from foreign law, the drafters do not mention businesses per se.²⁵ Nevertheless, the bill's mention of contracts in its choice of law provision suggests the drafters intend to govern businesses as well.

The general reference to contracts in § 9-12-150(d) suggests HB 45 is not necessarily silent on whether the bill applies to businesses. Section 9-12-150(d) states:

If any contractual provision or agreement provides for the choice of a foreign law to govern its interpretation or the resolution of any claim or dispute between the parties, and if the enforcement or interpretation of the contractual provision or agreement would result in a violation of a right guaranteed by the Constitution of this state or of the United States, the agreement or contractual provision shall be modified or amended to the extent necessary to preserve the constitutional rights of the parties.

The drafters' general use of the terms "agreement" and "contractual provision" seem to bring businesses within the bill's scope.

Because the bills differ on whether they apply to businesses that are parties to international commercial contracts, the bills could statutorily direct the flow of

mo.gov/BillActions.aspx?bill=HB768&year=2011&code=R. The bill was referred to the House Committee on Judiciary on April 12, 2011. *Id.*

Republican Senator Nieves introduced Senate Bill 308 on February 21, 2011. *See* S.B. 308, 96th Leg., Reg. Sess. (Mo. 2011), available at http://www.senate.mo.gov/11info/BTS_Web/Bill.aspx?SessionType=R&BillID=4170067. Since April 28, 2011, the bill has been in the Senate Committee on Judiciary. *Id.*

For the Nebraska Legislative Bill, *see* H.B. 647, 102nd Leg., Reg. Sess. (Neb. 2011), available at http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=12719. Republican Representative Christensen introduced the bill on January 19, 2011. *Id.* The Judiciary Committee gave notice for a hearing on February 28, 2011. *Id.*

For North Carolina House Bill 640, *see* H.B. 640, 2011 Leg., Reg. Sess. (N.C. 2011), available at <http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H640v0.pdf>. Republican Representatives Cleveland and Killian introduced the bill on April 5, 2011 and the bill was sent to the House Committee on the Judiciary on April 6, 2011. *Id.*

For Oklahoma House Bill 1552, *see* H.B. 1552, 53rd Leg., Reg. Sess. (Okla. 2011), available at <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1552>. Republican House Representative Kern introduced the bill on January 20, 2011. *Id.* The bill has been in the Subcommittee on Rules since March 24, 2011. *Id.*

For South Carolina House Bill 3490, *see* H.B. 3490, 119th Leg., Reg. Sess. (S.C. 2011), available at http://www.scstatehouse.gov/sess119_2011-2012/bills/3490.htm. Republican Representative Nanney introduced the bill on January 27, 2011. *Id.* Since its date of introduction, the bill has been in the House Committee on Judiciary. *Id.*

Republican Senator Fair also introduced an identical bill, Senate Bill 444, on January 26, 2011. *See* H.B. 3490, 119th Leg., Reg. Sess. (S.C. 2011), available at http://www.scstatehouse.gov/sess119_2011-2012/bills/444.htm. The bill has been in the Senate Committee on Judiciary since the date of its introduction. *Id.*

For South Dakota Senate Bill 201, *see* S.B. 201, 86th Leg., Reg. Sess. (S.D. 2011), available at <http://legis.state.sd.us/sessions/2011/Bill.aspx?File=SB201P.htm>. The Committee on Commerce and Energy introduced the bill on February 1, 2011 and the State Affairs deferred it to the 41st Legislative Day on February 2, 2011. *Id.*

24. *Id.* at § 9-12-150(a), available at http://www1.legis.ga.gov/legis/2011_12/fulltext/hb45.htm.

25. *Id.*

international business from one state to another. Consequently, states that have not proposed an anti-foreign law bill or states that have excluded businesses from such bills could be the recipients of more international businesses that value the ability to utilize foreign law in arbitration or mediation.

3. Defining Foreign law

A survey of the twenty-two states' definitions of foreign law reveals that the bills' plain language places them into two categories. The first category consists of foreign law definitions that explicitly mention international organizations and tribunals. The second category consists of foreign law definitions that implicitly touch on international organizations and tribunals through their choice of law provisions. Although the two categories refer to international organizations or tribunals, international institutions, such as the ICC, will likely fall outside of the bills' foreign law definition.

a. State Bills That Include International Organizations and Tribunals in Their Foreign Law Definition

Michigan's House Bill 4769 (HB 4769) illustrates state bills that include international organizations and tribunals in their definition of foreign law.²⁶ HB 4769 defines foreign law as:

[A]ny law, legal code, or system of a jurisdiction outside of any state or territory of the United States, including, but not limited to, international

26. H.B. 4769, *supra* note 4, § 3(4).

Other states include Arkansas, Florida, Iowa, Kansas, Maine, Michigan, Missouri, Nebraska, Oklahoma, South Dakota, and West Virginia.

For Arkansas Senate Bill 97 *see* § 2(a), *available at* <http://www.arkleg.state.ar.us/assembly/2011/2011R/Bills/SB97.pdf>

For Florida House Bill 1273 *see* § 1(1), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1273_.docx&DocumentType=Bill&BillNumber=1273&Session=2011.

For Iowa House Bill 489 *see* § 1, *available at* <http://coolice.legis.state.ia.us/CoolICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=hf489>.

For Kansas House Bill 2087 *see* § 2, *available at* http://www.kslegislature.org/li/b2011_12/year1/measures/documents/hb2087_02_0000.pdf.

For Maine House Bill 811 *see* § 352, *available at* http://www.mainelegislature.org/legis/bills/bills_125th/billpdfs/HP081101.pdf.

For Michigan House Bill 4769 *see* § 1(2), *available at* <http://www.legislature.mi.gov/documents/2011-2012/billintroduced/House/pdf/2011-HIB-4769.pdf>.

For Missouri House Bill 708 *see* § 3, *available at* <http://www.house.mo.gov/billtracking/bills111/biltxt/senate/1642S.02C.htm>.

For Nebraska Legislative Bill 647 *see* § 1(2), *available at* http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=12719.

For Oklahoma House Bill 1552 *see* § 1(B), *available at* <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1552>.

For South Dakota Senate Bill 201 *see* § 1, *available at* <http://legis.state.sd.us/sessions/2011/Bill.aspx?File=SB201P.htm>.

For West Virginia House Bill 3220 *see* § 2-1-3(b), *available at* http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=hb3220%20intr.htm&yr=2011&sesstype=RS&i=3220.

organizations and tribunals, and applied by that jurisdiction's courts, administrative bodies, or other formal or informal tribunals.²⁷

Although the bill's definition of foreign law is broad enough to technically include international institutions like the ICC, the ICC would likely fall outside of the bill's scope. Section 3 of the bill only prohibits foreign law if its application "would result in a violation of a right guaranteed by the constitution of this state or of the United States"²⁸ Because the ICC and other similar international institutions mainly provide arbitration and mediation procedures for international commercial contract disputes, it is unlikely HB 4769 would prevent parties to such contracts from utilizing the ICC's procedures.

b. State Bills That Implicitly Mention International Organizations and Tribunals in Their Definitions of Foreign Law

South Carolina's House Bill 3490²⁹ (HB 3490) is one such state bill that does not mention international organizations and tribunals in its definition of foreign law.³⁰ Section 14-1-240(A) of HB 3490 defines foreign law as "any law, rule, or legal code or system established and used or applied in or by another jurisdiction outside of the United States or its territories." Even though HB 3490's scope is wide enough to include numerous regulatory forms, the bill is silent on whether it includes international institutions and tribunals—or if the bill applies to businesses for that matter.³¹ Nevertheless, the bill provides an interpretative answer.

Clarity is possibly found in § 14-1-240(C)(1) of HB 3490. Section 14-1-240(C)(1) is the bill's choice of law provision. The provision states if a contractual provision or agreement:

[P]rovides for the choice of a foreign law to govern its interpretation or the resolution of a dispute between the parties and the enforcement or interpretation of the contractual provision or agreement would result in a violation of the constitutional rights of a person, the contractual provision

27. H.B. 4769, *supra* note 4, § 1(2).

28. H.B. 4769, *supra* note 4, § 3.

29. H.B. 3490, *supra* note 5.

30. The states are Alabama, Arizona, Georgia, Mississippi, and North Carolina.

For Alabama Senate Bill 61 § d *see supra* note 19. It is important to note that unlike South Carolina's House Bill 3490, Alabama's bill would not apply to international institutions like the International Chamber of Commerce ("ICC") because it excludes businesses from its scope as long as businesses invoke the ICC in a foreign court. *Id.*

For Arizona House Bill 2064 *see supra* note 1. Arizona's bill does not include international organizations and tribunals because the bill does not apply to businesses. *Id.*

For Georgia House Bill 45 *see* § 9-12-150(b), available at http://www1.legis.ga.gov/legis/2011_12/fulltext/hb45.htm.

For Mississippi House Bill 301 *see* § 1(1), available at <http://billstatus.ls.state.ms.us/documents/2011/pdf/HB/0300-0399/HB0301IN.pdf>.

For North Carolina House Bill 640 *see* § 1-87.2(2), available at <http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H640v0.pdf>.

31. H.B. 3490, *supra* note 5.

or agreement must be modified or amended to the extent necessary to preserve the constitutional rights of the parties;³²

The plain language of § 14-1-240(C)(1) seems to try to carve out an exception for the use of international institutions and tribunals, such as the ICC, as long as they do not violate South Carolinians' state and federal constitutional rights. Such a caveat suggests that HB 3490's drafters attempt to balance the bill's purpose of banning foreign law in South Carolina courts while trying not to deter foreign businesses from contracting with South Carolinian businesses. Although the bill is silent on international institutions and tribunals, § 14-1-240(C)(1), on its face, seems to not prohibit parties from using ICC procedures in their arbitrations or mediations.

Although Michigan's and South Carolina's bills either explicitly or implicitly include international organizations and tribunals in their definition of foreign law, the bills are unlikely to prevent businesses from incorporating international institutions' procedures in their international commercial contracts' dispute resolution provision. This is because the foreign procedures are unlikely to violate either state's constitution when applied to arbitration and mediation proceedings. Similarly, it is unlikely that the other twenty states would prevent parties from using arbitration and mediation procedures from international institutions, such as the ICC, in their arbitration and mediation proceedings.

4. Conclusion

After examining the sample of bills representing the twenty-two states' anti-foreign law legislation, the need for such legislation is unclear,³³ and, more importantly, possibly detrimental to the practice of international business in their respective states. Unless state legislators explicitly exclude businesses from their bills' scope, the bills' effect on arbitration and mediation provisions in international commercial contracts is equivocal. Moreover, state legislators' proposed bills could create patchworks of ambiguity in the U.S. regarding their effect on arbitration and mediation provisions in international commercial contracts. If the twenty-two states' proposal to ban foreign law becomes state law, the bills could deny such states the benefits of international commerce.

32. *Id.* at § 14-1-240(C)(1).

33. See Gary Born, Oklahoma's "Save Our State Amendment" and Related Legislative Developments in the United States, *KLUWER ARBITRATION BLOG* (Jun. 25, 2010), <http://kluwerarbitrationblog.com/blog/2010/06/25/oklahoma%E2%80%99s-%E2%80%9Csave-our-state-amendment%E2%80%9D-and-related-legislative-developments-in-the-united-states/> (discussing possible federal constitutional challenges to Oklahoma's Save Our State Amendment).

B. The Trend Toward State Adoption of the Uniform Collaborative Law Act

- Bill Numbers:** Alabama Senate Bill 18, District of Columbia Council Bill 829, District of Columbia Council Bill 43, Hawaii House Concurrent Resolution 202, Hawaii Senate Concurrent Resolution 113, Massachusetts House Bill 31, Minnesota Senate Bill 2492, Nevada Assembly Bill 91, Oklahoma House Bill 3102, Tennessee House Bill 3648, Tennessee Senate Bill 3531, Utah House Bill 284.
- Summary:** These bills adopt the Uniform Collaborative Law Act, which provides a statutory basis for collaborative law, a mediation-like process through which family law disputes can be resolved.
- Status:** Alabama S.B. 18 – referred to Senate Committee on Judiciary on March 1, 2011; District of Columbia B. 829 – died in Council Committee on Public Safety and Judiciary on June 8, 2010; District of Columbia B. 43 – referred to Council Committee on the Judiciary on January 18, 2011; Hawaii H.C.R. 202 – referred to Senate Committee on Judiciary and Labor on March 16, 2011; Hawaii S.C.R. 113 – referred to House Committee on Judiciary on April 5, 2011; Massachusetts H.B. 31 – in Joint Committee on Judiciary on April 5, 2011. Heard. Eligible for Executive Session; Minnesota S.B. 2492 – referred to Senate Committee on Judiciary on February 2, 2010; Nevada A.B. 91 – signed by Governor on May 13, 2011, chaptered at Chapter 43; Oklahoma H.B. 3102 – referred to Senate Committee on Judiciary on March 30, 2011; Tennessee H.B. 3648 – in House Committee on Judiciary, referred to Subcommittee on Civil Procedure and Practice on February 3, 2010; Tennessee S.B. 3531 – referred to Senate Committee on Judiciary on February 1, 2010; Utah H.B. 284 – signed by Governor on April 7, 2010 and chaptered at Chapter 382.

1. Introduction

Over the past thirty years, the traditional system of litigating matters in the courtroom has become, “too costly, too painful, too destructive, too inefficient for a truly civilized people.”¹ This is especially true of family law matters, where hostilities are often very high because contentious litigation regularly “escalates disputes rather than resolving them.”² Traditional litigation has not only become

1. Warren E. Burger, *Mid-Year Meeting of American Bar Association*, 52 U.S. L. WK. 2471, 2471 (1984).

2. Pauline H. Tesler, *Donna J. Hitchens: Family Law Judge for the Twenty-First Century*, 2 COLLABORATIVE Q. 1, 3 (2000).

an “uncommon method of resolving disputes, but a disfavored one.”³ This transition is increasingly apparent in the family law context, where the advent of collaborative law has opened a new opportunity for settling disputes, which in many ways responds to the criticisms of the adversarial system.⁴

Stuart Webb, a long-time family law practitioner in Minnesota, became dismayed with the negative impact of divorce litigation on children and families and created a new model of alternative dispute resolution specifically addressing issues inherent to family law disputes – adversarial tension between the parties, stress on the children involved, and the stigmatizing and costly burden of the courtroom.⁵ After Webb introduced the concept of collaborative law to the legal community, it spread like wildfire across thirty-eight states and at least twelve other countries.⁶ Attorneys who practice family law have seen many benefits from use of the collaborative process, including faster resolution than traditional litigation, lower financial costs for all parties, decreased emotional harm to children, and increased personal satisfaction for the clients and attorneys involved.⁷ While collaborative law originated with and continues to be practiced primarily in family law matters, where its success has been demonstrated by its still expanding popularity, advocates are promoting its widespread use in non-family law civil matters, including business, trusts and estates, intellectual property, employment, personal injury, medical error, real estate and construction disputes.⁸ Consequently, the collaborative law contract “agreements initially developed by family law practice groups are being increasingly adapted for broader use.”⁹

2. Development of the Uniform Collaborative Law Act

The American Bar Association (ABA) recognized the benefits of a uniform system of laws across the states as early as the late-1800’s.¹⁰ In 1889, the ABA established the National Conference of Commissioners for Uniform State Laws (NCCUSL) and appointed 12 initial commissioners. By 1912, every state was represented with a commissioner at the NCCUSL.¹¹ The purpose of the NCCUSL is to provide “states with non-partisan, well-conceived and well-drafted legislation

3. Allen Blair, *A Matter of Trust: Should No-Reliance Clauses Bar Claims for Fraudulent Inducement of Contract?*, 92 MARQ. L. REV. 423, 470 (2009).

4. Patrick Foran, *Adoption of the Uniform Collaborative Law Act in Oregon: The Right Time and the Right Reasons*, 13 LEWIS & CLARK L. REV. 787, 789 (2009).

5. See Norman Solovay & Lawrence R. Maxwell, Jr., *Why a Uniform Collaborative Law Act?*, 2 N.Y. DISP. RESOL. LAW 36, 36 (Spr. 2009).

6. See *Collaborative Practice Groups*, INTERNATIONAL ACADEMY OF COLLABORATIVE PROFESSIONALS, http://www.collaborativepractice.com/_t.asp?M=7&&T=PracticeGroups (last visited Nov. 5, 2011).

7. See Foran, *supra* note 4, at 789.

8. Solovay & Maxwell, *supra* note 5, at 36.

9. *Id.* Collaborative law agreements are created when parties agree to resolve their disputes outside of the courtroom.

10. See *About Us*, UNIFORM LAW COMMISSION, <http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC> (last visited Nov. 5, 2011).

11. Eric M. Fish, *ULC Or UFO? What the Heck Is the Uniform Law Commission?*, LAW TRENDS & NEWS PRACTICE AREA NEWSL. (A service of the ABA General Practice, Solo & Small Firm Division), winter 2009, at 7, available at http://www.americanbar.org/content/dam/aba/publishing/law_trends_news_practice_area_enewsletter/09_winter.authcheckdam.pdf.

that brings clarity and stability to critical areas of state statutory law.”¹² Since its inception, the NCCUSL has drafted in excess of two hundred uniform laws.¹³

Following Stuart Webb’s creation of collaborative law, there was little uniform legal authority governing its application and practice. Prior to 2009, only four states – California, North Carolina, Texas, and Utah – had adopted statutes regarding collaborative law.¹⁴ Due to a lack of clarity and consistency, the NCCUSL expressly stated the need for uniformity in the practice of collaborative law and ordered the creation of a Uniform Collaborative Law Act.¹⁵ The NCCUSL appointed Peter K. Munson, a Texas lawyer, as the drafting committee’s Chairman.¹⁶ In 2007, the drafting committee began holding conferences to determine how to successfully codify the collaborative law process.¹⁷ The final product, the Uniform Collaborative Law Act (UCLA), was approved by the NCCUSL in 2009, amended in 2010, and given to state legislatures for consideration.¹⁸

3. Notable Provisions of the Uniform Collaborative Law Act

The fundamental cornerstone of collaborative law is its voluntary nature. The UCLA reflects this principle in Section 3(b), which states that, a “[t]ribunal may not order a party to participate in a collaborative law process over that party’s objection.”¹⁹ By requiring a signed, written participation agreement prior to the initiation of the collaborative process, the UCLA further reinforces the voluntary contractual nature of collaborative law.²⁰ In addition to an agreement amongst the parties to pursue collaborative resolution, the UCLA requires the participation agreement to include the specific nature and scope of the matter and identify each party’s collaborative lawyer.²¹ This lawyer and other attorneys in his firm are then barred from participation in any subsequent litigation relating to the matter covered in the agreement,²² with exceptions for low-income parties and governmental entities.²³

The UCLA also places standards on attorneys who represent parties in collaborative law matters. Prior to the execution of the participation agreement, the UCLA requires the advising attorney to provide the client with information regarding the process and whether it is appropriate for the situation.²⁴ By mandating these disclosures before the process even begins, the UCLA ensures the informed consent of clients. The UCLA also places an affirmative duty on the attorneys to

12. See UNIFORM LAW COMMISSION, *supra* note 10.

13. *Id.*

14. See CAL. FAM. CODE § 2013 (West 2008); N.C. GEN. STAT. §§ 50-70 to 50-79 (West 2007); TEX. FAM. CODE ANN. §§ 6.603, 153.0072 (West 2006); UTAH CODE ANN. § 78B-19-101 (West 2004).

15. Solovay & Maxwell, *supra* note 5, at 36.

16. Lawrence Maxwell, *An Update Uniform Collaborative Law Act Uniform Collaborative Law Rules*, Alternative Resolutions NEWSLETTER (State Bar of Texas), winter 2011, at 3, available at http://www.texasadr.org/2011_winter.pdf.

17. *Id.* at 4.

18. *Id.* at 4-5.

19. The Uniform Collaborative Law Act § 3(b), available at http://www.law.upenn.edu/bl/archives/ulc/ucla/2009am_approved.pdf (hereinafter UCLA).

20. *Id.* § 4(a).

21. *Id.*

22. *Id.* § 9(a).

23. See UCLA §§ 10, 11.

24. UCLA, *supra* note 19, at § 14.

“make reasonable inquiry into whether any prospective party has a history of coercive or violent behavior toward another prospective party.”²⁵ This ensures the safety of parties who could otherwise be manipulated or abused during the collaborative process.

Much like other forms of alternative dispute resolution, the UCLA also has provisions for the confidentiality and privilege of communications made during the collaborative process. Communications are only confidential to the extent agreed upon by the parties, leaving great leeway for the parties to contract according to the individual situation.²⁶ All collaborative law communications, however, are privileged, and not subject to discovery or admissible as evidence should the matter continue to litigation.²⁷

4. Legislative Success of the Uniform Collaborative Law Act

A notable number of states took up the UCLA for consideration during the 2009 legislative session, just after it was confirmed by the ABA. Washington D.C. Council Bill 829, Minnesota Senate Bill 2492, Tennessee House Bill 3648 and concurrent Senate Bill 3531, and Oklahoma House Bill 3102 became the first UCLA proposals.²⁸ However, the Washington D.C., Minnesota, and Tennessee bills died in committee without any real consideration.²⁹ The Oklahoma House was the first legislative body to pass the UCLA, although it too died in committee once being referred to the Oklahoma Senate Committee on Judiciary.³⁰

The 2010 legislative session began with a bleak outlook for the UCLA. None of the three states or the District of Columbia, which considered the UCLA in 2009, actually passed the bill. Additionally, Utah was the only state legislature that proposed the UCLA during the 2010 legislative session. In March of 2010, both chambers of the Utah legislature passed H.B.284, and it was signed into law by the state’s governor, thereby resuscitating the UCLA movement.³¹

Following the UCLA’s adoption in Utah, four states, and the District of Columbia where it previously failed, brought legislation proposing the UCLA’s adoption during the 2011 session. Alabama Senate Bill 18 and Washington D.C. Council Bill 43 have so far been held up in committee.³² However, the other three bills have had some success. Massachusetts House Bill 31 is currently in a Joint Committee on the Judiciary and is eligible for an executive session.³³ Hawaii House Concurrent Resolution 202 and Senate Concurrent Resolution 113 passed their respective chambers and appear to be in a Joint Committee, with the hope of

25. *Id.* § 15.

26. *Id.* § 16.

27. *Id.* § 17.

28. D.C. B. 829, Council Period 18 (D.C. 2009); S.B. 2492, 86th Reg. Sess. (Minn. 2009); H.B. 3648, 106th Gen. Assem., 2d Sess. (Tenn. 2009); S.B. 3531, 106th Gen. Assem., 2d Sess. (Tenn. 2009); H.B. 3102, 52nd Leg. Sess., 2d Sess. (Okla. 2009).

29. D.C. B. 829, Council Period 18 (D.C. 2009); S.B. 2492, 86th Reg. Sess. (Minn. 2009); H.B. 3648, 106th Gen. Assem., 2d Sess. (Tenn. 2009); S.B. 3531, 106th Gen. Assem., 2d Sess. (Tenn. 2009).

30. H.B. 3102, 52nd Leg. Sess., 2d Sess. (Okla. 2009).

31. H.B. 284, 58th Leg., Gen. Sess. (Utah 2010).

32. S.B. 18, 2011 Reg. Sess. (Ala. 2011); D.C. B. 43, Council Period 19 (D.C. 2011).

33. H.B. 31, 187th Gen. Ct., 2011 Reg. Sess. (Mass. 2011).

reconciling the differences between the House and Senate versions.³⁴ Nevada Assembly Bill 91 passed both chambers of the state legislature and became law with the governor's signature in May of 2011.³⁵ Thus far, only Utah and Nevada have passed the UCLA, although there is still chance for its passage in Massachusetts and Hawaii in 2011.

5. Conclusion

The collaborative law process has been extremely successful in the family law context because it can be tailored to the family's unique dispute.³⁶ It has a track record of encouraging a "voluntary, early, and peaceable settlement".³⁷ Further, the collaborative law process shows great potential to benefit clients and attorneys alike.³⁸ Abraham Lincoln once wrote of the attorney's proper role in helping to resolve clients' issues:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peace-maker the lawyer has superior opportunity of being a good man. There will still be business enough.³⁹

By enacting the UCLA, state legislatures encourage the future growth of collaborative law by "setting minimum standards for the process and providing for consistency in the practice and application of collaborative law."⁴⁰ The UCLA confirms and solidifies the most important features of collaborative law—disqualification of collaborative lawyers, "evidentiary privilege for collaborative law communications, and the enforcement of participation agreements."⁴¹ Collaborative law under the UCLA offers families an alternative dispute resolution method that often proves to be more productive and less damaging to all parties involved.⁴² It encourages parties to reach a peaceful resolution, rather than endure the emotional and monetary toll of the courtroom.⁴³ While the UCLA's adoption by the states has had a slow start, the 2011 legislative session has cast an optimistic light on the future of the UCLA, with more states than ever taking it up for consideration.

34. H.C.R. 202, 26th St. Leg. (Haw. 2011); S.C.R. 113, 26th St. Leg. (Haw. 2011).

35. A.B. 91, 76th Reg. Sess. (Nev. 2011).

36. Solovay & Maxwell, *supra* note 5 at 39.

37. *Id.*

38. *Id.*

39. Abraham Lincoln, *Notes for a Law Lecture, in THE LIFE AND WRITINGS OF ABRAHAM LINCOLN* 329 (Philip Van Doren Stern ed., 1940).

40. Solovay & Maxwell, *supra* note 5.

41. *Id.* at 39.

42. *Id.*

43. *Id.*

C. Alternative Dispute Resolution Trending as Budget-balancing Becomes Priority for States

- Bill Numbers:** Connecticut Public Act 11-201, Ohio Senate Bill 5, New Jersey Assembly Bill 3435, New Jersey Assembly Bill 3434, New York Senate Bill 04358, New York Assembly Bill 1036, North Dakota Senate Bill 2156, North Dakota House Bill 1462, Wisconsin Assembly Bill 11.
- Summary:** These bills reflect recent state efforts to strengthen, expand, or restrict alternative dispute resolution processes.
- Status:** Connecticut Public Act 11-201—signed by Governor on July 13, 2011, Ohio Senate Bill 5—signed by Governor March 31, 2011 (this law is currently suspended pending a referendum in November of 2011 when voters will decide whether to appeal it), New Jersey Assembly Bill 3435—passed by legislature May 9, 2011, New Jersey Assembly Bill 3434—passed by legislature May 9, 2011, New York Senate Bill 04358—passed by Senate and referred to the Assembly’s Judiciary Committee on June 6, 2011, New York Assembly Bill 1036—referred to the state Assembly’s Consumer Protection Committee on April 6, 2011, North Dakota Senate Bill 2156—signed by Governor on April 25, 2011, North Dakota House Bill 1462—signed by Governor April 26, 2011, Wisconsin Assembly Bill 11 (also known as the 2010 Wisconsin Act)—Signed by Governor on March 31, 2011.

1. Introduction

In a year of fiscal crises, states turned to alternative dispute resolution to save money and increase their tax bases. For instance, in order to encourage economic development, North Dakota expanded the scope of its agriculture mediation service to help an oil industry resolve mineral rights disputes more quickly.¹ Similarly, Connecticut, threatened with a sharp increase in the number of home mortgage defaults, provided homeowner mediation with banks.² These laws are aimed at promoting economic stability and growth, while preserving judicial resources.

Some states also restricted the scope of what alternative dispute resolution can require the government to pay in compensation. For example, Ohio passed a law limiting the bargaining rights of public employees, so that, for instance, they

1. H.B. 1462, 62nd Leg., Reg. Sess. (N.D. 2011), available at <http://e-lobbyist.com/gaits/text/239831> (“An act. . .to amend and reenact sections. . .relating to the agricultural mediation service.”).

2. H.B. 6351, 2011 Gen. Assemb., Reg. Sess. (Conn. 2011), available at <http://www.cga.ct.gov/2011/act/pa/pdf/2011PA-00201-R00HB-06351-PA.pdf> (“An act concerning foreclosure mediation and assistance programs . . .”); New York State Unified Court System, *Residential Mortgage Foreclosures: Promoting Early Court Intervention*, 9 (June 2008), <http://www.nycourts.gov/whatsnew/pdf/ResidentialForeclosure6-08.pdf> (reporting that mortgage default filings in Connecticut increased from 11,764 in 2005-06 to almost 20,000 in 2007-08).

cannot bargain to pay less than fifteen percent of their benefits costs.³ Similarly, New Jersey capped arbitration awards for police and firefighter wages at two percent annually.⁴ These laws aimed at controlling the capacity of alternative dispute resolution to force states spend money.

In sum, a trend among states this year has been to implement and manipulate alternative dispute resolution in ways that help their governments balance state budgets.

2. Historical Overview of Alternative Dispute Resolution As a Fiscal Solution for Government

Alternative dispute resolution has not always been viewed by legislators as a fiscal solution for government spending. In fact, in the early 20th century many states did not enforce arbitration clauses.⁵

As the number of business disputes began to rise (due to industrialization), the federal government and some states enacted legislation, including the 1925 Federal Arbitration Act, which protected the right to use arbitration clauses.⁶

Congress' legislative intent behind the 1925 Act was not to save governments money but to instead enforce a policy of liberal contract law.⁷ Not until the last two decades has the federal government overtly sought to use alternative dispute resolution to preserve state resources.⁸

One reason for state and federal governments' slow acceptance of alternative dispute resolution may be that, even as recently as 1994, doubt existed as to

3. Julie A. Rishel, *Final Analysis*, OHIO LEGISLATIVE SERVICE COMMISSION, 2, 5, & 43, <http://www.lsc.state.oh.us/analyses129/11-sb5-129.pdf>; S.B. 5, 126th Gen. Assemb., Reg. Sess. (Ohio 2011), available at http://www.legislature.state.oh.us/BillText129/129_SB_5_EN_N.pdf ("An Act . . . to make various changes to laws concerning public employees, including collective bargaining, salary schedules and compensation, layoff procedures, and leave.").

4. Matt Friedman, *New Jersey Assembly Approves Arbitration Reform Bill with 2 Percent Pay Cap for Police, Firefighters*, NJ.COM (Dec. 13, 2010), http://www.nj.com/news/index.ssf/2010/12/nj_assembly_passes_2_percent_a.html; A. B. 3393, 214th Leg., Reg. Sess. (N.J. 2010), available at http://www.njleg.state.nj.us/2010/Bills/AL10/105_PDF.

5. Jon O. Shimabukuro, *The Federal Arbitration Act: Background and Developments*, CONGRESSIONAL RESEARCH SERVICE, 5 (June 17, 2002), http://digital.library.unt.edu/ark:/67531/metacrs2223/m1/1/high_res_d/RL30934_2002Jun17.pdf (stating that prior to 1925 many American and English judges were unwilling to enforce arbitration clauses and surrender their jurisdiction partly because, in the English system at least, judges were paid fees based on the number of cases they heard).

6. Federal Arbitration Act, 9 U.S.C. §§ 1 & 2 (2006)(stating that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable").

7. See *Perry v. Thomas*, 482 US 483, 489 (1987)(quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)) (holding that Congress "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"); *S. Elec. Health Fund v. Kelley*, 308 F. Supp. 2d 847, 852 (M.D. Tenn 2003) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985))("Passage of the [Federal Arbitration] Act was motivated, first and foremost, by congressional desire to enforce agreements into which parties had entered. . .").

8. William J. Clinton, Memorandum For Heads of Executive Departments and Agencies (May 1, 1998), <http://govinfo.library.unt.edu/npr/library/direct/memos/disputre.html>; U.S. GEN. ACCOUNTING OFFICE, MANAGEMENT REFORM: IMPLEMENTATION OF THE NATIONAL PERFORMANCE REVIEW'S RECOMMENDATIONS 226 (1994), available at <http://www.gao.gov/archive/1995/oc95001.pdf> ("The increased use of alternative dispute resolution could reduce litigation and produce significant long-term savings.")

whether alternative dispute resolution actually saved money.⁹ Confusion about the cost-saving nature of alternative dispute resolution existed partly because not all cases are amenable to arbitration,¹⁰ and partly because alternative dispute resolution must be used efficiently if it is to reduce costs.¹¹ Thus, learning how to effectively utilize alternative dispute resolution was a key step to its implementation.

Since the 1990s, however, people have learned more about how to implement alternative dispute resolution effectively.¹² As a result, alternative dispute resolution programs have multiplied in federal, state, and private organizations.¹³ Proponents of alternative dispute resolution have offered many reasons alternative dispute resolution programs should continue to develop.¹⁴ As more states use dispute resolution preserve financial resources, support for alternative dispute resolution will likely increase.¹⁵

9. Deborah R. Hensler, *Does ADR Really Save Money? The Jury's Still Out*, NAT'L L. J., 1994, at 1-3, available at <http://www.rand.org/pubs/reprints/RP327> (last visited Oct. 3, 2011) ("Whether public or private ADR programs achieve cost savings will probably depend in large measure on how much they change [inefficient] patterns of disputing and lawyering."); see also Stacey Keare, *Reducing the Costs of Civil Litigation: Alternative Dispute Resolution*, PUB. L. RESEARCH INST., available at <http://www.uchastings.edu/public-law/plri/fal95tex/adr.html#F1> ("The few extensive studies that have been done do not show significant cost savings. Those studies that do report cost savings tend to be anecdotal or opinion-based.")

10. Utah State Bar, *Mandatory Binding Arbitration of Medical Malpractice Claims in Utah* (Oct. 3, 2003), http://webster.utahbar.org/barjournal/2003/10/mandatory_binding_arbitration.html ("Arbitration of complex claims typically does not produce a faster decision, nor does the arbitration of complex claims generally save money, not when the parties are responsible for the arbitrator's fees of \$200 to \$400 per hour.")

11. *Id.*; see e.g. Julie Bédard, *Recession-Proof Arbitration: the Power of Constraint to Control Time and Costs*, ALLBUSINESS, <http://www.allbusiness.com/legal/labor-employment-law-alternative-dispute-resolution/13301476-1.html> (last visited Oct. 3, 2011) (offering advice to businesses for how to use arbitration efficiently and reduce costs).

12. Determining best practices for alternative dispute resolution in modern society required a substantial amount of research because each application of ADR in a particular field entailed developing a separate body of knowledge. See e.g. Terenia Urban Guill, *Framework for Understanding and Using ADR*, 71 TUL. L. REV. 1313, 1315-16, 1323-24 & 1327 (1997) (concerning ADR in securities, divorce and criminal prosecution); Sarah L. Inderbitzin, *The Use of Alternative Dispute Resolution in Natural Resource Damage Assessments*, 20 WM. & MARY ENV'T L. & POL'Y REV. 1, 2 (1995).

13. LEONARD L. RISKIN ET AL, DISPUTE RESOLUTION & LAWYERS 46-48 (3rd ed. 2005).

14. See Keare, *supra* note 9 ("There are many well-documented benefits to ADR, such as satisfaction of parties and a growing effort generally to resolve disputes outside of the courts, which argue for the continued use of ADR in the courts, even if costs savings are not substantial."). Also, President George W. Bush's first attorney general, John Ashcroft, stated in 2002 that "today, perhaps more than any time in our history, it is vital that we aspire to a deeper understanding of justice." Attorney General John Ashcroft, Commencement Address for the University of Missouri Columbia School of Law (May 18, 2002), available at http://www.justice.gov/archive/ag/speeches/2002/051802commencement_columbia.htm.

15. James Melamed, *The Mediation Industry: Our Time Has Come*, MEDIATE.COM (Feb. 2009), <http://www.mediate.com/articles/melamed27.cfm> (last visited Oct. 3, 2011) ("What is happening, especially under the current economic stress conditions, is that things are 'shaking out' and our economy and society simply can not afford to process disputes in the old (inefficient) due process ways. . . . [I]n state after state, and soon for the federal government as well, there has been a systemic reliance on mediation to get the job done.")

3. How States Are Implementing Alternative Dispute Resolution For Fiscal Benefit

States implementing alternative dispute resolution in a myriad of ways. Some states are creating more regulations for alternative dispute resolution organizations to ensure alternative dispute resolution is fair and unbiased. For instance, recent bills in New Jersey and New York require alternative dispute resolution organizations to be more transparent about prior clients and reveal conflicts of interest to current clients.¹⁶

Some states are also increasing access to alternative dispute resolution. For instance, under New Jersey legislation, alternative dispute resolution organizations must provide free service to the indigent (much as a court would waive fees for an “in forma pauperis” party).¹⁷ As a result, more court cases can be channeled through alternative dispute resolution rather than traditional judicial processes.¹⁸

Similarly, North Dakota increased judicial discretion by allowing courts to appoint arbitrators in certain cases when parties fail to do so.¹⁹

On the administrative side of alternative dispute resolution, some states are seeking to save money by outsourcing clerical and user services associated with alternative dispute resolution. For instance, New Jersey contracted with a business called Forthright to manage information relating to arbitrations.²⁰ New Jersey’s contract with Forthright works by selling administrative service for a specific category of alternative dispute resolution, for instance all personal injury arbitrations arising under the Automobile Insurance Act in New Jersey.²¹ Forthright claims its affordable services saves the state and users tens of millions of dollars.²²

16. See Assem.B. 3435, 214th Leg., Reg. Sess. (N.J. 2011) (amendment “establish[ing] certain consumer protections related to arbitration organizations”; Assem.B. 1036, 2011 Gen. Assem., Reg. Sess. (N.Y. 2011), available at <http://e-lobbyist.com/gaits/text/304155> (“An act to amend the general business law, in relation to arbitration organizations.”); See also Assem.B. 3434, 214th Leg., Reg. Sess. (N.J. 2011), available at <http://e-lobbyist.com/gaits/text/288272> (requiring review of arbitration agreements for unconscionability).

17. See, e.g., *id.* In this way, alternative dispute resolution is available to everyone and not just the wealthy.

18. Benefits of ADR for courts are such that some court systems are actively selling ADR as an alternative to litigation. For instance, the New York Court System waxes on the merits of ADR on its web page, stating that “ADR often saves money and speeds settlement. In ADR processes such as mediation, parties play an important role in resolving their own disputes. This often results in creative solutions, longer-lasting outcomes, greater satisfaction, and improved relationships.” Alternative Dispute Resolution, N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/ip/adr/What_Is_ADR.shtml (last visited Oct. 4, 2011).

19. S.B. 2156, 62nd Legis. Assem., Reg. Sess. (N.D. 2011), available at <http://e-lobbyist.com/gaits/text/221704> (providing “that the district court may appoint arbitrators if parties fail.”).

20. *Forthright Awarded New Jersey No-Fault Arbitration Contract*, FORTHRIGHT PROCESS DESIGN AND MANAGEMENT, http://www.nj-no-fault.com/users/nj/resources/NJ%20PIP%20contract%20award%20press%20release%20_1-27-11.pdf (last visited Oct. 4, 2011).

21. *Id.* (concerning a “three-year contract from the State of New Jersey to administer No-Fault Insurance Personal Injury Protection (PIP) arbitrations under the State’s Automobile Insurance Cost Reduction Act.”).

22. See e.g. *Forthright Process Design and Management*, P.R. NEWSWIRE, <http://www.prnswire.com/news-releases/forthright-awarded-new-jersey-no-fault-arbitration-contract-114724104.html> (last visited Oct. 4, 2011) (claiming that a client state agency “significantly lowered overhead”

If true, then such administrative outsourcing of alternative dispute resolution should make alternative dispute resolution more accessible to the public.²³

Economic development is another reason states are implementing alternative dispute resolution. For instance, North Dakota, which is currently experiencing an oil boom, expanded the scope of its Agricultural Mediation Service to help the oil industry resolve mineral right disputes more quickly.²⁴

Expanding mediation services is expensive though. As a result, the North Dakota legislature included a contingency clause that if money for the mediation service should run out, then an agricultural commissioner who oversees the service “may petition for a transfer from the state contingency fund.”²⁵ In this way, the state limits its obligation to a new program and creates a process of review for the program’s performance before committing additional resources.

In another example of expanding alternative dispute resolution services, New York is considering a bill that would allow municipalities to pass laws creating non-binding mediation for land use decisions.²⁶ In this way, New York is empowering local government to expand parochial use of mediation and tailor alternative dispute resolution to their individual needs.

In an effort to maintain economic stability in the wake of a large number of home mortgage defaults, several states are providing mediation service for banks and defaulting homeowners.²⁷ For instance, Connecticut is extending its homeowner mediation service for another funding cycle.²⁸ The service does more than provide a mediation service, however, because it contains a provision that requires a bank to mediate with a willing homeowner.²⁹ This mandatory mediation provi-

because of tools like paperless, online filing, online payment and complete, up-to-date rules, forms, FAQs, and educational materials online).

23. *The Costs of Arbitration*, Public Citizen, (Apr. 2002), 9, <http://www.citizen.org/documents/ACF110A.PDF> (discussing how “arbitration sticker shock. . . frightened many consumers away”)

24. See e.g. H.B. 1462, 62nd Legis. Assem., Reg. Sess. (N.D. 2011), available at <http://e-lobbyist.com/gaits/text/239831> (“An act . . . to amend and reenact sections . . . relating to the agricultural mediation service . . .”).

25. *Id.* § 11.

26. S.B. 4358, 2011 Gen. Assem., Reg. Sess. (N.Y. 2011), available at <http://e-lobbyist.com/gaits/text/306737> (“An act to amend the general city law, the town law, and the village law, in relation to authorizing the use of mediation in land use decisions.”); *Legislative Detail: NY Senate Bill 4358 – 2011 General Assembly*, E-LOBBYIST, <http://e-lobbyist.com/gaits/view/311798> (last visited Oct. 4, 2011) (summarizing that the bill “[a]uthorizes certain municipal legislative bodies, including towns and villages, to enact local laws and ordinances providing for non-binding mediation of land use decisions.”).

27. See *Summary of Mediation Programs*, NATIONAL CONSUMER LAW CENTER, http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/summary-of-programs.pdf (last visited Oct. 4, 2011) (describing mediation programs in California, Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island and Vermont); *Pending Legislation for 2010*, NATIONAL CONSUMER LAW CENTER, <http://www.nclc.org/issues/pending-legislation.html> (last visited Oct. 4, 2011) (describing pending legislation for California, the District of Columbia, Florida, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Texas, Wisconsin, Washington and the Federal Government).

28. H.B. 6351, 2011 Gen. Assem., Reg. Sess. (Conn. 2011), 1-2, available at <http://www.cga.ct.gov/2011/act/pa/pdf/2011PA-00201-R00HB-06351-PA.pdf> (“An act concerning foreclosure mediation and assistance programs. . .”).

29. *Recent Developments in Foreclosure Mediation*, NATIONAL CONSUMER LAW CENTER, http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/rpt-mediatiion-2011.pdf (last visited

sion for banks helps redistribute power in the lending relationship and prevent banks from committing bad faith practices that might otherwise displace more people from their homes than necessary.

So far, Connecticut's homeowner mediation program has been successful. Since 2008, approximately seventy percent of defaulting homeowners have chosen to enter mediation, and sixty percent of those homeowners have received refinancing to keep their homes.³⁰ With income tax revenues dropping generally,³¹ keeping homes occupied may be one way to protect property tax revenue for states, as well as avoid community decay and welfare expenses.³²

Yet, despite such promising results from foreclosure mediation, not all states may be choosing to adequately fund their mediation programs. For instance, a manager for a Florida state mediation program told *U.S.A. Today* that her state had not added money to the homeowner mediation program despite an "overwhelming" influx of foreclosures.³³ The irony of states with fiscal problems underfunding their mortgage mediation programs is that this may ultimately cost these states more through lost taxes and welfare expenses in the long term.

4. Government Restricting the Scope of Alternative Dispute Resolution for Fiscal Benefit

Some states are passing laws that restrict what the government can pay for through alternative dispute resolution. For instance, the 2011 Ohio legislature passed a law prohibiting public employees from bargaining for less than a fifteen

Oct. 4, 2011)(Reporting "[s]ervicers' lack of good faith in negotiating with homeowners over mortgage modifications). While using ADR to prevent trickery by banks, states may also limit their court expenses with new statutes of limitations on bank malfeasance. Assem.B. 633, 2011 Gen. Assem., Reg. Sess. (N.Y. 2011), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A00633%09%09&Summary=Y&Actions=Y&Memo=Y&Text=Y ("A[n] [act] to amend the civil practice law and rules in relation to consumer credit transactions . . ."). The New York bill proposes a "3 year statute of limitations for commencement of a cause of action arising out of a consumer credit transaction. . .").

30. Thomas B. Scheffey, *A Closer Look At Foreclosure Mediation Success*, CONN. LAW TRIBUNE, Mar. 28, 2011, available at <http://www.ctlawtribune.com/getarticle.aspx?ID=40019> (last visited Oct. 4, 2011) (citing that 64% of homeowners in mediation kept their homes); U.S. DEPT. OF HOUSING & URBAN DEV., EMERGING STRATEGIES FOR EFFECTIVE FORECLOSURE MEDIATION PROGRAMS 7, available at <http://www.justice.gov/atj/effective-mediation-prog-strategies.pdf> (last visited Oct. 4, 2011) (citing that approximately 70% of defaulting homeowners in Connecticut enter mediation).

31. Individual Income Tax Returns 2009, Department of the Treasury Internal Revenue Service (July 2011), <http://www.irs.gov/pub/irs-soi/09inalcr.pdf>; see also Alexander Eichler, *American Millionaires: 1,400 Paid No U.S. Income Taxes in 2009*, HUFFINGTON POST, Aug. 5, 2011, http://www.huffingtonpost.com/2011/08/04/irs-incomes_n_918458.html (reporting that the number of taxpayers filing with the IRS fell by two million between 2008 and 2009).

32. See e.g. *Subprime Spillover: Foreclosures Cost Neighbors \$202 Billion; 40.6 Million Homes Lose \$5,000 on Average*, CENTER FOR RESPONSIBLE LENDING, <http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf> (last visited Oct. 4, 2011) (The article "estimate[s] the monetary value of [mortgage] losses in terms of lower property value and a reduced tax base for communities.").

33. Jeff Schweers, *More Homeowners Turn to Mediation After Foreclosure*, USA TODAY, May 28, 2010, http://www.usatoday.com/money/economy/housing/2010-05-28-foreclosure28_CV_N.htm (last visited Oct. 4, 2011).

percent contribution to their benefits' costs.³⁴ Similarly, New Jersey's legislature passed a law capping arbitration awards for police and firefighter salaries at two percent per year.³⁵ The New Jersey law illustrates one way that alternative dispute resolution professionals are being affected by state budget deficits.³⁶ Facing budget problems, state officials argued that arbitrators were giving awards to police and firefighters without adequate consideration to the government's ability to pay. Other examples of similar concerns about government employees taking advantage of alternative dispute resolution abound. For instance, Wisconsin passed a law limiting the dollar amount for which public employees could collectively bargain.³⁷

Notably, variations exist among the laws limiting collective bargaining in each state. For example, the Wisconsin law Assembly Bill 11 makes an exception for public safety employees like police and firefighters, whereas the Ohio law Senate Bill 5 does not.³⁸ In another difference between the states' laws, the New Jersey law Assembly Bill 3393 places a numerical cap on salary increases, two percent,³⁹ whereas Wisconsin's law allows for a flexible ceiling for wage raises dependent on the percentage change in the consumer price index.⁴⁰

In sum, numerous laws limiting collective bargaining and arbitration have appeared amidst states' efforts to control spending.⁴¹

34. S.B. 5, 126th Gen. Assem., Reg. Sess. (Ohio 2011), available at http://www.legislature.state.oh.us/BillText/129/129_SB_5_EN_N.pdf ("An Act . . . to make various changes to laws concerning public employees, including collective bargaining, salary schedules and compensation, layoff procedures, and leave."); Rishel, *supra* note 3 at 5 (Senate Bill 5 "[l]imits public employer contributions toward health care benefit costs to 85%."); The enacted version of Senate Bill 5 is currently suspended pending a referendum in November where voters will decide whether to appeal it. The Associated Press, *Senate Bill 5 repeal makes ballot*, CINCINNATI.COM, July 21, 2011, <http://news.cincinnati.com/article/20110721/NEWS0108/110721028/Senate-Bill-5-repeal-makes-ballot?odyssey=tab|topnews|text> (last visited Oct. 4, 2011).

35. Assem.B. 3393, 214th Leg., Reg. Sess. (N.J. 2010), available at http://www.njleg.state.nj.us/2010/Bills/AL10/105_.PDF ("An act concerning police and fire arbitration and amending and supplementing P.L.1977, c.85."); Friedman, *supra* note 4 (Assembly Bill 3393 set a cap for pay raises at two percent annually).

36. Through its new law New Jersey now limits the power of arbitrators to increase police and firefighter salaries in at least four ways. First, the law caps awards to a two percent annual salary increase for public employees. Friedman, *supra* note 4. Second, offers to settle from either party must be accompanied with a statement explaining the financial impact of the offer on taxpayers. Assem.B. 3393, *supra* note 35 at 8. Third, arbitrators must take into account "limitations imposed upon the local unit's property tax levy" (calculated by considering various financial elements). *Id.* at 9. Technically, these tax levy caps could further limit police and firefighter salary increases to less than the definite two percent named by the law. Finally, arbitrators must provide a written report to the government in which they explain their decision, specifically explaining consideration of any existing tax caps on the government. *Id.* at 7. In other words, arbitrators deciding a police or firefighter salary dispute in New Jersey can no longer assume that state and local governments can raise property taxes endlessly in order to pay for higher wages.

37. Assem..B. 11, 2011 Assem., Spec. Sess. (Wisc. 2011), 1, 19, available at <https://docs.legis.wisconsin.gov/2011/related/acts/10.pdf> ("An Act relating to: state finances, collective bargaining for public employees, compensation and fringe benefits of public employees. . .").

38. *Id.* at 23.

39. Friedman, *supra* note 4.

40. Assem.B. 11, *supra* note 37 at 19.

41. Other states that made headlines with contentious laws limiting collective bargain rights in 2010-2011 include:

Massachusetts, Idaho, New Hampshire, Indiana, Tennessee, and Iowa. Alternatively, bills strengthening public union ADR rights generally failed. H.B. 362, 2011 Gen. Ct., Reg. Sess.

5. Conclusion

Although they are presently amicable partners, alternative dispute resolution and government have historically shared a lukewarm relationship. Prior to 1925, many courts refused to recognize arbitration clauses, despite a growing tendency of private individuals to use these clauses in commerce. In 1925, the U.S. government intervened to protect arbitration clauses and, in so doing, created legal space for other kinds of alternative dispute resolution as well.

In the 1990s and early 2000s an understanding of how to effectively use alternative dispute resolution grew, such that states can now confidently turn to alternative dispute resolution as a means of saving and raising revenue. To the extent alternative dispute resolution achieves these financial goals, its growth as a viable resolution to legal disputes will likely increase.

(N.H. 2011), available at <http://www.gencourt.state.nh.us/legislation/2011/HB0362.html> (“A[n] [act] relative to binding arbitration in public labor disputes.”). The New Hampshire House of Representatives voted the bill down as “inexpedient.” *HB 362, MYGOV365*, <http://www.mygov365.com/legislation/view/id/4e00ecac49e51b6d30320700/tab/actions/> (last visited Oct. 4, 2011).

II. HIGHLIGHTS

A. *Arizona House Bill 2064*¹

Representative Judy Burges sponsored House Bill 2064,² which amends Title 12 of the Arizona Constitution by adding Chapter 22 titled *Application of Foreign Laws*.³ House Bill 2064 intends to protect Arizona citizens from the application of foreign laws when such application will result in a “violation of a right guaranteed by the constitution of this state or of the United States or conflict with the laws of this state.”⁴ The bill does so by prohibiting the application of foreign law(s) to arbitration or mediation or any type of adjudication conducted in Arizona if the foreign law violates a guaranteed right under the state or federal constitutions.⁵ Because the bill excludes businesses from its scope, it specifically applies to individuals.⁶ Governor Brewer signed the bill into law on April 12, 2011.⁷

B. *Connecticut House Bill 5789*⁸

Representative Gail Lavielle introduced House Bill 5789 to permit the “legislative body of a municipality to reject a contract without requiring mandatory binding arbitration during periods of high unemployment.”⁹ The bill requires the unemployment rate to be above seven and one-half percent before the legislative body of a municipality may reject a contract without being required to participate in mandatory binding arbitration.¹⁰ Once the state’s unemployment rate drops below seven and one-half percent for at least six months, mandatory binding arbitration will be reinforced.¹¹ House Bill 5789 was referred to the Joint Committee on Planning and Development on January 21, 2011.¹²

1. For House Bill 2064, see H.B. 2064, 50th Leg., Reg. Sess. (Ariz. 2011), available at <http://www.azleg.gov/legtext/50leg/1r/bills/hb2064s.pdf>.

2. See *Bill Sponsors: AZ House Bill 2064*, E-LOBBYIST.COM, <http://e-lobbyist.com/gaits/sponsors/221440> (last visited Oct. 25, 2011).

3. H.B. 2064, *supra* note 1.

4. *Id.* at § 2.

5. *Id.* at § 12-3103.

6. *Id.* at § 12-3102(B).

7. See *Legislative Detail: AZ House Bill 2064*, E-LOBBYIST.COM, <http://e-lobbyist.com/gaits/AZ/2064> (last visited Oct. 25, 2011).

8. For House Bill 5789, see H.B. 5789, 2011 Leg., Reg. Sess. (Conn. 2011), available at <http://www.cga.ct.gov/2011/TOB/h/pdf/2011HB-05789-R00-HB.pdf>.

9. *Id.*

10. *Id.*

11. *Id.*

12. See *Proposed H.B. No 5789*, CONNECTICUT GENERAL ASSEMBLY, http://www.cga.ct.gov/asp/CGABillStatus/CGABillstatus.asp?selBillType=Bill&bill_num=HB5789 (last visited Oct. 25, 2011).

*C. Oregon House Bill 3450*¹³

House Bill 3450 was introduced on February 21, 2011, by Representative Kevin Cameron.¹⁴ This bill modifies law relating to employment contracts in a way that could be seen as favorable to employers.¹⁵ Specifically, House Bill 3450 alters grievance resolution procedures by reducing the time that an employer must take to notify a prospective employee that an arbitration agreement is required as a condition of employment.¹⁶ Under prior law, an employer had to notify a prospective employee at least two weeks before the first day of the employee's employment.¹⁷ House Bill 3450 reduces that time to 72 hours.¹⁸ House Bill 3450 was signed by Governor John Kitzhaber on June 23, 2011, and chaptered at Chapter 489.¹⁹

*D. Utah Senate Bill 52*²⁰

Senate Bill 52 was introduced on January 28, 2011 by Senator Stephen Urquhart.²¹ This bill creates a new act allowing for plaintiffs to choose arbitration in civil tort cases,²² presumably to give plaintiffs an alternative venue to seek justice which might be more efficient, less costly, and less time-consuming than litigation. Specifically, Senate Bill 52 provides that in all cases other than specified auto injury, medical malpractice and governmental claims, a plaintiff may with permission of the district court and agreement of the parties, resolve their dispute through arbitration.²³ Doing so limits the plaintiff's recovery to the lesser of either the insurance policy limits or \$50,000.²⁴ Further, all claims seeking punitive damages are waived.²⁵ The bill was signed by Governor Gary Herbert on March 22, 2011, and chaptered as Utah Code Ann. § 78B-10a-101 to 109.²⁶

*E. Hawaii House Bill 582*²⁷

On February 21, 2011, Representatives Sharon Har (D) and Ken Ito (D) introduced House Bill 582, relating to mortgages. The companion Senate bill, Sen-

13. H.B. 3450, 76th Leg., Gen. Sess. (Or. 2011), available at <http://www.leg.state.or.us/searchmeas.html> (select "House Bill" radio button; then enter "3450" in the Number Box; then click "Search").

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. S.B. 52, 59th Leg., Gen. Sess. (Utah 2011), available at <http://le.utah.gov/~2011/htmdoc/sbillhtm/sb0052.htm>.

21. *Id.*

22. *Id.*

23. *Id.* at § 78B-10a-102.

24. *Id.* at § 78B-10a-102(3).

25. *Id.* at § 78B-10a-103

26. See UTAH CODE ANN. § 78B-10a-101 to 109 (West 2011).

27. H.B. 582, 2011 Leg., 26th Sess. (Haw. 2011), available at <http://e-lobbyist.com/gaits/text/145434>.

ate Bill 707²⁸, was introduced the same day by Senators Mike Gabbard (D) and Will Espero (D). The bills most notably place a moratorium on non-judicial foreclosures while requiring foreclosing mortgagees to engage in mediation.²⁹ The House version of the bill was referred to the Committee on Judiciary and the Committee on Consumer Protection and Commerce.³⁰ On February 4, 2011, a public hearing was scheduled and on February 9, 2011, the measure was deferred.³¹ The Senate bill was referred to the Committee on Commerce and Consumer Protection on January 24, 2011, where it remains.³²

F. Maine House Bill 142³³

On January 26, 2011, Representative Kerri Prescott (R) introduced House Bill 142, an act to require divorce actions to go to mediation.³⁴ The bill proposes to require all contested divorce cases to be resolved through mediation instead of in the courts, unless there are extenuating circumstances, such as abuse.³⁵ On January 27, 2011, the House and Senate referred the bill to the Joint Committee on Judiciary.³⁶ The committee submitted the Majority Committee Report on March 30, 2011, recommending that the bill ought not to pass.³⁷ On April 7, 2011, the House and Senate both adopted the Majority Committee Report, effectively killing the concept draft.³⁸ This bill is unique because it would create a system entirely separate from the courts to handle divorce cases.³⁹

III. CATALOG OF STATE LEGISLATION

The following is a state-by-state list of measures introduced during the first eleven months of 2011 concerning alternative dispute resolution.

Alabama

Bills Enacted: None.

Other Legislation: S.B. 18 (would adopt a modified Uniform Collaborative Law Act to provide a procedure by which parties to divorce, custody or visitation matter, adoption, parentage, or other premarital, marital, or post-marital agreement, could resolve the matter through a collaborative law agreement, like mediation or arbitration, without intervention by an administrative or judicial tribunal); H.B. 26 (defines when a power of attorney is durable, validly executed. It permits the use of alternative dispute resolution); H.B. 76 (would establish the Surplus Lines Insurance Multi-State Compliance Compact Act providing for exclusive

28. S.B. 707, 2011 Reg. Sess. (Haw. 2011), available at <http://e-lobbyist.com/gaits/HI/SB707>.

29. *Id.*; H.B. 582, *supra* note 1.

30. H.B. 582, *supra* note 1.

31. *Id.*

32. S.B. 707, *supra* note 2.

33. H.B. 142, 125th Leg. (Me. 2011), available at <http://e-lobbyist.com/gaits/ME/LD142>.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

single-state regulatory compliance for multi-state surplus lines and independently procured insurance placements, this act also permits the use of alternative dispute resolution); H.B. 123 (would permit the funding of \$ 125,615 to fund the Office of the Attorney General for performance of arbitration services, including administration of the State's tenure laws by the Office of Administrative Hearings, Division of Administrative Law Judges); H.B. 341 (would require manufacturers, distributors, and dealers of recreational vehicles to use mediation for certain disputes but voids the arbitration if one of the parties agree under coercion.); H.B. 360 (would allow permits for the audit of pharmacy records and provides for mediation after an audit appeal); S.B. 393 (aims, in part, to permit any state certified or licensed marriage mediator to perform four sessions that focus on post-marital financial planning); H.B. 434 (proposes to amend the state's sales formula such that sales of services and other sales of intangible property are sourced to Alabama if the taxpayer's market for the sales is in Alabama. The amendment also requires that disputes over the Commission's adjudication be settled through arbitration); H.B. 560 (provides for the reassignment of a bully to another school for the purpose of separating the student from his or her harassment victim. Also, this bill aims to use mediation as a tool to encourage victims to report bullying.); H.B. 607 (aims to amend the Constitution of Alabama of 1901 by prohibiting the application of foreign law in violation of rights guaranteed natural citizens by the United States and Alabama Constitutions, and the laws and public policy of the state, without application to business entities. This would include prohibiting the application of foreign laws in arbitration).

Alaska

Bills Enacted: None.

Other Legislation: H.B. 88 (would prohibit a court, arbitrator, mediator, administrative agency, or enforcement authority from applying a foreign law, rule, or provision of an agreement that violates an individual's right under the Constitution of the State of Alaska or the United States Constitution); H.B. 220 (relates to the shared use of oil and gas facilities; would direct the commissioner of natural resources to promote and facilitate the shared use of facilities for the purpose of developing oil and gas resources for the maximum benefit of the people of the state; and provides that an application for assistance in the form of mediation and arbitration may be sought in cases where lease agreements cannot be met); S.B. 116 (would offer mediation of disputed workers' compensation claims by a hearing officer or other classified employee of the division of workers' compensation and allowing collective bargaining agreements to supersede certain provisions of the Alaska Workers' Compensation Act).

Arizona

Bills Enacted: H.B. 1504 (aims to revise the Revised Uniformed Arbitration Act by prohibiting certain waivers, prohibiting insufficiency of notice, allowing for disclosure of facts by a neutral arbitrator, waiving of right to be represented by a lawyer, applicability, agreements, motions to compel or stay arbitration, immunity of arbitrator, court fees, judicial enforcement of preaward ruling, change of award, confirmation of award, vacating of award, modification, judgment on award and an exclusive remedy for claims against the state); H.B. 2064 (relates to

application of foreign law; provides that a court, arbitrator, administrative agency or other adjudicative, mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed by the Constitution of this state or of the United States or conflict with the laws of the United States or of this state).

Other Legislation: H.B. 2642 (would relate to foreclosures of deeds of trust; would establish the mandatory foreclosure medication program to address foreclosure, reinstatement of deed of trust, loan modification, court fees for mediation, notice of sale and confidentiality of communications; provides that for owner-occupied residential property, the power of sale of trust property conferred upon the trustee shall not be exercised before the recording of the notice from the court that the mediation process has been satisfactorily completed); S.B. 1034 (would permit the use of arbitration to settle easement disputes between landowner and of a private right-of-way and an easement holder); S.B. 1227 (would make known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration).

Arkansas

Bills Enacted: None.

Other Legislation: None.

California

Bills Enacted: A.B. 646 (would amend provisions that govern collective bargaining of local represented employees and delegate jurisdiction to the Public Employment Relations Board to resolve disputes and enforce the duties and rights of local public agency employers and employees; authorizes the employee organization to request the matter be submitted to a factfinding panel if the mediator is unable to effect a settlement within a specified time period; provides procedures for the submission of an agency's last, best, and final offer); S.B. 684 (Requires that any agreement between an employer and a workers' compensation insurer concerning resolution of disputes be part of a form or endorsement filed with the rating organization, provided to the employer in writing with any written quote that offers to provide insurance coverage; requires that where a state agency has been granted the authority to resolve the dispute, it would not be subject to an alternative dispute resolution between an employer and workers' compensation carrier).

Other Legislation: A.B. 456 (would amend existing that provides that in an action to record and enforce a mechanics lien, a person does not waive any right of arbitration if the person takes certain measures, including filing and serving a motion to stay the action pending arbitration. Authorizes the claimant to make a motion to stay the action pending arbitration even if an application for an order to arbitrate has not been filed, unless the court makes certain findings; would provide what constitutes a waiver of arbitration); A.B. 993 (would relate to mediation and counseling in child custody cases; specifies that a mediator and a licensed mental health professional are not liable for damages in certain circumstances; requires that a complaint be made to the court that set the matter for mediation or that required outpatient counseling instead of a licensing board; requires the court to

refer the matter to the licensing board if it finds unprofessional conduct on the part of the mediator or licensed mental health professional). A.B. 1062: (would amend existing law that specifies those types of orders and judgments from which an appeal may be taken, including, an order dismissing or denying a petition to compel arbitration; would limit that basis from which an appeal may be taken to an order dismissing or denying a petition to compel arbitration pursuant to the terms of a public or private sector collective bargaining agreement); A.B. 462 (Authorizes special education local plan areas to develop a voluntary special education advocate certification program. Requires alternative dispute resolution training and testing to persons seeking certification. Requires a registry of persons who have successfully passed the test and completed the training. Provides that the Superintendent of Public Instruction shall certify that the listed persons or organizations provide services for free or at a reduced cost).

Colorado

Bills Enacted: SJR 49 (Concerns recognition of October as conflict resolution month in Colorado).

Other Legislation: HB 1299 (would repeal the “Colorado Estate Tax Law” and the “Uniform Act on Interstate Compromise and Arbitration of Inheritance Taxes” which relate to two states both claim that a decedent was domiciled in their state; states that at no time shall the state impose an estate tax directly on an estate in excess of the federal credit, nor shall the state impose an estate tax that is calculated separately from any federal estate tax).

Connecticut

Bills Enacted: H.B. 6598 (concerns offers of compromise in construction contract arbitration proceedings and mediation and arbitration of construction contracts; allows a party in an arbitration proceeding on a construction contract to submit an offer of compromise to the other party and provide that the party who Files such offer of compromise may recover eight per cent annual interest on the amount of any award equal to or in excess of the amount in the party’s offer); H.B. 6639 (Concerns pretrial diversionary programs; revises the eligibility requirements for certain pretrial diversionary programs, establish a pretrial diversionary program for veterans and expand mediation programs in criminal prosecutions to all geographical area court locations); S.B. 1155 (concerns the disclosure of information in a tobacco arbitration proceeding; allows the Department of Revenue Services to disclose to the Attorney General certain information relevant to an arbitration or other dispute resolution proceeding brought under the Master Settlement Agreement between cigarette manufacturers and the states, and to allow the Attorney General to disclose that information in such proceeding).

Other Legislation: H.B. 5061 (would ensure the full disclosure of the mediation or arbitration decision by notifying the legislative body of the school district that a copy of the completed mediation and arbitration decision has been filed with the town); HB 5190 (would concern binding arbitration awards; prohibits wage increase awards in binding arbitration for collective bargaining purposes if unemployment in Connecticut exceeds seven per cent); H.B. 5191 (would concern

limitations on binding arbitration awards; amends the collective bargaining statutes to limit binding arbitration awards to no more than the Consumer Price Index); H.B. 5250 (allows municipal legislative bodies to intervene in binding arbitration proceedings; allows legislative bodies of municipalities intervene in binding arbitration proceedings); H.B. 5321 (allows municipal legislative body intervention in binding arbitration proceedings; allows legislative bodies of municipalities to intervene in binding arbitration proceeding); H.B. 5463 (reforms municipal binding arbitration reform; reform municipal binding arbitration timelines and the manner in which neutral arbitrators are selected); H.B. 5469 (concerns the rejection of arbitration awards; provides that when arbitration awards are rejected by the legislative body of a municipality, the parties shall continue to negotiate rather than submitting to mandatory binding arbitration); H.B. 5779 (concerns mandatory binding arbitration; prohibits arbitration panels from considering municipal fund balances when determining a municipality's ability to pay); H.B. 5789 (concerns labor contracts during periods of high unemployment; allows the legislative body of a municipality to reject a contract without requiring mandatory binding arbitration during periods of high unemployment); H.B. 5815 (requires mediation when parents of minor children seek to get divorced); H.B. 5833 (ensures that all persons who serve on the Department of Education Arbitration Panel be a resident of the State and impartial and unbiased); H.B. 5930 (concerns considerations in mandatory binding arbitration; prohibits arbitration panels from considering municipal fund balances when determining a municipality's ability to pay); H.B. 6098 (gives towns the ability to reject arbitration awards); H.B. 6409 (requires neutral municipal arbitrators be members of the American arbitration association; requires all individuals selected to serve as neutral arbitrators in municipal arbitrations be members of the American Arbitration Association); H.B. 6608 (aims to adopt the Revised Uniform Arbitration Act; responds to the increased use of arbitration in resolving disputes and revise and modernize arbitration procedures by adopting the Revised Uniform Arbitration Act); S.B. 76 (concerns arbitration awards; provides relief from labor contracts by authorizing municipalities to reject arbitration awards and continue negotiations prior to submitting to final and binding arbitration); S.B. 362 (concerns municipal budget reserve balances and municipal arbitration reform; provides municipalities with tools to address local budget deficits and restore balance to the binding arbitration process by making it consistent with the state binding arbitration process).

Delaware

Bills Enacted: H.B. 58 (regulates conduct related to foreclosures in the State; establishes the Automatic Residential Mortgage Foreclosure Mediation Program; provides for mediation prior to a judgment or sheriff's sale; expands access to such medication; requires that plaintiffs pay a court-determined mediation fee in foreclosure actions for which mediation will occur; sets forth certain requirements for the filing of a complaint or summons in a mortgage foreclosure action).

Other Legislation: None.

District of Columbia

Bills Enacted: None.

Other Legislation: Bill 19-43 (authorizes the adoption of the Uniform Collaborative Law Act, which imposes certain content requirements for any collaborative law participation agreement and ensures communications made during the process are confidential according to the terms agreed upon by the parties, or as provided in law);

Florida

Bills Enacted: None.

Other Legislation: HB 967 (provides that circuit courts have exclusive original jurisdiction of unresolved arbitration actions involving Florida Motor Vehicle no-fault Law; requires requests for disclosure of certain information be by certified mail; revises reference to Medicare Part B payments as schedule for insurer's discretionary use when limiting reimbursement of certain medical services, supplies, & care; specifies Medicare fee schedule or payment limitation that is to be used by insurer to limit reimbursements); HB 7121(provides that when an action is referred to mediation by court order, the time period for responding shall be tolled until an impasse has been declared or the mediator has reported that no agreement was reached; allows an offer or demand for judgment may be made at any time after impasse; states that if neither party requests or agrees to voluntary binding arbitration, the claim shall proceed to trial or to any available legal alternative such as offer of and demand for judgment); HB 1273 (would prohibit the application of foreign laws in an individual's arbitration if the foreign law will violate the public policy; would also void arbitration awards based on foreign laws if the award is contrary to public policy).

Georgia

Bills Enacted: None.

Other Legislation: H.B. 45 (relates to verdict and judgment, so as to provide a short title; to provide for legislative findings; provides that no court, arbitrator, administrative agency, or other tribunal shall enforce a foreign law if doing so would violate a right guaranteed by the Constitution of this state or of the United States; provides for construction; provides for null contracts; provides for findings of fact and conclusion of law); S.B. 51 (see above); S.B. 149 (establishes the Georgia Medicaid Access Act; relates to public assistance, so as to provide for the filing of a proposed complaint of a medical malpractice claim against a medical assistance provider; relates to medical malpractice arbitration, so as to include actions for medical malpractice in the definition of a medical malpractice claim for which arbitration is authorized); H.B. 242 (excludes arbitration from the prohibition of applying foreign law to adjudicative process if it violates public policy).

Hawaii

Bills Enacted: None.

Other Legislation: H.B. 582 (requires a Hawaii agent for mortgage servicers, requires foreclosing mortgagees to engage in mediation, and places a moratorium on non-judicial foreclosures); H.B. 879 (gives apartment owners the right to demand mediation or arbitration to resolve disputes about the amount or validity of an association of apartment owners' assessment); HB 1411 (Repeals the former non-judicial foreclosure process; clarifies the new non-judicial foreclosure process, including a foreclosure mediation program); HB 1453 (requires that in contested termination proceedings where there are allegations of abuse of a partner to a civil union, the court shall not require a party alleging the abuse to participate in any component of any mediation program against the wishes of that party); S.B. 576 (requires mandatory foreclosure mediation).

Idaho

Bills Enacted: None.

Other Legislation: H.B. 320 (prohibits discrimination on the basis of income by potential residential video service providers, and requires that all complaints be mediated prior to litigation).

Illinois

Bills Enacted: None.

Other Legislation: H.B. 90 (requires the Interstate Commission promulgate a rule providing for both mediation and binding dispute resolution for disputes among compacting states); H.B. 178 (amends the Illinois Human Rights Act to provide for voluntary mediation); H.B. 184 (requires cemetery authorities to submit to mediation in the event of a consumer complaint); H.B. 296 (provides for mandatory mediation in the event of collective bargaining disputes between the state and fire fighters, peace officers, and security employees).

Indiana

Bills Enacted: H.B. 1427 (provides that a prosecuting attorney or private attorney who contracts or agrees to undertake activities required under Title IV-D is not required to mediate, resolve, or litigate a dispute between the parties relating to the assignment of the right to claim a child as a dependent for federal and state tax purposes); S.B. 34 (creates a National Interstate Commission for Juveniles with mediation authority for compacting states).

Other Legislation: None.

Iowa

Bills Enacted: None.

Other Legislation: H.B. 18 (provides for mediation for parties to an action regarding grandparent or great grandparent visitation; provides that the district court

may, on its own motion or on the motion of any party, order the parties to participate in mediation in a proceeding, unless the court determines that such mediation is not in the best interest of the child; mediation performed under the bill must comply with the provisions of Code chapter 679C (mediation). The supreme court is directed to prescribe rules for the mediation, and the bill specifies standards with which mediation provided under the bill must comply including participation in the mediation; the selection of a mediator; the rights of the parties to the advice and presence of counsel at all times; the presentation of any agreement and the enforceability of a mediation agreement; the costs of mediation; and qualifications for mediators); H.B. 275 (allows school districts to require truancy mediation to prevent students from dropping out of school).

Kansas

Bills Enacted: None.

Other Legislation: H.B. 2130 (makes it a prohibited practice for public employees or employee organizations willfully to deliberately and intentionally avoid mediation, fact-finding and arbitration efforts as provided in K.S.A. 75-4332).

Kentucky

Bills Enacted: None.

Other Legislation: HB 27 (requires mediation or binding arbitration, in accordance with the procedures set forth by the American Arbitration Association, or its successor, of any dispute between the managed care plan and the cute-care hospital regarding a covered person's access to care under the continuity of care provision); HB 465 (relating to the enactment of an interstate racing and wagering compact which aims to provide mediation and a binding dispute resolution service for member states who decide to use them to resolve a compact dispute among each other).

Louisiana

Bills Enacted: None.

Other Legislation: None.

Maine

Bills Enacted: None.

Other Legislation: H.B. 142 (proposes to require all contested divorce cases to be resolved through mediation, instead of in the courts, unless there are extenuating circumstances, such as abuse); H.B. 1056 (aims to adopt the Interstate Prescription Monitoring Program Compact); H.B. 1154 (aims to amend the laws governing workers' compensation, specifically to amend the mediation provision to require that mediation be requested both by the employer and the employee).

Maryland

Bills Enacted: H.B. 412 (concerning real property and residential property foreclosure procedures; if a lender determines that the lender is not eligible for any loan modification or other relief, the lender has the right to file a request with the court and have foreclosure mediation).

Other Legislation: H.B. 285 (concerning human relations and discrimination by a place of public accommodation; specifically, when appropriate and to the extent authorized under law, in a dispute arising under this part, in which the complainant seeks compensatory or punitive damages, the parties are encouraged to use alternative means of dispute resolution, including settlement negotiations or mediation).

Massachusetts

Bills Enacted: None.

Other Legislation: H.B. 30 (aims to make uniform certain aspects of mediation); H.B. 1355 (aims to establish mandatory foreclosure mediation with judicial review; not later than ninety (90) days after the enactment of this legislation, the Attorney General shall establish the Massachusetts Foreclosure Mediation Program (MFMP) and promulgate regulations as necessary and appropriate to implementing such a mediation program. The Attorney General shall also set standards for training mediators in foreclosure mediation, loss mitigation and alternatives to foreclosure); H.B. 1454 (facilitates mediation of mortgage foreclosures of owner occupied residential real property in the city of Boston); HB 2117 (concerns manufactured housing communities; upon receipt of a complaint from the attorney general, the commission shall assign one of its members to conduct a mediation between the parties involved in the dispute. If the parties fail to agree to a resolution of the dispute during the mediation process, one or both parties may request that the commission hear and decide the dispute); HB 2851 (concerns mediation of divorce cases involving children; in all cases involving disputed parental rights and responsibilities or grandparents' visitation rights, including requests for modification of prior orders, the court may order the parties to participate in mediation. If the parties are ordered to participate in mediation under this section, all issues relevant to their case, including but not limited to child support and issues relative to property settlement and alimony, shall also be mediated unless the court orders otherwise); HB 2971 (concerns regulating collective bargaining impasses involving public employees, including mandatory mediation of conflicts).

Michigan

Bills Enacted: None.

Other Legislation: None.

Minnesota

Bills Enacted: None.

Other Legislation: H.B. 322 (proposes changes to custody and parenting arrangements relating to children; parties to a marriage dissolution proceeding are encouraged to attempt alternative dispute resolution pursuant to state law); HB 501 (specifies factors that must be considered in interest arbitration); H.B. 565 (relates to family law; provides for grandparent visitation rights on behalf of the child; expands grandparent visitation rights; specifies procedures; requires mediation.); H.B. 1430 (relates to manufactured home park lot rentals; establishes a new administrative remedy for violations of state statutes).

Mississippi

Bills Enacted: None.

Other Legislation: H.B. 1373 (provides for mediation in the event of disputes involving recreational vehicle franchising).

Missouri

Bills Enacted: None.

Other Legislation: H.B. 569 (provides requested mediation services to political subdivisions involved in jurisdictional disputes regarding the provision of 911 services); H.B. 922 (attempts to add new sections relating to mortgage foreclosures; specifically, each office of the circuit court in a county in Missouri shall establish a loss mitigation application and a residential mortgage foreclosure mediation negotiation program to assist mortgagors and mortgagees in achieving a mutually agreeable resolution to a mortgage foreclosure plan).

Montana

Bills Enacted: None.

Other Legislation: H.B. 527 (revises laws relating to arbitration for public labor contracts); H.B. 235 (allows parties to liens to enter into arbitration).

Nebraska

Bills Enacted: LB 335 (provides for the waiver of city bidding procedures for certain contract rights).

Other Legislation: L.B. 647 (aims to prohibit the application of certain foreign laws in Nebraska courts).

Nevada

Bills Enacted: A.B. 317 (revises provisions governing arbitration of certain claims that relate to resident property).

Other Legislation: S.B. 165 (aims to revise provisions that govern arbitrators).

New Hampshire

Bills Enacted: H.B. 185 (relates to determining bargaining units for purposes of public employee collective bargaining).

Other Legislation: H.B. 362 (aims to require binding arbitration in public labor relations disputes); H.B. 275 (establishes an employers' private cause of action to enforce the payment of workers' compensation insurance coverage);

New Jersey

Bills Enacted: A3393 (revises procedure for police and fire contract disputes, and imposes a limit on certain arbitration awards).

Other Legislation: S.B. 2546 (revises the scope of public employee collective negotiations).

New Mexico

Bills Enacted: None.

Other Legislation: None.

New York

Bills Enacted: None.

Other Legislation: A633 (proposes to enact the "consumer credit fairness act"; establishes a 3-year statute of limitations for commencement of a cause of action arising out of a consumer credit transaction where the defendant is a purchaser, borrower or debtor); A1036 (relates to arbitration organizations; requires private arbitration organizations involved in fifty or more consumer arbitrations per year to collect, publish at least quarterly, and make available to the public in a computer searchable database, certain information relating to such arbitrations); A01756 (establishes the Uniform Mediation Act; specifically, that a mediation communication is privileged and is not subject to discovery or admissible in evidence unless waived or precluded).

North Carolina

Bills Enacted: None.

Other Legislation: None.

North Dakota

Bills Enacted: S.B. 2156 (revises the provisions of existing law the relate to the arbitration of a controversy arising out of a contract for the construction or repair of a highway; provides that the district court may appoint arbitrators if parties fail; relates to claims of less than a specified amount, except that the parties jointly shall select the arbitrator after the demand and response).

Other Legislation: None.

Ohio

Bills Enacted: SB5 (aims to eliminate binding arbitration as a means for public employee unions to resolve contract disputes; instead, in case of a dispute, a fact finder suggests a solution, which if denied, contract options might go to voters for referendum. Also, generally restricts collective bargaining to wages (i.e. not benefits).)

Other Legislation: None.

Oklahoma

Bills Enacted: None.

Other Legislation: H.B. 1113 (attempts to alter appropriations and budgeting, among other items, for the Oklahoma Merit Protection Commission); H.B. 1210 (would modify the arbitration procedures and statutes governing workplace issues for police and firefighters in Oklahoma); S.B. 638 (would amend the dispute resolution process at public schools to eliminate the clause that the status quo between parties prior to a filed grievance shall be considered as remaining the same); S.B. 826 (would substantially amend arbitration procedures; deleting certain notice and procedural processes for arbitration; deleting authority to present certain bargaining offers to vote of people; deleting special election procedure for municipal bargaining offers; authorizing informal procedure for arbitration; providing for hearing and presentation of evidence; stating time periods for commencement of hearing and reporting opinions; requiring certain delivery of opinion to bargaining agent and corporate authorities; stating procedure to adopt or not adopt majority opinion of arbitrators; allowing for renegotiation under certain condition; providing an effective date; and declaring an emergency).

Oregon

Bills Enacted: H.B. 2468 (would remove the sunset on provisions that establish requirements for arbitration proceedings regarding uninsured motorist coverage unless parties agree otherwise); H.B. 3450 (relating to conditions of employment; reduces from two weeks to 72 hours the minimum time before the first day of employment that an employer is required to notify an employee in a written employment offer that an arbitration agreement is required as a condition of employment; additionally requires acknowledgment by the employee of such condition); S.B. 5556 (creates a fee schedule for mediation sessions provided by the Employment Relations Board; increases fees related to unfair labor practice proceedings).

Other Legislation: H.B. 2514 (would modify methods determining length of service for probationary teachers; prohibit reconsideration of dismissal or nonrenewal of probationary teachers during arbitration proceedings, and modify the authority of arbitrators regarding reinstatement of public employees); H.B. 2606 (defines "comparable" for collective bargaining arbitration purposes, related to total compensation of employees of the Oregon Department of Corrections); H.B. 2655 (would require approval by the legislature of collective bargaining agreements for public employees when total compensation increases by an amount

greater than the cost-of-living increase for the Portland-Salem and Oregon-Washington areas.); H.B. 3089 (would, among other things, establish a right of local jurisdiction to conference and mediation with the Department of Revenue regarding modification of a tentative assessment of property located in the local jurisdiction); S.B. 198 (would require mandatory mediation between trustee and grantor before a sale to foreclose residential trust deeds; requires certain notices and procedures for conducting mediation; requires trustee to provide grantor with documentation as part of notice of sale that identifies beneficial owner of loan; prohibits owner of foreclosed property from neglecting real property during periods of vacancy; permits local governments to assess civil penalties); S.B. 495 (Requires court or arbitrator to award reasonable attorney fees to prevailing plaintiffs in any action for fraud or other actions based on untrue statements or omission of material facts in connection with the sale or purchase of securities; provides that conditions, stipulations, or provisions binding persons to waive compliance with Oregon Securities Law or rule adopted or order issued under Oregon Securities Law is void); S.B. 516 (would provide that a nine-percent interest rate applies to judgments for payment of money, to awards in arbitration proceedings that a court mandates, and to mediate agreements that are subject to judgment for failure to comply with the agreement); S.B. 713 (would require that all mandatory arbitration provisions in insurance policies make the State Insurance Arbitration Board the arbitrator of the dispute; requires the Director of the Department of Consumer and Business Services to appoint members of the board based upon the public contracting process; compensates members from state funds, and allows insured persons to terminate arbitration proceedings filed after January 1, 2009 and before the effective date of the Act, and vacate the decisions on such claims); S.B. 949 (would require that a last best offer be submitted in certain arbitration proceedings by an exclusive representative of public employees, that would require increases in taxes or fees or reduction of services or workforce to meet the cost of the implementation of the offer, to be deemed not in the best interests and welfare of public).

Pennsylvania

Bills Enacted: None.

Other Legislation: H.B. 1052 (would establish an independent informal dispute resolution process for long-term care nursing facilities to dispute Department of Health survey findings and provides for the powers and duties of the Department of Health.); H.B. 1159 (would amend the Judiciary and Judicial Procedure Code which would extensively revise the Uniform Arbitration Act and make editorial changes); H.B. 1161 (would amend the Public School Code of 1949 to provide for dispute resolution for the education of exceptional children); H.B. 1369 (would amend the Public School Code of 1949 by deleting and replacing provisions relating to collective bargaining between public schools and their employees; by banning all strikes or lockouts that interrupt government services; providing for assessments of the Bureau of Mediation and the PA Labor Relations Board; and imposing penalties.); H.B. 1719 (would, among other things, provide for dispute resolution for municipalities in water and power disputes); S.B. 767 (would amend the Public Employees Relations Act by providing for powers of the board, for submission of an impasse to a panel of arbitrators, and for the prohibi-

tion of certain strikes); S.B. 999 (would amend the Medical Care Availability and Reduction of Error Act by providing for mandatory arbitration); S.B. 1095 (would establish an independent informal dispute resolution process for long-term care nursing facilities to dispute Department of Health survey findings and provides for the powers and duties of the Department of Health).

Rhode Island

Bills Enacted: H.B. 5638 (relating to health insurance; requires all entities that provide professional liability insurance to healthcare professionals and healthcare facilities to report all claims, settlements, judgments, and arbitration awards to the Department of Health); S.B. 299 (would require all entities that provide professional liability insurance to healthcare professionals and healthcare facilities to report all claims, settlements, judgments, and arbitration awards to the Department of Health); S.B. 794 (aims to expand the scope of the binding arbitration process to include monetary issues for teachers and non-teacher educational employees; it would also streamline the actual binding arbitration process itself).

Other Legislation: H.B. 5298 (would allow an arbitration board to render a decision regarding collective bargaining agreements for firefighters or municipal police for multiple years in order to bring the contract up to date); H.B. 5304 (would require the Department of Business Regulation to appoint the health insurance commissioner as an ombudsman to assist and mediate problems that individuals have with their ERISA claims); H.B. 5536 (would authorize hospitals and health insurers to declare an impasse and submit to binding arbitration the terms of agreements between hospitals and commercial health insurers); H.B. 5538 (would expand the definition of correctional officer to include any bargaining unit in which correctional officers constitute a majority of the bargaining unit); H.B. 5700 (would make changes to the arbitration process for arbitration of municipal employees' disputes); H.B. 5705 (would amend the definition of a "municipal employee" for the purpose of arbitration by eliminating part-time employees); H.B. 5766 (would empower the Labor Relations Board to prevent any employees from engaging in any unfair labor practice regardless of grievance procedure elected, contract collective bargaining agreement or arbitration); H.B. 5816 (would, upon the expiration of a firefighters' collective bargaining agreement, continue all contractual provisions in effect until a successor collective bargaining agreement is ratified or a binding interest arbitration award has been rendered); H.B. 5817 (would make several procedural and substantive changes in municipal employees' grievance and interest in arbitration laws, and would also establish specific factors to be considered by arbitration boards when deciding an arbitrator's central case); H.B. 5943 (would provide that if the parties have not agreed to a successor collective bargaining agreement in certified schoolteachers arbitration, then the terms and conditions of the old teachers' contract would remain in full force and effect until a new agreement is reached); H.B. 5961 (would expand the scope of the binding arbitration process to include monetary issues for teachers and non-teacher educational employees; it would also streamline the actual binding arbitration process itself); H.B. 6066 (would allow all contractual provisions contained in a collective bargaining agreement to continue until a successor agreement is reached or an interest arbitration award is rendered); H.B. 6146 (would continue in effect all the terms of a municipal employee's collective bar-

gaining agreement, which had expired, until a successor agreement had been reached); S.B. 73 (would allow an arbitration board to render a decision regarding a collective bargaining agreement for firefighters or municipal police for multiple years in order to bring the contract up to date); S.B. 310 (would provide for the fair and reasonable compensation of homeowners for the removal or destruction of their residential property on leased land, and would also provide for a process of binding arbitration for a landowner and homeowner to resolve their dispute over the compensation to be paid; this would also provide binding arbitration for a landowner and a homeowner of a leased land dwelling to resolve claims of excessive rent increases); S.B. 404 (would, upon the expiration of a firefighters' collective bargaining agreement, continue all contractual provisions in effect until a successor collective bargaining agreement is ratified or a binding interest arbitration award has been rendered); S.B. 672 (would establish standards and procedures whereby a school may, within five (5) days of a negative vote by an appropriating authority, request non-binding, fact-finding mediation to be conducted by a special master appointed by the superior court); S.B. 789 (would keep in effect all contractual provisions contained in a collective bargaining agreement to continue until a successor agreement is reached or an interest arbitration award is rendered).

South Carolina

Bills Enacted: None.

Other Legislation: H.B. 3108 (would create the mandatory mortgage foreclosure mediation program within the judicial department; provide a required mediation process before a competent jurisdiction could order the sale of property subject to the foreclosure action; provide that the department may promulgate rules needed to carry out the purpose of the bill; and mandate mediation of a foreclosure action within a specific period following the initiation of a foreclosure action).

South Dakota

Bills Enacted: None.

Other Legislation: None.

Tennessee

Bills Enacted: H.B. 533 (aims to provide that any revenue generated by county litigation taxes for victim-offender mediation be used for the purpose of victim-offender mediation or other community mediation matters); S.B. 391 (provides that any revenue generated by county litigation taxes for victim-offender mediation be used for the purpose of victim-offender mediation or other community mediation matters).

Other Legislation: H.B. 1193 (would simplify the Local Education Agency's reporting on conflict resolution programs by requiring such reports be made to the commissioner of education biennially instead of annually; and require that, in lieu of a separate report by the commissioner, that a summary of the reports and the commissioner's findings be published in the commissioner's annual report); H.B.

1522 (would require mandatory mediation between a bank or other financial institution and a borrower before foreclosure proceedings may be instituted on a deed of trust, mortgage, or other lien securing the payment of money or other thing of value); H.B. 1549 (would exclude certain residential mortgage transactions from the application of the Tennessee Home Loans Protection Act; and create a pilot program in Shelby County for voluntary mediation prior to the foreclosure of loans entered into under such act); H.B. 1967 (would require the Tennessee Housing Development Agency to study the feasibility of establishing a Tennessee foreclosure mediation program); S.B. 881 (would simplify the Local Education Agency's reporting on conflict resolution programs by requiring such reports be made to the commissioner of education biennially instead of annually; and require that, in lieu of a separate report by the commission); S.B. 965 (would decrease from eight months to six months the time an award shall be filed if the time is not fixed in the submission and the time is prolonged by mutual consent); S.B. 1487 (would exclude certain residential mortgage transactions from the application of the Tennessee Home Loans Protection Act; and create a pilot program in Shelby County for voluntary mediation prior to the foreclosure of loans entered into under such); S.B. 1610 (would require mandatory mediation between a bank or other financial institution and a borrower before foreclosure proceedings may be instituted on a deed of trust, mortgage, or other lien securing the payment of money or other thing of value); S.B. 2030 (would require the Tennessee Housing Development Agency to study the feasibility of establishing a Tennessee foreclosure mediation program).

Texas

Bills Enacted: H.B. 1774 (relating to workers' compensation; aims to provide for negotiated rulemaking, the use of alternative dispute resolution to resolve internal and external disputes, and procedures for complaint investigation and resolution in the office of injured employee counsel under the workers' compensation program); H.B. 3833 (relating to the adoption of the Uniform Collaborative Family Law Act; adopts the Uniform Collaborative Family Law Act, which would specify requirements for collaborative family law participation agreements, impose certain requirements on attorneys, provide for representation of low-income parties and informed consent, and would require inquiries related to family violence and related privileged communication); S.B. 647 (relating to continuation and operation of the office of the public insurance counsel; would develop and implement a policy to encourage appropriate alternative dispute resolution procedures to assist in the resolution of internal and external disputes; would state that the office shall coordinate the implementation of the policy; would provide training as needed to implement the procedures for negotiated rulemaking or alternative dispute resolution, and would collect data concerning the effectiveness of those procedures); S.B. 809 (relating to judicial review in workers' compensation disputes; would provide that in the case of a medical fee dispute the party seeking judicial review must file suit by a specified time; and provides that an issue regarding whether a carrier properly provided an employee the information required by this subsection may be resolved using the process for adjudication of dispute); S.B. 1216 (relating to marriage dissolution; would order a court to promptly try a marriage dissolution or child custody case where a prior contract might order arbi-

tration if one party asserts that the contract is not valid and enforceable; and would only allow arbitration of that case if the court finds the contract to actually be valid and enforceable); S.B. 1433 (relating to insurance disputes; gives power to the Insurance Commissioner to authorize a party in arbitration to bring a claim against an estate).

Other Legislation: H.B. 2019 (would provide for the creation of a victim-offender mediation program for misdemeanor crimes where the defendant is a non-felon, and the defendant requests such); H.B. 2031 (would establish a voluntary compensation plan as a form of alternative dispute resolution); H.B. 2041 (would create and modify certain dispute resolution procedures in certain disputes between the Department of Aging and Disability Services and an assisted living facility licensed by the Department); H.B. 2065 (would provide for the creation of a victim-offender mediation program for misdemeanor crimes where the defendant is a non-felon, and the defendant requests such); H.B. 2461 (relating to property tax; would grant immunity to property tax arbitrators for determinations made in the course of binding arbitration); H.B. 2479 (relating to court ordered alternative dispute resolution; would allow a judge to send certain civil cases (and criminal cases, at the written consent of the state), to an alternative dispute resolution forum); H.B. 3060 (would allow property insurers operating in the Texas seacoast area to mandate binding arbitration for storm damage claims); H.B. 3061 (would allow a personal automobile accident claimant seeking less than \$25,000 to request arbitration with the insurer if a dispute arise); H.B. 3794 (would create and modify certain dispute resolution procedures in matters involving appraisal of value or damage); S.B. 1328 (relating to education; sets forth procedures for optional dispute resolution methods for school districts and parents of students seeking or receiving special education services, and requires the local school board to disseminate information on such dispute resolution procedures); S.B. 1508 (relating to business and commerce; would give rights to certain debtors to elect to mediate a dispute before a debt is accelerated or a contract lien on real property is foreclosed).

Utah

Bills Enacted: S.B. 32 (related to agricultural mediation program; changes program and duties of the Department of Agriculture to include agricultural mediation program participation, the promotion and support of multiple use of public lands, acting mediator concerning public land issues, pesticide dealers triennial license, rangeland health improvement credits, conservation easement purposes, agricultural producers environmental stewardships, the beef promotion fee, nutrient management systems, and an animal slaughter license exception); S.B. 52 (related to tort arbitration; Creates a new chapter to promote arbitration in court cases; enacts a new chapter, Tort Arbitration; creates filing and notice limits; prohibits claims for punitive damages; sets guidelines for rescinding an arbitration election; provides for the selection of a single arbitrator or panel of arbitrators; states that decisions by arbitrators are final, but still allows for a trial de novo; specifies payment obligations for parties; addresses pre- and post-judgment interest); S.B. 56 (related to the Office of the Property Rights Ombudsman; amends provisions relating to the Office; clarifying the scope of the de novo district court review of an arbitrator's decision; and modifying the time for requesting an advi-

sory opinion for a neutral third party); S.B. 174 (relating to motor vehicle insurance arbitration; modifies the insurance code by amending provisions relating to arbitration for motor vehicle insurance coverage; clarifies that certain caps on the amount of an arbitration award for certain uninsured and underinsured motorist claims apply only in certain circumstances; clarifies that the caps on the award of fees and costs for certain uninsured and underinsured motorist claims only apply in certain circumstance).

Other Legislation: H.B. 117 (related to property disputes; authorizes the Office of the Property Rights Ombudsman to advise condominium owners and conduct or arrange for mediation or arbitration of disputes between condominium owners and condominium associations; and modifies the Office of the Property Rights Ombudsman provisions to reflect the duties related to condominium issue); S.B. 225 (related to personal injury; would require the commissioner of insurance to issue a request for proposal for an organization to administer personal injury protection actions through arbitration; provides that any dispute regarding the recovery of medical expense benefits or other benefits provided under personal injury protection coverage arising out of the operation, ownership, maintenance, or use of an automobile may be submitted to arbitration on the initiative of any party to the dispute).

Vermont

Bills Enacted: None.

Other Legislation: H.B. 29 (proposes to require an arbitration panel appointed to resolve a dispute regarding municipal lines to include at least one land surveyor licensed by the state of Vermont); H.B. 222 (proposes to establish a system of mandatory arbitration for medical malpractice claims).

Virginia

Bills Enacted: None.

Other Legislation: H.B. 1846 (would include mediators certified pursuant to guidelines promulgated by the Judicial Council of Virginia, relating to the definition of professional services for the Neighborhood Assistance Program); H.B. 1902 (provides that contractual claims submitted under Section 2.2-4363 related to a construction contract entered into by or on behalf of the Virginia Community College System for which the System has not made a final decision by the time specified in the contract or in Section 2.2-4363, shall be submitted for mediation, arbitration, or other nonbinding alternative dispute resolution procedures; provides that nothing shall be construed to limit the contractor's right to institute immediate legal action); S.B. 1171 (provides that administrative actions of the Council shall include a public participation process and dispute resolution).

Washington

Bills Enacted: H.B. 1362 (related to the Foreclosure Fairness Act; establishes the Foreclosure Fairness Act to encourage homeowners to use the skills and professional judgment of housing counselors as early as possible in the foreclosure

process; among other things, it provides a process for foreclosure mediation when a housing counselor or attorney determines that mediation is appropriate);

Other Legislation: H.B. 1291 (relating to juvenile court services; provides that administrative actions of the Council shall include a public participation process and dispute resolution); H.B. 1736 (related to binding arbitration grants binding interest arbitration rights to certain uniformed personnel); H.B. 2011 (would allow collective bargaining and binding interest arbitration for Department of Corrections employees); S.B. 5368 (would grant binding arbitration rights to certain juvenile court services and Department of Corrections employees); S.B. 5448 (would grant binding interest arbitration rights to police forces for universities and The Evergreen State College); S.B. 5762 (concerns interest arbitration panel determinations related to local government).

West Virginia

Bills Enacted: H.B. 2522 (relates to nursing home administrative appeals and complaint hearing procedures; establishes an independent dispute resolution process for nursing homes; clarifies the informal and formal review process; and clarifies the judicial review process);

Other Legislation: H.B. 2427 (establishes an independent dispute resolution process for nursing homes); S.B. 97 (establishes an independent dispute resolution process for nursing homes).

Wisconsin

Bills Enacted: None.

Other Legislation: A.B. 127 (relates to public employees; concerns payment by employers of contributions under the Wisconsin Retirement System that are required of public safety employees; relates to arbitration under the Municipal Employment Relations Act; allows municipal employers choice in health care coverage plan providers and health savings accounts that cover public safety employees; and prohibits and permits subjects of collective bargaining).

Wyoming

Bills Enacted: None.

Other Legislation: None.

