

The Maryland International Commercial Arbitration Act: the Proper State Response Until Congress Enacts a Comprehensive Federal Statute

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ARTICLE

THE MARYLAND INTERNATIONAL COMMERCIAL
ARBITRATION ACT: THE PROPER STATE RESPONSE UNTIL
CONGRESS ENACTS A COMPREHENSIVE FEDERAL
STATUTE

FRANCIS J. GORMAN* AND
SANJAY M. SHIRODKAR**

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I. INTRODUCTION

Maryland has taken a unique approach to address international commercial arbitrations conducted within the state. In 1990, the Maryland General Assembly passed the Maryland International Commercial Arbitration Act¹ (MICAA), which precludes the application of state law to international arbitrations. Instead, the MICAA makes the uniform federal law the sole body of law to govern the process and enforcement of international commercial arbitrations occurring in Maryland. Consequently, the MICAA will add certainty and uniformity to the business and legal climate for international arbitrations in this state.

This article asserts that pending the enactment of a more comprehensive federal statute, the Maryland approach is the appropriate state response to the need in the United States for a better and uniform law governing the process and enforcement of international commercial arbitration. In making this argument, the article first highlights the lack of legal uniformity by surveying the different and overlapping schemes applicable to international arbitration in the United States, including the United States Arbitration Act² (FAA) and the various state statutes that address international commercial arbitration. Second, by comparing the FAA with the United Nations Commission on International Trade Law (UNCITRAL) Model Law,³ this article will develop the rationale behind the Maryland approach. This article suggests that Congress should amend the FAA by expressly requiring it to preempt state international arbitration laws. In conclusion, this article argues that other states contemplating the enactment of international commercial arbitration statutes should follow Maryland's lead. A bifurcated multi-statute system leads to a host of complex litigation-generating problems;⁴ the Maryland approach, in contrast, will decrease the confusion engendered by multiple statutes and add certainty to international

1. Maryland International Commercial Arbitration Act, MD. CODE ANN. CTS. & JUD. PROC. §§ 3-2B-01 to -09 (1992).

2. 9 U.S.C. §§ 1-15, 201-208 (1988).

3. 24 I.L.M. 1302 (1985).

4. Jack Garvey & Totton Heffelfinger, *Towards Federalizing U.S. International Commercial Arbitration Law*, 25 INT'L LAW 209, 211 (1991).

commercial arbitrations.

II. OVERVIEW

Arbitration⁵ has long been considered an important alternative to litigation for resolving international business disputes.⁶ Commentators have advanced three theories as to the nature of arbitration. The first views arbitration as a private contract, unconstrained by the requirements of any external legal system; the second theory perceives arbitration as a true judicial proceeding, subject to the legal rules of the jurisdiction in which the arbitration will be conducted; and the third and prevailing view⁷ regards arbitration as a hybrid of the other theories, with only some of its elements contractual in nature.⁸ The incidence of international commercial arbitration in the United States has rapidly increased since World War II.⁹ This expansion is a result of increased international trade and the acceptance by the major trading nations of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is now part of the federal statutory framework dealing with arbitration in the United States.¹⁰ Many nations compete actively for international arbitration business.¹¹

Arbitration is an offshoot of the law of procedure and is a method of resolving disputes by one or more third parties "who derive their powers from agreement of the parties and whose decision is binding

5. Arbitration is "a process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal." MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* 1 (Wilner rev. ed. 1984).

6. See Rosabel E. Goodman, *Advantages of International Arbitration*, N.Y.L.J., Mar. 14, 1985, at 2 (discussing the advantages of international arbitration over litigation).

7. Arden C. McClelland, *Toward a More Mature System of International Commercial Arbitration: The Establishment of Uniform Rules of Procedure and the Elimination of the Conflict of Laws Question*, 5 N.C.J. INT'L L. & COM. REG. 169, 185 (1980).

8. Sauser-Hall, *L'arbitrage en Droit International Privé*, 44 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 416, 469 (Vienna 1952), cited in Gabriel M. Wilner, *Determining the Law of Performance in International Commercial Arbitration: A Comparative Study*, 19 RUTGERS L. REV. 646, 651 n.11 (1965).

9. See *Commercial Arbitration for the 1990s*, A.B.A. *Sec. Of Litigation* 127 (R. Medalie ed. 1991) (noting that 220 new international arbitrations were instituted in 1990 through the American Arbitration Association) [hereinafter *Commercial Arbitration*].

10. 9 U.S.C. §§ 201-208 (1988).

11. See *Commercial Arbitration*, supra note 9, at 125.

upon them."¹² It can thus be viewed as a private method of dispute resolution in which the parties agree to submit to a person not clothed with judicial power by the state.¹³ Four possible schemes govern international arbitration: contractual agreement, institutional arbitration rules, national law, and international treaties.¹⁴ A court will consider all of the applicable law when determining the validity, process, and enforcement of an arbitration agreement.

The agreement is of primary significance; it contains the parties' understanding that they will resolve current or future disputes through arbitration, rather than through litigation.¹⁵ The agreement specifies whether the arbitration will be conducted on an ad hoc basis or through institutional proceedings.¹⁶ If the parties agree to an ad hoc forum, the arbitration is conducted according to the terms specified in the contract.¹⁷ The parties, however, may have difficulties drafting the terms

12. Henry P. De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TULANE L. REV. 42, 43 (1982); see also *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643 (1986). The Supreme Court underscored the voluntariness of abiding by the arbitration agreement since "[a]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Technologies, Inc.*, 475 U.S. at 648-49.

13. See Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597-98 (1928).

14. See Neil E. McDonell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 COLUM. J. TRANSNAT'L L. 273, 273-74 (1984); ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 37-51 (1986).

15. HOWARD M. HOLTZMAN & JOSEPH E. NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* 7 (1989).

16. See REDFERN & HUNTER, *supra* note 14, at 37-41. The authors state: In an ideal world, the choice between ad hoc and institutional arbitration would only be made once a dispute has arisen. It would then be possible to look at the nature of the dispute, to decide what kind of arbitral tribunal was needed to deal with it, what procedures should be followed and, most importantly, to assess the extent to which the parties are likely to co-operate in the conduct of the arbitration. In practice, however, the choice will usually have to be made at a much earlier stage [T]he time to consider the relative advantages and disadvantages of institutional and ad hoc arbitration is usually when the original contract between the parties is being negotiated.

Id. at 37-38.

17. See HOLTZMAN & NEUHAUS, *supra* note 15, at 6; see also Francis J. Higgins et al., *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035, 1036-37 (1980); REDFERN & HUNTER, *supra* note 14, at 39-41 ("An arbitration clause which provides, for instance, for disputes to be referred to arbitration in Paris 'before a tribunal of three arbitrators, one of whom is to be chosen by each party and a third by agreement between the other two arbitrators' is a clause which provides for ad hoc

of the contract because it is nearly impossible to foresee all the legal intricacies when negotiating a complex international commercial agreement.¹⁸ Institutional arbitration is invoked when the parties do not set forth specific arbitration proceedings in their contract, but instead refer to a set of pre-existing arbitration rules.¹⁹ Organizations such as the American Arbitration Association²⁰ or the International Chamber of Commerce help administer arbitration proceedings for a fee,²¹ and assist the parties by providing administrative services²² and model arbitration clauses.²³

International arbitration, like domestic arbitration, requires the assistance of the national judiciary to enforce the agreement to arbitrate.²⁴ National law generally sets forth the procedural parameters

arbitration.”). *Id.* at 40.

18. See REDFERN & HUNTER, *supra* note 14, at 41 (noting that ad hoc arbitration operates smoothly only when an arbitral tribunal is in existence and a proper set of rules have been established).

19. See William P. Mills, III, *State International Arbitration Statutes and the U.S. Arbitration Act: Unifying the Availability of Interim Relief*, 13 FORDHAM INT'L L. J. 604, 607 (1989-1990) (citing *Arbitration Rules of the United Nations Commission on International Trade Law*, G.A. Res. 98, 31 U.N. GAOR Supp. (No. 39), U.N. Doc. A/31/39 (1976), reprinted in II Y.B. COMM. ARB. 161 (1977)); see also REDFERN & HUNTER, *supra* note 14, at 39 (noting that some disadvantages of institutional arbitration are increased costs and delays due to the bureaucratic red tape).

20. The American Arbitration Association (AAA) is a private non-profit membership corporation headquartered in New York. It has been active since 1926 and is the largest of the world's arbitration institutions. See *Commercial Arbitration*, *supra* note 9, at 127.

21. *Id.* (The International Chamber of Commerce generally supervises the administration of international arbitration.); see REDFERN & HUNTER, *supra* note 14, at 38; ROBERT COULSON, BUSINESS ARBITRATION - WHAT YOU NEED TO KNOW 130-32 (3d ed. 1986) (listing major arbitral institutions around the world).

22. See COULSON, *supra* note 21, at 121 (The organization may undertake the “filing of papers, the appointment of arbitrators, the filling of any vacancies caused by the death or disability of an arbitrator, and the details of the hearing.”).

23. See De Vries, *supra* note 12, at 54.

24. *Id.* at 47. National courts assist and control the arbitration proceedings. Specifically:

Courts assist arbitration proceedings by compelling arbitration, appointment of arbitrators, their revocation or replacement; by compelling attendance of witnesses and the taking of evidence; and in the area of provisional remedies, by ordering conservatory measures by way of attachment of assets or disposal of the subject matter of the action pending final determination. Courts also assist by providing remedies after entry of the award, particularly measures of execution against the defendant's assets. The function of control is exercised by denying effect to an arbitration agreement, by annulment of an award, or a review of its provisions on procedural or substantive grounds.

that parties must follow in an arbitration proceeding.²⁵ However, international treaties or conventions may also provide an effective method of creating an international system of law governing international arbitration.²⁶ Several international treaties address arbitration,²⁷ the most important of which is the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).²⁸

In the United States, international commercial arbitration agreements and proceedings are subject to at least three sources of national law.²⁹ First, contracts that involve interstate or foreign commerce, that are within the admiralty jurisdiction or that may be the subject of liti-

Id. at 47 n.21.

25. See REDFERN & HUNTER, *supra* note 14, at 42; Mills, *supra* note 19, at 607-08; see also HOLTZMAN & NEUHAUS, *supra* note 15, at 8-9 (“[N]ational laws applicable to an arbitration, as well as the agreement of the parties on procedure, including any agreement to use particular arbitration rules, are *intimately* related to the means by which international awards can be enforced.”).

26. REDFERN & HUNTER, *supra* note 14, at 43.

27. See *id.* at 43-48. The first such treaty can be traced back to 1889. The Montevideo Convention addressed the implementation of arbitration agreements between certain Latin American states. *Id.* at 44; see also HOLTZMAN & NEUHAUS, *supra* note 15, at 8.

28. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3. Article II of the Convention reads:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Id. at 2519.

As of January 1, 1990, 83 countries were parties to the New York Convention: Algeria, Antigua & Barbuda, Argentina, Australia, Austria, Bahrain, Belgium, Benin, Botswana, Bulgaria, Burkina Faso, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Djibouti, Dominica, Ecuador, Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Guatemala, Haiti, Holy See, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kenya, Korea, Kuwait, Lesotho, Luxembourg, Madagascar, Malaysia, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Peru, Philippines, Poland, Romania, San Marino, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Thailand, Trinidad & Tobago, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, and Yugoslavia. U.S. DEP'T OF STATE, TREATIES IN FORCE 282 (Jan 1, 1990).

29. Mills, *supra* note 19, at 608.

gation in the federal courts³⁰ are subject to the FAA. Commentators have noted that because the FAA does not contain any subject matter restrictions, its scope is quite broad.³¹ Second, contracts are subject to the New York Convention, which the United States ratified in 1970 and is now codified as Chapter two of the FAA.³² Third, an arbitration proceeding in the United States falls within the purview of state arbitration laws.³³ All states, along with the District of Columbia and Puerto Rico, have enacted statutes addressing intrastate arbitration,³⁴ and

30. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924) [hereinafter HOUSE REPORT]; S. REP. NO. 536, 68th Cong., 1st Sess. 1 (1924) [hereinafter SENATE REPORT]; 9 U.S.C. §§ 1-2, 201-208 (1988).

31. *See generally*, Michael F. Hoellering, *Arbitrability of Disputes*, 41 BUS. LAW. 125 (1985) (commenting that essentially all disputes can be subject to arbitration proceedings).

32. 9 U.S.C. §§ 201-208 (1988); *see also*, Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). The Supreme Court observed that:

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Id. at 520 n.15.

33. Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989).

34. Many of the state arbitration statutes are patterned after the Uniform Arbitration Act (UAA). In 1955, the National Conference of Commissioners on Uniform State Laws and the American Bar Association initially approved the UAA. *See* UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 1 (1955).

Currently, 35 jurisdictions have adopted the UAA. *See* ALA. CODE §§ 6-6-1 to -16 (1977); ALASKA STAT. §§ 09.43.010 - .180 (1983) (adopting UAA); ARIZ. REV. STAT. ANN. §§ 12-1501 to -1518 (1982) (adopting UAA); ARK. STAT. ANN. §§ 16-108-201 to -224 (1987) (adopting UAA); CAL. CIV. PROC. CODE §§ 1280-1298.8 (West 1980 & Supp. 1989); COLO. REV. STAT. §§ 13-22-201 to -223 (1987) (adopting UAA); CONN. GEN. STAT. ANN. §§ 52-408 to -424 (West 1960); DEL. CODE ANN. tit. 10, §§ 5701-5725 (1975) (adopting UAA); D.C. CODE ANN. §§ 1604301 to -4314 (1989) (adopting UAA); FLA. STAT. ANN. §§ 682.01-.20 (West Supp. 1989); GA. CODE ANN. §§ 9-9-1 to -83 (Supp. 1989); HAW. REV. STAT. §§ 658-1 to -12 (1985); IDAHO CODE §§ 7-901 to -922 (1979) (adopting UAA); ILL. REV. STAT. ch. 10, para. 101-123 (1987) (adopting UAA); IND. CODE §§ 34-4-2-1 to -22 (1986) (adopting UAA); IOWA CODE ANN. §§ 679A.1-.14 (West 1987) (adopting UAA); KAN. STAT. ANN. §§ 5-401 to -422 (1982) (adopting UAA); KY. REV. STAT. ANN. §§ 417.045-.240 (Michie/Bobbs-Merrill Supp. 1988) (adopting UAA); LA. REV. STAT. ANN. §§ 9:4201-4217 (West 1983); ME. REV. STAT. ANN. tit. 14, §§ 5927-5949 (1980) (adopting UAA); MD. CODE ANN. CTS. & JUD. PROC. §§ 3-201 to -234 (1984) (adopting UAA); MASS. GEN. LAWS ANN. ch. 251, §§ 1-19 (West 1988) (adopting UAA); MICH. STAT. ANN. §§ 600.5001-.5305 (Callaghan 1988) (adopting UAA); MINN. STAT. ANN. §§ 572.08-.30 (West 1988) (adopting UAA); MISS. CODE ANN. §§ 11-15-101 to -143 (Supp.

have generated a body of decisional law on arbitration. Moreover, a few states have also enacted statutes addressing international arbitration.³⁵ These statutes concern arbitration involving foreign commerce³⁶

1988); MO. ANN. STAT. §§ 435.350-470 (Vernon Supp. 1989) (adopting UAA); MONT. CODE ANN. §§ 27-5-111 to -324 (1989) (adopting UAA); NEB. REV. STAT. §§ 25-2601 to -2622 (Supp. 1988) (adopting UAA); NEV. REV. STAT. ANN. §§ 38.015-.205 (Michie 1987) (adopting UAA); N.H. REV. STAT. ANN. §§ 542:1-10 (1974); N.J. STAT. ANN. § 2A:24-1 (West 1987); N.M. STAT. ANN. §§ 44-7-1 to -22 (1978) (adopting UAA); N.Y. CIV. PRAC. L. & R. §§ 7501-7514 (McKinney 1980); N.C. GEN. STAT. §§1-567.1-.20 (1983) (adopting UAA); N.D. CENT. CODE §§ 32-29.2-01 to -20 (Supp. 1989) (adopting UAA); OHIO REV. CODE ANN. §§ 2711.01-.24 (Anderson 1981); OKLA. STAT. ANN. tit. 15, §§ 801-818 (West Supp. 1989) (adopting UAA); OR. REV. STAT. §§ 33.210-.300 (1987); PA. CONS. STAT. ANN. §§ 7301-7320 (Purdon 1982) (adopting UAA); R.I. GEN. LAWS §§ 10-3-1 to -21 (1985); S.C. CODE ANN. §§ 15-48-10 to -240 (Law. Co-op. Supp. 1988) (adopting UAA); S.D. CODIFIED LAWS ANN. §§ 21-25A-1 to -38 (1987) (adopting UAA); TENN. CODE ANN. §§ 29-5-301 to -320 (Supp. 1988) (adopting UAA); TEX. REV. CIV. STAT. ANN. arts. 224 to 238-6 (Vernon Supp. 1989) (adopting UAA); UTAH CODE ANN. §§ 78-31A-1 to -18 (1987) (adopting UAA); VT. STAT. ANN. tit. 12, §§ 5651-5681 (Supp. 1989) (adopting UAA); VA. CODE ANN. §§ 8.01-581.01-.016 (Supp. 1989) (adopting UAA); WASH. REV. CODE ANN. §§ 7.04.010-.220 (1961); W. VA. CODE §§ 55-10-1 to -8 (1981); WIS. STAT. ANN. §§ 788.01-.18 (West 1981); WYO. STAT. §§ 1-36-101 to -119 (1988) (adopting UAA). Puerto Rico has enacted a similar statute. P.R. LAWS ANN. tit. 32, §§ 3201-3229 (1968).

35. See California International Arbitration and Conciliation Act, CAL. CIV. PROC. CODE §§ 1297.11-.42 (West Supp. 1992); Florida International Arbitration Act, FLA. STAT. ANN. §§ 684.01-.35 (West Supp. 1990); GA. CODE ANN. §§ 9-9-30 to -43 (Supp. 1992); Hawaii International Arbitration, Mediation and Conciliation Act, HAW. REV. STAT. §§ 6580-1 to -9 (Supp. 1991); Maryland International Commercial Arbitration Act, MD. CODE ANN. CTS. & JUD. PROC. §§ 3-2B-01 to -09 (1990); TEX. REV. CIV. STAT. ANN. art. 249 (Vernon Supp. 1990). Recently, Oregon and North Carolina have also enacted International Arbitration Statutes.

36. See *eg.*, CAL. CIV. PROC. CODE § 1297.13 (West Supp. 1992) which requires the following for an arbitration to be deemed within its scope:

- a. The parties to an arbitration or conciliation agreement have, at the time of the conclusion of the agreement, their places of business in different states.
- b. One of the following places is situated outside the state in which the parties have their places of business:
 1. The place of arbitration or conciliation if determined in, or pursuant to, the arbitration or conciliation agreement.
 2. Any place where a substantial part of the obligations of the commercial relationship is to be performed.
 3. The place with which the subject matter of the dispute is most closely connected.
- c. The parties have expressly agreed that the subject matter of the arbitration or conciliation agreement relates to commercial interests in more than one state.
- d. The subject matter of the arbitration or conciliation agreement is otherwise

and either supplement³⁷ or preempt³⁸ the state's domestic statute.

A. Federal Arbitration Act

1. Legislative History

Historically, courts disfavored arbitration as a means of dispute resolution.³⁹ The source of this hostility to arbitration may be economic: English courts received fees for hearing cases, and relinquishing cases to an arbitrator meant forfeiting those fees.⁴⁰ American courts adhered to certain English common law principles, most notably the principle that an agreement to submit to arbitration was voidable until an award was issued.⁴¹ However, this common law rule of revocability

related to commercial interests in more than one state.

Id.

37. GA. CODE ANN. § 9-9-30 (Supp. 1991) (stating that the section of the code which provides for arbitration of international disputes "shall be used *concurrently*" with other provisions of the Georgia Code.).

38. See CAL. CIV. PROC. CODE § 1297.17 (West Supp. 1992); FLA. STAT. ANN. § 684.03(3) (West Supp. 1990); MD. CODE ANN. CTS. & JUD. PROC. § 3-2B-03 (1990); TEX. REV. CIV. STAT. ANN. art. 249-1(8) (Vernon Supp. 1992).

39. The Senate considered three principal reasons when enacting the FAA: [F]irst, the expressed fear on the part of the courts that arbitration tribunals did not possess the means to give full or proper redress, and also the doubt they entertained as to their right to compel an unwilling party to submit his cause to such a tribunal, thus denying to him the right to submit the same to the ordinary courts of justice for hearing and determination. Second, the jealousy of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction [T]hird, established precedent has had its large part of course in perpetuating the old rules long after the courts themselves could no longer see that they were founded in reason or justice.

SENATE REPORT, *supra* note 30, at 2-3; see *Kulukundis Shipping Co. v. Armstrong Trading Co.*, 126 F.2d 978, 983-85 (2d Cir. 1942) (explaining the development of the ouster of the courts concept). *But see Sayre, supra* note 13, at 610 (questioning this theory in early English cases).

40. See *Kulukundis Shipping Co.*, 126 F.2d at 983-84.

41. *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874); *Haskell v. McClintic-Marshall Co.*, 289 F.2d 405 (9th Cir. 1923); *Meachem v. Jamestown, F&C R.R.*, 105 N.E. 653 (N.Y. 1914). The Senate Report explicitly states:

[I]t is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded at bar of the action; nor would such an agreement be grounds for a stay of proceedings until arbitration was had. Further, the agreement was subject to revocation by either of the parties at any time before the award. With this as the state of the law, such agreements were in large part ineffec-

gradually began to lose support with the enactment of New York's arbitration statute in 1920.⁴² The New York statute established that arbitration provisions in contracts were binding.

In 1925, Congress, following the lead of the New York legislature⁴³ and acting upon the business community's concerns for the delays, expenses, and problems of litigation,⁴⁴ enacted the FAA.⁴⁵ In 1922, the American Bar Association Committee on Commerce, Trade and Commercial Law patterned the initial draft of the FAA after the New York law⁴⁶ and introduced it to Congress.⁴⁷ In 1923, the Senate

tual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy. Until recently in England, and up to the present time in nearly, if not quite all, the States of the Union, such has been the law in regard to arbitration agreements.

SENATE REPORT, *supra* note 30, at 2; HOUSE REPORT, *supra* note 30, at 1-2.

42. N.Y. Arbitration Act, ch. 275, 1920 N.Y. Laws 803 (currently codified at N.Y. CIV. PRAC. L. & R. §§ 7501-7514 (McKinney 1980)); *see also* Raymond A. Connell, *The Federal Arbitration Act: The Expanding Impact of State Law Upon Rigorous Enforcement*, 20 J. MAR. L. & COM. 327 (1989) ("This was the first statute enacted in an American jurisdiction providing agreements to arbitrate future disputes were enforceable and irrevocable, and it survived challenge as violative of constitutional mandates limiting judicial power to duly constituted courts."). *Id.* at 329.

43. SENATE REPORT, *supra* note 30, at 3.

44. *Id.*; *see also* Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and its Application*, 11 A.B.A.J. 153 (1925). The 1925 Act was passed to remedy three problems:

1. The delay incident to a proceeding in our courts, which, in centers of commercial activity where there exists congestion of the court calendars, frequently amounts to several years. Contributing to this delay are the preliminary motions and other steps which litigants may take and the appeals which are open to them.

2. The expense of litigation.

3. The failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world. This failure may result either because the courts necessarily apply general rules which do not fit all specific cases, or because the judge or the jury is not and cannot be made familiar with the peculiarities of the given controversy. A judgement by men [sic] particularly experienced in the given field is one of the greatest advantages of arbitration.

Id. at 155-56 (1925).

45. Act of Feb. 12 1925, ch. 213, § 43 Stat. 883 (1925) (currently codified at 9 U.S.C. §§ 1-15, 201-208 (1988)). For a detailed exposition of the legislative history of the FAA, *see* Barbara Ann Atwood, *Issues in Federal-State Relations under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61, 76 (1985).

46. *Hearings on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 1-3 (remarks by Charles Beinheimer), 7-9 (remarks by W.H.H. Piatt) (1923) [hereinafter *Hearings on S. 4214*].

47. S. 4214, 67th Cong., 4th Sess., 64 CONG. REC. 732 (1922); H.R. 13,522, 67th

Judiciary Committee heard testimony on the bill, but did not enact any legislation.⁴⁸ However, in 1924, joint congressional hearings were held⁴⁹ and the bill was enacted into law.⁵⁰

Congress' power to enact the FAA is constitutionally derived from (1) the power to regulate interstate and foreign commerce,⁵¹ (2) the power to create admiralty law,⁵² and (3) the power to establish procedures for lower federal courts.⁵³ Although it is unclear under which of these constitutional delegations Congress enacted the FAA,⁵⁴ some commentators have suggested that Congress relied on its power to establish federal court procedure.⁵⁵ The prevailing view, however, is that

Cong., 4th Sess., 64 CONG. REC. 797 (1922).

48. See *Hearings on S. 4214*, *supra* note 46.

49. *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Committees on the Judiciary*, 68th Cong., 1st Sess. 21 (1924) [hereinafter *Joint Hearings*]. The hearings were on S. 1005 and H.R. 646, 68th Cong., 1st Sess., reprinted in 65 CONG. REC. 11,081 (1924).

50. The House enacted the bill in its original form. 65 CONG. REC. 11,082 (1924). The Senate amended and then passed it. 66 CONG. REC. 2761 (1924). The House concurred in the amendments. 66 CONG. REC. 3003 (1924).

51. U.S. CONST. art. I, § 8, cl. 3.

52. U.S. CONST. art. III, § 2; see Atwood, *supra* note 45, at 76. Professor Atwood notes:

Congressional power over admiralty and maritime matters is something of an anomaly in constitutional law. The grant of federal court jurisdiction over admiralty and maritime cases serves as the basis not only for the creation of a maritime common law by the federal courts, but also for the enactment of federal statutory law on the subject.

Id. at n.102 (citations omitted).

53. U.S. CONST. art. I, § 8, cl. 8; see Atwood, *supra* note 45, at 76. ("Congress' power over federal court procedure derives from the power to establish the lower courts."). *Id.* at n.103.

54. See Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1314-16 (1985).

55. Atwood, *supra* note 45, at 76; Connell, *supra* note 42, at 331-32; see *Joint Hearings*, *supra* note 49, at 37. Mr. Julius Cohen, a member of the American Bar Association Committee on Commerce, Trade and Commercial Law, the drafter of the original proposal for a federal arbitration statute, described the legal basis for the bill:

It has been suggested that the proposed law depends for its vitality upon the exercise of the interstate commerce and the admiralty powers of Congress. That is not the fact. The statute as drawn establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as Congressional acts relate to the procedure in the Federal courts, they are clearly within the Congressional power. . . . The primary purpose of the statute is to make enforceable in the Federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal

Congress enacted the FAA pursuant to its power to control commerce and create admiralty and maritime law.⁵⁶ As the Supreme Court noted in *Prima Paint Corp. v. Flood & Conklin Mfg.*, the “[FAA] is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty.”⁵⁷

2. Structure of the Act

The FAA is arranged into two chapters.⁵⁸ Chapter one includes the original provisions passed in 1925 along with the subsequent amendments.⁵⁹ Chapter two covers international arbitration and provides the enabling legislation for the New York Convention.⁶⁰ The Act’s main goals are to bind private arbitration agreements and to provide a mechanism for the efficient and speedy resolution of disputes.⁶¹

Section 1 defines the central elements of the Act.⁶² The statute defines “commerce” to include interstate as well as foreign commerce, but the courts have interpreted the term with varying results.⁶³ Generally, the Act is not applicable to transactions that are wholly intrastate.⁶⁴

courts.

Id. at 37-38; *see also* *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 418 (1967) (Black, J., dissenting) (“[I]t is clear that Congress in passing the Act relied primarily on its power to create general rules to govern federal courts.”).

56. *Id.*

57. *Prima Paint*, 388 U.S. at 405.

58. 9 U.S.C. §§ 1-15, 201-208 (1988).

59. *Id.* §§ 1-15.

60. *Id.* §§ 201-208.

61. *See* *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

62. 9 U.S.C. § 1 (1988) provides:

“Maritime transaction,” as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce,” as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Id.

63. *See* DOMKE, *supra* note 5, at 31-33.

64. *See* Report to the Washington Foreign Law Society on the UNCITRAL Model Law on International Commercial Arbitration, *reprinted in* 3 Ohio S. J. Disp.

The statute also requires the parties' intent to arbitrate. The parties must indicate their intention to submit to arbitration for the agreement to come within the purview of the FAA.⁶⁵ Intent is determined by applying the federal substantive law of arbitration,⁶⁶ and by using a doubt test which questions whether "there are any 'doubts concerning the scope of arbitrable issues.'"⁶⁷ Case law also instructs courts to consider "only issues relating to the making and performance of the agreement to arbitrate" when determining the parties' intent.⁶⁸

Section one of the FAA notably defines certain relevant terms, but also specifically limits their reach. For example, employment contracts are explicitly excluded from the scope of the FAA.⁶⁹ Other exceptions have also been created under separate federal statutes and these exceptions have influenced courts that hear FAA cases.⁷⁰

Resol. 303, 324 (1988) [hereinafter WFLS Report] (suggesting that if a transaction involved purely intrastate matters and was brought in a state court, the state arbitration statute would control both the procedural and substantive proceedings); Judith A. Mellman, *Seeking Its Place in the Sun: Florida's Emerging Role in International Commercial Arbitration*, 19 U. MIAMI INTER-AM. L. REV. 363, 370-71 (1987); see also *Tejas Development Co. v. McGough Bros.*, 165 F.2d 276 (5th Cir. 1948); *Warren Bros. Co. v. Cardi Corp.*, 471 F.2d 1304 (1st Cir. 1973). *But see* *Associated Metals & Minerals Corp. v. The Steamship Mihalis Angelos*, 234 F. Supp. 236, 237-38 (S.D.N.Y. 1964); *Sumitomo Corp. v. Parakopi Compania Maritima*, 477 F. Supp. 737, 740 (S.D.N.Y. 1979).

65. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.").

66. *Id.*; see also *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 400-04 (1967); *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

67. Allison B. Overby, Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1143 (1986) (stating that the test used by federal courts is whether "there are any 'doubts concerning the scope of arbitrable issues,' or if the claim of arbitrability is 'plausible,' or if the scope of the clause is even 'fairly debatable or reasonably in doubt.'").

68. See *Prima Paint*, 388 U.S. at 404.

69. 9 U.S.C. § 1 (1988).

70. See *American Safety Equip. Corp. v. J.P. McGuire & Co.*, 391 F.2d 821, 827-28 (2d Cir. 1968) (Sherman Act); *Beckman Instruments, Inc. v. Technical Dev. Corp.*, 433 F.2d 55 (7th Cir. 1970) (patent laws). *But see* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628-29 (1985).

It is important to note that even though *Mitsubishi Motors* addressed claims arising under the Sherman Act, the international nature of the transaction ultimately persuaded the Supreme Court. Indeed, the *American Safety* doctrine was left intact insofar as domestic transactions are concerned. *Mitsubishi Motors Corp.*, 473 U.S. at 628-40. As the Court noted:

[W]e conclude that concerns of international comity, respect for the capaci-

Section two contains the substantive provisions of the Act.⁷¹ It states that written arbitration agreements that address "any maritime transaction or a contract evidencing a transaction involving commerce"⁷² shall be construed as being "valid, irrevocable, and enforceable."⁷³ The written document requirement is not strictly adhered to because the writing may be in any particular form.⁷⁴ Additionally, the FAA extends to future as well as existing disputes.⁷⁵

Sections three⁷⁶ and four⁷⁷ provide two avenues of judicial enforce-

ties of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a *contrary* result would be forthcoming in a domestic context.

Id. at 629 (emphasis added).

The Court was persuaded by similar concerns in *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974). Emphasizing the international scope of the transaction, it observed: A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

Id. at 516-17.

71. 9 U.S.C. § 2 (1988) provides in pertinent part:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or 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, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id.

72. *Id.*

73. *Id.*; see HOUSE REPORT, *supra* note 30, at 1. ("An arbitration agreement is placed upon the same footing as other contracts, where it belongs.")

74. Howard M. Holtzmann, *United States*, II Y.B. COMM. ARB. 116, 119 (1977).

75. Atwood, *supra* note 45, at 65.

76. 9 U.S.C. § 3 (1988) provides in pertinent part:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of

ment. If litigation has already commenced, section three comes into play. It allows a party to obtain a stay of litigation so long as the issue is referable to arbitration and the petitioning party is not in default of that agreement.⁷⁸ Section four addresses petitions by an aggrieved party to compel arbitration proceedings when the other party refuses to do so.⁷⁹ Both sections three and four require that independent jurisdiction be established prior to a court ruling on the motion.⁸⁰ Moreover, judicial enforcement may be available in federal as well as state court.⁸¹

the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Id.

77. 9 U.S.C. § 4 (1988) provides in pertinent part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Id.

78. *See supra* note 76; *see also* *Pioneer Supply Co. v. American Meter Co.*, 484 F. Supp. 227 (W.D. Okla. 1979).

79. *See supra* note 77.

80. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). The Supreme Court observed:

The Arbitration Act . . . creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute Section 3 likewise limits the federal courts to the extent that a federal court cannot stay a suit pending before it unless there is such a suit in existence.

Id.

81. *Id.* at 26 nn.34-35. The only proviso is that the arbitration agreement has to fall within the purview of section two. *See Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 24-25 (1977) (section four); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melamed*, 405 So. 2d 790, 793 (Fla. 1981) (section three); *C.P. Assoc. v. Pickett*, 697 S.W.2d 828, 830-31 (Tex. 1985) (section three).

The Supreme Court has not directly addressed this issue yet. In *Southland*, the Court sidestepped the issue by reserving until a later date the question whether "§§ 3 and 4 of the Arbitration Act apply to proceedings in state courts." *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984). Similarly, in *Volt Info. Sciences v. Board of Trustees*, the Court did not address the proper scope of §§ 3 and 4. *Volt Info. Sciences*

Section five provides for the appointment of an arbitrator.⁸² The arbitrator may be selected according to the terms of the arbitration agreement or may be appointed by the court.⁸³ In either case, the arbitrator has the power to subpoena documents or witnesses that are crucial to the case.⁸⁴

Although it contemplates judicial enforcement, the FAA does not explain when judicial interference is appropriate or prohibited. Most parties to commercial arbitration agreements generally disapprove of judicial interference because it increases uncertainty as well as costs. However, some parties employ the court's assistance to enforce or review an extra-judicial arbitration award. Sections nine, ten and eleven of the Act enumerate the court-ordered remedies a party has *after* a final award is rendered. Section nine⁸⁵ states that a party can ask a court to confirm the arbitration award within one year after the award.⁸⁶ Generally, a domestic or international arbitral award must be confirmed before the U.S. courts may enforce it.⁸⁷ Sections ten and eleven catalog the alternatives available to a court for a party seeking either to vacate or modify the award. Section ten⁸⁸ requires the court to

v. Board of Trustees, 489 U.S. 468 (1989).

82. 9 U.S.C. § 5 (1988).

83. *Id.*

84. 9 U.S.C. § 7 (1988).

85. 9 U.S.C. § 9 (1988) provides in pertinent part:

If the parties in their agreement have agreed that a judgement of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at *any* time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must* grant such an order . . .

If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district which such award was made.

Id. (emphasis added).

86. Court interference becomes necessary since arbitrators lack the legal authority to compel the recalcitrant party to obey their award. *See generally* Robert B. von Mehren, *The Enforcement of Arbitral Awards Under Conventions and United States Laws*, 9 YALE J. WORLD PUB. ORD. 343, 343-44 (1983).

87. *See supra* note 85; *see also* 9 U.S.C. § 207 (1988) (pertaining to the international arbitration awards being pursued in United States courts).

88. 9 U.S.C. § 10 (1988) provides:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitra-

determine whether one of the specific grounds for vacation of an award provided in this section exists.⁸⁹ Importantly, section ten applies only to purely domestic arbitration. Section eleven⁹⁰ enables the court to modify an award if it contains a mistake, addresses a matter not submitted for arbitration, or is imperfect in form.⁹¹ Finally, section fifteen⁹² oversees the appeal process.

Chapter two of the FAA also contains the legislation that implements the New York Convention.⁹³ The Convention pertains to "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" as well as

tors, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Id.

89. *See Saxis S. S. Co. v. Multifacs Int'l. Traders, Inc.*, 375 F.2d 577 (2d Cir. 1967). The ability of a court to review the decision of an arbitrator is severely limited in light of the federal policy favoring arbitration. *Shahmoon Indus., Inc. v. United Steelworkers of Am., AFL-CIO*, 263 F. Supp. 10 (D.N.J. 1966).

90. 9 U.S.C. § 11 (1988) provides:

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award so as to effect the intent thereof and promote justice between parties.

Id.

91. *Id.*

92. 9 U.S.C. § 15 (1990).

93. Congress passed the enabling legislation in 1970 to facilitate United States business interests; *see* H.R. REP. No. 1181, 91st Cong., 2nd Sess. 4 (1970); S. REP. No. 702, 91st Cong., 2nd Sess. 1 (1970).

“arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”⁹⁴

Thus, the Convention is applicable if the arbitral award is rendered in a country other than the country in which enforcement is being sought. In addition to the arbitral awards, Article II of the Convention delineates the obligations of each contracting party.⁹⁵ In essence, each contracting party is bound to recognize agreements that are capable of settlement by arbitration unless a court finds the agreement to be null and void, inoperative, or incapable of being performed.

Enforcement of an international arbitration, as defined by section 202⁹⁶ of the Act, is controlled by section 207.⁹⁷ It provides that when judicial enforcement of an international arbitration award is sought in the United States “[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”⁹⁸ Jurisdiction of an ac-

94. New York Convention, 9 U.S.C. §§ 201-208, art. 1, § 1.

95. Article II of the Convention provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange or letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Id.

96. 9 U.S.C. § 202 (1988) provides:

An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

Id.

97. 9 U.S.C. § 207 (1988).

98. *Id.* Article V of the Convention itemizes the following as grounds for refusal:

(1) The parties to the agreement were either incapacitated or the agreement is invalid.

(2) Improper notice to the party against whom the award is invoked.

(3) The award is outside the scope of the arbitration agreement.

(4) The composition of the panel was either improper or not in accordance with the law of the country where it took place.

tion or proceeding under the Convention is specifically granted to the federal district courts.⁹⁹

3. Supreme Court Construction

The enactment of the FAA occurred at a time when federal courts were empowered to create federal common law that pertained to issues that were properly in front of them and that were not governed by state statutes.¹⁰⁰ As early as 1842, the Supreme Court in *Swift v. Tyson*¹⁰¹ authorized federal courts to disregard applicable state law in "contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence."¹⁰² This authorization remained in effect until 1938 when, in *Erie R.R. v. Tompkins*,¹⁰³ the Court curbed the power of federal courts to create federal common law because in

[m]atters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court is not a matter of federal concern. There is no federal common law. Congress has no power to declare substantive rules of common law applicable in a State And no clause in the Constitution purports to confer such power upon the federal courts.¹⁰⁴

A few years later, the Court further explained the *Erie* principle in *Guaranty Trust Co. v. York*.¹⁰⁵ In this case, the Court created an "outcome-determinative" test and observed that:

[Erie] was not an endeavor to formulate scientific legal termi-

(5) The award has not become binding on the parties or been set aside.

(6) The subject matter of the difference is outside the scope of the arbitration agreement.

(7) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, *supra* note 94, at art. V (1),(2).

99. 9 U.S.C. § 203 (1988).

100. See Connell, *supra* note 42, at 330-31.

101. 41 U.S. (16 Pet.) 1 (1842).

102. *Id.* at 18.

103. 304 U.S. 64 (1938).

104. *Id.* at 78.

105. 326 U.S. 99 (1945).

nology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts . . . [thus] in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.¹⁰⁶

After these cases, the question of whether the FAA was procedural or substantive became quite important. *Erie* clearly stood for the proposition that federal courts did not have the power to declare substantive rules of common law.¹⁰⁷ Moreover, even if the FAA was merely procedural,¹⁰⁸ if its use substantially affected the outcome, the outcome-determinative test espoused in *Guaranty Trust* would deem the FAA to be substantive.¹⁰⁹

In *Bernhardt v. Polygraphic Co. of America*,¹¹⁰ the Court again addressed this issue. *Bernhardt* involved a diversity suit between a citizen of Vermont and a New York corporation. The issue was whether the court could stay litigation pursuant to section three of the FAA. The District Court denied Polygraphic's motion for a stay because "the arbitration provision of the contract was governed by Vermont law and . . . the law of Vermont makes revocable an agreement to arbitrate at any time before an award is actually made."¹¹¹ The Court of Appeals for the Second Circuit reversed. The Supreme Court disagreed with the Second Circuit, holding that because the transaction did not deal with a maritime or commerce issue, the transaction was not within the purview of section two. In addition, the Court held that section three did not create independent federal jurisdiction and was limited to transactions enumerated in sections one and two of the FAA.¹¹² In other

106. *Id.* at 109.

107. *See supra* note 104.

108. *See generally* Hirshman, *supra* note 54, at 1316-18.

109. Connell, *supra* note 42, at 332-33.

110. 350 U.S. 198 (1956).

111. *Id.* at 199-200.

112. The Court observed that:

Sections 1, 2, and 3 are integral parts of a whole. To be sure, § 3 does not repeat the words "maritime transaction," or "transactions involving commerce," used in §§ 1 and 2. But §§ 1 and 2 define the field in which Congress was legislating. Since § 3 is a part of the regulatory scheme, we can only assume that the "agreement in writing" for arbitration referred to in § 3 is the kind of agreement which §§ 1 and 2 have brought under federal regulation.

words, because section two was inapplicable to the transaction, a federal court could not enforce arbitration except as provided by Vermont law. Under *Bernhardt*, then, because the determination under section two required substantive analysis, the FAA did not involve issues of federal procedure.¹¹³

Bernhardt did not, however, address the question of whether the FAA or state law would apply to a transaction involving diversity and interstate commerce. This issue was first addressed in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*¹¹⁴ The Court of Appeals for the Second Circuit began its analysis by stating that the Congress, in enacting the FAA, intended to “create a new body of substantive law relative to arbitration agreements affecting commerce or maritime transactions.”¹¹⁵ The court then traced the legislative history of the FAA and asserted that in passing the Act, Congress relied on its “admiralty power implied from article III, section 2, clause 3 and the commerce power, article I, section 8, clause 3.”¹¹⁶ In other words, the court characterized the Congressional authority as being an exercise of the admiralty and commerce power. Consequently, federal as well as state courts could hear disputes under the FAA because:

[t]he Arbitration Act in making agreements to arbitrate “valid, irrevocable, and enforceable” created national substantive law clearly constitutional under the maritime and commerce powers of the Congress and . . . rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, including diversity cases, just as the federal courts adjudicate controversies affecting other substantive rights when subject matter jurisdiction over the litigation exists. We hold that the body of law thus created is substantive not procedural in character and that it encompasses questions of interpretation as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs, since these two type of legal questions are inextricably intertwined.¹¹⁷

This characterization was crucial because the *Erie* doctrine would have

Bernhardt, 350 U.S. at 201.

113. Hirshman, *supra* note 54, at 1320.

114. 271 F.2d 402 (2d Cir. 1959), *cert denied*, 364 U.S. 801 (1960).

115. *Id.* at 404.

116. *Id.* at 406.

117. *Id.* at 409.

otherwise limited the FAA's applicability.¹¹⁸ The Second Circuit affirmed its interpretation of the FAA as being substantive law in *Metro Industrial Painting Corp. v. Terminal Construction Co.*¹¹⁹ The remaining circuits, however, did not agree with the Second Circuit's interpretation.¹²⁰

The Supreme Court finally resolved this uncertainty in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*¹²¹ *Prima Paint*, a diversity suit, arose in the Second Circuit and concerned a fraud in the inducement claim. The contract included an arbitration clause.¹²² The specific issue was whether the FAA could be applied to a contract in interstate commerce in a diversity case where the FAA conflicted with the applicable state arbitration law. The District Court granted the defendant's motion to stay court action pending arbitration. Because the Second Circuit found *Robert Lawrence Co.* controlling, it dismissed *Prima Paint's* appeal.

The Supreme Court granted certiorari to consider "whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate."¹²³ The Court found that Congress could do so because "it is clear beyond dispute that the federal arbitration statute is based upon

118. Connell, *supra* note 42, at 336-38. The commentator further points out that: The early proponents of the FAA believed that it was the product of Congressional power to prescribe procedural rules for the federal courts. Ironically, if that held true, in light of *Guaranty Trust* the FAA would be consigned to relative obscurity, inapplicable in state courts, and inapplicable to diversity suits before the federal courts, limited solely to maritime and "federal question" litigation.

Id. at 339.

119. 287 F.2d 382, 385 (2d Cir. 1961), *cert. denied*, 368 U.S. 817 (1961). The Second Circuit observed that:

the constitutional problems raised by applying the Act in diversity cases only become operative if the Act is regarded as procedural in scope, and that since Congress, drawing upon its commerce powers, created Section 2 of the Act a rule of substantive law declaring certain arbitration agreements "valid, irrevocable, and enforceable," the Act could constitutionally be applied in diversity cases when the requisite commerce elements are present.

Id.

120. See generally James F. Nooney, Note, *Commercial Arbitration in Federal Courts*, 20 VAND. L. REV. 607, 622-25 (1967).

121. 388 U.S. 395 (1967).

122. *Id.* The clause stated "[a]ny controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association." *Id.*

123. *Id.* at 405.

and confined to the incontestable federal foundation of control over interstate commerce and over admiralty."¹²⁴ The Court reasoned that contracts involving interstate commerce are within the purview of section two of the FAA.¹²⁵ Because federal courts are bound to apply rules that Congress enacts and because the FAA is derived from Congressional authority over interstate commerce and admiralty, the federal courts could avoid the pitfalls of *Erie* and *Guaranty*.¹²⁶ Therefore, *Prima Paint* instructed that actions properly brought under section two of the FAA were to be decided as a matter federal substantive law rather than procedural law.¹²⁷

*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*¹²⁸ further refined the scope of the FAA. The question presented was whether a district court could stay a motion to compel arbitration under section four of the FAA pending the resolution of a state court action.¹²⁹ The Court stated that the "refusal [of the district court] to proceed was plainly erroneous in view of Congress' clear intent, in the Arbitration Act, to move the parties to an arbitration as quickly and easily as possible."¹³⁰ In other words, because exceptional circumstances were not present, the District Court had abused its discretion by staying the arbitration proceeding.¹³¹ In *Moses Cone*, the Court expressly stated its implicit decision in *Prima Paint*¹³² by observing that:

section [two] is a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding* any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to *any* arbitration agreement within the coverage of the Act.¹³³

124. *Id.* The Court did concede that at the time the FAA was enacted "Congress had reason to believe that it still had power to create federal rules to govern questions of 'general law.'" *Id.* at 405 n.13. The Court noted, however, that such a belief "was only supplementary to the admiralty and commerce powers, which formed the principal bases of legislation." *Id.*

125. *Id.* at 400.

126. *Id.* at 404-07; *see also id.* at 405 n.13.

127. Connell, *supra* note 42, at 338-41.

128. 460 U.S. 1 (1983).

129. *Id.* at 7.

130. *Id.* at 22.

131. *Id.* at 26-27.

132. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

133. *Moses H. Cone*, 460 U.S. at 24 (emphasis added).

Section two, therefore, is applicable in federal as well as state courts.

Prima Paint and *Moses Cone* established the national scope of the FAA. However, the federal courts still lacked authority to decide the extent to which the FAA preempted conflicting state statutes. The Supreme Court addressed this question in *Southland Corp. v. Keating*.¹³⁴ The dispute arose when several California 7-Eleven franchise owners brought suit against Southland, a Texas corporation, alleging fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the California Franchise Investment Law¹³⁵ (CFIL). The issue was whether a particular section of the CFIL,¹³⁶ which invalidated certain arbitration agreements covered by the FAA, violated the Supremacy Clause. The California Supreme Court found that this section precluded arbitration because the statute required judicial consideration of actions brought under the statute.¹³⁷

The Supreme Court held, however, that the California statute violated the Supremacy Clause because it conflicted directly with section two of the FAA.¹³⁸ The Court reaffirmed the national scope of section two and observed that “[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and 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.”¹³⁹ The Court did recognize two limitations on the FAA: the transaction in question must involve commerce¹⁴⁰ and revocation of such clauses can only occur upon grounds existing at law or equity.¹⁴¹ However, once a transaction involves interstate commerce, the FAA preempts state law that inhibits the enforcement of arbitration agreements.¹⁴²

134. 465 U.S. 1 (1984).

135. CAL. CORP. CODE §§ 31000-31516 (West 1977).

136. CAL. CORP. CODE § 31512. This section provided that “[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule hereunder is void.” *Id.*

137. *Keating v. Superior Court of Alameda County*, 645 P.2d 1192, 1203-04 (Cal. 1982).

138. *Southland Corp.*, 465 U.S. at 10.

139. *Id.*

140. The Court interpreted this phrase “not as an inexplicable limitation on the power of the federal courts, but as a necessary qualification on a statute intended to apply in state and federal courts.” *Id.* at 14-15.

141. *Id.* at 10-11.

142. *Id.* at 15-16. The Court, commenting on the scope of the FAA, noted that “[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.” *Id.* at 16 (citations omitted).

*Perry v. Thomas*¹⁴³ further explained the extent to which section two of the FAA preempts contrary state laws. This case involved the California Labor Code, which permitted actions for the collection of wages regardless of the existence of any private agreement to arbitrate.¹⁴⁴ An employee of Kidder, Peabody & Co., relying on this statute, argued that judicial action against his former employer could be maintained despite the presence of an arbitration agreement in his initial job application.¹⁴⁵ The Supreme Court held, however, that because there was a direct conflict between the two laws, section two of the FAA preempts the California statute.¹⁴⁶

Consistently since 1925, the Supreme Court has interpreted the FAA as a national substantive law that favors arbitration notwithstanding any state substantive or procedural rules to the contrary. However, this preemptive effect of the FAA has been called into question as a result of the Court's recent decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*.¹⁴⁷

143. 482 U.S. 483 (1987).

144. CAL. LAB. CODE § 229 (West 1971).

145. *Perry*, 482 U.S. at 484-85. The initial application contained a provision addressing arbitration. It stated:

I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions or by-laws of the organization with which I register.

Id. The employee registered with the New York Stock Exchange (NYSE), which had a rule requiring that:

[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such member or member organization shall be settled by arbitration, at the instance of any such party

Id. Kidder, Peabody & Co. was a member of the NYSE. *Id.* at 485-86.

146. *Id.* at 491-92. The Court reasoned that in upholding the arbitration clause it was merely following its earlier decision in *Dean Witter Reynold Inc. v. Byrd*, 470 U.S. 213 (1985). *Byrd* addressed the enforceability of private agreements. In following its earlier precedent, the Court noted "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered." *Perry*, 482 U.S. 490 (citing *Byrd*, 470 U.S. at 221). The Court then compared the possible outcome of the litigation under the FAA and the California statute. The FAA would uphold the arbitration agreement, while the California statute would not. Given the strong federal policy concerns in upholding private agreements, the Court concluded that section two of the FAA preempted the California statute. *Id.*

147. 489 U.S. 468 (1989). For a detailed analysis of this case, see Arthur S. Feldman, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University: Confusing Federalism with Federal Policy Under the FAA*, 69 TEX. L.

At issue was a California statute which allowed a court to stay arbitration proceedings pending the resolution of court action arising out of the same transaction.¹⁴⁸ Volt moved to compel arbitration due to a term in the contract mandating the resolution of all claims through arbitration.¹⁴⁹ Stanford, relying on the California statute, moved to stay arbitration since the contract contained a choice-of-law provision selecting California law.¹⁵⁰ The California Court of Appeals affirmed the lower court's denial of Volt's motion to compel arbitration.¹⁵¹

The Supreme Court affirmed by focusing on the choice-of-law provision. The Court reasoned that even though its prior holdings imply a federal policy favoring arbitration, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to the terms, of private agreements to arbitrate."¹⁵² By characterizing the issue as a choice-of-law question, the Court found the California statute congruent with the policies implied in the FAA.¹⁵³ The Court asserted that

REV. 691 (1991).

148. *Volt*, 489 U.S. at 470; see CAL. CIV. PROC. CODE ANN. § 1281.2(c) (West 1982). The statute provides that:

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy, the court shall order the petitioner and the respondent to arbitrate the controversy . . . unless it determines that: . . . (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding . . . arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact If a court determines that a party to the arbitration is also a party to litigation in a pending court action . . . the court . . . (4) may stay arbitration pending the outcome of the court action or special proceeding.

CAL. CIV. PROC. CODE ANN. § 1291.2(c)(emphasis added); see also *Board of Trustees of Leland Stanford Junior Univ. v. Volt Info. Sciences*, 240 Cal. Rptr. 558, 559 n.1 (1987).

149. *Volt Info. Sciences*, 240 Cal. Rptr. at 559. The arbitration clause provided that:

[a]ll claims, disputes and other matters in question between the parties to this contract, arising out of or relating to this contract or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing unless the parties mutually agreed [sic] otherwise This agreement to arbitrate . . . shall be specifically enforceable under the prevailing arbitration law.

Volt, 489 U.S. at 470 n.1.

150. The contract choice-of-law provision stated "[t]he Contract shall be governed by the law of the place where the Project is located." *Volt*, 489 U.S. at 470.

151. *Id.* at 476.

152. *Id.*

153. *Id.* at 479.

the parties were well aware of the implications of choosing California law to govern the contract.¹⁵⁴ Because California permitted a court to stay arbitration proceedings pending the resolution of a court action arising from the same transaction, the Court held that because:

the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to their contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.¹⁵⁵

The *Volt* Court was persuaded to uphold the California statute since "[t]he FAA contains no express pre-emptive provision nor does it reflect congressional intent to occupy the entire field of arbitration."¹⁵⁶ Moreover, by focusing on the parties' choice-of-law clause, the Court did not perceive any direct conflict with the FAA.¹⁵⁷ The Court observed that upholding this clause would merely enforce the parties' intent that California law would govern the agreement.¹⁵⁸

The *Volt* decision will have a significant impact on state commercial arbitration statutes. Under *Southland* and *Perry* these statutes had a limited role, but *Volt* supports an expansion of this role.¹⁵⁹ In international commercial arbitration cases, any expansion should be limited because of a prevailing federal interest in such matters.¹⁶⁰

154. *Id.*

155. *Id.*

156. *Id.* at 477.

157. *Id.* at 477-78.

158. *Id.* at 479.

159. See Scott B. Harris, *Report of the ABA Committee on the State International Arbitration Statutes*, 1, 26-27, March 30, 1990 [hereinafter *State Statute Report*]. The commentators suggest that in light of the *Volt* decision, state arbitration statutes will play a bigger role. They point out that:

whatever the extent of the FAA's preemption of state procedures, it does not preempt state procedures to which the parties agree. The *Volt* holding suggests that by choosing the substantive law of a state, the parties may be governed by the state's arbitration rules even if an action is brought in federal court and even if the state rules are at some variance with the FAA.

Id. at 27.

160. See *id.* at 25-26; see also *infra* notes 241-61 and accompanying text.

B. State Arbitration Acts

All states have arbitration statutes, which increases the likelihood of federal-state law conflicts. However, *Volt* suggested that preemption occurs when a state statute limits the use of the arbitral process.¹⁶¹ As a general rule, *Volt* explained that state laws are preempted when "[the state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁶² The Court specifically stated that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."¹⁶³ Similarly, if a state arbitration statute provided for extensive discovery, the statute arguably could be the basis for seeking court intervention in an attempt to order the arbitrators to allow depositions even if the arbitration involved interstate or foreign commerce and was subject to the FAA. Thus, if

the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward . . . [since doing so] give[s] effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.¹⁶⁴

This holding in *Volt* can be construed as injecting new life and vitality into state arbitration statutes.¹⁶⁵

1. Domestic Arbitration Acts

Many state statutes are patterned after the Uniform Arbitration

161. See generally *supra* notes 147-60 and accompanying text.

162. *Volt Info. Sciences v. Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1988) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

163. *Id.* at 476.

164. *Id.* at 479.

165. See *State Statute Report*, *supra* note 159, at 27. The authors of the Report observe:

In short, the application of state law in international arbitration appears to be growing after *Volt*. Indeed, the relationship between federal and state law poses a problem because it is increasingly difficult to foresee when state rules will apply, and to foresee which rules will be preempted and which will be enforced.

Id.

Act (UAA).¹⁶⁶ The UAA applies to any existing and future controversy so long as there is a valid agreement to arbitrate.¹⁶⁷ Judicial review is available to determine if any errors have been made in the arbitration process.¹⁶⁸ A reviewing court can either confirm, vacate or modify an award.¹⁶⁹ An arbitration panel is empowered to issue subpoenas,¹⁷⁰ take depositions,¹⁷¹ modify an award,¹⁷² and assign arbitrator's fees.¹⁷³ The UAA is similar to the FAA since both are rather limited in their scope. As a result, state statutes that adopt the UAA without making substantive changes generally will not present conflicts with the FAA. Several states, however, have made significant changes to the UAA.¹⁷⁴ For example, Texas' statute authorizes the arbitrators to permit discovery depositions. Federal courts occasionally use these statutes as procedural supplements in either an intra- or interstate transaction.¹⁷⁵

2. State International Commercial Arbitration Acts

Several state legislatures have recognized the importance of arbitration¹⁷⁶ in the international arena and enacted statutes to address

166. *See supra* note 34.

167. UNIF. ARBITRATION ACT § 1; 7 U.L.A. 5 (1985 and Supp. 1992).

168. UNIF. ARBITRATION ACT §§ 12-13; 7 U.L.A. at 140, 201-02.

169. UNIF. ARBITRATION ACT §§ 11-13; 7 U.L.A. at 133-204.

170. UNIF. ARBITRATION ACT § 7; 7 U.L.A. at 114.

171. *Id.*

172. UNIF. ARBITRATION ACT § 9; 7 U.L.A. at 128.

173. UNIF. ARBITRATION ACT § 10; 7 U.L.A. at 131.

174. *See, e.g.*, ALA. CODE § 6-6-1 (1977) (excluding agreements to arbitrate future disputes); IOWA CODE ANN. § 679A1 (West 1987) (excluding contracts between employees and employers); KAN. STAT. ANN. §§ 5-401 (1982) (excluding insurance contracts and any provision of a contract providing for arbitration of a claim in tort); TEX. REV. CIV. STAT. ANN. art. 230 (West 1973)(depositions for discovery purposes).

175. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202-03 (1956). "The federal court enforces the state-created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts"; *see also* Garvey & Heffelfinger, *supra* note 4, at 213. "Most procedural aspects of arbitration not addressed in federal statutes or treaties can be regulated by state or other local (domestic or foreign) law deemed by the finder of fact to be applicable by reason of choice by the parties, or absent such choice, choice of law principles." *Id.*

176. WFLS Report, *supra* note 64, at 326. The Washington Foreign Law Society recommended that states may wish to adopt the Model Law to supplement their existing arbitration regime. The rationale was that such an enactment would improve the existing state laws and indicate that the state was generally receptive to arbitration. The authors of this article respectfully disagree.

it.¹⁷⁷ These statutes vary considerably in their approach¹⁷⁸ and will be briefly discussed in this section.

a. Florida

Florida was the first state to enact a statute addressing international arbitration.¹⁷⁹ The Florida International Arbitration Act (FIAA) was enacted due to the perceived shortcomings of the existing arbitration code¹⁸⁰ and to create an environment favorable towards arbitration.¹⁸¹ Part I of the FIAA provides the scope of the statute along with definitions,¹⁸² and part II specifies rules governing the arbitration proceedings.¹⁸³ These rules were developed pursuant to the UNCITRAL

177. California International Arbitration and Conciliation Act, CAL. CIV. PROC. CODE §§ 1297.11-.432 (West Supp. 1992); UNCITRAL Model Law on International Commercial Arbitration, CONN. GEN. STAT. ANN. app. at 30 (West Supp. 1990); Florida International Arbitration Act, FLA. STAT. ANN. §§ 684.01 to .35 (West Supp. 1990); Georgia Arbitration Code, GA. CODE ANN. §§ 9-9-30 to -43 (Michie Supp. 1991); Hawaii International Arbitration, Mediation and Conciliation Act, HAW. REV. STAT. §§ 658D-1 to -9 (Supp. 1991); Maryland International Commercial Arbitration Act, MD. CODE ANN. CTS. & JUD. PROC. §§ 3-2B-01 to -09 (1990); N.C. GEN. STAT. § 1.567.67 (1992); OR. REV. STAT. § 36.450 to .454 (1992); TEX. REV. CIV. STAT. ANN. art. 249-1 to -43 (West Supp. 1992).

178. Compare GA. CODE ANN. § 9-9-30 (stating that the section of the code which provides for arbitration of international disputes shall be used concurrently with other provisions of the Georgia Code) with CAL. CIV. PROC. CODE § 1297.17 (stating that the section of the code which provides for arbitration of international disputes shall supersede other provisions of the California Code).

179. FLA. STAT. ANN. §§ 684.01-.35 (West Supp. 1990); see Mellman, *supra* note 64, at 374.

180. FLA. STAT. ANN. §§ 682.01-.20. The task force that drafted the statute was concerned with the impotence of Florida state courts in addressing problems in the international arbitration arena. See Carlos E. Loumiet et. al., *Proposed Florida International Arbitration Act*, 16 U. MIAMI INTER-AM. L. REV. 591, 595 (1985) [hereinafter *Proposed Florida*].

181. The Florida Bar task force observed that:

This growth in the use of arbitration presents Florida with a genuine opportunity. Given its geographic location, infrastructure, transportation and communication facilities, population with varied linguistic skills, service industries, academic facilities, business and banking communities and well-developed legal system, Florida could emerge over a period of time as a significant center for international arbitration, particularly for disputes involving Latin America or the Caribbean. Such a development would naturally complement the emergence of Florida over the past fifteen years as a regional center for international banking and commerce.

Loumiet, *supra* note 180, at 595.

182. FLA. STAT. ANN. §§ 684.01-.04.

183. FLA. STAT. ANN. §§ 684.05-.20. It is important to note that this section of

Arbitration Rules.¹⁸⁴ Part III delineates the relationship between the court and the arbitration tribunal.¹⁸⁵

The FIAA provides a mechanism that is favorable to arbitration.¹⁸⁶ Application of the Act is limited to written¹⁸⁷ international arbitrations.¹⁸⁸ The Act's scope is quite broad because it places no limits on the types of transactions covered¹⁸⁹ and it may be applicable within or without the state.¹⁹⁰ However, certain transactions are excluded from the Act.¹⁹¹ Parties are given the freedom to fix the rules for arbitration since portions of the FIAA can be excluded.¹⁹² Several other sections describe procedures that may be followed during the arbitration process.¹⁹³ Interim relief can be obtained from either the arbitral

the FIAA is not mandatory. In other words, party autonomy is maintained as an arbitration agreement can be fashioned in any manner desired by the parties.

184. Mellman, *supra* note 64, at 378-79.

185. FLA. STAT. ANN. §§ 684.21-.35; *see* Mellman, *supra* note 64, at 385-86.

186. FLA. STAT. ANN. § 684.02. The statute specifically states that "[i]t is the policy of the Legislature to encourage the use of arbitration to resolve disputes arising out of international relationships and to assure access to the courts of this state for legal proceedings ancillary to, or otherwise in aid of, such arbitration." *Id.*

187. FLA. STAT. ANN. § 684.02(2).

188. FLA. STAT. ANN. § 684.03. Domestic arbitrations continue to be subject to the Florida Arbitration Code. FLA. STAT. ANN. §§ 682.01-.20.

189. The lack of specificity was intended to broaden the scope of the FIAA. *Proposed Florida*, *supra* note 180, at 624-25.

190. FLA. STAT. ANN. § 684.05. The statute states:

This part shall apply to any arbitration within the scope of this chapter, without regard to whether the place of arbitration is within or without this state, if:

- (1) The written undertaking to arbitrate expressly provides, or the parties otherwise agree, that the law of this state shall apply;
- (2) In the absence of a choice of law provision applicable to the written undertaking to arbitrate, that undertaking forms part of a contract the interpretation of which is to be governed by the law of this state; or
- (3) In any other case, the arbitral tribunal decides under applicable conflict of laws principle that the arbitration shall be conducted in accordance with the law of this state.

Id.

191. FLA. STAT. ANN. § 684.03(2) (real property (when expressly agreed to in writing), domestic relations, and political disputes between two governments).

192. FLA. STAT. ANN. § 684.07. This freedom to exclude applies only to part II of the FIAA. *Id.* §§ 684.05-.20.

193. FLA. STAT. ANN. §§ 684.05-.08 (initiation of the arbitration proceedings); §§ 684.09-.12 (appointment and establishment of the arbitration tribunal); §§ 684.13-.16 (specifics of the arbitration proceeding including interim relief); §§ 684.17-.20 (applicable law and the final award).

tribunal¹⁹⁴ or any "court, tribunal, or other governmental authority."¹⁹⁵ The final sections¹⁹⁶ deal with the interplay between the court and the arbitration tribunal and provide grounds for compelling arbitration, obtaining a stay of court proceedings¹⁹⁷ and vacating an award.¹⁹⁸

b. California

The California International Arbitration and Conciliation Act¹⁹⁹ (CIACA) was enacted in 1988.²⁰⁰ The Act enumerates a detailed set of procedures that can be followed in an arbitration proceeding.²⁰¹ Its basic purpose is to grant parties the autonomy to pick and choose any of the procedures delineated in the Act.²⁰² If, however, the agreement is silent as to a particular aspect, the CIACA acts as a default mechanism.²⁰³

The CIACA is divided into seven chapters. The first six chapters incorporate the UNCITRAL Model Law,²⁰⁴ with some modifications, and the seventh chapter addresses conciliation. If agreements to cover present and future disputes are in writing,²⁰⁵ the Act is applicable. The scope, however, is restricted to arbitrations that occur within Califor-

194. FLA. STAT. ANN. § 684.16.

195. *Id.* The FIAA gives an arbitration tribunal the ability to seek assistance from any court in such matters. *Id.* § 684.16(2). The interim relief section may, however, be excluded by parties in their agreement. *Id.* § 684.07.

196. FLA. STAT. ANN. §§ 684.21-.35.

197. FLA. STAT. ANN. § 684.22. Interestingly, this section provides for a judge, sitting without a jury, to make such determinations. *Id.*

198. FLA. STAT. ANN. § 684.25. These grounds are similar to those provided in the New York Convention.

199. CAL. CIV. PROC. CODE §§ 1297.11-.431 (West Supp. 1992).

200. See Kenneth B. Wright, *California's International Commercial Arbitration Act: New Procedures for the Arbitration and Conciliation of International Commercial Disputes*, 17 INT'L BUS. LAW. 45, 45-47 (1989). For a brief summary of the reasoning of the California legislature in enacting this Act, see Mills, *supra* note 19, at 615-16.

201. Wright, *supra* note 200, at 45-47.

202. *Id.*

203. See, e.g., CAL. CIV. PROC. CODE §§ 1297.191-.192. The parties can specifically agree to the procedures that the arbitration tribunal will follow. *Id.* However, if the agreement fails to mention any procedures, the arbitration tribunal can conduct the arbitration in the manner it considers proper. *Id.*

204. Chapters seven and eight of the UNCITRAL Model Law were not adopted. These two chapters address the recourse against the award and the recognition and enforcement of awards. The chapters are almost identical to the New York Convention provisions that address the same topic. Therefore, the FAA or other applicable California law continues to govern these issues.

205. CAL. CIV. PROC. CODE §§ 1297.71-.72.

nia.²⁰⁶ Other parts of the California Code dealing with international commercial arbitration are superseded.²⁰⁷ The Act defines the international status of a particular agreement rather broadly and emphasizes the party's place of business.²⁰⁸ It also provides a laundry list of commercial relationships.²⁰⁹ An arbitration tribunal is empowered to rule on its own jurisdiction,²¹⁰ subject to the review of a superior court.²¹¹ Parties to the arbitration can select the procedures that the arbitral tribunal will follow,²¹² the place of arbitration,²¹³ the language to be used in the arbitral proceedings,²¹⁴ and the applicable rules of law.²¹⁵ The parties' failure to address these aspects in the agreement results in

206. *Id.* § 1297.12. This section specifically states that the CIACA "applies *only* if the place of arbitration or conciliation is in the State of California." *Id.* (emphasis added).

207. *Id.* § 1297.17.

208. *Id.* § 1297.12.

209. *Id.* § 1297.16. The following relationships are considered to be commercial:

- (a) A transaction for the supply or exchange of goods or services.
- (b) A distribution agreement.
- (c) A commercial representation or agency.
- (d) An exploitation agreement or concession.
- (e) A joint venture or other, related form of industrial or business cooperation.
- (f) The carriage of goods or passengers by air, sea, rail, or road.
- (g) Construction.
- (h) Insurance.
- (i) Licensing.
- (j) Factoring.
- (k) Leasing.
- (l) Consulting.
- (m) Engineering.
- (n) Financing.
- (o) Banking.
- (p) The transfer of data or technology.
- (q) Intellectual or industrial property, including trademarks, patents, copyrights, and software programs.
- (r) Professional services.

Id. This list is not exclusive and conceivably other commercial relationships may exist. *Id.*

210. *Id.* § 1297.161.

211. *Id.* § 1297.166. This section allows any party to challenge the preliminary ruling of the arbitral tribunal on the question of jurisdiction. *Id.* The tribunal, however, can continue with its task pending the resolution of such a request. *Id.* § 1297.167.

212. *Id.* § 1297.91.

213. *Id.* § 1297.201.

214. *Id.* § 1297.221.

215. *Id.* § 1297.281.

the arbitral tribunal making these decisions.²¹⁶ Judicial intervention is prohibited unless provided for in the CIACA or the federal law.²¹⁷ If the agreement covers the matter, a court may order to stay judicial proceedings.²¹⁸ The CIACA also provides for interim measures²¹⁹ along with elaborate grounds for challenging and possibly removing an arbitrator.²²⁰

c. Georgia

The Georgia Arbitration Code contains a separate section dealing with international transactions.²²¹ This section is used concurrently with other sections of the Code.²²² The Code's purpose is to promote arbitration for resolving international disputes and to demonstrate Georgia's commitment to international commerce.²²³ The statute focuses on either the domicile of one of the parties or the location of the actual business undertaking.²²⁴ Most of the provisions are quite procedural in nature. Parties have the ability to appoint arbitrators,²²⁵ compel arbitration proceedings,²²⁶ and select the language to be used in the

216. *Id.* §§ 1297.192, 1297.202, 1297.222, 1297.283.

217. *Id.* § 1297.51.

218. *Id.* § 1297.81.

219. There are two possible avenues for obtaining interim measures. A party may request such relief from a superior court either before or during the arbitral proceedings. *Id.* § 1297.91. Such measures may include either an order of attachment to protect against the dissipation of party assets or a preliminary injunction intended to protect trade secrets or to conserve goods. *Id.* § 1297.93. A party may also request the arbitral tribunal for interim measures. *Id.* § 1297.171. The right to petition the arbitral tribunal, however, is subject to the restrictions present in the agreement since parties can agree to waive this right. *Id.*

220. *Id.* §§ 1297.131-136.

221. Georgia Arbitration Code, GA. CODE ANN. §§ 9-9-30 to -43 (Supp. 1992).

222. *Id.* § 9-9-30. The Georgia Code is unique since other international arbitration statutes have exclusive jurisdiction over matters in this arena. *See, e.g.,* CAL. CIV. PROC. CODE § 1297.17; FLA. STAT. ANN. § 684.03(3) (West Supp. 1990).

223. GA. CODE ANN. §§ 9-9-30 to -43 (Supp.1992).

224. GA. CODE ANN. § 9-9-31 provides in pertinent part:

This part shall apply only to the arbitration of disputes between:

- (1) Two or more persons at least one of whom is domiciled or established outside the United States; or
- (2) Two or more persons all of whom are domiciled or established in the United States if the dispute bears some relation to property, contractual performance, investment, or other activity outside the United States.

Id.

225. *Id.* § 9-9-7.

226. *Id.* § 9-9-6. The grant of a motion to compel arbitration operates to stay a

arbitral proceedings.²²⁷ Interim relief can be obtained from a court²²⁸ or from an arbitral tribunal.²²⁹ The tribunal is also authorized to rule on its own jurisdiction²³⁰ and to determine the language of the arbitral proceedings if the parties have failed to do so.²³¹

d. Hawaii

The Hawaii International Arbitration, Mediation and Conciliation Act²³² (HIAMCA) is different from any of the other international arbitration statutes. It establishes an independent, nonprofit educational corporation to resolve disputes in international business transactions.²³³ These corporations are known as "centers"²³⁴ and are authorized to develop rules governing arbitration proceedings.²³⁵ The scope of the Act is rather broad with emphasis placed on the residence of the parties.²³⁶

pending or subsequent action. *Id.*

227. *Id.* § 9-9-37.

228. *Id.* § 9-9-4(e) states:

The superior court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subsection (b) of this Code section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the grounds that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.

Id.

229. GA. CODE ANN. § 9-9-35. The arbitral tribunal has the power to order measures which it deems appropriate including compelling a party to post bond or give other security. *Id.*

230. *Id.* § 9-9-34. Unlike California, Georgia does not provide for a challenge to the preliminary ruling of the arbitral tribunal on the question of jurisdiction. *See* CAL. CIV. PROC. CODE § 1297.166.

231. GA. CODE ANN. § 9-9-37.

232. HAW. REV. STAT. § 658D-1 to -9 (Supp. 1991).

233. *Id.* § 658D-5.

234. *Id.*

235. *Id.* § 658D-7.

236. *Id.* § 658D-4. The statute provides:

This chapter shall apply only to the arbitration, mediation, or conciliation of disputes between:

(1) Two or more persons at least one of whom is a nonresident of the United States; or

(2) Two or more persons all of whom are residents of the United States if the dispute:

(i) involves property located outside the United States;

(ii) relates to a contract which envisages enforcement of performance in whole or in part outside the United States; or

(iii) bears some other relation to one or more foreign countries.

Moreover, like the FIAA in Florida,²³⁷ the HIAMCA is applicable within or without the state.²³⁸ Limited interim relief²³⁹ is provided if three conditions are met: the party has consented to the jurisdiction of the Hawaii courts, the party resides in a country that has not ratified the New York Convention, and the party does not possess adequate assets in the state.²⁴⁰

III. CONFUSION: ARGUMENTS IN FAVOR OF AMENDING THE FAA

As demonstrated above, several different statutory schemes are applicable to an international commercial arbitration proceeding. A party may either be subject to the FAA, to a particular state domestic arbitration statute²⁴¹ or to a state international commercial arbitration statute. The multiplicity of laws produces uncertainty as to how an international commercial arbitration will be conducted in the United States, which in turn deters foreign commercial interests.²⁴² Notwithstanding these issues or Supremacy Clause considerations,²⁴³ state legislatures continue to enact international arbitration statutes. Clearly, international commercial arbitration would be better served by federal uniformity. As justification for its actions, Florida cited the need to better serve countries in Latin America and the Caribbean.²⁴⁴ Similarly, California and Hawaii recognized the opportunity to participate in international commerce by passing such an act,²⁴⁵ while Texas wanted to send a clear message to alien parties that it was interested in promoting international arbitration.²⁴⁶ Due to their inherent complexity, however, many of the international arbitration statutes will only frustrate these goals.²⁴⁷

Id.

237. FLA. STAT. ANN. § 684.05.

238. HAW. REV. STAT. § 658D-4(d).

239. *Id.* § 658D-9(b). The relief is limited to posting a bond or other security considered suitable by the center. *Id.*

240. *Id.*

241. Depending upon the state either the domestic arbitration, the international arbitration statute or both of these statutes may be applicable. See *supra* notes 166-240 and accompanying text.

242. See CAL. CIV. PROC. CODE §§ 1297.11-.42; FLA. STAT. ANN. §§ 684.01-.35.

243. U.S. CONST. art. IV, cl. 2.

244. *Supra* note 181.

245. See Mills, *supra* note 19, at 616.

246. Mont P. Hoyt, *Proposed Texas International Arbitration Act*, 52 TEX. B.J. 148 (1989).

247. See generally Garvey & Heffelfinger, *supra* note 4, at 212-21.

A. *The Inadequacies of the FAA and of State Arbitration Acts*

Although *Volt* upheld a choice-of-law clause incorporated into a contract,²⁴⁸ *Southland* established the rule that federal law preempts contrary state statutes.²⁴⁹ Whether the FAA preempts a state statute granting procedural rights is difficult to predict after *Volt*. *Volt* was a domestic case²⁵⁰ and the Supreme Court was not faced with the international concerns that it encountered in *Mitsubishi Motors*²⁵¹ and *Scherk*.²⁵² The Court's endorsement of the FAA in such circumstances remains strong, and thus, in international matters, the federal interest will almost certainly prevail.²⁵³

It is important to note that even though case law would indicate that the FAA does not create independent federal jurisdiction,²⁵⁴ each of the cases dealt with chapter one²⁵⁵ of the FAA. However, chapter two grants jurisdiction to federal district courts, thereby acknowledging Congressional resolve to elevate the federal interest for international matters.²⁵⁶ This suggests that Congress prefers domestic arbitration statutes, such as the FAA, to state international arbitration statutes. Consequently, if a state statute infringes upon international matters covered by the FAA, a court may be more inclined to find preemption. However, the lack of more specific guidelines in resolving state and federal discrepancies leaves courts with the perplexing determination of which law predominates.

The differences between state arbitration statutes and the FAA also causes confusion among the parties to an arbitration as to which statute governs their agreement. Uncertainty about governing law may lead parties to request judicial intervention. Parties should not assume

248. *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

249. *Southland Corp. v. Keating*, 465 U.S. 1, 10-15 (1984).

250. The California Court of Appeals acknowledged this fact in observing that "it is apparent that were federal rules to apply, Volt's petition to compel arbitration would have been granted." *Board of Trustees of the Leland Stanford Junior Univ. v. Volt Info. Sciences*, 240 Cal. Rptr. 558, 559 (1987).

251. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

252. *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974).

253. *See supra* note 70.

254. *Southland*, 465 U.S. at 12; *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

255. 9 U.S.C. §§ 1-15 (1988).

256. 9 U.S.C. § 203 (1988). This line of reasoning is further buttressed by § 205, which grants a defendant the right to remove a case falling under the New York Convention to a federal district court. 9 U.S.C. § 205 (1988).

that the federal preemption doctrine will remove any issue over conflicts between federal and state laws applicable to arbitration.

Most state international arbitration legislation is procedural in nature.²⁵⁷ It has been suggested that Congress should amend the FAA to incorporate some of the changes that the states have enacted.²⁵⁸ As it reads today, the FAA is too general and too abbreviated to deter state international arbitration statutes. Congressional action is warranted as the states have taken it upon themselves to pass statutes in this arena.²⁵⁹ Notably, state statutes differ in the scope of their application²⁶⁰ and the availability of interim measures.²⁶¹ This variance frustrates the central purpose for entering into an arbitration agreement: certainty.

The above arguments support the need for a Congressional amend-

257. See *supra* notes 179-240 and accompanying text. An argument in favor of such legislation is that because the FAA is quite skeletal, these statutes fill gaps to provide more clarity to parties interested in entering into arbitration agreements. Such an argument is not persuasive because institutional arbitration is the preferred mode of conducting arbitration. See *supra* note 20. Moreover, organizations such as the American Arbitration Association and the International Chamber of Commerce are designed to accommodate many of the concerns parties may have in entering into an arbitration agreement. See *supra* notes 20-22.

258. See generally Garvey & Heffelfinger, *supra* note 4, at 209; *State Statute Report*, *supra* note 159, at 2.

259. See *supra* notes 191-251 and accompanying text.

260. Compare CAL. CIV. PROC. CODE § 1297.12 and TEX. REV. CIV. STAT. ANN. art. 249-1(2) with FLA. STAT. ANN. § 684.01 and HAW. REV. STAT. § 658D-4 (applicability of statute either within or without the state); CAL. CIV. PROC. CODE § 1297.13 and CONN. GEN. STAT. ANN. 50a-101 with FLA. STAT. ANN. § 684.03 and GA. CODE ANN. § 9-9-31 (focusing on the place of business as compared to party domicile).

Some state statutes provide benefits that are unique. California has mandatory disclosure requirements concerning the impartiality of arbitrators. These requirements are quite broad in their scope and extend to "a person within the third degree of relationship to either" the arbitrator or his or her spouse. CAL. CIV. PROC. CODE § 1297.121(e). For a discussion criticizing the California approach, see Garvey and Heffelfinger, *supra* note 4, at 215-17. Georgia grants concurrent jurisdiction to its domestic and international transactions statutes over matters pertaining to international arbitration. GA. CODE ANN. § 9-9-30. This means that an international practitioner must be familiar with Georgia cases that involve international *as well as* domestic arbitration statutes. Hawaii creates centers to formulate policies affecting international arbitration. HAW. REV. STAT. § 658D-7. However, organizations such as the American Arbitration Association and the International Chamber of Commerce already address such concerns.

261. Compare CAL. CIV. PROC. CODE § 1297.93 and TEX. REV. CIV. STAT. ANN. art. 249-9(3) with GA. CODE ANN. § 9-9-35 (specifying available interim measures); compare CAL. CIV. PROC. CODE § 1297.91 with CONN. GEN. STAT. ANN. § 50a-109 (restricting availability of interim measures from a court).

ment to the FAA. Congress must insert specific language in the Act establishing that the federal Act either expressly preempts state international arbitration laws or, at a minimum, reflects congressional intent to occupy the entire field.

B. Amending the FAA to Clarify United States Federal Law on International Arbitration

Commentators have suggested two separate methods for amending the FAA. The Committee on Arbitration and Alternative Dispute Resolution of the City of New York has recommended limited amendments of the FAA to include selected provisions of the UNCITRAL Model Law.²⁶² The ABA Committee on State International Arbitration Statutes has gone a step further by suggesting that Congress repeal the FAA and adopt the UNCITRAL Model Law.²⁶³ Despite their different approaches both propositions would have the same common effect: transforming confusion to clarity.²⁶⁴

The United Nations Model Act²⁶⁵ serves as a model law for international commercial arbitrations and has been adopted and promoted by the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Model Law is a comprehensive document that enumerates the procedural requirements of an arbitration proceeding.²⁶⁶ These procedures could be utilized to alleviate some of the current deficiencies of the FAA.

262. *Adoption of the UNCITRAL Model Law on International Commercial Arbitration as Federal or State Legislation, Report of the Committee on Arbitration and Alternative Dispute Resolution, Association of the Bar of the City of New York, 1 (1988) [hereinafter *Alternative Dispute Resolution Report*].*

263. *See State Statute Report, supra* note 159, at 1-3.

264. The Model Law, however, should not be adopted by individual states because doing so would foster additional conflicts between state and federal law.

265. The Model Law is organized into eight chapters and thirty-six articles. The chapters address the following subject matters: (1) scope of application and extent of court intervention (Ch. I, arts. 1-6); (2) stays of legal proceeding and interim measures by court (Ch. II, arts. 7-9); (3) the number and manner of appointment of arbitrators along with grounds and procedures for challenge (Ch. III, arts. 10-15); (4) the competence of an arbitral tribunal to rule on its jurisdiction and its power to order interim measures (Ch. IV, arts. 16-17); (5) the conduct of arbitral proceedings (Ch. V, arts. 18-27); (6) the making of award and termination of proceedings including the determination of the applicable law (Ch. VI, arts. 28-33); (7) recourse against the award (Ch. VII, art. 34); and (7) the recognition and enforcement of awards (Ch. VIII, arts. 35-36). 24 I.L.M. 1302-13. For a summary of the Model Law, *see* WFLS report, *supra* note 64, at 306-07.

266. *See supra* notes 164-72 and accompanying text.

1. Legislative History of the UNCITRAL

The U.N. General Assembly established the United Nations Commission on International Trade Law to "harmonize and unify international trade law."²⁶⁷ UNCITRAL has long recognized the importance of arbitration and developed the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules.²⁶⁸ In 1977, the Asian-African Legal Consultative Committee (AALCC), an inter-governmental body, suggested that changes be made to the New York Convention to address concerns regarding the ability of parties to choose the arbitration rules.²⁶⁹ AALCC's suggestion ultimately led to the development of the Model Law because "the necessary harmonization of the enforcement practices of states, and the judicial control of arbitral procedure, could be achieved more effectively by the promulgation of a model or uniform law, rather than by any attempt to revise the New York Convention"²⁷⁰ The underlying theory of the Model Law is to "maximize party autonomy and limit judicial intervention."²⁷¹ The Model Law was well received and, in 1985, the UNCITRAL and the United Nations General Assembly adopted it.²⁷²

2. Proposed Amendments to the FAA

As discussed above, the need for amendment and clarification on

267. HOLTZMAN & NEUHAUS, *supra* note 15, at 4. Membership to UNCITRAL is limited and consists of variety of nations including Third World countries. *Id.*

268. *Id.* at 5; 20 I.L.M. 714 (1981).

269. HOLTZMAN & NEUHAUS, *supra* note 15, at 9.

270. REDFERN & HUNTER, *supra* note 14, at 388.

271. *Commercial Arbitration*, *supra* note 9, at 125.

UNCITRAL considered the following policy objectives:

[1] The liberalization of international commercial arbitration by limiting the role of national courts, and by giving effect to the doctrine of "autonomy of the will" allowing the parties freedom to choose how their disputes should be determined;

[2] The establishment of a certain defined core of mandatory provisions to ensure fairness and due process;

[3] The provision of a framework for the conduct of international commercial arbitrations, so that in the event of the parties being unable to agree on procedural matters the arbitration would nevertheless be capable of being completed; and

[4] The establishment of other provisions to aid the enforceability of awards and to clarify certain controversial practical issues.

REDFERN & HUNTER, *supra* note 14, at 388.

272. See 24 I.L.M. 1302; G.A. Res. 40/72 (112th Mtg.), U.N. Doc. A/40/935, at 620 (1985).

the federal level is apparent. If Congress adopted parts of the UNCITRAL Model Law, the parties to the arbitration and the courts will clearly understand the law that governs international arbitration.

The United States courts are divided about whether the FAA can grant interim relief.²⁷³ Several commentators have suggested that the grant of interim relief is consistent with the New York Convention.²⁷⁴ Furthermore, providing such measures is consistent with the measures available in other countries.²⁷⁵ The enactment of article nine²⁷⁶ and article seventeen²⁷⁷ of the UNCITRAL Model Law, which respectively allow a court and an arbitral tribunal to grant interim relief, would resolve the current confusion.

Several provisions of the UNCITRAL Model Law delineate the powers granted to an arbitral tribunal.²⁷⁸ The substance of this power rests in three articles. Article twelve addresses the impartiality of an arbitrator and requires disclosure of "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."²⁷⁹ Article thirteen provides the procedure that a party must follow when challenging an arbitrator.²⁸⁰ Finally, article sixteen authorizes the arbi-

273. Compare *McCreary Tire & Rubber Co. v. CEAT, S.A.*, 501 F.2d 1032 (3d Cir. 1974) and *Cooper v. Ateliers de la Motobecane, S.A.*, 442 N.E.2d 1239 (N.Y. 1982) (denying pre-award attachment) with *Carolina Power & Light Co. v. Uranex*, 451 F.Supp. 1044 (N.D. Cal. 1977) (allowing pre-award attachment). See generally *Mills*, *supra* note 19, at 604. The primary purpose in granting interim relief, which may take the form of an attachment or injunctive relief, is to maintain jurisdiction over the party and to ensure that the assets are not dissipated. *DOMKE*, *supra* note 5, at 404-07.

274. See *McDonell*, *supra* note 14, at 273; Kevin J. Brody, Note, *An Argument for Pre-Award Attachment in International Arbitration under the New York Convention*, 18 CORNELL INT'L L.J. 99, 124 (1985).

275. *REDFERN & HUNTER*, *supra* note 14, at 232.

276. 24 I.L.M. 1302 (1985). Article 9 states that "[i]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure." *Id.* at 1304.

277. *Id.* at 1307. Article 17 provides:

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measures.

Id.

278. See *supra* note 265.

279. 24 I.L.M. 1305.

280. *Id.* at 1306.

tral tribunal to rule on its own jurisdiction.²⁸¹ The incorporation of these articles into the federal law has been criticized because of the potential for increased litigation and delay.²⁸² However, the FAA does not contain any such comparable provisions and current state international arbitration statutes vary considerably.

In addition, article thirteen²⁸³ and article sixteen²⁸⁴ specifically state that the arbitral proceedings shall continue pending any such appeal, thereby mitigating the occasion for unnecessary delays. Thus, enactment of these procedural guidelines will provide much needed clarity in this area.

Congress should also adopt the UNCITRAL Model Law articles dealing with the geographic location of the arbitral tribunal and the choice-of-law provisions. Article twenty authorizes the arbitral tribunal to select the place of arbitration if the parties have not done so.²⁸⁵ The tribunal is specifically advised to consider "the circumstances of the case, including the convenience of the parties."²⁸⁶ Article twenty-eight of the Model Law addresses the choice-of-law provisions.²⁸⁷ If the parties do not designate the appropriate rules of law applicable to the arbitration proceeding, the arbitral tribunal is empowered to do so.²⁸⁸ Whereas section four²⁸⁹ and 206²⁹⁰ of the FAA address the ability of a court to hear matters that are properly before it, the FAA does not grant authority to a court or to a arbitral tribunal to choose the place of arbitration when the parties have failed to do so. Furthermore, the

281. *Id.* at 1306-07. The ability of an arbitral tribunal to rule on its own jurisdiction has been termed "Competence/Competence." See REDFERN & HUNTER, *supra* note 14, at 213-16. This is generally recognized as the modern trend in arbitral proceedings. *Id.* at 395.

282. *Alternative Dispute Resolution Report*, *supra* note 262, at 10-13.

283. 24 I.L.M. 1306. Article 13 in its pertinent part provides that "while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award." *Id.*

284. *Id.* at 1306-07. Article 16 provides that "[i]f the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request . . . the court specified in article 6 to decide the matter . . ." *Id.*

285. 24 I.L.M. 1307. Article 20 in its pertinent part provides that "[t]he parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties." *Id.*

286. *Id.*

287. *Id.* at 1309.

288. *Id.*

289. 9 U.S.C. § 4 (1988).

290. 9 U.S.C. § 206 (1988).

applicability of section four in state courts is unclear.²⁹¹

In addition to its other deficiencies, the FAA does not embrace any guidelines regarding the choice of substantive law to an arbitration proceeding. Therefore, the enactment of articles twenty and twenty-eight of the UNCITRAL Model Law, which address this issue, has the potential to clear away the current ambiguity.

It is beyond the scope of this article to suggest the specific language that Congress should utilize if it were to amend the FAA. However, Congress should at a minimum make the following changes: (1) address the ability of a court or an arbitral tribunal to grant interim relief; (2) provide for specific disclosure requirements for arbitrators; (3) grant the arbitral tribunal power to rule on its jurisdiction; (4) clarify the venue selection provisions; and (5) articulate specific choice-of-law provisions.

IV. WHAT THE STATES SHOULD DO UNTIL THE FAA IS AMENDED: THE MARYLAND APPROACH

Until Congress and the President establish a comprehensive federal statutory framework for the process and enforcement of international commercial arbitration, states should follow the Maryland approach. Maryland's statute, the Maryland International Commercial Arbitration Act²⁹² (MICAA), defers to federal law for international arbitrations that take place in Maryland.²⁹³ By opting not to enact its own international arbitration statute, Maryland rejected the course chosen by other states. The MICAA aims to add certainty and uniformity to the business and legal climate for international arbitration in Maryland²⁹⁴ by providing for the exclusive applicability of federal law

291. See *Alternative Dispute Resolution Report*, *supra* note 262, at 13-15 (suggesting that court interpretation of section four is unclear).

292. MD. CODE ANN. CTS. & JUD. PROC. §§ 3-2B-01 to -09 (1992).

293. The International Commercial Law section of the Maryland State Bar Association drafted and approved the Maryland International Commercial Arbitration Act (MICAA). The Maryland General Assembly passed the MICAA, which became effective on July 1, 1990.

294. Prior to drafting the MICAA, the Maryland Bar examined the statutes enacted by Florida, Georgia, Hawaii, California, and Connecticut. They ultimately rejected the course chosen by the other states, however, concluding that:

these states have not taken the best course. They have adopted statutes which set different rules in their states for international commercial arbitrations - different from their domestic arbitration statutes and different from the United States federal law. These statutes, therefore, increase the potential for more disputes to end up in court. They do not make law uniform; instead, these other state statutes make the law more diverse and less certain.

to the process and enforcement of international commercial arbitration in the state.

Maryland's approach brings the portion of its state law that deals with international commercial arbitration into harmony with the United States law. This approach is consistent with any proposed improvements on the federal level, whether by amendments to the FAA or adoption of the United Nations Model Act.

The first section of MICA defines its scope.²⁹⁵ The definition of international commercial arbitration is taken primarily from the federal statute dealing with the enforcement of foreign arbitration awards²⁹⁶ and is compatible with the definition contained in the UNCITRAL Model Law.²⁹⁷ The purpose of the Act is to make Maryland a more attractive site for international commercial arbitration by eliminating any application of Maryland law to international arbitration proceedings. The second section of the Act expressly recognizes this concern.²⁹⁸

The third section is the core of the Act.²⁹⁹ It states that Maryland law relating to the process and enforcement of international commercial arbitration and arbitration awards shall be the same as United States law dealing with arbitration. This deference to federal law promotes uniformity and certainty in the process and enforcement of international commercial arbitration. Moreover, the Act does not in any way limit the ability of the parties or an arbitral tribunal to choose substantive law governing the performance of the contract.

The fourth section empowers Maryland state courts, along with federal courts, to handle matters relating to international commercial arbitration.³⁰⁰ The sixth section addresses interim measures available

Frances J. Gorman, *Arbitration Act Makes Maryland Attractive For Settling Disputes*, THE DAILY RECORD, June 6, 1990, at 22.

295. MD. CODE ANN. CTS. & JUD. PROC. § 3-2B-01 (1992).

296. 9 U.S.C. § 201 (1988).

297. 24 I.L.M. 1302.

298. MD. CODE ANN. CTS. & JUD. PROC. § 3-2B-02 states:

The purpose of this subtitle is to:

1. Promote international commercial arbitration in this State;
2. Enforce arbitration agreements by parties in international commercial transactions;
3. Facilitate the prompt and efficient resolution by arbitration of disputes in international commercial agreements and transactions; and
4. Promote *uniformity* in the law of international commercial arbitration in the United States.

Id. (emphasis added).

299. *Id.* § 3-2B-03.

300. *Id.* § 3-2B-04.

under the MICAA.³⁰¹ This section represents an addition to the rights parties have under the FAA. It is not in conflict with the FAA, however, and is consistent with the UNCITRAL Model Law. Specifically, it makes clear that an arbitral tribunal in Maryland that hears an international commercial arbitration may order either party to post pre-award security in appropriate circumstances where there is just cause. This section also sets the standard for review by a court if a party challenges an order issued by the arbitral panel as to the posting of pre-award security. The premise is that the court should enforce the tribunal's order unless the tribunal has abused its discretion.

The seventh section limits court intervention into international commercial arbitration proceedings to those permitted under United States law.³⁰² The FAA is silent on court intervention.

One area in which the Maryland statute differs from the FAA concerns the FAA's use of a jury only to determine whether the parties made an arbitration agreement. The MICAA requires the courts to make any decisions concerning the MICAA without a jury. MICAA did not adopt this federal provision because it is complex and because it would have explicitly contradicted the existing Maryland domestic statute on the same point.³⁰³ Moreover, allowing a court to make determinations without a jury is consistent with the process familiar to many foreign businesses.

V. CONCLUSION

The main reason parties enter into an arbitration agreement is to resolve disputes quickly, fairly, and inexpensively. The enactment of state international commercial arbitration statutes threatens to frustrate these goals. These state statutes vary considerably in their approach and contain different procedural guidelines. Under *Volt*, federal

301. *Id.* § 3-2B-06.

302. *Id.* § 3-2B-07. This section follows article five of the UNCITRAL Model Law. See 24 I.L.M. 1304. MICAA initially contained a provision allowing intervention to correct any proceedings in conflict with the public policy of the State of Maryland. This provision was eliminated since it was viewed by foreign attorneys as permitting a very wide loophole intended to permit, and indeed encourage, court intervention in international commercial arbitration proceedings held in Maryland. Letter from Francis J. Gorman to Delegate Timothy F. Maloney (January 28, 1991) (recommending that the Act be amended to eliminate the provision in question) (copy on file with MD. J. INT'L. L. & TRADE).

303. The Maryland Uniform Arbitration Act provides that "[t]he court shall make any determinations provided for in this subtitle without a jury." MD. CODE ANN. CTS. & JUD. PROC. § 3-204.

courts will be more tolerant of state statutes that provide procedural devices. Many state international commercial arbitration statutes contain procedural devices that may well present a trap for the unwary. The uncertainty engendered by these statutes will cause international business to avoid the United States as a site for arbitration.

The Maryland Legislature avoided the pitfalls inherent in multiple schemes by choosing expressly to follow federal law in international commercial arbitration proceedings. A better response is to amend the FAA. In the meantime, parties to a Maryland arbitration only need be concerned about one source of law, federal law, rather than three or four different sources of applicable law. This approach will alleviate much of the uncertainty and should minimize expenses caused by discovery and judicial intervention in arbitration proceedings.