INTERNATIONAL COMMERCIAL ARBITRATION LEGISLATION IN THE STATE OF MICHIGAN: A PROPOSAL

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† In July, 1990, the Michigan Law Revision Commission contracted with Professor Kevin Kennedy of the Detroit College of Law to undertake a project identifying and analyzing state and federal statutes, treaties, and international conventions applicable to the resolution of international commercial disputes in Michigan. The Commission further directed Professor Kennedy to draft proposed language amending Michigan statutes as necessary to facilitate the resolution of international commercial disputes in Michigan.
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INTRODUCTION

The State of Michigan stands poised to capture a unique economic opportunity stemming from the Canada-U.S. Free Trade Agreement which became effective January 1, 1989. In anticipation of the increased trade and investment flows that will result between the United States and Canada as a direct consequence of the Free Trade Agreement's liberalization of trade and investment rules, interest in and demand for private dispute resolution will be heightened on both sides of the border.

For Michigan to realize its full potential as a center for international commercial dispute resolution, the Michigan Legislature should give consideration to enacting legislation that provides specifically for international commercial arbitration. Several excellent reasons exist for doing so, but perhaps the most compelling are three legal developments in the 1980's. The first came in 1985 with the United States Supreme Court's landmark decision of Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,¹ in which the Court endorsed resort to

arbitration to resolve international commercial disputes, even when the dispute involved an antitrust claim. The second occurred in 1986 when Canada became the first country to adopt the Model Law on International Commercial Arbitration, drafted by the United Nations Commission on International Trade Law (the UNCITRAL Model Law). The third took place in late 1987 with the signing of the Canada-U.S. Free Trade Agreement, offering the genuine prospect for tremendous economic growth for Michigan business.

To date, seven states have enacted international commercial arbitration legislation: California, Connecticut, Florida, Georgia, Hawaii, Maryland, and Texas. These seven state laws are analyzed in detail in Part Two of this report. Before considering current Michigan law, the advantages and disadvantages of international arbitration should be mentioned.

A. The Advantages and Disadvantages of International Arbitration

International arbitration, like domestic arbitration, is a means by which a dispute or class of future disputes can be definitively resolved by a disinterested, nongovernmental body. In a sense, international commercial arbitration is merely a species of domestic arbitration with an international aspect. Within the past thirty years a movement has developed in the international arbitration arena to devise rules that avoid the peculiarities and surprises of local law by excluding them from the arbitral process. Emblematic are the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and

2. The federal enactment is the Commercial Arbitration Act, CAN. REV. STAT. ch. 22 (1986). Because of the many areas reserved exclusively to the provinces under the Canadian Constitution, federal-provincial cooperation was essential for a comprehensive international commercial arbitration legal regime to come into existence. All the provinces and territories have enacted the Model Law. See Noecker & Hentzen, The New Legislation on Arbitration in Canada, 22 INT'L LAW 829 (1988).


the UNICITRAL Model Law on International Commercial Arbitration, both of which are discussed below. Both are limited to international commercial arbitration and provide generally accepted, but very limited, grounds for setting aside or refusing to enforce an arbitral award.\(^5\) The laws of most major trading nations provide a considerable degree of freedom for arbitration and often permit parties to use government enforcement measures to ensure compliance with the arbitration process and with arbitral awards. International arbitration has both its strengths and weaknesses as a method for resolving international commercial disputes.\(^6\) First, arbitration is often perceived as a means to obtain a neutral decision-maker, unattached to either party or any governmental authority. This feature can allay business fears of potential bias in a foreign court. Second, a well-drafted arbitration clause generally permits consolidation of litigation between the parties in a single forum, thereby avoiding the expense of multiple proceedings. On the other hand, once touted as an inexpensive and expeditious means of dispute resolution, some commentators criticize arbitration as both slow and expensive.\(^7\) For example, an arbitration involving a $1 million dispute conducted under the auspices of the International Chamber of Commerce "will result in an administrative charge of $14,500, and fees per arbitrator ranging from a barebones' minimum of $7,450 to a maximum of $30,000. If the dispute involves $100 million, the figures are $50,500 (administrative charge) and $51,450 minimum/$188,000 maximum (arbitrators' fees)."\(^8\) Third, arbitration tends to be

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procedurally less formal than litigation. Parties thus have greater freedom to agree on efficient procedural rules and select expert decision-makers. At the same time, however, the lack of detailed procedural rules may result in additional disputes between the parties. Fourth, arbitration typically involves less extensive discovery than is common in litigation in United States courts, with the attendant reduction in costs and delay. By the same token, depending on the facts known by the parties concerning the dispute, a party may want the broader discovery rights provided in United States courts than are ordinarily available in arbitral proceedings. Finally, international arbitration is usually confidential, thus, helping to preserve business secrets.

B. Institutional Versus "Ad Hoc" Arbitration

International arbitration can be either "institutional" or "ad hoc." The best-known international arbitration institutions are the International Chamber of Commerce, the American Arbitration Association, the London Court of Arbitration, the Stockholm Chamber of Commerce, and the International Centre for Settlement of Investment Disputes. Each of these organizations supervises a substantial number of commercial arbitrations each year. These institutions have promulgated their own set of procedural rules that govern arbitration under the institution's auspices. Each institution maintains a standing staff that assists parties making use of the institution's arbitration procedures. Each institution also charges a fee for the arbitration services it provides.

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Ad hoc arbitration is not conducted under the auspices of an arbitral institution. Instead, parties simply select an arbitrator who resolves the dispute without institutional supervision. The parties will sometimes also select a preexisting set of procedural rules designed to govern ad hoc arbitration. The United Nations Commission on International Trade Law has published a commonly used set of such rules. Although ad hoc arbitration has the advantages of greater flexibility and less expense, most experienced international practitioners prefer the more structured character of institutional arbitration.

With this introduction as backdrop, this article turns to a consideration of the current Michigan laws dealing with commercial arbitration.

This Article is divided into four parts. Part One is a section-by-section analysis of the Michigan arbitration statute and Michigan Court Rule 3.602 dealing with arbitral proceedings. Part Two reviews the laws of those states that have enacted legislation dealing specifically with the arbitration of international commercial disputes. Part Three analyzes federal statutes and the treaties and international conventions to which the United States is a party providing for the non-judicial resolution of disputes, both domestic and international. Part Four identifies areas where statutory reform in Michigan would be appropriate and offers proposed amending language.

PART ONE

I. OVERVIEW

All fifty states, the District of Columbia, and Puerto Rico have enacted arbitration statutes of general application modelled after one of two statues, the Uniform Arbitration Act or the United States (Federal) Arbitration Act. In 1955 the Con-
ference of Commissioners on Uniform State Laws promulgated a uniform arbitration act. Since that time, thirty-two states, including Michigan, and the District of Columbia have adopted the Uniform Arbitration Act.\(^{16}\) The other eighteen states and Puerto Rico have enacted arbitration statutes that are modelled after the Federal Arbitration Act.\(^{17}\) Frequently, a jurisdiction will substantially adopt the major provisions of the Uniform Act with substitutions, omissions, and additions. The General Prefatory Notes to the Uniform Arbitration Act, as well as the notes to the Michigan arbitration statute, indicate that

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16. The following jurisdictions have enacted the Uniform Arbitration Act:

- ALASKA STAT. §§ 09.43.010-180 (1983)
- IDAHO CODE §§ 7-901 to -922 (1990)
- IND. CODE ANN. §§ 34-4-2-1 to -22 (1983)
- KAN. STAT. ANN. §§ 5-401 to -422 (1982)
- MASS. GEN. LAWS ANN. ch. 251, §§ 1-19 (1989)
- MICH. COMP. LAWS ANN. §§ 600.5001-.5035 (West 1987)
- MINN. STAT. ANN. §§ 572.08-.30 (1987)
- N.M. STAT. ANN. §§ 44-7-1 to 44-22 (1978)
- N.C. GEN. STAT. §§ 1-567.1-.20 (1983)
- TENN. CODE ANN. §§ 29-5-301 to -320 (Supp. 1990)
- Vt. STAT. ANN. tit. 12, §§ 5651-5681 (Supp. 1990)
- Va. Code §§ 8.01-581.01-.016 (Supp. 1990)

17. The following jurisdictions have enacted arbitration statutes varying in significant degree from the Uniform Arbitration Act:

- ALA. CODE §§ 6-6-1 to -16 (1977 & Supp. 1990)
- FLA. STAT. ANN. §§ 682.01-.22 (West 1990)
- GA. CODE ANN. §§ 9-9-1 to -18 (Harrison 1989)
- KY. REV. STAT. §§ 417.010-.240 (Supp. 1990)
- OHIO REV. CODE ANN. §§ 2711.01-.24 (Anderson 1981)
- OR. REV. STAT. §§ 33.210-400 (1988)
Michigan falls into this group\textsuperscript{18} (although one commentator does not consider Michigan's arbitration law to be an adoption of the Uniform Act because of its deviations from the Uniform Act\textsuperscript{19}).

Michigan has enacted two arbitration laws, one of general application,\textsuperscript{20} the second dealing with health care malpractice.\textsuperscript{21} Michigan has also enacted mandatory mediation statutes dealing with medical malpractice\textsuperscript{22} and tort actions.\textsuperscript{23} Of relevance to this project is the general arbitration statute, a section-by-section analysis of which follows, together with the auxiliary court rule, Michigan Court Rule 3.602.

II. THE MICHIGAN ARBITRATION STATUTE AND COURT RULE 3.602

A. Section 600.5001 — General Provision\textsuperscript{24}

The first section of the Michigan arbitration statute provides that all persons may submit any controversy to arbitration that might be the subject of a civil action provided they have so agreed in writing. Expressly excepted from coverage under the statute are collective bargaining agreements.\textsuperscript{25} Any subsequent arbitration award is subject to enforcement in circuit court.

B. Section 600.5005 — Real Estate Arbitration

Arbitration of claims to estates in fee or for life in real property are not permitted. Real estate claims to an interest for a term of years, partition claims between joint tenants or tenants in common, boundary disputes, and dower disputes may be submitted to arbitration.

\textsuperscript{18} UNIF. ARBITRATION ACT, General Prefatory Notes, 7 U.L.A. 3 (1985).
\textsuperscript{20} MICH. COMP. LAWS ANN. §§ 600.5001-.5035 (West 1987).
\textsuperscript{21} MICH. COMP. LAWS ANN. §§ 600.5040-.5065 (West 1975).
\textsuperscript{22} MICH. COMP. LAWS ANN. §§ 600.4901-.4923 (West 1986).
\textsuperscript{23} MICH. COMP. LAWS ANN. §§ 600.4951-.4969 (West 1986).
\textsuperscript{24} Section references are to Michigan Compiled Laws Annotated.
\textsuperscript{25} MICH. COMP. LAWS ANN. § 600.5001(3) (West 1986).
C. Section 600.5011 — Revocation of Arbitration Agreements

Unilateral revocation of an arbitration agreement is not permitted. In the event a party to such an agreement defaults after notice, the arbitrator is empowered to proceed and to render an award based on the evidence submitted by the appearing party. The circuit court is authorized to compel arbitration.

D. Section 600.5015 — Appointment of Arbitrator

Absent agreement on the method of appointing the arbitrator, or in the event the agreed method of appointment fails or the arbitrator who is appointed fails or is unable to act, the circuit court is to appoint an arbitrator.

E. Section 600.5021 — Conduct of Arbitration; MCR 3.602

The arbitration is to be conducted pursuant to rules of the Michigan Supreme Court. Michigan Court Rule 3.602 supplements the Michigan arbitration law chiefly in the area of procedural rules both for the conduct of the arbitration itself and for the judicial enforcement of the award.

1. MCR 3.602(B)26 — Proceedings to Compel or Stay Arbitration

A circuit court may compel arbitration on a showing of an arbitration agreement by the moving party, and it may stay an arbitration if it is shown that no such agreement exists. It is not grounds for denying an application to compel arbitration that the claim to be arbitrated lacks merit or is not brought in good faith.

2. MCR 3.602(C) — Stay of Judicial Proceedings

Any court action involving an issue subject to arbitration must be stayed if an order compelling arbitration or an application for such an order has been filed.

26. MCR denotes Michigan Court Rule.
3. **MCR 3.602(D) — Time and Place of Arbitration Hearing**

The arbitrator is empowered to set the time and place for the hearing and to order adjournments and postponements as necessary.

4. **MCR 3.602(E) — Oath of Arbitrator and Witnesses**

Prior to hearing testimony, the arbitrator is sworn to hear and fairly consider the matters submitted. The arbitrator is empowered to administer oaths to witnesses.

5. **MCR 3.602(F) — Subpoenas and Depositions**

The arbitrator has full subpoena power. The arbitrator may also order the taking of the deposition of a witness who cannot be subpoenaed or who is unable to attend the hearing.

6. **MCR 3.602(G) — Representation by Counsel**

A party is entitled to be represented by an attorney at the hearing. Any waiver of that right prior to the hearing is ineffective.

7. **MCR 3.602(H) — Award by Majority of the Arbitrators**

If a panel of arbitrators hears the arbitration, a majority may render a final award unless the submission provides for unanimity. If an arbitrator is unable to act after the commencement of the hearing, then the remaining members of the panel may continue and determine the controversy.

8. **MCR 3.602(I) — Confirmation of the Award**

An arbitration award filed with the court within one year after its rendition may be confirmed by the court, unless the award is vacated, corrected, or modified.

9. **MCR 3.602(J) — Vacating the Award**

An arbitration award may be vacated and a rehearing ordered upon an application made within twenty-one days after the
award. This subrule lists four grounds for vacating an arbitration award:

1. the award was procured by corruption, fraud, or other undue means;
2. there was evident partiality by a neutral arbitrator, corruption of an arbitrator, or prejudicial misconduct . . . ;
3. the arbitrator exceeded his or her powers; or
4. the arbitrator refused to postpone the hearing upon a showing of sufficient cause, refused to hear material evidence, or otherwise conducted the hearing in a manner that substantially prejudiced a party’s rights.

10. MCR 3.602(K) — Modification or Correction of Award

Within twenty-one days after the award, the circuit court may modify or correct it on one of three grounds:

1. There is an evident miscalculation of figures or an evident mistake in the description of a person, thing, or property referred to in the award;
2. The arbitrator has ruled on a matter not submitted for decision, and the award may be corrected without affecting the merits of the decision submitted.
3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

11. MCR 3.602(L)-(M) — Judgment, Costs, Appeals

The circuit court shall render judgment on the confirmed, corrected, or modified award, and the judgment shall have the same force and effect as other judgments. Costs of the arbitration may be taxed as in civil actions. Appeals from the circuit court’s orders or judgments may be had as in other civil actions. (This subrule mirrors the provisions of Michigan Compiled Laws Annotated section 600.5025).

F. Section 600.5031 — Venue

Venue for proceedings confirming an arbitration award is to be laid in the circuit court of the county provided for in the arbitration agreement. In the absence of such a designation, proceedings are to be had in one of four places:
1. in the county where the adverse party resides or has a place of business;
2. if the adverse party is a nonresident or has no place of business in Michigan, in the county where the applicant resides or has a place of business;
3. if the arbitration involves real property, in the county where the property is located; or
4. if 1 through 3 are inapplicable, in any county.

G. Section 600.5033 — Foreign Arbitration Awards

Although the heading of this section is "Foreign Arbitration Awards," the section itself only covers confirmation of sister state arbitration awards brought into a Michigan court. Sister state arbitration awards may be confirmed, corrected, modified, or rejected, and judgment entered thereon by a Michigan court of competent jurisdiction.

H. Section 600.5035 — Equitable Powers of Confirming Court

Nothing contained in the chapter is to be construed to affect the court's equitable powers over arbitrators, awards, or parties.

PART TWO: INTERNATIONAL COMMERCIAL ARBITRATION STATUTES

I. INTRODUCTION

Within the last four years seven states have enacted statutes addressed specifically to international commercial arbitration: California, Connecticut, Florida, Georgia, Hawaii,

Maryland,\textsuperscript{32} and Texas.\textsuperscript{33} All seven states had enacted arbitration statutes of general application prior to adoption of the special international commercial arbitration version. In several instances, enactment of international commercial arbitration statutes was in direct response to these states' growing international markets.\textsuperscript{34} California, for example, wanted to capitalize on its geographical proximity to Asia. In order to attract international business and investment, increase exports, and raise state employment, these states turned to various sources as models for the adoption of an international commercial arbitration statute, including the Model Law on International Commercial Arbitration prepared by the United Nations Commission on International Trade Law ("UNCITRAL") and adopted by the United Nations General Assembly on December 11, 1985.\textsuperscript{35} None of the state statutes impose costs on the states. In the words of one commentator, the recent international commercial arbitration enactment has "met the wishes of the business community and, best of all, it was free."\textsuperscript{36} Another has predicted that "as states begin to adopt legislation that makes their states more attractive as arbitral forums, other states are likely to join the competition."\textsuperscript{37}

These statutes can be grouped into four categories. In the first group fall those statutes that follow the Model Law verbatim. Connecticut is the one state in this category. Next are those that adopt most but not all of the Model Law's provisions and add many of their own. California and Texas are in this group. California's 1988 version of the Model Law deletes the final two chapters of the Model Law, "Recourse

\begin{itemize}
\item \textsuperscript{36} Gregory, supra note 34, at 44-46.
\end{itemize}
Against an Award” and “Recognition and Enforcement of Awards,” (apparently because those two chapters arguably are preempted by the Federal Arbitration Act38), and adds a section dealing with conciliation based on UNCITRAL’s Conciliation Rules.39 Connecticut, on the other hand, did not balk at the preemption issue, enacting the UNCITRAL Model Law in its entirety. The conciliation section was added to meet the strong Asian cultural preference for other non-confrontational means of resolving disputes.40 These same factors motivated Hawaii to include mediation and conciliation provisions in its international commercial arbitration statute. Texas in turn modeled its 1989 international commercial statute after California’s.

The third group of states are those that have adopted some of the Model Law’s provisions and add many of their own. Florida used the Model Law as one source for its 1986 international commercial arbitration law, but also considered other institutional arbitral rules, treatises, court decisions, conventions, and existing legislation in the United States and overseas.41 Florida’s aim was to attract regional banking and business from Latin America. Finally, in the fourth group are those states that have enacted skeletal international arbitration laws which adopt few, if any, of the Model Law’s articles. Georgia, Hawaii, and Maryland are in this category.

The following survey compares the key provisions of the UNCITRAL Model Law with the seven state international commercial arbitration statutes. Because the Connecticut arbitration statute is a verbatim copy of the Model Law, no specific analysis of it will be made.

II. Arbitrability

The applicability of an international commercial arbitration statute is contingent upon two conditions: The dispute must be both “commercial” and “international.”

A. The "Commercial" Nature of the Dispute

No statute contains an exhaustive list of what constitutes a "commercial transaction" or a "relationship commercial in nature." Instead, some statutes provide a non-exhaustive list of relationships that qualify as "commercial." Article 1, footnote **, of the Model Law, for example, provides:

The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether commercial 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.42

California lists eighteen types of agreements and relationships that qualify as commercial in nature, including contracts for professional services.43 Texas likewise lists types of agreements and relationships, and it includes agreements covering intellectual property.44

Because the lists themselves are expansive and non-exhaustive, enforcing courts should engage in a strong presumption of arbitrability, subject of course to express statutory exceptions for disputes deemed non-arbitrable. In this last connection, California, Connecticut, and Texas do not enumerate specific disputes which are not arbitral but instead state generally that their international commercial arbitration statute "does not affect any other law under which certain disputes may not be submitted to arbitration."45 Florida, Georgia, and Hawaii take the opposite tack. They list non-arbitrable disputes but enumerate more generally what type of disputes are arbitrable. Florida excepts (1) Florida real property disputes, unless the

42. Model Law, supra note 35, art. 1 n. **.
43. CAL. CIV. PROC. CODE § 1297.16(a)-(r) (West 1988).
44. TEX. REV. CIV. STAT. ANN. art. 249-1, § 6 (Vernon 1990).
parties expressly submit the dispute to international commercial arbitration, (2) domestic relations disputes, and (3) intergovernmental disputes. Georgia identifies ten disputes to which its international commercial arbitration statute does not apply, including small consumer loans; insurance contracts; employment contracts, unless the arbitration clause is initialed by all signatories at the time of execution of the contract; and bodily injury or wrongful death claims. Hawaii excludes domestic relations and real property disputes from the scope of coverage under its statute.

In determining whether a dispute is commercial in nature, Florida, Georgia, Hawaii, and Maryland collapse the international nature of the dispute into its commercial nature to arrive at a unitary standard for determining the applicability of their respective international commercial arbitration statutes. The focus is on the parties or, alternatively, the subject matter of the underlying transaction. Maryland’s provision is typical. It defines “international commercial arbitration” as an arbitration in which the relevant place of business of at least one of the parties (defined as the place of business with the closest relationship to the arbitration agreement) is in a country other than the United States. Alternatively, if none of the parties has a relevant place of business in a country other than the United States, the inquiry is expanded to whether the relationship between any of the parties involves property located outside the United States, envisages performance outside the United States, or has some other reasonable relation with one or more foreign countries. Georgia adds to this list of relationships investment outside the United States, while Florida goes even further by including “the ownership, management, or operation of a business entity through which such an investment [outside the United States] is effected, or any

50. Id. § 3-2B-01(b)(1)(i)-(ii).
agreement pertaining to any interest in such an entity.”52 Hawaii’s version tracks Maryland’s, but neither states’ scope provision mentions investment disputes specifically.53

The state legislatures of Florida, Georgia, Hawaii, and Maryland mentioned that one of the policies for enactment of the legislation was to encourage and promote international commercial arbitration in the state,54 strongly suggesting that the scope provisions of the respective statutes should be given an expansive rather than a restrictive reading.

B. The “International” Nature of the Dispute

The second prong of the inquiry as to the applicability of a state’s international commercial arbitration statute turns on whether the dispute is “international” in character. As noted, Florida, Georgia, Hawaii, and Maryland adopt an approach that focuses on the domicile of the parties to the dispute or, if all parties are from the United States, then on the locus of the dispute. Florida and Hawaii add a choice-of-law provision, which states that even if the place of arbitration is outside the state, if the arbitration is within the scope of the international commercial arbitration law, then, in three circumstances, that law shall apply (1) if the parties expressly provide that the law of the state shall govern the dispute; (2) in the absence of such an agreement, if the underlying contract is to be interpreted under that state’s law; or (3) in any other case, if an arbitrator determines that that state’s law governs the resolution of the dispute after applying conflict of laws principles.55

With one exception, California, Connecticut, and Texas do not depart significantly from the other four states’ criteria, adhering closely to the Model Law’s suggested indicia of whether or not a dispute is international in character: (1) whether the

52. FLA. STAT. ANN. § 684.03(1)(b)(3) (West 1990).
54. FLA. STAT. ANN. § 684.02(1) (West 1990); GA. CODE ANN. § 9-9-30 (Harrison 1989); HAW. REV. STAT. § 658D-3 (1988); MD. CTS. & JUD. PROC. CODE ANN. § 3-2B-02 (1989).
55. FLA. STAT. ANN. § 684.05(1)-(3) (West 1990); HAW. REV. STAT. § 658D-4(d)(1)-(3) (1988).
parties' place of business are in different countries; (2) whether the subject matter of the dispute is in a country other than the one where the parties' place of business is located; or (3) whether the parties have expressly agreed that the subject matter of the dispute relates to a country outside the United States.\[56\] This last criterion—significant for its deference to freedom of contract and party autonomy—does not figure at all in the Florida, Georgia, Hawaii, or Maryland statutory schemes. The second criterion is similar, however, to the one enacted by Florida, Georgia, Hawaii, and Maryland that considers a dispute international if the subject matter is outside the United States even when all parties are from the United States.\[57\]

III. THE ARBITRATION AGREEMENT

Six of the seven states with an international commercial arbitration statute stipulate that an arbitration agreement must be in writing in order to be enforceable, the one exception being Maryland.\[58\] Although the Maryland international commercial arbitration statute does not expressly require that the agreement be in writing, it does incorporate by reference the arbitration statutes and laws of the United States.\[59\] In that connection, Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enacted in federal implementing legislation at 9 U.S.C. § 201, provides that the “Contracting Parties shall recognize an agreement in writing under which the parties undertake to submit [disputes] to arbitration . . . .”\[60\] In addition, the Maryland arbitration statute of general application provides that “[a] written agreement

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to submit any existing controversy to arbitration . . . is valid and enforceable . . . .”61 By negative implication, an arbitration agreement would not be enforceable in Maryland unless it has been reduced to writing.

The form of an arbitration agreement may be either an arbitration clause in a contract or a separate agreement.62 Under the Florida and Hawaii provisions, the agreement may be contained in correspondence, telegrams, telexes, or any other form of written communication.63 The other states include a provision that an arbitration agreement can be evidenced by an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.64 The content of an arbitration agreement as defined in the Model Law is “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”65 California and Connecticut have adopted this language verbatim.66 Florida and Hawaii have defined a “written undertaking to arbitrate” as a “writing in which a person undertakes to submit a dispute to arbitration, without regard to whether that undertaking is sufficient to sustain a valid and enforceable contract or is subject to defenses.”67 Texas’ definition has a comparable tenor, providing that “[a]n arbitration agreement is an agreement to submit to arbitration disputes that have arisen or may arise between the parties concerning a defined legal relationship,

61. Id.
64. CAL. CIV. PROC. CODE § 1297.72 (West Supp. 1990); Pub. Act No. 89-179, § 7(2), 1989 Conn. Legis. Serv. 261, 263 (West); GA. CODE ANN. § 9-9-32 (Harrison 1989); TEEX. REV. CIV. STAT. ANN. art. 249-7, § 2 (Vernon Supp. 1990); Model Law, supra note 35, art. 7(2).
65. Model Law, supra note 35, art. 7(1).
whether or not contractual.”68 Georgia provides that an arbitration agreement is enforceable “without regard to the justiciable character of the controversy . . . .”69

IV. THE ARBITRAL TRIBUNAL

A. Composition and Appointment

The Model Law and Connecticut leave the composition and selection of the arbitral tribunal largely to the parties' own determination. Absent agreement, three arbitrators are to be appointed.70 California, Florida, and Texas fix the number of arbitrators at one, unless the parties agree to a greater number,71 perhaps attempting to avoid a preemption issue in view of the Federal Arbitration Act's provision for one arbitrator in the absence of party agreement to the contrary.72 Georgia, Hawaii, and Maryland are silent on this question, although their general arbitration statutes provide for the court within its discretion to appoint one or more arbitrators, unless the parties agree otherwise.73 Nationality is expressly excluded as a ground for disqualification under the Model Law,74 as well as under the California, Connecticut, Georgia, and Texas statutes75.

In cases where the arbitral tribunal consists of three arbitrators and the parties fail to agree on the method of appointment, the Model Law, California, Connecticut, and Texas provide that each party shall appoint an arbitrator and the two arbitrators shall in turn appoint a third.76 Court intervention is authorized

74. Model Law, supra note 35, art. 11(1).
where either party fails to appoint an arbitrator or the two arbitrators are unable to select a third.\textsuperscript{77} There is no appeal from the court appointment.\textsuperscript{78} In instances where a sole arbitrator is to resolve the dispute, court appointment is authorized under all the state laws when the parties fail to agree on the selection of the arbitrator.\textsuperscript{79} In selecting an arbitrator, the appointing court is directed to consider certain factors in making its selection. The following factors listed in the California statute are typical:

(a) Any qualifications required of an arbitrator by the agreement of the parties.
(b) Other considerations as are likely to secure the appointment of an independent and impartial arbitrator; [and]
(c) In the case of a sole or third arbitrator, the advisability of appointing an arbitrator of a nationality other than those of the parties.\textsuperscript{80}

B. Grounds for Challenge and Challenge Procedure

The Model Law imposes an affirmative duty on any person approached to serve as an arbitrator to disclose any circumstances that may give rise to justifiable doubts as to their impartiality or independence.\textsuperscript{81} This duty is a continuing one for any person ultimately selected as an arbitrator.\textsuperscript{82} The Model Law permits a challenge to an arbitrator only if circumstances relating to impartiality and independence are raised, or if the arbitrator fails to possess the qualifications agreed to by the parties.\textsuperscript{83} A party may challenge his own

\textsuperscript{81} Model Law, supra note 35, art. 12(1).
\textsuperscript{82} Id.
\textsuperscript{83} Id. art. 12(2).
arbitrator only for reasons that come to light after the selection was made. Absent agreement on a challenge procedure, a challenge must be made within fifteen days after the arbitral tribunal is constituted or after becoming aware of a ground for challenge. Unless the challenged arbitrator recuses himself or the other party consents in the challenge, the arbitral tribunal decides the challenge. If this procedure fails for any reason, then the matter may be referred to court for its nonappealable decision on the challenge. Pending the judicial determination, the arbitral tribunal may proceed to an award with the challenged arbitrator participating in the proceeding.

In contrast to the Model Law's general requirement of disclosure, the California and Texas statutes contain a nonexhaustive list of grounds for recusal which is remarkably similar to the grounds listed in Michigan Court Rule 2.003 for disqualification of a judge. Among the grounds that California and Texas list for disqualification are personal bias, knowledge of disputed evidentiary facts, service as a lawyer in the matter in controversy, prior service as an arbitrator in another proceeding involving one of the parties, a relationship within the third degree to a person who has an interest that could be substantially affected by the outcome of the arbitration, or a close personal or professional relationship with a person known to have an interest that could be substantially affected by the outcome of the proceeding. In California the obligation to disclose is mandatory and cannot be waived. The procedure adopted for challenging an arbitrator in California and Texas is virtually identical to the Model Law's. If an arbitrator is removed or is unable to perform his functions de facto, California, Texas, and the Model Law provide for substitution in the same manner as an original appointment. California

84. Id.
85. Id. art. 13(2).
86. Id. art. 13(3).
89. Id. §§ 1297.131-.136; TEX. REV. CIV. STAT. ANN. art. 249-13, §§ 1-6 (Vernon Supp. 1990).
and Texas further provide that in the event of a substitution during the course of an arbitration with more than one arbitrator, the arbitral tribunal has the discretion to repeat any hearings previously held.91

C. Competence of the Tribunal to Rule on Its Jurisdiction

California, Florida, Georgia, Texas, and the Model Law vest the arbitral tribunal with the power to rule on its own jurisdiction.92 In California, Georgia, and Texas, the arbitration clause is treated as an agreement independent of the other terms of the contract, so that a determination that the underlying agreement is void does not result in the invalidation of the arbitration clause.93 California and Texas also require that a jurisdictional challenge be raised in the statement of defense.94

D. Power of the Arbitral Tribunal to Order Interim Relief

Unless otherwise stipulated by the parties in their arbitration agreement, the Model Law and the California, Connecticut, Maryland, and Texas statutes authorize the arbitral tribunal to order appropriate interim relief (typically, the posting of security), subject to judicial supervision.95 Florida and Georgia empower the arbitral tribunal to order interim relief, regardless

92. CAL. CIV. PROC. CODE § 1297.161 (West Supp. 1990); FLA. STAT ANN. § 684.06(2) (West 1990); GA. CODE ANN. § 9-9-34 (Harrison 1989); TEX. REV. CIV. STAT. ANN. art. 249-16, § 1 (Vernon Supp. 1990); Model Law, supra note 35, art. 16(1).
of the parties’ agreement, and without prejudice to the parties’ right to seek such relief directly from any appropriate court. 96 Florida adds that resort to a court for interim relief constitutes a waiver of the agreement to arbitrate if so provided in the undertaking to arbitrate. 97

Hawaii has no provision explicitly authorizing the granting of interim relief by an arbitral tribunal, although it does permit the arbitral tribunal to seek judicial assistance. 98 In Maryland the posting of security can only be required if the party to be required to post security resides in a country that has not acceded to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and if that party does not have sufficient assets in the United States to satisfy the amount of the claim. 99 California and Texas empower their courts to preliminarily enjoin the disclosure of trade secrets and the disposition of goods that are the subject matter of the arbitration, pending completion of the arbitration. 100 Furthermore, if a court application is made seeking interim measures, then the court is to give preclusive effect to the arbitrator’s findings of fact bearing on the question of the propriety of interim relief. 101 In Maryland, the standard is abuse of discretion. 102

E. The Conduct of Arbitral Proceedings

Each state statute that addresses the question of the conduct of the arbitral proceeding leaves the parties essentially free to fashion their own rules governing the procedure to be followed.

in the arbitration. 103 Only the Maryland statute is silent on this point. Under the Model Law and the California, Florida, and Texas statutes, in the absence of agreement the arbitral tribunal is vested with the power to "conduct the arbitration in the manner it considers appropriate," subject to the express procedural rules set forth in the arbitration statute. 104 In this last connection, a wide range of gap-filling rules are provided in the Model Law and in the California, Florida, and Texas statutes. Georgia, Hawaii, and Maryland, by contrast, are either skeletal in approach or altogether silent on the point, leaving it to the parties to determine their own procedures. Connecticut, of course, tracks the Model Law verbatim.

The gap-filling provisions of the Model Law and the California, Florida, and Texas statutes are described below.

1. **Place of Arbitration**

   Under the Model Law and the California, Florida, and Texas statutes, the arbitrator is free to select the place of arbitration, "having regard to the circumstances of the case, including the convenience of the parties." 105 The arbitrator is authorized to hold the arbitration in more than one place if appropriate for the purpose of receiving evidence. 106

2. **Commencement of Arbitral Proceeding**

   Absent agreement of the parties, the arbitration proceedings commence on the date a request for arbitration is received by the respondent. 107

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3. **Language to be Used in the Proceeding**

The arbitrator has the discretion to select the language applicable to all phases of the arbitration proceeding and to order translations of documentary evidence.\(^{108}\)

4. **Statement of Claim and Defense**

Within the period of time set by the arbitrator, the claimant must state the facts supporting his claim, the points at issue, and the relief sought. The respondent must state his defense to each of these allegations. Statements of claim or defense may be amended or supplemented, subject to limits by the arbitrator for delay in making the amendment or supplementation.\(^{109}\)

5. **Hearings and Written Proceedings**

The arbitral tribunal conducts hearings with prior notice at appropriate stages of the proceedings, unless the parties have waived that right. The tribunal retains the discretion to determine whether to hold oral hearings for the presentation of evidence or argument, and whether the proceedings should be conducted on the basis of documentary proofs. No *ex parte* communications are permitted.\(^{110}\) California and Texas specify that all hearings are to be held *in camera*.\(^{111}\) California, Florida, and Texas also authorize consolidation of arbitration proceedings.\(^{112}\)

6. **Default**

Under Article 25 of the Model Law, which California and Texas have adopted, the arbitral tribunal is to terminate the


proceeding if, without showing sufficient cause, the claimant fails to communicate its statement of claim in accordance with the procedure set forth in Article 23 of the Model Law. The respondent’s failure to communicate its statement of defense is not to be treated as an admission of the claimant’s allegations and the proceeding is to continue.\textsuperscript{113}

Florida provides that a failure to respond shall constitute a general denial of the claim.\textsuperscript{114} If any party fails to appear at a hearing or produce evidence, then the arbitrator may make an award based on the evidence presented. Florida forbids the making of an award based solely on the default of a party, thereby requiring the nondefaulting party to adduce proofs in support of his claim.\textsuperscript{115} Florida also empowers the arbitral tribunal to dismiss claims for failure to prosecute.\textsuperscript{116}

7. Experts Appointed by Tribunal

Under Article 26 of the Model Law the tribunal may appoint experts to report to it on specific issues and may require the parties to assist the expert by providing him with relevant information. Upon a party’s request, the expert may participate in the hearing and be examined by the parties. The parties may present their own expert witnesses to testify on the points in issue. California, Georgia, and Texas have adopted the Model Law’s provision on experts.\textsuperscript{117} Hawaii authorizes a similar power of appointment of experts by the arbitrator.\textsuperscript{118}

8. Representation by Counsel

Florida is the only state that makes express provision for representation by counsel in an arbitration. It makes that right absolute and non-waivable prior to the commencement of the proceeding.\textsuperscript{119}

\textsuperscript{113} CAL. CIV. PROC. CODE § 1297.251-.253 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-25 (Vernon Supp. 1990).
\textsuperscript{114} FLA. STAT. ANN. § 684.08(4) (West 1990).
\textsuperscript{115} Id. § 684.13(6).
\textsuperscript{116} Id.
\textsuperscript{118} HAW. REV. STAT. § 658D-7(d)(4) (1988).
\textsuperscript{119} FLA. STAT. ANN. § 684.14 (West 1990).
9. Evidence; Witnesses; Subpoenas; Depositions

Two distinct approaches are taken on the subject of evidence and testimony. Florida and Hawaii empower the arbitrator to determine the relevance and materiality of evidence without the need to follow formal rules of evidence, to issue subpoenas duces tecum and ad testificandum, to order the taking of depositions and the use of other discovery devices, to fix fees for the attendance of witnesses, and to make awards of interest and of reasonable attorney’s fees. Both states also provide for resort to the courts as necessary in exercising these powers.

In contrast to the Florida and Hawaii approach, the Model Law, California, and Texas leave these matters for judicial resolution. They permit the tribunal, or a party with the permission of the tribunal, to request judicial assistance in taking evidence. In addition, California and Texas permit judicial assistance that includes requests for the issuance of subpoenas for the attendance of witnesses.

10. Applicable Law

California, Florida, and Texas follow Article 28 of the Model Law regarding the rules applicable to the substance of the dispute. The guiding principle is that the tribunal is to decide the dispute according to the rules of law chosen by the parties. To avoid the problem of renvoi, the parties’ choice of law includes the substantive law of the state only and not its conflict of laws rules. In the absence of a choice of law provision, the tribunal determines the governing law using the conflict of laws rules which it considers applicable. The tribunal may decide the dispute ex aequo et bono or as amiable compositeur.


122. Model Law, supra note 35, art. 27.


only if so authorized by the parties. In all cases the tribunal is to apply relevant usages of trade.

Although it is otherwise silent on the choice of law issue, Georgia does provide that the selection of that state as the place of arbitration does not in itself constitute selection of Georgia procedural or substantive law as the law governing the dispute.\textsuperscript{125} Hawaii provides that regardless of whether the place of arbitration is in Hawaii, its international commercial arbitration statute applies if the dispute is otherwise within the scope of that statute and (1) the parties expressly so provide or, (2) in the absence of such agreement, if Hawaii law is determined to be the governing substantive law under applicable conflict of laws rules.\textsuperscript{126}

On issues of procedure, if authorized by the parties or by all members of the panel, the presiding officer has the power to rule on all procedural questions.

11. Decision by Panel of Arbitrators

Under the Model Law and in California and Texas, if a panel of arbitrators determines the dispute, then a majority of its members makes an award unless the parties agree to a different number.\textsuperscript{127}

12. Settlement, Mediation, and Conciliation

If the dispute is settled, Article 30 of the Model Law authorizes reducing the settlement to an arbitral award and gives it the same status and effect as an award on the merits. California and Texas adopt this approach, and include a section which directs the tribunal to encourage settlement and, to that end, to use mediation and conciliation to encourage settlement.\textsuperscript{128} To implement this portion of their international arbitration statutes, both California and Texas have enacted identical

\textsuperscript{125} GA. CODE ANN. § 9-9-36 (Harrison 1989).
\textsuperscript{126} HAW. REV. STAT. § 658D-4(d) (1988).
\textsuperscript{127} Model Law, supra note 35, art. 29; CAL. CIV. PROC. CODE § 1297.291 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-29 (Vernon Supp. 1990).
\textsuperscript{128} CAL. CIV. PROC. CODE § 1297.301-.304 (West Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 249-30 (Vernon Supp. 1990).
provisions establishing a fairly detailed conciliation process.\textsuperscript{129} In a similar vein, Hawaii has created a center to facilitate the mediation and conciliation process, authorizing the center to promulgate rules regulating mediation and conciliation.\textsuperscript{130}

13. \textit{Form and Contents of Award}

The Model Law and the California, Florida, and Texas statutes require four formalities to be followed when a tribunal issues an award: (1) the award must be in writing; (2) it must be signed by a majority of the arbitrators if it was a panel proceeding; (3) it must state the reasons upon which it is based (unless the parties agree that no reasons be given), and the date and place of arbitration; and (4) it must be delivered to the parties.\textsuperscript{131} Georgia requires only that a written statement of reasons be given for the award.\textsuperscript{132} California, Florida, and Texas also permit the tribunal to make an interim award and to award interest and costs. Included in the term “costs” are the fees and expenses of arbitrators and expert witnesses, legal fees and expenses, and administrative fees of the institution supervising the arbitration.\textsuperscript{133} In Florida the award may not be publicly disclosed by the tribunal or by a party unless the parties consent in writing to such disclosure, disclosure is required by law, or disclosure is necessary as part of a judicial enforcement proceeding.\textsuperscript{134}

14. \textit{Termination of Proceedings}

Under Article 32 of the Model Law arbitration proceedings are terminated \textit{ipso facto} upon issuance of the final award. In other circumstances, the arbitral tribunal has the power to

terminate proceedings when the parties agree to it; when the claimant withdraws its claim, unless the respondent objects and has a legitimate interest in obtaining a final resolution of the dispute; or when the tribunal finds that further proceedings have become unnecessary or impossible. California and Texas have adopted Article 32 verbatim.\textsuperscript{135}

15. \textit{Correction and Interpretation of Award; Additional Award}

Article 33 of the Model Law gives the parties thirty days from receipt of the award to request a correction in the award for computational or clerical errors. If agreed to by the parties, a party may request an interpretation of a specific point or part of the award. The tribunal has thirty days to respond to such requests and need only do so if it considers the request to be justified. The tribunal may also make corrections of a clerical or computational nature on its own initiative. Within that same thirty-day period, a party may request an additional award as to claims presented in the proceeding but omitted from the award.

California and Texas have included this provision in their respective laws.\textsuperscript{136} Florida provides generally for vacating, modifying, clarifying, correcting, or amending an award upon request of a party if made within thirty days after issuance of the award.\textsuperscript{137} Georgia permits the parties to request an interpretation of an award.\textsuperscript{138}

F. Court Proceedings to Set Aside or Enforce Arbitral Awards

The international arbitration statutes take two distinct approaches toward judicial intervention following the termination of the arbitration proceeding. One approach,

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\item[138.] \textsc{Ga. Code Ann.} § 9-9-39(b) (Harrison 1989).
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adopted by California, Maryland, and Texas, is to prohibit all judicial intervention except as provided under its international commercial arbitration statute or applicable federal law. Neither California nor Texas expressly authorizes its courts to set aside or enforce international commercial arbitration awards, leaving that subject for resolution under federal law. Maryland expressly authorizes its courts to enforce awards and to intervene in an international commercial arbitration proceeding which is contrary to the public policy of the state, but does not set out the procedure to be followed. A broad-brush approach is taken by Hawaii as well. It authorizes enforcement of the arbitral award pursuant to the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In contrast to the virtual statutory silence of California, Hawaii, Maryland, and Texas on the question of enforcement of international commercial arbitration awards, the Model Law and the Florida and Georgia statutes state the grounds for and the procedures to be followed in having an international commercial arbitration award set aside or enforced. The grounds set forth in the Georgia and Florida statutes are closely modeled after those provided in the Federal Arbitration Act. The Model Law's grounds for setting aside or refusing enforcement of an arbitral award track those found in Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Articles 34 and 36 of the Model Law specify the same seven grounds for setting aside or refusing to enforce an arbitral award as are contained in the New York Convention:

1. Incapacity of a party.
2. Invalidity of the arbitration agreement under the law to which the parties have subjected it or under the law of the state in which the parties arbitrated.

3. Improper notice to a party of the appointment of an arbitrator or of the arbitral proceedings, or the party was otherwise unable to present its case.

4. Defects in the award (the award deals with a dispute not contemplated by or falling within the terms of the submission to arbitration, or the award contains decisions on matters beyond the scope of the submission\textsuperscript{142}).

5. Defects in the composition of the arbitral tribunal or in the arbitral procedure as agreed to by the parties, unless such agreement was in conflict with a non-derogable provision of the Model Law.

6. The subject matter of the dispute is not capable of resolution by arbitration under the law of the state.

7. The award conflicts with the public policy of the state.

In addition to furnishing the grounds for setting aside or refusing recognition of an arbitral award, the Model Law further provides that an application for setting aside an award must be made within three months of the award. A court is given the discretion to suspend judicial proceedings in order to give the tribunal an opportunity to eliminate any grounds for setting aside the award, if cure is possible.\textsuperscript{143} A court which is asked to enforce an award may adjourn its proceedings if the award is the subject of a pending application to have it set aside in another court.\textsuperscript{144}

The grounds for vacating or refusing recognition of an arbitration award in Florida represent a blend of the grounds listed in the New York Convention and the Federal Arbitration Act. In addition to the seven grounds listed above, Florida adds the following as grounds for vacating an award or declaring it not entitled to confirmation:

1. There was no written undertaking to arbitrate or there was fraud in the inducement of that undertaking.

2. A prior tribunal had determined that the dispute was nonarbitrable or the undertaking was invalid or enforceable, unless the challenging party participated on the merits without objection.

\textsuperscript{142} If the decision on matters beyond the scope of the submission can be separated from those submitted, then only the part of the award that contains decisions on matters not submitted may be set aside. Model Law, \textit{supra} note 35, art. 35(2)(a)(iii).

\textsuperscript{143} Model Law, \textit{supra} note 35, art. 35(3)-(4).

\textsuperscript{144} \textit{Id.} art. 36(2).
3. The arbitral tribunal conducted its proceedings so unfairly as to substantially prejudice the rights of the challenging party.
4. The award was obtained by corruption, fraud, or undue influence.
5. A neutral arbitrator had a material conflict of interest.\textsuperscript{145}

These five grounds are included in the Georgia statute as well. Both Georgia and Florida impose a three-month limitation period on bringing an application to \textit{vacate} an award.\textsuperscript{146} Although the federal legislation implementing the New York Convention is silent on that precise question, 9 U.S.C. § 207 does provide that an application to \textit{confirm} an award must be brought within three years after an arbitral award falling under the Convention is made.\textsuperscript{147} Section 9 of the Federal Arbitration Act provides a one-year period for bringing an action to confirm other arbitration awards, but it too is silent on the question of when an action must be brought to vacate an award.

G. Consent to Jurisdiction

Florida and Hawaii provide that participation in an arbitral proceeding in the state or making a written agreement to arbitrate pursuant to the state's international commercial arbitration statute constitutes consent to the exercise of personal jurisdiction by the state courts over the party.\textsuperscript{148}

H. Immunity of Arbitrators

Only Florida expressly provides for immunity of arbitrators from suit based on the performance of the arbitrator's duties.\textsuperscript{149}

I. Conciliation

Three states, California, Hawaii, and Texas, provide for resolving international commercial disputes through conciliation


\textsuperscript{146} FLA. STAT. ANN. § 684.24(3)(b) (West 1990); GA. CODE ANN. § 9-9-13(a) (1989).


\textsuperscript{148} FLA. STAT. ANN. § 684.30 (West 1990); HAW. REV. STAT. § 658D-6 (1988).

\textsuperscript{149} FLA. STAT. ANN. § 684.35 (West 1990).
in lieu of arbitration. The Hawaii legislation notes that it is the policy of the state to encourage the use of arbitration, mediation, and conciliation to resolve international commercial disputes, but makes no express provision for conciliation, instead leaving it to the center created under its law to establish rules and procedures for conducting conciliation.\textsuperscript{150}

California and Texas, on the other hand, have enacted detailed provisions on conciliation. Their conciliation statutes provide for the appointment of conciliators, furnish conciliators with principles for conducting their proceedings, permit representation by any person of the parties' choice, guarantee confidentiality of all communications made in the conciliation proceeding, stay all arbitral and judicial proceedings pending the outcome of the conciliation proceedings, give a conciliation agreement which settles the dispute with the same status as an arbitral award, authorize the conciliator to award costs, and immunize conciliators from suit.\textsuperscript{151} Additionally, these statutes give parties immunity from civil process while present in the state to participate in the conciliation proceeding, and their participation in the conciliation process is not deemed as consent to judicial jurisdiction in the event the conciliation fails. As noted, these conciliation rules were drawn from the UNCITRAL Model Rules on Conciliation.\textsuperscript{152}

\textbf{PART THREE: THE FEDERAL AND INTERNATIONAL LEGAL ENVIRONMENT}

\textbf{I. THE FEDERAL ARBITRATION ACT}

The United States Arbitration Act of 1925, sometimes referred to as the Federal Arbitration Act, provides for arbitration in maritime transactions and contracts involving interstate or foreign commerce.\textsuperscript{153} The original provisions of the federal act do not deviate dramatically from those of the uniform act.

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Provisions of the Federal Arbitration Act which were added in 1970 to implement the New York Convention are discussed in the following section dealing with the New York Convention.\textsuperscript{154}

Of greatest importance is whether the federal Act preempts state arbitration laws. In 1989, the United States Supreme Court considered this question in \textit{Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University}, concluding that the Federal Arbitration Act did not preempt a California statute permitting a stay of arbitration where the contracting parties had agreed that the arbitration agreement would be governed by California law.\textsuperscript{155} In \textit{Volt Information Sciences, Inc.}, Stanford University and a construction firm entered into a construction contract under the terms of which the parties agreed that (1) all disputes between them arising out of or relating to the contract or its breach would be resolved through arbitration, and (2) the contract would be governed "by the law of the place where the Project is located."\textsuperscript{156} When a dispute arose over payment for extra work, the firm made a demand for arbitration.\textsuperscript{157} The university responded by filing an action in California state court, alleging fraud and breach of contract by the firm,\textsuperscript{158} and also seeking indemnity from two other companies involved in the construction project, with whom the university did not have arbitration agreements.\textsuperscript{159} The firm moved to compel arbitration pursuant to the contract. The university in turn moved to stay arbitration pursuant to a California statute which authorizes a court to stay arbitration pending resolution of related litigation between a party to an arbitration agreement and third parties not bound by such agreement where there is a possibility of conflicting rulings on common issues of law or fact.\textsuperscript{160} The state court granted the stay and rejected the challenge that the Federal

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154. \textit{See infra} text accompanying note 176.
156. \textit{Id.} at 470.
157. \textit{Id.}
158. \textit{Id.} at 471.
159. \textit{Id.}
160. \textit{Id.} CAL. CIV. PROC. CODE § 1281.2(c)(West 1982).
\end{footnotesize}
Arbitration Act preempted the California law, even though the parties’ contract involved interstate commerce. On appeal to the United States Supreme Court, a six-member majority affirmed the state court’s decision. In an opinion by Chief Justice Rehnquist, the Court held as a preliminary matter that the California Court of Appeals’ holding—that the parties intended the choice-of-law clause to incorporate California arbitration rules—was a question of state law and would not be set aside by the Court. The Court further ruled that application of the California procedural statute was not preempted by the Federal Arbitration Act because (a) the Act contained no provision authorizing a stay of arbitration in such a situation; (b) even if sections 3 and 4 of the Act were fully applicable in state court proceedings, they did not prevent application of the California statute to stay arbitration where the parties to the contract had agreed to arbitrate in accordance with California law; (c) the Act contained no express preemptive provision and did not reflect a congressional intent to occupy the entire field of arbitration; (d) application of the California statute to stay arbitration, in accordance with the parties’ arbitration agreement, would not undermine the goals and policies of the Act; and (e) enforcement of California rules of arbitration according to the terms of the parties’ agreement to abide by such rules was fully consistent with the goals of the Act, even if the result was that arbitration was stayed where the Act would otherwise permit it to go forward. The Court identified Congress’ principal purpose in enacting the Federal Arbitration Act to be that of “ensuring that private arbitration agreements are enforced according to their terms. . . . [I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself.”

161. 489 U.S. at 471.
162. Id. at 479.
163. Id. at 474-76.
165. 489 U.S. at 476-79.
166. Id. at 478-79.
In the *Volt Information Services, Inc.* decision, the Court flatly declared that the Federal Arbitration Act "contains no express pre-emptive provisions, nor does it reflect a congressional intent to occupy the entire field of arbitration."\(^{167}\) In light of the Court's willingness to set limits on the reach of the broad federal policy of promoting arbitration, the seven international commercial arbitration statutes analyzed above may well test the scope of federal preemption in this field.\(^{168}\) They certainly have been given some room to roam under the *Volt Information Services, Inc.* decision.

II. THE UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (THE NEW YORK CONVENTION)

The most carefully drafted arbitration agreement is worthless if it cannot be enforced. The enforceability *vel non* of an international arbitration agreement is a question answered under the law of the country where enforcement is sought. Because national laws vary greatly, creating uncertainties when questions of enforceability arise, major trading nations, including the United States, have entered into international agreements designed to eliminate or, at a minimum, reduce this uncertainty.\(^{169}\) By far the most important international agreement in this connection is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, popularly known as the New York Convention, which has been ratified by some eighty countries, including Canada.\(^{170}\)

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\(^{167}\) *Id.* at 477.

\(^{168}\) For additional discussion on the Federal Arbitration Act, see G. Wilner, *Domke on Commercial Arbitration* §§ 4.03-.05 (rev. ed. 1988). Compare *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (the United States Supreme Court held that a California state law, which did not favor arbitration agreements, conflicted with the provisions of the Federal Arbitration Act, and thus it was preempted).


After United States ratification of the New York Convention in 1970, Congress enacted amendments to the Federal Arbitration Act to bring the Convention into effect under United States domestic law.\textsuperscript{171} In the event of inconsistencies between the Federal Arbitration Act and the New York Convention and its implementing legislation, the latter controls.\textsuperscript{172} Similarly, in the event state law directly conflicts with either congressional enactment, the former will be preempted.\textsuperscript{173} Federal law and the Convention are silent, however, on many issues bearing on international arbitration. In light of the Supreme Court’s recent determination in \textit{Volt Information Sciences, Inc.}, which held that Congress did not intend to occupy the entire field of interstate or international arbitration, the states are currently free to enact legislation to fill these gaps in the federal legislative scheme.

Briefly, the New York Convention addresses the critical problem in international commercial arbitration of creating within the major trading nations a dependable body of rules for securing enforcement of arbitral awards, regardless of the place of the arbitral proceeding or the nationality of the arbitrators. The Convention authorizes the direct enforcement of a foreign arbitral award in the courts of any country which is a party to the Convention, subject to review only on procedural grounds dealing with questions of fairness in obtaining the award, nonarbitrability, and public policy. To enforce a foreign arbitral award in the United States, a party need only furnish an authenticated original or certified copy of the award and of the arbitration agreement (together with necessary translations) within three years after the award. Regardless of whether the award is the product of an institutional or ad hoc


\textsuperscript{172} 9 U.S.C. § 208 (1982).

arbitration, U.S. district courts, as well as state courts, have jurisdiction to hear applications to confirm or challenge a foreign arbitral award. In practice, enforcement is seldom refused.\textsuperscript{174}

A. Scope of the New York Convention

In the words of the United States Supreme Court, the New York Convention was designed to “encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”\textsuperscript{175} At its core, the Convention requires that national courts of signatory countries refer parties to arbitration when they have entered into a valid agreement to arbitrate an international commercial dispute,\textsuperscript{176} and, subject to certain exceptions,\textsuperscript{177} to recognize and enforce foreign arbitral awards.

1. Commercial Relationships

The scope of the New York Convention is set out in Article I. Article I(3) provides that member states may declare that the Convention applies only to relationships which are considered commercial under the national law of the state making the declaration. Most nations, including the United States, have made such a declaration. In interpreting this provision of the Convention, United States courts have construed the term “commercial” broadly.\textsuperscript{178}

2. Foreign Awards and Agreements

Under Article I(1), the Convention applies only to arbitral awards that either (1) are made outside the country of


\textsuperscript{176} Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958 art. II (3) [hereinafter New York Convention].

\textsuperscript{177} \textit{Id.} art. III.

enforcement or (2) are not considered as domestic awards in the country where enforcement is sought. Congress implemented the limitations of Article I(1) in section 202 of the Federal Arbitration Act which provides in part:

An agreement or award arising out of such a [commercial] 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.\(^{179}\)

Section 202 thus extends the Convention to certain awards rendered within the United States if the parties' relationship involves foreign property or performance abroad.

3. Reciprocity

Articles I(3) and XIV of the Convention provide for the recognition and enforcement of agreements and awards only on a reciprocal basis. The United States has declared that it will "apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State." It is clear from these reciprocity provisions that United States courts are not required by the Convention to recognize or enforce arbitral awards rendered in a nation that is not a party to the Convention.

4. Agreements in Writing

The scope of the New York Convention is limited to arbitration agreements that are reduced to writing.\(^{180}\) Article II(2) of the Convention defines "agreements in writing" to include agreements that are reflected in exchanges of letters or telegrams.

B. Enforceability of Arbitration Agreements

Article II of the New York Convention obliges courts of contracting states to refer persons who are parties to a valid

\(^{180}\) New York Convention, \textit{supra} note 176, art II(1).
arbitration agreement to arbitration. Judicial assistance is provided in section 4 of the Federal Arbitration Act, the provisions of which are incorporated by reference in the 1970 legislation implementing the New York Convention.\footnote{181}{See 9 U.S.C. § 208 (1988).}

It is fundamental, of course, that personal jurisdiction exist over a party to an arbitration agreement before a United States court may order that party to proceed with arbitration. Some courts have held that by agreeing to arbitrate within a particular forum, the party implicitly consents to personal jurisdiction of the forum's courts for purposes of suits to compel arbitration.\footnote{182}{See e.g., Island Territory of Curacao v. Solitron Devices Inc., 489 F.2d 1313 (2d Cir. 1973), cert. denied, 416 U.S. 986 (1974).}

As previously noted, this is a result achieved by statute in Florida and Hawaii.\footnote{183}{See also 9 U.S.C. §§ 204, 206 (1990).}

C. Exceptions to Enforceability of Arbitration Agreements

Despite the general rule of enforceability of arbitration agreements under the New York Convention, Article II(3) of the Convention expressly excepts cases from referral to arbitration where the arbitration agreement is "null and void, inoperative or incapable of being performed." Article II(1) of the Convention only requires referrals of disputes to arbitration "concerning a subject matter capable of settlement by arbitration." The Supreme Court construed this Article in \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.},\footnote{184}{473 U.S. 614 (1985).} holding that antitrust claims under the Sherman Act are arbitrable. Given the strong federal policy in favor of arbitral dispute resolution reflected in the \textit{Mitsubishi} case,\footnote{185}{See also Scherk v. Alberto-Culver Co., 417 U.S. 506, reh'g denied, 419 U.S. 885 (1974) (securities fraud claims are arbitrable).} a presumption will exist in favor of enforcing freely negotiated arbitration agreements, even when the subject matter of the arbitration touches sensitive public policy concerns, unless Congress expressly singles out categories of claims as being nonarbitrable.\footnote{186}{473 U.S. at 628, 639-40 n.21.}
D. Enforceability of Arbitral Awards

Article III of the Convention requires contracting states to "recognize arbitral awards as binding and enforce them," subject to the seven enumerated exceptions set out in Article V.\textsuperscript{187} An expedited procedure for enforcing a foreign arbitral award is prescribed in 9 U.S.C. §§ 6 and 208. Under section 207 of the Federal Arbitration Act, an application for confirmation of the award must be made within three years of the date of the award.\textsuperscript{188} Any state international commercial arbitration law providing a different time period for bringing an action to enforce an award arguably would not be preempted by this provision, given that section 207 applies only to enforcement of foreign arbitral awards (any award made under a state international commercial arbitration statute would be only a domestic award.) However, under 9 U.S.C. § 9 an application for enforcement of a domestic arbitral award must be made within one year. To the extent a state law provides a different time period for doing so, it may be preempted.

Despite the Convention’s emphasis on facilitating the enforcement of foreign arbitral awards, Article V enumerates seven important exceptions to enforcement:

1. The arbitration agreement is invalid because the parties lacked capacity to make such an agreement or the agreement itself was invalid.\textsuperscript{189}
2. The losing party "was not given proper notice of the appointment of [an] arbitrator or of the arbitration proceedings or was otherwise" prevented from presenting its case.\textsuperscript{190}
3. The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitrate.\textsuperscript{191}

\textsuperscript{187.} New York Convention, supra note 176, art. V(1)(a).
\textsuperscript{189.} New York Convention, supra note 176, art. V(1)(b). \textit{See also} Prima Paint Corp. v. Flood & Conklin Manufacturer, 388 U.S. 395 (1967) (the Supreme Court held that the validity of the contract was itself a matter for the arbitrator to decide).
\textsuperscript{190.} New York Convention, supra note 176, art. V(1)(b).
\textsuperscript{191.} \textit{Id.}
4. The composition of the tribunal or its procedures violated either the parties' agreement or the law of the arbitral forum.192
5. The arbitral award is either not yet binding or has been set aside or suspended in the arbitral forum.193
6. The subject matter of the parties' dispute "is not capable of settlement by arbitration under the law[s]" of the enforcing country.194
7. Recognition or enforcement of the arbitral award would be contrary to the public policy of the enforcing country.195

Notwithstanding the implication from both the Convention and the language of section 207 of the Federal Arbitration Act that the Convention's exceptions are exhaustive, United States courts have suggested that, in addition to the Convention's seven grounds for nonrecognition of a foreign arbitral award, nonenforcement would be appropriate if the tribunal acted in manifest disregard of law,196 or if the arbitral forum was unreasonably inconvenient for the losing party.197 Despite this expansion on the grounds for nonrecognition and nonenforcement, courts in the United States exhibit a strong pro-enforcement attitude toward both domestic and foreign arbitral awards, an attitude that is at the core of the New York Convention.198

192. Id. arts. V(1)(d), V(2)(b).
193. This provision was a response to concerns that an arbitral award should not be given binding effect in one country when it is not binding under the laws where it was made. At the same time, this provision was designed to avoid "double exequator," which requires judicial recognition of the award in both the rendering country and the enforcing country. See Comment, supra note 170, at 504-05.
195. Id. art. V(2)(b). The public policy defense is the most frequently litigated. In order to avoid making this defense a major loophole to enforcement of arbitral awards, U.S. courts have given it a narrow construction. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974).
III. The Inter-American Convention on International Commercial Arbitration

The Inter-American Convention on International Commercial Arbitration,199 which is modeled after the New York Convention, was adopted in 1975 at a diplomatic conference of the Organization of American States. The Senate gave its advice and consent to ratification of the Inter-American Convention on October 8, 1986, with the understanding that ratification would not be effected until implementing legislation was enacted. On August 15, 1990, the 101st Congress enacted legislation200 to bring the provisions of the Inter-American Convention on International Commercial Arbitration into domestic effect in the United States.

Even with the parallels between the Inter-American and New York Conventions, Latin American countries have been wary of joining international conventions such as the New York Convention. For example, of the eighteen countries which are parties to the Inter-American Convention,201 Bolivia, Brazil, El Salvador, Honduras, Nicaragua, Paraguay, and Venezuela are not parties to the New York Convention. These countries have shown less resistance to joining regionally based conventions, however, including the Inter-American Convention.

The adoption and implementation of the Inter-American Convention by the United States is an important development. Before the Inter-American Convention was adopted in Latin America, agreements to arbitrate future disputes were unenforceable in many Latin American countries; only agreements to arbitrate existing disputes were generally enforceable. Because the overwhelming majority of arbitrations are the product of agreements to arbitrate future disputes, the Latin American position on arbitration effectively eliminated arbitration as a method of commercial dispute resolution in most cases.

The text of the Inter-American Convention is substantially similar to the New York Convention. Article 1 of the Inter-

201. Those countries are Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, Uruguay, and Venezuela.
American Convention provides that arbitration agreements are valid, whether the dispute arises in the future or is an existing dispute. This is similar to Article II(1) of the New York Convention. Under the Inter-American Convention, the agreement to arbitrate must be contained in "an instrument signed by the parties,"\(^{202}\) while the New York Convention requires an "agreement in writing."\(^{203}\)

Article 3 of the Inter-American Convention fills a gap that exists under the New York Convention. That Article provides for a set of fall back procedural rules (\textit{i.e.,} the rules promulgated by the Inter-American Commission) for conducting the arbitral proceeding in the event the parties fail to agree to such rules.

Article 4 of the Inter-American Convention tracks New York Convention Article III which provides that an arbitration agreement is generally enforceable. The Inter-American Convention makes it clearer than the New York Convention that an arbitral award is not appealable and has the force of a final judicial judgment. The grounds for refusing to enforce an arbitral decision in Article 5 of the Inter-American Convention are comparable to those in the New York Convention.

The implementing legislation creates a new Chapter 3 to the Federal Arbitration Act specifically to implement the provisions of the Inter-American Convention.\(^{204}\) The implementing legislation incorporates by reference those sections of the Federal Arbitration Act which were enacted to implement the New York Convention. In addition, section 306 of the implementing legislation makes the rules of the Inter-American Commercial Arbitration Commission the applicable rules for conducting the arbitral proceeding, in the absence of party agreement to the contrary. The Inter-American Commission rules are virtually identical to the UNCITRAL arbitration rules. Finally, under section 305, the Inter-American Convention prevails over the New York Convention where a majority of the parties to the arbitration are citizens of a country which has ratified the

\(^{202}\) Inter-American Convention on Commercial Arbitration, \textit{supra} note 199, art. I.

\(^{203}\) New York Convention, \textit{supra} note 176, art. II(2).

Inter-American Convention and which is a member of the Organization of American States.

IV. THE UNCITRAL MODEL LAW IN CANADA

Before 1985, uncertainty was the hallmark of foreign arbitral awards in Canada. For one thing, double exequatur was the rule, rather than the exception, for enforcement of foreign arbitral awards in Canada. For another, because of the division of powers between the federal and provincial governments, the provinces have exclusive jurisdiction over matters affecting international transactions, resulting in conflict between federal and provincial jurisdiction.

In January, 1985, a seventy-member task force was assembled by the British Columbia government to explore options in the field of international commercial arbitration. Prompted by British Columbia's leadership, in the summer of 1985, the provinces and the federal government reached an agreement that resulted in adoption of the New York Convention by the federal government and the common-law provinces, and the adoption of the UNCITRAL Model Law, with modifications, by Ottawa and all of the provinces. Canada thus became the first country to adopt the UNCITRAL Model Law. Australia, Germany, the United Kingdom, Egypt, Hong Kong, and several smaller developing are considering adopting the UNCITRAL Model Law as well. With these choices opening up, foreign parties are less likely to choose a state of the United States that has not enacted the Model Law as a situs for arbitration when other forums have accessible, familiar, and easily understood arbitral legal regimes.

In addition, British Columbia and Quebec have established international commercial arbitration centers that offer administrative services to parties involved in international commercial arbitration. The primary goal of British Columbia was to

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capitalize on business expansion in the Pacific Rim by developing international arbitration business in Vancouver.

V. THE CANADA-U.S. FREE TRADE AGREEMENT

A. Overview

The Free Trade Agreement (FTA) has been tagged with many labels — historic, unprecedented, ground breaking, trail blazing. Regardless of one’s sympathies, it is difficult not to think of the Free Trade Agreement in these terms, given the enormous flow of cross-border trade between Canada and the United States. The FTA liberalizes all trade in goods and most trade in services between two countries with the largest volume of two-way trade in goods in the world. The United States buys more goods from and sells more goods to Canada that any other country. In the two-year period 1984-85, Canada bought 22% of all U.S. exports, twice that of second-place Japan.207 Two-way merchandise trade between Canada and the United States totalled $147 billion in 1988.208 Closer to home, Professor John Mogk has observed that “Michigan conducts more trade with Canada than any other state and more than Canada’s second and third largest trading partners, Japan and the United Kingdom, combined. In 1987, two-way trade between Michigan and Canada exceeded $24.8 billion.”209 In 1988 United States exports to Canada increased 15.6% over 1987, more than doubling the 7.2% increase of 1987.210 United States imports from Canada likewise increased during 1988 by 13.9% over

210. Operation of the Trade Agreements Program, supra note 208, at 91.
Even though United States export performance improved in 1988, the United States still had a merchandise trade deficit with Canada in 1988 (as it has every year but once since 1970) of $14.8 billion, a $1 billion increase over 1987.\textsuperscript{212} Trade in automobiles and replacement parts dominates U.S.-Canada merchandise trade, comprising over one-third of all merchandise trade between the two countries. Imports from Canada of passenger cars increased over 30\% in 1988.\textsuperscript{213} In addition to automobiles, trucks, and motor vehicle parts, the other leading U.S. exports to Canada in 1988 were computers, parts of office machinery, and coal.\textsuperscript{214} The leading U.S. imports from Canada in 1988 were passenger cars, parts of motor vehicles, newsprint, trucks, crude oil, natural gas, wood pulp, and lumber.\textsuperscript{215}

The most significant substantive provisions of the FTA are those covering trade in goods and services, government procurement, and investment. The most significant procedural provision, and certainly the most controversial in the entire Agreement, creates a binational dispute panel for resolving dumping and subsidy complaints. Briefly, Part One of the FTA outlines the objectives and scope of the Agreement. Part Two regulates trade in goods and provides for the elimination of all tariffs on bilateral trade in goods by January 1, 1998, using three formulae. For some sectors (e.g., computers, motorcycles, whiskey), the Agreement immediately eliminated tariffs upon its entry into force on January 1, 1989. For a second group of sectors (e.g., paper, paints, furniture), tariffs are phased out in five equal annual stages beginning January 1, 1989. The elimination of all other tariffs will occur by January 1, 1998, in ten equal annual steps for a third group of trade-sensitive products such as textiles, wearing apparel, tires, steel, and appliances.\textsuperscript{216} Part Three, dealing with government procurement, lowers the threshold in the GATT Government

\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id. at 92.
\textsuperscript{215} Id.
Procurement Code from US $171,000 to US $25,000, *i.e.*, federal government purchases above this threshold will be open to competitive bidding by each party. Part Four covers trade in services, investment, and business travel. With regard to services, Canada and the United States will extend national treatment to trade in most services so that agriculture, mining, construction, insurance, real estate, and commercial service providers will be treated in the same manner as domestic firms providing those same services.\(^{217}\) In the field of investment, this same national treatment obligation is assumed in connection with the establishment of new businesses,\(^{218}\) with a liberalization of rules for the acquisition of existing businesses in Canada.\(^{219}\) Part Five, financial services, accords national treatment to investors in the financial services market. Part Six covers settlement of disputes arising under the Agreement.

**B. The Institutional Provisions of the FTA**

The Canada-U.S. Free Trade Agreement contains two broad institutional provisions for implementing, interpreting, and enforcing the Agreement’s obligations. Chapter 18 of the FTA establishes the basic dispute resolution institution, the Canada-U.S. Trade Commission (the Commission), whose mandate is generally to implement and enforce the substantive provisions of the FTA.\(^{220}\) The second major institutional provision of the

\(^{217}\) *Id.* art. 1401, 1402, annex 1408. Excluded from the scope of coverage are transportation services, most telecommunications services, and the services of doctors, dentists, lawyers, and teachers.

\(^{218}\) *Id.* art. 1602.

\(^{219}\) *Id.* art. 1607. The review threshold by Investment Canada for acquisition of existing businesses is to be raised from CAN $5 million to CAN $150 million by 1992.

\(^{220}\) Article 1802, paragraph 1, provides: “The Parties hereby establish the Canada-United States Trade Commission (the Commission) to supervise the implementation of this Agreement, to resolve disputes that may arise over its interpretation and application, to oversee its further elaboration, and to consider any other matter that may affect its operation.” *Id.* art. 1802, para. 1. In addition to resolving disputes under the Agreement, the Commission is to supervise its implementation, thus performing a management function as well. See Graham, *The Role of the Commission in the Canada-U.S. Free Trade Agreement: A Canadian Perspective in United States/Canada Free Trade Agreement: The Economic and Legal Implications* 233 (ABA 1988); Robinson, *Dispute Settlement Under Chapter 18 of the U.S.-Canada Free Trade Agreement in United States/Canada Free Trade Agreement: The Economic and Legal Implications* 261 (ABA 1988).
FTA is Chapter 19 which creates the binational panel for reviewing both statutory amendments to and administrative determinations under the anti-dumping (AD) and countervailing duty (CVD) laws. Neither of these Chapters provides a mechanism for resolving purely private commercial disputes between Canadians and Americans.

In addition to these two major institutions established to smooth the operation of the FTA, several sectors have their own separate framework for implementing and supervising the FTA provisions applicable to them. Most significantly, disputes over financial services are to be resolved through notification and consultation between the Canadian Department of Finance and the U.S. Department of the Treasury, pursuant to Article 1704, paragraph 2. The Commission has been expressly divested of jurisdiction over financial services disputes under Article 1801, paragraph 1. Other mechanisms for resolving sectoral disputes have also been created under the FTA that are outside the jurisdiction of the Commission. For example, the parties are to notify and consult with one another on customs matters under Annex 406. A Working Group is created under Annex 705.4 to discuss issues concerning grains. Several Working Groups are created under Article 708, paragraph 4, to implement provisions of the FTA affecting other agricultural products. That same Article establishes a joint monitoring committee to check the progress of these Working Groups. And Article 1503 calls for establishment of procedures for consulting on the temporary entry of business persons.

1. The Canada-U.S. Trade Commission

Chapter 18 of the FTA, which creates the Canada-U.S. Trade Commission, establishes a mechanism for resolving most FTA disputes. The principal representative of each party to the Commission is, in the case of Canada, the Minister of International Trade and, in the case of the United States, the U.S. Trade Representative or their designee. The parties have the following basic rights and duties under Chapter 18. First, Article 1803 obligates a party to notify the other of any measure

221. Free Trade Agreement, supra note 216, art. 1802 para. 2.
which "might materially affect the operation of" the FTA.222 Article 1804, mirroring the GATT Article XXII obligation to consult with any other contracting party "with respect to any matter affecting the operation of [GATT]," permits either party to request consultations when any measure of the other party or any other matter affects the operation of the FTA, in the opinion of the requesting party.223 If consultation fails, submissions may be made to the Commission which in turn may refer the matter to mediation.224 If any matter referred to the Commission is not resolved in thirty days, then it may refer the dispute to binding arbitration or to a panel of experts.225 Where the dispute is referred to arbitration, the party found to have violated the Agreement is required to comply, failing which the aggrieved party "shall be free to suspend the application to the other Party of benefits of equivalent effect until such time as the Parties have reached agreement on a resolution of the dispute."226 This provision closely parallels GATT Article XXIII's remedy for nullification or impairment of GATT benefits, leaving it ultimately with the offending party to cease and desist. In addition, as is true with GATT panel proceedings, only the two governments through their designated representatives may appear before the Commission or Chapter 18 panels; private parties have no standing and no right to intervene.

Unfortunately, the dispute resolution mechanisms of Chapter 18 may in the end be no different than those of GATT. It is unfortunate because like GATT and its members inter sese where it has been left up to the offending party to accede to a panel decision when found to be in violation of its international

222. Id. art. 1803.
223. Id. art. 1803. Another GATT feature borrowed by FTA Article 2011 is that of nullification or impairment contained in GATT Article XXIII. Nullification or impairment essentially is a measure of injury to a party regardless of whether the event causing the injury is violative of GATT. See J. Jackson, World Trade and the Law of GATT 163-92 (1969).
224. Free Trade Agreement, supra note 216, art. 1805.
225. Id. art. 1806, para. 1. Article 1807 provides for five-member arbitration panels and the procedures for conducting a Chapter 18 arbitration. Article 1807 provides for a submission of the dispute to a panel of experts. Id. art. 1807, para. 2.
226. Id. art. 1807, para. 9.
GATT obligations, the Chapter 18 sanction is no different, imposing a sanction that is no sanction at all because it lacks bite. Canada and the United States have failed to surrender a sufficient amount of sovereignty under Chapter 18, as have the GATT contracting parties under Article XXIII. A painful yet valuable lesson from the GATT experience that apparently was forgotten in the course of the FTA negotiations is that economic integration without sufficiently strong institutions to manage that integration have a high probability of eventually unraveling.

Although the jurisdictional mandate of the Commission to resolve disputes under the FTA is broad, it nevertheless has been given no power to resolve AD and CVD disputes.\textsuperscript{227} Responsibility for settling disputes under the AD and CVD trade remedy laws has been vested in a binational review panel under Chapter 19 of the FTA.

2. \textit{The Binational Dispute Panel}

Chapter 19 of the FTA, the most controversial chapter in the entire Agreement, creates not one, but two panel procedures. The first is designed to review final AD and CVD administrative determinations, thus substituting judicial review of such determinations with binational panel review.\textsuperscript{228} The second has been established to screen amendments to each country’s AD and CVD laws. These two procedures are intended to be stop-gap measures, however, and not a permanent feature of the FTA landscape. Under Article 1906 the parties have five years to develop a substitute system for the current AD and CVD legal regime. If no such substitute system is agreed to or implemented within that five-year period, the parties have an additional two years within which to reach such agreement. Failing such agreement, either party may terminate the FTA on six months’ notice. Article 1906 only hints at the kind of substitute AD and CVD legal regime the parties are supposed to adopt. Will the substitute system exempt each country from the other’s AD and CVD laws? Will the definition of a

\textsuperscript{227} Id. art. 1801, para. 1.
\textsuperscript{228} Id. art. 1904, para. 1.
countervailable subsidy be broadened in order to exempt more or most Canadian assistance programs? Will a larger de minimis subsidy and dumping margin (currently .5% in the United States) be adopted so that only the most serious cases will receive administrative relief? The answer the FTA gives to these questions is cryptic.\textsuperscript{229} Article 1907 directs the parties to establish a Working Group that will:

a) seek to develop more effective rules and disciplines concerning the use of government subsidies;
b) seek to develop a substitute system of rules for dealing with unfair pricing and governmental subsidization; and
c) consider any problems that may arise with respect to the implementation of this Chapter and recommend solutions, where appropriate.\textsuperscript{230}

Whether this mandate contemplates wholesale scrapping of the current AD and CVD statutory scheme as applied to the imports of each party, or whether something less ambitious is envisioned, it is difficult to say. It is fairly safe to predict, however, that the most contentious subject on the Working Group’s agenda will be subsidization, given the very sensitive nature of this subject for Canada.

\textbf{a. Article 1903 Panel Review of AD and CVD Statutory Amendments}

Although the commitments made by the parties under the Article 1902 standstill provision on AD and CVD statutory amendments are comparatively soft, those commitments nevertheless are not without bite owing to the creation of a panel procedure for reviewing all such statutory amendments. After its enactment, any AD or CVD amendment may be referred to a panel under Article 1904 and Annex 1903.2 for a declaration (1) whether the amendment is consistent with the


\textsuperscript{230} Free Trade Agreement, supra note 216, art. 1907, para. 1.
FTA, the Antidumping Code, the Subsidies Code, or GATT generally; or (2) whether the amendment reverses a binational panel decision and, if so, whether that amendment conforms with GATT, the two GATT Codes, and the FTA. The FTA makes no provision for resort by private parties to an Article 1903 panel proceeding. Thus, only Canada and the United States, through their national representatives, may demand and appear in this specific binational panel proceeding.

The composition of all Chapter 19 panels is the same regardless of whether the challenge is to an AD or CVD statutory amendment or to an AD or CVD determination. First, Annex 1901.2, paragraph 1, states that "the Parties shall develop a roster of individuals to serve as panelists in disputes under this Chapter." Annex 1901.2 further provides for five-member panels with each party appointing two panelists and a fifth neutral panelist being mutually selected by the parties or by the four appointed panelists under Annex 1901.2, paragraphs 1-3. A majority of any Chapter 19 panel must be lawyers. Second, panel decisions are to be based solely on the parties' oral and written submissions under Annex 1903.2, paragraph 1. Third, Article 1903 panel proceedings leading to the panel's final declaratory opinion are confidential, unless the parties otherwise agree, and its final opinion may not be published if the parties so agree. Fourth, Article 1903 panels proceed under rigorous time constraints. Within ninety days after the appointment of the panel chair (which is to be done promptly after appointment of the fifth panelist), an initial opinion containing findings of fact and a determination is issued. In the event of an affirmative determination (one that finds the statutory amendment in violation of Article 1902), the panel may make recommendations on how the amendment can be brought into conformity with Article 1902. The parties may request reconsideration of the panel's initial opinion within fourteen days after its issuance. A final opinion is to be issued within thirty days after the request for reconsideration. If the panel recommends modifications to the offending statutory amendment, then the parties are to consult with one another in an effort to remedy the nonconformity. As part of their consultations, the parties may draft remedial legislation that must be enacted within nine months after the consultations are concluded, absent some other agreement. Unless the remedial
legislation is enacted, the aggrieved party may either retaliate through comparable legislative or executive action, or terminate the Agreement.

In sum, although the commitment to refrain from enacting protectionist AD or CVD statutory amendments may lack a hard edge, the remedial provisions that can be invoked following the enactment of such amendments do have potential sting. Whether the threat to terminate the Agreement or to retaliate in kind with reciprocal legislative or executive action will be credible, or even effective if carried out, remains to be seen. One thing is certain, however: Chapter 19 has set the stage for high-stakes brinkmanship.

b. Article 1904 Binational Panel Review of Final AD and CVD Determinations

The second dispute settlement forum created under Chapter 19 is the binational panel for reviewing final AD and CVD administrative determinations. Its function is simply stated: Binational panel review replaces judicial review of final AD and CVD determinations. Its composition and procedures are identical to those of Article 1903 panels. The applicable substantive law, the standard of review, and general legal principles are those of the importing party. This body of law includes the AD and CVD statutes, their legislative history, administrative regulations, administrative practice, rules of statutory construction, and case law to the extent such sources of law would be considered by a reviewing court of the importing party. The parties are to adopt rules of procedure for the panel based upon judicial rules of appellate procedure, further judicializing the process. Private parties have the same standing and right to panel review as they do to judicial review under domestic law. Panel proceedings are to be conducted under an expedited time schedule so that panel decisions issue within 315 days from the date of the initial request for panel review. Decisions of the panel are binding and ordinarily final, subject to extraordinary challenge only (1) where a panelist is guilty

231. Id. art. 1904, paras. 2-3.
232. Id. art. 1904, para. 14.
of gross misconduct, bias, or serious conflict of interest, where a panel has seriously departed from a fundamental procedural rule, or where the panel has exceeded its Article 1904 powers; and (2) any of those occurrences materially affected the panel's decision and threatens the integrity of the binational panel review process.\textsuperscript{233}

\textbf{PART FOUR}

\textbf{PROPOSED LEGISLATIVE REVISIONS}

A guiding principle when considering the adoption of international commercial arbitration legislation should be clarity of procedural direction for the arbitrating parties. The current Michigan arbitration statute does not address many important procedural issues. By contrast, the Model Law is a far more fully-articulated body of law. For example, whereas the Michigan arbitration law does not address the use of experts, section 26 of the Model Law authorizes the arbitral tribunal, unless otherwise agreed to by the parties, to appoint experts to report on specific issues and to require the parties to submit relevant information to the experts. Article 12 of the Model Law provides a specific procedure for challenging an arbitrator. The Michigan statute is silent on this point. Model Law Article 16 vests the arbitral tribunal with power to rule on its own jurisdiction. Article 23 of the Model Law directs the claimant to state the facts supporting its claim and requires the respondent to state its defense to each of those allegations. Article 25 of the Model Law sets forth a detailed default procedure. Article 28 guides the arbitral tribunal in choosing the applicable law, absent agreement of the parties on this question. Article 30 directs the arbitral tribunal to reduce a settlement to an award and gives it the same status as an award on the merits. Article 31 specifies the form and content that an award must take. Again, the Michigan arbitration statute does not address any of these issues.\textsuperscript{234}

\textsuperscript{233} \textit{Id.} art. 1904, para. 13. The extraordinary challenge panel consists of three members selected from a roster of judges and former judges from the U.S. federal bench and from Canadian courts of superior jurisdiction. \textit{Id.} annex 1904.13, para. 1.

\textsuperscript{234} These procedural lacunae are also present in the Federal Arbitration Act.
The choice seems to be between enacting patchwork revisions to the Michigan arbitration statute or enacting a new international commercial arbitration statute that is based on the Model Law. My tentative proposal is that the Michigan legislature adopt the UNCITRAL Model Law, including the conciliation provisions found in the California and Texas statutes. The Model Law could be added as a new chapter that supersedes the Michigan arbitration statute only with respect to international commercial arbitration. This approach would follow Florida's lead of adopting international arbitration legislation that does not supersede the domestic arbitration law. Although the Model Law could easily perform simultaneous service for all types of arbitration, its draft text is specifically restricted to arbitration of an international commercial nature, with the result that it can be adopted without modifying existing law regarding arbitration of a purely local character. In this way, the *raison d'être* for enacting the Model Law — filling the procedural gaps of the Michigan arbitration statute and thereby making Michigan a more attractive forum for international commercial arbitration — would be met without disturbing the domestic arbitration scheme in Michigan.

Adoption of the Model Law, together with the conciliation provisions of the California and Texas statutes, should be especially attractive to Asian businesses which prefer non-adversarial methods of dispute resolution. Inclusion of the conciliation provisions may aid in preserving a business relationship after an initial disagreement, thus keeping future business within Michigan that could otherwise likely be lost in the fallout of litigation. More importantly for Michigan, given Canada's wholesale adoption of the Model Law at both the federal and provincial levels, adoption of the Model Law in Michigan will inject a degree of predictability needed by business in the resolution of international commercial disputes. The resulting uniformity on both sides of the Canadian-Michigan border will not only provide the benefit of predictability in the field of international commercial arbitration, it will also increase the precedential value in Michigan courts of Canadian, California, Connecticut, and Texas court decisions interpreting the new law. Growing international business expectations with regard to commercial dispute resolution will conform to the Model Law, especially in Canada. By adopting the Model Law, Mi-
chigan may be viewed more favorably by Canadian and other foreign counsel as a forum for arbitration, which may in turn increase foreign trade between it and other nations.

The Model Law was drafted by arbitration experts from both civil law and common law jurisdictions in an effort to meet expectations from all legal traditions. The Model Law introduces some balance to the poor international image of the United States with respect to the adversarial nature of its litigation, its broad scope of discovery, and its unpredictable jury awards. Michigan's adoption of the Model Law would send a message that Michigan is hospitable to arbitration as an alternative to litigation for resolving commercial disputes.

The Model Law complements a currently accepted body of arbitration rules, the 1976 UNCITRAL Arbitration Rules. These procedural rules are used by many arbitration institutions and are frequently included in agreements for international arbitration. As noted, the Inter-American Convention incorporates those rules by reference. In addition, the Iran-United States Claims Tribunal operates under the UNCITRAL Arbitration Rules. As a consequence, more U.S. lawyers and arbitrators are gaining familiarity with this set of procedural rules, making it easier for parties to an international commercial arbitration situated in Michigan to find acceptable and knowledgeable arbitrators.

A requirement should be added to the Model Law that the courts consult the travaux préparatoires (the legislative histories of the Model Law) as an interpretive guide. This requirement should increase the likelihood of a uniform interpretation of the Model Law, allay fears that Michigan courts might give the Model Law a parochial or unusual interpretation, and thus make Michigan a more attractive international arbitral forum. The Canadian Parliament and the provinces have added a provision to their respective adoptions of the Model Law which expressly permits recourse to the travaux préparatoires for this purpose. Furthermore, since the Model Law and the travaux préparatoires are published in six languages and available internationally, many of foreign counsel's questions are likely to be answered with some ease.

In addition, two provisions should be included which are not part of the Model Law, one that gives arbitrators immunity from suit, and the other that states that participation in an
arbitral proceeding constitutes consent to the exercise of personal jurisdiction in Michigan for purposes of confirming or vacating the arbitral award.

Finally, the lurking issue of preemption will persist. My reading of the Supreme Court caselaw in this area, in particular the *Volt Information, Sciences Inc.* decision, is that if the Model Law has no corresponding provision in the Federal Arbitration Act, the New York Convention, or the Inter-American Convention, there will be no preemption problem. Conversely, to the extent there is a provision in the Model Law that corresponds to a provision in the federal laws, the Model Law provision will still not be preempted provided it is at least as hospitable to arbitration as the corresponding federal law. In short, as long as application of the Model Law would not undermine or be inconsistent with the goals of the Federal Arbitration Act, the New York Convention, or the Inter-American Convention, none of the federal arbitration laws precludes the enforcement of an agreement to arbitrate under different rules than those set forth in these three federal laws.