
Francis J. Gorman
Sanjay M. Shirodkar
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**

I. INTRODUCTION ........................................ 184
II. OVERVIEW .................................................. 185
   A. Federal Arbitration Act .................................. 191
      1. Legislative History .................................... 191
      2. Structure of the Act .................................... 194
      3. Supreme Court Construction ............................ 201
   B. State Arbitration Acts .................................. 210
      1. Domestic Arbitration Acts .............................. 210
         a. Florida ............................................... 212
         b. California .......................................... 214
         c. Georgia .............................................. 216
         d. Hawaii ............................................... 217

III. CONFUSION: ARGUMENTS IN FAVOR OF AMENDING THE FAA .................................................. 218
   A. The Inadequacies of the FAA and of State Arbitration Acts ........................................... 219
   B. Amending the FAA to Clarify United States Federal Law on International Arbitration .......... 221
      1. Legislative History of the UNCITRAL ............. 222

* Mr. Gorman is a partner at Semmes, Bowen & Semmes, Baltimore and Washington, D.C. He was the spokesperson for the Maryland State Bar Association before the Maryland General Assembly in connection with the passage of the Maryland International Commercial Arbitration Act.

** Mr. Shirodkar is a law clerk to the Honorable Michael W. Lee, Baltimore, Maryland. The author wishes to thank his family for their support through law school.
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 Act (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 Act (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, 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; the Maryland approach, in contrast, will decrease the confusion engendered by multiple statutes and add certainty to international

II. Overview

Arbitration has long been considered an important alternative to litigation for resolving international business disputes. 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 view regards arbitration as a hybrid of the other theories, with only some of its elements contractual in nature. The incidence of international commercial arbitration in the United States has rapidly increased since World War II. 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. Many nations compete actively for international arbitration business.

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).


11. See Commercial Arbitration, supra note 9, at 125.
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. Four possible schemes govern international arbitration: contractual agreement, institutional arbitration rules, national law, and international treaties. 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. The agreement specifies whether the arbitration will be conducted on an ad hoc basis or through institutional proceedings. If the parties agree to an ad hoc forum, the arbitration is conducted according to the terms specified in the contract. The parties, however, may have difficulties drafting the terms

---


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 Association\(^{20}\) or the International Chamber of Commerce help administer arbitration proceedings for a fee, \(^{21}\) and assist the parties by providing administrative services \(^{22}\) 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

\(^{18}\) 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).


\(^{20}\) 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 filing 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. However, international treaties or conventions may also provide an effective method of creating an international system of law governing international arbitration. Several international treaties address arbitration, the most important of which is the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

In the United States, international commercial arbitration agreements and proceedings are subject to at least three sources of national law. 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.").


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.


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.
igation in the federal courts are subject to the FAA. Commentators have noted that because the FAA does not contain any subject matter restrictions, its scope is quite broad. 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. Third, an arbitration proceeding in the United States falls within the purview of state arbitration laws. All states, along with the District of Columbia and Puerto Rico, have enacted statutes addressing intrastate arbitration, and


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).


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.


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).

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

---


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 supplement or preempt the state's domestic statute.

A. Federal Arbitration Act

1. Legislative History

Historically, courts disfavored arbitration as a means of dispute resolution. 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. 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. However, this common law rule of revocability related to commercial interests in more than one state.

\[\text{Id.}\]

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.).


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 ineffect-
gradually began to lose support with the enactment of New York’s arbitration statute in 1920. The New York statute established that arbitration provisions in contracts were binding.

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

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

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

---

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

2. Structure of the Act

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

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

---

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. Intent is determined by applying the federal substantive law of arbitration and by using a doubt test which questions whether "there are any 'doubts concerning the scope of arbitrable issues.'" 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.

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. Other exceptions have also been created under separate federal statutes and these exceptions have influenced courts that hear FAA cases.


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.").


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.


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

Sections three and four provide two avenues of judicial enforce-

- 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.

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 thereaf-

- er 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.").

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. Section four addresses petitions by an aggrieved
party to compel arbitration proceedings when the other party refuses to
do so. Both sections three and four require that independent jurisdi-
c tion be established prior to a court ruling on the motion. Moreover,
judicial enforcement may be available in federal as well as state
court.

the agreement, providing the applicant for the stay is not in default in pro-
ceeding 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 is-
sue, the court shall make an order directing the parties to proceed to arbitra-
tion in accordance with the terms of the agreement.

Id.

78. See supra note 76; see also Pioneer Supply Co. v. American Meter Co., 484

79. See supra note 77.

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);
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.
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.\textsuperscript{82} The arbitrator may be selected according to the terms of the arbitration agreement or may be appointed by the court.\textsuperscript{83} In either case, the arbitrator has the power to subpoena documents or witnesses that are crucial to the case.\textsuperscript{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 nine\textsuperscript{85} states that a party can ask a court to confirm the arbitration award within one year after the award.\textsuperscript{86} Generally, a domestic or international arbitral award must be confirmed before the U.S. courts may enforce it.\textsuperscript{87} Sections ten and eleven catalog the alternatives available to a court for a party seeking either to vacate or modify the award. Section ten\textsuperscript{88} requires the court to

\textsuperscript{v. Board of Trustees, 489 U.S. 468 (1989).}
\textsuperscript{82. 9 U.S.C. \S  5 (1988).}
\textsuperscript{83. Id.}
\textsuperscript{84. 9 U.S.C. \S  7 (1988).}
\textsuperscript{85. 9 U.S.C. \S  9 (1988) provides in pertinent part:}
\textsuperscript{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. . . .}
\textsuperscript{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.}
\textsuperscript{Id.} (emphasis added).
\textsuperscript{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).}
\textsuperscript{87. See supra note 85; see also 9 U.S.C. \S  207 (1988) (pertaining to the international arbitration awards being pursued in United States courts).}
\textsuperscript{88. 9 U.S.C. \S  10 (1988) provides:}
\textsuperscript{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 —}
\textsuperscript{(a) Where the award was procured by corruption, fraud, or undue means.}
\textsuperscript{(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. Importantly, section ten applies only to purely domestic arbitration. Section eleven enables the court to modify an award if it contains a mistake, addresses a matter not submitted for arbitration, or is imperfect in form. Finally, section fifteen oversees the appeal process.

Chapter two of the FAA also contains the legislation that implements the New York Convention. 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.


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 to the arbitration —
(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.


"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 202 96 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-

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.

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. Tyson101 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).
102. Id. at 18.
103. 304 U.S. 64 (1938).
104. Id. at 78.
ology. 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.
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.

115. *Id.* at 404.
116. *Id.* at 406.
117. *Id.* at 409.
otherwise limited the FAA's applicability. The Second Circuit affirmed its interpretation of the FAA as being substantive law in *Metro Industrial Painting Corp. v. Terminal Construction Co.* The remaining circuits, however, did not agree with the Second Circuit's interpretation.

The Supreme Court finally resolved this uncertainty in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* Prima Paint, a diversity suit, arose in the Second Circuit and concerned a fraud in the inducement claim. The contract included an arbitration clause. 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." 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.*


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.” The Court reasoned that contracts involving interstate commerce are within the purview of section two of the FAA. 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*. 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.

*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* 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. 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.” In other words, because exceptional circumstances were not present, the District Court had abused its discretion by staying the arbitration proceeding. In *Moses Cone*, the Court expressly stated its implicit decision in *Prima Paint* 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.

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.


129. *Id.* at 7.

130. *Id.* at 22.

131. *Id.* at 26-27.


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*. 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 Law (CFIL). The issue was whether a particular section of the CFIL, 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.

The Supreme Court held, however, that the California statute violated the Supremacy Clause because it conflicted directly with section two of the FAA. 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." The Court did recognize two limitations on the FAA: the transaction in question must involve commerce and revocation of such clauses can only occur upon grounds existing at law or equity. However, once a transaction involves interstate commerce, the FAA preempts state law that inhibits the enforcement of arbitration agreements.

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).
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\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{147}

\textsuperscript{143} 482 U.S. 483 (1987).
\textsuperscript{144} CAL. LAB. CODE § 229 (West 1971).
\textsuperscript{145} Perry, 482 U.S. at 484-85. The initial application contained a provision addressing arbitration. It stated:

\begin{quote}
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.
\end{quote}

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

\begin{quote}
[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 . . . .
\end{quote}

\textit{Id.} Kidder, Peabody & Co. was a member of the NYSE. \textit{Id.} at 485-86.

\textsuperscript{146} \textit{Id.} at 491-92. The Court reasoned that in upholding the arbitration clause it was merely following its earlier decision in Dean Witter Reynolds 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. \textit{Id.}

\textsuperscript{147} 489 U.S. 468 (1989). For a detailed analysis of this case, see Arthur S. Feldman, \textit{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. Volt moved to compel arbitration due to a term in the contract mandating the resolution of all claims through arbitration. Stanford, relying on the California statute, moved to stay arbitration since the contract contained a choice-of-law provision selecting California law. The California Court of Appeals affirmed the lower court's denial of Volt's motion to compel arbitration.

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." By characterizing the issue as a choice-of-law question, the Court found the California statute congruent with the policies implied in the FAA. The Court asserted 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.

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

[all 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. 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.

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.” Moreover, by focusing on the parties’ choice-of-law clause, the Court did not perceive any direct conflict with the FAA. The Court observed that upholding this clause would merely enforce the parties’ intent that California law would govern the agreement.

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. In international commercial arbitration cases, any expansion should be limited because of a prevailing federal interest in such matters.

---

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. 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." 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." 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.

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

1. Domestic Arbitration Acts

Many state statutes are patterned after the Uniform Arbitration

---

161. See generally supra notes 147-60 and accompanying text.
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.
Act (UAA). The UAA applies to any existing and future controversy so long as there is a valid agreement to arbitrate. Judicial review is available to determine if any errors have been made in the arbitration process. A reviewing court can either confirm, vacate or modify an award. An arbitration panel is empowered to issue subpoenas, take depositions, modify an award, and assign arbitrator's fees. 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. 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.


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

166. See supra note 34.
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.
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.
These statutes vary considerably in their approach and will be briefly discussed in this section.

a. Florida

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


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-.04.

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. Part III delineates the relationship between the court and the arbitration tribunal.

The FIAA provides a mechanism that is favorable to arbitration. Application of the Act is limited to written international arbitrations. The Act's scope is quite broad because it places no limits on the types of transactions covered and it may be applicable within or without the state. However, certain transactions are excluded from the Act. Parties are given the freedom to fix the rules for arbitration since portions of the FIAA can be excluded. Several other sections describe procedures that may be followed during the arbitration process. Interim relief can be obtained from either the arbitral
tribunal or any "court, tribunal, or other governmental authority." The final sections deal with the interplay between the court and the arbitration tribunal and provide grounds for compelling arbitration, obtaining a stay of court proceedings and vacating an award.

b. California

The California International Arbitration and Conciliation Act (CIACA) was enacted in 1988. The Act enumerates a detailed set of procedures that can be followed in an arbitration proceeding. Its basic purpose is to grant parties the autonomy to pick and choose any of the procedures delineated in the Act. If, however, the agreement is silent as to a particular aspect, the CIACA acts as a default mechanism.

The CIACA is divided into seven chapters. The first six chapters incorporate the UNCITRAL Model Law, with some modifications, and the seventh chapter addresses conciliation. If agreements to cover present and future disputes are in writing, 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.
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. Other parts of the California Code dealing with international commercial arbitration are superseded. The Act defines the international status of a particular agreement rather broadly and emphasizes the party's place of business. It also provides a laundry list of commercial relationships. An arbitration tribunal is empowered to rule on its own jurisdiction, subject to the review of a superior court. Parties to the arbitration can select the procedures that the arbitral tribunal will follow, the place of arbitration, the language to be used in the arbitral proceedings, and the applicable rules of law. 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.

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. If judicial intervention is prohibited unless provided for in the CIACA or the federal law. If the agreement covers the matter, a court may order to stay judicial proceedings. The CIACA also provides for interim measures along with elaborate grounds for challenging and possibly removing an arbitrator.

c. Georgia

The Georgia Arbitration Code contains a separate section dealing with international transactions. This section is used concurrently with other sections of the Code. The Code's purpose is to promote arbitration for resolving international disputes and to demonstrate Georgia's commitment to international commerce. The statute focuses on either the domicile of one of the parties or the location of the actual business undertaking. Most of the provisions are quite procedural in nature. Parties have the ability to appoint arbitrators, compel arbitration proceedings, 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.
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. Interim relief can be obtained from a court or from an arbitral tribunal. The tribunal is also authorized to rule on its own jurisdiction and to determine the language of the arbitral proceedings if the parties have failed to do so.

**d. Hawaii**

The Hawaii International Arbitration, Mediation and Conciliation Act (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. These corporations are known as "centers" and are authorized to develop rules governing arbitration proceedings. The scope of the Act is rather broad with emphasis placed on the residence of the parties.

--

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.*


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, the HIAMCA is applicable within or without the state. Limited interim relief 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.

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 statute 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. Notwithstanding these issues or Supremacy Clause considerations, 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. Similarly, California and Hawaii recognized the opportunity to participate in international commerce by passing such an act, while Texas wanted to send a clear message to alien parties that it was interested in promoting international arbitration. Due to their inherent complexity, however, many of the international arbitration statutes will only frustrate these goals.

---

Id.

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.
243. U.S. Const. art. IV, cl. 2.
244. Supra note 181.
245. See Mills, supra note 19, at 616.
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, Southland established the rule that federal law preempts contrary state statutes. Whether the FAA preempts a state statute granting procedural rights is difficult to predict after Volt. Volt was a domestic case and the Supreme Court was not faced with the international concerns that it encountered in Mitsubishi Motors and Scherk. The Court's endorsement of the FAA in such circumstances remains strong, and thus, in international matters, the federal interest will almost certainly prevail.

It is important to note that even though case law would indicate that the FAA does not create independent federal jurisdiction, each of the cases dealt with chapter one of the FAA. However, chapter two grants jurisdiction to federal district courts, thereby acknowledging Congressional resolve to elevate the federal interest for international matters. 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

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).
253. See supra note 70.
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. It has been suggested that Congress should amend the FAA to incorporate some of the changes that the states have enacted. 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. Notably, state statutes differ in the scope of their application and the availability of interim measures. 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 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.


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.

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. 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. Despite their different approaches both propositions would have the same common effect: transforming confusion to clarity.

The United Nations Model Act 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. These procedures could be utilized to alleviate some of the current deficiencies of the FAA.


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
the federal level is apparent. If Congress adopted parts of the UNCI-
TRAL 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. Several commentators have suggested that the
grant of interim relief is consistent with the New York Convention.
Furthermore, providing such measures is consistent with the measures
available in other countries. The enactment of article nine and
article seventeen 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. 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.”
Article thirteen provides the procedure that a party must follow when
challenging an arbitrator. 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.


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 re-
quest 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-mat-
ter 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. The incorporation of these articles into the federal law has been criticized because of the potential for increased litigation and delay. However, the FAA does not contain any such comparable provisions and current state international arbitration statutes vary considerably.

In addition, article thirteen and article sixteen 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. The tribunal is specifically advised to consider “the circumstances of the case, including the convenience of the parties.” Article twenty-eight of the Model Law addresses the choice-of-law provisions. If the parties do not designate the appropriate rules of law applicable to the arbitration proceeding, the arbitral tribunal is empowered to do so. Whereas section four and 206 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.


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.


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 Act 292 (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 Maryland 294 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).


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 MICAA defines its scope.296 The definition of international commercial arbitration is taken primarily from the federal statute dealing with the enforcement of foreign arbitration awards297 and is compatible with the definition contained in the UNCITRAL Model Law.298 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

297. 24 I.L.M. 1302.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{303} Moreover, allowing a court to make determinations without a jury is consistent with the process familiar to many foreign businesses.

\section*{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 \textit{Volt}, federal

\begin{itemize}
\item \textsuperscript{301} \textit{Id.} § 3-2B-06.
\item \textsuperscript{302} \textit{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).
\item \textsuperscript{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.
\end{itemize}
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.