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Trends in State Legislation Governing International Arbitrations

Cover Page Footnote
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Trends in State Legislation Governing International Arbitrations

George K. Walker*

I. Introduction

Nine states have enacted statutes governing arbitration with an international context during the last decade. Florida began the trend in 1986, and most recently North Carolina and Oregon have followed suit. Other states, such as Michigan and New Mexico, have

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1 Throughout this article “state” refers to one of the 50 states of the United States, while “State” refers to countries, in the sense of nation-state.

the concept under study.

During the same ten years, Congress has amended the Federal Arbitration Act (FAA) to permit the act of state defense and has added legislation to implement the Inter-American (Panama) Arbitration Convention. While the United States Supreme Court has praised expansively the use of international arbitration, the Court has also underscored the place of state statutes in disputes otherwise covered by the FAA. Additionally, the arbitration of commercial disputes according to international principles has received increased emphasis. For example, the 1979 Algiers Accords, which resolved the Iran Hostage Crisis, provided for arbitration of U.S. claimants' disputes before three-member tribunals in The Hague.

The homogenization of these seemingly disparate strands of ar-

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arbitration law can be illustrated by the influence that the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law has had on state international arbitration statutes and on institutional rules chosen for arbitration under the FAA or other federal legislation where the parties have chosen institutional rules close in terms to the Rules. An additional illustration is provided by the adoption of UNCITRAL's Arbitration Rules (1976) by the Iran-U.S. Arbitral Tribunal. Alongside this developing harmony within which the state acts have appeared, however, the question

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arises as to this legislation’s place in an international arbitration arena dominated by national norms, such as treaty terms, the U.S. Code, or perhaps federal common law. Some commentators have argued that federal law should apply exclusively to international arbitrations. Accordingly, they contend that the solution is revising federal legislation, perhaps along the lines of the 1985 UNCITRAL Model Law, in addition to applying federal common law for the interstices.13

This Article’s thesis is that while international agreements to which the United States is a party, federal statutes, and federal common law necessarily trump state law,14 where applicable, there is an appropriate place for the state acts. Particularly, this is the current situation since Congress has not yet revised federal statutes governing arbitration. Even where federal law does apply, the state acts may supply norms if adopted as rules. The state acts may play an interstitial role in a transaction otherwise governed by federal law. Even if federal law controls, the state acts may be factors in inform-
ing the policy for the choice of federal law. In any future amendments of the federal arbitration statutes, Congress may choose to incorporate state law by reference.\(^5\)

This Article begins with a survey of the state international arbitration acts in Part II. Part III analyzes international agreements and federal law applicable to transnational arbitrations and examines the place of the state acts in the federal law context. Projections for the future are suggested in Part IV.

II. The State International Arbitration Acts

In terms of their individual structure and comprehensiveness, the state acts fall into three groups: (1) legislation supplementary to the individual state's basic arbitration statutes,\(^6\) which usually follow the Uniform Arbitration Act (UAA);\(^7\) (2) self-contained legislation largely following the UNCITRAL Model Law;\(^8\) and (3) self-contained legislation not generally following the UNCITRAL Model Law.\(^9\) Nearly all state statutes show the influence of institutional arbitration rules, and all the self-contained versions have provisions similar to the UAA. Some legislation includes provisions for additional alternative dispute resolution methods,\(^20\) a subject peripheral to this article.

A. Policy, Scope and Definitions

In Volt Information Services, Inc. v. Board of Trustees, the U. S.


Supreme Court upheld the application of state arbitral procedures in a FAA-covered transaction where there was no controlling FAA provision.\textsuperscript{21} Perhaps attempting to take advantage of the policy thrust of \textit{Volt}, several state legislatures have enacted international arbitration statutes with policy statements. North Carolina's statute has a typical provision:

It is the policy of the State of North Carolina to promote and facilitate international trade and commerce, and to provide a forum for the resolution of disputes that may arise from participation therein. Pursuant to this policy, the purpose of this Article is to encourage the use of arbitration as a means of resolving such disputes, to provide rules for the conduct of arbitration proceedings, and to assure access to the courts of this State for legal proceedings ancillary to such arbitration.\textsuperscript{22}

Aside from stating that the UAA should be construed to effectuate its general purpose of uniformity among states enacting it, the UAA has no statement of policy.\textsuperscript{23} However, decisional law has frequently articulated a policy in favor of general arbitration.\textsuperscript{24} The result is that among those states that either lack such a policy statement or that link their international arbitration acts to their basic arbitration statutes, there is no stated policy for the legislation that might influence the choice of law in a federal-state balance.\textsuperscript{25}

Article 1 of the UNCITRAL Model Law provides a statement of those transactions normally covered by the legislation:

1. This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.
2. The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.
3. An arbitration is international if:
   a. the parties to an arbitration agreement have, at the time


\textsuperscript{25} See infra notes 137-72 and accompanying text.
of the conclusion of that agreement, their places of business in different States; or
(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 or the place with which the subject-matter of the dispute is most closely connected; or
(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purpose of paragraph (3) of this article:
   (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
   (b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

An asterisk footnote in paragraph (1) above elaborates on the definition of “commercial”:

** The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing, banking, insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.26

The states following the Model Law track this format, with all but Connecticut elevating the definition of “commercial” to the body of the statutes and adding other examples. The state acts also conform the Model Law to the definitional problem of “state of the United States” versus “States” in the sense of “nation-states”; Connecticut and Oregon refer to “countries” while North Carolina substitutes “nations.” The California and Texas versions boilerplate the Model Law but add a definition that “the states of the United States, including the District of Columbia, shall be considered ‘one state.’” In these states, this wording leaves open to conjecture the status of Puerto Rico, the Virgin Islands, and other possessions of the United States. Although the Model Law refers to the residence of a party if the party has no place of business, the states require a more significant tie to a nation; habitual residence in all cases except North Car-

26 UNCITRAL Model Law, art. 1, supra note 8, at 1302-03.
olina, which stipulates domicile. The states' exclusion provisions are similar to exceptions in the Model Law, although North Carolina would allow contracting parties to exempt an agreement from statutory coverage. All state legislation declares the truism that the acts are subject to international agreements between the United States and foreign nations. Although North Carolina restates the Supremacy Clause in that state law is subject to federal statutes.

Although other state acts appear to have borrowed from the UNCITRAL model with respect to the definition of "commercial," there are significant differences and possible ambiguities among the state variations. For example, the Florida act is not limited to commercial matters; it could apply to a dispute "[b]ear[ing] some other relation to one or more foreign countries." Although disputes concerning "property located outside the United States" are within the act's purview, and Florida real property interests are not covered unless there is an express submission under the state act, the status of personal property within Florida is not clear. Although the UNCITRAL Model Law jurisdictions limit coverage to transactions in which the arbitration situs is within the state, the Florida statutory coverage extends to arbitrations outside that state if either of the parties agree that Florida law applies or conflict of laws principles would declare that Florida law would apply to the contract or to rules for arbitration. The Hawaii statute is similar to the Florida act.

The Maryland approach is even simpler; its act applies to agreements where one party has a relevant place of business or, if no one has such a place of business, property, performance or "some other reason[al] relationship with 1 or more foreign countries" suffices. The Georgia Code has a narrow scope of applicability. Its act

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27 Compare UNCITRAL Model Law, art. 1, supra note 8, at 1302-03 with CAL. CIV. PROC. CODE §§ 1297.11-1297.17 (West Supp. 1992); CONN. GEN. STAT. ANN. § 50a-101 (West Supp. 1991); N.C. GEN. STAT. § 1-567.31 (Supp. 1991); OR. REV. STAT. §§ 36.453(5), 36.454 (1991); TEX. REV. CIV. STAT. ANN. art. 249-1 (West Supp. 1991). The New York Convention, supra note 4, art. 1, allows a State to limit its application to awards made in the territory of another contracting State, and to further limit application of the Convention to transactions deemed commercial under the law of the State in which recognition and enforcement is sought. The Panama Convention has no such limitations. See Panama Convention, supra note 4, art. 6, 14 I.L.M. 337-38. For a typical Article I declaration, see e.g., Declaration of the United States of America, Sept. 30, 1970, 21 U.S.T. 2566, 751 U.N.T.S. 398. Thus far, the New York Convention and other conventions to which the United States is a party, the state international arbitration acts, whether incorporated by reference in an agreement or stated to be applicable by their terms, may be helpful in defining what is "commercial" in award enforcement under the treaties. See infra notes 137-57 and accompanying text.

28 N.C. GEN. STAT. § 1-567.31(a) (Supp. 1991).

29 Compare id. with FLA. STAT. ANN. §§ 684.03(1)(b)(4), 684.03(1)(b)(1), 684.05(1) (West 1992).


31 If a party has more than one place of business, that location having the closest relationship to the arbitration agreement, or the place chosen by the parties, shall be the
applies only if one party is domiciled outside the United States. If all parties are domiciled or "established" within the United States, the dispute must "bear . . . some relation to property, contractual performance, investment, or other activity outside the United States." Also excluded are exceptions listed in another section of the Georgia Arbitration Code; these transactions include insurance contracts, "[a]ny loan agreement or consumer financing agreement" for less than $25,000, consumer goods purchase contracts, sales or loan agreements for residential real estate, and employment contracts "unless the clause agreeing to arbitrate is initialed by all signatories" when the agreement is signed.\textsuperscript{32}

Definitional provisions for UNCITRAL Model Law terms are mirrored in state legislation patterned after the Model Law,\textsuperscript{33} but other definitions are also included.\textsuperscript{34} Probably the most important definition is the limitation of the legislation to written agreements to arbitrate, whether by a clause in a contract or by a separate agreement, and in this regard, the states parallel the UAA and federal statutes. State statutes following the UNCITRAL Model Law add a broad definition of agreements in writing, encompassing exchanges of correspondence or electronic communications (including, in the case of North Carolina, facsimile transmission), and statements of claim and defense where one party alleges an agreement to arbitrate and the other denies it. Some statutes give the parties freedom to place of business. Compare Md. Cts. & Jud. Proc. Code Ann. § 3-2B-01(b) (Michie Supp. 1991) with UNCITRAL Model Law, arts. 1(3)(b)(i), 1(4), supra note 8, at 1302-03.


agree on narrower, or broader, terms for concluding an agreement to arbitrate. North Carolina and Oregon add language from the UAA, by providing that such agreements to arbitrate are irrevocable. State statutes that are self-contained and lack such "irrevocability" language may inadvertently generate the same problem present in the old UAA, which did not have an irrevocability provision and thus allowed parties to renege on arbitration, even after including such a clause.

B. Pre-Hearing Procedures

The UNCITRAL Model Law, and its state counterparts, provide for specific means of communication, such as notice to a party for arbitration. Methods of notice include personal delivery, and delivery to place of business, "habitual residence," or mailing address, such as a post office box. If after reasonable inquiry none of these addresses can be ascertained, a written communication is deemed received if sent to an addressee's last-known place of business, habitual residence or mailing address by registered mail or "any other means which provides a record of the attempt to deliver it." The communication is deemed received on the day of delivery. Although arbitration communication methods do not apply to litigation notices, the methods appear to comport with the minimum requirements of the U.S. Constitution for notice and general options under, e.g., the Federal Rules of Civil Procedure. State versions may vary in certain critical details (such as North Carolina's provision for facsimile mail), and the Civil Rules provide for timing service when filed, rather than the "tag" theory of the UNCITRAL Model Law.


36 Compare UNCITRAL Model Law, art. 3, supra note 8 at 1303; CAL. CIV. PROC. CODE §§ 1297.31-1297.33 (West Supp. 1992); CONN. GEN. STAT. ANN. § 50a-103 (West Supp. 1991); N.C. GEN. STAT. § 1-567.33 (Supp. 1991)(delivery to domicile instead of place of habitual residence, use of facsimile allowed "if the communication or submission is in fact received," and exclusion of administrative or special proceedings); OR. REV. STAT. § 36.558 (1991); TEX. REV. CIV. STAT. ANN. art. 249-3 (West Supp. 1991); with the Constitutional requirements of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-20 (1950) and later cases, e.g. Tulsa Prof'l Collection Serv., Inc. v. Pope, 485 U.S. 478 (1988); FED. R. CIV. P. 4, 5(a)-(c). Other state international arbitration legislation does not have specific notice provisions, e.g. GA. CODE ANN. § 9-9-30 (Michie Supp. 1991), referring to GA. CODE ANN. § 9-9-8(a), which unfortunately does not have the flexibility of notice provisions under the UNCITRAL Model Law. In that respect the Georgia Code mirrors the Uniform Arbitration Act and federal legislation, which are silent on the point. Rules of administrative institutions may fill the gap, however. See, e.g., AAA Int'l Arb. R., art. 19, supra note 11, at 80. The Panama Convention includes notice modalities, but the New York Convention does not. See supra note 34. The ICSID Convention, supra note 4.
The UNCITRAL Model Law and jurisdictions following it allow parties to choose the place for arbitration. If the parties do not agree on a site, the arbitral tribunal must do so, "having regard to the circumstances of the case, including the convenience of the parties." And despite the parties' agreement on a site, the tribunal may meet anywhere to consult among its members, to hear witnesses, experts or parties, or to inspect property or documents. In contrast, the institutional arbitration rules allow the supervising institution (e.g. those of the American Arbitration Association (AAA)) to choose a place if the parties cannot agree, with final authority remaining in the tribunal to choose a site. As under the UNCITRAL model, the tribunal may move around to hold conferences, hear witnesses, or inspect property or documents. This flexibility might be contrasted with a minor, and unfortunate, trend in general state arbitration legislation that restricts arbitration hearings to a single state. The date for

art. 36, 17 U.S.T. 1284-85, 575 U.N.T.S. 182, provides for request for arbitration but is not specific as to the means for such. The MIGA Convention, supra note 4, procedure is more specific. See Annex II: Settlement of Disputes Between a Member and the Agency Under Article 57, arts. 4(a), 5, 24 I.L.M. 1632, 1634.

Compare UNCITRAL Model Law, art. 20, supra note 8, at 1307; CAL. CIV. PROC. Code §§ 1297.201-1297.203 (West Supp. 1992); CONN. GEN. STAT. ANN. § 50a-120 (West Supp. 1991); FLA. STAT. ANN. § 684.13 (West 1992); N.C. GEN. STAT. § 1-567.50 (Supp. 1991); OR. REV. STAT. § 36.492 (1991), also allowing a situs selection by the court if no arbitrators have been chosen; TEX. REV. CIV. STAT. ANN., art. 299-20 (West Supp. 1991); with AAA Int'l Arb. R. 13, supra note 11, at 80. GA. CODE ANN. §§ 9-9-8(a), 9-9-30 (Michie Supp. 1991) is to the same effect as the UNCITRAL Model Law, although the reference to "county" in GA. CODE ANN. § 9-9-8(a) may introduce ambiguities for international contracts stating a site outside the United States or in Alaska, with its boroughs, Louisiana, with its parishes, or Virginia, with its separate city and county governments. UNIF. ARBITRATION ACT, § 5(a), 7 U.L.A. 99-100 (1985) states that unless the parties agree, the arbitrators shall choose a site; there is no discretionary language to take into account the circumstances of the case. The FAA, 9 U.S.C. § 4 (1988), is silent on the point; 9 U.S.C. § 206 (1988) and 9 U.S.C. § 302 (Supp. II 1990), in implementing the New York and Panama Conventions, supra note 4, provide that the court must direct arbitration at the place chosen by the parties. Courts outside the United States can also direct arbitration at a site chosen by the parties. Statement of Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law, Feb. 9, 1970, appendix to SEN. FOR. RELS. COMM., FOREIGN ARBITRAL AWARDS, S. REP. No. 91-702, 91st Cong., 2d Sess. 7 (1970) [hereinafter Statement of Richard D. Kearney]. Not surprisingly, courts have divided on whether they can direct arbitration at a site when the parties have failed to name one. Compare, e.g., Bauhinia Corp. v. China Nat'l Mach. & Equip. Import & Export Corp., 819 F.2d 247, 250 (9th Cir. 1987) (district court must use 9 U.S.C. § 4 authority to direct arbitration within the district) with Oilex A.G. v. Mitsui & Co. (USA), 669 F. Supp. 85, 87 (S.D.N.Y. 1987) (absent agreement on site, court is powerless to order a venue). Both Committee Rep., supra note 13, at 256, 259-60, and Washington Foreign Law Society Rep., supra note 15, at 315, 330, recommend adoption of the Model Law, art. 20, through federal legislation. See also Kolkey, supra note 13, at 518; Rivkin & Kellner, supra note 8, at 552-53.

About a half dozen states would give parties, otherwise bound by an agreement to arbitrate, the opportunity to restrict the situs of the arbitration if the courts of those states would have jurisdiction to try the cause of action absent provisions for arbitration. MONT. CODE ANN. § 27-5-323 (1991); S.C. CODE ANN. § 15-7-120 (Law. Co-op. Supp. 1991) would void those clauses for all agreements to arbitrate, while four states would void foreign situs clauses for specific transactions. ILL. REV. STAT. ch. 121 1/2, § 1704 (Smith-Hurd Supp. 1991) (franchise disclosure legislation); LA. REV. STAT. ANN. § 32:1256.1
beginning arbitral proceedings is established by the request for arbitration, unless the parties agree otherwise, whereas the institutional rules provide for notice to the sponsoring agency.\(^{39}\)

Although the UNCITRAL Model Law and some states' legislation require a panel of three arbitrators if the parties do not agree on the size of the panel, other state statutes specify a sole arbitrator if the parties have not agreed on a tribunal. All states following the UNCITRAL Model Law allow persons of any nationality to serve as an arbitrator, thus following common international practice, particularly when a multimember panel is employed. All state laws allow court intervention, or intervention by an arbitration institution, to name arbitrator(s) if a party fails to do so and the demandant petitions the court or institution. In the latter regard, the international arbitration legislation parallels the Uniform Act and federal statutes.

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The court's decision is final and not subject to appeal, according to some state statutes, a point on which the UNCITRAL Model Law is silent.40

The UNCITRAL Model Law provisions for challenge of arbitrators, for situations where arbitrators are unable to act, or for substitution of arbitrators, are followed in the state acts, which parallel the FAA and the Uniform Act in this regard except as to challenging arbitrators, for which no provision is made in the FAA or the UAA. However, several state statutes add specific statements of what constitutes a conflict as an arbitrator.41 Critics of the UNCITRAL Model Law provisions argue that they provide too much flexibility and that the model law should be more specific in its requirements for conflict of interest.
Law note the potential for disruption of the arbitration during the challenge and the inability of parties to challenge arbitrators under the FAA, where arbitrations must proceed to award before an arbitrator can be challenged. However, such commentators do not recognize the Model Law's provision for continuation of the proceedings during the challenge, as well as the short time limits for challenges. Moreover, it would seem that a challenge would be no more disruptive than the case where a recalcitrant party fails to nominate an arbitrator, and the court must do so, as the Model Law, the FAA, and the Uniform Act all provide. And while it is true that arbitrator ethics require a nominee to disclose conflicts of interest, this does not cure the situations where an arbitrator may know facts but does not tell them or the situation where a party perceives possible bias and the arbitrator does not.

Besides court appointment of arbitrators in default of action by the parties, the UNCITRAL Model Law also allows the court to award "interim measures" against any party, including posting security as the arbitral tribunal may consider necessary, unless the parties have agreed otherwise, or to award such interim measures "before or during arbitral proceedings." Parties cannot contract out of this provision. Aside from the New York statute, no state stat-


42 Rivkin & Kellner, supra note 8, at 546-47.
44 UNCITRAL Model Law, art. 17, supra note 8, at 1307.
45 Id., art. 9, supra note 8, at 1304.
ute governing domestic arbitration has a provision allowing a court to preserve the status quo by injunctive or other prejudgment procedures designed to protect the integrity of the arbitration. Federal law is also silent as to this matter, resulting in a division among the courts as to the availability of interim relief absent statutory authority.\textsuperscript{47} The practical result is that a party to an arbitration might secrete or remove assets, such that any subsequent award might be unenforceable.

Three state statutes following the UNCITRAL Model Law copy the interim measure provisions without much change.\textsuperscript{48} Although four other state acts simply declare that arbitral tribunals may request interim measures, some statutes are quite particular with lists of actions courts may take to protect the arbitral process. North Carolina's act is typical:

Interim relief and the enforcement of interim measures.

(a) In the case of an arbitration where the arbitrator or arbitrators have not been appointed, or where the arbitrator or arbitrators are unavailable, a party may seek interim relief directly from the superior court as provided in subsection (c). Enforcement shall be granted as provided by the law applicable to the type of interim relief sought.

(b) In all other cases, a party shall seek interim measures under G.S. 1-567.47 from the arbitral tribunal and shall have no right to seek interim relief from the superior court, except that a party to an arbitration governed by this Article may request from the superior court enforcement of an order of an arbitral tribunal granting interim measures under G.S. 1-567.47.

(c) In connection with an agreement to arbitrate or a pending arbitration, the superior court may grant, pursuant to subsection (a) of this section:

\begin{itemize}
\end{itemize}
(1) An order of attachment [or] garnishment;  
(2) A temporary restraining order or preliminary injunction;  
(3) An order for claim and delivery;  
(4) The appointment of a receiver;  
(5) Delivery of money or other property into court;  
(6) Any other order that may be necessary to ensure the preservation or availability either of assets or of documents, the destruction or absence of which would be likely to prejudice the conduct or effectiveness of the arbitration.

d) In considering a request for interim relief or the enforcement of interim measures, the court shall give preclusive effect to any finding of fact of the arbitral tribunal in the proceeding, including the probable validity of the claim that is the subject of the interim relief sought or the interim measures granted.

e) Where 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 relief or the enforcement of interim measures 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 proceedings.

(f) The availability of interim relief under this section may be limited by prior written agreement of the parties.\(^4^9\)

Besides serving as an objective warning as to what awaits the misbehaving party, state statutes such as those of North Carolina provide easy incorporation by reference for federal litigation.\(^5^0\)

The state acts have general provisions, like the Uniform Act and the FAA, to compel or stay arbitration in other respects.\(^5^1\)

C. The Hearing and Other Proceedings

The UNCITRAL Model Law, and the state statutes following it, all declare that "parties shall be treated with equality and each party shall be given a full opportunity of presenting his case," a clause similar to the philosophy behind the language in the Uniform Act.\(^5^2\)


\(^5^0\) Fed. R. Civ. P. 64.


The arbitral tribunal has authority to rule on its jurisdiction, including objections to the existence or validity of the arbitration agreement. The UNCITRAL Model Law separates the arbitration clause from the contract, such that if the substantive contract is void, the clause is not void as well. Objections generally can be made at any time as long as the objection is stated "without undue delay" or within the contractually-stated time. However, jurisdictional objections must be filed no later than the statement of defense, unless the tribunal considers the delay justified. In that respect, international arbitration practice is more restrictive than the principles governing federal courts, where subject-matter jurisdiction may be raised at any time. Rulings on jurisdiction or scope of authority may be given either in a preliminary decision or in an award on the merits. The losing party has thirty days to petition a trial court for review of these decisions. There is no appeal from the reviewing court's ruling. The arbitration can decide the merits while jurisdiction or scope issues are before the court. In this regard, the

U.L.A. 100 (1985) ("parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses at the hearing.")


55 Compare UNCITRAL Model Law, art. 16(2), supra note 8, at 1306; CAL. CIV. PROC. CODE § 1297.162 (West Supp. 1992); CONN. GEN. STAT. ANN. § 50a-116(2) (West Supp. 1991); N.C. GEN. STAT. § 1-567.46(b) (Supp. 1991); OR. REV. STAT. § 36.484(2) (1991); TEX. REV. CIV. STAT. ANN. art. 249-16, §§ 2-4 (West Supp. 1991), all of which state that participation in selection of an arbitrator does not bar such a plea; with, e.g., Louisville & N. Ry. v. Montana, 211 U.S. 149, 152 (1908) and FED. R. CIV. P. 12(b)(1), 12(b).

56 Compare UNCITRAL Model Law, art. 16(3), supra note 8, at 1307; CAL. CIV. PROC. CODE §§ 1297.165-1297.167 (West Supp. 1992); CONN. GEN. STAT. ANN. § 50a-116(3) (West Supp. 1991); N.C. GEN. STAT. § 1-567.46(c) (Supp. 1991); OR. REV. STAT. §§ 36.484(3)-36.484(5) (1991); TEX. REV. CIV. STAT. ANN. art. 249-16, §§ 5-7 (West Supp. 1991). Both Committee Rep., supra note 13, at 255, 258, and Washington Foreign Law Society Rep., supra note 13, at 316, opposed the UNCITRAL Model Law, art. 16(3), supra note 8, at 1307, right of immediate appeal of lack of jurisdiction on grounds of efficiency. Given the possibility that a U.S. party may invoke arbitration frivolously, however, the right of immediate jurisdictional review would protect a foreign party’s interests in that the U.S. party could not force arbitration, and the problem of a suit to enjoin arbitration, perhaps followed by a counterinjunction suit, might be avoided. See supra note 38. Kolkey, supra note 13, at 516 (arguing that “the right to seek an early decision on the tribunal’s jurisdiction can be very cost effective.”) For those states permitting appeal before final judgment to test personal jurisdiction, e.g., N.C. GEN. STAT. § 1-277(b) (1983), there is a rough symmetry in the pre-award appeal process for international arbitrations. N.C. GEN. STAT. § 1-567.46(c) (Supp. 1991) makes abundantly clear for North Carolina-based arbi-
Model Law follows European practice in arbitrations.\(^5\)

The procedure under the Uniform Act and the FAA varies considerably from UNCITRAL Model Law practice on this point. Under the Uniform Act, a court may stay an arbitration proceeding if it is shown that there is no agreement to arbitrate, \textit{i.e.}, that there is no jurisdiction. The FAA also provides for a hearing by the court, with the possibility of jury trial. Under both the Uniform Act and the FAA, stay orders may be appealed. Neither legislation states deadlines like the 30-day rule under Model Law practice. Thus, the international arbitration acts allow an initial \textit{nisi prius} review of jurisdiction, but no right of further appellate review, as contrasted with the opportunity for appellate review under the older legislation. As will be discussed later, full appellate review of such issues can occur after the award has been rendered.\(^5\) While the UNCITRAL procedure for initial jurisdiction determination has been criticized as time-consuming,\(^5\) stay order appeals under the FAA or the Uniform Act (or perhaps a jury trial) would seem to be even more burdensome.

The North Carolina Act allows stays of litigation involving a claim of commitment of the dispute to arbitration, with right of appeal from that decision, thus paralleling the Uniform Act but not the FAA in this regard.\(^6\) The message of the North Carolina statute is clear; the preferred route, if a valid arbitration clause is signed, is for dispute resolution out of court. No other state acts cover the problem directly, although those jurisdictions incorporating the general arbitration acts by reference may have such provisions thus available.\(^6\)

The UNCITRAL Model Law, the Uniform Act, and the FAA do not mention the possibility of consolidating several arbitrations. The state international arbitration acts frequently add such, however, if the parties agree. Otherwise, if the parties do not agree, the arbitral tribunal (in Florida) or the court (in California, Georgia, arbitrations that there is no further appeal until after the final award under N.C. GEN. STAT. § 1-567.67 (Supp. 1991). This eliminates appeal under North Carolina's "substantial right" doctrine. N.C. GEN. STAT. §§ 1-277(a) (1983), 7A-27(d)(1) (1989). The UNCITRAL Model Law, art. 16, supra note 8, at 1306-07, operates analogously to the ICSID Convention, supra note 4, art. 41, 17 U.S.T. 1286, 575 U.N.T.S. 186, except that there is no right of appeal from the tribunal's decision. See also ICSID Arb. R. 41, in INTERNATIONAL CENTRE FOR INVESTMENT DISPUTES 80-81 (Jan. 1985). The MIGA Convention, supra note 4, procedure is similar to that under the ICSID Convention. Annex II: Settlement of Dispute Between a Member and the Agency Under Rule 57, art. 4(f), 24 I.L.M. 1633.

\(^{57}\) Rivkin & Kellner, supra note 8, at 547-48.

\(^{58}\) See infra note 103 and accompanying text.

\(^{59}\) Rivkin & Kellner supra note 8, at 547-48; but see Kolkey, supra note 13, at 514.


North Carolina, Oregon, and Texas) can order consolidation.\textsuperscript{62} These provisions answer a criticism of the UNCITRAL Model Law.\textsuperscript{63}

The UNCITRAL Model Law allows parties to craft their own rules of procedure, subject to the provisions of the legislation, to be followed by the arbitral tribunal. Although the Model Law does not so state, the parties may simply adopt by reference the procedure of arbitration institutions, such as the AAA international arbitration rules. At least one state, North Carolina, has declared that parties may explicitly opt out of the legislation. If there is no agreement on procedure, the arbitral tribunal may, subject to the legislation, "conduct the arbitration in such a manner as it considers appropriate." This includes the power to determine admissibility, relevance, materiality, and weight of any evidence. The North Carolina Act cautiously provides that evidence is not limited by the rules of evidence applicable in judicial proceedings, except as to immunities and privileges, and further declares that each party has the burden of proof as to facts supporting claims, setoffs, or defenses.\textsuperscript{64} Neither the Uniform Act nor the FAA have comparable provisions, although institutional authorities' rules may fill some gaps.\textsuperscript{65}


\textsuperscript{63} Rivkin & Kellner, supra note 8, at 558. J. Gillis Wetter, The Proper Scope of a National Arbitration Act, 5 INT'L ARB. REP. 17, 21-23 (No. 10, 1990) lists numerous omissions in the UNCITRAL Model Law but notes that other national statutes (e.g., Switzerland's) may have significant gaps too.


\textsuperscript{65} See, e.g., AAA Int'l Arb. R., art. 16(1), supra note 11, at 80.
Unlike domestic arbitration legislation, state statutes following the UNCITRAL Model Law provide for the language(s) to be used during the arbitration and the parties may agree on such. However, if there is no agreement, the tribunal may choose which language applies to both oral and written aspects of the proceedings. The tribunal may also direct that documentary evidence be accompanied by translations into the agreed or ordered language(s). The North Carolina Act adds that the tribunal may employ translators at the parties' expense, thereby minimizing the possible situation where the parties' translations might be suspect.66

The UNCITRAL Model Law has provisions akin to the Federal Rules of Civil Procedure and institutional arbitration rules for exchange of statements of claim, defenses, and amendments or supplementary statements.67 Surprisingly, many of the state international arbitration acts lack explicit provisions stating that the parties are entitled to representation by counsel, unlike the Uniform Act and institutional rules.68 This omission is not a serious defect, since other legislation and case law may declare that parties are entitled to representation by counsel in proceedings within a state.69 Parties concerned about the statutory omission should insert a clause in contracts to that effect.70

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69 The states commonly provide for appointment of counsel to represent indigents, e.g., N.C. Gen. Stat. § 1-110 (1983), or may forbid certain entities, e.g., corporations except for law school legal clinics or Legal Services Corporation offices, from practicing law, N.C. Gen. Stat. §§ 7A-474.1-7A.474.5 (1989, 1991 Cum. Supp.), 84-5-84-9 (1985), leaving the inference that other parties in arbitration may choose a lawyer to represent them.

70 The UNCITRAL Model Law, art. 18, supra note 8, at 1307, adopted by California, Connecticut, North Carolina, Oregon and Texas, supra note 52, in providing for treating parties with equality, also declares that "each party shall be given full opportunity of presenting his case." "Full opportunity of presenting [a] case" should be interpreted to
Defaults in submissions and presentations of evidence are governed by procedures similar to those in institutional arbitration. Claimants failing to communicate statements of claim suffer termination of the proceedings, a result analogous to plaintiffs not filing amended complaints after a successful motion to dismiss in Federal Rules practice. Unlike default practice in litigation, however, the arbitral tribunal must continue the proceeding to award if the respondent, i.e., the defendant in civil practice, does not communicate a statement of defense. Failure to file a defense is not an admission of the claimant's allegations. There is no equivalent of summary judgment or directed verdict if the arbitration goes to hearing; rather, the tribunal makes an award on the available evidence.\textsuperscript{71}

The traditional procedure in arbitration has been for curtailment of the relatively freewheeling use of discovery as practiced in civil litigation. Courts have stated that discovery, in the style of litigation, is not favored because parties agreeing to arbitrate are deemed to have substituted the relatively low cost of arbitration for the potential of greater expense in discovery.\textsuperscript{72} The general notion is that arbitrators will sift all evidence presented for admissibility, relevancy, materiality, and weight without the normal strictures of the evidence rules.\textsuperscript{73} However, domestic arbitration legislation, such as the Uniform Act or the FAA, do have provisions for compelling witnesses to testify and for the production of documents and other materials.\textsuperscript{74} On the other hand, arbitration rules have permitted discovery.\textsuperscript{75} Perhaps reflective of other nations' aversion to U.S. discovery,\textsuperscript{76} allow parties to employ persons, e.g., attorneys, to develop their cases fully. See First Working Group Report, supra note 68.

\textsuperscript{71} Compare UNCITRAL Model Law, art. 25, supra note 8, at 1308; CAL. CIV. PROC. CODE §§ 1257.251-1297.253 (West Supp. 1992); CONN. GEN. STAT. ANN. § 50a-125 (West Supp. 1991); FLA. STAT. ANN. § 684.13(6) (West 1992); N.C. GEN. STAT. § 1-567.55 (Supp. 1991); OK. REV. STAT. § 36.502 (1991); TEX. REV. CIV. STAT. ANN. art. 249-25 (West Supp. 1991); AAA Int'l Arb. R., art. 24, supra note 11, at 81, which omits a provision for a claimant who fails to file a notice of claim, because AAA Int'l Arb. R., art. 2, supra note 11, at 78, requires the statement of claim as part of the notice to the administrator, without which the arbitration cannot begin; ICSID Convention, supra note 4, art. 45(2), 17 U.S.T. 1287, 575 U.N.T.S. 188; ICSID Arb. R. 42, 44-45, supra note 56, at 81-82; with FED. R. CIV. P. 12(b), 50, 55, 56. The term "directed verdict" has been replaced by the phrase "judgment as a matter of law" in FED. R. CIV. P. 50. The procedure for defaults in arbitration has been followed in court-ordered arbitration. See, e.g., N.C. Ct.-Ord. Arb. R. 9(j). The UNIF. ARBITRATION ACT § 5(a), 7 U.L.A. 99-100 (1985), has a similar provision.

\textsuperscript{72} United Nuclear Corp. v. General Atomic Corp., 597 P.2d 290, 302 (N.M.), cert. denied, 444 U.S. 911 (1979); M. Domke, Domke on Commercial Arbitration § 27:01 (G. Wilner rev. ed. 1984). Michael F. Hoelling, Scope of Documentary Discovery in U.S. and International Arbitration, 3 WORLD ARB. & MED. REP 46, 49 (No. 2, 1992) notes the importance of choosing the right arbitrator(s), who have the discretion to shape the scope and extent of discovery.

\textsuperscript{73} See supra note 64 and accompanying text.

\textsuperscript{74} AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES, R. 41, 42, 45 (1986); PRIVATE ADJUDICATION CENTER, INC., INFORMATION BOOKLET, R. 5.01 (1991). The ICSID Convention, art. 43, supra note 4, permits the tribunal to call upon parties to
covery practices, most state acts copying the UNCITRAL Model Law follow the philosophy of the Uniform Act and the FAA\textsuperscript{76} in providing for compelling production for use only before the tribunal. A two-stage compulsion procedure is contemplated: initial orders are made by the arbitrators, followed by resort to the courts if a party is recalcitrant. The North Carolina Act explicitly tailors its version to state legislation, with the specific possibility of sanctions for noncompliance.\textsuperscript{77} In this regard, the Rules follow case law, which allows arbitrator interim measures, at least in New York.\textsuperscript{78} The North Carolina version answers one criticism of omissions in the UNCITRAL Model Law.\textsuperscript{79}

Unless the parties have agreed otherwise, the arbitral tribunal decides whether to hold oral hearings or to decide the case on the basis of documents and other materials. The parties must be given sufficient advance notice of hearings and of meetings of the tribunal to inspect documents, property, etc. The parties must exchange statements, documents or other material upon which they expect to rely, and they must receive expert reports on other evidentiary documents. Some state acts also declare deadlines for document exchange and provide that hearings will be private, which are common features of institutional arbitration rules. The North Carolina Act also provides for confidentiality of all aspects of the arbitration proceedings unless the parties agree otherwise or applicable law requires disclosure. In addition, the North Carolina statute suggests that parties may agree on a court reporter, a transcript, or an audio or video record at their expense; the Georgia Code requires the arbitrators to keep a record, perhaps by court reporter. The party that pays in Georgia arbitrations is less than clear.\textsuperscript{80} Presumably, the tri-

\textsuperscript{76} See supra notes 72-73 and accompanying text.


\textsuperscript{79} See Rivkin & Kellner, supra note 8, at 558, which is critical of UNCITRAL Model Law, art. 27. See supra note 75 and accompanying text.

\textsuperscript{80} Compare UNCITRAL Model Law, art. 24, supra note 8, at 1308; with CAL. CIV. PROC. CODE §§ 1297.241-1297.242 (West Supp. 1992) (adding provision for in camera hearings or meetings unless parties agree otherwise); CONN. GEN. STAT. ANN. § 50a-124 (West Supp. 1991); FLA. STAT. ANN. § 684.13(1) (West 1992) (allows a party to request or a tribu-
bunal would direct the parties to share costs.

Consistent with the Uniform Act and the FAA, the state international arbitration acts provide for court assistance in obtaining evidence, such as by subpoenaing witnesses or persons with custody of documents or other materials. Unlike earlier legislation, the acts allow parties to request judicial assistance if the arbitral tribunal approves. As is the practice under the Federal Rules of Evidence, the civil law, or institutional arbitration rules, arbitral tribunals may appoint experts to report on specific issues. The parties may be required to give the expert information or to provide access to documents located on other property for inspection. Unless otherwise agreed, the parties can request, or the arbitral tribunal can direct, the expert to submit to cross-examination by the parties, who additionally can offer rebuttal expert testimony.

The parties' choice of law in the agreement to arbitrate must be honored by the tribunal. Unless the agreement to arbitrate states otherwise, choice of law refers to the substantive law of the jurisdiction(s) and not to choice of law rules. If the parties do not state choice(s) of law, "the . . . tribunal shall apply the law determined by the conflict of laws rules . . . it considers applicable." Unless expressly authorized to do so, the tribunal may not make an award ex aequo et bono, i.e. on the basis of fundamental fairness, or as amiable compositeur, i.e. as an amicable compounder, the occasional practice outside the United States. In this regard the acts mirror principles adopted by institutional arbitration rules, except that the UNICITRAL Model Law and several statutes add a requirement that the

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tribunal must “take into account the usage of the trade applicable to the transaction,” which may be at variance with the law chosen by the parties.\textsuperscript{83}

Whether an agreement is governed by the state acts, or is subject to federal law, the choice of law is a fundamental decision that should be stated in every agreement.\textsuperscript{84} Otherwise, an international arbitral tribunal may apply its own notions of what law to apply, perhaps using different law for different parts of a transaction under the conflicts rules of the place where the tribunal sits. The state acts give the parties a free choice in this important aspect of the transaction, and it is an option that should be crystallized in a well-drafted choice of law clause.

Unless otherwise agreed by the parties, a multimember arbitral panel decides substantive issues by majority vote. Procedural questions may be decided by the presiding arbitrator if the parties agree or if all tribunal members so agree. This provision is common in institutional arbitration rules.\textsuperscript{85}

\textsuperscript{83} Compare UNGITRAL Model Law, art. 28, supra note 8, at 1309; CAL. CIV. PROC. CODE §§ 1297.281-1297.285 (West Supp. 1992); CONN. GEN. STAT. ANN. § 50a-128 (West Supp. 1991); FLA. STAT. ANN. § 684.17 (West 1992), which allows for the application of “equitable principles” if the tribunal is faced with a choice of law decision; N.C. GEN. STAT. § 1-567.58 (Supp. 1991) (defining terms); OR. REV. STAT. § 36.508 (1991); TEX. REV. CIV. STAT. ANN. art. 249-28 (West Supp. 1991) with AAA Int’l Arb. R., art. 29, supra note 11, at 82. GA. CODE ANN. § 9-9-36 (Michie Supp. 1991) recites that selection of Georgia does not \textit{ipso facto} mean choosing Georgia procedural or substantive law as the law governing the arbitration, thereby giving arbitrators even less guidance than the UNGITRAL Model Law if the parties do not insert a choice of law clause. The ICSID Convention, supra note 4, art. 42, 17 U.S.T. 1286-87, 575 U.N.T.S. 186, allows the parties to choose the substantive law rules applicable to the dispute. In the absence of such rules the tribunal applies the law of the Contracting State, including its conflicts principles, “and such rules of international law as may be applicable.” Id. The tribunal may also apply \textit{ex aequo et bono} principles if parties agree to such. Choice of law under the MIGA Convention, supra note 4, is similar. Annex II: Settlement of Disputes Between a Member and the Agency Under Article 57, art. 4(g), 24 I.L.M. 1633. Article 38(2) of the I.C.J. statute, would permit \textit{ex aequo et bono} treatment, but only if the parties agree to such. Committee Rep., supra note 15, at 257-58, recommends against the adoption of the Model Law, art. 28, supra note 8, at 1309, while Washington Foreign Law Society Rep., supra note 13, at 315-16, 350, advocates federal legislation covering the substance of art. 28. Resolving a case on \textit{ex aequo et bono} or \textit{amiable compositeur} principles would mean “deciding the merits of the dispute in the manner that the tribunal deems just, without necessarily reaching the decision that would have been mandated by applicable principles of law and equity.” Loumiet et al., supra note 2, at 634.

\textsuperscript{84} For an analysis of the process of decision if there is no choice of law clause, see Danilowicz, supra note 64, at 258-82. The variety of approaches taken by tribunals, perhaps to the complete surprise of parties, underscores the importance of such a clause.

D. Ending the Arbitral Proceedings

As in traditional litigation, parties can agree to settle claims at any time without any record of the terms. If they request, and the tribunal does not object, the settlement may be recorded as an award, which has the same form, status, and effect as an award by the tribunal. The California, Oregon, and Texas acts add that an arbitral tribunal may encourage settlement of the dispute and may use other alternative dispute resolution methods, such as mediation or conciliation, if the parties agree to such. Thus, an award that records a settlement can operate like a judgment that records a settlement or confession of liability, if the award is converted into a judgment for enforcement purposes.

Requirements for a valid award are similar to those of the Uniform Act. The award must be in writing, must be signed by the arbitrator(s) giving the award, and must be delivered to each party. The international arbitration statutes also require that reasons for non-signature by arbitrators be stated and that the award include the date and place of arbitration. In a reversal of policy from the Uniform Act and the FAA, most statutes follow the UNCITRAL Model Law requirement that the tribunal deliver a reasoned award unless the parties agree otherwise. State statutes also commonly provide for interim or partial awards, interest computation, and costs, including attorney fees, and thereby follow provisions in institutional arbitration rules. The UNCITRAL Model Law does not require that the award remain private, but some state acts so provide. The North Carolina Act, following institutional rules, declares that the award can be made in foreign currency. Specific performance can be awarded upon a party’s request.

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87 Compare UNCITRAL Model Law, art. 31, supra note 8, at 1310; with CAL. CIV. PROC. CODE §§ 1297.311-1297.318 (West Supp. 1992); CONN. GEN. STAT. ANN. § 50a-131 (West Supp. 1991); FLA. STAT. ANN. §§ 684.18-684.19 (West 1992) (no reasoned award necessary unless parties agree to such or tribunal determines that failure to do so would prejudice recognition or enforcement of the award; privacy of the award required unless all parties consent or such is required by law); GA. CODE ANN. §§ 9-9-10, 9-9-19 (Michie Supp. 1991) (no reasoned award unless parties agree to such, or tribunal determines that failure to do so would prejudice recognition or enforcement of the award); N.C. GEN. STAT. §§ 1-567.54(d), 1-567.61 (Supp. 1991); OR. REV. STAT. § 36.514 (1991); TEX. REV. CIV. STAT. ANN. art. 249-31 (West Supp. 1991); UNIF. ARBITRATION ACT § 8(a), 7 U.L.A. 116 (1985); AAA Int’l Arb. R., arts. 28, 32, supra note 11, at 82; see also ICSID Arb. R. 46-49, supra note 56, at 82-84. Provisions for attorneys fees as part of the costs in an award is common in international practice but is a significant departure from customary U.S. practice. Parties not wanting fee-shifting should include a contract provision to that effect. Garvey & Helfgenter, supra note 2, at 220; Golbert & Kolkey, supra note 2, at 588; Loumiet et al., supra note 2, at 636.
Commentators criticize the requirement for a reasoned award, stating that it is better to leave this decision to the arbitrators, who may choose not to elaborate on their decision, and argue that a reasoned award may promote further litigation in some cases. These critics do admit that a reasoned decision is given in "most awards."\(^8\) These commentators' arguments appear to overlook the current requirements of institution-governed arbitration, and there is the additional observation that requiring a reasoned award "provides an additional discipline and restraint on arbitrary decisions." Since the chances of overturning an award on appeal are relatively slight, this can be an additional comforting factor in international arbitrations.\(^8\)

Arbitrations are considered ended when the tribunal reaches its final award, according to the UNCITRAL Model Law. The proceedings can terminate if the claim is withdrawn, if the parties agree on termination, or if "the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible." Except for the possibility of correcting, explaining, or setting aside the award, the tribunal's mandate ends with termination of the proceedings. These terms also appear in institutional rules.\(^9\)

**E. Modifying or Setting Aside the Award**

UNCITRAL-based legislation contemplates the same two-stage procedure for altering the award as found in the Uniform Act and institutional arbitration rules. Some statutes, e.g. those of Georgia, depart from the language of the Model Law and are tailored after the Uniform Act.

The arbitral tribunal has the first opportunity to change its award. It may do so, upon application of a party or on its initiative, to correct typographical, computation, or clerical errors, within 30 days or a time agreed by the parties. If the parties agree, the tribunal can give an interpretation of a specific point or part of the award, which then becomes part of the award. The tribunal must complete these tasks within 30 days of receipt of the request. The tribunal also has authority to make additional awards for claims considered but omitted from the award when requested by a party, unless the parties have agreed otherwise, upon notice to all parties. The tribunal may extend its time deadline for making corrections, interpretations, or additional awards.\(^9\)

\(^8\) Rivkin & Kellner, supra note 8, at 548.
\(^9\) Kolkey, supra note 13, at 522.
\(^9\) Compare UNCITRAL Model Law, art. 33, supra note 8, at 1310-11; CAL. CIV. PROC.
The second stage for modifying or setting aside the award involves action by a court. Here, the state statutes tend to parallel the Uniform Act and federal legislation as well as the UNCITRAL Model Law, which provides:

An arbitral award may be set aside by the court . . . only if:

(a) the party making the application furnishes proof that:
   (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
   (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
   (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
   (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
(b) the court finds that:
   (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
   (ii) the award is in conflict with the public policy of this State.

These are the exclusive reasons for setting aside an award. Parties are given three months for set-aside motions. The court may, when appropriate and when requested by a party, suspend the set-aside proceeding to give the arbitral tribunal an opportunity to eliminate the problem. Several states follow this formula. North Carolina employs language that blends the Model Law and the Uniform Act.


while other statutes would have parties rely on the Uniform Act or general arbitration legislation.\textsuperscript{95}

\textbf{F. Recognition and Enforcement of Awards: Appeals}

The recognition and enforcement of arbitral awards within the United States is a relatively simple matter. Both the Uniform Act and the FAA provide that a party may apply to the court for an order confirming an award. When the order confirming the award is granted, perhaps after rulings on motions to vacate, modify, or correct the award, a judgment or decree in conformity with the award will be entered. Such a judgment or decree can then be enforced like any other judgment or decree.\textsuperscript{96} The international arbitration legislation operates either directly,\textsuperscript{97} or through application of the state’s general arbitration statute,\textsuperscript{98} to provide for such conversions. In some instances the state acts also provide for enforcement of awards rendered outside the state; to that extent the acts reiterate the pledges of federal statutes implementing the Conventions, but foreign awards from non-Convention nations would also be included.\textsuperscript{99}

\begin{footnotesize}


Some state statutes include grounds for refusal of enforcement, taken from the UNCITRAL Model Law, art. 36:

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
   (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
      (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
      (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
      (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitrate, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
      (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
      (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
   (b) if the court finds that:
      (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
      (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

These parallel grounds are listed in the Conventions or U.S. implementing legislation.100 All state acts, except those of Florida, Mary-

MIGA Convention, supra note 4, Annex II: Settlement of Disputes Between a Member and the Agency Under Article 57, art. 4(j), 24 I.L.M. 1633.

100 California, Maryland and Texas have no comparable provisions. Compare UNCITRAL Model Law, art. 36, supra note 8, at 1312-13, with CONN. GEN. STAT. ANN. § 50a-136
land, and North Carolina, rely on general arbitration legislation to trace routes of appeal.\(^\text{101}\)

Once an award is final, the Full Faith and Credit Act\(^\text{102}\) can then be employed to enforce the judgment throughout the United States. The Uniform Act has a special provision for appeals from a judgment or decree on an award, while federal court judgments must be appealed pursuant to the final judgment statute.\(^\text{103}\)

The full faith and credit principles stated above apply to any arbitral award reduced to judgment in the United States. The arbitration of international transactions involves four different problems:

1. Recognition and enforcement of an arbitral award rendered outside the United States;
2. Recognition and enforcement of an arbitral award rendered in the United States that is taken outside the United States for recognition and enforcement;
3. Recognition and enforcement of a foreign-nation judgment on an arbitral award rendered outside the United States;
4. Recognition and enforcement of a judgment on an arbitral award rendered within the United States that is taken outside the United States for recognition and enforcement.

The first and second situations, involving arbitral award recognition and enforcement, are the subject of the ICSID, MIGA, New York, and Panama Conventions,\(^\text{104}\) and are already applicable for the United States and other nations party to them. The state international arbitration acts can only cover the first situation for the particular state and are subject to Supremacy Clause primacy\(^\text{105}\) for those arbitrations covered by the Conventions. Neither the third nor

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\(^{104}\) See supra note 4 and accompanying text.

\(^{105}\) U.S. Const. art. VI, cl. 2.
fourth situations are covered by the Conventions or the state legisla-
tion. Those states that have enacted the Uniform Foreign Money-
Judgments Recognition Act,\textsuperscript{106} or its equivalent, have provided for
the third situation; there is no federal legislation and only one draft
treaty on the point.\textsuperscript{107} Other nations, notably the European Com-
\newblock munity,\textsuperscript{108} have international agreements to regulate incoming and
outgoing judgments, but not all outgoing U.S. judgments are subject
to them (Situation 4).

Part III analyzes the state legislation in the context of the Con-
ventions, the implementing federal legislation, and federal law.\textsuperscript{109}
Here, the texts of the state legislation, largely based on the UNCIT-
RAL Model Law, are combined with treaty law, implementing legis-
lation and the federal common law.

III. The State Legislation in the Context of International Agreements
to Which the United States is a Party, Implementing
Federal Legislation, and Other Federal Law

The United States is party to four multilateral treaties governing
arbitration of international transactions of a commercial nature: (1)
the 1958 New York Convention, which around 90 states have rati-
fied;\textsuperscript{110} (2) the 1965 ICSID Convention dealing with investment dis-
putes between a State and a private investor, also having about 90

\textsuperscript{106} UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 263 (1980).
\textsuperscript{107} Draft Convention on the Reciprocal Recognition and Enforcement of Judgments
floundered on differences over the size and punitive nature of some U.S. judgments and
the reach of U.S. judicial jurisdiction. P.M. North, The Draft U.K./U.S. Judgments Convention:
Proposed United States-United Kingdom Convention on the Recognition of Judgments: A Prototype for
\textsuperscript{108} European Communities Convention on Jurisdiction and Enforcement of Judg-
ments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229 (1969), is subject to
numerous protocols and amendatory conventions; a composite text is reprinted in 6A
BENEDICT ON ADMIRALTY, supra note 4, Doc. No. 8-9 (1991). See also Hague Convention on
the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,
Feb. 1, 1971, 1144 U.N.T.S. 249, to which three States were party as of 1991; European
Communities - European Free Trade Association Convention on Jurisdiction and Enforce-
ment of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 28 I.L.M. 623 (1989);
Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral
Awards, May 8, 1979, 18 I.L.M. 1224 (1979); Agreement of the Arab League Regarding
the Execution of Judgments, Sept. 14, 1952, reprinted in 6A BENEDICT ON ADMIRALTY, supra
note 4, Doc. No. 8-11B. Other nations negotiated bilateral agreements for the recognition
and enforcement of judgments. See, e.g., Convention for the Reciprocal Enforcement of
For tables of these, see 6C BENEDICT ON ADMIRALTY, supra note 4, Docs. 15-1A - 15-1C.
\textsuperscript{109} See infra notes 110-79 and accompanying text.
\textsuperscript{110} New York Convention, supra note 4. The precise number of nations party to this
Convention is not clear because of the recent breakup of the USSR and Yugoslavia. Be-
larus (formerly Byelorussian S.S.R.), Ukraine and the Soviet Union all have been formal
parties for some time. The Federal Republic of Germany and the German Democratic
Republic, now merged as Germany, also ratified the Convention separately. U.S. DEPART-
ratifications;\textsuperscript{111} (3) the 1975 Panama Convention,\textsuperscript{112} limited to Organization of American States Members, with a dozen parties, and (4) the MIGA Convention.\textsuperscript{113} The ICSID Convention's implementing legislation declares that an award of an arbitral tribunal "create[s] a right arising under a treaty of the United States." The FAA does not apply to award enforcement, and the federal courts are given exclusive jurisdiction of actions and proceedings involving ICSID arbitration.\textsuperscript{114} In comparison, the New York and Panama Convention legislation "deem[s]" any action falling under the treaties as "arising under the laws and treaties of the United States." While state courts have concurrent jurisdiction, there is an explicit right of removal to the U.S. District Court.\textsuperscript{115}

\textbf{A. Scope of the Federal and State Legislation}

The scope of the transactions covered by the conventions is a combination of treaty law and legislation.

The ICSID Convention's arbitration provisions cover "any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the [International] Centre [for Investment Disputes] by that State) and a national of another Contracting State," if the disputants agree to submit the dispute to the Centre.\textsuperscript{116} There is no qualification in the implementing legislation;\textsuperscript{117} thus the scope of the arbitration is the same as in the Convention.

However, the scope of arbitrations under the New York and Panama Conventions is less clear. The New York Convention allows

\begin{itemize}
  \item \textsuperscript{111} ICSID Convention, \textit{supra} note 4, implemented by 22 U.S.C. §§ 1650-50a (1988). Although the USSR is not a party, Yugoslavia has ratified the Convention, and the number of parties is thus less than clear. \textit{See} U.S. \textit{DEPARTMENT OF STATE}, \textit{supra} note 110, at 336. For general analysis, see Koa, \textit{supra} note 95, at 507-41; Michael M. Moore, \textit{International Arbitration Between States and Foreign Investors—The World Bank Convention}, 18 \textit{STAN. L. REV.} 1359-63 (1966).
  \item \textsuperscript{112} Panama Convention, \textit{supra} note 4.
  \item \textsuperscript{116} ICSID Convention, art. 25(I), \textit{supra} note 4, 17 U.S.T. at 1280, 575 U.N.T.S. at 174 (emphasis added). The term "investment" in art. 25(I) was deliberately left undefined, so that if two disputants agree to the Centre's jurisdiction, there should be no rigid definition to oust the Centre of jurisdiction. \textit{HOUSE COMM. ON FOREIGN AFFAIRS, CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES, H.R. REP. NO. 1741, 89th Cong. 2d Sess.} 2 (1966). The MIGA Convention, \textit{supra} note 4, approach is similar. \textit{See} Annex II: Settlement of Disputes Between a Member and the Agency Under Article 57, Art. 1, 24 I.L.M. 1631 ("All disputes within the scope of Article 57").
  \item \textsuperscript{117} \textit{See} \textit{supra} note 114 and implementing legislation.
\end{itemize}
parties, on condition of reciprocity, to declare upon ratification that
the recognition and enforcement of awards will only be accorded if
these occur on the territory of another contracting State and that the
Convention will only be applied "to differences arising out of legal
relationships, whether contractual or not, . . . considered as commer-
cial under the natural law of the State making much declaration."118
The Panama Convention has a similar provision for territorial appli-
cability. The Convention is declared applicable to "differences that
may arise or have arisen between them with respect to a commercial
transaction," a term otherwise undefined.119 The United States
filed declarations on both options under the New York Convention,
although awards rendered anywhere on U.S. territory, for whose in-
ternational relations the United States is responsible, are in-
cluded.120 Other nations have filed similar declarations,121 and the
United States has also filed a reservation on territorial applicability
under the Panama Convention.122 The U.S. legislation implement-
ing the Conventions provides:

An arbitration agreement or arbitral award arising out of a legal rel-
ationship, whether contractual or not, which is considered as com-
mercial, 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 . . . . [A]
corporation is a citizen of the United States if it is incorporated or
has its principal place of business in the United States.123

Section 2 refers to the Federal Arbitration Act, which declares that
agreements to arbitrate are irrevocable:

A written provision in any maritime transaction or a contract evi-
dencing a transaction involving commerce to settle by arbitration a
controversy thereafter arising out of such contract or transaction, or
the refusal to perform the whole or any part thereof, or an agree-
ment in writing to submit to arbitration an existing controversy aris-
ing out of such a contract, transaction, or refusal, shall be valid,
irrevocable, and enforceable, save upon such grounds as exist at law
or in equity for the revocation of any contract.124

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119 Panama Convention, supra note 4, arts. 1, 11, 14, I.L.M. 336, 338-39.
122 Reservation of the United States, Oct. 9, 1986, SENATE COMM. ON FOREIGN RELA-
TIONS, Inter-American Convention on Commercial Arbitration, S.Ex. REP. No. 99-24, 99th
Cong., 2d Sess. 5 (1986).
into the implementing legislation for the Panama Convention).
"Maritime transactions" and "commerce" are defined in the FAA as follows:

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.125

The courts have given a broad definition to "commerce."126 The Convention legislation includes all international "commercial" transactions under the FAA, plus other applicable "legal relationship[s], whether contractual or not, which [are] considered commercial."127 Thus, the Convention legislation definition of "commerce" is at least as broad as the FAA and purports to encompass a broader scope.128

The major question concerns the relative reach of the federal legislation. When a transaction related to an investment covered by the ICSID Convention does not arise "directly" out of the investment,129 by statutory definition, the Convention does not apply for courts in the United States. Similarly, if a transaction stated to be "commercial" within the meaning of the state acts is held to be outside the scope of the federal statutes, then the federal legislation cannot apply. Does, for example, a local lawyer's contract for professional services to research a state title for a state subsidiary of a non-U.S. company fall under the federal legislation if the lawyer sends a copy of the title to the company?130 Depending on the factual circumstances, the transaction, which is certainly commercial, might fall

127 See supra note 116 and accompanying text.
outside the federal legislative coverage, but within the state's statutory coverage, if the disputants choose to arbitrate.\textsuperscript{131} If the disputants choose to litigate in the federal courts under diversity of citizenship,\textsuperscript{132} the federal courts would be obliged to apply the state arbitration acts to achieve the same outcome that the parties would obtain in state court litigation.\textsuperscript{133}

\textbf{B. Federal Common Law and International Arbitration}

Commentators argue for blanket application of federal common law to international arbitration.\textsuperscript{134} This might have particular relevance where no treaty relationship exists between states whose nationals have agreed to arbitrate; not all nations are parties to the ICSID, New York, Panama or MIGA Conventions.\textsuperscript{135} In any event, the Supreme Court has shown special solicitude for arbitration in the international context,\textsuperscript{136} perhaps indicating the potential for a broader application of federal common law than seen in the interstate context.\textsuperscript{137} Federal common law, although seemingly destroyed as a concept by \textit{Erie R.R. v. Tompkins}' overruling of \textit{Swift v. Tyson} in 1938,\textsuperscript{138} dates its present pedigree from a diversity decision involving interstate waters rendered the same day as \textit{Erie}.\textsuperscript{139} The "new federal common law"\textsuperscript{140} has particular relevance in maritime and international transactions,\textsuperscript{141} whether decided in the context of

\begin{footnote}
\textsuperscript{131} Garvey & Heffelfinger, \textit{supra} note 2, at 213; but see McClendon, \textit{supra} note 2, at 245.
\textsuperscript{134} See, e.g., Brunel, \textit{supra} note 2, at 61-68; Carter, \textit{supra} note 13, at 4, noting the ABA's favoring of the UNCITRAL Model Law as a replacement for the FAA; Garvey & Heffelfinger, \textit{supra} note 2, at 211-21; Rivkin & Kellner, \textit{supra} note 8, at 539-40; Washington Foreign Law Society Rep., \textit{supra} note 13, at 330. See also Kolkey, \textit{supra} note 13, at 524-28. The legislative history of 9 U.S.C. §§ 201-08 (1988), implementing the New York Convention, \textit{supra} note 4, hints that "Federal authority" would not be broadened, and U.S. citizens' rights under State laws would not be altered or changed, but the colloquy seems to be more concerned with the federal courts' subject-matter jurisdiction. See Statement of Richard D. Kearney, \textit{supra} note 37, at 10.
\textsuperscript{135} See \textit{supra} notes 110-13 and accompanying text.
\textsuperscript{136} See \textit{supra} note 5 and accompanying text.
\textsuperscript{137} McClendon, \textit{supra} note 2, at 248.
\textsuperscript{139} Hindelinger v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92, 113 (1938). A more modern statement of the interstate waters problem, again involving federal common law, was Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972).
\textsuperscript{141} Texas Indus., Inc. v. Radcliff Mat'l's., Inc., 451 U.S. 630, 641 (1981).
\end{footnote}
a partial Congressional statutory matrix or as a policy for a national approach to international transactions in the absence of legislation. The new federal common law is binding on the state courts as well as federal courts, and diversity jurisdiction-based litigation can result in a decision on federal common law grounds.

When the federal government or a federal agency is directly involved, the application of federal common law is almost automatic. The same would appear to be true when a foreign sovereign or its agencies is sued. Of course, Congress can legislate for state law standards, as it has done for tort claims against the government, under the Federal Tort Claims Act. Additionally, Congress can supersede the common law by stating a federal law standard, as it has done in the Foreign Sovereign Immunities Act or the Second Hickenlooper Amendment, which supersedes part of the federal common law of the act of state doctrine. In the arbitration arena, this might include claims involving the ICSID Convention, although that treaty has its own arbitration rules for claims against governments by private investors. Only one case in the United States' courts appears to have considered ICSID Convention arbitration issues; it would seem that such litigation would apply federal common law to cover the gaps. For example, the ICSID Convention provides that the Panel of Arbitrators is keyed to national law.

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152 Liberian E. Timber Corp. v. Government of Liberia, 650 F. Supp. 73 (S.D.N.Y. 1986), aff’d, 854 F.2d 1314 (2d Cir. 1987). Many ICSID arbitral awards and judicial decisions of other nations were reported elsewhere. See generally Koa, supra note 95.
ity, but has no provision for a definition of nationality, e.g., the status of dual nationals. Most assuredly that definition would be derived on a federal common law basis by the U.S. District Court. However, the court might choose to resort to state law if the court finds that there is little need for a uniform body of federal law for the problem. As courts have done in other contexts, such as in admiralty and maritime law, an important, and perhaps controlling, factor would often be international customary law on the subject. A similar analysis would hold for the Panama Convention, whose article 3 declares that arbitrations shall be governed by the rules of procedure of the Inter-American Commercial Arbitration Commission. Such rules, incorporated by reference into the Convention and implemented by federal legislation, would govern for arbitrations and would displace any state statutory rules to the contrary. However, to the extent that the Commission rules do not cover a point, that issue would be covered by federal common law.

Even where a court might be persuaded to apply federal common law, state law may be employed as a gap-filler or to supply definitions for the federal common law. Admiralty and maritime

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153 The ICSID Rules may cover the gaps. ICSID Convention, supra note 4, arts. 6(1)(b), 6(1)(c), 13, 16(2), 17 U.S.T. at 1274, 1276-77, 575 U.N.T.S. at 164, 168-70.
155 The Pacquete Habana, 175 U.S. 677, 700 (1900) (customary law regarding seizure of coastal fishing vessels in wartime, noting that customary law may be applied only in the absence of treaties, legislation or executive acts). Since Habana the subject has been covered by treaties. Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right to Capture in Naval War, Oct. 18, 1907, art. 3, 36 Stat. 2396, 2408-09. This would be the same result for issues covered by the ICSID Convention. See supra note 140 and accompanying text. See also Grant Gilmore & Charles E. Black, THE LAW OF ADMIRALTY § 6-64, at 482 (2d ed. 1975), commenting on Lauritzen v. Larsen, 355 U.S. 571, 581-82 (1953). For a modern analysis of the determination of customary international law, see Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
156 Panama Convention, supra note 4, art. 3, 1 I.L.M. at 337. The Inter-American Commercial Arbitration Commission, Rules of Procedure (1978), are reprinted in 6A BENEDICT ON ADMIRALTY, supra note 4, Doc. No. 7-19.
158 The United States is reserved to applying the Commission’s rules as of the date of U.S. ratification, subject to “later [U.S.] official determination to adopt and apply subsequent amendments to such rules.” Senate Comm. on Foreign Relations, supra note 122, at 2, 5.
159 This has been employed most recently in Kamen v. Kemper Finan. Serv., Inc., 111 S.Ct. 7111, 717-7-3 (1991), where the state law of demand futility for the state of incorporation was applied in a federal common law analysis of the Investment Company Act of 1940, 15 U.S.C.A. §§ 80a-1(a)-80a-64 (West 1981 & Supp. 1991): “the presumption that state law should be incorporated into federal common law is particularly strong in areas where private parties entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards . . . . Corporation law is one such area.” Kamen, 111 S. Ct. at 1717.
law may employ the similar "maritime but local" law principle.\textsuperscript{162} Such cases have dealt with matters traditionally within the purview of the jurisprudence of the 50 states, including internal corporate governance, family law and estates, and a local smoke ordinance, as these state standards were incorporated into national law for the particular transactions. The analysis has been restated most effectively in \textit{United States v. Kimbell Foods}:

Undoubtedly, federal programs that "by their nature are and must be uniform in character throughout the Nation" necessitate formulation of controlling federal rules. Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.\textsuperscript{163}

Where there are important federal interests, of course, federal standards will apply, and this would appear to be more likely in admiralty law, maritime law, and the truly international context,\textsuperscript{164} rather than in purely domestic transactions. Thus, given the relative breadth of the definitions of international commercial transactions in the state acts, the state legislation can be used as either a gap filler or to inform definitions, particularly if the transaction contains many state law policy interests. This is particularly true if Congress appears to have left an area to the states.\textsuperscript{165} Use of the state acts as a basis for federal common law standards in international arbitrations would be quite helpful where no treaties or implementing federal legislation apply because the States whose nationals have chosen to

\begin{footnotesize}
\textsuperscript{162} \textit{See, e.g.}, \textit{Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 444-48 (1960)}, where Detroit was allowed to apply its local pollution ordinance even though a ship's boilers met federal standards. For analysis of the problem see generally \textit{Gilmore & Black, supra note 155, §§ 1-17, 6-61, at 47-51, 463-68.}
\textsuperscript{163} \textit{United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979) (citations and footnotes omitted).}
\textsuperscript{164} \textit{Kossick v. United Fruit Co., 365 U.S. 731, 735-42 (1961).}
\end{footnotesize}
arbitrate have not seen fit to ratify or accede to any international agreement.166

If parties explicitly contract for the terms of the state acts as the procedural rules for dispute resolution, then the chosen legislation should be applied as where the parties have chosen institutional arbitration rules.167 Accordingly, the established principles of applying parties' choice of institutional arbitration rules as part of the federal law governing the dispute should be employed to enforce such agreements according to their terms,168 subject to any contrary federal legislation or treaties.169

C. Application of the State Legislation as State Law

Besides the discretionary gap-filler/definitional employment of the state legislation in the context of the federal common law, it must be used where federal law commands such as, e.g., under the Federal Rules of Civil Procedure170 or in situations dictated by the outcome-

166 See Loumiet, et al., supra note 2, at 619-20; Mellman, supra note 2, at 387.
169 See supra note 105 and accompanying text for this analysis.
170 Fed. R. Civ. P. 64 requires the district court, regardless of the subject-matter jurisdiction, to employ state prejudgment remedies for the seizure of property, if no federal statute is involved, enables the court to entertain interim measures requests in accordance with the state arbitration acts. See supra notes 48-50 and accompanying text.
determinative principle for diversity litigation.\(^\text{171}\) Although concededly federal common law may play a large role in international arbitration, there remains the possibility that peripheral, local issues would continue to be governed by state law, particularly if parties choose state law for the transaction in a contract clause. To be sure, many of these peripheral claims might be resolved through supplemental jurisdiction.\(^\text{172}\) However, for the single, isolated, local transaction arbitrated after all other claims have been settled, the state acts would have utility.

**D. State-Court Applications**

In terms of state-court litigation, the result is the same, but through a different analysis. The state courts must apply federal common law.\(^\text{173}\) They must apply pertinent federal legislation, whether deemed substantive, procedural, or dealing with arbitration.\(^\text{174}\) However, to the extent that no federal law governing arbitration controls, the states are free to establish their own standards for conducting arbitrations and protecting the arbitral process.\(^\text{175}\) Thus, the state courts may employ the state international arbitration acts in much the same way as the federal courts employ them. Given the near paralysis of federal courts overwhelmed with criminal cases, particularly those connected with the war on drugs,\(^\text{176}\) the opportu-
nity for state-court litigation ancillary to international arbitrations seems greater today than ever before.

IV. Conclusions and Projections for the Future

Part III demonstrates that state legislation can play an important, even if subordinate, role in international arbitration and might be considered by all states for enactment. The UNCITRAL Model Law, a prototype for several of the state acts, could serve as a workable approach to promoting uniformity. As in the case of the Uniform Arbitration Act, currently in force in nearly all the states, there have been local variations. Some of these variations were enacted because of state court structure or procedural nuances, while others were enacted because of other perceived needs. Other jurisdictions will undoubtedly follow with their legislation, building on the first round of statutes and hopefully following the UNCITRAL model in force in a majority of states that now have the acts.

The result may be a crazy-quilt of statutes, with a babble of over 50 voices, advertising the virtues of their particular dispute resolution systems, if one counts the legislatures of the U.S. possessions. This would be a substitute, in part, for the current system, if it is duly considered that federal common law will be applied perhaps with reference to state legislation when disputants have not agreed to particularized rules. In terms of predictability, the present system of basic federal legislation, including the FAA or federal statutes to implement Conventions the statutes implement, is reasonably good, provided the parties negotiate rules of arbitral procedure, perhaps tied to an institution. If the parties fail to choose arbitral procedure rules, and particularly if there is no state international arbitration legislation to reference, the predictability may be worse than the situation where a state act is available. The most egregious case occurs where the non-U.S. party is from a nation that is not a party to any Convention, and therefore, enforcement mechanisms are limited to the FAA, if foreign commerce is involved, and the general state arbitration statutes.

The individual state international arbitration statutes are therefore valuable interim gap-fillers. What may be needed in the near future is some semblance of national uniformity. One agency for this task is the National Conference of Commissioners on Uniform State Laws, which has celebrated its centennial, and is the sponsor of the Uniform Arbitration Act. The major national dispute resolution

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177 Walker, supra note 17, at 906. The limitations on arbitration sites are an unfortunate example of the latter. See supra note 38 and accompanying text.
178 Kolkey, supra note 13, at 510.
agencies, which have promoted standard rules, are another. 180 Bar associations are a third source of possible consistency. 181 These groups are studying the advisability of federal legislation, perhaps paralleling the UNCITRAL Model Law.

Given the heavy infusion of federal common law into the international arbitral process, national legislation is the best course. As the debate proceeds, the state acts, along with the UNCITRAL Model Law and other models, may serve as valuable references; as the states have long been the laboratories for effecting legal change in the Union. After the enactment of any federal legislation, the state acts, perhaps made uniform through amendment, will continue to serve as either gap-fillers and definitional sources or as laws in their own right in the state and federal courts. Until Congress acts, and that could be some time in coming, the state international arbitration legislation will serve as a useful, if perhaps varied, guide to this form of alternative dispute resolution. In the current state of the economy, the states, and indeed the Nation, need all the business that can be generated, and state statutes can serve as an inducement, 182 albeit limited and varied by jurisdiction, to foreign investors whose preferences are for arbitration, rather than for litigation, when disputes arise.

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180 For example, the American Arbitration Association, which has appointed a committee to study the UNCITRAL Model Law and the possibility of proposed FAA amendments. James H. Carter, AAA Committee Studies Possibility of U.S. Adoption of Model Law, 2 WORLD ARB. & MEDIATION REP. 319 (1991).
182 McClendon, supra note 2, at 257.