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The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns

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The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns

Cover Page Footnote

International Law; Commercial Law; Law

The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns

Daniel A. Zeff[†]

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I. Introduction

Both the United States and its constituent states have enacted arbitration statutes.¹ Under the Supremacy Clause, provisions in state arbitration laws may apply to the extent such provisions do not conflict with the Federal Arbitration Act.² The Supreme Court has recognized that state arbitration law may govern matters not addressed by the FAA except that the FAA will preempt state statutory provisions in conflict with the FAA.³

The Federal Arbitration Act contains provisions that apply to international commercial arbitrations conducted in the United States and that incorporate standards under which courts in the United States may recognize and enforce international arbitral awards pursuant to the treaty obligations of the United States. Chapter 1 of the Federal Arbitration Act applies to written

¹ See Federal Arbitration Act, 9 U.S.C. §§ 1-307 [hereinafter FAA]. In 1925, Congress enacted the Federal Arbitration Act primarily to overcome judicial reluctance to enforce agreements to arbitrate. "[T]he legislative history reveals that the drafters viewed the primary authority for the [Federal Arbitration] Act to be congressional power to regulate federal court procedure" and did not intend for the FAA to "nullify substantive rights governed by state law." Barbara Ann Atwood, *Issues in Federal-State Relations under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61, 76-77 (1985). For a detailed study of the legislative history of the FAA, see generally IAN MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* (1992). Every state has enacted some form of commercial arbitration legislation. Twenty-four states and the District of Columbia have patterned their domestic arbitration statutes after the Uniform Arbitration Act. See 7 U.L.A. 199-201 (1997); UNIF. ARBITRATION ACT, 7 U.L.A. 1 (1997).

² See U.S. CONST. art. VI, cl. 2.

³ In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, the Supreme Court declared that

[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is, to the extent that it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

489 U.S. 468, 477 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (citations omitted).

arbitration agreements contained in contracts evidencing a transaction involving the foreign commerce of the United States.⁴ Moreover, chapters 2 and 3 of the FAA implement the obligations of the United States to enforce arbitration agreements and arbitral awards that fall under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁵ and the Inter-American Convention on International Commercial Arbitration.⁶

Chapter 1 of the FAA contains provisions that apply primarily to the enforcement of international agreements to arbitrate in the United States or the confirmation of international arbitral awards rendered in the United States.⁷ Few provisions in chapter 1 of the

⁴ See 9 U.S.C. §§ 1-2. Sections 1 and 2 of the FAA also apply to written arbitration agreements in maritime transactions within the admiralty jurisdiction of the United States or contained in contracts evidencing interstate commerce. See *id.*

⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. Chapter 2 of the FAA implements the United States' obligations under the New York Convention. See 9 U.S.C. §§ 201-208. For further discussion of the scope and application of chapter 2 of the FAA, see *infra* notes 62-65 and 69-72 and accompanying text.

⁶ Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, reprinted in 3 Y.B. COMM. ARB. 15 (1978) [hereinafter Inter-American Convention]. Chapter 3 of the FAA implements the United States' obligations under the Inter-American Convention. 9 U.S.C. §§ 301-307. While foreign arbitral awards rendered in nations that are contracting parties to the Inter-American Convention and agreements to arbitrate that could result in such awards are within the scope of chapter 3 of the FAA, neither the Convention, chapter 3, nor case law indicate the extent that international arbitral awards rendered in the United States or arbitration agreements that could result in such awards are subject to chapter 3 of the FAA. See 9 U.S.C. § 304; Inter-American Convention, *supra*, art. 4. Since this limits the number of preemption issues raised by the coexistence of the Inter-American Convention, chapter 3 of the FAA, and the state statutes analyzed in this study, the author chooses not to examine the scope and application of chapter 3 of the FAA in depth. In addition, except for Mexico, few important U.S. trading partners have become parties to the Inter-American Convention, which lessens the treaty's significance. See GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS 319 (1994). As of January 1, 1996, the United States and eleven other member states of the Organization of American States were parties to the Inter-American Convention. See OFFICE OF THE LEGAL ADVISOR, U.S. DEPARTMENT OF STATE, PUB. NO. 9433, TREATIES IN FORCE 317 (1996). El Salvador, Honduras, and Paraguay were the only parties to the Inter-American Convention that were not parties to the New York Convention. See *id.* at 316-17.

⁷ In order to enforce international arbitration agreements, chapter 1 contains

FAA authorize action by the arbitrators or intervention by the courts to further the conduct of an arbitration.⁸

Chapter 2 of the FAA contains provisions that enforce international arbitration agreements subject to the New York Convention and that confirm or enforce international arbitral awards subject to the Convention.⁹ The FAA's chapter 2 contains no additional provisions authorizing specific action by the arbitrators or intervention by the courts to further the conduct of an international arbitration.¹⁰

provisions authorizing designated courts to stay judicial proceedings before them involving arbitrable issues or to compel arbitration. *See* 9 U.S.C. §§ 3-4. Section 3 of the FAA authorizes "courts of the United States" to stay proceedings before them involving "issue[s] referable to arbitration." 9 U.S.C. § 3. Section 4 of the FAA allows United States district courts to issue orders compelling arbitration "within the district in which the petition for an order directing such arbitration is filed." 9 U.S.C. § 4. Section 9 of the FAA's chapter 1 provides that the designated court must confirm an award rendered in the United States, unless the court vacates the award pursuant to section 10. *See* 9 U.S.C. § 9. Section 10 of the FAA specifies the grounds upon which "the United States court in and for the district wherein the award was made" may issue an order vacating such an award. 9 U.S.C. § 10. Section 9 provides that the appropriate court may also refuse to confirm an award if the court issues an order modifying or correcting the award pursuant to section 11. *See* 9 U.S.C. §§ 9, 11.

⁸ An exception is section 7 which authorizes the arbitrators to summon witnesses to attend the arbitral proceedings or to order the production of "material" evidence at the arbitral proceedings. *See* 9 U.S.C. § 7. Pursuant to section 7, the United States district court in the district where the arbitrators are sitting may compel the attendance of such witnesses and may utilize its contempt powers to enforce the arbitrators' summons. *See id.*

⁹ Section 206 provides that a court with jurisdiction under chapter 2 may issue orders compelling the parties to arbitrate. *See* 9 U.S.C. § 206. Section 206 authorizes court orders compelling arbitration according to the parties' arbitration agreement whether the place of arbitration is within or without the United States. *See id.* Section 207 authorizes a court with jurisdiction under chapter 2 to confirm an international arbitral award rendered in the United States subject to the New York Convention or to enforce a foreign arbitral award subject to the Convention unless the court invokes one of the grounds specified in Article V of the New York Convention in order to vacate or deny enforcement to such an award. *See* 9 U.S.C. § 207; New York Convention, *supra* note 5, art. V. For further discussion concerning the application of section 207 to confirm an international arbitral award rendered in the United States, see *infra* notes 125-26 and accompanying text. For further discussion concerning the application of section 207 to enforce a foreign arbitral award subject to the New York Convention, see *infra* note 75.

¹⁰ Other provisions in chapter 2 of the FAA concern such matters as jurisdiction, venue, and removal of cases from state courts. *See* 9 U.S.C. §§ 203-205. Moreover, section 208 of chapter 2 of the FAA provides that chapter 1 provisions apply to "actions

In an attempt to make their states attractive forums for conducting international commercial arbitrations, ten states have enacted state legislation applicable to international commercial arbitration.¹¹ State international arbitration statutes contain provisions concerning matters addressed expressly by provisions in chapter 1 or 2 of the FAA. Such state legislation authorizes state court intervention to enforce international agreements to arbitrate within the respective state, by means of stay orders or orders compelling the parties to arbitrate.¹² State statutes authorize their respective state courts to confirm or vacate international arbitral awards rendered within the particular state.¹³ In addition,

and proceedings" brought under chapter 2 to the extent that the pertinent chapter 1 provisions do not conflict with chapter 2 or the New York Convention as ratified by the United States. *See* 9 U.S.C. § 208.

¹¹ *See* CAL. CIV. PROC. CODE §§ 1297.11-1297.432 (West 1996); UNCITRAL Model Law on International Commercial Arbitration, CONN. GEN. STAT. ANN. §§ 50a-100 - 50a-136 (West 1994); Florida International Arbitration Act, FLA. STAT. ANN. §§ 684.01-684.35 (West, WESTLAW through 1996 2nd Reg. Sess.); GA. CODE ANN. §§ 9-9-30-9-9-43 (LEXIS through 1996 Supp.); Hawaii International Arbitration, Mediation, and Conciliation Act, HAW. REV. STAT. §§ 658D-1-658D-9 (Supp. 1992); Maryland International Commercial Arbitration Act, MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2B-01-3-2B-09 (1995); North Carolina International Commercial Arbitration Act, N.C. GEN. STAT. §§ 1-567.30-1-567.68 (1996); OHIO REV. CODE ANN. §§ 2712.01-2712.91 (Banks-Baldwin, WESTLAW through 1996 portion of 121st G.A.); Oregon International Commercial Arbitration and Conciliation Act, OR. REV. STAT. §§ 36.450-36.558 (1995); TEX. CIV. PRAC. & REM. CODE ANN. §§ 172.001-172.310 (West Supp. 1996). Several state international arbitration statutes contain statements declaring that the legislation's purpose is to make the state an attractive place for conducting international commercial arbitration. For example, the North Carolina International Commercial Arbitration Act contains the following provision:

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

N.C. GEN. STAT. § 1-567.30. For similar statements of purpose, see FLA. STAT. ANN. § 684.02(1); GA. CODE ANN. § 9-9-30; HAW. REV. STAT. § 658D-2; MD. CODE ANN., CTS. & JUD. PROC. § 3-2B-02; OR. REV. STAT. § 36.452(1).

¹² *See, e.g.*, CAL. CIV. PROC. CODE § 1297.81.

¹³ Some state international arbitration statutes contain express provisions regarding the confirmation or vacation of arbitral awards. *See, e.g.*, N.C. GEN. STAT. §§ 1-567.64-1-567.65. Other state international arbitration statutes rely on the state's

several state international arbitration statutes contain provisions that expressly address the recognition and enforcement of foreign arbitral awards.¹⁴

Moreover, state international arbitration statutes contain provisions concerning matters not addressed expressly in chapter 1 or 2 of the FAA. State international arbitration act provisions authorize their respective state courts to render judicial assistance to further the conduct of an international arbitration.¹⁵ Furthermore, state international arbitration statutes contain provisions concerning matters of arbitral procedure often addressed in institutional or *ad hoc* arbitral rules.¹⁶

Most state international arbitration act provisions either (1) have been carefully drafted to avoid conflicting with provisions in chapter 1 or 2 of the FAA or (2) address matters not covered

general arbitration code provisions concerning the confirmation or vacation of arbitral awards. *See, e.g.*, GA. CODE ANN. §§ 9-9-13, 9-9-42.

¹⁴For further discussion concerning state international arbitration act provisions that expressly address the recognition and enforcement of foreign arbitral awards, see *infra* notes 73-74 and accompanying text.

¹⁵Examples of such judicial assistance authorized by state international arbitration statutes include the issuance of discovery orders or the granting of provisional measures by state courts in aid of an international arbitration. For discussion concerning state international arbitration act provisions authorizing their respective state courts to order discovery or provisional measures, see *infra* notes 181 and 189 and accompanying text.

¹⁶For example, sections 1297.131–1297.136 of the California international arbitration statute provide the procedures under which a party to an arbitration subject to the California statute may challenge the impartiality of an arbitrator. *See* CAL. CIV. PROC. CODE §§ 1297.131–1297.136. Institutional arbitration rules also provide procedures for challenging the impartiality of an arbitrator. *See, e.g.*, American Arbitration Association International Arbitration Rules, arts. 7, 8, 9, *reprinted in* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION: SELECTED TREATIES, STATUTES, AND RULES 87 (1993); International Chamber of Commerce Rules of Arbitration, art. 2(8), (9), *id.* at 99. State international arbitration act provisions that concern matters of arbitral procedure often included in institutional or *ad hoc* arbitral rules would not appear to raise preemption concerns in most cases. However, the author contends that state international arbitration act provisions authorizing the arbitral tribunal to rule on questions of the scope or validity of an arbitration agreement may raise preemption concerns in particular factual circumstances in light of the Supreme Court's recent decision in *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920 (1995). For further discussion concerning whether the FAA may preempt state international arbitration act provisions authorizing the arbitral tribunal to decide questions of the scope or validity of an arbitration agreement, see *infra* notes 221-45 and accompanying text.

expressly in chapter 1 or 2 of the FAA. However, commentators have concluded that state international arbitration statutes create significant uncertainty regarding whether federal or state law applies to international commercial arbitrations conducted in the United States.¹⁷

Supreme Court precedent establishes that the principal purpose of Congress in enacting the FAA was to ensure the enforcement of private arbitration agreements according to their terms.¹⁸ The Supreme Court has held consistently that the FAA preempts state legislation requiring a judicial forum for claims the parties agreed

¹⁷See Jack Garvey & Totton Heffelfinger, *Towards Federalizing U.S. International Commercial Arbitration Law*, 25 INT'L LAW. 209, 215 (1991) ("Whatever the scope of federal preemption in international arbitration, a shared purview of state and federal arbitration law generates such uncertainties, though the parties, in choosing arbitration, have sought predictability. To the extent state jurisdiction is sound and state law prevails, and to the extent there are ambiguities and inconsistencies from state to state and between federal and state laws concerning international arbitration, arbitration in the United States is rendered less viable as a dispute resolution mechanism for international parties."); J. Stewart McClendon, *State International Arbitration Laws: Are They Needed or Desirable?*, 1 AM. REV. INT'L ARB. 245, 246 (1990) (declaring that state international arbitration statutes "introduce uncertainty and confusion into international commercial arbitration, and are a potential source of conflict and litigation."); Daniel M. Kolkey, *Reflections on the U.S. Statutory Framework for International Commercial Arbitrations: Its Scope, Its Shortcomings, and the Advantages of U.S. Adoption of the UNCITRAL Model Law*, 1 AM. REV. INT'L ARB. 491, 492 (1990) (professing that the enactment of state international arbitration statutes has "further aggravated the uncertain relationship between federal and state arbitration laws."); Committee on Arbitration and Alternative Dispute Resolution of the Association of the Bar of the City of New York, *Adoption of the UNCITRAL Model Law on International Commercial Arbitration as Federal or State Legislation*, ARBITRATION AND THE LAW 1988-89 250, 260 (1989) [hereinafter New York City Bar Report] (declaring that adoption of UNCITRAL Model Law as state legislation would "create confusion abroad concerning the legal regimes governing arbitration in the United States."); James H. Carter, *Federal Arbitration Act Seen As Out of Step With Modern Laws*, 5 NEWS & NOTES FROM THE INSTIT. FOR TRANSNAT'L ARB. 1, 1 (Nov. 4, 1990) (stating that "questions concerning the relationship between the FAA and U.S. state international arbitration statutes now cause substantial confusion."). Commentators also profess that the Supreme Court decision in *Volt* has heightened the uncertainty whether federal law or state international arbitration statutes apply. See *infra* note 25 and accompanying text.

¹⁸"While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage 'was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.'" *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985)).

to arbitrate.¹⁹ In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,²⁰ the Court revealed its strong support for the FAA's purpose of enforcing arbitration agreements according to their terms. The *Moses H. Cone* Court affirmed the enforcement of an arbitration agreement even though this resulted in the resolution of certain issues by arbitration while other issues that the parties had not agreed to arbitrate would be subject to judicial proceedings.²¹

Citing the FAA's primary purpose of enforcing arbitration agreements according to their terms, the Supreme Court in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*²² professed that parties may agree in their arbitration agreement to apply state arbitration law to an arbitration within the scope of the FAA even if the application of such state law provisions effectively frustrates an arbitration that the FAA would allow to proceed.²³ In *Volt*, the Supreme Court declared that:

[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. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the [Federal Arbitration] Act is a matter of

¹⁹ See *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987); *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995). For discussion of the Supreme Court's holdings in *Southland*, *Perry*, and *Terminix*, see *infra* notes 87-97 and accompanying text.

²⁰ 460 U.S. 1 (1983).

²¹ See *id.* at 19-20. In *dicta*, the *Moses H. Cone* Court declared that "federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement. Under the [Federal] Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Id.* at 20.

²² 489 U.S. 468 (1989). For further discussion of the Supreme Court's decision in *Volt*, see *infra* notes 251-62 and accompanying text.

²³ In *Volt*, the Supreme Court did not itself hold that the parties intended to incorporate state arbitration law rules into their arbitration agreement. Rather, the Supreme Court refused to disturb the California courts' conclusion on the subject. For further discussion of this aspect of the Supreme Court's decision in *Volt*, see *infra* note 260.

consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the [Federal Arbitration] Act would otherwise permit it to go forward. By permitting the courts to “rigorously enforce” such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.²⁴

The *Volt* Court’s enforcement of arbitration agreements within the scope of the FAA according to the terms of such agreements appears consistent with prior Supreme Court cases. However, Supreme Court precedent does not support the *Volt* Court’s refusal to overturn the lower court’s holding that the inclusion in the parties’ contract of a standard choice of law clause selecting state law indicated the parties’ intentions to apply state arbitration law inconsistent with the FAA to their arbitration. Agreeing with the rulings of the lower courts that by including a choice of law clause selecting California law the parties intended to incorporate California arbitration law into their arbitration agreement, the *Volt* Court held that the FAA could not preempt state arbitration law in this circumstance.

Commentators have viewed the *Volt* decision as creating greater uncertainty concerning whether the Federal Arbitration Act or state international arbitration statutes apply to international arbitrations conducted in the United States when the parties include a standard choice of law clause selecting state law and an arbitration agreement in their contract.²⁵ Fearing that the apparent

²⁴ *Id.* at 479 (citations omitted).

²⁵ See George A. Davidson, et al., *Report of the New York State Bar Association International Litigation Committee, Commercial and Federal Litigation Section: The UNCITRAL Model Law on International Commercial Arbitration*, 23 N.Y.U. J. INT’L L. & POL. 87, 95 (1990) [hereinafter *New York State Bar Report*] (“[T]he passage of state international arbitration laws coupled with the recent *Volt* case has thrown U.S. international arbitration law into confusion.”); Andre J. Brunel, Note, *A Proposal to Adopt UNCITRAL’s Model Law on International Commercial Arbitration as Federal*

uncertainty regarding the applicable law as a result of the

Law, 25 TEX. INT'L L.J. 43 (1990) (concluding that after the *Volt* decision, the question concerning whether the FAA preempts state international arbitration statutes "remains a confusing quagmire that will deter prospective arbitration parties from choosing forums in the United States."); McClendon, *supra* note 17, at 248 (professing that the *Volt* decision adds to the uncertainty concerning whether the FAA preempts state law provisions that conflict with it).

As discussed in part IV, the Supreme Court's subsequent decision in *Mastrobuono v. Shearson Lehman Hutton Inc.* resolves the uncertainties created by the *Volt* decision. For further discussion of the Supreme Court's decision in *Mastrobuono*, see *infra* notes 263-75 and accompanying text. *Mastrobuono* suggests that parties can apply state arbitration law inconsistent with the FAA only if the parties include in their contract a choice of law provision that expressly selects particular state arbitration law provisions over federal law. See *infra* notes 271-72 and accompanying text.

The author contends that the *Mastrobuono* decision as well as the Supreme Court's unwavering support for advancing the FAA's primary purpose of enforcing private arbitration agreements according to their terms indicate that parties may choose not to apply federal law derived from the FAA concerning matters of arbitral procedural by including in their contract a choice of law clause that expressly provides for the application of particular state arbitration law provisions. The Supreme Court's unyielding support for advancing the FAA's primary purpose of enforcing arbitration agreements according to their terms would appear to allow parties to apply most state law provisions concerning matters of arbitral procedure. Chapters 1 and 2 of the FAA contain few provisions that apply to matters of arbitral procedure. Thus, a state law provision concerning a matter of arbitral procedure could conflict with the FAA if such a state law provision was contrary to federal law derived from the FAA created by judicial decisions. For example, the FAA does not contain a provision that expressly addresses whether arbitrators may award punitive damages. However, the Supreme Court confirmed in *Mastrobuono* that the FAA does not preclude arbitral awards of punitive damages. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995). For further discussion concerning the Supreme Court's decision in *Mastrobuono*, see *infra* notes 263-75 and accompanying text. In *dicta*, the *Mastrobuono* court professed that if parties provided expressly in their contract that the arbitrators may not award punitive damages, then the FAA obligates courts to enforce the arbitration agreement according to the parties' clearly expressed intentions. See *id.* at 1216. Thus, this statement by the Court would appear to allow parties who expressly select state law procedural provisions to exclude the applicability of contrary federal law derived from the FAA. The Supreme Court has held that section 2 of the FAA's chapter 1 creates federal substantive law favoring the enforceability of arbitration agreements applicable in state courts. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984). For further discussion of *Southland*, see *infra* notes 87-90 and 94-97 and accompanying text. One could view section 2 as a "mandatory law" provision since *Southland* and its progeny establish that the FAA preempts state arbitration law that conflicts with the federal policy embodied in section 2 of the FAA favoring the enforceability of arbitration agreements. See *infra* note 96 and accompanying text. Thus, it would appear that the "mandatory" character of section 2 of the FAA would preclude parties from selecting state arbitration law provisions that may undermine the enforceability of their arbitration agreement.

enactment of state international arbitration statutes and the *Volt* decision would make the United States an undesirable situs for international commercial arbitration, commentators have argued for the reform of federal law with the result that federal law would apply exclusively to international commercial arbitrations conducted in the United States.²⁶

²⁶The New York State Bar Report recommends amendments to the FAA that expressly preempt state international arbitration statutes, unless the parties explicitly agree in their written agreement to arbitrate that the provisions of a state international arbitration statute apply to their international arbitration. *See New York State Bar Report, supra* note 25, at 103-05. Specifically, the New York State Bar Report proposes the addition of the following language to 9 U.S.C. § 208:

An action and proceeding shall be excepted from the provisions of Chapter 1 only if an agreement falling under the Convention explicitly provides that procedures other than those set forth in Chapter 1 govern the action or proceeding. A choice of law clause shall not be deemed to be an agreement that procedures other than those set forth in Chapter 1 govern the action or proceeding. Except as set forth in this section, state law shall not apply to actions and proceedings subject to this Chapter and Chapter 1.

Id. at 104. In addition, the New York State Bar Report supports the inclusion of an additional provision in Chapter 1 of the FAA entitled "International Arbitrations" containing the following language:

Agreements or contractual provisions described in Section 2 of this Chapter that concern commerce with foreign nations shall be excepted from the provisions of this Chapter only if the agreement or contractual provision explicitly provides that procedures other than those set forth in this Chapter govern the arbitration action or proceeding. A choice of law clause shall not be deemed to be an agreement that procedures other than those set forth in this Chapter govern the arbitration action or proceeding. Except as set forth in this section, state law shall not apply to arbitration actions or proceedings subject to this Chapter that concern commerce with foreign nations.

Id. at 105. The New York State Bar Report concludes that

[t]hese amendments to the enabling legislation of the [New York] Convention and the FAA would mean that, unless parties explicitly agree otherwise, state law does not apply to international arbitrations. Moreover, the changes would also provide that, in international arbitrations, choice of law provisions specifying the substantive law governing the arbitration would not be sufficient to opt out of federal procedural law. Instead, to do so, the arbitration agreement must explicitly provide that the arbitration *action* or *proceeding* is to be governed by procedural law other than the FAA and the [New York] Convention.

Id. at 105.

Other commentators advocate the adoption of the UNCITRAL Model Law on International Commercial Arbitration as federal law in part to preempt state international

This article examines the scope and applicability of state international arbitration statutes in order to evaluate the position advocated by commentators that state international arbitration statutes and the *Volt* decision cause confusion and uncertainty as to the applicable international commercial arbitration law, a situation that these commentators argue warrants reform of the FAA to preempt state international arbitration statutes.²⁷ While

arbitration statutes. See Kolkey, *supra* note 17, at 492 (recommending the enactment of UNCITRAL Model Law as federal law to preempt state law and eliminate the uncertain relationship between federal and state law); Garvey & Heffelfinger, *supra* note 17, at 211-21 (contending that federal law should apply exclusively to international commercial arbitration and advocating adoption of the UNCITRAL Model Law as federal law); Brunel, *supra* note 25, at 68 (supporting enactment of the UNCITRAL Model Law as federal law to completely preempt state law in the area of international commercial arbitration). For the text of the UNCITRAL Model Law on International Commercial Arbitration, see *Report of the United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration*, U.N. GAOR, 40th Sess., Supp. No. 17, Annex 1, at 81-93, U.N. Doc. A/40/17 (1985), reprinted in 24 I.L.M. 1302 (1985) [hereinafter *UNCITRAL Model Law*].

²⁷The parties to an international arbitration may agree to apply institutional arbitration rules, such as those of the American Arbitration Association (AAA) or the International Chamber of Commerce (ICC), or *ad hoc* arbitration rules, such as the UNCITRAL Rules, to address procedural matters not covered by the FAA. The selection of arbitral rules will preclude in most instances the application of provisions in state international arbitration statutes analogous to the particular arbitral rules selected by the parties. The FAA and arbitration rules selected by the parties are sufficient to regulate most issues concerning an international commercial arbitration that falls within the scope of the FAA. However, provisions in state international arbitration statutes appear to apply to arbitration agreements and awards not covered by the FAA. Part II discusses the scope and applicability of state international arbitration statutes. See *infra* notes 32-78 and accompanying text. Moreover, provisions in state international arbitration statutes may also apply to arbitration agreements or awards within the scope of chapter 1 or 2 of the FAA to the extent that the FAA does not preempt such provisions. Part III discusses whether the FAA may preempt provisions in selected state international arbitration statutes. See *infra* notes 79-246 and accompanying text. Furthermore, part IV argues that state international arbitration act provisions inconsistent with chapter 1 or 2 of the FAA may only apply if the parties include in their contract a choice of law clause that expressly selects such state law provisions. See *infra* notes 271-72 and accompanying text.

This article will not evaluate the arguments of commentators who advocate adoption of the entire UNCITRAL Model Law as federal legislation. It is widely recognized that the FAA and the relevant case law strongly support the enforcement of international commercial arbitration agreements and the recognition and enforcement of international arbitral awards. See, e.g., Charles A. Hunnicutt, et al., *Report to The Washington Foreign Law Society on The UNCITRAL Model Law on International Commercial Arbitration*, 3 OHIO ST. J. ON DISP. RESOL. 303, 311 (1988) [hereinafter

one could attempt to draw conclusions with broader applications from an examination of the scope and applicability of state international arbitration statutes, this study does not have such a purpose.²⁸

Washington Foreign Law Society Report]; McClendon, *supra* note 17, at 250-52; David W. Rivkin & Frances L. Kellner, *In Support of the F.A.A.: An Argument Against U.S. Adoption of the UNCITRAL Model Law*, 1 AM. REV. INT'L ARB. 535, 536 (1990). Even commentators advocating adoption of UNCITRAL Model Law as federal law acknowledge that the FAA "functions well." Kolkey, *supra* note 17, at 492. Since the FAA provides an effective legal framework for the enforcement of international arbitration agreements and the recognition and enforcement of international arbitral awards, the Washington Foreign Law Society Report states that it is unrealistic to expect Congress to repeal the FAA and to enact the UNCITRAL Model Law in its entirety. See *Washington Foreign Law Society Report, supra*, at 311.

Moreover, the author chooses not to evaluate proposed amendments to the FAA of specific provisions designed to clarify matters viewed as important to international arbitration and not included in the FAA. Other commentators recommend amendments to the FAA to address perceived deficiencies in federal law, but they do not advocate that federal law should apply exclusively to international commercial arbitrations. See *id.* at 311-16 (recommending amendment to the FAA following the substance of provisions in the UNCITRAL Model Law concerning interim measures of protection ordered by a court, challenges of arbitrators, tribunal authority to name the place of arbitration if the parties have not done so, and rules applicable to the substance of the dispute); New York City Bar Report, *supra* note 17, at 256-57 (recommending amendments to the FAA similar to UNCITRAL Model Law provisions concerning venue selection and interim measures of protection ordered by a court).

Furthermore, while generally taking a favorable view toward existing state international arbitration statutes, this article does not attempt to formulate a recommendation concerning whether state international arbitration legislation patterned after the UNCITRAL Model Law or some other design is the most effective approach for future state legislation. However, in part III, when comparing provisions in the FAA with those contained in selected state international arbitration statutes to determine the extent of FAA preemption of state law provisions, the author will describe the varying approaches to particular matters taken by different state international arbitration statutes, and in certain instances, the possible benefits of a particular provision or approach.

²⁸In his comprehensive study of national arbitration laws, Dr. J. Gillis Wetter delineates the subject areas and general characteristics that define the scope of a properly drafted national arbitration act. See J. Gillis Wetter, *The Proper Scope of a National Arbitration Act*, 5 INT'L ARB. REP. 17 (1990). While Wetter does not articulate specifically the proper scope of the national and local arbitration laws that may exist within a federal state, Wetter does suggest that both federal and local arbitration laws can create an effective environment for the conduct of international commercial arbitrations conducted within a federal state. See *id.* at 25. A determination of the subject areas applicable to international arbitration that national and local laws within a federal state should address would appear to require a comprehensive comparative study such as completed by Wetter. The author views a comparative study of arbitration laws as of limited value in assessing the appropriate scope of the U.S. state international

This article seeks to dispel the fears of commentators who argue for amendment of the FAA to preempt state international arbitration statutes based on their belief that state international arbitration statutes create significant uncertainty concerning whether federal or state law applies to international arbitrations conducted in the United States.²⁹ Part II discusses the applicability of provisions in state international arbitration statutes. This part reveals that such state statutory provisions only apply (1) when provisions in chapter 1 or 2 of the FAA do not preempt such state statutory provisions or (2) when the arbitration agreement or arbitral award does not fall within the scope of the FAA's chapter 1 or 2 but is within the scope of the state international arbitration statute.

Part III examines provisions primarily in three state international arbitration statutes representative of the different state law approaches.³⁰ The analysis in this part demonstrates that

arbitration statutes since the interrelationship between national and local law and the applicable judicial precedents within other federal states may differ significantly from their United States counterparts.

²⁹See *supra* note 26 for the views of commentators professing that state international arbitration statutes create sufficient uncertainty regarding whether the FAA or state international arbitration acts may apply to warrant amendment of the FAA preempting state international arbitration statutes.

³⁰Comparison and analysis of provisions contained in the ten state international arbitration statutes presently enacted is beyond the scope of this study. For a comprehensive study of provisions contained in state international arbitration statutes, see generally, George K. Walker, *Trends in State Legislation Governing International Arbitrations*, 17 N.C. J. INT'L L. & COM. REG. 419 (1992). In his 1992 study, Walker examines provisions in all state international arbitration statutes presently enacted, except for the Ohio international arbitration legislation, which went into effect on October 23, 1991. See *id.* In part III, the author chooses to examine primarily provisions in the state international arbitration legislation enacted in California, Florida, and Georgia, which each adopt distinct approaches. The California international arbitration statute follows to a great extent provisions in the UNCITRAL Model Law. State international arbitration statutes also containing provisions closely following the UNCITRAL Model Law include Connecticut, Texas, Oregon, North Carolina, and Ohio. Thus, California is representative of those state international arbitration statutes Walker defines as self-contained legislation, separate and distinct from the state's code sections applicable to domestic arbitrations, which largely follow the UNCITRAL Model Law. See *id.* at 423. The Florida International Arbitration Act is the most comprehensive statute included in the group of self-contained legislation not generally following the Model Law. See *id.* Walker also includes the Hawaii state legislation in this group. See *id.* However, the Florida statute is more comprehensive in scope than the Hawaii statute making provisions in the Florida statute more appropriate for comparing with the

few provisions in state international arbitration statutes conflict directly with provisions in chapter 1 or 2 of the FAA or undermine the purposes or policies of the FAA or the New York Convention. These results suggest that the extent of preemption of provisions in state international arbitration statutes is not significant.

Part IV argues that the *Volt* decision has not had the negative impact feared by its critics. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,³¹ the Supreme Court limited the potential negative implications of *Volt* when the Court held that a standard choice of law clause selecting state law is not sufficient to indicate the parties' intent to apply state arbitration law that the FAA would otherwise preempt. Moreover, *Mastrobuono* suggests that state arbitration law inconsistent with the FAA may only apply to an arbitration if the parties include in their contract a choice of law clause that expressly selects state law over federal law.

Part V concludes that there is not sufficient uncertainty concerning whether federal or state statutory provisions apply to warrant an amendment to the FAA preempting state international arbitration statutes. The author bases this conclusion on the following findings of this study: (1) state international arbitration act provisions only apply when the FAA does not preempt such

comprehensive California legislation, which follows to a great extent the UNCITRAL Model Law. The Georgia statutory provisions specifically supplement Georgia's domestic arbitration code. The author chooses to compare the pertinent Georgia statutory provisions with those in the California and Florida statutes, since the language contained in the Georgia statutory provisions in many cases differs from provisions in corresponding sections of the California and Florida statutes. The state international arbitration legislation enacted in Maryland does not fall under one of the three approaches of which the California, Florida, and Georgia statutes are representative. The Maryland legislation includes few significant provisions. It appears that the purpose of the Maryland legislation is to clarify that federal law applies to the conduct of international commercial arbitrations and the enforcement of international arbitral awards in Maryland. Section 3-2B-03 of the Maryland statute declares that "[i]n all matters relating to the process and enforcement of international commercial arbitration and awards, the laws of Maryland shall be the arbitration statutes and laws of the United States." MD. CODE ANN., CTS. & JUD. PROC. § 3-2B-03 (1995). While part III will focus primarily on provisions contained in the California, Florida, and Georgia statutes, the author will address provisions in state international arbitration statutes patterned after the UNCITRAL Model Law if such provisions differ significantly from the corresponding provision in the California statute or are not included in the California statute.

³¹ 115 S. Ct. 1212 (1995).

provisions or when the arbitration agreement or arbitral award falls outside of the scope of chapter 1 or 2 of the FAA; (2) few state international arbitration act provisions conflict with specific FAA provisions or undermine the purposes or policies of the FAA or the New York Convention; and (3) the Supreme Court's holding in *Mastrobuono* clarifies the uncertainties created by the *Volt* decision. Moreover, in part V, the author opposes amending the FAA to preempt state international arbitration statutes, since such an amendment to the FAA would limit parties in their choice of the legal framework applicable to an international arbitration conducted in the United States.

II. The Applicability of State International Arbitration Statutes

Many of the state international arbitration statutes do not expressly recognize the predominant role played by the FAA in governing international commercial arbitrations conducted within the particular state.³² Critics of state international arbitration

³²For example, the California statute applies to international commercial arbitration "subject to any agreement which is in force between the United States and any other state or states." CAL. CIV. PROC. CODE § 1297.11 (West 1996). State international arbitration statutes largely following the UNCITRAL Model Law also contain this provision. See CONN. GEN. STAT. ANN. § 50a-101(1) (West 1994); OHIO REV. CODE ANN. § 2712.02(A) (Banks-Baldwin, WESTLAW through 1996 portion of 121st G.A.); OR. REV. STAT. § 36.454(1) (1995); TEX. CIV. PRAC. & REM. CODE ANN. § 172.001(a) (West Supp. 1996). The Florida International Arbitration Act does not recognize the supremacy of the New York Convention, the Inter-American Convention, or federal law. See FLA. STAT. ANN. § 648.03 (West, WESTLAW through 1996 2nd Reg. Sess.). However, an account of the legislative history of the Florida International Arbitration Act by one of its drafters indicates that the Florida statute was intended to apply to arbitration agreements and arbitral awards not governed by the New York Convention, the Inter-American Convention, or the FAA. See Carlos E. Loumiet, *Introductory Note: Florida International Arbitration Act*, 26 I.L.M. 949, 957 n.10 (1987) [hereinafter Loumiet, *Introduction to Florida Act*]. In addition, the portion of the Georgia arbitration statute relevant to international arbitration does not expressly recognize the supremacy of the conventions or federal law. See GA. CODE ANN. §§ 9-9-30-9-9-43 (LEXIS through 1996 Supp.). However, one state international arbitration statute does expressly recognize the supremacy of the conventions and the FAA. Section 1-567.31(a) of the North Carolina statute declares that "[t]his Article applies to international commercial arbitration, subject to any applicable international agreement in force between the United States of America and any other nation or nations, or any federal statute." N.C. GEN. STAT. § 1-567.31(a) (1996). The Maryland statute contains a provision that adopts federal law as the international arbitration law of Maryland.

statutes profess that the failure of such state legislation to declare specifically that FAA provisions control over state law provisions and that the state legislation serves to supplement the FAA could mislead foreign parties who may believe that state arbitration law primarily governs international arbitration conducted in the United States.³³ Critics contend that this confusion could decrease the attractiveness of states that have enacted state international arbitration statutes as places for international arbitration.³⁴

While declarations in state international arbitration statutes recognizing the supremacy of the FAA are preferable, such declarations do not help clarify the specific circumstances under which provisions in state international arbitration statutes may apply. As discussed in parts II and III of this article, provisions in state international arbitration statutes may apply primarily in the following situations: (1) if an action is brought in state court pursuant to a state international arbitration statute with regard to an arbitration agreement or arbitral award within the scope of chapter 1 or 2 of the FAA, then provisions in the state international arbitration statute may apply to the extent that such provisions do not conflict with the corresponding provisions in the FAA's chapter 1 or 2, or do not undermine the purposes or policies of the FAA or the New York Convention;³⁵ or (2) if an arbitration agreement or arbitral award does not fall within the scope of the FAA, then provisions in a state international arbitration statute may apply if the arbitration agreement or arbitral award is within the scope of the state statute.³⁶

Section 3-2B-03(a) of the Maryland statute provides that "[i]n all matters relating to the process and enforcement of international commercial arbitration and awards, the laws of Maryland shall be the arbitration statutes and laws of the United States." MD. CODE ANN., CTS. & JUD. PROC. § 3-2B-03(a).

³³ See McClendon, *supra* note 17, at 259; New York City Bar Report, *supra* note 17, at 260.

³⁴ See, e.g., McClendon, *supra* note 17, at 259.

³⁵ See *infra* notes 32-246 and accompanying text. Moreover, part IV contends that state international arbitration act provisions inconsistent with chapter 1 or 2 of the FAA may apply to an arbitration agreement or arbitral award within the scope of chapter 1 or 2 of the FAA only if the parties include in their contract a choice of law clause that selects expressly such state law over federal law. See *infra* notes 271-72 and 274 and accompanying text.

³⁶ One commentator also suggests that provisions in state international

This part attempts to delineate the circumstances when provisions in state international arbitration statutes may apply. The author will discuss those arbitration agreements contained in contracts involving the foreign or interstate commerce of the United States subject to chapter 1 of the FAA.³⁷ While provisions in state international arbitration statutes may apply to arbitration agreements falling within the scope of the FAA's chapter 1 as well as to arbitral awards resulting from such arbitration agreements, the FAA may preempt state international arbitration act provisions to the extent that such state statutory provisions conflict directly with a provision in the FAA's chapter 1 or undermine the purposes or policies of the FAA.³⁸ This part also discusses when provisions in state international arbitration statutes may apply if an arbitration agreement or arbitral award is not within the scope of chapter 1 of the FAA.³⁹

arbitration statutes may also apply in federal court actions under certain circumstances. Walker professes that federal courts should apply state international arbitration statutes in two situations that require the application of state law. First, Walker cites the situation where federal law requires the application of state law such as under the Federal Rules of Civil Procedure. *See Walker, supra* note 30, at 457. For example, Walker notes that if no federal statute applies, Federal Rule of Civil Procedure 64 requires a United States district court to apply state law pre-judgment remedies for the seizure of property. *See id.* at 457 n.170. Walker comments that this provision allows a federal district court to hear requests for interim measures of protection as provided for in state international arbitration statutes. *See id.* Second, Walker states that a federal court should apply a state international arbitration statute when the outcome-determinative principle requires that state law apply in a diversity case in federal court. *See id.* at 457-58.

³⁷Chapter 1 of the FAA contains provisions addressing matters important to the conduct of international arbitrations conducted in the United States, such as court intervention to enforce agreements to arbitrate as well as the confirmation or vacation of arbitral awards made in the United States. Since state international arbitration statutes primarily concern international arbitrations conducted in the particular state or the confirmation of international arbitral awards rendered in the respective state, articulating the scope of chapter 1 of the FAA is essential to determine the applicability of numerous provisions in state international arbitration statutes.

³⁸Part II discusses the circumstances under which provisions in state international arbitration statutes may apply. *See infra* notes 43-78 and accompanying text. However, part II does not specifically address the extent of FAA preemption of provisions in state international arbitration statutes. Part III examines whether the FAA preempts the application of particular provisions in state international arbitration statutes with regard to arbitration agreements covered by the FAA. *See infra* notes 79-246 and accompanying text.

³⁹*See infra* notes 57-61 and accompanying text.

Moreover, this part will describe those international arbitrations conducted in the United States that may result in “nondomestic” awards subject to the New York Convention. Such nondomestic awards are within the scope of the FAA’s chapter 2, which implements the United States’ obligations under the New York Convention. Provisions in state international arbitration statutes may apply to confirm or vacate nondomestic awards subject to the FAA’s chapter 2 as well as to enforce arbitration agreements that could result in such a nondomestic award, unless corresponding provisions in the FAA’s chapter 2 preempt such state law provisions.⁴⁰

Furthermore, this part will discuss briefly foreign arbitral awards rendered abroad that fall within the scope of the New York Convention as ratified by the United States. As discussed in part III, state international arbitration act provisions that expressly provide grounds for refusing the enforcement of foreign arbitral awards may apply to foreign arbitral awards subject to the New York Convention to the extent that the pertinent provision in chapter 2 of the FAA does not preempt such state statutory provisions.⁴¹ In addition, state international arbitration act provisions that concern the enforcement of foreign arbitral awards apply to those foreign arbitral awards not subject to the New York Convention.⁴²

Federal and state courts have concurrent jurisdiction with regard to matters arising from an arbitration agreement that falls within the scope of chapter 1 of the FAA.⁴³ Sections 1 and 2 of the FAA’s chapter 1 provide for the enforceability of arbitration

⁴⁰ For discussion concerning whether section 207 of the FAA’s chapter 2 may preempt state international arbitration act provisions invoked to confirm or vacate a nondomestic award, see *infra* notes 119-38 and accompanying text. For discussion concerning whether section 206 of the FAA’s chapter 2 may preempt state international arbitration act provisions invoked to enforce an arbitration agreement that could result in a nondomestic award, see *infra* note 118.

⁴¹ For discussion concerning whether section 207 of the FAA’s chapter 2 may preempt state international arbitration act provisions that provide grounds for refusing enforcement to foreign arbitral awards, see *infra* notes 144-52 and accompanying text.

⁴² See *infra* notes 74 and 76-77 and accompanying text.

⁴³ Chapter 1 of the FAA does not create an independent basis for federal question jurisdiction. See BORN, *supra* note 6, at 436.

agreements contained in contracts evidencing a transaction involving the foreign or interstate commerce of the United States.⁴⁴ The Supreme Court has held that section 2 of the FAA, which specifically provides for the enforceability of arbitration agreements satisfying the "commerce" requirement, applies in both federal and state courts.⁴⁵ While the FAA provides procedures applicable in federal courts, it is unclear whether FAA provisions other than section 2 apply in state court actions involving an arbitration agreement satisfying the "commerce" requirement and thus falling within the scope of chapter 1 of the FAA.⁴⁶

Section 1 of the FAA's chapter 1 defines commerce as "commerce among the several states or with foreign nations."⁴⁷ Courts have interpreted the foreign commerce requirement broadly. Contracts between a U.S. corporation or U.S. national and a foreign corporation negotiated in a foreign country and performed in that country are transactions involving "commerce with foreign nations" pursuant to section 1 of the FAA's chapter 1.⁴⁸

⁴⁴See 9 U.S.C. §§ 1-2 (1994).

⁴⁵See *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The Supreme Court has also held that section 2 of the FAA creates federal substantive law favoring the enforceability of arbitration agreements which applies in both federal and state courts. See *id.* at 16.

⁴⁶For example, it is not clear whether sections 3 and 4 of the FAA apply in state courts. Section 3 provides that the "courts of the United States" may stay actions before them with regard to issues referable to arbitration under a written arbitration agreement. 9 U.S.C. § 3. Section 4 allows any "United States district court" to compel arbitration in accordance with the terms of a written arbitration agreement. 9 U.S.C. § 4. As a result of the failure of sections 3 and 4 to apply expressly to state courts, lower courts have reached different results concerning whether sections 3 and 4 of the FAA apply in state courts. See BORN, *supra* note 6, at 229-30, 439, 446. In addition, the Supreme Court has not clarified whether sections 3 and 4 of the FAA are applicable in state courts. In *Volt*, the Supreme Court declared that while "the FAA's 'substantive' provisions — §§ 1 and 2 — are applicable in state as well as federal court, we have never held that §§ 3 and 4, which by their terms appear to apply only in proceedings in federal court . . . are nonetheless applicable in state court." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) (citations omitted).

⁴⁷9 U.S.C. § 1.

⁴⁸See *Al-Salamah Arabian Agencies Co. v. Reece*, 673 F. Supp. 748, 750 (M.D.N.C. 1987) (marketing services contract to sell insurance in Saudi Arabia between

“Commerce with foreign nations” requires a U.S. nexus.⁴⁹ Courts have held that commerce between foreign nations which is without a sufficient U.S. nexus does not constitute “commerce with foreign nations” pursuant to section 1 of the FAA.⁵⁰ For example, an international contract of sale between a United States corporation and a foreign corporation would have a sufficient U.S. nexus to satisfy the “commerce with foreign nations” requirement of the FAA’s chapter 1.⁵¹ On the other hand, an international contract of sale between two non-U.S. corporations in which a U.S. corporation acted as an agent on behalf of one of the non-U.S. contracting parties would not appear to have a sufficient U.S. nexus to constitute “commerce with foreign nations” pursuant to

U.S. national and Saudi Arabian insurance company entered into in Saudi Arabia is a transaction involving foreign commerce pursuant to section 1 of the FAA); *Pioneer Properties, Inc. v. Martin*, 557 F. Supp. 1354, 1363-64 (D. Kan. 1983) (joint venture agreement involving use of U.S. corporation’s money by Canadian corporation to develop and manage Canadian real estate, where joint venture agreement negotiated in Canada, was a transaction involving foreign commerce for purposes of section 1 of FAA); *El Hoss Eng’g & Trans. Co. v. Am. Indep. Oil Co.*, 183 F. Supp. 394, 397 (S.D.N.Y. 1960) (contract between U.S. corporation and Lebanese corporation for sale and leasing of automotive and construction equipment and rendering transportation required by U.S. corporation, where contract negotiated and performed in Kuwait, constitutes a transaction involving foreign commerce pursuant to section 1 of the FAA).

⁴⁹ See, e.g., *Reynolds Jamaica Mines, Ltd. v. La Societe Navale Caennaise*, 239 F.2d 689, 693 (4th Cir. 1956) (contract for sale of ship between U.S. corporate buyer and French corporate seller, where Panamanian corporation created to hold title to ship while U.S. corporation remains liable for purchase price and continues as beneficiary under contract, was not a transaction “between two foreign nations,” but rather was a contract made by a U.S. corporation with a foreign corporation, and, thus was a transaction involving commerce “with a foreign country” pursuant to section 1 of the FAA).

⁵⁰ See *Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 253 F. Supp. 359, 363 (S.D.N.Y. 1966) (contracts for purchase and sale of sugar on London Commodities Exchange entered into by U.S. corporation on behalf of Italian citizen, who was a sole stockholder of a Panamanian corporation having its principal office in Switzerland, at Paris office of U.S. corporation engaged in brokerage and investment business were not transactions involving “commerce with foreign nations” pursuant to section 1 of FAA); *Petroleum Cargo Carriers, Ltd. v. Unitas, Inc.*, 220 N.Y.S.2d 724, 727 (1961) (assignment of rights under a shipbuilding contract where assignee was Liberian, buyer was Panamanian, shipbuilder was Japanese, and goods purchased pursuant to assignment agreement manufactured in Germany, constitutes commerce between foreign countries but does not satisfy requirement of “commerce with foreign nations” pursuant to section 1 of FAA).

⁵¹ For case law following this example, see *supra* note 49.

section 1 of the FAA's chapter 1.⁵²

Most international contracts containing agreements to arbitrate in the United States will satisfy the definition of foreign commerce under section 1 of the FAA's chapter 1.⁵³ An international arbitration agreement included in a contract evidencing a transaction involving interstate commerce also falls within the scope of chapter 1 of the FAA. Such a transaction involving interstate commerce could include business dealings that implicate two or more U.S. states and that concern one U.S. party and one foreign party or two foreign parties.⁵⁴ For example, a contract of sale between two non-U.S. corporations in which the foreign corporate seller sends goods from its factory in Wisconsin to the foreign corporate buyer at the buyer's factory in Illinois would involve interstate commerce. Thus, the arbitration agreement contained in the parties' contract would fall within the scope of chapter 1 of the FAA.

As discussed in this part and developed further in part III, provisions in state international arbitration statutes may apply to an arbitration arising from an arbitration agreement within the scope of chapter 1 of the FAA to the extent that such state statutory provisions do not conflict directly with provisions in the FAA's chapter 1 or do not undermine the purposes or policies of the FAA's chapter 1.⁵⁵ However, if the arbitration agreement does not fall within the scope of chapter 1 of the FAA, then provisions in a state international arbitration statute may apply when the arbitration agreement is within the scope of the particular state

⁵² For case law following this example, see *supra* note 50.

⁵³ See BORN, *supra* note 6, at 436-37.

⁵⁴ It would appear that the provisions of chapter 1 of the FAA might not apply to an international arbitration arising from an arbitration agreement consented to by two foreign parties included in a transaction involving interstate commerce if such an arbitration agreement would result in a "nondomestic" award under the New York Convention. Section 208 of the FAA's chapter 2 states that provisions in chapter 1 of the FAA may apply to the extent that chapter 1 provisions do not conflict with provisions in chapter 2 or the New York Convention as ratified by the U.S. See 9 U.S.C. § 208 (1994).

⁵⁵ Part III discusses the extent of FAA preemption of particular provisions contained in state international arbitration statutes. See *infra* notes 79-246 and accompanying text.

statute. If an arbitration agreement falls within the scope of a state international arbitration statute but is outside of the scope of chapter 1 of the FAA, then the FAA's chapter 1 cannot preempt the pertinent state statutory provisions.⁵⁶

By their terms, state international arbitration statutes apply to arbitration agreements contained in contracts evidencing transactions involving the foreign or interstate commerce of the United States.⁵⁷ However, provisions addressing the applicability of state international arbitration statutes also appear to allow the application of such state statutes to international arbitration agreements that do not satisfy the foreign or interstate commerce requirement and, therefore, do not fall within the scope of chapter 1 of the FAA. In the paragraphs that follow, this part will address the applicability of selected state international arbitration statutes to those arbitration agreements that are not within the scope of chapter 1 of the FAA.⁵⁸

Provisions in state international arbitration statutes appear to allow the application of such state statutes to international arbitrations between either a U.S. party and a foreign party or two foreign parties when the underlying transaction does not have a

⁵⁶The Washington Foreign Law Society Report comments that state law would "apply exclusively to those few international arbitrations taking place in the United States to which the FAA does not apply." *Washington Foreign Law Society Report, supra* note 27, at 324. The Washington Foreign Law Society cites as an example of an international arbitration conducted in the U.S. not subject to chapter 1 of the FAA as a dispute between two foreign parties not involving interstate commerce. *See id.*

⁵⁷For example, the California international arbitration statute applies to arbitrations conducted in California if the parties to an arbitration have places of business in different states (nations) at the time of the conclusion of the arbitration agreement. *See* CAL. CIV. PROC. CODE §§ 1297.12, 1297.13(a) (West 1996). This provision appears to apply to arbitration agreements that satisfy the foreign or interstate commerce requirement as well as to arbitration agreements that do not fall within the scope of chapter 1 of the FAA.

⁵⁸This part discusses provisions contained in international arbitration legislation enacted in California, Florida, and Georgia, which suggest the applicability of such state statutes to arbitration agreements that are not within the scope of chapter 1 of the FAA. The author selects provisions in the California, Florida, and Georgia statutes for analysis, since these statutes are representative of the different state law approaches among the ten state international arbitration statutes presently enacted. For further discussion concerning the California, Florida, and Georgia statutes as representative of the different state law approaches, see *supra* note 30.

sufficient U.S. nexus to constitute a transaction involving the foreign or interstate commerce of the United States pursuant to section 1 of the FAA's chapter 1. The California international arbitration statute deems an arbitration agreement "international" for the purposes of the statute, if any of the following occurs: (1) the parties to the arbitration have places of business in different states; (2) the parties have expressly agreed that the subject matter of the arbitration agreement relates to commercial interests in more than one state; or (3) the subject matter of the arbitration agreement is otherwise related to commercial interests in more than one state.⁵⁹ These provisions appear to allow the application of the California international arbitration statute to arbitrations conducted in California when the underlying transaction does not have a sufficient U.S. nexus to constitute a transaction involving the foreign or interstate commerce of the United States.⁶⁰ For example, the California international arbitration statute would apply to an arbitration conducted in California involving an international contract of sale between parties from France and Spain in which the underlying transaction has no contacts with the United States. Although not suggesting particular circumstances when their state statutes may apply to an arbitration agreement outside the scope of chapter 1 of the FAA, provisions in the Florida International Arbitration Act and the Georgia Code also authorize the application of their respective state statutes to arbitrations between either a U.S. party and a foreign party or two foreign parties when the underlying transaction does not involve

⁵⁹ See CAL. CIV. PROC. CODE §§ 1297.13(a), (c), (d). While section 1297.13(c) provides that an arbitration agreement is "international" for the purposes of the California statute if the parties have expressly agreed that the subject matter of the arbitration agreement relates to commercial interests in more than one state, it is questionable whether a California court would deem an arbitration agreement "international" pursuant to section 1297.13(c) if such a statement of the parties was fraudulent.

⁶⁰ In order for the California international arbitration statute to apply to an arbitration conducted in California, the arbitration agreement must be "international" pursuant to section 1297.13 as well as arise out of a commercial relationship pursuant to section 1297.16. Note that section 1297.16 includes a nonexclusive list of what may constitute such a commercial relationship. In addition, the California international arbitration statute only applies to arbitrations conducted in California. See CAL. CIV. PROC. CODE § 1297.12.

the foreign or interstate commerce of the United States.⁶¹

Article I(1) of the New York Convention provides in part that the Convention applies to arbitral awards “not considered as domestic awards in the State [nation] where recognition and enforcement are sought.”⁶² United States courts have held that an arbitration between two foreign parties conducted in the United States pursuant to United States arbitration law may result in a “nondomestic” award subject to the New York Convention and the FAA’s chapter 2. For example, the Second Circuit has held that an arbitration between Swiss and Norwegian parties conducted in New York pursuant to United States arbitration law resulted in a “nondomestic” arbitral award within the meaning of the New York Convention.⁶³ One must question whether such U.S. court decisions represent enlightened policy, since such decisions appear to conflict with the meaning of nondomestic award intended by the drafters of the New York Convention.⁶⁴

⁶¹ Section 684.03 of the Florida International Arbitration Act provides that the Florida act applies to arbitrations between “two or more persons at least one of whom is a nonresident of the United States.” FLA. STAT. ANN. § 684.03(1a) (West, WESTLAW through 1996 2nd Reg. Sess.). Section 9-9-31(b)(1) of the Georgia Code provides that part 2 of the Georgia arbitration legislation, which pertains to international arbitration, applies to the arbitration of disputes between “two or more persons at least one of whom is domiciled or established outside of the United States.” GA. CODE ANN. § 9-9-31(b)(1) (LEXIS through 1996 Supp.).

⁶² New York Convention, *supra* note 5, art. I(1). The New York Convention does not define “nondomestic” awards subject to the Convention. One commentator has noted that “[t]he question of what constitutes a non-domestic award within the meaning of the New York Convention is one of the most complicated issues posed by this Treaty.” Albert van den Berg, *When is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 PACE L. REV. 25, 26 (1985).

⁶³ See *Bergeson v. Joseph Miller Corp.*, 710 F.2d 928 (2d Cir. 1983). Other lower United States courts have agreed with the *Bergeson* decision. See *Dworkin-Cosell Interair Courier Servs., Inc. v. Avraham*, 728 F. Supp. 159 (S.D.N.Y. 1989); *Transmarine Seaways Corp. v. Marc Rich & Co.*, AG, 480 F. Supp. 352 (S.D.N.Y. 1979). Born comments that no reported decision subsequent to *Bergeson* has held that an arbitral award made in the United States cannot constitute a nondomestic award subject to the New York Convention. See BORN, *supra* note 6, at 477.

⁶⁴ The *Bergeson* decision would appear to conflict with the meaning of nondomestic award intended by the drafters of the New York Convention. The legislative history of the New York Convention indicates that the drafters intended that arbitrations conducted within a contracting state pursuant to another nation’s arbitration law would result in nondomestic awards under the Convention. See *id.* at 479. For example, an arbitration between two Germans conducted in Germany pursuant to

An arbitration between two United States parties conducted in the United States may result in a "nondomestic" award under the New York Convention as long as the underlying transaction "has a reasonable relation with one or more foreign states."⁶⁵ State international arbitration statutes also contain provisions allowing application of the state statute to arbitrations between two or more United States parties with regard to disputes related to property, contractual performance, or other matters occurring outside the United States.⁶⁶

State international arbitration act provisions that authorize state courts to vacate arbitral awards rendered within the particular state may apply to awards deemed nondomestic within the meaning of the New York Convention, unless section 207 of the FAA's chapter 2 preempts such a state statutory provision.⁶⁷ In addition, state international arbitration act provisions authorizing state courts to issue orders to compel arbitration may apply to an arbitration agreement that may result in a nondomestic award subject to the New York Convention, unless section 206 of the FAA's chapter 2 preempts the pertinent state statutory provision.⁶⁸

English arbitration law would result in a nondomestic award within the meaning of term as intended by the Convention's drafters. *See id.* van den Berg professes that neither the text or legislative history of either the New York Convention nor the FAA's chapter 2 support the Second Circuit's decision in *Bergeson*. *See van den Berg, supra* note 62, at 50.

⁶⁵ BORN, *supra* note 6, at 480. Section 202 of the FAA's chapter 2 provides that "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." 9 U.S.C. § 202 (1994). Born comments that United States courts have not clearly articulated the scope of the "reasonable relationship" standard under section 202 as well as the scope of awards rendered in the United States deemed nondomestic under section 202. *See BORN, supra* note 6, at 480.

⁶⁶ *See, e.g.,* CAL. CIV. PROC. CODE § 1297.13(b) (West 1996); FLA. STAT. ANN. § 684.03(1)(b); GA. CODE ANN. § 9-9-31(b)(2).

⁶⁷ Specifically, section 207 of the FAA's chapter 2 will preempt state law provisions that provide a broader basis to vacate an award than provided in Article V of the New York Convention. *See* 9 U.S.C. § 207. For further discussion concerning the extent that section 207 may preempt state international arbitration act provisions that specify the grounds a state court may invoke to vacate a nondomestic award, see *infra* notes 129-38 and accompanying text.

⁶⁸ Arbitration agreements falling under the New York Convention appear limited

Article I(1) of the New York Convention provides in part that the Convention applies to arbitral awards “made in the territory of a State other than the State where recognition and enforcement of such awards are sought.”⁶⁹ Article I(3) of the New York Convention allows a State, when signing, ratifying, or acceding to the Convention, to declare that the State will apply the Convention “on the basis of reciprocity” such that the State’s courts will only recognize or enforce foreign arbitral awards made “in the territory of another Contracting State.”⁷⁰ When ratifying the New York Convention, the United States deposited a reciprocity reservation providing that the United States 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.”⁷¹ Thus, courts in the United States may only apply the New York Convention to recognize or enforce foreign arbitral awards made in nations that are contracting parties to the Convention.⁷² For

to arbitration agreements that would result in awards enforceable in the United States under the Convention, because such awards are made in a country that is a signatory to the Convention or such awards are considered as “nondomestic” by United States courts. See BORN, *supra* note 6, at 291. State international arbitration statutes may apply to arbitration agreements that may result in a “nondomestic” award under the New York Convention. However, state international arbitration statutes do not contain provisions that enforce agreements to arbitrate abroad. Thus, it appears that section 206 of the FAA’s chapter 2 could only preempt state international arbitration act provisions authorizing state courts to issue orders compelling arbitration in circumstances involving the enforcement of an arbitration agreement that may result in nondomestic award under the New York Convention.

⁶⁹New York Convention, *supra* note 5, art. I(1). In this context, “State” refers to a contracting party to the New York Convention and not to a constituent state of the United States.

⁷⁰*Id.* art. I(3).

⁷¹9 U.S.C.A. § 201. Section 304 of the FAA’s chapter 3 contains a reciprocity requirement similar to the U.S. reciprocity reservation to the New York Convention. Section 304 provides that arbitral awards made in the territory of a foreign state may be recognized and enforced pursuant to chapter 3 only if the foreign state has ratified or acceded to the Inter-American Convention. See 9 U.S.C. § 304.

⁷²As of January 1, 1996, 109 nations were parties to the New York Convention. U.S. DEPARTMENT OF STATE, TREATIES IN FORCE 316 (1996). United States courts have applied the Convention’s Article II in order to “refer” parties to arbitration in a signatory nation to the Convention. See BORN, *supra* note 6, at 290-91. Since state international arbitration statutes do not contain provisions that enforce agreements to arbitrate abroad, this study will not discuss the extent that provisions in the New York Convention or the FAA’s chapter 2 may apply to agreements to arbitrate outside of the United States.

example, pursuant to the New York Convention, courts in the United States must recognize and enforce arbitral awards made in France, a contracting party to the Convention.

All state international arbitration statutes acknowledge either expressly or implicitly that their respective state courts must recognize and enforce foreign arbitral awards rendered in countries that are contracting parties to the New York and Inter-American Conventions, subject to specified grounds for refusing such enforcement.⁷³ However, four state statutes contain specific provisions that expressly allow their respective state courts to recognize and enforce foreign arbitral awards made in countries that are not contracting parties to the New York or Inter-American Conventions.⁷⁴

⁷³ Both the North Carolina and Maryland statutes provide expressly that their respective state courts may only enforce arbitral awards to the extent authorized by the New York and Inter-American Conventions as well as federal law. See N.C. GEN. STAT. § 1-567.65 (1996); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2B-03, 04 (1995). The statutes enacted in Florida, Connecticut, Oregon, and Georgia contain provisions that expressly allow their respective state courts to enforce arbitral awards regardless of the country where the award was made. See *infra* note 74 and accompanying text for discussion concerning these state statutory provisions. The California, Hawaii, and Ohio statutes contain provisions that acknowledge the application of provisions in their state statute is subject to the New York and Inter-American Conventions. See *supra* note 32. This recognition of the supremacy of the New York and Inter-American Conventions implies that their respective state courts would recognize and enforce only those foreign arbitral awards rendered in countries that are contracting parties to the New York and Inter-American Conventions. A provision in the Georgia Code recognizes the Georgia courts will recognize and enforce foreign arbitral awards subject to the New York and Inter-American Conventions as well as appears to allow Georgia courts to recognize and enforce foreign arbitral awards made in countries that are not contracting parties to the New York or Inter-American Conventions. See GA. CODE ANN. § 9-9-42 (LEXIS through 1996 Supp.). For discussion of the Georgia Code provision that concerns the enforcement of foreign arbitral awards by Georgia courts, see *infra* note 74. The Florida International Arbitration Act fails to expressly recognize the supremacy of the Conventions or the FAA. See FLA. STAT. ANN. § 648.03 (West, WESTLAW through 1996 2nd Reg. Sess.); *supra* note 32.

⁷⁴ Section 684.24(1)(a) of the Florida International Arbitration Act provides that a Florida court may confirm an award "without regard to the place of arbitration." FLA. STAT. ANN. § 684.24(1)(a). The Connecticut and Oregon statutes authorize their respective state courts to enforce a foreign arbitral award "irrespective of the country in which it was made." CONN. GEN. STAT. ANN. § 50a-135 (West 1994); OR. REV. STAT. § 36.522 (1995). While section 9-9-42 of the Georgia Code appears to authorize Georgia courts to recognize and enforce foreign arbitral awards made in countries that are not contracting parties to the New York or Inter-American Conventions, the

State international arbitration act provisions that authorize their state courts to refuse the recognition or enforcement of foreign arbitral awards may apply to foreign arbitral awards subject to the New York Convention, unless section 207 of the FAA's chapter 2, which incorporates by reference the grounds specified in the Convention's Article V for refusing the recognition or enforcement of Convention awards, preempts such a state law provision.⁷⁵ On the other hand, state international arbitration act provisions may apply to grant or deny enforcement to foreign arbitral awards rendered in nations not contracting parties to the New York Convention.⁷⁶ Such a state statutory provision may apply to a foreign arbitral award not subject to the Convention to the extent that such a foreign award falls within the scope of the state international arbitration statute. For example, a Connecticut state court could invoke the Connecticut statutory provision authorizing its state courts to enforce a foreign arbitral award "irrespective of the country in which it was made" in order to enforce an award rendered in Brazil, which is not a contracting

language of the provision is not entirely clear. Section 9-9-42 entitled "Reciprocity in Recognition and Enforcement of an Award" provides in pertinent part that "an arbitration award irrespective of where it was made, on the basis of reciprocity, shall be recognized as binding and shall be enforceable in the courts of this state Reciprocity in the recognition and enforcement of foreign arbitral awards shall be in accordance with applicable federal laws, international conventions, and treaties." GA. CODE ANN. § 9-9-42. This provision is less than clear since enforcing arbitral awards irrespective of the country where they were made goes beyond the requirements of the New York and Inter-American Conventions, which allow only the enforcement of foreign arbitral awards rendered in countries that are contracting parties to the Conventions.

⁷⁵ See BORN, *supra* note 6, at 659. Section 207 provides in part that a court with jurisdiction under the FAA's chapter 2 "shall confirm" a Convention award unless one of the grounds for refusing the recognition or enforcement of the award applies. 9 U.S.C. § 207. While the literal language of section 207 authorizes the court to "confirm" a Convention award, Born professes that "section 207 imposes a general obligation to enforce arbitral awards, subject to the Convention's eight exceptions to enforceability." BORN, *supra* note 6, at 659. For discussion concerning the extent that section 207 of the FAA's chapter 2 may preempt state international arbitration act provisions that authorize their respective state courts to refuse the recognition or enforcement of foreign arbitral awards, see *infra* notes 144-52 and accompanying text.

⁷⁶ Thus, a state court, invoking its state's international arbitration act provision, may enforce foreign arbitral awards rendered in the more than 100 countries that are not parties to the New York Convention. Such foreign awards are not enforceable by courts in the United States under the Convention.

party to the New York Convention.⁷⁷

The foregoing analysis reveals that provisions in state international arbitration statutes apply exclusively to those international agreements to arbitrate in the United States, international arbitral awards rendered in the United States, and foreign arbitral awards not subject to chapter 1 or 2 of the FAA, as well as within the scope of the state international arbitration statute. If an arbitration agreement or arbitral award falls within the scope of the FAA's chapter 1 or 2, then state international arbitration act provisions may apply only to the extent that the FAA does not preempt such state statutory provisions.⁷⁸ Moreover, as developed in part III, in cases where state court actions involve international arbitration agreements or international arbitral awards within the scope of the FAA's chapter 1 or 2, the extent of preemption of state international arbitration act provisions is not significant since few provisions in state international arbitration statutes conflict directly with provisions in chapter 1 or 2 of the FAA or undermine the purposes or policies of the FAA or the New York Convention.

III. Analysis of Preemption of Provisions in State International Arbitration Statutes

If a state court action pursuant to a state international arbitration statute pertains to an arbitration agreement or arbitral award within the scope of chapter 1 or 2 of the FAA, then relevant provisions of the state international arbitration statute may apply to the extent the FAA does not preempt such provisions. Whether

⁷⁷See *supra* note 74 for discussion of the Connecticut and other state statutory provisions that expressly allow their respective state courts to recognize and enforce foreign arbitral awards made in countries that are not contracting parties to the New York Convention. As of January 1, 1996, Brazil was not a contracting party to the New York Convention. See U.S. DEPARTMENT OF STATE, TREATIES IN FORCE 308 (1996).

⁷⁸In addition, provisions in state international arbitration statutes apply primarily in state court actions. In many cases involving international arbitral agreements or awards, parties can avoid the applicability of provisions in state international arbitration statutes by suing in federal court. See *Washington Foreign Law Society Report, supra* note 27, at 324. However, federal courts would not have jurisdiction over an action stemming from an arbitration between two foreign parties in which the underlying transaction does not involve the foreign or interstate commerce of the United States. See *id.*

federal law preempts state law in a particular case is to a great extent a question of statutory construction.⁷⁹ While the Supreme Court has addressed questions concerning whether the FAA may preempt a particular provision of a state arbitration law, the Court has not decided a case involving the interaction of the FAA and a state international arbitration statute.⁸⁰

The Supreme Court has held that the FAA may preempt state arbitration law "to the extent that it [state law] actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"⁸¹ A court may invalidate a state law that interferes with the fulfillment of the purposes and objectives of the federal law if the state law is in "actual conflict" with the substantive operation of the federal law.⁸² "Actual conflict" between federal and state legislation may exist in two circumstances: (1) when federal and state legislation are directly contradictory on their face; or (2) when federal and state laws are not contradictory on their face, but state legislation frustrates the narrow objectives of the federal legislation.⁸³

This part analyzes preemption issues that appear important within the context of the coexistence of the New York Convention, chapters 1 and 2 of the FAA, and state international arbitration

⁷⁹ LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 480 (1988).

⁸⁰ The FAA preemption cases decided by the Court have involved state laws that preclude or significantly interfere with the parties' agreement to arbitrate. For FAA preemption cases involving state laws that precluded the arbitrations agreed to by the parties, see *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987); *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995). In *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, the relevant provision of California arbitration law stayed the arbitration pending completion of a state court action to adjudicate issues of fact and law also pertaining to the arbitration. See 489 U.S. 468, 477 (1989). On the other hand, state international arbitration statutes do not contain provisions that preclude or significantly hinder arbitration.

⁸¹ *Volt*, 489 U.S. at 477 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581 (1941)).

⁸² TRIBE, *supra* note 79, at 481. A court may also strike down a state law when the federal law validly occupies the entire field. See *id.* However, the Supreme Court has held that the FAA "does not reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477.

⁸³ TRIBE, *supra* note 79, at 481-83.

statutes. The author chooses to examine provisions amenable to preemption analysis contained in selected state international arbitration statutes. The author divides these state international arbitration act provisions into two general groups: (1) state law provisions concerning matters addressed expressly in chapter 1 or 2 of the FAA; and (2) state law provisions concerning matters not addressed expressly in the FAA or the New York Convention.⁸⁴ With regard to state international arbitration act provisions concerning matters addressed expressly in chapter 1 or 2 of the FAA, this part compares the pertinent state law provision with the corresponding FAA provision to determine whether the state law provision conflicts directly with the FAA provision to the extent the state law provision may provide a broader basis to refuse the enforcement of an arbitration agreement or arbitral award than provided in the FAA.⁸⁵ This part's examination of state

⁸⁴This part analyzes whether the FAA may preempt state international arbitration act provisions that concern the following matters addressed expressly by provisions in chapter 1 or 2 of the FAA: (1) court intervention to enforce agreements to arbitrate within a particular state, by means of stay orders or court orders to compel arbitration; (2) confirmation and vacation of arbitral awards rendered inside the particular state; and (3) recognition and enforcement of foreign arbitral awards. This part also analyzes whether the FAA or the New York Convention may preempt state international arbitration act provisions that concern the following matters not addressed expressly by the FAA or the Convention: (1) discovery orders issued by the arbitrators or a court in aid of arbitration; (2) provisional measures ordered by a court in aid of arbitration, focusing on court orders for pre-award attachment and preliminary injunctions; and (3) the competence of an arbitral tribunal to rule on questions concerning the scope or validity of an arbitration agreement. The author chooses to examine primarily state law provisions contained in the international arbitration legislation enacted in California, Florida, and Georgia, since these state statutes are representative of the different state law approaches among the state international arbitration statutes currently enacted. For further discussion concerning the California, Florida, and Georgia statutes as representative of the different state law approaches, see *supra* note 30.

⁸⁵The Washington Foreign Law Society Report suggests comparison of FAA and state law provisions as a method for resolving preemption questions. "To the extent a state statute is consistent with the 'procedural' provisions [all FAA provisions except section 2] of the FAA, it would presumably not be preempted. If, however, the state enacted statute varies substantially from the FAA, the court would have to determine whether the state procedures infringe on the substantive command of section 2 of the FAA [ensuring the enforceability of arbitration agreements]. If they do, a federal court may find such procedures to be preempted by the federal statute." *Washington Foreign Law Society Report, supra* note 27, at 324-25. Born also suggests a similar comparative

international arbitration act provisions concerning matters not addressed expressly by the FAA or the Convention focuses on whether the application of such state law provisions may frustrate or undermine a purpose or policy of the FAA or the Convention.

Overall, the analysis of preemption issues in this part reveals that few provisions contained in the state international arbitration statutes examined conflict directly with provisions in chapter 1 or 2 of the FAA, or frustrate the purposes and policies of the FAA or the New York Convention. These results suggest that the extent of preemption of provisions in state international arbitration statutes is not significant.⁸⁶ The infrequency that the state international arbitration act provisions examined conflict with FAA provisions or undermine the purposes or policies of the FAA or the Convention argues against the need for amending the FAA in order to preempt state international arbitration statutes.

analysis to determine whether provisions in chapter 1 or 2 of the FAA may preempt state arbitration law provisions. See generally BORN, *supra* note 6.

⁸⁶In this part, the author chooses to analyze whether the FAA may preempt particular provisions in state international arbitration statutes without examining the impact of the Supreme Court's decision in *Volt* on questions of preemption of state arbitration law. As noted previously, the *Volt* Court agreed with the lower courts that by including a standard choice of law clause selecting state law the parties intended to incorporate state arbitration law into their arbitration agreement. As a result, the FAA could not preempt the state arbitration law provision that the FAA would otherwise preempt if the parties had not included the standard choice of law clause selecting state law. Part III examines questions concerning possible preemption of state arbitration law provisions without addressing the implications of the *Volt* decision on preemption questions since it appears that the Supreme Court's decision in *Mastrobuono* limits the impact of the *Volt* decision. Part IV reveals that the Court's holding in *Mastrobuono* seems to preclude a finding that a standard choice of law clause indicates the parties' intention to apply state arbitration law that the FAA would otherwise preempt, unless the choice of law clause expressly provides for the application of such a state law provision. For discussion of the Court's treatment in *Volt* and *Mastrobuono* of the impact on questions of FAA preemption of the inclusion of both a standard choice of law clause and an arbitration clause, see *infra* notes 251-75 and accompanying text. Another commentator professes that questions of preemption and the parties' intent concerning the effect of a standard choice of law clause on the law applicable to their arbitration merit separate inquiries. See Arthur S. Feldman, Note, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University: Confusing Federalism with Federal Policy Under the FAA*, 69 TEX. L. REV. 691, 711 (1991). Feldman comments that "[t]he difficulties that confront a court attempting to discern what the parties intended when a contract contains both an agreement to arbitrate and a concurrent choice of law clause are potentially enormous. Some unnecessary confusion might be avoided by distinguishing this inquiry" from "the discrete topic" of FAA preemption. *Id.*

A. *Enforcement of Arbitration Agreements by Court Order to Stay Litigation or to Compel Arbitration*

Concluding that section 2 of the FAA applies in state courts, the Supreme Court has held consistently that the FAA preempts state legislation requiring a judicial forum for claims the parties agreed to arbitrate.⁸⁷ In *Southland Corp. v. Keating*,⁸⁸ the Supreme Court ruled that the provision of the California Franchise Investment Law, interpreted by the California Supreme Court to require the adjudication of claims brought under the statute, conflicted directly with section 2 of the FAA and violated the Supremacy Clause.⁸⁹ The Court in *Southland* declared that "in enacting section 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."⁹⁰ The Court also held in *Perry v. Thomas*⁹¹ and *Allied-Bruce Terminix Cos. v. Dobson*,⁹² decisions subsequent to *Southland*, that the FAA preempts state laws that require the litigation of claims the parties agreed to arbitrate.⁹³

⁸⁷ See *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987); *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834 (1995). See *infra* notes 88-97 and accompanying text for discussion of the Supreme Court's holdings in *Southland*, *Perry* and *Terminix*.

⁸⁸ 465 U.S. 1 (1984).

⁸⁹ See *Southland*, 465 U.S. at 10. Tribe cites *Southland* as an example of federal preemption of state law when federal and state legislation are directly contradictory on their face. See TRIBE, *supra* note 79, at 482. Tribe comments that "federal regulation obviously supersedes state regulation where compliance with both is a literal impossibility." *Id.* at 481.

⁹⁰ *Southland*, 465 U.S. at 10.

⁹¹ 482 U.S. 483 (1987).

⁹² 115 S. Ct. 834 (1995).

⁹³ In *Perry*, the Court held that the FAA preempted a provision of the California Labor Code allowing wage collection actions without regard to the existence of an agreement to arbitrate, for there was an "unmistakable conflict" between state law and the federal policy favoring the enforceability of arbitration agreements embodied in section 2 of the FAA. *Perry*, 482 U.S. at 491 (1987). In *Terminix*, the Court ruled that the FAA preempted the provision in Alabama state law that prohibited the enforceability of predispute arbitration agreements. See *Terminix*, 115 S. Ct. at 834. The Court declared that "state courts cannot apply state statutes that invalidate arbitration agreements." *Id.* at 838 (quoting *Southland*, 465 U.S. at 15-16, 104 S. Ct. at 860-61).

The broader holding of *Southland* is that the FAA preempts state law provisions that limit the enforceability of arbitration agreements covered by the FAA. In *Southland*, the Court declared that “in creating a substantive rule [section 2 of the FAA] applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”⁹⁴ As a result, state arbitration law may not impose restrictions on the enforceability of arbitration agreements beyond the restrictions on enforceability set out in sections 1 and 2 of the FAA.⁹⁵

Southland and its progeny establish that the FAA preempts state arbitration law that conflicts with the federal policy embodied in section 2 of the FAA favoring the enforceability of arbitration agreements covered by the FAA.⁹⁶ These Supreme Court

The respondents in *Terminix* argued that the Court should overrule *Southland* in order to allow the Alabama court to apply its state’s anti-arbitration provision even though this provision makes written, predispute arbitration agreements invalid and unenforceable, which clearly conflicts with section 2 of the FAA. However, the Supreme Court refused to reconsider the well-established rule declared in *Southland* that the FAA preempts state statutes that invalidate arbitration agreements. *See id.* at 838-39.

⁹⁴*Southland*, 465 U.S. at 16. One commentator states that the *Terminix* decision also reaffirms the broader holding of *Southland*. “*Terminix* signals that the Supreme Court will not tolerate efforts by the state legislatures or judiciaries to undermine the clear purpose of the FAA — the enforcement of contractual agreements to arbitrate.” Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1, 16-17 (1996).

⁹⁵*See Southland*, 465 U.S. at 11. The Court declared that the FAA places two limitations on the enforceability of arbitration agreements: (1) the underlying contract that contains the arbitration agreement must satisfy the commerce requirement or involve a maritime transaction pursuant to section 1; and (2) section 2 provides for the revocation of arbitration clauses upon “grounds as exist at law or in equity for the revocation of any contract.” *Id.* In dicta, the *Southland* court professed that “we see nothing in the [Federal Arbitration] Act indicating that the broad principle of enforceability is subject to any additional limitations under State law.” *Id.*

⁹⁶The 1988 Washington Foreign Law Society Report concludes that the FAA “presumably” would not preempt state law where the state statutory provisions are consistent with the “procedural” provisions (all FAA provisions except for section 2) of the FAA. *Washington Foreign Law Society Report*, *supra* note 27, at 324-25. However, if state procedural provisions “vary [sic] substantially” from the corresponding FAA provisions such that the state law provisions conflict with the federal substantive policy favoring the enforceability of arbitration agreements expressed in section 2, then a court “may find” that the FAA preempts such state law procedural provisions. *Id.* at 325. Note that the Washington Foreign Law Society Report preceded the Supreme Court’s 1989 decision in *Volt*.

decisions as well as the *Volt* decision reveal that “the Court views commercial arbitration under the FAA as a matter of contract, and the role of the judiciary under the Act primarily to be a simple matter of enforcing agreements to arbitrate.”⁹⁷ In accordance with the FAA’s emphasis on enforcing the parties’ agreement to arbitrate, commentators have articulated different conceptions of the types of state laws that the FAA may preempt, including state laws that interfere with the parties’ intent to arbitrate,⁹⁸ deprive a party from availing itself of the contractual right to arbitration,⁹⁹ or limit the freedom of contract with regard to arbitration agreements.¹⁰⁰

Sections 3 and 4 of the FAA, which authorize court orders to stay the litigation of arbitrable issues and to compel arbitration, are central to furthering the federal substantive policy favoring the enforceability of arbitration agreements. As a result, in order to avoid preemption by section 3 or 4 of the FAA, a state law provision authorizing such court intervention to enforce arbitration agreements within the state would likely have to appear similar to

⁹⁷ Hayford, *supra* note 94, at 17.

⁹⁸ See Feldman, *supra* note 86, at 711. Feldman comments “preemption is relevant only to the extent that state law might interfere with the parties’ ability to carry forward their intent to arbitrate, the one element of an arbitration agreement the FAA protects in all instances.” *Id.*

⁹⁹ See Garvey & Heffelfinger, *supra* note 17, at 212. Garvey & Heffelfinger profess that the FAA preempts a state statutory provision that does not conflict with a specific FAA provision, when the state law provision is so burdensome as to effectively “deprive [not just delay] the right of a party to avail itself of its contractual right to arbitration.” *Id.*

¹⁰⁰ See Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government’s Role in Punishment and Federal Preemption of State Law*, 63 *FORDHAM L. REV.* 529, 571 (1994). Ware comments that “a state law that limits freedom of contract with regard to arbitration agreements conflicts with the FAA and is preempted by it.” *Id.* For example, New York case law refuses to enforce arbitration agreements that give the arbitrators the power to award punitive damages. See *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353 N.E.2d 793, 794 (1976). Ware professes that the FAA preempts *Garrity* which limits the freedom to contract for punitive damages. See Ware, *supra*, at 571. This statement by Ware anticipates the Supreme Court’s 1995 decision in *Mastrobuono* where the Court declared that “in the absence of contractual intent to the contrary, the FAA would preempt the *Garrity* rule.” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1217 (1995). Ware also declares that the FAA would preempt a state law rule that limits the freedom to contract against arbitral awards of punitive damages. See Ware, *supra*, at 571.

section 3 or 4 of the FAA.¹⁰¹

Section 3 of the FAA provides that a "court of the United States" shall stay proceedings involving "any issue referable to arbitration" pursuant to a written arbitration agreement.¹⁰² The provisions authorizing their respective state courts to stay litigation of arbitrable issues contained in the California international arbitration statute and the Georgia Code do not conflict with the language of section 3 of the FAA.¹⁰³ Thus, these state statutory provisions do not appear to raise preemption concerns.

The provision concerning court-ordered stays of litigation contained in the Florida International Arbitration Act sets forth three circumstances under which a Florida court may not stay an action before it involving a dispute "subject to arbitration."¹⁰⁴ Since section 3 of the FAA does not expressly include the exceptions to the issuance of stay orders provided in section

¹⁰¹"A state court entertaining an arbitration dispute within the scope of section 2 of the FAA would probably have to provide state procedures for court intervention similar to sections 3 and 4. Otherwise, its procedures would be preempted by these federal provisions." *Washington Foreign Law Society Report, supra* note 27, at 325.

¹⁰²9 U.S.C. § 3 (1994).

¹⁰³See CAL. CIV. PROC. CODE § 1297.81 (West 1996); GA. CODE ANN. § 9-9-6(a) (LEXIS through 1996 Supp.). Section 1297.81 of the California international arbitration statute provides in pertinent part that when a party to an international commercial arbitration agreement pursuant to the California statute commences judicial proceedings seeking relief with regard to a matter covered by the arbitration agreement, another party to the arbitration agreement may apply to a California superior court for an order to stay the judicial proceedings. See CAL. CIV. PROC. CODE § 1297.81. Section 9-9-6(a) of the Georgia Code provides in pertinent part that if an issue claimed to be arbitrable is involved in a pending Georgia court action, an order to compel arbitration issued by the Georgia court operates to stay a pending or subsequent court action. See GA. CODE ANN. §§ 9-9-6(a), 9-9-30.

¹⁰⁴FLA. STAT. ANN. § 684.22(2) (West, WESTLAW through 1996 2nd Reg. Sess.). Section 684.22(2) provides that a Florida court may issue such a stay if the court could issue an order compelling arbitration under section 684.22(1). Section 684.22(1) provides that a Florida court may issue an order compelling arbitration unless the court finds one of the following: (1) there was fraud in the inducement of the written arbitration agreement; (2) submission of the dispute to arbitration would be contrary to the public policy of Florida or the United States; or (3) an arbitral tribunal constituted pursuant to the written arbitration agreement determined previously that the dispute is not arbitrable or that the arbitration agreement is invalid or unenforceable. See FLA. STAT. ANN. § 684.22(1)(a)-(c).

684.22(2) of the Florida International Arbitration Act, the FAA may preempt these state law provisions if such state law provisions create limitations on the enforceability of arbitration agreements additional to the limitations imposed by the FAA.¹⁰⁵

Two of the exceptions to the issuance of stay orders under the Florida International Arbitration Act do not appear to present preemption concerns. Pursuant to sections 684.22(1)(a) and 684.22(2), a Florida court may not issue a stay order if the court finds fraud in the inducement of the written arbitration agreement.¹⁰⁶ Since section 2 of the FAA would make unenforceable an arbitration agreement induced by fraud, this state law provision does not place additional limitations on the enforceability of arbitration agreements. In addition, sections 684.22(1)(c) and 684.22(2) preclude the issuance of a stay order if the Florida court finds that an arbitral tribunal constituted pursuant to the written arbitration agreement determined previously that the dispute is not arbitrable or that the arbitration agreement is invalid or unenforceable.¹⁰⁷ These state law provisions do not seem to present preemption concerns. Section 3 of the FAA allows stays of litigation with regard to issues "referable to arbitration."¹⁰⁸ Moreover, a stay order pursuant to section 3 would not apply to an arbitration agreement deemed invalid or unenforceable.¹⁰⁹

However, sections 684.22(1)(b) and 684.22(2) of the Florida

¹⁰⁵See *supra* notes 94-95 and accompanying text for discussion of the Court's conclusion in *Southland* that state arbitration law may not impose restrictions on the enforceability of arbitration agreements beyond the restrictions on enforceability expressed in sections 1 and 2 of the FAA. Neither chapters 2 nor 3 of the FAA, which implement the United States' obligations under the New York and Inter-American Conventions respectively, include provisions equivalent to section 3 of chapter 1 of the FAA. See 9 U.S.C. §§ 201-208, 301-307. As a result, the FAA may preempt state law provisions concerning stay orders only if the arbitration agreement falls within the scope of chapter 1 of the FAA. However, while the basis for such decisions is not clear, U.S. courts have stayed actions before them involving disputes arbitrable under the conventions. See BORN, *supra* note 6, at 447.

¹⁰⁶See FLA. STAT. ANN. §§ 684.22(1)(a), 684.22(2).

¹⁰⁷See FLA. STAT. ANN. § 684.22(1)(c), 684.22(2).

¹⁰⁸9 U.S.C. § 3.

¹⁰⁹Section 2 of the FAA provides in pertinent part that an arbitration agreement is invalid or unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

International Arbitration Act provide that a Florida court may not stay litigation of arbitrable issues if the court finds arbitration of the dispute contrary to the public policy of Florida or the United States.¹¹⁰ Commentators have stated that this public policy exception should only apply if submission of the dispute to arbitration “would thwart some basic legislative regime”¹¹¹ or would conflict with a “fundamental constitutional principle”¹¹² of Florida or the United States. If a Florida court applied this public policy exception expansively, then this provision could create preemption concerns. A federal or state appellate court should rule that section 3 of the FAA preempts sections 684.22(1)(b) and 684.22(2) of the Florida International Arbitration Act if a Florida circuit court invoked these state law provisions as grounds for refusing to stay litigation, such that the public policy exception precluded the enforceability of an arbitration agreement that the FAA would otherwise enforce.¹¹³

Section 4 of the FAA provides that a United States district court may issue an order compelling arbitration, as provided for in the written arbitration agreement, within the district where the parties file the petition requesting the compulsion order.¹¹⁴ As a

¹¹⁰See FLA. STAT. ANN. § 684.22(1)(b), 684.22(2) (West, WESTLAW through 1996 2nd Reg. Sess.).

¹¹¹Carlos E. Loumiet et al., *Proposed Florida International Arbitration Act*, 16 U. MIAMI INTER-AM. L. REV. 591, 641 (1985) [hereinafter Loumiet, *Proposed Florida Act*].

¹¹²Loumiet, *Introduction to Florida Act*, *supra* note 32, at 954.

¹¹³The author takes the position that section 3 of the FAA may only preempt sections 684.22(1)(b) and 684.22(2) of the Florida International Arbitration Act if a Florida circuit court read these state law provisions expansively with the result that the state court ruling precluded the enforceability of an arbitration agreement that section 3 of the FAA would otherwise enforce. Absent such an actual ruling by a Florida circuit court, a plaintiff would not appear to have standing to claim that the state statutory provisions were in conflict with section 3 of the FAA, and thus violated the Supremacy Clause. The hypothetical possibility that a Florida circuit court would read these state statutory provisions expansively would not appear to result in a sufficient chilling effect on the parties' choice of the Florida International Arbitration Act as the applicable law or on the effective conduct of an arbitration pursuant to the Florida statute to satisfy the requirement that the plaintiff suffer actual injury in order for a plaintiff to have standing to bring a claim alleging violation of the Supremacy Clause of the United States Constitution.

¹¹⁴See 9 U.S.C. § 4.

result of the Supreme Court's decision in *Southland* that section 2 of the FAA creates federal substantive law favoring the enforceability of arbitration agreements applicable in state courts, state arbitration law may not impose restrictions on the enforceability of arbitration agreements beyond the restrictions on enforceability provided in sections 1 and 2 of the FAA.¹¹⁵ Provisions concerning court orders to compel arbitration included in the California international arbitration statute and the Georgia Code do not appear to raise preemption concerns since these provisions do not impose restrictions on the enforceability of arbitration agreements additional to those mandated by the FAA.¹¹⁶

On the other hand, under the Florida International Arbitration Act, the three exceptions that apply to the issuance of court orders to stay litigation also apply to the issuance of court orders to compel arbitration pursuant to section 684.22(1) of the Florida statute.¹¹⁷ Thus, as discussed previously with regard to the Florida provision concerning court orders to stay litigation, a federal or state appellate court should rule that section 4 of the FAA

¹¹⁵For discussion concerning this aspect of the *Southland* decision, see *supra* notes 94-95 and accompanying text.

¹¹⁶Section 1297.81 of the California international arbitration statute provides in pertinent part that when a party to an international commercial arbitration agreement as defined under the California statute initiates judicial proceedings involving a matter covered by the arbitration agreement, any other party to the arbitration agreement may apply to a California superior court for an order to compel arbitration. See CAL. CIV. PROC. CODE § 1297.81 (West 1996). The Georgia Code provides that upon application of a party, a Georgia state court shall order the parties to arbitrate if the court determines the following: (1) there is no "substantial issue" concerning the validity of the arbitration agreement or compliance with the arbitration agreement; or (2) time limitations do not bar the arbitration of the claims at issue. See GA. CODE ANN. §§ 9-9-6(a), 9-9-30 (LEXIS through 1996 Supp.). Section 1297.81 of the California international arbitration statute and section 9-9-6(a) of the Georgia Code do not provide that court orders to compel arbitration must require that the arbitration occur within the judicial district where the parties have filed the petition requesting the compulsion order as provided in section 4 of the FAA. However, this difference between these state law provisions and the FAA's section 4 does not appear to raise preemption concerns, since these state law provisions, which do not restrict the place within their respective state where the arbitration may occur, more readily enforce arbitration agreements than section 4 of the FAA.

¹¹⁷See *supra* note 104 for discussion of the exceptions to the issuance of a court order to compel arbitration pursuant to section 684.22(1) of the Florida International Arbitration Act.

preempts section 684.22(1) of the Florida statute if a Florida circuit court applied this state law provision's public policy exception broadly in order to deny a request to compel arbitration with the result that the application of state law prevented the enforcement of an arbitration agreement that the FAA would otherwise enforce.¹¹⁸

B. Vacation of International Arbitral Awards Rendered Inside the Particular State

Provisions included in a state's international arbitration statute or in the state's general arbitration law address the confirmation or vacation of international arbitral awards rendered in the particular state.¹¹⁹ The paragraphs that follow will discuss the extent that relevant provisions contained in chapters 1 and 2 of the FAA may preempt state law provisions that apply to the vacation of international arbitral awards rendered in the particular state.¹²⁰ The

¹¹⁸The FAA's section 4 may preempt a state statutory provision concerning court orders to compel arbitration if the arbitration agreement falls within the scope of chapter 1 of the FAA. For discussion of the scope of chapter 1 of the FAA, see *supra* notes 43-54 and accompanying text. However, if the arbitration agreement falls within the scope of chapter 2 of the FAA, then section 206 of the FAA's chapter 2 may preempt state law provisions authorizing state courts to compel arbitration. "It appears settled that federal court jurisdiction to enforce section 206 is not exclusive, but merely concurrent with the jurisdiction of state courts." BORN, *supra* note 62, at 432. Section 206 provides in pertinent part that a court with jurisdiction under chapter 2 may compel arbitration in accordance with the agreement of the parties. See 9 U.S.C. § 206. The author's analysis concerning whether section 4 of the FAA may preempt the state law provisions examined would seem to apply to whether section 206 may also preempt these same state law provisions. See *supra* notes 114-18 and accompanying text. Note that section 206 may preempt corresponding state law provisions in cases involving arbitration agreements that may result in a nondomestic award subject to the New York Convention. While section 206 may also enforce agreements to arbitrate abroad, state international arbitration statutes do not contain provisions that enforce such arbitration agreements.

¹¹⁹Some state international arbitration statutes contain provisions concerning the confirmation or vacation of international arbitral awards rendered in the particular state. See, e.g., FLA. STAT. ANN. §§ 684.24, 684.25 (West, WESTLAW through 1996 2nd Reg. Sess.). Other state international arbitration legislation does not contain such provisions, and thus the provisions concerning the confirmation and vacation of arbitral awards contained in the state's general arbitration legislation apply. See, e.g., CAL. CIV. PROC. CODE §§ 1285-1288; GA. CODE ANN. §§ 9-9-12, 9-9-13, 9-9-30.

¹²⁰Since several state international arbitration statutes contain provisions that expressly address the enforcement of international arbitral awards rendered abroad, the

analysis focuses on state law provisions concerning the vacation of international arbitral awards rendered in the particular state, because such state law provisions appear to present more preemption issues than do state law provisions concerning the confirmation of arbitral awards.¹²¹

State law provisions may provide the authority for a state court to order the vacation of an international arbitral award rendered in the respective state to the extent section 207 of the FAA's chapter 2 or section 10 of the FAA's chapter 1 do not preempt such state law provisions. Specifically, section 207 or section 10 will preempt state law provisions "providing for broader bases to vacate awards than available under federal law."¹²² However, section 207 or section 10 will not preempt state law provisions that are less restrictive and more readily allow the confirmation of international arbitral awards than provided under section 207 or section 10.¹²³ Thus, to avoid FAA preemption in a particular case, a state law provision specifying the grounds for vacating international arbitral awards need not contain language identical to the grounds for vacating awards provided in section 207 or section 10.

As discussed previously, an international arbitral award rendered in the United States may constitute a "nondomestic"

author will discuss the possible preemption of such provisions by the New York Convention separately from questions of preemption involving state law provisions authorizing state court orders to confirm or vacate international arbitral awards made in the particular state. See *supra* notes 144-52 and accompanying text for this discussion of state law provisions expressly applicable to the enforcement of international arbitral awards rendered abroad.

¹²¹The differences between federal and state law provisions addressing the confirmation of awards are less amenable to preemption analysis than are federal and state law provisions authorizing different grounds for vacating arbitral awards. For example, section 207 of the FAA's chapter 2 provides that any party to the arbitration may apply to a court with jurisdiction under chapter 2 for an order confirming an award within three years after an award falling under the Convention is made. See 9 U.S.C. § 207. State law provisions may provide for a different time period within which the party to the arbitration must apply to the respective state court for an order confirming the award. For example, section 9-9-12 of the Georgia Code provides that a party must apply within one year after the award is rendered. See GA. CODE ANN. § 9-9-12.

¹²²BORN, *supra* note 6, at 679.

¹²³See *id.* at 678-79.

award subject to the New York Convention.¹²⁴ Section 207 of the FAA's chapter 2, which implements the United States' obligations under the New York Convention, provides in pertinent part that a court with jurisdiction under chapter 2 shall confirm an arbitral award falling under the Convention unless the court invokes one of the grounds for refusal of recognition or enforcement of an award stated in Article V of the New York Convention.¹²⁵ If a party invokes section 207 when requesting a state court to confirm a nondomestic award, then the state court could vacate the award by citing one of the specified grounds in Article V of the New York Convention as provided in section 207.¹²⁶ However, it is "reasonably clear" that section 207 is not the exclusive avenue in the United States for confirming or vacating an award subject to the New York Convention.¹²⁷ Based on this conclusion, it appears that a state law provision could authorize a state court to confirm or vacate an arbitral award subject to the New York Convention to the extent that section 207 of the FAA's chapter 2 does not preempt the state law provision.¹²⁸

Specifically, section 207 of chapter 2 of the FAA will preempt

¹²⁴See *supra* notes 62-64 and accompanying text.

¹²⁵See 9 U.S.C. § 207. One can apply to either a federal or a state court to confirm an arbitral award pursuant to section 207. See BORN, *supra* note 6, at 661.

¹²⁶See New York Convention, *supra* note 5, art. V(1)(a)-(e), (2)(a)-(b).

¹²⁷BORN, *supra* note 6, at 659. The Second Circuit has held that a party may bring an action to confirm an award subject to the New York Convention by invoking either section 207 of the FAA's chapter 2 or section 9 of the FAA's chapter 1. See *Seetransport Wiking Trader v. Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993). Born comments that "presumably, state and common law actions to confirm an arbitral award [subject to the New York Convention] are also possible under this theory." See BORN, *supra* note 6, at 660.

¹²⁸See *id.* at 678-79. As discussed previously, to avoid preemption by section 207, state law provisions specifying the grounds for vacating international arbitral awards need not include language identical to the grounds provided in the New York Convention's Article V, which may apply to vacate an international arbitral award pursuant to section 207. See text *supra* p. 746. Note that sections 9 and 10 of the FAA's chapter 1 could authorize a federal court to confirm or vacate an arbitral award subject to the New York Convention to the extent that sections 9 and 10 do not conflict with section 207 of the FAA's chapter 2. See 9 U.S.C. § 208 which provides that chapter 1 applies to actions and proceedings brought under chapter 2 to the extent that chapter 1 does not conflict with chapter 2 or the New York Convention as ratified by the United States.

state law provisions if such state law provisions provide broader bases to vacate awards than specified in Article V of the Convention.¹²⁹ Provisions concerning the vacation of arbitral awards in the California and Georgia state statutes appear consistent with the grounds specified in Article V of the New York Convention for vacating an arbitral award pursuant to section 207.¹³⁰

Most grounds for vacating an arbitral award included in the Florida International Arbitration Act are also consistent with the corresponding provisions in Article V of the New York Convention.¹³¹ However, several grounds for vacating an arbitral

¹²⁹As mentioned previously, section 207 provides that the court may vacate an award if the court finds one of the grounds to refuse the recognition or enforcement of an award set forth in Article V of the New York Convention. *See* 9 U.S.C. § 207.

¹³⁰Since the California international arbitration statute does not provide an express provision addressing the vacation of arbitral awards, section 1286.2 of California's general arbitration provisions applies. Similarly, section 9-9-13 of part 1 of the Georgia Arbitration Code, which applies to arbitrations generally, specifies the grounds upon which a Georgia court may vacate an arbitral award and applies to international arbitrations subject to part 2 of the Georgia Arbitration Code. The provisions in Article V of the New York Convention seem to present different grounds for vacating an award than these provisions in the California and Georgia state laws. *See* New York Convention, *supra* note 5, art. V(1)(a)-(e), (2)(a)-(b); CAL. CIV. PROC. CODE § 1286.2 (West 1996); GA. CODE ANN. § 9-9-13 (LEXIS through 1996 Supp.). However, the grounds for vacating arbitral awards included in the California and Georgia statutes do not appear to provide broader bases to vacate awards than specified in Article V of the New York Convention pursuant to section 207. Note that these California and Georgia statutory provisions contain language similar or identical to the grounds for vacating an award pursuant to section 10 of chapter 1 of the FAA. *See* 9 U.S.C. § 10; CAL. CIV. PROC. CODE § 1286.2; GA. CODE ANN. § 9-9-13.

¹³¹The grounds for vacating an award provided in sections 684.25(1)(a), (1)(b), (1)(f) and (1)(g) of the Florida International Arbitration Act are similar to the New York Convention's Article V(1)(a), (1)(b), (1)(c), (1)(d), respectively. *See* FLA. STAT. ANN. §§ 684.25(1)(a), (1)(b), (1)(f) and (1)(g) (West, WESTLAW through 1996 2nd Reg. Sess.); New York Convention, *supra* note 5, art. V(1)(a), (1)(b), (1)(c), (1)(d). Note that section 684.25 of the Florida statute provides grounds for vacating an award or declaring it not entitled to confirmation. *See* FLA. STAT. ANN. § 684.25. Section 684.24(1)(b) states that a court shall grant an application to vacate an award if the following occurs: (1) one of the grounds for vacating an award pursuant to section 684.25 apply and (2) either the arbitration occurred in Florida or the arbitration was subject to part II of the Florida International Arbitration Act which concerns the conduct of the arbitration. *See* FLA. STAT. ANN. § 684.24(1)(b). Section 684.24(1)(c) provides that a Florida court shall declare an award not entitled to confirmation even though one of the grounds for vacating an award pursuant to section 684.25 apply if both the arbitration did not occur

award in section 684.25 of the Florida statute could create broader bases to vacate an award than provided in Article V of the New York Convention pursuant to section 207, if the Florida courts interpreted these state law provisions expansively. Section 684.25(1)(c) provides that a Florida court may vacate an award if “the arbitral tribunal conducted proceedings so unfairly as to substantially prejudice the rights of the party challenging the award.”¹³² Broad interpretation of this provision by a Florida court could conceivably result in the vacation of an award which section 207 would otherwise confirm.¹³³ A federal or state appellate court should rule that section 207 preempts section 684.25(1)(c) of the Florida International Arbitration Act if a Florida circuit court invoked this state law provision to vacate an award that section 207 would enforce.¹³⁴ Another provision that could raise preemption concerns is section 684.25(1)(d), which provides in pertinent part that a Florida court shall vacate an arbitral award deemed contrary to Florida public policy.¹³⁵ While the drafters

in Florida and the arbitration was not subject to part II of the Florida statute. See FLA. STAT. ANN. § 684.24(1)(c).

¹³²FLA. STAT. ANN. § 684.25(1)(c).

¹³³Section 684.25(1)(c) of the Florida statute allows Florida courts to deny confirmation if “the tribunal’s choice of procedure both offended some basic principle of fairness and was critical to the outcome.” Loumiet, *Proposed Florida Act*, *supra* note 111, at 650. While recognizing the broad wording of the provision, members of the task force that drafted the Florida International Arbitration Act comment that this provision “does not confer upon the courts a license to supervise or ‘second guess’ the tribunal.” *Id.*

¹³⁴Absent an actual ruling by a Florida circuit court invoking section 684.25(1)(c) of the Florida International Arbitration Act, a plaintiff would not appear to have standing to bring a suit claiming that section 684.25(1)(c) was in conflict with section 207, and thus violated the Supremacy Clause. The hypothetical possibility that a state court may apply section 684.25(1)(c) broadly to vacate an award that section 207 would enforce would not appear to give a prospective plaintiff standing. For further discussion concerning the author’s view that the FAA may only preempt a state arbitration law provision if a state court has invoked the state law provision in an actual case, see *supra* note 113.

¹³⁵See FLA. STAT. ANN. § 684.25(1)(d). Note that both section 684.25(1)(d) of the Florida International Arbitration Act and Article V(2)(b) of the New York Convention authorize the vacation of an award deemed contrary to the public policy of the United States. See New York Convention, *supra* note 5, art. V(2)(b); FLA. STAT. ANN. § 684.25(1)(d). However, Article V does not permit the vacation of arbitral award viewed as contrary to public policy of a constituent state within a federation. See New York Convention, *supra* note 5, art. V.

intended this provision to apply “to assure that the award is not offensive to some basic moral or legal principle”¹³⁶ of Florida, the vacation of an award that section 207 of the FAA’s chapter 2 would otherwise confirm could result if a Florida court interpreted the Florida public policy exception broadly. In addition, section 684.25(1)(e) provides in pertinent part that a Florida court shall vacate an award if a “neutral arbitrator had a material conflict of interest with the party challenging the award.”¹³⁷ If a Florida court gave a broad interpretation to “material conflict of interest,” leading the court to vacate an award based on an apparent conflict not affecting the vote of the neutral arbitrator, then a federal or state appellate court should rule that section 207 preempts this state law provision if the Florida circuit court’s decision resulted in the vacation of an award that section 207 would otherwise confirm.¹³⁸

If an international arbitral award rendered in the United States is not subject to the New York Convention and the underlying arbitration agreement falls within the scope of chapter 1 of the FAA, then state law provisions concerning state court orders to vacate such awards may apply to the extent that the FAA’s section 10 does not preempt such state law provisions. Specifically, section 10 will preempt state law provisions that provide broader bases to vacate an arbitral award than provided in section 10.¹³⁹

¹³⁶Loumiet, *Proposed Florida Act*, *supra* note 111, at 650.

¹³⁷FLA. STAT. ANN. § 684.25(1)(e).

¹³⁸The task force that drafted the Florida International Arbitration Act did not intend such a broad interpretation of section 684.25(1)(e). In order to invoke section 684.25(1)(e), members of the task force comment that “it must be shown that the vote of the neutral arbitrator with the alleged conflict was critical to the award, or part thereof, being challenged.” Loumiet, *Proposed Florida Act*, *supra* note 111, at 651.

¹³⁹See BORN, *supra* note 6, at 679. As discussed previously, to avoid preemption by section 10 of the FAA, a state law provision specifying grounds for vacating an international arbitral award need not contain language identical to the grounds provided in section 10. See text *supra* p. 746. The language of section 10 suggests that section 10 does not apply directly in state court. Section 10 provides in pertinent part that “the United States court in and for the district wherein the award was made may make an order vacating the award.” 9 U.S.C. § 10 (1994). However, since state courts must comply with the federal substantive policy favoring the enforceability of arbitration agreements embodied in section 2 of the FAA, this suggests that state law provisions must authorize grounds for vacating arbitral awards consistent with section 10 to avoid preemption. Born comments that “[i]f § 2’s provisions regarding the

The California and Georgia statutory provisions do not appear to authorize broader grounds to vacate an award than provided in section 10, since these state statutory provisions contain language identical or similar to the grounds for vacation of awards specified in section 10.¹⁴⁰ While the Florida statutory provision was not drafted to mirror the language of section 10 of the FAA, one can interpret most grounds for vacating arbitral awards under the Florida International Arbitration Act as consistent with section 10.¹⁴¹ On the other hand, section 684.25(1)(d) of the Florida

substantive enforceability of arbitration agreements must be followed by state courts, then it is difficult to see why the provisions of §§ 9 and 10 concerning the enforceability of arbitral awards would not be binding in a similar fashion." BORN, *supra* note 6, at 671 (citations omitted). However, one commentator contends that sections 9 and 10 do not preempt state laws authorizing the vacation of arbitral awards on broader grounds than provided for in the FAA. See Atwood, *supra* note 1, at 90-91.

¹⁴⁰See CAL. CIV. PROC. CODE § 1286.2 (West 1996); GA. CODE ANN. §§ 9-9-13, 9-9-30 (LEXIS through 1996 Supp.); 9 U.S.C. § 10. Note that the California and Georgia statutory provisions that apply to the vacation of international arbitral awards rendered in the respective state are part of general arbitration provisions of these states. See *supra* note 130. The consistency between these state statutory provisions and section 10 of the FAA suggests a conscious attempt to draft state law provisions to avoid conflict with section 10.

¹⁴¹Section 684.25(1)(d) of the Florida statute provides in part that a Florida court may vacate an award "obtained by fraud, corruption, or undue influence" which is language similar to section 10(a). FLA. STAT. ANN. § 684.25(1)(d); 9 U.S.C. § 10(a). Section 684.25(1)(e) authorizes a Florida court to vacate an award if a neutral arbitrator had a "material conflict of interest" with the party challenging the award. FLA. STAT. ANN. § 684.25(1)(d). One could plausibly view this provision as consistent with the FAA's section 10(b), which permits vacation of an award if an arbitrator reveals "evident partiality." 9 U.S.C. § 10(b). Section 684.25(1)(b) of the Florida statute allows a Florida court to vacate an award if the party opposing the award was not given notice of the appointment of the arbitral tribunal or of the arbitral proceedings. See FLA. STAT. ANN. § 684.25(1)(b). Section 684.25(1)(c) provides that a Florida court shall vacate an award if the arbitral tribunal conducted the proceedings "so unfairly as to substantially prejudice the rights of the party challenging the award." FLA. STAT. ANN. § 684.25(1)(c). One could read sections 684.25(1)(b) and (1)(c) as consistent with the FAA's section 10(c), which states in part that a court may vacate an award where the arbitrators' misbehavior "prejudiced" the rights of any party to the arbitration. 9 U.S.C. § 10(c). Section 684.25(1)(g) of the Florida statute provides that a Florida court may vacate an award if "the arbitral tribunal was not constituted in accordance with the agreement of the parties." FLA. STAT. ANN. § 684.25(1)(g). This state law provision appears consistent with the FAA's section 10(d), which allows the court to vacate an award "where the arbitrators exceeded their powers . . . that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(d).

Sections 684.25(1)(a) and (1)(f) provide that a Florida court may vacate an

International Arbitration Act provides that a Florida court shall vacate an arbitral award deemed contrary to the public policy of the United States or Florida.¹⁴² If a Florida court interpreted this public policy exception expansively resulting in the vacation of an award that sections 9 and 10 of the FAA would otherwise confirm, then a federal or state appellate court should find that section 10 of the FAA preempts section 684.25(1)(d) of the Florida statute.¹⁴³

C. Recognition and Enforcement of Foreign Arbitral Awards

Several state international arbitration statutes also contain provisions that expressly address the recognition and enforcement of international arbitral awards rendered abroad.¹⁴⁴ As discussed previously, it appears that these state law provisions could authorize the respective state court to enforce or refuse

arbitral award if the arbitration agreement is invalid or the dispute is nonarbitrable. See FLA. STAT. ANN. § 684.25(1)(a), (1)(f). One can view these provisions as consistent with the federal substantive policy favoring the enforceability of arbitration agreements embodied in section 2 of the FAA.

¹⁴²See FLA. STAT. ANN. § 684.25(1)(d). Section 10 of the FAA's chapter 1 does not specify United States or state public policy as a ground for vacating an award. See 9 U.S.C. § 10. Note that Article V(2)(b) of the New York Convention authorizes United States public policy as a ground for vacating an arbitral award pursuant to section 207 of the FAA's chapter 2. See New York Convention, *supra* note 5, art. V(2)(b); 9 U.S.C. § 207.

¹⁴³Absent an actual ruling by a Florida circuit court invoking section 684.25(1)(d) of the Florida International Arbitration Act, a plaintiff would not appear to have standing to bring a suit claiming that section 684.25(1)(d) was in conflict with section 10, and thus violated the Supremacy Clause. For further discussion concerning the author's view that the FAA may only preempt a state arbitration law provision if a state court has invoked the state law provision in an actual case, see *supra* note 113.

¹⁴⁴The statutes enacted in Florida, Georgia, Connecticut and Oregon contain provisions that expressly allow their state courts to enforce arbitral awards regardless of the country where the award was made, as well as specify grounds for refusing to enforce such awards. See CONN. GEN. STAT. ANN. §§ 50a-135, 50a-136 (West 1994); FLA. STAT. ANN. §§ 684.24, 684.25; GA. CODE ANN. § 9-9-42; OR. REV. STAT. §§ 36.522, 36.524 (1995). Section 3-2B-03(a) of the Maryland statute provides in pertinent part that "the arbitration statutes and laws of the United States" are Maryland state law applicable to the enforcement of international arbitral awards. MD. CODE ANN., CTS. & JUD. PROC. § 3-2B-03(a) (1995). Thus, Maryland state courts may only enforce arbitral awards rendered abroad to the extent authorized by the New York and Inter-American Conventions as well as federal law. See MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2B-03(a), 3-2B-04(3). State statutes enacted in California, Hawaii, North Carolina, Ohio, and Texas do not contain provisions expressly addressing state court enforcement of arbitral awards rendered abroad.

enforcement of a foreign arbitral award subject to the New York Convention to the extent that section 207 of the FAA's chapter 2 does not preempt the state law provision.¹⁴⁵ Specifically, section 207 will preempt state law provisions authorizing their respective state courts to refuse the recognition or enforcement of foreign arbitral awards if such state law provisions provide broader bases to refuse recognition or enforcement of awards than specified in Article V of the Convention.¹⁴⁶ However, to avoid preemption by section 207, state law provisions need not include language identical to the grounds provided in Article V of the New York Convention, since section 207 will not preempt state law provisions that allow their respective state courts to more readily enforce foreign arbitral awards than would occur pursuant to section 207.¹⁴⁷

Most grounds for refusing the recognition or enforcement of a foreign arbitral award specified in state international arbitration statutes appear consistent with grounds provided in Article V of New York Convention.¹⁴⁸ However, particular state law provisions

¹⁴⁵See *supra* note 128 and accompanying text.

¹⁴⁶See BORN, *supra* note 6, at 679. As discussed previously, the FAA's section 207, which allows for vacation of awards pursuant to the grounds specified in Article V of the New York Convention, as well as the FAA's section 10 will preempt state law provisions authorizing a state court to order the vacation of an international arbitral award rendered in the particular state when such state law provisions set forth broader bases to vacate awards than provided in section 207 or section 10. See *supra* note 122 and accompanying text.

¹⁴⁷See BORN, *supra* note 6, at 678.

¹⁴⁸Most grounds for refusing the recognition or enforcement of a foreign arbitral award included in section 684.25 of the Florida International Arbitration Act are consistent with the corresponding provisions in Article V of the New York Convention. The grounds for refusing the recognition and enforcement of a foreign award provided in sections 684.25(1)(a), (1)(b), (1)(f), and (1)(g) of the Florida statute are similar to the New York Convention's Article V(1)(a), (1)(b), (1)(c), and (1)(d), respectively. See FLA. STAT. ANN. §§ 684.25(1)(a), (1)(b), (1)(f), (1)(g); New York Convention, *supra* note 5, art. V(1)(a), (1)(b), (1)(c), (1)(d). Note that section 684.25 of the Florida International Arbitration Act provides the same grounds for both refusing the enforcement of foreign awards and vacating international arbitral awards rendered in Florida. See FLA. STAT. ANN. § 684.25. Section 9-9-42 of the Georgia Code provides that a Georgia court may refuse to recognize or enforce an arbitral award rendered abroad if one of the grounds for vacating an award rendered inside the state pursuant to section 9-9-13 applies. See GA. CODE ANN. §§ 9-9-13, 9-9-42. The grounds specified in section 9-9-13 of the Georgia Code do not appear to provide broader bases to refuse

authorizing a state court to refuse the recognition or enforcement of foreign arbitral awards may create a broader basis to refuse the recognition or enforcement of an award than provided in Article V of the New York Convention, if a state court interpreted such state law provisions expansively. For example, state statutes authorize their respective state courts to refuse the recognition or enforcement of foreign arbitral awards if such recognition or enforcement would be contrary to state public policy.¹⁴⁹ Moreover, some state statutes allow a state court to refuse the recognition or enforcement of a foreign arbitral award if the subject matter of the dispute is not arbitrable under state law.¹⁵⁰ A federal or state appellate court should rule that section 207 of the FAA's chapter 2 preempts such state law provisions if a state court decision interpreted the state law provision expansively with the result that the state court denied recognition or enforcement to a foreign arbitral award that Article V of the New York Convention would recognize or enforce.¹⁵¹ In addition, an expansive interpretation of several of the grounds for refusing recognition or enforcement of a foreign award specified in the Florida International Arbitration Act could provide broader bases for denying recognition or enforcement than provided in Article V of the New York Convention.¹⁵² A federal or state appellate court should rule that

recognition or enforcement of an award than provided in Article V of the New York Convention. See *supra* note 130. Most of the grounds for refusing the recognition or enforcement of foreign arbitral awards provided in the Connecticut and Oregon international arbitration statutes contain language identical to the provisions of Article V of the New York Convention. See CONN. GEN. STAT. ANN. §§ 50a-136(1)(a)(i-v); OR. REV. STAT. §§ 36.524(1)(a)(A-E); New York Convention, *supra* note 5, art. V(a-e).

¹⁴⁹See CONN. GEN. STAT. ANN. § 50a-136(1)(b)(ii); FLA. STAT. ANN. § 684.25(1)(d); GA. CODE ANN. § 9-9-42; OR. REV. STAT. § 36.524(1)(b)(B).

¹⁵⁰CONN. GEN. STAT. ANN. § 50a-136(1)(b)(i); OR. REV. STAT. § 36-524(1)(b)(A).

¹⁵¹While Article V of the New York Convention does authorize refusal of the recognition or enforcement of an award viewed as contrary to United States public policy or concerned with subject matter not capable of settlement by arbitration under United States law, Article V does not expressly permit the refusal of the recognition or enforcement of an award deemed contrary to the public policy or arbitrability rules of a constituent state. See New York Convention, *supra* note 5, art. V(2)(a), (b).

¹⁵²For further discussion of the grounds for refusing recognition or enforcement of a foreign arbitral award provided in the Florida statute that a Florida circuit court could invoke to refuse recognition or enforcement of a foreign award entitled to

section 207 preempts such Florida statutory provisions if a Florida circuit court invoked such a state law provision to deny recognition or enforcement to a foreign award entitled to recognition or enforcement under Article V of the New York Convention.

If a foreign or nondomestic arbitral award is subject to the New York Convention, then a party may invoke section 205 of chapter 2 of the FAA in order to remove to federal court an action to refuse enforcement or to vacate an award brought in state court pursuant to a state international arbitration statute.¹⁵³ After removal to federal court, section 207 would apply to enforce or confirm an award subject to chapter 2 of the FAA.¹⁵⁴ Thus, removal to federal court would preclude the applicability of state law provisions that provide broader bases to refuse enforcement or vacate arbitral awards subject to chapter 2 of the FAA than provided in Article V of the Convention.

D. Discovery Orders in Aid of Arbitration

The parties may agree on the discovery and evidentiary procedures for their international arbitration either in their arbitration agreement or after the arbitration commences.¹⁵⁵ If the parties have not reached such an agreement, the applicable law will have significant influence on the availability of discovery and evidentiary procedures in an international arbitration.¹⁵⁶

recognition or enforcement under the New York Convention, see *supra* notes 131-37. Note that section 684.25 of the Florida International Arbitration Act provides the same grounds for both refusing the recognition or enforcement of foreign awards and vacating international arbitral awards rendered in Florida. See FLA. STAT. ANN. § 684.25.

¹⁵³See 9 U.S.C. § 205 (1994). Section 205 provides in pertinent part that if an action pending in a state court relates to an award subject to the New York Convention, then a defendant to the state court action may remove the action to the United States district court within the district and division where the state court action is pending prior to the trial of the state court action. See *id.*

¹⁵⁴See BORN, *supra* note 6, at 678.

¹⁵⁵See *id.* at 82-83.

¹⁵⁶See *id.* at 82. Absent agreement by the parties, applicable arbitral rules as well as the nationalities and legal backgrounds of the arbitrators may also influence the availability of discovery in international arbitration. See *id.* However, arbitral rules do not define significantly the authority of the arbitral tribunal or the courts within the three central subject areas that concern discovery in international arbitration. See *infra* note 157 and accompanying text. The legal backgrounds of the arbitrators can also influence

The influence of the applicable law on the availability of discovery and evidentiary procedures in international arbitration may depend on substantive legal provisions that address the following matters: (1) the authority of the arbitrators to order pre-hearing discovery and to request the production of evidence at the arbitral proceeding; (2) the authority of courts to enforce discovery orders issued by the arbitral tribunal; and (3) the authority of courts to order discovery in aid of arbitration at the request of a party.¹⁵⁷ Section 7 of the FAA expressly addresses the authority of the tribunal to order the attendance of witnesses and the production of evidence at the arbitral proceeding, as well as court enforcement of such orders issued by the tribunal.¹⁵⁸ In addition to addressing these matters, provisions in state international arbitration statutes also authorize the arbitrators to order pre-hearing discovery, a subject not addressed by section 7 of the FAA.¹⁵⁹ Moreover, while section 7 of the FAA does not expressly permit courts to order discovery in aid of arbitration, state international arbitration statutes also authorize courts to order discovery in aid of arbitration at the request of the tribunal or a party to the arbitration.¹⁶⁰ These differences between section 7 of the FAA and such state statutory provisions raise questions concerning whether section 7 may preempt provisions contained in state international arbitration statutes addressing discovery matters on which section 7 is silent.

As revealed below, state law provisions allowing court-ordered

the extent and nature of discovery orders issued by the arbitral tribunal. Stemming from the inquisitional approach to evidence gathering central to civil law systems, arbitrators from civil law countries will generally not favor tribunal orders for discovery initiated by a party. See Arthur L. Marriott, *Evidence in International Arbitration*, 5 *ARB. INT'L* 280, 283-84 (1989). On the other hand, arbitrators from common law nations will more likely issue orders allowing discovery directed by the parties. See BORN, *supra* note 6, at 83.

¹⁵⁷See *id.* at 826-61.

¹⁵⁸See 9 U.S.C. § 7.

¹⁵⁹For discussion concerning state international arbitration act provisions that authorize arbitrators to order pre-hearing discovery, see *infra* notes 164-67 and accompanying text.

¹⁶⁰For discussion concerning state international arbitration act provisions that authorize their respective state courts to order discovery in aid of arbitration at the request of the tribunal or a party to the arbitration, see *infra* note 181 and accompanying text.

discovery in aid of arbitration at the request of a party appear to raise the most significant preemption concerns. While the cases do not involve state law provisions, federal courts have denied parties' requests for court-ordered discovery in aid of arbitration citing the FAA's underlying policy that courts should avoid interfering with the arbitral process.¹⁶¹ The state law provisions examined permitting a party to request court-ordered discovery in aid of arbitration further the arbitral process. Thus, the "judicial interference" caused by such provisions in state international arbitration statutes does not justify preemption of these state law provisions by section 7 of the FAA.

Section 7 of the FAA provides in part that the arbitrator "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."¹⁶² While this provision allows arbitrators to request the attendance of witnesses and the production of material evidence at the arbitral proceedings, section 7 does not expressly authorize the arbitrators to require pre-hearing depositions or the discovery of documents.¹⁶³

¹⁶¹In general, federal courts denying party requests for court-ordered discovery in aid of arbitration have not articulated clearly why such court-ordered discovery constitutes undesirable judicial interference in the arbitral process. However, one federal district court cited the likelihood that court administration of the discovery process "could preshape the issues before the arbitrator." *Recognition Equip., Inc. v. NCR Corp.*, 532 F. Supp. 271, 275 n.4 (N.D. Tex. 1981). Other federal courts have not declared explicitly why court-ordered discovery constitutes undesirable judicial interference in the arbitral process. For further discussion, see *infra* note 179.

¹⁶²9 U.S.C. § 7.

¹⁶³Federal courts have reached different conclusions concerning whether arbitrators can order pre-hearing discovery pursuant to section 7 of the FAA. Some lower federal courts have held that FAA section 7 does not allow an arbitral tribunal to order pre-hearing discovery, but only to require the production of material evidence at the arbitral hearing. "Arbitration has never afforded to litigants complete freedom to delve into and explore at will, the adversary party's files under the pretense of pre-trial discovery." *Local Lodge 1746, Int'l Ass'n of Machinists and Aerospace Workers v. Pratt & Whitney*, 329 F. Supp. 283, 286-287 (D. Conn. 1971) (enforcing arbitrator's subpoena, but requiring in camera inspection of disputed evidence by the arbitrator and allowing parties access only to "relevant evidence in the dispute"). See also *Wilkes-Barre Publ'g Co. v. Newspaper Guild of Wilkes-Barre*, 559 F. Supp. 875 (M.D. Pa. 1982); *Oceanic Trans. Corp. of Monrovia v. Alcoa S.S. Co.*, 129 F. Supp. 160 (S.D.N.Y. 1954). Other federal courts have enforced broad discovery orders issued by

On the other hand, provisions in state international arbitration statutes expressly authorize the arbitrators to order pre-hearing discovery.¹⁶⁴ Section 684.15(2) of the Florida International Arbitration Act provides in pertinent part that the arbitral tribunal "may order depositions to be taken or other discovery obtained, without regard to the place where the witness or other evidence is located."¹⁶⁵ The Georgia Code provision applicable to international arbitrations conducted within the state allows the arbitrators to establish procedures for the use of depositions and "other discovery" during an arbitration.¹⁶⁶ The California international arbitration statute, citing sections applicable generally to arbitrations conducted within the state, provides that the arbitrators may issue a subpoena requiring the attendance of witnesses or a subpoena duces tecum requiring the production of documents at a "deposition for discovery."¹⁶⁷

arbitrators revealing the reluctance of these courts to question the determination regarding the materiality of the evidence made by the arbitrators. "Under the [Federal] Arbitration Act, the arbitrators may order and conduct such discovery as they find necessary." *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242 (S.D. Fla. 1988); *see also Corcoran v. Shearson/Am. Express, Inc.*, 596 F. Supp. 1113 (N.D. Ga. 1984); *Mississippi Power Co. v. Peabody Coal Co.*, 69 F.R.D. 558 (S.D. Miss. 1976).

¹⁶⁴In accordance with section 7 of the FAA, state statutory provisions applicable to international arbitrations conducted within the respective state also authorize the arbitral tribunal to issue subpoenas for the attendance of witnesses or the production of documents at the arbitral proceeding. *See, e.g., CAL. CIV. PROC. CODE* §§ 1282.6(a), 1297.271 (West 1996); *FLA. STAT. ANN.* § 684.15(2) (West, WESTLAW through 1996 2nd Reg. Sess.); *GA. CODE ANN.* §§ 9-9-9(a), 9-9-30 (LEXIS through 1996 Supp.). However, section 684.15(2) of the Florida International Arbitration Act provides that the arbitral tribunal may issue subpoenas for the attendance of witnesses or the production of evidence at the arbitral hearing "without regard to the place where the witness or other evidence is located." *FLA. STAT. ANN.* § 684.15(2). The absence of territorial limitations on the service of such subpoenas differs from section 7 of the FAA, which states that the arbitrators shall issue a summons that "shall be served in the same manner as subpoenas to appear and testify before the [United States district] court." 9 U.S.C. § 7. Rule 45 of the Federal Rules of Civil Procedure allows service of subpoenas only within the judicial district in which the United States district court is located. *See BORN, supra* note 6, at 846-47.

¹⁶⁵*FLA. STAT. ANN.* § 684.15(2).

¹⁶⁶*GA. CODE ANN.* §§ 9-9-9(b), 9-9-30.

¹⁶⁷*CAL. CIV. PROC. CODE* §§ 1282.6(a), 1283.05(a)(e), 1297.271. It would appear that arbitrators presiding over an international arbitration subject to the California international arbitration statute could issue subpoenas requiring the attendance of

If an arbitration agreement is subject to chapter 1 or 2 of the FAA, then state law provisions authorizing the arbitrator to order pre-hearing discovery would appear applicable unless a court deemed such provisions contrary to a policy underlying the FAA.¹⁶⁸ While not addressing whether section 7 of the FAA may preempt state law provisions authorizing arbitrators to order pre-hearing discovery, federal courts have suggested that parties to an arbitration should not have access to pre-hearing discovery, for by agreeing to arbitrate their dispute, parties agreed impliedly to forego the benefits and costs of judicial discovery.¹⁶⁹ It is conceivable that a court could articulate the FAA's purpose of providing disputants with a less costly and time consuming alternative to litigation to justify preemption of state law provisions authorizing pre-hearing discovery ordered by the arbitrators.¹⁷⁰

However, the Uniform Arbitration Act appears to allow the arbitrators to sanction pre-hearing depositions.¹⁷¹ Thus, since the

witnesses or the production of documents at "deposition for discovery" or a deposition "taken for use as evidence and not for discovery." CAL. CIV. PROC. CODE §§ 1282.6(a), 1283, 1283.05(a)(e), 1297.271.

¹⁶⁸Born comments that there is no lower court precedent addressing whether state law can validly authorize an arbitrator to order discovery if the arbitration agreement is subject to the FAA or the New York Convention. *See BORN, supra* note 6, at 847. During the arbitration, questions concerning the scope of the arbitrators' authority to order discovery can arise in the following circumstances: (1) the party to the arbitration resists the discovery orders issued by the arbitral tribunal; or (2) the party opposing a judicial action to enforce a discovery order issued by the arbitral tribunal questions the tribunal's authority to order such discovery. *See id.* at 833.

¹⁶⁹"By voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations." *In re the Arbitration between Commercial Solvents Corp. and La. Liquid Fertilizer Co.*, 20 F.R.D. 359, 361 (S.D.N.Y. 1957) (denying a party's request to take depositions of the employees of the other party to an arbitration pursuant to the Federal Rules of Civil Procedure); *see also Recognition Equip., Inc. v. NCR Corp.*, 532 F. Supp. 271, 275 (N.D. Tex. 1981).

¹⁷⁰While a court could articulate this position, the primary purpose of Congress in enacting the FAA was to ensure the enforceability of arbitration agreements rather to establish expedited procedures for settling disputes. *See supra* note 18 and accompanying text.

¹⁷¹Section 7(b) of the Uniform Arbitration Act provides that a party may apply to the court to use a deposition as evidence, and the arbitrators "may permit a deposition to be taken, in the manner and upon terms designated by the arbitrators, of a witness

Uniform Arbitration Act, designed to complement the FAA, authorizes arbitrators to order pre-hearing depositions, this suggests that section 7 of the FAA should not preempt similar provisions contained in state international arbitration statutes.¹⁷²

Section 7 of the FAA provides in part that if a party does not comply with a subpoena requiring the attendance of witnesses or the production of documents issued by the arbitrators, then the arbitrators may petition the United States district court in the district where the arbitrators "are sitting" for an order compelling compliance.¹⁷³ On the other hand, the provisions concerning the enforcement of subpoenas and other discovery orders applicable to international arbitrations subject to the Florida, Georgia, and California statutes authorize either the arbitrators or a party to the arbitration to request such judicial enforcement.¹⁷⁴ While one

who cannot be subpoenaed or is unable to attend the hearing." UNIF. ARBITRATION ACT § 7(b), 7 U.L.A. 114 (1985).

¹⁷²Note that section 7 of the Uniform Arbitration Act does not authorize the arbitrators to order types of pre-hearing discovery other than depositions. Section 684.15(2) of the Florida International Arbitration Act and section 9-9-9(b) of the Georgia Code permit the arbitrators to allow other types of pre-hearing discovery. See *supra* notes 165-66 and accompanying text.

¹⁷³9 U.S.C. § 7 (1994). Note that the express language of section 7 does not indicate whether the arbitrators or the parties to the arbitration may petition the United States district court in this circumstance. See *id.* However, Born concludes that only the arbitrators may petition the United States district court to enforce the subpoena issued by the arbitrators, in contrast with section 7 of the Uniform Arbitration Act and most state laws, which allow either the arbitrators or a party to the arbitration to request judicial enforcement of the arbitrators' subpoena. See BORN, *supra* note 6, at 841. See *infra* notes 174 and 176 and accompanying text for discussion of section 7 of the Uniform Arbitration Act and selected state international arbitration act provisions that address who may apply for judicial enforcement of subpoenas issued by the arbitrators. Note that arbitrators do not generally request judicial enforcement of subpoenas or other discovery orders that the arbitrators have issued. Rather, the arbitrators are more likely to draw adverse inferences from a party's refusal to produce requested documents or witnesses. See *id.* at 842-43.

¹⁷⁴Section 684.23(2)(a) of the Florida International Arbitration Act provides that the arbitral tribunal or a party authorized by the tribunal may request that a Florida court enforce subpoenas or orders issued by the arbitral tribunal for the attendance of witnesses, the production of documents, the taking of depositions, or the obtaining of other discovery. See FLA. STAT. ANN. § 684.23(2)(a) (West, WESTLAW through 1996 2nd Reg. Sess.). Georgia law provides that either a party or the arbitrators may apply for court enforcement of subpoenas for the attendance of witnesses or for the production of documents or "other evidence" issued by arbitrators presiding over an international arbitration subject to the Georgia arbitration legislation. GA. CODE ANN. §§ 9-9-9(a), 9-

could question whether such judicial enforcement of subpoenas issued by the arbitrators at the request of a party may constitute undesirable judicial interference in the arbitral process,¹⁷⁵ the provision in section 7 of the Uniform Arbitration Act allowing a party to request court enforcement of subpoenas ordered by the arbitrators argues against preemption of like state law provisions applicable to international arbitrations.¹⁷⁶

Section 7 of the FAA does not expressly permit courts to order discovery in aid of arbitration at the request of a party to the arbitration.¹⁷⁷ Moreover, the majority of lower courts hold that such court-ordered discovery at the request of a party is generally improper as a matter of federal law.¹⁷⁸ Courts denying party requests for court-ordered discovery in aid of arbitration have reasoned that such court involvement conflicts with the FAA's policy of limiting judicial interference in the arbitral process.¹⁷⁹

9-30 (LEXIS through 1996 Supp.). Neither the California statutory provisions that apply to international arbitrations conducted in California or to arbitrations generally address expressly the enforcement of subpoenas issued by arbitrators. The relevant statutory provisions suggest that the enforcement of subpoenas issued by arbitrators presiding over an international arbitration subject to the California international arbitration statute is in accordance with the provisions concerning the enforcement of subpoenas issued by California courts. See CAL. CIV. PROC. CODE §§ 1282.6, 1297.271, 1991-1994 (West 1996). This would appear a drafting oversight by the California legislature.

¹⁷⁵While Born raises this question, he does not address its proper resolution. See BORN, *supra* note 6, at 847.

¹⁷⁶See UNIF. ARBITRATION ACT § 7(a), 7 U.L.A. 114 (1985).

¹⁷⁷See 9 U.S.C. § 7 (1994).

¹⁷⁸See BORN, *supra* note 6, at 856. However, most federal courts have allowed court-ordered discovery in aid of arbitration at the request of a party to the arbitration in limited cases suggesting "exceptional circumstances" in which the arbitral tribunal has not been formed or is not able to safeguard the evidence. *Id.* at 857.

¹⁷⁹One federal district court has explained why it considers court-ordered discovery in aid of arbitration as undesirable judicial interference in the arbitral process.

A further reason for denying discovery pending arbitration lies in the potential for interference with the arbitral function. By retaining jurisdiction over this action and allowing prearbitration discovery the Court would be duty bound to administer the discovery process. In so doing, there is a likelihood that its administration of the discovery issues could preshape the issues before the arbitrator.

Recognition Equip., Inc. v. NCR Corp., 532 F. Supp. 271, 275 n.4 (N.D. Tex. 1981) (denying party's request that federal district court order discovery prior to arbitration)

While these court cases did not involve state laws authorizing court-ordered discovery at the request of a party, one commentator suggests section 7 of the FAA may preempt state law provisions allowing state courts to order discovery at the request of a party to an arbitration to the extent that such state laws result in sufficient judicial interference in the arbitral process.¹⁸⁰ However, the state international arbitration act provisions concerning court-ordered discovery at the request of a party to an arbitration do not appear to raise preemption concerns. Both the California and Florida international arbitration statutes allow only a party authorized by the arbitral tribunal to apply for state court assistance in obtaining discovery.¹⁸¹ Since these state statutory provisions only allow

pursuant to the Federal Rules of Civil Procedure). However, other federal courts have not articulated clearly why court-ordered discovery in aid of arbitration constitutes undesirable judicial interference in the arbitral process. One federal district court declared that court-ordered discovery at the request of a party "would interfere with a matter entrusted by federal law to the arbitrators, without any congressional expression reserving to the courts the power to issue, rather than merely enforce, subpoenas [as provided in section 7 of the FAA]." *Thompson v. Zavin*, 607 F. Supp. 780, 783 (C.D. Cal. 1984) (holding that section 7 and the pro-arbitration policies of the FAA prevent a federal court from ordering discovery at the request of a party to the arbitration). Without explaining its reasoning, another federal district court declared that "in federal courts pre-hearing examinations under court aegis in matters pending before arbitration tribunals are unwarranted." *In re the Arbitration between Commercial Solvents Corp. and La. Liquid Fertilizer Co.*, 20 F.R.D. 359, 363 (S.D.N.Y. 1957) (denying party's request to take depositions of employees of opposing party to an arbitration pursuant to Federal Rules of Civil Procedure).

¹⁸⁰ See BORN, *supra* note 6, at 858.

¹⁸¹ Section 1297.271 of the California international arbitration statute provides in part that "the arbitral tribunal or a party with the approval of the arbitral tribunal, may request from the superior court assistance in taking evidence." CAL. CIV. PROC. CODE § 1297.271 (West 1996). Section 684.23(2)(b) of the Florida International Arbitration Act authorizes a Florida circuit court "to the extent of its powers, [to] render such other assistance" in addition to enforcing subpoenas or discovery issued by the arbitral tribunal "including [the] issuance of letters rogatory or other requests for foreign judicial assistance" as requested by the arbitral tribunal or a party authorized by the arbitral tribunal. FLA. STAT. ANN. § 684.23(2)(b) (West, WESTLAW through 1996 2nd Reg. Sess.). Garvey and Heffelfinger profess that federal law would not likely preempt state law provisions allowing discovery in aid of arbitration unless such state law provisions conflict with what they term a "treaty restricting discovery" such as the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Garvey & Heffelfinger, *supra* note 17, at 212; Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 [hereinafter Hague Evidence Convention]. One could foresee a situation in which section 684.23(2)(b) of the Florida International Arbitration Act, which authorizes Florida

court-ordered discovery at the request of a party authorized by the arbitral tribunal to make such a request, it is difficult to conclude that such state law provisions result in sufficient judicial interference in the arbitral process to justify their preemption by section 7 of the FAA.

E. Court-Ordered Provisional Measures

Delays in the formation of the arbitral tribunal as well as in the commencement and ultimate resolution of an arbitration may prejudice a party to an international arbitration. Such delays enable the opposing party to dissipate or conceal its assets or to destroy evidence pertinent to an international arbitration.¹⁸² Such circumstances suggest the need for provisional measures to preserve the status quo pending the resolution of the international arbitration.¹⁸³

courts to seek foreign judicial assistance to obtain discovery in aid of arbitration, could conflict with the Hague Evidence Convention. Article I of the Hague Evidence Convention provides in pertinent part that a "judicial authority" of a Contracting State may send a "letter of request" to the "competent authority" of another Contracting State seeking assistance in obtaining evidence. *Id.* art. I. However, Article I of the Hague Evidence Convention requires that such a letter of request may seek evidence "intended for use in judicial proceedings, commenced or contemplated." *Id.* Based on a literal reading of this language, it would appear that a Florida court could violate the Hague Evidence Convention if the court utilized the letter of request mechanism provided in Article I of the Convention to obtain foreign judicial assistance desired by the arbitral tribunal or a party authorized by the tribunal pursuant to section 684.23(2)(b) of the Florida International Arbitration Act. *See id.*; FLA. STAT. ANN. § 684.23(2)(b). Note that an official report on the Hague Evidence Convention reveals that the drafters did not intend for Article I to include judicial assistance in obtaining evidence for arbitration. *See Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention*, 28 I.L.M. 1556, 1566-67 (1989). Born comments that "there is little authority" concerning whether an arbitral tribunal may apply to a national court in the arbitral situs and request that the court issue a "letter of request" pursuant to the Convention. BORN, *supra* note 6, at 860.

¹⁸²*See* BORN, *supra* note 6, at 753-54; Charles N. Brower & W. Michael Tupman, *Court-Ordered Provisional Measures Under the New York Convention*, 80 AM. J. INT'L L. 24, 24-25 (1986).

¹⁸³Provisional measures may include attachments, injunctions, orders to post security to satisfy a final judgment, sequestration orders or the appointment of a neutral third party to take designated actions. One can find provisional measures also described as provisional relief, interim relief, conservatory measures, prejudgment relief, or pre-award relief.

Neither chapter 1 nor chapter 2 of the FAA contains express provisions addressing whether the arbitrators or a court may order provisional measures in aid of arbitration.¹⁸⁴ However, most United States courts have recognized the authority of an arbitrator under the FAA to order provisional measures as long as such measures are consistent with the parties' agreement to arbitrate.¹⁸⁵ Thus, state international arbitration act provisions authorizing the arbitral tribunal to order provisional measures do not appear to raise preemption concerns.¹⁸⁶

However, since the need for provisional relief may arise prior

¹⁸⁴While the FAA is silent generally on the granting of provisional measures, section 8 of the FAA provides a specific exception that authorizes the court to order pre-award attachment of a vessel in a maritime dispute. Section 8 of the FAA provides in pertinent part: "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then . . . the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings . . ." 9 U.S.C. § 8 (1994).

¹⁸⁵See BORN, *supra* note 6, at 760. U.S. courts have acknowledged that arbitrators have the authority to order attachment and particular injunctive relief, although it is not clear whether arbitrators may order other types of provisional measures. See Neil E. McDonell, *The Availability of Provisional Relief in International Commercial Arbitration*, 22 COLUM. J. TRANSNAT'L L. 273, 283 (1984). Since the parties' arbitration agreement will not often address expressly the power of an arbitrator to order provisional measures, institutional arbitral rules will establish the arbitrator's authority to grant provisional relief in many cases. See BORN, *supra* note 6, at 761. For discussion concerning how the choice of particular institutional arbitral rules may affect the availability of provisional relief, see McDonell, *supra*, at 290-95. However, while the rules of most international arbitral regimes authorize a tribunal to order provisional measures, such arbitral rules do not endow a tribunal with executory authority to enforce an order for provisional measures against the assets of one of the parties. See Brower & Tupman, *supra* note 182, at 24.

¹⁸⁶Section 684.16(1) of the Florida International Arbitration Act provides in pertinent part that at the request of a party the arbitral tribunal may order such interim relief as it considers appropriate. See FLA. STAT. ANN. § 684.16(1). Section 1297.171 of the California international arbitration statute authorizes the arbitral tribunal, at the request of a party to order any interim measure of protection the tribunal "may consider necessary in respect of the subject matter of the dispute," unless the parties have agreed otherwise. CAL. CIV. PROC. CODE § 1297.171. Section 9-9-35 of the Georgia Code provides that the arbitrators may grant interim relief that they consider appropriate. See GA. CODE ANN. § 9-9-35 (LEXIS through 1996 Supp.). While it does not appear that federal law preempts state law provisions authorizing arbitral awards of provisional relief, arbitral awards of provisional measures are subject to judicial review by U.S. courts. For commentary on the standards of judicial review of arbitral awards ordering provisional measures in U.S. courts, see BORN, *supra* note 6, at 819-23.

to the appointment and constitution of the arbitral tribunal, obtaining provisional measures from the arbitrators is often not feasible. While the FAA does not expressly address the availability of court-ordered provisional measures in aid of arbitration, U.S. courts have derived judicial power to order provisional measures when it was impractical for a party to obtain provisional measures from the arbitral tribunal.¹⁸⁷

Conversely, some U.S. courts have interpreted Article II(3) of the New York Convention as prohibiting courts from ordering pre-award attachments in aid of arbitration.¹⁸⁸ Provisions contained in the state international arbitration statutes examined authorize the respective state courts to order pre-award attachments in aid of an international arbitration subject to the state statute.¹⁸⁹ If the applicable court precedent in a particular case holds that Article

¹⁸⁷For example, federal courts have invoked Federal Rules of Civil Procedure 81(a)(3) and 64 as a basis for ordering attachment in aid of arbitration. See McDonnell, *supra* note 185, at 280-81. Federal courts have applied general standards for obtaining preliminary injunctions when authorizing court-ordered injunctions in aid of international arbitration. See, e.g., Rogers, Burgun, Shahine & Deschler, Inc. v. Dongsan Constr. Co., 598 F. Supp. 754 (S.D.N.Y. 1984) (applying the standard for issuing a preliminary injunction established in the Second Circuit and granting a preliminary injunction in aid of a pending international arbitration).

¹⁸⁸See *infra* notes 196-206 and accompanying text.

¹⁸⁹Section 1297.91 of the California international arbitration statute provides that "it is not incompatible with an arbitration agreement for a party to request from a [California] superior court, before or during the arbitral proceedings, an interim measure of protection, or for the court to grant such a measure." CAL. CIV. PROC. CODE § 1297.91. Section 1297.93 of the California international arbitration statute provides that a California superior court may order attachment in connection with a pending arbitration "to assure that the award . . . is not rendered ineffectual by the dissipation of party assets." CAL. CIV. PROC. CODE § 1297.93(a). Section 684.23(3) of the Florida International Arbitration Act provides in pertinent part that a Florida court, in response to a request by the arbitral tribunal or a party authorized by the arbitral tribunal, may grant any interim relief including attachments that the court "is empowered by law to grant." FLA. STAT. ANN. § 684.23(3). Section 684.23(4) allows a party to an arbitration subject to the Florida International Arbitration Act to request interim relief directly from Florida courts provided that such interim relief will not be granted "unless the moving party shows that an application to the arbitral tribunal for that relief would prejudice the party's rights and that interim relief from the court is necessary to protect those rights." FLA. STAT. ANN. § 684.23(4). Section 9-9-35 of the Georgia Code, which specifically applies to international arbitrations, provides in pertinent part that a party to an arbitration may request interim relief directly from a court, inside or outside of Georgia. See GA. CODE ANN. § 9-9-35.

II(3) of the New York Convention prohibits a court from ordering pre-award attachment prior to a pending arbitration, then one could argue that the New York Convention would preempt a state law provision permitting such court-ordered attachment.¹⁹⁰ However, this article argues that pre-award attachment, as well as other provisional measures ordered by a court in connection with a pending arbitration, will in most instances further the arbitral process.¹⁹¹ This conclusion suggests that in most cases the New York Convention should not preempt state international arbitration act provisions authorizing courts to order pre-award attachments.

Moreover, provisions contained in state international arbitration statutes also authorize their respective state courts to order preliminary injunctions in aid of an arbitration subject to the state international arbitration statute.¹⁹² U.S. courts have reached different conclusions concerning whether they have authority under chapter 1 of the FAA to order injunctive relief in aid of arbitration, and if so, the particular circumstances when a court

¹⁹⁰See BORN, *supra* note 6, at 798. As discussed previously, state international arbitration statutes may apply to an arbitration agreement resulting in a "nondomestic" award under the New York Convention. See *supra* note 68. However, since state international arbitration statutes do not contain provisions that enforce agreements to arbitrate abroad, state international arbitration statutes do not apply to agreements to arbitrate covered by the New York Convention resulting in a foreign award rendered in the territory of another signatory to the Convention. See *id.* Thus, the author concludes that the New York Convention may only preempt state international arbitration act provisions that concern provisional measures when the arbitration agreement could result in a nondomestic award under the Convention.

¹⁹¹This position follows the view of the majority of U.S. courts as well as the prevailing view among commentators that pre-award attachment ordered by courts is consistent with the text and purposes of the New York Convention. See *infra* notes 207-13 and accompanying text.

¹⁹²Section 684.23(3) of the Florida International Arbitration Act authorizes a Florida court to grant preliminary injunctions in aid of an international arbitration subject to the Florida statute to the extent the court "is empowered by law" and "subject to such procedural requirements and other conditions as would apply in a comparable action not pertaining to an arbitration." FLA. STAT. ANN. § 684.23(3). Section 1297.93(b) of the California international arbitration statute provides that a California court may grant a preliminary injunction "to protect trade secrets or to conserve goods which are the subject matter of the arbitral dispute" in aid of a pending arbitration. CAL. CIV. PROC. CODE § 1297.93(b). While section 9-9-35 of the Georgia Code authorizes a party to request interim relief directly from a court, inside or outside of Georgia, the provision does not specify the forms that court-ordered provisional measures may assume. See GA. CODE ANN. § 9-9-35.

may grant such an injunction.¹⁹³ One commentator suggests that if the applicable court precedent establishes that chapter 1 of the FAA prohibits a court from ordering a preliminary injunction in aid of an arbitration, then chapter 1 of the FAA would preempt a state international arbitration act provision authorizing the respective state court to issue such a preliminary injunction.¹⁹⁴ This article contends that court decisions holding that chapter 1 of the FAA precludes a court from ordering a preliminary injunction in aid of arbitration or places significant restrictions on the issuance of such injunctions conflict with the FAA's pro-arbitration policies. Accordingly, if such case law were applicable, then preemption of state statutory provisions authorizing a court to order a preliminary injunction in aid of arbitration would not be justified.¹⁹⁵

¹⁹³See BORN, *supra* note 6, at 794-95. Describing some of the different holdings of U.S. courts concerning whether a court has the power to grant injunctive relief to maintain the status quo prior to an arbitration, one commentator states that

some courts have held that courts have no power under the Federal Arbitration Act to issue an injunction. Others have concluded that courts have the power, but that an injunction would be appropriate only if the contract contained a provision for injunctive relief pending arbitration. Others would grant injunctive relief only if the plaintiff had a substantial likelihood of winning its dispute before the arbitrators.

Philip E. Karmel, *Injunctions Pending Arbitration and the Federal Arbitration Act: A Perspective from Contract Law*, 54 U. CHI. L. REV. 1373, 1374 (1987). For discussion of the disparate case law addressing the authority of courts under chapter 1 of the FAA to order preliminary injunction in aid of arbitration, see *id.* at 1374-86.

¹⁹⁴See BORN, *supra* note 6, at 798.

¹⁹⁵Born also suggests if the applicable court precedent in a particular case establishes that a court has the authority under chapter 1 of the FAA to order a preliminary injunction only in certain circumstances, then such a restrictive legal standard would suggest preemption of state law provisions granting their respective state courts wider latitude to order a preliminary injunction in aid of an arbitration subject to the state international arbitration statute. See *id.* It is beyond the scope of this study to discuss the varying standards concerning the availability of court-ordered injunctive relief in aid of arbitration under chapter 1 of the FAA, and the possible preemption questions that could arise when provisions contained in state international arbitration statutes allow state courts to order preliminary injunctions without the restrictions established under case law.

This part discusses the general body of case law addressing the authority of courts to order pre-award attachments under Article II(3) of the New York Convention and to order preliminary injunctions under chapter 1 of the FAA. This study does not attempt to discuss the binding case law that would apply if a court were to address

The New York Convention does not provide expressly for court-ordered provisional measures. However, some U.S. courts have held that Article II(3) of the Convention prohibits courts from ordering pre-award attachments in aid of arbitration.¹⁹⁶ In *McCreary Tire & Rubber Co. v. CEAT S.P.A.*,¹⁹⁷ the Third Circuit held that Article II(3) of the Convention deprives a U.S. court of jurisdiction to order pre-award attachment in aid of arbitration.¹⁹⁸ The Third Circuit reasoned that a judicial action of attachment prior to the issuance of an arbitral award would violate the parties' agreement to arbitrate.¹⁹⁹ The *McCreary* court declared that the complaint requesting the lower court to order pre-award attachment "seeks to bypass the agreed upon method of settling disputes," and thus the party requesting attachment had attempted to circumvent the arbitral process.²⁰⁰ The Third Circuit concluded that "[t]he Convention forbids the courts of a contracting state

whether the New York Convention or chapter 1 of the FAA may preempt the California, Florida, and Georgia state statutory provisions at issue.

This part addresses the possible preemption of state international arbitration act provisions authorizing state courts to order pre-award attachments or preliminary injunctions. Some state international arbitration statutes also authorize their respective state courts to order other types of provisional measures in aid of arbitration. For example, section 684.23(3) of the Florida International Arbitration Act expressly authorizes Florida courts to grant temporary restraining orders, garnishments, or writs of replevin which the Florida court "is empowered by law to grant." FLA. STAT. ANN. § 684.23(3). Section 1567.39(c) of the North Carolina international arbitration statute authorizes the respective state court to grant an order for claim or delivery, the appointment of a receiver, and the delivery of money or other property into court as well as authorizes the respective state court to order attachments and preliminary injunctions. N.C. GEN. STAT. § 1-567.39(c) (1996). However, the author chooses not to address whether provisional measures other than pre-award attachments and preliminary injunctions may be preempted since it does not appear that existing case law raises preemption questions in these areas.

¹⁹⁶Article II(3) of the New York Convention provides that "the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." New York Convention, *supra* note 5, art. II(3).

¹⁹⁷501 F.2d 1032 (3d Cir. 1974).

¹⁹⁸*See id.* at 1038.

¹⁹⁹*See id.*

²⁰⁰*Id.*

from entertaining a suit that violates an agreement to arbitrate.”²⁰¹

In *Cooper v. Ateliers de la Motobecane, S.A.*,²⁰² the New York Court of Appeals, the state’s highest appellate court, also held that Article II(3) of the New York Convention deprives a U.S. court of jurisdiction to order pre-award attachment in aid of arbitration.²⁰³ The court viewed the complaint requesting the lower court to order pre-award attachment as an attempt to circumvent the arbitral process.²⁰⁴ In *dicta*, the *Cooper* court implied that Article II(3) of the New York Convention prohibited courts from ordering pre-award attachments intended to further as well as frustrate the arbitral process. The New York Court of Appeals declared that “[t]he purpose and policy of the UN Convention [on the Recognition and Enforcement of Foreign Arbitral Awards] will be best carried out by restricting prearbitration judicial action to determining whether arbitration should be compelled.”²⁰⁵ Several New York cases subsequent to *Cooper* have followed *Cooper*’s reasoning and have held that Article II(3) of the New York Convention prohibits a court from ordering pre-award attachments not intended to frustrate the arbitral process.²⁰⁶

²⁰¹*Id.*; *Accord I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981) (attachment action not in aid of arbitration contrary to the parties’ agreement to arbitrate and the New York Convention).

²⁰²57 N.Y.2d 408, 456 N.Y.S.2d 728 (1982).

²⁰³57 N.Y.2d at 414, 456 N.Y.S. 2d at 731.

²⁰⁴“[T]he instant case, is nothing more than plaintiff’s attempt to circumvent Special Term’s ruling . . . denying the stay of arbitration.” 57 N.Y.2d at 415, 456 N.Y.S.2d at 732.

²⁰⁵57 N.Y.2d at 416, 456 N.Y.S. at 732.

²⁰⁶*See* *Drexel Burnham Lambert, Inc. v. Ruebsamen*, 531 N.Y.S.2d 547 (App. Div. 1988); *Shah v. Eastern Silk Indus., Ltd.*, 493 N.Y.S.2d 150 (App. Div. 1985); *Faberge Int’l, Inc. v. DiPino*, 491 N.Y.S.2d 345 (App. Div. 1985). In 1985, the New York Legislature amended its state arbitration statute by enacting a provision authorizing court-ordered provisional measures. Section 7502(c) of the New York Civil Practice Law and Rules authorizes a New York supreme court (trial court) to order an attachment or a preliminary injunction “in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.” N.Y. CIV. PRAC. L. & R. § 7502(c). While the legislative history of the amendment does not clearly reveal the drafters’ intentions, some commentators have suggested that section 7502(c) may overturn *Cooper*. *See* Curtis E. Pew & Robert M. Jarvis, *Pre-Award Attachment in International Arbitration: The Law in New York*, 7:3 J. INT’L ARB. 31, 35 (1990).

However, most U.S. courts have held that Article II(3) of the New York Convention does not preclude a court from ordering pre-award attachment in aid of arbitration. The seminal case professing the majority view is *Carolina Power & Light Co. v. Uranex*²⁰⁷ in which the District Court of the Northern District of California declared that "this court will not follow the reasoning of *McCreary Tire & Rubber Co. v. CEAT S.P.A.* There is no indication in either the text or the apparent policies of the Convention that resort to prejudgment attachment was to be precluded."²⁰⁸ The *Uranex* court also emphasized that chapter 1 of the FAA does not prohibit pre-award attachment ordered by a court, and thus the similar operation of provisions contained in chapter 1 of the FAA and the New York Convention supports a conclusion that the New York Convention does not prohibit a court from ordering pre-award attachment.²⁰⁹ Most lower courts have followed the rationale of *Uranex*.²¹⁰

The *McCreary* and *Cooper* decisions are in most respects based on misinterpretations of the New York Convention. The *McCreary* and *Cooper* decisions prohibit court-ordered attachment in part based on both courts' opposition to judicial action ordering pre-award attachment that frustrates the arbitral process. This position would appear consistent with the New York

However, a New York intermediate appellate court has ruled that section 7502(c) does not extend to cases falling under the New York Convention, thus recognizing the continued applicability of *Cooper* after enactment of section 7502(c). See *Drexel Burnham Lambert, Inc. v. Ruebsamen*, 531 N.Y.S.2d at 550-51.

²⁰⁷451 F. Supp. 1044 (N.D.Cal. 1977).

²⁰⁸*Id.* at 1052.

²⁰⁹See *id.* at 1051. Commentators profess that it is clear that pre-award attachment ordered by a court is available under chapter 1 of the FAA. See *Brower & Tupman*, *supra* note 182, at 27. In *Murray Oil Products Co. v. Mitsui & Co., Ltd.*, Judge Learned Hand writing for the Second Circuit recognized that pre-award attachment ordered by a court promotes the strong federal policy in favor of arbitration and enforcement of arbitral awards. Hand acknowledged that pre-award attachment "is entirely consistent with a desire to make as effective as possible recovery upon awards, after they have been made, which is what provisional remedies do." *Murray Oil Prods. Co. v. Mitsui & Co.*, 146 F.2d 381, 384 (2d Cir. 1944).

²¹⁰"The weight of lower US court authority" follows the result in *Uranex*. *BORN*, *supra* note 6, at 782. See, e.g., *Filanto S.P.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992).

Convention.²¹¹ However, dictum in *Cooper* professes that Article II(3) of the New York Convention prohibits court-ordered attachment at the pre-award stage intended by the party requesting the attachment to support the international arbitration.²¹² Commentators view this position of the *Cooper* court as a misinterpretation of Article II(3) of the New York Convention and as threatening to the arbitral process.²¹³

The position expressed by the majority of U.S. courts and commentators suggests a possible standard concerning the circumstances in which Article II(3) of the New York Convention may preempt state international arbitration act provisions authorizing a court to order pre-award attachment. Article II(3) should preempt such state law provisions when the party requesting the court to order pre-award attachment intended the judicial action of attachment to frustrate or circumvent the arbitral process. On the other hand, Article II(3) should not preempt state law provisions authorizing pre-award attachments intended to aid an international arbitration. Whether a party requesting a pre-award attachment intended such provisional relief to aid or to frustrate the arbitration depends on the specific facts in the particular case.²¹⁴ Other commentators suggest a similar

²¹¹ See Lawrence F. Ebb, *Flight of Assets from the Jurisdiction "In the Twinkling of a Telex": Pre- and Post-Award Conservatory Relief in International Commercial Arbitrations*, 7:1 J. INT'L ARB. 9, 12 (1990); BORN, *supra* note 6, at 783.

²¹² See *supra* note 205 and accompanying text.

²¹³ "As a general proposition, it is almost certainly based on a misinterpretation of Article II, paragraph 3 of the New York Convention." Ebb, *supra* note 211, at 13. "The *Cooper* rationale threatens, rather than furthers, the arbitral process, by denying what is often the only realistic means of preserving the status quo." BORN, *supra* note 6, at 782. Other commentators profess that the notion expressed in *McCreary* and *Cooper* of the undesirability of any judicial involvement in the arbitral process is contrary to the intent of the New York Convention. See Brower & Tupman, *supra* note 182, at 33. Brower & Tupman declare that "the underlying rationale of both *McCreary* and *Cooper* rests upon misapprehension of the principle that the 'essence of arbitration is resolving disputes without the interference of the judicial process and its strictures.'" *Id.* (quoting *Cooper*, 57 N.Y.2d at 416, 456 N.Y.S.2d at 729).

²¹⁴ Born comments that whether a request for pre-award attachment is "in aid" of arbitration rather than an attempt to circumvent the arbitration depends on "the timing of the request, the availability of provisional relief from the arbitrators, the extent to which provisional measures will effectively resolve the underlying dispute, and the hardship suffered by the parties." BORN, *supra* note 6, at 785.

preemption standard.²¹⁵

While federal courts have assumed widely divergent positions concerning when a United States district court has the authority under chapter 1 of the FAA to issue a preliminary injunction maintaining the status quo in aid of an arbitration, some federal courts have forbidden the issuance of such injunctions or have formulated restrictive standards for their issuance.²¹⁶ If the applicable court precedent in a particular case establishes that chapter 1 of the FAA prohibits a court from ordering a preliminary injunction in aid of arbitration or places significant restrictions on the issuance of such injunctions, then chapter 1 of the FAA would appear to preempt state international arbitration act provisions authorizing the issuance of such preliminary injunctions not subject to the restrictions imposed by case law.²¹⁷

However, case law holding that chapter 1 of the FAA prohibits or places significant restrictions on the issuance of preliminary injunctions in aid of arbitration would appear at odds with the pro-arbitration policies of the FAA. In *Blumenthal v. Merrill Lynch*,

²¹⁵While not addressing whether the New York Convention may preempt state law provisions, the Washington Foreign Law Society Report suggests that chapter 1 of the FAA will not preempt state law provisions authorizing prejudgment attachment and interim relief which promote arbitration. The Washington Foreign Law Society Report states that

in other areas of potential court oversight and intervention [other than sections 3 and 4 of the FAA], such as prejudgment attachment and interim relief, states should be permitted to enforce such provisions so long as they promote arbitration which would normally be the case. If, however, any such provision undermines the ability of a party to seek arbitration in a contract involving a maritime transaction or a transaction in interstate commerce that provision would be preempted by federal law.

Washington Foreign Law Society Report, *supra* note 27, at 325 n.94. While not expressly articulating a preemption standard, Born makes conclusions concerning the proper application of Article II(3) of the New York Convention to the question of pre-award attachments ordered by a court which are similar to the preemption standard formulated by the author. See BORN, *supra* note 6, at 785.

²¹⁶For example, the Eighth Circuit overturned the district court's grant of a preliminary injunction, because the parties did not provide specifically for such relief in their contract. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1291-92 (8th Cir. 1984).

²¹⁷See *supra* note 194.

Pierce, Fenner & Smith, Inc.,²¹⁸ the Second Circuit declared that the FAA's pro-arbitration policies "are furthered, not weakened, by a rule permitting a district court to preserve the meaningfulness of the arbitration through a preliminary injunction. Arbitration can become a 'hollow formality' if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute."²¹⁹ The Second Circuit also professed that "[t]he issuance of an injunction to preserve the status quo pending arbitration fulfills the court's obligation under the FAA to enforce a valid agreement to arbitrate."²²⁰ Thus, if such case law, in conflict with the FAA's pro-arbitration policies, were applicable, then preemption of state international arbitration act provisions authorizing the issuance of preliminary injunctions, not subject to the restrictions required by case law, would not appear justified.

F. Authority of Arbitral Tribunal to Decide Questions of Scope and Validity of Arbitration Agreement

The power or competence of an arbitral tribunal depends on (1) the validity of the arbitration clause and (2) the scope of the arbitration clause that establishes the disputed issues subject to arbitration.²²¹ While the FAA does not address expressly whether the arbitral tribunal or the courts may resolve these questions, Supreme Court precedent establishes that with regard to cases subject to the FAA, the arbitrators do not have the authority in most instances to resolve disputes concerning the validity or scope of an arbitration agreement, but rather such questions require judicial resolution in most cases.²²² However, provisions contained in the state international arbitration statutes examined authorize the arbitral tribunal to rule on questions of the validity and scope

²¹⁸910 F.2d 1049 (2d Cir. 1990).

²¹⁹*Id.* at 1053.

²²⁰*Id.* at 1054.

²²¹See Hans Smit, *Elements of International Arbitration in the United States*, 1 AM. REV. INT'L ARB. 64, 67 (1990).

²²²See *infra* note 243 for discussion of Supreme Court precedent holding that courts must resolve disputes concerning the existence or validity of an arbitration agreement. For discussion of the Supreme Court's decision in *First Options of Chicago v. Kaplan* revealing the specific circumstances when arbitrators may decide questions of the scope of an arbitration clause, see *infra* notes 230-36 and accompanying text.

of an arbitration clause.²²³

As discussed below, the FAA's purpose of enforcing arbitration agreements in accordance with their terms and the parties' intentions, which underlies the Supreme Court's holding in *First Options of Chicago, Inc. v. Kaplan*,²²⁴ suggests that the FAA should preempt state law provisions authorizing the arbitral tribunal to rule on questions of the scope of an arbitration clause, when such state law provisions are mandatory provisions from which the parties cannot derogate or default provisions that the arbitrators may apply in the absence of contractual agreement by the parties on the matter.²²⁵ However, the *Kaplan* decision does not suggest that the FAA should preempt state law provisions authorizing the arbitrators to decide questions of the scope of an arbitration clause, when the parties agree expressly to confer such power on the arbitral tribunal pursuant to a discretionary state law provision.

In addition, Supreme Court precedent holding that a court must resolve questions of the validity of an arbitration agreement²²⁶ suggests that the FAA may preempt state law provisions authorizing the arbitral tribunal to rule on the validity of an arbitration agreement, when such state law provisions establish mandatory or default rules. However, this article contends that the Supreme Court's support for enforcing arbitration agreements according to their terms in *Kaplan* and other recent cases suggests that the FAA may not preempt state law provisions allowing the parties to agree expressly that the arbitral tribunal has the authority to rule on questions of the validity of the arbitration agreement.

The California and Florida international arbitration statutes

²²³See *infra* notes 227 and 242 and accompanying text.

²²⁴115 S. Ct. 1920 (1995). For discussion of the Supreme Court's decision in *Kaplan*, see *infra* notes 230-36 and accompanying text.

²²⁵"Default rules fill the gaps in incomplete contracts; they govern unless the parties contract around them." Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989). Mandatory or "[i]mmutable rules cannot be contracted around; they govern even if the parties attempt to contract around them." *Id.*

²²⁶See *infra* note 243 for discussion of Supreme Court precedent holding that courts must resolve disputes concerning the existence or validity of an arbitration agreement.

contain provisions that authorize the arbitral tribunal to rule on questions of arbitrability.²²⁷ As discussed below, the California statute appears to create a mandatory rule from which the parties cannot derogate.²²⁸ On the other hand, the Florida statute seems to create a default rule that the arbitrators may apply as well as a discretionary rule that allows the parties to confer on the arbitral tribunal the authority to decide questions of arbitrability.²²⁹

The California and Florida statutory provisions authorizing the arbitral tribunal to rule on questions of arbitrability appear to conflict in most respects with the Supreme Court's recent unanimous decision in *First Options of Chicago, Inc. v. Kaplan*.²³⁰ In a domestic arbitration subject to chapter 1 of the FAA, the Supreme Court held in *Kaplan* that the agreement of the parties determines whether the arbitral tribunal or a court has the primary authority to decide questions of arbitrability.²³¹ If the parties

²²⁷Section 684.06(2) of the Florida International Arbitration Act provides in pertinent part that the arbitral tribunal "shall have the power to rule on all challenges to its jurisdiction" including "challenges asserting that the dispute is not within the scope of the questions referable to arbitration." FLA. STAT. ANN. § 684.06(2) (West, WESTLAW through 1996 2nd Reg. Sess.). Provisions in the California state international arbitration statute provide that the arbitral tribunal "may" rule on a plea that the tribunal "is exceeding the scope of its authority." CAL. CIV. PROC. CODE §§ 1297.163, 1297.165 (West 1996). Note that the Georgia statutory provision that concerns the power of arbitrators to rule on their own jurisdiction in international arbitrations subject to the Georgia statute does not expressly authorize the arbitrators to decide questions of arbitrability. See GA. CODE ANN. § 9-9-34 (LEXIS through 1995 Supp.). The author uses the term "questions of arbitrability" to refer to questions concerning the scope of an arbitration clause since the Supreme Court in *Kaplan* utilizes this term in its opinion.

²²⁸See *infra* notes 238-39 and accompanying text for discussion of the mandatory rule authorizing the arbitral tribunal to decide questions of arbitrability created by the California statute and the possible preemption of this mandatory rule by the FAA.

²²⁹See *infra* note 240 and accompanying text for discussion of the Florida statute's default rule that allows the arbitrators to determine that they have the authority to decide questions of arbitrability in certain cases when the parties have not provided expressly for this result. The author contends that the FAA may preempt this default rule. See text *infra*. See *infra* note 241 and accompanying text for comment on the Florida statute which may authorize the parties to agree expressly that the arbitrators have the power to decide questions of arbitrability.

²³⁰115 S. Ct. 1920 (1995).

²³¹See *id.* at 1923. The Court stated that "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate the dispute . . . so the

agreed to submit questions of arbitrability to the arbitrators, then a court reviewing the arbitrators' decision will apply a deferential standard of review, which gives "considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances."²³² However, the Supreme Court emphasized that courts should not find the parties to have agreed to submit questions of arbitrability to the arbitrators unless there is "clear and unmistakable" evidence that they did so."²³³ If clear and unmistakable evidence of the parties' agreement to submit arbitrability questions to the arbitrators does not exist, then a court must decide arbitrability questions independently without special deference to a ruling by the arbitrators on the matter.²³⁴

While ruling that the arbitrators do not have the authority to decide arbitrability questions absent "clear and unmistakable" evidence that the parties agreed to confer such power on the arbitrators, the *Kaplan* court emphasized that its holding was consistent with the purposes of the FAA articulated by the Court in prior cases. The Court professed that its holding in *Kaplan* stems from the fact that under the FAA, "arbitration is simply a matter of contract between the parties; it is a way to resolve those

question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about the matter." *Id.*

²³²*Id.*

²³³*Id.* at 1924 (quoting *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S. Ct. 1415, 1418-1419 (1986)). The *Kaplan* Court found that "clear and unmistakable" evidence of the parties agreement to submit arbitrability questions to the arbitrators must exist in order for the arbitrators to decide arbitrability questions. The Court reasoned that

[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers . . . [G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 1925.

²³⁴*See id.* at 1924. If "the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely independently." *Id.*

disputes—but only those disputes—that the parties have agreed to submit to arbitration.”²³⁵ In *Kaplan*, the court also suggested that its holding furthered the FAA’s purpose of “ensur[ing] that commercial arbitration agreements, like other contracts ‘are enforced according to their terms’. . . and according to the intentions of the parties.”²³⁶

In cases in which a federal statute is silent on a particular matter, the federal statute may nevertheless preempt state law provisions that frustrate the objectives of the federal law.²³⁷ The FAA does not contain a provision addressing whether the arbitrators or the courts may rule on arbitrability questions. However, this article contends that the *Kaplan* Court’s support, in the context of the arbitrators’ authority to decide questions of arbitrability, for the FAA’s purpose of ensuring that arbitrations proceed in accordance with the agreement of the parties, suggests that the FAA may preempt state law provisions authorizing arbitrators to rule on questions of arbitrability where it is not clear that the parties intended such a result.

The California statutory provisions that authorize an arbitral tribunal to decide questions of arbitrability appear to create a mandatory rule from which the parties cannot derogate.²³⁸ The mandatory rule created by the California international arbitration statute, which conflicts with the Supreme Court’s holding in *Kaplan*, authorizes an arbitral tribunal to decide questions of arbitrability in the absence of “clear and unmistakable evidence” that the parties have agreed to submit such questions to the arbitrators. The FAA’s purpose of ensuring that arbitrations

²³⁵*Id.* at 1924 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216-1217 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 837-838 (1995)).

²³⁶*Id.* at 1925 (citing *Mastrobuono*, 115 S. Ct. at 1214 (quoting *Volt*, 489 U.S. at 479, 109 S. Ct. at 1256)); *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 3353 (1985).

²³⁷See *supra* notes 81-83 and accompanying text.

²³⁸As stated earlier, sections 1297.163 and 1297.165 when read together provide that an arbitral tribunal “may” rule on a plea that the tribunal “is exceeding the scope of its authority.” CAL. CIV. PROC. CODE §§ 1297.163, 1297.165 (West 1996). No provision in the California international arbitration statute indicates that the parties may derogate from the rule created by sections 1297.163 and 1297.165.

proceed in accordance with the agreement of the parties, which the Court invokes as a basis for its decision in *Kaplan*, would appear to support preemption of such a mandatory state law provision authorizing the arbitral tribunal to rule on arbitrability questions in a case where it is not clear that the parties intended to confer such power on the arbitrators.²³⁹

The Florida International Arbitration Act provision authorizing the arbitral tribunal to rule on questions of arbitrability may operate as a default rule that grants the arbitral tribunal the power to decide arbitrability questions without the parties' intending this result.²⁴⁰ Since these default rules authorize the arbitral tribunal to rule on arbitrability questions when the parties have not agreed to confer such power on the arbitrators, the FAA's purpose of ensuring that arbitrations proceed pursuant to the clearly expressed agreement of the parties, articulated by the Court in *Kaplan*, would support preemption of these default rules created by the Florida International Arbitration Act.

However, based on *Kaplan*, it would appear that the FAA should not preempt state law provisions allowing the parties to agree that the arbitral tribunal has the authority to rule on questions of arbitrability, when circumstances indicate that this

²³⁹As discussed throughout this study, chapter 1 of the FAA may preempt a provision contained in state international arbitration statute only if the arbitration agreement falls within the scope of both the pertinent state international arbitration statute and chapter 1 of the FAA.

²⁴⁰Section 684.06(2) of the Florida statute, which authorizes an arbitral tribunal to rule on questions of arbitrability, is contained in part II of the Florida International Arbitration Act. Sections 684.05(2) and 684.05(3) provide two situations when part II may apply to an arbitration within the scope of the Florida International Arbitration Act when the parties have not agreed expressly or impliedly that part II shall apply. Section 684.05(2) provides that part II shall apply if "[i]n the absence of a choice of law provision applicable to the written undertaking to arbitrate, that undertaking forms part of a contract the interpretation of which is to be governed by the law of this state [Florida]." FLA. STAT. ANN. § 684.05(2) (West, WESTLAW through 1996 2nd Reg. Sess.). Section 684.05(3) provides that in any case not covered by section 684.05(1) [which requires that the arbitration agreement contain an express provision that part II apply or that "the parties otherwise agree" that Florida law shall apply] or section 684.05(2), then the arbitral tribunal, applying conflict of law principles, may determine that Florida law shall govern the conduct of the arbitration. See FLA. STAT. ANN. § 684.05(3). Sections 684.05(2) and 684.05(3) are default rules, for they authorize the arbitrators to rule on questions of arbitrability when the parties did not agree to confer such power upon the arbitrators.

was the clear intent of the parties. While it is not entirely clear, the Florida International Arbitration Act provision may apply in this manner.²⁴¹

Provisions contained in the state international arbitration statutes examined also authorize the arbitral tribunal to rule on questions of the validity of the arbitration agreement.²⁴² However, Supreme Court precedent professes that the courts must resolve disputes concerning the existence or validity of an arbitration agreement and that an arbitral tribunal may not decide such matters.²⁴³ This apparent conflict between these state law

²⁴¹Section 684.06(2) of the Florida statute, which authorizes an arbitral tribunal to decide arbitrability questions, is included in part II of the Florida International Arbitration Act. See FLA. STAT. ANN. § 684.06(2). Section 684.05(1) provides that part II shall apply to an arbitration within the scope of the Florida International Arbitration Act if “the written undertaking to arbitrate expressly provides, or the parties otherwise agree” that Florida law shall apply. FLA. STAT. ANN. § 684.06(1). If the parties have agreed expressly or impliedly that Florida law should apply to their arbitration, then the application of section 684.05(1) could authorize the arbitral tribunal to rule on arbitrability questions pursuant to section 684.06(2) in accordance with the parties’ intentions, if by agreeing to apply Florida law the parties intended that section 684.06(2) would apply. However, to satisfy the “clear and unmistakable” evidence standard required by the *Kaplan* Court, it would appear that the parties’ arbitration agreement would need to expressly state that the parties intend for the arbitrators to decide arbitrability questions. Note that section 684.07(1) of the Florida statute provides that the parties may agree in writing to conduct the arbitration in accordance with such rules as they may select. See FLA. STAT. ANN. § 684.07(1). However, based on these provisions, the express or implied agreement of the parties that Florida law shall apply to the arbitration could also authorize the arbitrators to rule on arbitrability questions when this was not the intent of the parties. In this circumstance, it would appear that the FAA would preempt section 684.06(2) which authorizes an arbitral tribunal to rule on questions of arbitrability.

²⁴²Provisions in the California, Georgia, and Florida statutes authorize the arbitrators to rule on their own jurisdiction, including objections concerning the existence or validity of the arbitration agreement. See CAL. CIV. PROC. CODE § 1297.161; FLA. STAT. ANN. § 684.06(2); GA. CODE ANN. § 9-9-34 (LEXIS 1996 Supp.):

²⁴³In *Moseley v. Electronic & Missile Facilities, Inc.*, the Supreme Court held that a claim alleging fraud in the procurement of the arbitration agreement was for judicial resolution and was not arbitrable. 374 U.S. 167, 171 (1963). In his concurring opinion, Justice Black declared that “fraud in the procurement of an arbitration contract . . . makes it void and unenforceable and that this question of fraud is a judicial one, which must be determined by a court.” *Id.* at 172 (Black, J., concurring). In *dicta*, the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* reaffirmed its holding in *Moseley* by declaring that “if the claim is fraud in the inducement of the arbitration clause itself . . . the federal court may proceed to adjudicate it.” *Prima Paint*

provisions and Supreme Court precedent questions whether the FAA may preempt state law provisions authorizing an arbitral tribunal to rule on questions of the existence or validity of an arbitration agreement.

While the Supreme Court's recent decision in *Kaplan* does not directly address whether arbitrators may decide questions of the existence or validity of an arbitration agreement, this article contends that *Kaplan* may suggest a possible preemption analysis similar to the approach discussed above applied to state law provisions that authorize an arbitral tribunal to rule on arbitrability questions. The California and Georgia statutory provisions authorizing an arbitral tribunal to rule on questions of the existence or validity of an arbitration agreement appear to create mandatory rules from which the parties cannot derogate.²⁴⁴ Based on the FAA's purpose of ensuring that arbitrations proceed in accordance with the parties' intent articulated by the Court in *Kaplan*, the FAA would appear to preempt these mandatory state law provisions authorizing the arbitral tribunal to rule on questions of the existence or validity of an arbitration agreement, if the circumstances indicate that the parties did not intend to confer this authority on the arbitrators. Moreover, the Florida International Arbitration Act provision authorizing an arbitral tribunal to rule on questions of the existence or validity of an arbitration agreement may function as a default rule that enables the arbitral tribunal to decide these questions without the parties intending to confer this power on the arbitrators.²⁴⁵ In such circumstances, it would appear that the FAA may preempt this provision in the Florida statute.

G. Conclusions

While provisions contained in chapter 1 or 2 of the FAA also

Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).

²⁴⁴Section 1297.161 of the California international arbitration statute and section 9-9-34 of the Georgia Code, which authorize an arbitral tribunal to decide questions of the existence and validity of an arbitration agreement, appear to create mandatory rules since neither state statute indicates that the parties may derogate from the effect of these provisions. See CAL. CIV. PROC. CODE § 1297.161; GA. CODE ANN. § 9-9-34.

²⁴⁵Section 684.06(2) of the Florida statute authorizes an arbitral tribunal to decide questions of the existence or validity of an arbitration agreement. See FLA. STAT. ANN. § 684.06(2). For discussion concerning how section 684.06(2) may apply as a default rule, see *supra* note 241.

address the nature of judicial involvement in these areas, a state court may invoke state international arbitration act provisions in order to enforce agreements to arbitrate international disputes within the respective state, to confirm international arbitral awards rendered in the particular state, and to grant or deny enforcement of foreign arbitral awards to the extent that chapter 1 or 2 of the FAA does not preempt these state statutory provisions. This part reveals that most of the state law provisions examined concerning court orders to enforce arbitration agreements, to confirm or vacate international arbitral awards, or to grant or refuse the recognition or enforcement of foreign arbitral awards are sufficiently similar to the corresponding FAA provisions to suggest that the pertinent FAA provision should not preempt such a state law provision. However, a few of the state law provisions examined concerning matters addressed expressly by provisions in chapter 1 or 2 of the FAA could provide broader bases to limit the enforceability of an arbitration agreement, to deny the confirmation of an international arbitral award rendered in the United States, or to refuse the recognition or enforcement of a foreign arbitral award, if a state court interpreted such a state law provision broadly. A federal or state appellate court should rule that the pertinent provision in chapter 1 or 2 of the FAA preempts such a state law provision when a state court decision invoking the state law provision frustrates the enforceability of an arbitration agreement or the confirmation or enforcement of an arbitral award that the FAA would enforce or confirm.

While analysis of the possible preemption of state law provisions concerning matters not addressed expressly in chapter 1 or 2 of the FAA is less straightforward than analysis of preemption questions when corresponding FAA provisions exist, the FAA or the New York Convention may preempt such a state law provision when application of the state law provision would serve to frustrate or undermine a purpose or policy of the FAA or the New York Convention. Determinations concerning whether application of a state law provision defeats a purpose or policy of the FAA or the New York Convention depend ultimately on the particular factual circumstances in a given case.

However, this part reveals that state international arbitration act provisions authorizing state courts to order discovery, pre-

award attachments, and preliminary injunctions in aid of arbitration do not appear to frustrate articulated purposes or policies underlying the FAA or the New York Convention, and thus, do not seem to raise significant preemption concerns. A court would have difficulty concluding that the state law provisions examined that allow court-ordered discovery in aid of arbitration at the request of a party to an arbitration conflict with the FAA's policy of limiting judicial interference in the arbitral process, since these state law provisions only authorize a state court to order such discovery if the arbitral tribunal has authorized the party to make such a request. Moreover, the prevailing view among U.S. courts and commentators suggests that the New York Convention should only preempt state law provisions authorizing a state court to issue pre-award attachment when the party requesting such court-ordered attachment intended the judicial action to frustrate or circumvent the arbitration. Absent such intent by the requesting party, the application of state law provisions allowing state courts to order pre-award attachment would not conflict with the purposes or policies underlying the New York Convention, and thus, would not result in preemption by the New York Convention. In addition, since state law provisions allowing state courts to issue preliminary injunctions in aid of an international arbitration appear to further the pro-arbitration policies of the FAA, courts should not find that the FAA's chapter 1 preempts state law provisions authorizing the issuance of such preliminary injunctions.

While the FAA does not contain a provision addressing whether the arbitrators may rule on questions involving the scope or validity of an arbitration agreement, this article argues that based on the Supreme Court's decision in *Kaplan*, the FAA may preempt state law provisions authorizing arbitrators to rule on such questions where it is unclear that the parties intended to confer such power on the arbitrators.²⁴⁶ Thus, whether chapter 1 of the

²⁴⁶The *Kaplan* decision holds expressly that an arbitrator may not decide questions of the scope of an arbitration agreement unless there is clear and unmistakable evidence that the parties have authorized the arbitrator to decide such questions. See *supra* notes 230-41 and accompanying text for discussion of the Court's decision in *Kaplan* and the author's argument that *Kaplan* may support FAA preemption of state arbitration law provisions that authorize the arbitrator to rule on questions of the scope

FAA may preempt state law provisions authorizing arbitrators to decide questions of the scope or validity of an arbitration agreement would appear to depend on if factual circumstances indicate that the parties intended such a result. Since it is unlikely that many parties will address expressly in their arbitration agreement the arbitrators' authority to rule on these questions, the state law provisions examined authorizing the arbitrators to rule on questions of the scope or validity of an arbitration agreement are among the few state international arbitration act provisions analyzed that the FAA may preempt in many cases.

Overall, few provisions contained in the state international arbitration statutes examined conflict directly with provisions in chapter 1 or 2 of the FAA or with the purposes or policies of the FAA or the New York Convention. This suggests that the extent of preemption of provisions in state international arbitration statutes is not significant. The infrequency that provisions contained in the state international arbitration statutes analyzed conflict with FAA provisions or undermine the underlying purposes or policies of the FAA or the New York Convention confirms the "pro-arbitration" character of state international arbitration statutes, enacted in order to encourage and facilitate international arbitration within the respective state. Since most provisions in the state international arbitration statutes examined operate similarly to existing provisions in chapter 1 or 2 of the FAA or supplement the FAA by authorizing court involvement supportive of the arbitral process concerning matters not addressed expressly in the FAA, the complementary character of most of these state law provisions argues against the need for amending the FAA in order to preempt state international arbitration statutes.

of an arbitration agreement when the parties have not clearly intended such a result. *Kaplan* does not address directly whether arbitrators may decide questions of the existence or validity of an arbitration agreement only if the parties have clearly intended such a result. However, the author contends that based on the FAA's purpose of ensuring that arbitrations proceed in accordance with the parties' intent articulated by the Court in *Kaplan*, the FAA would appear to preempt state law provisions that authorize arbitrators to decide questions of the existence or validity of an arbitration agreement when the parties did not intend to confer such power on the arbitrator. For further discussion, see *supra* notes 245-46 and accompanying text.

IV. Impact of *Volt* and *Mastrobuono* Decisions on FAA Preemption of Provisions in State International Arbitration Statutes

Commentators have professed that the Supreme Court's decision in *Volt Information Sciences Inc. v. Board of Trustees of Leland Stanford Junior University*²⁴⁷ heightened the uncertainty concerning whether the FAA or state international arbitration statutes apply to international arbitrations conducted in the United States when the parties include a standard choice of law clause and an arbitration agreement in their contract.²⁴⁸ In *Volt*, the Supreme Court agreed with the decisions of the state courts that by including a standard choice of law clause selecting state law, the parties intended to incorporate state arbitration law into their arbitration agreement, and consequently, the FAA could not preempt the state arbitration law provision that the FAA would appear to preempt in the absence of the choice of law clause. Citing the apparent uncertainty concerning the applicable law created by the enactment of state international arbitration statutes and the *Volt* decision, commentators have argued for the reform of federal law with the result that federal law would apply exclusively to international arbitrations conducted in the United States.²⁴⁹

This part contends that the *Volt* decision has not increased the level of confusion or uncertainty pertaining to questions concerning the law applicable to international arbitrations conducted in the United States to an extent that justifies federal statutory preemption of state international arbitration statutes. First, the *Volt* decision appears consistent to a great extent with prior Supreme Court precedent, since the *Volt* decision strongly supports the federal substantive policy favoring the enforceability

²⁴⁷489 U.S. 468 (1989).

²⁴⁸See *supra* note 25. The author uses the term "standard choice of law clause" to refer to a choice of law clause that selects state law without expressly providing that the parties have agreed to apply state arbitration law to their arbitration. For example, the author considers the following a standard choice of law clause: "the laws of the state of New York shall apply." Under this definition, the choice of law clause at issue in *Volt* is also a standard choice of law clause. See *infra* note 253.

²⁴⁹See *supra* note 26.

of arbitration agreements. Second, in the Supreme Court's recent decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*,²⁵⁰ the Court limited the potential negative implications of *Volt* by ruling that a standard choice of law clause is not sufficient to indicate the parties' intent to apply state arbitration law that the FAA would otherwise preempt. Moreover, *Mastrobuono* suggests that state arbitration law inconsistent with the FAA may only apply to an arbitration if the parties include in their contract a choice of law clause that expressly selects such state law over federal law.

In *Volt*, the Supreme Court ruled on the applicability of a California Arbitration Act provision²⁵¹ authorizing a court to stay an arbitration pending related litigation between a party to the arbitration and third parties not bound by the arbitration agreement, in a case involving a domestic arbitration within the scope of chapter 1 of the FAA. The FAA does not provide for such a stay provision.

Denying *Volt*'s motion to compel arbitration under section 4 of the FAA and the analogous California Arbitration Act provision, the California Court of Appeals affirmed the trial court decision.²⁵² The California Court of Appeals based its decision on the parties' choice of law clause, which the court interpreted as indicating that the parties had incorporated the rules provided in California arbitration law into their arbitration agreement.²⁵³ Citing the parties' agreement to apply state rules of arbitration, the California Court of Appeals rejected *Volt*'s contention that the FAA

²⁵⁰115 S. Ct. 1212 (1995).

²⁵¹Section 1281.2(c) of the general California Arbitration Act provides in pertinent part that if a court determines that

[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact, . . . the court . . . may stay arbitration pending the outcome of the court action or special proceeding.

CAL. CIV. PROC. CODE § 1281.2(c) (West 1996).

²⁵²See *Volt Info. Sciences v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 471-72 (1989).

²⁵³See *id.* at 472. The choice of law clause at issue in *Volt* provided that "the Contract shall be governed by the law of the place where the Project is located." *Id.* at 470.

preempted the California arbitration provision.²⁵⁴

In affirming the decisions of the state courts, the Supreme Court in *Volt* emphasized the FAA's strong support for enforcing arbitration agreements in accordance with the terms agreed to by the parties. The *Volt* Court declared that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."²⁵⁵ The Court's recognition in *Volt* of the FAA's central purpose of ensuring the enforceability of arbitration agreements follows the Court's strong support for this principle established in previous cases.²⁵⁶

²⁵⁴*See id.* at 472. The California Court of Appeals declared that

where, as here, the parties have chosen in their agreement to abide by the state rules of arbitration, application of the FAA to prevent enforcement of those rules would actually be inimical to the policies underlying state and federal arbitration law, because it would force the parties to arbitrate in a manner contrary to their agreement.

Id. at 472. Note that the California Supreme Court denied *Volt's* petition for discretionary review. *See id.* at 472-73.

²⁵⁵*Id.* at 478.

²⁵⁶For discussion of Supreme Court precedent upholding the FAA's primary purpose of enforcing arbitration agreements according to their terms prior to the *Volt* decision, see *supra* notes 18-21 and accompanying text. Most lower courts have interpreted *Volt* as upholding the federal policy derived from the FAA favoring the enforceability of arbitration agreements. *See, e.g.,* Securities Indus. Ass'n v. Connolly, 883 F.2d 1114 (1st Cir. 1989). Holding that the FAA preempted state regulations that limited the enforceability of arbitration agreements, the First Circuit in *Connolly* distinguished its decision from *Volt* declaring that the state statutory provision at issue in *Volt* "filled an interstice in the FAA . . . whereas the [r]egulations here . . . plainly undermine the presumption of validity that the [Federal Arbitration] Act meant to confer on arbitration contracts generally." *Id.* at 1119. One commentator professes that the *Volt* decision clearly upholds the enforceability of arbitration agreements. "[I]f the [*Volt*] Court has opened a window for courts to apply state law to contracts governed by the FAA, the window has not been opened very wide. States are still foreclosed from directly regulating arbitration agreements." Faith A. Kaminsky, *Arbitration Law: Choice-of-Law Clauses and the Power to Choose Between State and Federal Law*, ANN. SURV. AM. L. 527, 540 (1991). Most lower courts have also interpreted *Volt* as upholding the federal policy derived from the FAA which strongly supports the arbitrability of particular claims. *See, e.g.,* Ackerberg v. Johnson, 892 F.2d 1328 (8th Cir. 1989). The *Ackerberg* court stated that *Volt* "clearly does not hold that state law can determine whether any given claim is arbitrable under the [FAA]." *Id.* at 1334. Kaminsky professes that the *Volt* decision does not allow the parties' choice of state law to affect questions of arbitrability under the FAA. "The parties' choice of law can only be interpreted as affecting the question of how to proceed once a court decides that their

Moreover, the *Volt* decision appears to allow the application of state international arbitration act provisions that further the arbitral process, even if the FAA contains no comparable provisions, when there is a standard choice of law clause selecting the law of a state that has enacted an international arbitration statute. In *Volt*, the Supreme Court held that interpretation of a standard choice of law clause to allow the application of rules of state arbitration law where such state law rules are “manifestly designed to encourage resort to the arbitral process” does not conflict with any policy derived from the FAA.²⁵⁷ One commentator contends that the interpretation of the choice of law clause affirmed by the Supreme Court in *Volt* seems to allow courts to apply state law procedural provisions that complement the FAA as long as such state law provisions do not frustrate clearly articulated policies of the FAA.²⁵⁸ This reasoning supports the application of state international arbitration act provisions addressing such matters as court-ordered discovery at the request of a party to an arbitration or court-ordered provisional measures in aid of arbitration. As discussed in part III, these state international arbitration act provisions, which authorize judicial assistance in the arbitral process not provided for in chapter 1 or 2 of the FAA, do not appear to frustrate the purposes or policies embodied in the FAA or the New York Convention.²⁵⁹

The problematic aspect of the Supreme Court’s decision in

dispute is arbitrable. Because the arbitrability determination is governed by substantive federal law, the parties’ choice of law can have no effect on it.” Kaminsky, *supra*, at 549. However, the *Volt* decision’s support for FAA preemption of state law non-arbitrability rules does not appear to have much relevance to preemption questions involving state international arbitration statutes, which do not contain non-arbitrability rules.

²⁵⁷*Volt*, 489 U.S. at 476. The *Volt* Court professed that the California arbitral rules deemed incorporated into the parties’ arbitration agreement “generally foster[ed] the federal policy favoring arbitration.” *Id.* at 476 n.5. It is questionable whether one can plausibly view the state arbitration law rule at issue in *Volt*, which authorized the stay of an arbitration the FAA would have allowed to proceed, as supportive of the arbitral process.

²⁵⁸See Feldman, *supra* note 86, at 692-93.

²⁵⁹For discussion concerning whether the FAA may preempt provisions concerning court-ordered discovery at the request of a party and court-ordered provisional measures in aid of arbitration, see *supra* notes 177-81 and *supra* notes 182-220, respectively.

Volt is that the stay of the parties' arbitration, which the FAA would have allowed to proceed, was upheld because of the Court's refusal to disturb the state courts' interpretation that the standard choice of law clause selecting state law indicated the parties' intentions to apply state arbitration law inconsistent with the FAA.²⁶⁰ Criticizing the *Volt* decision, commentators profess that it is not proper to interpret a standard choice of law clause selecting state law as indicating the parties' intentions to apply state arbitration law that the FAA would otherwise preempt.²⁶¹ Moreover, in his dissent in *Volt*, Justice Brennan espoused the accepted position that standard choice of law clauses do not indicate the parties' intentions to select state law over federal law. Justice Brennan declared that

²⁶⁰In *Volt*, the Supreme Court did not itself hold that the parties intended their standard choice of law clause to incorporate state arbitration law rules into their arbitration agreement. Rather, the Supreme Court refused to disturb the California courts' conclusion on the subject. The Supreme Court declared that "interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt*, 489 U.S. at 474. Some commentators profess that the *Volt* Court's deference to the state courts' interpretation of state law lessens the significance of *Volt* as precedent for cases involving questions of whether the FAA may preempt state arbitration law. "*Volt* appears to have been an aberration in the Court's pro-arbitration stance, and should be considered more as a decision on states' rights in interpreting state law than as a decision against FAA preemption of state arbitral laws." Rivkin & Kellner, *supra* note 27, at 556. For criticism of the *Volt* Court's deference to state court interpretation of choice-of-law clauses, see Zhaodong Jiang, *Federal Arbitration Right, Choice-of-Law Clauses and State Rules and Procedure*, 22 SW. U. L. REV. 159, 229-235 (1992).

²⁶¹"[I]t is almost certainly a bad job of contractual interpretation to read a typical choice-of-law clause in an arbitration agreement as choosing to be governed by state arbitration law that would otherwise be preempted by the FAA." Ware, *supra* note 100, at 556. Feldman comments that

If the broad pro-arbitration policy of the FAA, applicable unless displaced by the mutual agreement of the parties, is to have any meaning, courts must require more concrete manifestation of intent than boilerplate contractual provisions. For courts to allow their interpretation of the contract to be guided so heavily by policy considerations rather than by the actual language in the contract threatens the ability of future contracting parties who may actually intend to embrace the FAA to give legal effect to that intent.

Feldman, *supra* note 86, at 718. "Choice-of-law clauses are commonly used in domestic contracts to determine which state law will apply, not to dilute the preemptive effect of federal statutes." Robert Coulson, *AAA President Says Volt Decision Creates Setback for Arbitration*, 3 BNA'S ADR REPORT 135, 136 (1989).

it seems to me beyond dispute that the normal purpose of such [standard] choice of law clauses is to determine that the law of one State rather than that of another State will be applicable; they simply do not speak to any interaction between state and federal law. A cursory glance at standard conflicts texts confirms this observation: they contain no reference at all to the relation between federal and state law in their discussions of contractual choice of law clauses.²⁶²

While the *Volt* decision does create uncertainty concerning whether the FAA preempts inconsistent state arbitration law when the parties have included a standard choice of law clause in their contract, the Supreme Court's recent decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.* reveals that the Court has retreated from its position in *Volt* concerning the interpretation of standard choice of law clauses. As discussed below, the decision of the Supreme Court in *Mastrobuono* professes that a standard choice of law clause is not sufficient to indicate the parties' intentions to apply state arbitration law that the FAA would otherwise preempt.

The central question in *Mastrobuono* concerns whether a standard choice of law clause may preclude an arbitral award of punitive damages that the FAA would otherwise allow absent the conflicting state law.²⁶³ Citing the standard choice of law clause selecting New York law and New York state case law holding that arbitrators may not award punitive damages, the United States District Court for the Northern District of Illinois vacated the award of punitive damages and the Seventh Circuit affirmed.²⁶⁴ Thus, the lower courts interpreted the arbitration agreement to incorporate New York law, including the rule of New York case

²⁶²*Volt*, 489 U.S. at 488-89 (Brennan, J., dissenting) (citing R. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 147 (4th ed. 1986)); E. SCOLES & P. HAY, CONFLICT OF LAWS 632-652 (1982); R. WEINTRAUB, COMMENTARY OF THE CONFLICT OF LAWS § 7.3C (2d ed. 1980)).

²⁶³The standard choice of law clause in *Mastrobuono* provides that the contract "shall be governed by the laws of the State of New York." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1214 (1995).

²⁶⁴*See id.* at 1215. In *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976), the New York Court of Appeals, the state's highest court, held that arbitrators do not have the authority to award punitive damages under New York law.

law that arbitrators may not award punitive damages.²⁶⁵

The Supreme Court framed the central issue in *Mastrobuono* as whether the contract reveals that the parties intended to arbitrate claims of punitive damages.²⁶⁶ The Court found that the standard choice of law clause selecting New York law was not sufficient to indicate that the parties intended for the New York decisional rule prohibiting punitive damages awards to apply to their arbitration.²⁶⁷ The *Mastrobuono* court declared that

[we] think the best way to harmonize the choice of law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice of law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.²⁶⁸

Commentators profess that the Court's decision in *Mastrobuono* reveals that standard choice of law clauses selecting state law should not result in the application of state arbitration law that the FAA would otherwise preempt.²⁶⁹ Thus, the Court's

²⁶⁵See *Mastrobuono*, 115 S. Ct. at 1215.

²⁶⁶See *id.* at 1216.

²⁶⁷See *id.* at 1218-19.

²⁶⁸*Id.* at 1219.

²⁶⁹In the future, courts must carefully review all relevant evidence relating to the intent of the parties as to whether the applicable law clause was intended to cover only substantive rights and duties, or was also intended to embrace the arbitration law of the state . . . if no evidence exists beyond the typical applicable law clause in *Mastrobuono*, the FAA will preempt state arbitration law as to that contract.

William E. Huth, *International Decisions: Mastrobuono v. Shearson Lehman Hutton, Inc.*, 89 AM. J. INT'L L. 601 (1995).

Mastrobuono establishes that choice of law provisions are properly interpreted to exclude a particular matter from arbitration or to limit the arbitration proceeding in a manner inconsistent with the FAA, only when the parties' contract clearly and unequivocally evidences a mutual intent to that effect. Given the "boilerplate" nature and vague wording of the typical contractual choice of law provision, that result seems unlikely in most cases.

Hayford, *supra* note 94, at 21. The result in *Mastrobuono* appears to conflict with the Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). In *Carnival Cruise Lines*, the Court held that a forum selection clause requiring

decision in *Mastrobuono* would appear to alleviate the concerns of commentators who feared that *Volt* would create significant uncertainty regarding whether the FAA would preempt inconsistent state arbitration law in cases involving standard choice of law clauses selecting state law.

Moreover, the Supreme Court's decision in *Mastrobuono* suggests that state arbitration law inconsistent with the FAA may only apply to an arbitration if the parties include a choice of law clause that expressly reveals the parties' intentions to have such a state law provision apply. While holding that the standard choice of law clause selecting New York law was not sufficient to indicate that the parties intended the New York rule precluding arbitral awards of punitive damages to apply to their arbitration, the Supreme Court declared in *Mastrobuono* that "if the contract says 'no punitive damages' that is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties—even if the effect of those intentions is to limit arbitration."²⁷⁰ Commentators have viewed *Mastrobuono* as requiring an express contractual clause providing for the application of state arbitration law inconsistent with the FAA in order for such state law to apply to the parties' arbitration.²⁷¹ The

litigation of all disputes in Florida contained in a cruise line's standard form passenger contract was reasonable and enforceable. However, one commentator professes that the Supreme Court in *Mastrobuono* was troubled by the rigid interpretation of *Volt* by the lower courts which allowed the standard choice of law clause selecting New York state law to preclude the arbitration of punitive damages claims. Huth, *supra*, at 602. Prior to *Mastrobuono*, securities firms used a standard-form brokerage contract that included a clause that all disputes be resolved by arbitration and a standard choice of law clause selecting New York state law in order to avoid arbitral awards of punitive damages. See *id.*

²⁷⁰ *Mastrobuono*, 115 S. Ct. at 1216.

²⁷¹ "Mastrobuono establishes that choice-of-law provisions are properly interpreted to exclude a particular matter from arbitration, or to limit the arbitration proceeding in a manner inconsistent with the FAA, only when the parties' contract clearly and unequivocally evidences a mutual intent to that effect." Hayford, *supra* note 94, at 21. Huth professes that after *Mastrobuono* parties may agree not to allow the arbitrators to award punitive damages, contrary to federal law derived from the FAA, by including a contractual provision that specifically limits the authority of the arbitrators to award punitive damages. See Huth, *supra* note 269, at 603. However, after *Mastrobuono*, the parties may not use a standard choice of law clause selecting state law as a means to preclude the arbitrators from awarding punitive damages. See *id.* Prior to the *Mastrobuono* decision, Ware articulated a hypothetical example of a choice of law

Mastrobuono decision as well as the Supreme Court's unyielding support for advancing the FAA's primary purpose of enforcing arbitration agreements according to their terms indicate that parties may choose not to apply federal law derived from the FAA that concerns matters of arbitral procedural by including in their contract a choice of law clause that expressly provides for the application of particular state arbitration law provisions.²⁷²

Overall, the Supreme Court's decision in *Mastrobuono* appears to resolve the uncertainties created by the Court's decision in *Volt* concerning whether a standard choice of law clause selecting state law results in the application of state arbitration law that the FAA would otherwise preempt if the parties had not included such a choice of law clause. *Mastrobuono* reveals that a standard choice of law clause is not sufficient to indicate the parties' intent to apply state arbitration law inconsistent with the FAA.²⁷³ Moreover, the Court's decision in *Mastrobuono* also suggests that state arbitration law inconsistent with the FAA may apply only if the parties include in their contract a choice of law clause that expressly selects such state law over federal law.²⁷⁴ Thus, the *Mastrobuono* decision appears to clarify the interaction between provisions in the FAA and state international arbitration statutes to an extent which obviates the professed need to amend the FAA in

clause that expressly selects state law over federal law on the question of whether the arbitrators may award punitive damages. "The law of New York, rather than federal law, governs whether our arbitrator has the power to award punitive damages." Ware *supra* note 100, at 557. Ware comments that this hypothetical choice of law clause is "truly unusual because it expressly chooses state law over federal law" revealing the parties' intentions "to displace otherwise preemptive federal law." *Id.* at 558.

²⁷²For discussion of Supreme Court precedent advancing the FAA's primary purpose of enforcing arbitration agreements according to their terms, see *supra* notes 18-24 and accompanying text. For discussion of the ability of parties to apply state law procedural provisions that conflict with federal law derived from the FAA, see *supra* note 25.

²⁷³See *supra* notes 267-68 and accompanying text.

²⁷⁴For example, the FAA may preempt sections 1297.163 and 1297.165 of the California international arbitration statute which appear to create a mandatory rule authorizing the arbitrators to decide questions of arbitrability. See *supra* note 238. However, *Mastrobuono* suggests that the parties could have these state law provisions apply to their arbitration by including a choice of law clause such as the following: "Sections 1297.163 and 1297.165 of the California Code of Civil Procedure, rather than federal law, govern whether the arbitrators have the authority to decide questions of arbitrability."

order to preempt state international arbitration statutes.²⁷⁵

V. Conclusion

State international arbitration statutes play an important but secondary role in governing international arbitrations within the respective state. As discussed in part II, state international arbitration act provisions may only apply (1) when the FAA does not preempt such state law provisions or (2) when the arbitration agreement or arbitral award does not fall within the scope of chapter 1 or 2 of the FAA but is within the scope of the state international arbitration statute.²⁷⁶ Moreover, as revealed in part III, since most state international arbitration act provisions complement or supplement the provisions in chapters 1 and 2 of the FAA, the FAA will not preempt state international arbitration act provisions in most instances.²⁷⁷ Based on the secondary role assumed by state international arbitration statutes and the complementary character of most provisions contained in such state statutes, amendment of the FAA to preempt state international arbitration statutes does not appear justified.

Furthermore, part IV contends that the Supreme Court's

²⁷⁵In response to the *Volt* decision, the New York State Bar Report recommends amendments to chapters 1 and 2 of the FAA that expressly preempt provisions in state international arbitration statutes unless the parties' arbitration agreement provides explicitly that "procedures other than those set forth in Chapter 1 [of the FAA] govern the action or proceeding." See *supra* note 26. These amendments proposed in the New York State Bar Report require an express contractual provision declaring the parties' intentions to apply state arbitration law in order to apply state arbitration law provisions that the FAA would not preempt because such state law provisions are consistent with the FAA. Thus, these proposed amendments are not consistent with the *Mastrobuono* decision, which requires an express choice of law clause selecting a particular state law provision over federal law in order to apply state arbitration law that the FAA would otherwise preempt. *Mastrobuono* does not require such an express choice of law clause selecting particular state arbitration law provisions in order for the parties to apply a state arbitration law provision that complements the FAA. Requiring a choice of law clause expressly selecting particular state arbitration law provisions over federal law in order for state law provisions that complement the FAA to apply could preclude the application of state international arbitration act provisions authorizing court involvement supportive of the international arbitral process. For further discussion, see the author's conclusions in part V.

²⁷⁶See *supra* notes 32-78 and accompanying text.

²⁷⁷See *supra* notes 79-246 and accompanying text.

decision in *Mastrobuono* requires that the parties include in their contract a choice of law clause that expressly selects state arbitration law over federal law in order for a state arbitration law provision inconsistent with the FAA to apply to an arbitration.²⁷⁸ The *Mastrobuono* decision appears to dispel the fears of commentators who contended that the *Volt* decision created significant uncertainty concerning whether the FAA would preempt inconsistent state arbitration law in cases involving standard choice of law clauses selecting state law. Thus, the Supreme Court's reversal of its problematic position in *Volt* further argues against the need for enacting an amendment to the FAA that would preempt state international arbitration statutes.

Federal statutory preemption of state international arbitration statutes would also limit parties in their choice of the legal framework applicable to an international arbitration conducted in the United States. Preemption of state international arbitration statutes would create a predictable and certain legal regime. However, the inability of parties to invoke state international arbitration act provisions that further the international arbitral process and that concern matters not addressed in the FAA, such as court-ordered discovery or provisional measures, outweighs any benefits accruing from the adoption of a uniform legal regime applicable to all international arbitrations conducted in the United States. The coexistence of chapters 1 and 2 of the FAA and differing state international arbitration statutes provides sufficient certainty to parties since the FAA will preempt few provisions in such state statutes, while offering the parties choices among varied legal frameworks supportive of the international arbitral process.

²⁷⁸See *supra* notes 271-72, 274 and accompanying text.