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State International Arbitration Statutes and the U.S. Arbitration Act: Unifying the Availability of Interim Relief

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State International Arbitration Statutes and the U.S. Arbitration Act: Unifying the Availability of Interim Relief

William P. Mills, III

Abstract

The Note argues that the U.S. law of the availability of interim relief in international arbitration situations should be uniform. It states that the best resolution to the current conflict over the availability of interim relief at the federal and state levels is to amend both the Arbitration Act and state laws governing international arbitrations to provide expressly for the availability of interim relief from a court.

STATE INTERNATIONAL ARBITRATION STATUTES
AND THE U.S. ARBITRATION ACT: UNIFYING
THE AVAILABILITY OF INTERIM
RELIEF

INTRODUCTION

Arbitration¹ is a particularly favored method of dispute resolution in international business.² An arbitration can take place only if the parties agree contractually to use this method for the settlement of their disputes.³ In addition, legislation is required that recognizes the validity of agreements to arbitrate.⁴ In the United States, the U.S. Arbitration Act (the "Arbitration Act" or the "Act"),⁵ which includes provisions implementing the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or the "Convention"),⁶ has for sixty-five years applied to inter-

1. Arbitration has been defined as "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." M. DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* 1 (Wilner rev. ed. 1984).

2. *See id.* at 543. Several explanations have been offered for the favored status of arbitration in international commercial dealings. *See, e.g.*, Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 235, 236-37 (1986) (stating that arbitration is favored due to its reduced cost, increased speed, secrecy, procedural simplicity, technically competent decision makers, avoidance of the uncertainty and complexity of foreign litigation, means of obtaining jurisdiction over foreign parties, and certain and neutral forum); Aksen, *The Need to Utilize International Arbitration*, 17 VAND. J. TRANSNAT'L L. 11 (1984); De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 43 (1982) (peer experts and maintenance of business relationship).

3. M. DOMKE, *supra* note 1, at 1.

4. *Id.* at 2; *see* H. HOLTZMANN & J. NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* 7 (1989). In a jurisdiction where there is no legislation validating arbitration agreements, parties can reject arbitration. M. DOMKE, *supra* note 1, at 2.

5. 9 U.S.C. §§ 1-208 (1988).

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3, [hereinafter *New York Convention*]. As of January 1, 1989 seventy-eight countries were parties to the *New York Convention*: 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, The Holy See, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Korea, Kuwait, Luxembourg, Madagascar, Malaysia, Mexico, Monaco,

national arbitrations. Recently, however, international arbitration law in the United States has expanded to the state level with the emergence of state laws applicable to international arbitrations.⁷

In the context of arbitration, interim relief from a court is often desirable.⁸ Under the international arbitration law of the United States, however, a conflict exists over whether such interim relief is available.⁹ At the federal level, several courts have made different arguments concerning the availability of interim relief under the New York Convention, which is silent on this issue.¹⁰ At the state level, moreover, only a handful of state arbitration laws expressly provide for the availability of interim relief in international arbitration.¹¹

This Note argues that U.S. law on the availability of interim relief in international arbitration situations should be uniform. Part I discusses the general law of international arbitration, focusing particularly on the international arbitration

Morocco, The 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, the United Kingdom, the United States, Uruguay, and Yugoslavia. U.S. DEP'T OF STATE, TREATIES IN FORCE 274 (Jan. 1, 1989).

7. See, e.g., CAL. CIV. PROC. CODE §§ 1297.11-1297.432 (West Supp. 1990); Florida International Arbitration Act, FLA. STAT. ANN. §§ 684.01-684.35 (West Supp. 1990); Georgia Arbitration Code, GA. CODE ANN. §§ 9-9-30 to 9-9-43 (Supp. 1989); Hawaii International Arbitration, Mediation, and Conciliation Act, HAW. REV. STAT. §§ 658D-1 to 658D-9 (Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 249 (Vernon Supp. 1990).

For the purposes of this note, references to U.S. international arbitration law include the Arbitration Act, the New York Convention, and applicable state statutes. See *supra* notes 33-35 and accompanying text (discussing sources of U.S. arbitration law).

8. See *infra* notes 132-39 and accompanying text (discussing interim relief in international arbitration situations).

9. See *infra* notes 143-236 and accompanying text (discussing conflict under U.S. law concerning availability of interim relief). In an international arbitration, the parties or choice of law rules may determine that non-U.S. law governs an arbitration taking place in the United States. This note, however, addresses only those arbitrations to which U.S. law applies, whether federal or state law or a combination of the two.

10. See *infra* notes 164-205 and accompanying text (discussing court arguments supporting and opposing availability of pre-award attachment under New York Convention).

11. See *infra* notes 212-36 and accompanying text (discussing availability of interim relief at state level).

law of the United States. Part I also discusses interim relief in the context of international arbitration. Part II analyzes the conflict over the availability of interim relief at the federal and state levels of international arbitration law in the United States. Part III argues that interim relief should be available under the New York Convention and that the current inconsistency among state arbitration laws is undesirable in the international arbitration context. This Note concludes that the best resolution of the conflict is to amend both the Arbitration Act and state laws governing international arbitrations to provide expressly for the availability of interim relief from a court.

I. *INTERNATIONAL ARBITRATION, U.S. INTERNATIONAL ARBITRATION LAW, AND INTERIM RELIEF*

A. *The Legal Framework of International Arbitration*

An international arbitration is governed by several sources of law. These sources may be grouped into four general categories: contractual agreement, institutional arbitration rules, national law, and international agreements.¹² Each category must be considered whenever a court determines the validity and effect of an arbitration agreement.¹³

The contract between the parties is of primary significance.¹⁴ The parties must explicitly agree that any current or future dispute between them will be resolved through binding arbitration, rather than through litigation.¹⁵ A simple clause in a contract may suffice.¹⁶ To help ensure effective resolution, however, most parties address several important issues in their contract.¹⁷ These issues may be addressed in one of two ways. First, the parties themselves may define in their contract the rules and procedure by which the arbitration is to proceed.¹⁸ If such a case-by-case approach is employed, the arbitration is

12. See McDonell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 COLUM. J. TRANSNAT'L L. 273, 273-74 (1984).

13. *Id.* at 273.

14. See H. HOLTZMANN & J. NEUHAUS, *supra* note 4, at 7.

15. *Id.* at 6.

16. *Id.*

17. Park, *Arbitration of International Contract Disputes*, 39 BUS. LAW. 1783, 1786-89 (1984). Among these issues are the number of arbitrators and how they will be chosen, language, applicable law, and the place of arbitration. *Id.*

18. H. HOLTZMANN & J. NEUHAUS, *supra* note 4, at 6.

termed "ad hoc."¹⁹

Second, the parties may decline to address specific issues and instead refer to a set of pre-existing institutional rules.²⁰ These institutional rules, when referred to in the contract, are binding.²¹ This method is known as "institutional" arbitration.²² Institutional arbitration rules are drafted by private arbitral organizations and public international bodies.²³ They aid parties who seek to arbitrate by reducing the need for costly and time-consuming research.²⁴ They also usually provide model arbitration clauses.²⁵

Even if the parties agree to arbitrate, however, an international arbitration agreement will not be effective in a country unless national law exists that directs national courts to enforce agreements to arbitrate.²⁶ National law establishes certain procedural requirements that must be observed to satisfy

19. Park, *supra* note 17, at 1784.

20. See, e.g., *Arbitration Rules of the United Nations Commission on International Trade Law*, G.A. Res. 98, 31 U.N. GAOR Supp. (No. 39), U.N. Doc. A/31/39 (1976), reprinted in II Y.B. COMM. ARB. 161 (1977) [hereinafter UNCITRAL Arbitration Rules]; *International Center for the Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings*, reprinted in INTERNATIONAL COMMERCIAL ARBITRATION DOC. I.8.1 (Binder *) (C. Schmitthoff ed. 1979) [hereinafter ICSID Rules]; *Rules of Conciliation and Arbitration of the International Chamber of Commerce*, reprinted in I Y.B. COMM. ARB. 157 (1977) [hereinafter ICC Rules]; *Inter-American Commercial Arbitration Commission Rules of Procedure*, reprinted in III Y.B. COMM. ARB. 231 (1978) [hereinafter Inter-American Commercial Arbitration Rules]; *Permanent Court of Arbitration Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One is a State*, reprinted in INTERNATIONAL COMMERCIAL ARBITRATION DOC. I.13 (Binder *) (C. Schmitthoff ed. 1979) [hereinafter Permanent Court of Arbitration Rules].

21. H. HOLTSMANN & J. NEUHAUS, *supra* note 4, at 7.

22. Park, *supra* note 17, at 1784.

23. See De Vries, *supra* note 2, at 53.

24. *Id.*

25. *Id.* at 54.

26. *Id.* at 47. National courts serve two important functions in arbitration proceedings: assistance and control. *Id.* at 47 n.21. For example,

[c]ourts 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.

Id.

the concepts of fairness and public policy of the country in which the arbitration takes place.²⁷ National law, furthermore, often specifies certain procedures to be followed during the arbitration when the parties have not agreed otherwise.²⁸

The national law applicable to an international arbitration is composed of a country's domestic law and any international agreements or treaties to which the country is a party.²⁹ There are several international treaties on arbitration.³⁰ These treaties were designed to encourage trade in various regions of the world.³¹ The New York Convention is the world's leading arbitration treaty.³²

In the United States, agreements to arbitrate between international parties or involving international subject matter are subject to three sources of national law. First, the Arbitration Act, which includes provisions implementing the New York Convention, governs agreements in contracts involving interstate and foreign commerce, as well as maritime transactions.³³ Second, the United States is a party to the New York Convention.³⁴ Finally, the arbitration agreement is subject to applica-

27. H. HOLTZMANN & J. NEUHAUS, *supra* note 4, at 7. The relationship between the arbitration rules referred to in an agreement to arbitrate and national law is expressly recognized in article I(2) of the UNCITRAL Arbitration Rules: "These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail." UNCITRAL Arbitration Rules, *supra* note 20, art. I(2).

28. H. HOLTZMANN & J. NEUHAUS, *supra* note 4, at 7.

29. *Id.* at 8.

30. *See, e.g.*, European Convention Providing a Uniform Law on Arbitration, Jan. 20, 1966, Eur. T.S. No. 56; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159; European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349; New York Convention, *supra* note 6, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

31. De Vries, *supra* note 2, at 56. According to de Vries, the European Convention of 1961 was enacted to encourage East-West trade and the ICSID Convention was "designed to encourage private international investment and economic development in newly independent areas." *Id.*

32. *Id.*

33. 9 U.S.C. §§ 1-2, 201-08 (1988); *see* H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924) [hereinafter HOUSE REPORT]; S. REP. NO. 536, 68th Cong., 1st Sess. 1 (1924) [hereinafter SENATE REPORT].

34. New York Convention, *supra* note 6, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3. Chapter 1 of the Arbitration Act applies to actions and proceedings brought under the New York Convention to the extent that chapter 1 does not conflict with the New York Convention. 9 U.S.C. § 208 (1988). If the New York Con-

ble state law.³⁵

All fifty states, as well as the District of Columbia and Puerto Rico, have enacted their own arbitration statutes ("intra-state statutes").³⁶ These intrastate statutes govern all intrastate arbitrations to the exclusion of the Arbitration Act.³⁷ The intrastate statutes also apply as procedural supplements to the Act in an interstate or international transaction.³⁸ The Arbitration Act, however, prevails if there is a substantive conflict between the Act and an intrastate statute in an interstate or foreign commerce case.³⁹

Recently, several states have enacted laws governing international arbitration.⁴⁰ These statutes either supplement⁴¹ or pre-empt the state's intrastate statute in an arbitration that involves foreign commerce.⁴² The international statutes, however, are accorded the same legal status vis-à-vis the Arbitration Act as are the intrastate statutes.⁴³

vention is inapplicable, another treaty may apply. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. IV(2), 4 U.S.T. 2063, 2067-68, T.I.A.S. No. 2863, 206 U.N.T.S. 143, 196. If no treaty is applicable, chapter 1 of the Arbitration Act is applicable by default. 9 U.S.C. §§ 1-2 (1988).

35. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 109 S. Ct. 1248 (to be reported at 489 U.S. 468) (1989) (stating that even where Arbitration Act is fully applicable, state arbitration law is also applicable).

36. *See, e.g.*, CAL. CIV. PROC. CODE §§ 1280-1295 (West 1982 & Supp. 1990); FLA. STAT. ANN. §§ 682.01-682.20 (West Supp. 1990); GA. CODE ANN. §§ 9-9-1 to 9-9-133 (1982 & Supp. 1989); HAW. REV. STAT. §§ 658D-1 to 658D-15 (1985 & Supp. 1989); ILL. ANN. STAT. ch. 10, §§ 20-30, 101-123 (Smith-Hurd 1975 & Supp. 1989); MASS. ANN. LAWS ch. 251, §§ 1-19 (Law. Co-op 1980 & Supp. 1990); MICH. COMP. LAWS ANN. §§ 600.5001-600.5065 (West 1987 & Supp. 1990); N.J. STAT. ANN. §§ 2A:24-1 to 2A:24-11 (West 1987 & Supp. 1989); N.Y. CIV. PRAC. L. & R. §§ 7501-7514 (McKinney 1980 & Supp. 1990); PA. CONS. STAT. ANN. tit. 42, §§ 7301-7362 (Purdon 1982 & Supp. 1990); VA. CODE ANN. §§ 8.01-577 to 8.01-581.20 (1984 & Supp. 1989); WASH. REV. CODE ANN. §§ 7.04.010-7.04.220 (1961 & Supp. 1990); *see also* M. DOMKE, *supra* note 1, app. I (1984 & Supp. 1989).

37. *See* *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956).

38. *See Volt Information Sciences*, 109 S. Ct. at 1254.

39. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (Arbitration Act pre-empts state laws that require judicial forum for resolution of claims that contracting parties agreed to resolve by arbitration).

40. *See supra* note 7 (listing state laws governing international arbitrations).

41. *See* GA. CODE ANN. § 9-9-30 (Supp. 1989).

42. *See* CAL. CIV. PROC. CODE § 1297.17 (West Supp. 1990); FLA. STAT. ANN. § 684.03(3) (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-1(8) (Vernon Supp. 1990).

43. *See Southland Corp.*, 465 U.S. at 10.

B. *U.S. International Arbitration Law*

1. The U.S. Arbitration Act

In 1925, Congress enacted the Arbitration Act to make arbitration agreements arising out of contracts in interstate and foreign commerce and in maritime transactions valid and enforceable.⁴⁴ The Arbitration Act applies to any contract evidencing interstate or foreign commerce and, thus, has a broad-reaching effect.⁴⁵ The Act was the result of a legislative effort to overturn an anachronistic principle of English and U.S. common law that rejected agreements to arbitrate on the ground that arbitrations deprived courts of their jurisdiction.⁴⁶

Congress, moreover, intended the Arbitration Act to eliminate the misconception, prevalent at the time, that an arbitral tribunal could not give full and proper redress.⁴⁷ Before enactment of the Act, courts considered arbitration agreements to be enforceable contracts.⁴⁸ However, a party that reneged on an agreement to arbitrate would only be liable in an action for damages.⁴⁹ Specific performance was not an available remedy.⁵⁰ Thus, arbitration agreements were ineffectual because they could not be pleaded as a bar to judicial proceedings, and courts did not consider them grounds for a stay pending arbi-

44. SENATE REPORT, *supra* note 33, at 2; see HOUSE REPORT, *supra* note 33, at 1.

45. 9 U.S.C. § 1 (1988); see HOUSE REPORT, *supra* note 33, at 1.

46. HOUSE REPORT, *supra* note 33, at 1-2; see SENATE REPORT, *supra* note 33, at 2. The House Report noted that

[t]he jealousy [of courts] survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it.

HOUSE REPORT, *supra* note 33, at 2.

47. SENATE REPORT, *supra* note 33, at 2. Courts also believed they could not compel an unwilling party to submit to an arbitration and at the same time deny a party the right to final recourse in a court. *Id.*

48. See, e.g., *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915); see HOUSE REPORT, *supra* note 33, at 1.

49. SENATE REPORT, *supra* note 33, at 2. According to the Senate Report, "[a] party may be liable in an action for damages for the breach of an executory agreement to arbitrate; or, if the agreement has been executed according to its terms and an award made, the appropriate action may be brought at law or in equity to enforce the award." *Id.*

50. *Id.* The Senate Report stated that "it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity." *Id.*

tration.⁵¹ In addition, the parties could revoke the agreement at any time before an award was issued.⁵² Congress, therefore, passed the Arbitration Act primarily to effectuate a party's contractual rights under an arbitration agreement.⁵³

A secondary reason for passage of the Arbitration Act was Congress' concern over the increasing costliness and delay of litigation.⁵⁴ Enforceable arbitration agreements, Congress thought, would reduce the number of controversies to be resolved by the courts.⁵⁵ Finally, Congress cited arbitration's appeal to business as an additional motivation behind passage of the Act.⁵⁶

The Arbitration Act is divided into two chapters.⁵⁷ Chapter 1 contains the original provisions passed in 1925, as well as subsequent amendments.⁵⁸ It provides that a written agree-

51. See *The Atlanten*, 252 U.S. 313, 315 (1920); *The Eros*, 251 F. 45, 45 (2d Cir. 1918), cert. denied, 247 U.S. 509 (1918); *Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten*, 232 F. 403, 405 (S.D.N.Y. 1916), aff'd, 250 F. 935 (2d Cir. 1918), aff'd sub nom. *The Atlanten*, 252 U.S. 313 (1920); *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1012 (S.D.N.Y. 1915) (all courts refusing to give effect to arbitration agreements); SENATE REPORT, *supra* note 33, at 2.

52. SENATE REPORT, *supra* note 33, at 2.

53. HOUSE REPORT, *supra* note 33, at 1. According to the House Report, the Arbitration Act places "[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs." *Id.*

54. *Id.* at 2. According to the House Report, "[i]t is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation." *Id.*

55. *Id.* at 2; see Note, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 272 (1926). The courts would be less burdened because "[a]n arbitration . . . proceeds without any formality and . . . interference from the court. All technicalities of legal procedure and requirements are removed. Except for the few days' delay while the court is deciding whether an order should be entered, the matter stands as though no recourse to court ever had been had." *Id.*

56. SENATE REPORT, *supra* note 33, at 3. De Vries notes that

[a]rbitration has long been a favored means of resolving disputes among members of organized commercial groups in the trading countries of the West.

Decision of disputes by peer experts suits businessmen who hope to continue doing business with each other and who seek to keep their differences "in the family." This was the reason for the businessman's general preference for the arbitral process. This was the pattern for propagation of the now widespread belief in arbitration as a panacea for the ills of court procedural delays, uncertainties, expense, and publicity.

De Vries, *supra* note 2, at 43.

57. See 9 U.S.C. §§ 1-208 (1988).

58. See *id.* §§ 1-15.

ment to arbitrate in maritime contracts⁵⁹ or contracts involving commerce⁶⁰ will be valid, irrevocable, and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract."⁶¹ Pursuant to chapter 1, moreover, a court must stay any action that involves any issue referable to arbitration under a written arbitration agreement.⁶² Furthermore, according to chapter 1, any party to such an agreement may petition the district court for an order compelling arbitration under the terms of the agreement.⁶³ The Arbitration Act empowers the court to select an arbitrator if the parties effectively failed to choose an arbitrator.⁶⁴ The arbitrators are empowered to summon witnesses and to require them to submit any material evidence.⁶⁵ If a party petitions a court for confir-

59. *Id.* § 1. A maritime transaction "means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction." *Id.*

60. *Id.* Section 1 provides that "'commerce' . . . means commerce among the several States or with foreign nations." *Id.*

61. *Id.* § 2. The arbitration agreement, however, is revocable under ordinary principles of contract law. *Id.*

62. *Id.* § 3. A party must apply to the court to stay the trial of the action and the court must find that the issue involved is indeed referable to arbitration under the agreement. *Id.*

63. *Id.* § 4. Section 4 provides in relevant 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.

Id.

64. *Id.* § 5. The arbitrator or arbitrators chosen by the court "shall act under the said agreement with the same force and effect as if he or they had been specifically named therein." *Id.* Unless otherwise provided by the parties, the court shall appoint one arbitrator. *Id.*

65. *Id.* § 7. Section 8 of the Arbitration Act permits a party in an admiralty arbitration to begin the proceeding by seizure of the vessel or other property of an opponent. *Id.* § 8. Section 8 provides that

[i]f the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Id.

mation of an arbitral award within one year after the award is made, the court must grant such an order unless it decides to vacate or modify the award.⁶⁶

Chapter 2 contains provisions implementing the New York Convention.⁶⁷ The New York Convention is an international agreement that provides for the recognition of agreements to arbitrate⁶⁸ and, more importantly, for the enforcement of foreign arbitral awards.⁶⁹ Congress ratified the New York Convention specifically to serve the interests of U.S. citizens doing business abroad.⁷⁰ As implemented in the United

66. *Id.* § 9. A court may vacate or modify an award only under certain circumstances. *Id.* §§ 10-11. Grounds for vacating an arbitral award include corruption, fraud, or undue means in the procurement of the award, corruption of the arbitrators, misbehavior by the parties, and misuse of power by the arbitrators. *Id.* § 10. Modification is permissible if there has been a material miscalculation, an award on a matter not before the arbitrators, or where the order is "imperfect in matter of form not affecting the merits of the controversy." *Id.* § 11.

The Arbitration Act contains procedures for notice and filing. *Id.* §§ 12-13. In 1988 Congress amended the Arbitration Act to provide for inapplicability of the act of state doctrine and authorization of certain appeals. *See id.* § 15.

67. *See id.* §§ 201-08.

68. New York Convention, *supra* note 6, art. II(1), 21 U.S.T. at 2519, T.I.A.S. No. 6997, at 3, 330 U.N.T.S. at 38. Article II(1) provides that

[e]ach 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. Article II(3) provides that

[t]he 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. art. II(3), 21 U.S.T. at 2519, T.I.A.S. No. 6997, at 3, 330 U.N.T.S. at 40.

69. *Id.* art. III, 21 U.S.T. at 2519, T.I.A.S. No. 6997, at 3, 330 U.N.T.S. at 40. Article III provides that

[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Id.

70. H.R. REP. No. 1181, 91st Cong., 1st Sess. 2 (1970). According to the congressional report, "[i]n the [Judiciary] Committee's view, the provisions of [the New York Convention] will serve the best interests of Americans doing business abroad by

States, the Convention governs both arbitration agreements and awards that arise out of a commercial legal relationship,⁷¹ including a transaction, contract, or agreement described in chapter 1 of the Arbitration Act.⁷² The New York Convention will apply to virtually all commercial contracts containing arbitration agreements between citizens of any of the contracting states of the Convention.⁷³ Chapter 1 of the Arbitration Act still applies to an action brought under the New York Convention to the extent that chapter 1 does not conflict with chapter 2 or the Convention.⁷⁴

Other than the provisions passed in 1925, the incorporation of the New York Convention, and the subsequent amendments, the Arbitration Act addresses few specific issues.⁷⁵ Indeed, the Act is not a complete statutory statement on arbitral procedure, but rather a statement of legislative policy to be applied by the federal courts.⁷⁶

encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts." *Id.*; see S. REP. NO. 702, 91st Cong., 1st Sess. 3 (1970).

71. 9 U.S.C. § 202 (1988).

72. *Id.* Section 202 provides that

[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. 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. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Id.

73. *Id.*; see Reichert, *Provisional Remedies in the Context of International Commercial Arbitration*, 3 *INT'L TAX & BUS. LAW.* 368, 377 (1986).

74. 9 U.S.C. § 208 (1988). Section 208 provides that "[c]hapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." *Id.*

75. See *id.* §§ 1-208. Unlike other arbitration statutes, the Arbitration Act, including the New York Convention, does not address interim relief, the right to object, grounds for challenge of arbitrators, arbitrator appointment procedure, arbitral tribunal jurisdiction, place of arbitration, language, statements of claim and defense, manner of proceedings, default by a party, experts, applicable law, or a party's right to counsel. Compare 9 U.S.C. §§ 1-208 with CAL. CIV. PROC. CODE §§ 1297.11-1297.432 (West Supp. 1990).

76. Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 *TEX. INT'L L.J.* 33, 50 (1984).

2. State International Arbitration Statutes

The importance of international arbitration is increasingly apparent today at the state level in the United States.⁷⁷ Several U.S. states recently passed their own arbitration statutes governing international disputes⁷⁸ or amended their intrastate arbitration statutes to provide for international arbitrations.⁷⁹ These new state laws governing international arbitrations are more elaborate than the Arbitration Act and attempt to address issues not already resolved by existing national or international legislation.⁸⁰

a. Legislative History

Florida was the first state to enact an international arbitration statute.⁸¹ The Florida International Arbitration Act was passed to modernize Florida's Arbitration Code and to create a legal climate hospitably disposed toward international arbitration.⁸² The legal accommodation of international arbitration was also one of the reasons for the passing of similar legislation in California,⁸³ Texas,⁸⁴ Hawaii,⁸⁵ and Georgia.⁸⁶

Proponents of the state laws governing international arbi-

77. 2A WORLD ARBITRATION REPORTER 2814 (1988).

78. See, e.g., CAL. CIV. PROC. CODE §§ 1297.11-1297.432 (West Supp. 1990); FLA. STAT. ANN. §§ 684.01-684.35 (West Supp. 1990); HAW. REV. STAT. §§ 658D-1 to 658D-9 (Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 249 (Vernon Supp. 1990).

79. See, e.g., GA. CODE ANN. §§ 9-9-30 to 9-9-43 (Supp. 1989).

80. Compare 9 U.S.C. §§ 1-208 (1988) with CAL. CIV. PROC. CODE §§ 1297.11-1297.432 (West Supp. 1990) and FLA. STAT. ANN. §§ 684.01-684.35 (West Supp. 1990); see 2A WORLD ARBITRATION REPORTER 2814 (1988).

81. Florida's statute became effective in 1986. FLA. STAT. ANN. §§ 684.01-684.35 (West Supp. 1990). The California, Georgia and Hawaii laws became effective in 1988. CAL. CIV. PROC. CODE § 1297.11 (West Supp. 1990); GA. CODE ANN. § 9-9-30 (Supp. 1989); HAW. REV. STAT. § 658D-1 (Supp. 1989). The Texas statute became effective in 1989. TEX. REV. CIV. STAT. ANN. art. 249-1 (Vernon Supp. 1990).

82. Florida Task Force on International Arbitration, Proposed Florida International Arbitration Act, Florida State Archives ser. 19, carton 1492, at 2 (Dec. 18, 1985) [hereinafter Florida Task Report].

83. Kolkey, Recommendation in Favor of UNCITRAL Model Arbitration Law, at 1 (statement delivered at Hearings on AB 2667, California Senate Judiciary Committee, Jan. 26, 1988) [hereinafter California Recommendation].

84. Hearings on Senate Bill 391, Texas Senate Jurisprudence Committee, Feb. 28, 1989 (statement of Mark P. Hoyt, representative of Texas State Bar Association) (unofficial transcription of audio recording) [hereinafter Texas Senate Hearing].

85. HAW. REV. STAT. § 658D-2(4) (Supp. 1989). Section 658D-2(4) declares that "the objective of encouraging the development of Hawaii as an international center for the resolution of international business, commercial, trade, and other disputes be

trations argued that a unique opportunity existed for their respective states' participation in the post-World War II growth in international arbitration.⁸⁷ Sponsors of the Florida International Arbitration Act suggested, for example, that Florida's geographic location and diverse population with varied linguistic skills made the state an attractive site for international arbitration.⁸⁸ A state law governing international arbitrations, moreover, would complement Florida's emergence as a regional center for international banking and commerce.⁸⁹ Legislators in California and Hawaii cited the opportunity to participate in the rapid expansion of international business, trade, and commerce among countries in the Pacific region as a reason for passing their respective international arbitration statutes.⁹⁰

The state laws governing international arbitrations were passed also to benefit citizens of the respective states. The California and Texas sponsors argued, for example, that the new laws would eliminate the need for state businesses to travel to the traditional international arbitration centers of Geneva, Paris, or London for resolution of their disputes.⁹¹

supported through the establishment of certain legal authorities as set forth in this chapter." *Id.*

86. GA. CODE ANN. § 9-9-30 (Supp. 1989). Section 9-9-30 provides that

[i]n order to encourage the use of arbitration in the resolution of conflicts arising out of international transactions effectuating the policy of the state to provide a conducive environment for international business and trade, this part supplements Part 1 of this article and shall be used concurrently with the provisions of Part 1 of this article whenever an arbitration is within the scope of this part.

Id.

87. See, e.g., Florida Task Report, *supra* note 82, at 2.

88. *Id.*

89. *Id.*

90. HAW. REV. STAT. § 658D-2(1) (Supp. 1989). Section 658D-2(1) provides that "[t]he legislature hereby finds and declares that: (1) The rapid expansion of international business, trade, and commerce among nations in the Pacific region provides important opportunities for the State of Hawaii to participate in such business, trade, and commerce." *Id.*; see California Recommendation, *supra* note 83, at 1. California cited competition with British Columbia, Vancouver, Hong Kong, Melbourne, and Sydney, all of which passed laws intended to attract international arbitrations. *Id.* at 2. Texas also sought to create a hospitable center for the conduct of international arbitration. Texas Senate Hearing, *supra* note 84 (statement of Mark P. Hoyt, representative of Texas State Bar Association).

91. Killea, Statement in Favor of A.B. No. 2667, at 1 (statement delivered at Hearings on AB 2667, California Senate Judiciary Committee, Jan. 26, 1988) [hereinafter California Statement]; see California Recommendation, *supra* note 83, at 2;

In the opinion of the drafters, the goal of attracting international arbitration could not have been achieved under the respective intrastate statutes.⁹² Florida legislators, for instance, did not design the Florida intrastate statute with international arbitration in mind.⁹³ The Florida International Arbitration Statute was passed, therefore, to assure international business enterprises that if they choose to submit to Florida law, the arbitration will be governed by a set of rules that facilitates, rather than impedes, the dispute resolution process.⁹⁴ One objective of the California legislators was to ease a foreign party's fear of such U.S. litigation practices as extensive discovery and the cross-examination of witnesses.⁹⁵

California and Texas both patterned their international arbitration statutes after the Model Law on International Commercial Arbitration drafted by the United Nations Commission on International Trade Law (the "UNCITRAL Model Law").⁹⁶ Legislators in California chose to adopt the UNCITRAL Model Law, rather than draft a different statute, to communicate instantly to practitioners that arbitration within the state would be held in accordance with internationally recognized procedures.⁹⁷ Moreover, as one of the legislators in Texas noted, adoption of the UNCITRAL Model Law would establish an accessible and certain legal system for parties not familiar with

Texas Senate Hearing, *supra* note 84 (statement of Mark P. Hoyt, representative of Texas State Bar Association).

92. See, e.g., Florida Task Report, *supra* note 82, at 2. According to the Florida Task Report, "[t]he present Florida Arbitration Code . . . is seriously deficient in the powers it confers upon the Florida courts to enforce international arbitral agreements and awards." *Id.*

93. *Id.* at 3. The Florida Arbitration Code does not confer on Florida courts the power to enforce either an agreement to arbitrate abroad or an agreement to arbitrate in the state under the law of some jurisdiction other than Florida. It also did not confer the power to enforce awards emanating from any such arbitration. *Id.* at 2.

94. *Id.* at 3.

95. California Recommendation, *supra* note 83, at 1.

96. Compare CAL. CIV. PROC. CODE §§ 1297.11-1297.432 and TEX. REV. CIV. STAT. ANN. art. 249 (Vernon Supp. 1990) with U.N. COMM'N ON INT'L TRADE LAW, LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, 40 U.N. GAOR Supp. (no. 17), Annex I (1985) reprinted in 1 WORLD ARBITRATION REPORTER 147 (1988); see California Statement, *supra* note 91, at 1; Texas Senate Hearings, *supra* note 84 (statement of Sen. Krier). The language and organization of the California and Texas statutes are identical. Compare CAL. CIV. PROC. CODE §§ 1297.11-1297.432 (West Supp. 1990) with TEX. REV. CIV. STAT. ANN. art. 249 (Vernon Supp. 1990).

97. California Recommendation, *supra* note 83, at 3.

U.S. law.⁹⁸ Florida, on the other hand, did not adopt the UNCITRAL Model Law language, but instead passed a different bill, portions of which Hawaii subsequently adopted.⁹⁹ The Georgia International Arbitration Act similarly does not incorporate the UNCITRAL Model Law, and, unlike the other state laws governing international arbitrations, does not preempt, but rather supplements, the Georgia intrastate statute.¹⁰⁰

b. Significant Provisions

Like the Arbitration Act, state laws governing international arbitrations address issues that fall into four general categories: scope of application, preliminary matters,¹⁰¹ intra-arbitration issues,¹⁰² and the award.¹⁰³ The state laws, however, also address issues that are particularly relevant to parties to an international arbitration, including the nature of an international dispute, jurisdiction, place of arbitration, and choice of law.¹⁰⁴ Many of these issues are treated similarly by each state;¹⁰⁵ others are not.¹⁰⁶ Some states are silent on issues that

98. Texas Senate Hearing, *supra* note 84 (statement of Sen. Krier).

99. Compare FLA. STAT. ANN. §§ 684.01-684.03 (West Supp. 1990) with HAW. REV. STAT. §§ 658D-1, 658D-3 to 658D-4 (Supp. 1989).

100. GA. CODE ANN. §§ 9-9-30 to 9-9-43 (Supp. 1989).

101. Preliminary matters include the effectiveness of the agreement to arbitrate, appointment and challenge of arbitrators, place of arbitration, and choice of law. See, e.g., CAL. CIV. PROC. CODE §§ 1297.71, 1297.81, 1297.111-1297.136, 1297.201, 1297.281 (West Supp. 1990).

102. Intra-arbitration issues include the extent of judicial intervention, stay of proceedings, interim relief, evidence, and witnesses. See, e.g., FLA. STAT. ANN. §§ 684.23, 684.22, 684.16, 684.15 (West Supp. 1990).

103. Award issues include settlement, form and content, and correction and interpretation. See, e.g., TEX. REV. CIV. STAT. ANN. arts. 249-30, 249-31, 249-33 (Vernon Supp. 1990).

104. See, e.g., CAL. CIV. PROC. CODE § 1297.11 (West Supp. 1990) (international status of agreement); GA. CODE ANN. § 9-9-34 (Supp. 1989) (jurisdiction); FLA. STAT. ANN. § 684.13 (West Supp. 1990) (place of arbitration); TEX. REV. CIV. STAT. ANN. art. 249-28 (Vernon Supp. 1990) (choice of law).

105. Compare CAL. CIV. PROC. CODE § 1297.91 (West Supp. 1990) with TEX. REV. CIV. STAT. ANN. art. 249-9 (Vernon Supp. 1990) (interim measures); compare CAL. CIV. PROC. CODE §§ 1297.111-1297.118 (West Supp. 1990) with TEX. REV. CIV. STAT. ANN. art. 249-11 (Vernon Supp. 1990) (appointment of arbitrators); compare FLA. STAT. ANN. § 684.02(2) (West Supp. 1990) with GA. CODE ANN. § 9-9-2(c) (Supp. 1989) (written agreement to arbitrate).

106. Compare GA. CODE ANN. § 9-9-31(b) (Supp. 1989) with FLA. STAT. ANN. § 684.03(1) (West Supp. 1990) and CAL. CIV. PROC. CODE § 1297.13 (West Supp. 1990) (applicability of statute); compare TEX. REV. CIV. STAT. ANN. art. 249-20(2) (Vernon Supp. 1990) with GA. CODE ANN. § 9-9-8(a) (Supp. 1989) (considerations of

others address.¹⁰⁷

Each state law governing international arbitrations requires a written agreement to arbitrate before the statute will apply.¹⁰⁸ The statutes, moreover, apply only if the agreement is of an international nature.¹⁰⁹ The states offer varying definitions of international. Florida and Hawaii, for instance, focus on the residence of one or more of the parties.¹¹⁰ California

arbitral tribunal in selecting place of arbitration); *compare* CAL. CIV. PROC. CODE § 1297.171 (West Supp. 1990) with FLA. STAT. ANN. § 684.16(1) (West Supp. 1990) (agreement by parties not to seek interim relief from tribunal).

107. *Compare* GA. CODE ANN. §§ 9-9-30 to 9-9-43 (Supp. 1989) with HAW. REV. STAT. § 658D-4(d) (Supp. 1989) and FLA. STAT. ANN. § 684.05 (West Supp. 1990) (location of arbitration); *compare* CAL. CIV. PROC. CODE § 1297.202 (West Supp. 1990) with HAW. REV. STAT. §§ 658D-1 to 658D-9 (Supp. 1989) (tribunal selection of place of arbitration upon failure of parties to agree); *compare* FLA. STAT. ANN. § 684.17 (West Supp. 1990) with HAW. REV. STAT. §§ 658D-1 to 658D-9 (Supp. 1989) (law applicable to substance of dispute).

108. *See* CAL. CIV. PROC. CODE § 1297.72 (West Supp. 1990); FLA. STAT. ANN. § 684.02(2) (West Supp. 1990); GA. CODE ANN. § 9-9-2(c) (Supp. 1989); HAW. REV. STAT. § 658D-4(b)(1) (Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 249-7(2) (Vernon Supp. 1990). The written agreement may take a variety of forms. Under the Hawaii statute, for instance, a "written undertaking to arbitrate" shall mean a writing in which a person undertakes to submit a dispute to arbitration, without regard to whether that undertaking is sufficient to sustain a valid and enforceable contract or is subject to defenses." HAW. REV. STAT. § 658D-5 (Supp. 1989). "A written undertaking may be part of a contract, may be a separate writing, and may be contained in correspondence, telegrams, telexes, or any other form of written communication." *Id.*; *see* CAL. CIV. PROC. CODE § 1297.71-1297.72 (West Supp. 1990); FLA. STAT. ANN. § 684.04 (West Supp. 1990); GA. CODE ANN. § 9-9-32 (Supp. 1989).

109. *See* CAL. CIV. PROC. CODE § 1297.11 (West Supp. 1990); FLA. STAT. ANN. § 684.03 (West Supp. 1990); GA. CODE ANN. § 9-9-31 (Supp. 1989); HAW. REV. STAT. § 658D-4 (Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 249-1(1) (Vernon Supp. 1990).

110. *See* FLA. STAT. ANN. § 684.03(1) (West Supp. 1990); HAW. REV. STAT. § 658D-4(a) (Supp. 1989). The Florida law provides as follows:

- (1) This chapter shall only apply to arbitration of disputes between:
 - (a) Two or more persons at least one of whom is a nonresident of the United States; or
 - (b) Two or more persons all of whom are residents of the United States if the dispute:
 1. Involves property located outside the United States;
 2. Relates to a contract or other agreement which envisages performance or enforcement in whole or in part outside the United States;
 3. Involves an investment outside the United States or the ownership, management, or operation of a business entity through which such an investment is effected, or any agreement pertaining to any interest in such an entity; or
 4. Bears some other relation to one or more foreign countries.

FLA. STAT. ANN. § 684.03(1) (West Supp. 1990). The Florida international arbitra-

and Texas, on the other hand, center on the parties' places of business.¹¹¹ Georgia combines these two approaches by briefly focusing on domicile as well as the dispute's relation to activity outside the United States.¹¹²

Even though the agreement may be of an international na-

tion act does not apply to disputes involving real property in Florida, unless the parties specifically provide to the contrary. *Id.* § 684.03(2)(a). Nor would it apply to disputes involving domestic relations or disputes of a political nature between two or more governments. *Id.* § 684.03(2)(b).

Section 658D-4(a) of the Hawaii statute provides as follows:

(a) 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 or performance in whole or in part outside the United States; or
 - (iii) Bears some other relation to one or more foreign countries.

HAW. REV. STAT. § 658D-4(a) (Supp. 1989).

111. *See* CAL. CIV. PROC. CODE § 1297.13 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-1(3) (Vernon Supp. 1990). Section 1297.13 of the California law provides that

[a]n arbitration . . . is international if any of the following applies:

- (a) The parties to an arbitration . . . agreement have, at the time of the conclusion of that 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:
 - (i) The place of arbitration . . . if determined in, or pursuant to, the arbitration . . . agreement.
 - (ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed.
 - (iii) 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 . . . agreement relates to commercial interests in more than one state.
- (d) The subject matter of the arbitration . . . agreement is otherwise related to commercial interests in more than one state.

CAL. CIV. PROC. CODE § 1297.13 (West Supp. 1990).

112. *See* GA. CODE ANN. § 9-9-31(b) (Supp. 1989). Section 9-9-31 of the Georgia law provides that

(b) [t]his 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.

ture, the California and Texas international arbitration statutes apply only if the place of arbitration is within the state.¹¹³ The Florida and Hawaii statutes, however, state that they are applicable within or without the state if the parties agree to be bound by Florida or Hawaii law or, absent such an agreement, if the relevant choice of law rules would apply Florida or Hawaii law.¹¹⁴ Georgia is silent as to whether the situs of arbitration must be in-state.¹¹⁵ The Georgia International Arbitration Act does provide, however, that selection of Georgia as the place of arbitration will not itself constitute selection of Georgia law as governing the arbitration proceedings.¹¹⁶

Under most of the statutes, the parties may select the place of arbitration.¹¹⁷ Where the parties do not agree, the arbitral tribunal may select the place of arbitration,¹¹⁸ except in Hawaii.¹¹⁹ Under the California, Texas, and Florida laws, the tribunal is to consider the circumstances of the case and the parties' convenience in making the selection.¹²⁰ Georgia provides, however, that the tribunal will select the place of arbitra-

113. See CAL. CIV. PROC. CODE § 1297.12 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-1(2) (Vernon Supp. 1990).

114. See FLA. STAT. ANN. § 684.05 (West Supp. 1990); HAW. REV. STAT. § 658D-4(d) (Supp. 1989). The Florida statute provides that

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

(1) The written undertaking to arbitrate expressly provides, or the parties otherwise agree, that the law of this state shall apply;

(2) In the absence of a choice of law provision applicable to the written undertaking to arbitrate, that undertaking forms part of a contract the interpretation of which is to be governed by the law of this state; or

(3) In any other case, the arbitral tribunal decides under applicable conflict of laws principles that the arbitration shall be conducted in accordance with the law of this state.

FLA. STAT. ANN. § 684.05 (West Supp. 1990).

115. See GA. CODE ANN. §§ 9-9-30 to 9-9-43 (Supp. 1989).

116. *Id.* § 9-9-36 (Supp. 1989). Section 9-9-36 provides that "[s]election of this state as the place of arbitration shall not in itself constitute selection of the procedural or substantive law of that place as the law governing the arbitration." *Id.*

117. See CAL. CIV. PROC. CODE § 1297.201 (West Supp. 1990); FLA. STAT. ANN. § 684.13(3) (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-20(1) (Vernon Supp. 1990). *But see* GA. CODE ANN. § 9-9-8 (Supp. 1989).

118. See CAL. CIV. PROC. CODE § 1297.202 (West Supp. 1990); FLA. STAT. ANN. § 684.13(3) (West Supp. 1990); GA. CODE ANN. § 9-9-8(a) (Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 249-20(2) (Vernon Supp. 1990).

119. HAW. REV. STAT. § 658D-1-658D-9 (Supp. 1989).

120. CAL. CIV. PROC. CODE § 1297.202 (West Supp. 1990); TEX. REV. CIV. STAT.

tion, even when the agreement designates a county in which arbitration hearings are held.¹²¹

Certain of the state laws governing international arbitrations also address the law applicable to the substance of the dispute. Florida, California, and Texas provide that the law agreed upon by the parties shall be applied.¹²² Failing such agreement, the tribunal is empowered in these states to select the law it determines appropriate.¹²³ Hawaii and Georgia, however, are silent on this issue.¹²⁴

ANN. art. 249-20(2) (Vernon Supp. 1990); FLA. STAT. ANN. § 684.13(3) (West Supp. 1990).

121. GA. CODE ANN. § 9-9-8(a) (Supp. 1989). Section 9-9-8(a) provides that [t]he arbitrators, in their discretion, shall appoint a time and place for the hearing notwithstanding the fact that the arbitration agreement designates the county in which the arbitration hearing is to be held and shall notify the parties in writing, personally or by registered or certified mail, not less than ten days before the hearing. The arbitrators may adjourn or postpone the hearing. The court, upon application of any party, may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

Id.

122. FLA. STAT. ANN. § 684.17 (West Supp. 1990); CAL. CIV. PROC. CODE § 1297.281 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-28(1) (Vernon Supp. 1990). Florida, for instance, provides that

[t]he arbitral tribunal shall decide the merits of the dispute before it according to the law or other decisional principles provided for in the written undertaking to arbitrate, including acting *ex aequo et bono* or as *amiable compositeurs*. In the absence of such stipulation, the tribunal shall decide the merits of the dispute according to the law, including equitable principles, which it determines should control. In making that determination, the tribunal shall be free to employ the conflict of laws principles which it deems most appropriate to the circumstances of the arbitration.

FLA. STAT. ANN. § 684.17 (West Supp. 1990).

123. CAL. CIV. PROC. CODE § 1297.283 (West Supp. 1990); FLA. STAT. ANN. § 684.17 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-28(3) (Vernon Supp. 1990). The California law provides that "[f]ailing any designation of the law . . . by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute." CAL. CIV. PROC. CODE § 1297.283 (West Supp. 1990). The Florida statute states that

[i]n the absence of such stipulation, the tribunal shall decide the merits of the dispute according to the law, including equitable principles, which it determines should control. In making that determination, the tribunal shall be free to employ the conflict of laws principles which it deems most appropriate to the circumstances of the arbitration.

FLA. STAT. ANN. § 684.17 (West Supp. 1990).

124. See HAW. REV. STAT. § 658D-1 to 658D-9 (Supp. 1989); GA. CODE ANN. § 9-9-30 to 9-9-43 (Supp. 1989). Georgia provides, moreover, that the selection of Georgia "as the place of arbitration shall not in itself constitute selection of the procedural or substantive law of that place as the law governing the arbitration." *Id.* § 9-9-36.

C. Interim Relief in International Arbitrations

Interim relief¹²⁵ is expedited relief for a brief term given by a court before final adjudication of a case on the merits.¹²⁶ It involves a balancing of needs and hardships, and an effort to preserve the status quo pending final determination of the controversy.¹²⁷ A court's decision to issue interim relief is not conclusive as to the merits of the case.¹²⁸ A court's only purpose is to preserve the state of affairs between litigants so that effective resolution on the merits can be made later.¹²⁹ Interim relief originally developed in common law countries and is widely available in litigation as an exercise of the court's equity powers.¹³⁰

Interim relief may take many forms, depending on the situation to be remedied.¹³¹ In the international arbitration context, two types of interim remedies are particularly useful: attachment and preliminary injunction.¹³² Attachment helps to obtain jurisdiction and provides security for a party.¹³³ It preserves assets in the jurisdiction so that an arbitral award may be enforced.¹³⁴ Whether attachment is available is significant, especially if other means of enforcing arbitral awards are unavailable.¹³⁵ Indeed, in some instances attachment may be in-

125. Interim relief is also referred to as provisional, interlocutory, or temporary relief. See BLACK'S LAW DICTIONARY 731 (5th ed. 1979).

126. E. SHOEN & W. TABB, REMEDIES 152 (1989).

127. D. DOBBS, REMEDIES 110 (1973).

128. *Id.*

129. *Id.*

130. See generally *id.* at 24-134 (discussing equity and equitable remedies).

131. Reichert, *supra* note 73, at 371. Interim remedies may take the form of arrest, attachment, garnishment, replevin, sequestration, injunction, stay, establishment of escrow accounts, posting of bonds of security, and the sale of perishable goods. *Id.*; see D. DOBBS, *supra* note 127, at 105-34.

132. Reichert, *supra* note 73, at 371-72; see M. DOMKE, *supra* note 1, at 406-08 (discussing injunctive relief); Note, *An Argument for Pre-Award Attachment in International Arbitration Under the New York Convention*, 18 CORNELL INT'L L. J. 99, 100 (1985) (discussing attachment) [hereinafter Note, *Argument for Pre-Award Attachment*]; Note, *Attachment Prior to the Enforcement of International Arbitral Awards Under the New York Convention*, 6 FORDHAM INT'L L. J. 556, 567-68 (1983) (discussing justifications for attachment) [hereinafter Note, *Attachment Prior to the New York Convention*].

133. Reichert, *supra* note 73, at 371.

134. *Id.* at 372.

135. *Id.* The New York Convention, for example, is not accepted in all countries. See *supra* note 6 (listing countries that are parties to New York Convention). Thus, to ensure enforcement of a potential award a party to a dispute will seek to

dispensable.¹³⁶

Similarly, the injunction is important in an arbitration.¹³⁷ A preliminary injunction can also preserve the rights of a party pending resolution of the controversy by requiring a party to take a specified measure.¹³⁸ Frequently, a party will seek an injunction to prevent another party from interfering with the subject matter of the dispute, from initiating an action in another jurisdiction, or from committing the act the suit seeks to restrain.¹³⁹

II. *THE AVAILABILITY OF INTERIM RELIEF UNDER U.S. INTERNATIONAL ARBITRATION LAW*

The availability of interim relief under the international arbitration law of the United States is inconsistent.¹⁴⁰ At the federal level, the silence of both the Arbitration Act and the New York Convention has led to contradictory court decisions on the issue.¹⁴¹ In addition, some state arbitration statutes provide for interim relief, while others are silent on the issue.¹⁴²

attach an adversary's assets pending outcome of the dispute. Reichert, *supra* note 73, at 372.

136. Van den Berg, *Commentary*, IX Y.B. COMM. ARB. 329, 365 (1984). Van den Berg states that

[p]ractice shows that by the time the award is rendered the assets of the other party may well have disappeared to some jurisdiction where the award cannot be enforced under the Convention or have been transferred to a third party. Pre-award attachment therefore is a provisional remedy which is indispensable for international commercial arbitration.

Id.

137. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 246 (1970). In *Boys Markets*, the Supreme Court took the position that "[t]he injunction . . . is [an] important . . . remedial device, particularly in the arbitration context." *Id.*

138. D. DOBBS, *supra* note 127, at 105.

139. Reichert, *supra* note 73, at 373; see D. DOBBS, *supra* note 127, at 105. For example, if a dispute arises over a contract for the purchase and sale of perishable goods, the seller may decide to leave the goods on the dock until the buyer has paid. It would then be necessary for the goods to be preserved pending resolution of the dispute to protect the rights of the buyer.

140. See *infra* notes 143-236 and accompanying text (discussing conflict under U.S. law concerning availability of interim relief).

141. See *infra* notes 164-211 and accompanying text (discussing arguments supporting and opposing availability of pre-award attachment under New York Convention).

142. See *infra* notes 212-36 and accompanying text (discussing availability of interim relief at state level).

A. Federal Level

The federal law governing international arbitrations in the United States is composed of the original provisions of the Arbitration Act passed by Congress in 1925, subsequently amended, and the New York Convention, as implemented by chapter 2 of the Arbitration Act.¹⁴³ Both the Arbitration Act and the New York Convention are silent on the issue of interim relief.¹⁴⁴ This silence has led to an inconsistency over whether federal law allows interim relief in international arbitration settings.¹⁴⁵ In cases that discuss the availability of interim relief under federal law, pre-award attachment is usually the type of interim relief sought.¹⁴⁶ Courts, moreover, often generalize from the specific remedy under consideration, such as pre-award attachment, to all forms of interim relief.¹⁴⁷ This discussion will be confined to pre-award attachment cases.

Other than admiralty cases,¹⁴⁸ there are few cases discussing the availability of pre-award attachment in an international arbitration governed by the Arbitration Act.¹⁴⁹ In *Murray Oil*

143. 9 U.S.C. §§ 1-208 (1988); see *supra* notes 33-43 and accompanying text (discussing general framework of U.S. international arbitration law).

144. See 9 U.S.C. §§ 1-208 (1988); New York Convention, *supra* note 6, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

145. See *infra* notes 164-205 and accompanying text (discussing court arguments supporting and opposing availability of pre-award attachment under New York Convention).

146. See, e.g., *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032 (3d Cir. 1974); *Murray Oil Prods. Co. v. Mitsui & Co.*, 146 F.2d 381 (2d Cir. 1944); *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728 (1982); see Reichert, *supra* note 73, at 384 (issue of provisional remedies is most typically manifested as request for pre-award attachment).

147. See, e.g., *Murray Oil*, 146 F.2d at 384; *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044, 1052 (N.D. Cal. 1977); *Cooper*, 57 N.Y.2d at 415, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732.

148. Section 8 of the Arbitration Act expressly provides that where a court is seized of "a cause of action otherwise justiciable in admiralty," a party may commence a proceeding "by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings." 9 U.S.C. § 8 (1988). Courts, therefore, have consistently granted attachment in admiralty arbitration cases. See, e.g., *Reefer Express Lines Pty. Ltd. v. Petmovar, S.A.*, 420 F. Supp. 16, 18 (S.D.N.Y. 1976); *Instituto Cubano De Estabilizacion Del Azucar v. T/V Firbranch*, 130 F. Supp. 170, 172 (S.D.N.Y. 1954); *The Belize*, 25 F. Supp. 663, 665 (S.D.N.Y. 1938), *appeal dismissed*, 101 F.2d 1005 (2d Cir. 1939).

149. See, e.g., *McCreary*, 501 F.2d at 1032; *Murray Oil*, 146 F.2d at 381; *Atlas Chartering Servs., Inc. v. World Trade Group, Inc.*, 453 F. Supp. at 861 (S.D.N.Y. 1978); *Uranex*, 451 F. Supp. at 1044; *Andros Compania Maritima, S.A. v. Andre & Cie.*, 430 F. Supp. 88 (S.D.N.Y. 1977); *Metropolitan World Tanker Corp. v. P.N.*

Products Co. v. Mitsui & Co.,¹⁵⁰ however, the court held that under the Arbitration Act a party is not deprived of the usual provisional remedies when it agrees to arbitration.¹⁵¹ In *Murray Oil*, the plaintiff brought an action for damages in state court against a Japanese corporation for failure to deliver a parcel of oil under a sales contract, which provided for arbitration.¹⁵² The defendant removed the action to the U.S. District Court for the Southern District of New York.¹⁵³ Although the district court referred the parties to arbitration, it did not vacate the plaintiff's attachment of the defendant's bank accounts in New York.¹⁵⁴ The U.S. Court of Appeals for the Second Circuit affirmed the lower court's decision, holding that interim relief should be available in arbitration, as in litigation, because "[a]rbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law."¹⁵⁵

The court in *Murray Oil* also found that forms of interim relief such as pre-award attachment are necessary in litigation to give parties full redress of their grievances.¹⁵⁶ The court concluded that pre-award attachment should be available in arbitration.¹⁵⁷ Moreover, the court could not conceive of any reason for granting pre-award attachment in maritime cases, which is permissible under the Arbitration Act, and denying such relief in commercial cases.¹⁵⁸ *Murray Oil* is thus clear in its holding that pre-award attachment is available in international arbitrations falling under chapter 1 of the Arbitration Act.¹⁵⁹

However, most U.S. litigation on pre-award attachment as a form of interim relief in international arbitrations involves

Pertambangan Minjakdangas Bumi Nasional (P.M. Pertamina), 427 F. Supp. 2 (S.D.N.Y. 1975); *Cooper*, 57 N.Y.2d at 408, 442 N.E.2d at 1239, 456 N.Y.S.2d at 728.

150. 146 F.2d 381 (2d Cir. 1944)(L. Hand, J.).

151. *Id.* at 384. The court stated that "an arbitration clause does not deprive a promisee of the usual provisional remedies, even when he agrees that the dispute is arbitrable." *Id.*

152. *Id.* at 382.

153. *Id.*

154. *Id.*

155. *Id.* at 383.

156. *Id.* at 384.

157. *Id.*

158. *Id.*

159. *Id.*; see Brower & Tupman, *Court-Ordered Provisional Measures Under the New York Convention*, 80 AM. J. INT'L L. 24, 26-27 (1986).

the New York Convention.¹⁶⁰ There are two main schools of thought on whether the New York Convention permits pre-award attachment as a form of interim relief in international arbitration situations.¹⁶¹ One school, which often relies on *Murray Oil*, argues that pre-award attachment is available under the New York Convention.¹⁶² The other school takes the opposite view, arguing that despite *Murray Oil's* interpretation of chapter 1 of the Arbitration Act, the New York Convention does not provide for pre-award attachment in international arbitration and, therefore, it can not be available.¹⁶³

1. Arguments Opposing Pre-Award Attachment Under the New York Convention

Several courts have held that pre-award attachment is not available in international arbitrations governed by the New York Convention.¹⁶⁴ There are a number of reasons for this view. First, courts have argued that if pre-award attachment is available from a court, a party may seize upon this opportunity to avoid or delay the agreed upon method of dispute resolution.¹⁶⁵ This rationale was employed in the leading case of *McCreary Tire & Rubber Co. v. CEAT S.p.A.*¹⁶⁶ In *McCreary*, a Pennsylvania corporation sued an Italian corporation ("CEAT") for breach of a distributorship contract that contained an arbitra-

160. See *infra* notes 164-205 and accompanying text (discussing cases in U.S. interpreting New York Convention).

161. See *infra* notes 164-211 and accompanying text (discussing arguments made by each school). There is, however, no conflict over whether attachment is allowed in admiralty actions falling under the New York Convention. *Matrenord, S.A. v. Zokor Int'l, Ltd.*, No. 84-1639, slip op. (N.D. Ill. Dec. 19, 1984) (LEXIS, Genfed library, Dist file); see *Atlas Chartering Servs., Inc. v. World Trade Group, Inc.*, 453 F. Supp. 861, 863 (S.D.N.Y. 1978); *Andros Compania Maritima, S.A. v. Andre & Cie.*, 430 F. Supp. 88, 92 (S.D.N.Y. 1977).

162. See *infra* notes 187-211 and accompanying text (discussing arguments supporting pre-award attachment under New York Convention).

163. See *infra* notes 164-86 and accompanying text (discussing arguments opposing pre-award attachment under New York Convention).

164. See, e.g., *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1038 (3d Cir. 1974); *Metropolitan World Tanker, Corp. v. P.N. Pertamina*, 427 F. Supp. 2, 4 (S.D.N.Y. 1975); *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 416, 442 N.E.2d 1239, 1243, 456 N.Y.S.2d 728, 732 (1982).

165. See *McCreary*, 501 F.2d at 1038; *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981).

166. 501 F.2d 1032 (3d Cir. 1974).

tion clause.¹⁶⁷ The McCreary Tire & Rubber Company initiated the suit in Pennsylvania by attaching CEAT's bank assets in the state.¹⁶⁸ The U.S. Court of Appeals for the Third Circuit reversed the lower court's decision, granted the defendant's motion to compel arbitration, and vacated the attachment.¹⁶⁹ The appeals court reasoned that the attachment violated the agreement of the parties to submit the underlying disputes to arbitration.¹⁷⁰ It held, moreover, that article II(3) of the New York Convention obliges a court to recognize and enforce an agreement to arbitrate.¹⁷¹ The court found that confirming the attachment in this instance would, thus, violate the New York Convention.¹⁷² Finally, *McCreary* did not accept the contention in *Murray Oil* that arbitration is merely another method of trial.¹⁷³

A second argument offered by courts for denying pre-award attachment under the New York Convention is that to allow pre-award attachment would nullify the desirability of international arbitration over litigation.¹⁷⁴ In *Cooper v. Ateliers de la Motobecane, S.A.*,¹⁷⁵ for instance, the New York Court of Appeals noted that arbitration is attractive to international parties because it avoids the risks of resorting to foreign courts and the vagaries of foreign laws.¹⁷⁶ These advantages, the court argued, would be defeated if attachment and judicial proceed-

167. *Id.* at 1033.

168. *Id.*

169. *Id.* at 1038.

170. *Id.*

171. *Id.* Article II(3) of the New York Convention provides that

[t]he 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.

New York Convention, *supra* note 6, 21 U.S.T. at 2519, T.I.A.S. No. 6997, at 3, 330 U.N.T.S. at 40.

172. *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1038 (3d Cir. 1974). The court did suggest, however, that foreign attachment may be available for the enforcement of an arbitration award. *Id.*

173. *Id.*; see *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981) (following *McCreary's* rationale that attachment is not permissible under New York Convention because it is contrary to parties' agreement to arbitrate).

174. See *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 411, 442 N.E.2d 1239, 1240, 456 N.Y.S.2d 728, 729 (1982).

175. 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728 (1982).

176. *Id.* at 411-12, 442 N.E.2d at 1240-41, 456 N.Y.S.2d at 729-30.

ings were permitted.¹⁷⁷ The essence of arbitration, argued the court, is resolution of disputes without judicial interference.¹⁷⁸ The plaintiff's attachment of a debt owed by a New York corporation to the defendant French corporation was thus improper because it required court interference with an agreement to arbitrate.¹⁷⁹ Similarly, in *Metropolitan World Tanker, Corp. v. P.N. Pertambangan Minyakdangas Bumi Nasional (P.M. Pertamina)*,¹⁸⁰ the U.S. District Court for the Southern District of New York stated that to allow resort to attachment before arbitration would place "unnecessary and counterproductive pressure on a situation that could otherwise be settled expeditiously and knowledgeably in an arbitration context."¹⁸¹

A third argument, similar to the second, is that the purpose of the New York Convention was to minimize the uncertainty of enforcing arbitration agreements between international parties.¹⁸² Thus, in *Cooper*, the court argued that allowing a party to petition a court for pre-award attachment will inject uncertainty into whether the arbitration agreement itself will be enforced.¹⁸³ To avoid this possibility, the court took the view that pre-arbitration judicial action should be restricted only to determining whether an arbitration should occur.¹⁸⁴

Cooper also advanced the fourth argument that allowing pre-award attachment would open the door for foreign courts to subject U.S. businesses to similar actions under the peculiar

177. *Id.* at 414, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731.

178. *Id.* at 416, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732.

179. *Id.*

180. 427 F. Supp. 2 (S.D.N.Y. 1975).

181. *Id.* at 4.

182. See *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 414, 442 N.E.2d 1239, 1242, 456 N.Y.S.2d 728, 731 (1982).

183. *Id.*

184. *Id.* at 417, 442 N.E.2d at 1243, 456 N.Y.S.2d at 732. The court stated that [t]he essence of arbitration is resolving disputes without the interference of the judicial process and its strictures. When international trade is involved, this essence is enhanced by the desire to avoid unfamiliar foreign law. The [New York] Convention has considered the problems and created a solution, one that does not contemplate significant judicial intervention until after an arbitral award is made. The purpose and policy of the [New York] Convention will be best carried out by restricting prearbitration judicial action to determining whether arbitration should be compelled.

Id. (emphasis in original).

procedures and laws of a foreign country.¹⁸⁵ Finally, courts also argue that parties to an international arbitration do not need pre-award attachment because they are free to include a security clause in their agreement to ensure compliance with an arbitral award.¹⁸⁶

2. Arguments Supporting Pre-Award Attachment Under the New York Convention

Courts have advanced several arguments supporting pre-award attachment under the New York Convention.¹⁸⁷ An initial argument is that pre-award attachment is not inconsistent with the Convention's requirement that a court refer parties to arbitration. This rationale was employed in *Carolina Power & Light Co. v. Uranex*.¹⁸⁸ In *Uranex*, the Carolina Power & Light Co. ("CP&L") contracted with Uranex, a French corporation, for the delivery of uranium concentrates.¹⁸⁹ The contract contained an arbitration clause.¹⁹⁰ A dramatic rise in the price of

185. See *id.* at 415-16, 442 N.E.2d at 1243, 457 N.Y.S.2d at 732.

186. *Id.* at 415, 442 N.E.2d at 1242, 456 N.Y.S.2d at 731. One commentator argued that because "international law derives much of its strength from customary observance, to ignore the [New York] Convention or regard it as ineffective in this area [ensuring uniformity] would erode its authority and impair its function." McDonnell, *supra* note 12, at 286. One student writer also argued that the New York Convention does not permit a court to order pre-award attachment. See, e.g., Note, *Pre-Award Attachment Under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 VA. J. INT'L L. 785, 801 (1981) [hereinafter Note, *Pre-Award Attachment Under the U.N. Convention*]. Another student writer argued that courts should be circumspect in granting interim relief under the Convention. Note, *Attachment Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 36 WASH. & LEE L. REV. 1135, 1144 (1979) [hereinafter Note, *Attachment Under the U. N. Convention*]. In addition to the reasons offered by the courts, a student commentator argued that pre-award attachment is unnecessary because the New York Convention ensures international recognition of arbitral decisions and allows for post-award attachment to satisfy arbitral awards. Note, *Pre-Award Attachment Under the U.N. Convention*, *supra*, at 802. Further, a student writer posits that pre-award attachment would violate the New York Convention's purpose of international uniformity because attachment procedures are not available in all of the signatory nations. Note, *Attachment Under the U.N. Convention*, *supra*, at 1141-42.

187. See *Atlas Chartering Servs., Inc. v. World Trade Group, Inc.*, 453 F. Supp. 861 (S.D.N.Y. 1978); *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044 (N.D. Cal. 1977); *Andros Compania Maritima, S.A. v. Andre & Cie.*, 430 F. Supp. 88 (S.D.N.Y. 1977).

188. 451 F. Supp. 1044, 1051-52 (N.D. Cal. 1977); see *E.A.S.T., Inc. of Stamford, Conn. v. M/V Alaia*, 876 F.2d 1168, 1173 (5th Cir. 1989).

189. *Uranex*, 451 F. Supp. at 1045.

190. *Id.*

uranium fuel led Uranex to request renegotiation of the contract.¹⁹¹ CP&L refused to discuss contract modification and sought arbitration pursuant to the contract.¹⁹² After Uranex refused arbitration, CP&L sued Uranex in district court for breach of contract and attached a debt owed to Uranex by a California corporation.¹⁹³ Uranex moved to vacate the attachment.¹⁹⁴ The U.S. District Court for the Northern District of California refused to follow the reasoning in *McCreary* and found that the New York Convention does not prohibit a court from ordering pre-award attachment.¹⁹⁵ The court argued that the term "refer" in article II(3) of the Convention was included because the Convention is to be applied in many different jurisdictions.¹⁹⁶

Courts also allow pre-award attachment under the New York Convention because attachment, like other interim remedies, has several advantages.¹⁹⁷ For instance, the court in *Uranex* noted that the availability of provisional remedies encourages arbitration agreements.¹⁹⁸ More specifically, courts have argued that attachment helps to make an arbitral award meaningful.¹⁹⁹ Thus, in *Andros Compania Maritima, S.A. v. Andre*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 1046.

195. *Id.* at 1052. Recent cases have also refused to follow *McCreary*. See, e.g., *E.A.S.T., Inc. of Stamford, Conn. v. M/V Alaia*, 876 F.2d 1168, 1173 (5th Cir. 1989); *Atwood Navigation, Inc. v. M/V Rizall*, No. 89-1221, 1989 U.S. Dist. Lexis 1828, at *4 (E.D. Pa. Feb. 24, 1989); *Irinkos Shipping Corp. v. Tosco Corp.*, No. 84-519-Z, slip op. (D. Mass. Apr. 6, 1984) (LEXIS, Genfed library, Dist file).

196. *Carolina Power & Light v. Uranex*, 451 F. Supp. 1044, 1051-52 (N.D. Cal. 1977). The court in *Uranex* also analogized the New York Convention's use of the term "refer" to the term "stay" included by Congress in section 3 of the Arbitration Act. *Id.* at 1051. Section 3, *Uranex* suggested, "envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate." *Id.* (quoting *Barge Anaconda v. American Sugar Refining Co.*, 322 U.S. 42, 44-45 (1944)).

197. *Uranex*, 451 F. Supp. at 1052 (citing *Boys Market Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970)); see *supra* notes 133-39 and accompanying text (discussing advantages of pre-award attachment and injunction).

198. *Uranex*, 451 F. Supp. at 451; see *Andros Compania Maritima, S.A. v. Andre & Cie.*, 430 F. Supp. 88, 94 (S.D.N.Y. 1977). The court in *Andros* wrote "[t]rue enough, an attachment may, in some manner and degree, further embarrass already unsettled relations between the parties; nonetheless, the arbitration process—by contrast to settlement negotiations, for example—hardly draws its strength from the parties' mutual good will." *Id.* at 92.

199. See, e.g., *Andros*, 430 F. Supp. at 94-95 (quoting M. DOMKE, THE LAW AND

& *Cie.*,²⁰⁰ a case involving attachment of a grain company's funds in a charter party dispute, the court argued that attachment of the assets was necessary to force a party to arbitrate and to make a subsequent arbitral award meaningful.²⁰¹

Largely because of the advantages offered by interim remedies such as attachment, courts have granted attachment on the additional ground that to do so does not bypass or delay the agreed-upon method of resolving disputes.²⁰² In *Atlas Chartering Services, Inc. v. World Trade Group, Inc.*,²⁰³ for example, the court viewed pre-award attachment as a security device in aid of arbitration, not as a detour around arbitration itself.²⁰⁴ The court in *Atlas* noted, moreover, that the prospect of interim relief does not interfere with, nor deter parties from entering into, domestic arbitration.²⁰⁵

Numerous commentators have also argued that attachment and other forms of interim relief should be available in arbitrations governed by the New York Convention.²⁰⁶ Commentators offer several arguments in addition to those advanced by the courts. The argument is often made that there

PRACTICE OF COMMERCIAL ARBITRATION § 26.02, at 266 (1968)). The *Andros* court noted that "attachment . . . is not without countervailing virtue." *Id.* at 92.

200. 430 F. Supp. 88 (S.D.N.Y. 1977).

201. *Id.* at 94-95; see *Cordoba Shipping Co., Ltd. v. Maro Shipping Ltd.*, 494 F. Supp. 183 (D. Conn. 1980) (refusing to vacate order of attachment to ensure existence of monies to satisfy possible judgment).

202. See *Atlas Chartering Services, Inc. v. World Trade Group, Inc.*, 453 F. Supp. 861, 863 (S.D.N.Y. 1978); *Andros*, 430 F. Supp. at 92.

203. 453 F. Supp. 861 (S.D.N.Y. 1978).

204. *Id.* at 863; see *Matrenord v. Zokor Int'l*, No. 84-1639, slip op. (N.D. Ill. Dec. 19, 1984) (LEXIS, Genfed library, Dist file).

205. *Atlas*, 453 F. Supp. at 863.

206. See Reichert, *supra* note 73, at 388, 389; Brower & Tupman, *supra* note 159, at 31-35; see also Note, *An Argument for Pre-Award Attachment*, *supra* note 132, at 124 (arguing that U.S. policy allowing attachment in domestic arbitration and section eight of arbitration act suggest that pre-award attachment is compatible with New York Convention); Note, *Attachment Prior to the New York Convention*, *supra* note 132, at 567-73 (justifying pre-award attachment on policy and comparative law grounds); Note, *The Use of Pre-judgment Attachments and Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British and American Approaches*, 50 U. PITT. L. REV. 667, 692-99 (1989) (arguing that interim relief should be available under New York Convention because U.S. should speak with one voice in international relations, defendant's rights will be protected, and international trade would be encouraged) [hereinafter Note, *The Use of Pre-judgment Attachments*]. Another commentator argued that the availability of attachment and other forms of interim relief should be determined on a case-by-case basis. See, e.g. McDonell, *supra* note 12, at 289.

exists an international consensus that attachment and other forms of interim relief are available in arbitrations.²⁰⁷ Indeed, there are cases in foreign courts that considered the New York Convention and provided for attachment in aid of arbitration.²⁰⁸ Finally, most of the international institutional arbitration rules expressly authorize a party to an arbitration to seek provisional remedies.²⁰⁹

207. See Brower & Tupman, *supra* note 159, at 34-35; Reichert, *supra* note 73, at 392; Burrows & Newman, *Attachment in Aid of Arbitration*, N.Y.L.J., Dec. 30, 1982, at 2, col. 5. Burrows and Newman note that,

[a] review of the laws of other countries with respect to attachment in aid of arbitration yields a startling result—the Court of Appeals' interpretation of the New York Convention is unique among signatory countries. In Australia, for example, the court will stay the action pursuant to Australia's implementing legislation and may "for the purpose of preserving the rights of the parties, make such interim or supplementary orders that it thinks fit in relation to any property that it is the subject of the matter [of the dispute]." In Israel, the courts may stay an action and provide extensive provisional relief:

"In the following matter, the court has, in respect of arbitration, the same powers to grant relief as it has in respect of an action brought before it:

...
 "(5) the attachment of property, the prevention of departure from Israel, security for the protection of property, the appointment of a receiver, a mandatory injunction and a prohibitive injunction."

Id. (quoting Arbitration (Foreign Awards and Agreements) Act 1974, Act. No. 136 of 1974, § 3 (Dec. 9, 1974) (Austl.), and Arbitration Law No. 46 of 5723-1968, § 16(a)(5) (Isr.)) (footnotes omitted); see also Note, *Attachment Prior to the New York Convention*, *supra* note 132, at 568-71 (stating that at least twenty-three countries that are signatory to the Convention permit attachments when parties agree to arbitrate).

208. Scherk Enters. Aktiengesellschaft v. Société des Grandes Marques, Judgment of May 12, 1977, Corte. cass., Italy, IV Y.B. COMM. ARB. 286, 288 (1982); *The Rena K*, [1978] 1 Lloyd's L.R. 545. Brower & Tupman state that "courts in other states parties to the Convention consider it self-evident that provisional measures are an exercise of the courts' essential enforcement function, and thus further the purposes of the Convention." Brower & Tupman, *supra* note 159, at 34. Burrows & Newman found that

[i]n Japan, Italy and West Germany, the courts will also permit attachments in aid of arbitration as security for enforcement of an arbitral award. In addition, some form of provisional relief . . . is provided by the courts of such countries as Austria, East Germany, Federal Republic of Nigeria, Kuwait, Sweden and Switzerland.

Burrows & Newman, *supra* note 207, at 2, col. 5.

209. Brower & Tupman, *supra* note 159, at 34. Article 26 of the UNCITRAL Arbitration Rules provides:

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the

Commentators set forth two additional arguments urging U.S. courts to hold that the New York Convention permits pre-award attachment and similar forms of interim relief. First, the

subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

UNCITRAL Arbitration Rules, *supra* note 20, art. 26, reprinted in II Y.B. COMM. ARB. at 167.

Article 8(5) of the ICC Rules provides that

[b]efore the file is transmitted to the Arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator.

ICC Rules, *supra* note 20, art. 8(5), reprinted in I Y.B. COMM. ARB. at 161.

Rule 39 of the ICSID Rules states:

1. At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

2. The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

3. The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

4. The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

ICSID Rules, *supra* note 20, reprinted in INTERNATIONAL COMMERCIAL ARBITRATION Doc. I.8.1.

Article 26 of the Inter-American Commercial Arbitration Rules provides that

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Inter-American Commercial Arbitration Rules, *supra* note 20, art. 26, reprinted in III Y.B. COMM. ARB. at 237.

Article 24 of the Permanent Court of Arbitration Rules provides that

word "refer" in article II(3) of the New York Convention means only that a court lacks jurisdiction to try the merits of the dispute when the arbitration agreement is involved; it does not preclude issuing a pre-award attachment.²¹⁰ Second, the New York Convention necessarily contemplates a combination of both judicial and arbitral proceedings to resolve international disputes.²¹¹

B. State Level

At present, New York is the only U.S. state that expressly provides for interim relief in its intrastate arbitration statute.²¹²

[t]he Tribunal, or in urgent cases, its President shall have the power to prescribe provisional or conservatory measures, if they consider that the circumstances so demand.

If one of the Parties cannot agree to the measures prescribed by the President, it may ask for a decision by the Tribunal. Pending such decision, the interim measures shall remain in force.

Permanent Court of Arbitration Rules, *supra* note 20, art. 24, reprinted in INTERNATIONAL COMMERCIAL ARBITRATION Doc. I.13.

210. A. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 131 (1981). The court therefore has jurisdiction

to appoint or replace arbitrators if the parties have not made arrangements in this respect in their agreement, to administer evidence beyond the powers of the arbitrator, to decide on the setting aside of an award . . . [and to order] provisional remedies, especially attachment for securing the sum or goods in dispute.

Id.

211. Brower & Tupman, *supra* note 159, at 33. Brower and Tupman state that [t]he courts are integrally involved, first, by referring the parties to arbitration, and later, in enforcing the arbitral award. Judicial and arbitral proceedings go hand in hand, complementing one another. The arbitral tribunal determines the merits of the case. The courts, backed by the power of the state, compel arbitration and enforce the award. . . . An attachment before the award is simply an exercise of the same enforcement function.

Id. at 33-34 (footnotes omitted); see Reichert, *supra* note 73, at 388-89 (availability of provisional remedies is necessary adjunct to arbitral process).

One student writer has suggested that courts in the United States should award pre-award attachment under the New York Convention because, first, the U.S. should speak with one voice while conducting foreign affairs and related matters, and second, such a holding would encourage international trade. Note, *The Use of Prejudgment Attachments*, *supra* note 206, at 692-99.

212. Compare N.Y. CIV. PRAC. L. & R. § 7502(c) (McKinney 1980 & Supp. 1990) (intrastate statute providing for interim relief) with CAL. CIV. PROC. CODE §§ 1280-1295 (West 1982 & Supp. 1990) and FLA. STAT. ANN. §§ 682.01-682.20 (West Supp. 1990) and GA. CODE ANN. §§ 9-9-1 to 9-9-133 (1982 & Supp. 1989) and HAW. REV. STAT. §§ 658-1 to 658-15 (1985 & Supp. 1989) and ILL. ANN. STAT. ch. 10, §§ 20-30, 101-123 (Smith-Hurd 1975 & Supp. 1989) and MASS. ANN. LAWS ch. 251, §§ 1-19 (Law. Co-op 1980 & Supp. 1990) and MICH. COMP. LAWS ANN. §§ 600.5001-600.5065

All other state intrastate arbitration statutes are silent on the issue.²¹³

The new state laws governing international arbitrations do address the issue of interim relief.²¹⁴ These statutes usually treat interim relief in three general categories: the type of relief, its source, and the ability of the parties to restrict its availability by agreement.²¹⁵ Under the Florida International Arbitration Act, parties may seek interim relief from the arbitral tribunal or from any court within or without the state.²¹⁶ The

(West 1987 & Supp. 1990) and N.J. STAT. ANN. §§ 2A:24-1 to 2A:24-11 (West 1987 & Supp. 1989) and PA. CONS. STAT. ANN. tit. 42, §§ 7301-7362 (Purdon 1982 & Supp. 1990) and VA. CODE ANN. §§ 8.01-577 to 8.01-581.20 (1984 & Supp. 1989) and WASH. REV. CODE ANN. §§ 7.04.010 to 7.04.220 (1961 & Supp. 1990) (all intrastate statutes not addressing issue of interim relief); see M. DOMKE, *supra* note 1, at 401 (1984 & Supp. 1989). Section 7502(c) of the New York statute provides, in relevant part, that

[t]he Supreme Court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a), may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.

N.Y. CIV. PRAC. L. & R. § 7502(c) (McKinney 1980 & Supp. 1990).

213. See, e.g., CAL. CIV. PROC. CODE §§ 1280-1295 (West 1982 & Supp. 1990); FLA. STAT. ANN. §§ 682.01-682.20 (West Supp. 1990); GA. CODE ANN. §§ 9-9-1 to 9-9-133 (1982 & Supp. 1989); HAW. REV. STAT. §§ 658-1 to 658-15 (1985 & Supp. 1989); ILL. ANN. STAT. ch. 10, §§ 20-30, 101-123 (Smith-Hurd 1975 & Supp. 1989); MASS. ANN. LAWS ch. 251, §§ 1-19 (Law. Co-op 1980 & Supp. 1990); MICH. COMP. LAWS ANN. §§ 600.5001-600.5065 (West 1987 & Supp. 1990); N.J. STAT. ANN. §§ 2A:24-1 to 2A:24-11 (West 1987 & Supp. 1989); N.Y. CIV. PRAC. L. & R. §§ 7501-7514 (McKinney 1980 & Supp. 1990); PA. CONS. STAT. ANN. tit. 42, §§ 7301-7362 (Purdon 1982 & Supp. 1990); VA. CODE ANN. §§ 8.01-577 to 8.01-581.20 (1984 & Supp. 1989); WASH. REV. CODE ANN. §§ 7.04.010 to 7.04.220 (1961 & Supp. 1990); see also M. DOMKE, *supra* note 1, at 401 (1984 & Supp. 1989).

214. See CAL. CIV. PROC. CODE §§ 1297.91-1297.95 (West Supp. 1990); FLA. STAT. ANN. § 684.16 (West Supp. 1990); GA. CODE ANN. § 9-9-35 (Supp. 1989); HAW. REV. STAT. § 658D-9(b) (Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 249-9 (Vernon Supp. 1990).

215. See, e.g., CAL. CIV. PROC. CODE §§ 1297.91-1297.95 (West Supp. 1990); FLA. STAT. ANN. § 684.16 (West Supp. 1990); GA. CODE ANN. § 9-9-35 (Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 249-9 (Vernon Supp. 1990).

216. FLA. STAT. ANN. § 684.16(1) (West Supp. 1990). Section 684.16 (1) provides that

[u]pon application by a party and after all other parties have been notified and given an opportunity to comment, unless notice proves impossible after efforts reasonably designed to give actual notice, the arbitral tribunal may grant such interim relief as it considers appropriate and, in so doing, may require the applicant to post bond or give other security. The power herein conferred upon the tribunal is without prejudice to the right of a

parties may agree, however, that they cannot seek interim relief from a court.²¹⁷ Florida law further provides that an award of interim relief by the tribunal is enforceable by any court.²¹⁸

Under the California and Texas laws governing international arbitrations, parties may seek any interim relief, including attachment and preliminary injunction,²¹⁹ from the tribunal²²⁰ or from the appropriate state court.²²¹ California and Texas also set out a procedure for enforcing the measures ordered by the arbitral tribunal.²²² In such cases, the court must

party under applicable law to request interim relief directly from any court, tribunal, or other governmental authority, within or without this state, and to do so without prior authorization of the arbitral tribunal. Unless otherwise provided in the written undertaking to arbitrate, such a request shall not be deemed incompatible with, nor a waiver of, that undertaking.

Id.

217. *Id.*

218. *Id.*

219. CAL. CIV. PROC. CODE § 1297.93 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-9(3) (Vernon Supp. 1990).

220. CAL. CIV. PROC. CODE § 1297.171 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-17 (Vernon Supp. 1990). Article 249-17 of the Texas law provides:

Sec. 1. Unless otherwise agreed by the parties, the arbitral tribunal, at the request of a party, may order a party to take an interim measure of protection that the arbitral tribunal considers necessary concerning the subject matter of the dispute.

Sec. 2. The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under Section 1 of this article.

TEX. REV. CIV. STAT. ANN. art. 249-17 (Vernon Supp. 1990).

221. CAL. CIV. PROC. CODE § 1297.91 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-9(1) (Vernon Supp. 1990). Section 1297.91 of the California statute provides that "[i]t is not incompatible with an arbitration agreement for a party to request from a superior court, before or during arbitral proceedings, an interim measure of protection, or for the court to grant such a measure." CAL. CIV. PROC. CODE § 1297.91 (West Supp. 1990).

222. See CAL. CIV. PROC. CODE §§ 1297.92-1297.95 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. arts. 249-9(2)-(5) (Vernon Supp. 1990). Section 1297.92 of the California statute provides that

[a]ny party to an arbitration governed by this title may request from the superior court enforcement of an award of an arbitral tribunal to take any interim measure of protection of an arbitral tribunal pursuant to Article 2 (commencing with Section 1297.171) of Chapter 4. Enforcement shall be granted pursuant to the law applicable to the granting of the type of interim relief requested.

CAL. CIV. PROC. CODE § 1297.92 (West Supp. 1990). Section 1297.93 provides that

[m]easures which the court may grant in connection with a pending arbitration include, but are not limited to:

(a) An order of attachment issued to assure that the award to which

give preclusive effect to any findings of fact by the tribunal and grant enforcement pursuant to the legal standards applicable to the particular relief awarded.²²³ Unlike Florida, the California and Texas international arbitration statutes provide that the parties may agree not to seek interim relief from the tribunal.²²⁴ They may not, however, restrict their right to seek such relief from a court.²²⁵ Georgia's law governing international arbitration is similar in its treatment of the type of interim relief and its source.²²⁶ Georgia, however, is silent on the parties' right to restrict the availability of interim relief by agreement.²²⁷

Hawaii's international arbitration statute does not address

applicant may be entitled is not rendered ineffectual by the dissipation of party assets.

(b) A preliminary injunction granted in order to protect trade secrets or to conserve goods which are the subject matter of the arbitral dispute.

Id. § 1297.93. Section 1297.94 provides that

[i]n considering a request for interim relief, the court shall give preclusive effect to any and all findings of fact of the arbitral tribunal including the probable validity of the claim which is the subject of the award for interim relief and which the arbitral tribunal has previously granted in the proceeding in question, provided that such interim award is consistent with public policy.

Id. § 1297.94. Section 1297.95 provides that

[w]here the arbitral tribunal has not ruled on an objection to its jurisdiction, the court shall not grant preclusive effect to the tribunal's findings until the court has made an independent finding as to the jurisdiction of the arbitral tribunal. If the court rules that the arbitral tribunal did not have jurisdiction, the application for interim measures of relief shall be denied. Such a ruling by the court that the arbitral tribunal lacks jurisdiction is not binding on the arbitral tribunal or subsequent judicial proceeding.

Id. § 1297.95.

223. CAL. CIV. PROC. CODE §§ 1297.94, 1297.92 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. arts. 249-9(4), 249-9(2) (Vernon Supp. 1990).

224. CAL. CIV. PROC. CODE § 1297.171 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-17(1) (Vernon Supp. 1990).

225. CAL. CIV. PROC. CODE § 1297.171 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-17(1) (Vernon Supp. 1990); *see* FLA. STAT. ANN. § 684.16 (West Supp. 1990).

226. GA. CODE ANN. § 9-9-35 (Supp. 1989). Section 9-9-35 provides that

[t]he arbitrators may grant such interim relief as they consider appropriate and, in so doing, may require a party to post bond or give other security. The power conferred in this Code section upon the arbitrators is without prejudice to the right of a party to request interim relief directly from any court, tribunal, or other governmental authority, inside or outside this state, and to do so without prior authorization of the arbitrators.

Id.

227. *See id.* §§ 9-9-30 to 9-9-43.

interim relief in terms of type, source, or the parties' right of restriction.²²⁸ Hawaii's international interim relief provision is aimed at ensuring a reasonable likelihood of enforcement of any ultimate reward.²²⁹ The means to achieving this goal are narrow. The type of relief is restricted to the posting of bonds or other security.²³⁰ Unlike the other states, moreover, Hawaii only allows interim relief if a party to the arbitration is from a country that is not a signatory to the New York Convention.²³¹ Furthermore, the party must consent to the jurisdiction of Hawaii courts.²³² Finally, the party must not have sufficient assets in the state.²³³

Thus, at the state level, only six states address the issue of interim relief in their laws governing international arbitrations.²³⁴ The vast majority of U.S. state laws are silent on the issue.²³⁵ Moreover, the six state laws that address interim relief do so in varying degrees.²³⁶

III. UNIFYING THE AVAILABILITY OF INTERIM RELIEF UNDER U.S. INTERNATIONAL ARBITRATION LAW

Both federal and state law are inconsistent concerning the availability of interim relief during an international arbitra-

228. See HAW. REV. STAT. § 658D-1 to 658D-9 (Supp. 1989).

229. *Id.* Section 658D-9(b) provides that

[w]here the parties specifically submit to jurisdiction of this chapter pursuant to section 658D-6, the center may require those parties residing in countries not signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as implemented by 9 U.S.C. § 201 et seq., and not having sufficient assets otherwise within the jurisdiction of the circuit courts of this State, to post such bonds or other security as the center shall deem appropriate to assure reasonable likelihood of enforcement of any award or other relief ultimately ordered by the center in the proceeding.

Id.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. See CAL. CIV. PROC. CODE §§ 1297.91-1297.95 (West Supp. 1990); FLA. STAT. ANN. § 684.16 (West Supp. 1990); GA. CODE ANN. § 9-9-35 (Supp. 1989); HAW. REV. STAT. § 658D-9(b) (Supp. 1989); N.Y. CIV. PRAC. L. & R. § 7502(c) (McKinney 1980 & Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-9 (Vernon Supp. 1990).

235. See M. DOMKE, *supra* note 1, at 401 (1984 & Supp. 1989).

236. See *supra* notes 215-36 and accompanying text (discussing treatment of interim relief by state laws governing international arbitration).

tion.²³⁷ Courts interpreting the federal law that implements the New York Convention have reached contradictory results on the issue of interim relief.²³⁸ Moreover, if parties to an international arbitration provide that the law of a state of the United States will govern their agreement,²³⁹ the state law will apply even if federal law is also applicable.²⁴⁰ Thus, even in a court that holds interim relief is not available at the federal level, interim relief may still be available if the state law chosen by the parties so provides.²⁴¹ However, not all state arbitration statutes, whether intrastate or international, address the issue of interim relief.²⁴² Interim relief, therefore, will be available in some international arbitrations governed by state law, and

237. See *supra* notes 143-236 and accompanying text (discussing conflict under U.S. law concerning availability of interim relief).

238. Compare *Murray Oil Prods. Co. v. Mitsui & Co.*, 146 F.2d 381, 384 (2d Cir. 1944) and *Atlas Chartering Services, Inc. v. World Trade Group, Inc.*, 453 F. Supp. 861, 864 (S.D.N.Y. 1978) and *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044, 1052 (N.D. Cal. 1977) and *Andros Compania Maritima, S.A. v. Andre & Cie.*, 430 F. Supp. 88, 95 (S.D.N.Y. 1977) (all allowing pre-award attachment under New York Convention) with *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1038 (3d Cir. 1974) and *Metropolitan World Tanker, Corp. v. P.N. Pertamina Minjardang Bumi Nasional (P.M. Pertamina)*, 427 F. Supp. 2, 5 (S.D.N.Y. 1975) and *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 416, 442 N.E.2d 1239, 1243, 456 N.Y.S.2d 728, 732 (1982) (all denying pre-award attachment under New York Convention).

239. See, e.g., *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 109 S. Ct. 1248, 1251 (to be reported at 489 U.S. 468) (1989) (parties in interstate commerce case provided that "law of the place where the Project is located," namely California, would govern agreement).

240. *Id.* at 1254. In *Volt*, the Supreme Court held that even where the Arbitration Act is fully applicable, it does not prevent application of state law. *Id.*

241. *Id.* at 1255-56. *Volt* held that state law was applicable to an arbitration agreement in interstate commerce, even though the state law provision at issue was inconsistent with the Arbitration Act's requirement that litigation be stayed pending arbitration. *Id.* The rationale employed by the Court was that arbitration is a matter of consent and it is the purpose of the Arbitration Act to enforce private agreements to arbitrate according to their terms. *Id.* at 1255.

242. Compare CAL. CIV. PROC. CODE §§ 1297.91-1297.95 (West Supp. 1990) and FLA. STAT. ANN. § 684.16 (West Supp. 1990) and GA. CODE ANN. § 9-9-35 (Supp. 1989) and HAW. REV. STAT. § 658D-9(b) (Supp. 1989) and N.Y. CIV. PROC. L. & R. § 7502(c) (McKinney 1980 & Supp. 1990) and TEX. REV. CIV. STAT. ANN. art. 249-9 (Vernon Supp. 1990)(all addressing interim relief) with ILL. ANN. STAT. ch. 10, §§ 20-30, 101-123 (Smith-Hurd 1975 & Supp. 1989) and MASS. ANN. LAWS ch. 251, §§ 1-19 (Law. Co-op 1980 & Supp. 1990) and MICH. COMP. LAWS ANN. §§ 600.5001-600.5065 (West 1987 & Supp. 1990) and N.J. STAT. ANN. §§ 2A:24-1 to 2A:24-11 (West 1987 & Supp. 1989) and PA. CONS. STAT. ANN. tit. 42, §§ 7301-7362 (Purdon 1982 & Supp. 1990) and VA. CODE ANN. §§ 8.01-577 to 8.01-581.20 (1984 & Supp. 1989) and WASH. REV. CODE ANN. §§ 7.04.010 to 7.04.220 (1961 & Supp. 1990)(all not address-

in others it will not.²⁴³ Given this situation, interim relief should be expressly available at each level of international arbitration law in the United States.

Commentators have noted that in the majority of countries that are party to the New York Convention, interim relief may be ordered by a court during the course of an international arbitration.²⁴⁴ Many of these countries are trading partners of the United States.²⁴⁵ Indeed, each of the top six trading partners of the United States for 1989,²⁴⁶ which are also party to the Convention,²⁴⁷ permit a court to award interim relief.²⁴⁸ There thus appears to be a consensus among the many

ing interim relief); see *supra* notes 215-36 and accompanying text (discussing state laws addressing interim relief).

243. Parties who agree to arbitrate are free to provide for the availability of interim relief in their agreement. McDonell, *supra* note 12, at 301. If they do, interim relief may still be available even if the chosen state law does not provide for interim relief. This is so because arbitration is a matter of consent. *Voll*, 109 S. Ct. at 1255. However, parties often do not take advantage of the opportunity to control the availability of interim relief. *Id.* An agreement to arbitrate often takes the form of a short clause inserted in the underlying commercial contract. *Id.*; see Brower & Tupman, *supra* note 154, at 32 ("as a practical matter [parties] frequently are able to agree only on choice of arbitral regime, and perhaps a situs of arbitration and a choice of law"). The problem discussed here will, thus, usually arise if the parties employ an "ad hoc" arbitration agreement and do not consider the issue of interim relief.

244. Van den Berg, *Commentary*, XIV Y.B. COMM. ARB. at 570-71 (1989); see A. VAN DEN BERG, *supra* note 210, at 143; Burrows & Newman, *supra* note 207, at 2, col. 5. Van den Berg states that

[t]here also seems to be no doubt as to the possibility of a pre-award attachment, which is an attachment before or during the arbitration, in order to secure the subject matter in dispute or the payment under the award if rendered in favour of the party who applied for the attachment. In virtually all countries attachment, like other provisional remedies involving coercion, can be ordered by a court only.

Van den Berg, *supra*, at 570-71.

245. Compare *supra* note 6 (listing countries that are party to New York Convention) with Tucker, *U.S. World Trade Outlook*, BUSINESS AMERICA, Apr. 23, 1990, at 5 (ranking top trading partners of United States). The trading partners of the United States include countries to which the United States exports merchandise as well as countries from which the United States imports merchandise. *Id.* at 5.

246. The top six countries with which the United States both exported and imported goods in 1989 are: Canada, Japan, Mexico, the United Kingdom, West Germany, and South Korea. Tucker, *supra* note 245, at 5.

247. Compare *supra* note 246 (listing top six trading partners of United States for 1989) with *supra* note 6 (listing countries that are party to New York Convention).

248. See Commercial Arbitration Act, CAN. REV. STAT., ch. 22, art. 9 (Can.), reprinted in 2 WORLD ARBITRATION REPORTER 1155 (1987-1988); Minji Soshōhō, book IV, -ch. 4 (Japan); CODIGO FEDERAL DE PROCEDIMIENTOS CIVILES, tit. VIII, art. 634 (Mex.), reprinted in 2A WORLD ARBITRATION REPORTER 2065 (1987-1988); Arbitration

countries that are party to the New York Convention that interim relief should be available from a court during the course of an international arbitration. More importantly, all of the countries with which the United States has the most significant trade contacts provide for such relief.

In the United States, however, several courts have held that interim relief is unavailable under the federal law implementing the New York Convention.²⁴⁹ Foreign businesses, therefore, cannot be confident that interim relief will be available to them if they choose to arbitrate in the United States. This lack of confidence increases the risks of entering into a business transaction.²⁵⁰ When risks increase, businesses either refuse to enter into the transaction or seek increased compensation.²⁵¹ The inconsistency of U.S. law on the issue of interim relief in international arbitrations, therefore, may negatively affect the foreign trade relations of U.S. businesses.

Interim relief, moreover, is a necessary adjunct to the international arbitration process. Indeed, in the practice of international arbitration, interim relief is often indispensable.²⁵² Without an opportunity to obtain interim relief, a system of arbitration will not be effective under all circumstances.²⁵³ Attachment, for instance, may be necessary in the case of mova-

Act, 1950, § 12(h) (U.K.), *reprinted in* 2A *WORLD ARBITRATION REPORTER* 2707 (1987-1988); *ZIVILPROZESSORDNUNG* § 1036 (W. Ger.), *reprinted in* 2 *WORLD ARBITRATION REPORTER* 1572 (1987-1988); Arbitration Legislation, art. 9 (Korea), *reprinted in* 2A *WORLD ARBITRATION REPORTER* 2000 (1987-1988).

249. *See, e.g.*, *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1038 (3d Cir. 1974); *Metropolitan World Tanker, Corp. v. P.N. Pertamina Minjakdangas Bumi Nasional (P.M. Pertamina)*, 427 F. Supp. 2, 5 (S.D.N.Y. 1975); *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 416, 442 N.E.2d 1239, 1243, 456 N.Y.S.2d 728, 732 (1982); *see also supra* notes 164-86 and accompanying text (discussing arguments of courts holding interim relief unavailable under New York Convention).

250. Holtzmann, *Commentary*, in 60 *YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE* 361, 362 (1984). Holtzmann states that "[a]rbitration without a reasonable certainty of legal enforcement of awards would be a waste of time. If businessmen are not reasonably sure of enforcement of foreign arbitral awards, there will be little or no arbitration." *Id.*

251. *Id.*

252. *See van den Berg, supra* note 136, at 365.

253. Gaja, *Introduction*, *INTERNATIONAL COMMERCIAL ARBITRATION I.B.1* (Binder 1) (text accompanying n.40A) (G. Gaja ed. 1989). Gaja notes that "[i]f the [New York] Convention did not allow the courts to grant any provisional remedy in the presence of an arbitration agreement covered by the Convention, the arbitral award might be prevented from reaching any practical effect." *Id.*

ble assets or assets that can be transferred electronically to a foreign country beyond the jurisdiction of the arbitration.²⁵⁴ If the assets are moved, a subsequent arbitral award would be meaningless because no assets could be attached to enforce the award.²⁵⁵ Furthermore, an injunction may be necessary to preserve the subject matter of the dispute.²⁵⁶ An injunction may also be needed to prevent an uncooperative party from removing the subject matter, from suing in another jurisdiction, or from committing the act at issue in the dispute.²⁵⁷

Courts denying interim relief in the international arbitration context have argued that to permit such interim relief would allow a party to an arbitration agreement to avoid or delay the agreed upon method of dispute resolution.²⁵⁸ However, the purpose of interim relief is to preserve the status quo pending ultimate resolution on the merits.²⁵⁹ Thus, when a party seeks interim relief from a court, it is not asking the court to resolve the dispute. Rather, the party is asking the court to allow the dispute to be resolved as efficiently and equitably as possible through the agreed upon method of dispute resolution.

Some courts also argue that if interim relief is permitted from a court, the advantages of international arbitration would be nullified because parties would be subject to the uncertainties of foreign courts and laws.²⁶⁰ Referral of parties to arbitration, therefore, avoids the vagaries of foreign laws. However, if interim relief is unavailable from a court, the arbitration itself will be ineffective in many instances.²⁶¹ Therefore, parties will be reluctant to enter into arbitration agreements, and will have no alternative but to resort to the courts for resolution of their disputes.

254. Reichert, *supra* note 73, at 372.

255. *Id.*

256. *Id.* at 373. This would seem to be the case especially if perishable goods are involved.

257. *Id.*

258. See, e.g., *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1038 (3d Cir. 1974); *Metropolitan World Tanker, Corp. v. P.N. Pertamina Minjakdan-gas Bumi Nasional (P.M. Pertamina)*, 427 F. Supp. 2, 4 (S.D.N.Y. 1975).

259. D. DOBBS, *supra* note 127, at 110.

260. See, e.g., *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 414, 442 N.E.2d 1239, 1242, 456 N.Y.S.2d 728, 731 (1982).

261. See *supra* notes 132-39 and accompanying text (discussing importance of interim relief in international arbitration context).

In addition to these general reasons, there are specific reasons for making interim relief available at both the federal and state levels of international arbitration law in the United States.²⁶²

A. *Federal Level*

Federal law governing international arbitration should expressly provide for interim relief in the context of an international arbitration. First, Congress designed the Arbitration Act to validate arbitration as an effective alternative means of dispute resolution and to protect a party's contractual rights.²⁶³ If interim relief is unavailable, many parties entering into agreements to arbitrate will not obtain full and proper redress of their grievances.²⁶⁴ For instance, the subject matter of the dispute may be interfered with or an award will be meaningless because the opponent may have no assets in the jurisdiction.²⁶⁵ Many arbitrations, therefore, will be ineffective and the purpose behind the Arbitration Act will be undermined.

Second, Congress implemented the New York Convention because it believed the Convention would best serve the interests of U.S. business.²⁶⁶ The difficulty in obtaining interim relief pending resolution of an arbitration is one reason why many parties are reluctant to arbitrate disputes.²⁶⁷ This is so because business is usually attracted to uniformity and predictability.²⁶⁸ As long as courts in the United States remain split

262. See *infra* notes 263-80 and accompanying text (discussing reasons for amending federal and state legislation to provide for interim relief in international arbitration situations).

263. HOUSE REPORT, *supra* note 33, at 1-2.

264. See *supra* notes 132-39 and accompanying text (discussing importance of interim relief in international arbitration context).

265. See *supra* notes 134 & 139 and accompanying text (discussing how interim relief in international arbitration context protects subject matter of dispute and ensures meaningfulness of subsequent award).

266. See *supra* note 70 (quoting House Report recommending implementation of New York Convention).

267. Van den Berg, *supra* note 136, at 366. Van den Berg argues, "[t]he unavailability of pre-award attachment may deter parties from agreeing to international arbitration. . . . The question [of interim relief] has caused concern inside and outside the United States as it may seriously set back the achievement of the courts in the United States of favouring international arbitration." *Id.*

268. Weiss & White, *Of Econometrics and Indeterminacy: A Study of Investors' Reaction to Changes in Corporate Law*, 75 CALIF. L. REV. 551, 566 n.60 (1987). Predictability is a factor that makes a state attractive to corporate counsel. *Id.*

on the issue of whether interim relief is available under federal law, some foreign businesses will be discouraged by the lack of a uniform standard under which to arbitrate their disputes in the United States. Some U.S. businesses, thus, will be forced to arbitrate their disputes in foreign countries, which may not be in their best interest. Moreover, if the United States becomes the only country signatory to the New York Convention in which pre-award attachment is unavailable, foreigners will be able to attach the property of U.S. businesses abroad, but U.S. businesses will not be able to attach foreign property in the United States.²⁶⁹ U.S. businesses would in that case be at a disadvantage. Thus, a provision providing for the availability of interim relief under federal law would further a goal expressed by the United States when it ratified the New York Convention.

Interim relief should, therefore, be expressly available at the federal level of international arbitration law in the United States. The most effective way to achieve this goal would be congressional amendment of the Arbitration Act. A congressional amendment would bring the United States into immediate and unequivocal accord with international consensus on the issue. Moreover, an amendment will end the twenty-year debate on this issue that began with U.S. ratification of the New York Convention and that the U.S. Supreme Court has unfortunately not yet resolved.

B. State Level

There are also reasons why interim relief should be uniformly available under the arbitration laws of every state in the United States. First, there is a strong U.S. policy discouraging forum shopping.²⁷⁰ Forum shopping occurs when a party attempts to try an action in the particular jurisdiction where it

269. Burrows & Newman, *supra* note 207, at 2, col. 5.

270. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 73-75 (1938) (overruling *Swift v. Tyson*, 16 U.S. (Pet.) 1 (1842), in part because *Swift* led to practice of forum shopping); see *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). The Court in *Southland* stated that "[w]e are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." *Id.*

believes the most favorable judgment or verdict will result.²⁷¹ When a party attempts to seek out a forum for the sole purpose of availing itself of a forum's rule, as the U.S. Supreme Court has said, "injustice and confusion"²⁷² results. The U.S. Supreme Court has also recognized that the availability or nonavailability of interim relief in the arbitration context leads to forum shopping.²⁷³ The current status of arbitration law at the state level in the United States undermines the policy discouraging forum shopping. Interim relief is expressly available in some states and not in others.²⁷⁴ Parties to an international arbitration, therefore, may survey the laws of fifty states, the District of Columbia, and Puerto Rico to determine, and argue for the selection of, the state law regarding interim relief that is most advantageous to them.

Second, it is in the best interest of every state in the United States to attract international business and to eliminate the need for its citizens to travel abroad to traditional centers of international arbitration. According to a sponsor of the Texas law governing international arbitration, a state will attract business through enactment of readily accessible laws that deal with the special problems of international arbitration and are familiar to foreign parties.²⁷⁵ The ability to obtain interim relief from a court mitigates many of the problems associated with international arbitration such as enforcing an arbitral award and obtaining jurisdiction over a party.²⁷⁶ Foreign businesses will be attracted to a state where it is clear that these types of problems can be avoided through the familiar process of obtaining interim relief from a court. Moreover, providing for such interim relief would make a state a more

271. BLACK'S LAW DICTIONARY 590 (5th ed. 1979).

272. *Erie*, 304 U.S. at 77.

273. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 246 (1970). The Supreme Court stated that "[t]he injunction . . . is so important a remedial device, particularly in the arbitration context, that its availability or nonavailability in various courts will not only produce rampant forum shopping and maneuvering from one court to another but will also greatly frustrate any relative uniformity in the enforcement of arbitration agreements." *Id.*

274. See *supra* notes 212-36 and accompanying text (discussing availability of interim relief under state law in United States).

275. Texas Senate Hearing, *supra* note 84 (statement of Mark P. Hoyt, representative of Texas State Bar Association).

276. See *supra* notes 132-39 and accompanying text (discussing role of interim relief in international arbitration context).

convenient location for U.S. businesses to conduct arbitration.²⁷⁷ U.S. businesses would no longer have to travel to a distant place to conduct arbitration and risk a foreign court's attachment of their assets, which is permissible in a majority of the countries that are party to the New York Convention.²⁷⁸

Finally, article XI(b) of the New York Convention requires a federal government, such as the United States, to urge its constituent states to take any legislative action necessary to come within the Convention.²⁷⁹ Thus, the federal government should impress upon the states the need to provide for interim relief in international arbitration settings, especially because most countries that are party to the Convention do provide for such relief.²⁸⁰

Interim relief should, therefore, be expressly available to international parties under the arbitration laws of every state in the United States. The most feasible means to this end is amendment of state arbitration laws by the respective state legislatures throughout the United States. Such an amendment would be in the best interest of each state as well as the international community.

277. California Recommendation, *supra* note 83, at 10.

278. *Id.*; see *supra* note 248 (listing countries that provide for interim relief).

279. New York Convention, *supra* note 6, 21 U.S.T. at 2521, T.I.A.S. No. 6997, at 5-6, 330 U.N.T.S. at 46. Article XI provides that

[i]n the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Id.

280. See *supra* note 248 (listing several countries that provide for interim relief and are parties to New York Convention).

CONCLUSION

International arbitration is free-form. Parties may tailor their arbitration agreements in any way they deem appropriate or, as more frequently occurs, in a manner on which they can agree. There are numerous international and domestic institutions that assist parties in the formation of their arbitration agreement. However, an international arbitration agreement is meaningless unless laws exist that give effect to such agreements. These laws must be uniform. Otherwise, the free-form nature of international arbitration will be given different effect in different jurisdictions.

Currently, the international arbitration law of the United States is not uniform on the issue of interim relief nor is it in accord with international consensus. It is, therefore, in the interest of both the international community and the United States for Congress and the various state legislatures to amend the international arbitration laws of the United States to provide explicitly for the availability of interim relief from a court.

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