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Proposed Florida International Arbitration Act

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PROPOSED FLORIDA INTERNATIONAL ARBITRATION ACT

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1. SUMMARY EXPLANATION OF THE PROPOSED FLORIDA INTERNATIONAL ARBITRATION ACT

For the past three years a task force of The Florida Bar has been engaged in drafting a proposed statute on international arbitration for the State of Florida.¹ What follows here is a brief explanation of the reasons for this effort, the text of the proposed statute and a detailed section-by-section analysis of the text.²

Since World War II, arbitration has become a favored method of dispute resolution in international commerce. The increased unwillingness of international firms to submit to each other's courts; congestion and delay in the courts of many jurisdictions; concern over the rising costs of litigation, particularly in jurisdictions such as the United States; concern over confidentiality (court proceedings, unlike arbitration proceedings, are usually public); and a desire for a dispute-resolution mechanism which can be tailored to the dispute involved, have all contributed to the growth of arbitration during this period.

1. Special mention should be given to Professor Keith Rosenn of the University of Miami School of Law, Agustin de Goytisolo of Trenam, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, Attilio Costabel of Costabel, Cavgnaro & Ashing, and Robert L. Weintraub, Corporate Counsel for Williams Island, for their valuable assistance and participation in the task force's efforts.

2. In the course of its work, the task force reviewed numerous treatises, articles and court decisions on international arbitration, as well as the arbitration rules of the American Arbitration Association, the International Chamber of Commerce, the United Nations Commission on International Trade Law ("UNCITRAL"), the current or proposed arbitration laws of New York, California, France, the United Kingdom, Hong Kong and the Netherlands, the Model Arbitration Act, the Federal Arbitration Act, the current Florida Arbitration Code, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the so-called New York Convention), the Inter-American Convention on International Commercial Arbitration, and the work-product of the commission established by UNCITRAL to draft a model international arbitration statute.

In the opinion of the task force, and of others, this growth in the use of arbitration presents Florida with a genuine opportunity. Given its geographic location, infrastructure, transportation and communication facilities, population with varied linguistic skills, service industries, academic facilities, business and banking communities and well-developed legal system, Florida could emerge over a period of time as a significant center for international arbitration, particularly for disputes involving Latin America or the Caribbean. Such a development would naturally complement the emergence of Florida over the past fifteen years as a regional center for international banking and commerce.

For this to happen, however, Florida must have a modern statute which facilitates, rather than hinders, international arbitration, and generally reflects a legal climate hospitably disposed toward arbitration. This, broadly speaking, is the purpose of the proposed Act. Specifically, the Act has two basic objectives.

First, it is intended to fill a potentially serious gap in existing law. The present Florida Arbitration Code (Chapter 682 of the Florida Statutes) is seriously deficient in the powers it confers upon the Florida courts to enforce international arbitral agreements and awards. Unless a case is governed by the Federal Arbitration Act or the New York Convention, the courts of this state are presently, with few exceptions, powerless (i) to enforce either an agreement to arbitrate abroad or an agreement to arbitrate in this state under the law of some jurisdiction other than Florida and (ii) to enforce awards emanating from any such arbitration. Moreover, neither the Federal Arbitration Act nor the New York Convention completely fill this gap. The Federal Act applies only to arbitrations that arise out of transactions involving the foreign, interstate or maritime commerce of the United States. The New York Convention applies only to awards in such transactions and only then if they emanate from countries that have ratified the Convention. The vast majority of the countries in Latin America and the Caribbean have not signed the Convention.³

In sum, the existing arbitral law of Florida was clearly not designed with international arbitration in mind. There is, as a consequence, a gap which must be closed if Florida is ever to realize

3. Although this situation will be ameliorated somewhat upon eventual ratification by the United States of the Inter-American Convention on International Commercial Arbitration (which has already been ratified by various Latin American countries), it is uncertain when ratification by the United States and other major Latin American countries will occur.

its potential as a center for international arbitration, attractive not only to American companies but to foreign enterprises as well. The proposed Act would close this gap.

Second, the new Act sets out a comprehensive body of procedural rules for conducting international arbitration. These rules are generally not mandatory. Rather, they establish a framework upon which the parties to a dispute may draw in creating their own arbitral regime. In this way the Act reflects the fact that with the increased use of arbitration has come an increased tendency for the parties to develop their own, essentially self-contained, body of procedural rules. It also reflects the fact that international business enterprises, in selecting the place for and the law to govern their arbitrations, want to be assured that the selection will facilitate, rather than impede, operation of the system of rules that they have selected. They want the law chosen to supply a framework which they are free to modify but which they can also, without modification, rely upon to guide the arbitrators in meeting some of the special circumstances likely to attend the arbitration of an international dispute.

By these criteria, the Florida Arbitration Code is inadequate. It does not address many of the problems that can arise in an international arbitration. It does not address the problem of to whom and how notice is to be given. It does not guide the arbitrators in making choice of law decisions, or deciding when and how to seek judicial assistance in obtaining evidence from abroad, or what language is to be used in the arbitration, or whether foreign currency awards are valid and enforceable by the courts of this state. While the list could go on, the point is plain enough: existing Florida law is inadequate and must be brought up to date if Florida is ever to become a center for international arbitration. The proposed new Act achieves this objective.

Finally, it should be noted that the proposed Act would not supersede the existing Florida Arbitration Code except where the arbitration pertains to an international dispute. Even in that case, certain classes of disputes will continue to be governed by the existing Florida Arbitration Code unless the parties expressly submit them to the new Act.

2. PROPOSED FLORIDA INTERNATIONAL ARBITRATION ACT

Part I. *Title, Policy, Scope and Definitions.*

684.01. Title.

This Act may be cited as the "Florida International Arbitration Act."

684.02. Policy.

(1) It is the policy of the Florida Legislature to encourage the use of arbitration to resolve disputes arising out of international relationships and to assure access to the courts of this state for legal proceedings ancillary to, or otherwise in aid of, such arbitration.

(2) Any person may enter into a written undertaking to arbitrate any dispute then existing or thereafter arising between that person and another. If the dispute is within the scope of this Act, the undertaking shall be enforced by the courts of this state in accordance with Section 684.22 without regard to the justiciable character of the dispute. In addition, if the undertaking is governed by the law of this state, it shall be valid and enforceable in accordance with ordinary principles of contract law.

684.03. Scope of this Act.

(1) This Act shall only apply to the arbitration of disputes between:

(a) two or more persons at least one of whom is a non-resident of the United States; or

(b) two or more persons all of whom are residents of the United States if the dispute (i) involves property located outside the United States, (ii) relates to a contract which envisages enforcement or performance in whole or in part outside the United States, or (iii) bears some other relation to one or more foreign countries.

(2) Notwithstanding subsection (1), this Act shall not apply to the arbitration of:

(a) any dispute pertaining to the ownership, use, development or possession of, or a lien of record upon, real property located in this state, unless the parties in writing expressly submit the arbitration of that dispute to this Act; or

(b) any dispute involving domestic relations, or of a political nature between two or more governments.

(3) If in any arbitration within the scope of this Act reference must, under applicable conflict of laws principles, be made to the arbitration law of this state, such reference shall be to this Act.

684.04. Definitions.

As used in this Act:

(1) The term "person" shall have the meaning set forth in Section 1.01(3) and shall include a government or any agency, instrumentality or subdivision thereof.

(2) The term "resident of the United States" means:

(a) a natural person who maintains his sole residence within a state, possession or territory of the United States or within the District of Columbia; or

(b) any other person organized or incorporated under the laws of the United States, any state, possession or territory thereof, or the District of Columbia.

(3) The term "nonresident of the United States" means any person not a "resident of the United States" as defined in subsection (2).

(4) Any reference to a "written undertaking to arbitrate" shall be to that writing by which a person undertakes to submit a dispute to arbitration, without regard to whether that undertaking is sufficient to sustain a valid and enforceable contract or is subject to defenses. A written undertaking may be part of a contract, may be a separate writing, and may be contained in correspondence, telegrams, telexes, or any other form of written communication.

Part II. *Conduct of Arbitrations under this Act.*

684.05. Scope of this Part.

This Part shall apply to any arbitration within the scope of this Act, without regard to whether the place of arbitration is within or without this state: (a) if the written undertaking to arbitrate expressly provides that the law of this state shall apply, or (b) in the absence of a choice of law provision applicable to the written undertaking to arbitrate, if that undertaking forms part of a contract the interpretation of which is to be governed by the law of this state, or (c) in any other case, the arbitral tribunal decides under applicable conflict of laws principles that the arbitration shall be conducted in accordance with the law of this state.

684.06. Conduct of the Arbitration.

(1) Except as provided in this Act or in the written undertaking to arbitrate, the arbitral tribunal shall conduct the arbitration as it deems appropriate, including determination of the language to be used.

(2) The arbitral tribunal shall have the power to rule on all challenges to its jurisdiction. This shall include without limitation challenges based on the claim that the written undertaking to arbitrate does not exist or does not give rise to a valid and enforceable agreement, challenges asserting that the dispute is not within the scope of the questions referable to arbitration or is otherwise non-arbitrable, and challenges to the composition of or method used in forming the tribunal.

684.07. Freedom of Parties to Fix Rules for the Arbitration.

The parties may at any time agree in writing to conduct the arbitration in accordance with such rules as they may select, including any system of rules incorporated by reference in the written undertaking to arbitrate. The provisions of this Part shall not apply except to the extent consistent with, and subject to, the rules adopted by the parties. As used in this Part the term "written undertaking to arbitrate" includes any system of rules selected by the parties.

684.08. Notice Commencing Arbitration, Answer, and Notices During Arbitration.

(1) A party desiring to arbitrate a dispute under a written undertaking to arbitrate shall give, or cause to be given, to all parties to that undertaking, written notice of the commencement of the arbitration. The notice shall set forth the nature of the dispute, the names and addresses of the parties, a reference to the written undertaking to arbitrate, a demand that the dispute be referred to arbitration under that undertaking, and a statement of the relief sought, including the amount claimed, if any. The notice may also include a proposal for the method of appointing the tribunal, if that method has not already been agreed upon, or may give notice of the appointment of an arbitrator.

(2) The notice commencing arbitration shall be served upon the other parties to the written undertaking to arbitrate in the manner provided in that undertaking or, in the absence of such a provision, in a manner reasonably designed to give other parties notice of the proposed proceedings.

(3) If a party to a written undertaking to arbitrate dies or if a committee of the person or property of a party to such an undertaking is appointed, an arbitration under that undertaking may be commenced or continued by, or upon notice to, the personal representative or administrator of the deceased party or the committee of the person or property of that party or, where the proceedings relate to real property, any distributee or devisee who has succeeded to the deceased party's interest in the property.

(4) Following its appointment, the arbitral tribunal shall fix a time within which any party served with a notice commencing arbitration must file with the tribunal such written answer, counterclaim or crossclaim as that party determines appropriate. Such answer, counterclaim or crossclaim shall also be served upon the other parties to the arbitration in the manner provided in the written undertaking to arbitrate, or in the absence thereof, in the manner fixed by the arbitral tribunal. Failure to file an answer shall constitute a general denial of the claim set forth in the notice commencing the arbitration.

(5) If in the course of an arbitration it becomes necessary or advisable for any party to give notice to or serve documents upon the arbitral tribunal or one or more parties to the arbitration, it shall do so in the manner provided in the written undertaking to arbitrate or, in the absence thereof, in the manner

fixed by the tribunal.

684.09. Appointment of the Arbitral Tribunal.

If the parties, in the written undertaking to arbitrate or otherwise, agree upon a method for appointing the arbitral tribunal, that method shall be followed. If, notwithstanding that undertaking, the parties agree upon named arbitrators, the arbitrators so named shall constitute the tribunal. If the parties shall fail to agree upon a method for appointing the tribunal, or if the method selected shall fail and the parties shall not have otherwise named the tribunal, the tribunal may be appointed as provided in Section 684.23(1). Unless the parties otherwise agree, the tribunal shall consist of a single arbitrator.

684.10. Mediation, Conciliation and Settlement.

(1) If at any time during the arbitral proceedings a party claims in writing that one or more of the parties has not complied with an agreement to submit a dispute to mediation or conciliation, the tribunal shall determine the validity and timeliness of that claim and, upon finding it valid and timely, shall hold the arbitral proceedings in abeyance pending submission of the dispute to mediation or conciliation as agreed. Thereafter, the tribunal shall proceed to arbitrate the dispute when satisfied that the attempt at mediation or conciliation has failed.

(2) In the course of its proceedings, the arbitral tribunal may propose settlement terms to the parties or offer to act as mediator or conciliator.

(3) If before a final award is issued the parties agree to settle their dispute, the arbitral tribunal shall either issue an order terminating the arbitral proceeding or, if requested by the parties and accepted by the tribunal, record the agreed settlement in the form of a final award.

684.11. Majority Action by the Arbitral Tribunal.

If the arbitral tribunal consists of more than one arbitrator, its powers shall be exercised by a majority of its members, except that the tribunal may authorize the presiding arbitrator to decide matters of procedure subject to review by the full tribunal.

684.12. Consolidation of Arbitrations.

(1) If two or more disputes have common questions of law or fact or arise out of a single transaction or enterprise, and if at least one of those disputes is to be arbitrated under this Act, the disputes may be consolidated and determined by one arbitral tribunal if consolidation is not prohibited by the arbitral law or the rules otherwise applicable to the separate disputes and:

(a) all affected parties agree to the consolidation; or

(b) all of the disputes are to be submitted to the same tribunal, and that tribunal determines that consolidation will serve the interests of justice and the expeditious resolution of the disputes.

(2) The consolidated proceedings shall be conducted under such rules as the parties agree upon or, in the absence of agreement, as determined by the arbitral tribunal.

684.13. Hearings; Place of Arbitration.

(1) At the request of a party or upon its own initiative, the arbitral tribunal shall conduct one or more hearings for the purpose of examining witnesses, inspecting documents or other evidence or entertaining oral arguments. A hearing may be held at any place within or without this state that the tribunal determines appropriate, whether or not that place is the place of arbitration. In the absence of a request for a hearing, the tribunal may proceed on the basis of documents and other materials. If a hearing is to be conducted, the tribunal shall cause notice to be given to each party not less than fourteen days before the hearing, unless notice proves impossible after the exercise of due diligence. Appearance at a hearing without timely objection shall constitute a waiver of the notice requirement.

(2) Prior to a date certain established by the arbitral tribunal, any party may amend a claim, answer, counterclaim or crossclaim previously filed by it or may assert additional claims, counterclaims or crossclaims. After that date all such additions and amendments shall be at the discretion of the tribunal.

(3) The place of arbitration, whether within or without this state, shall be determined by the parties or, in the absence of such determination, by the arbitral tribunal having regard to the circumstances of the arbitration. Selection of the place of arbitration shall not constitute in itself selection of the procedural

or substantive law of that place as the law governing the arbitration.

(4) The arbitral tribunal may hold meetings at any place, whether or not it is the place of arbitration, and may use any means of communication it deems appropriate.

(5) The arbitral tribunal may adjourn its proceedings from time to time upon its own initiative and shall do so upon the request of a party for good cause shown, provided that no adjournment shall extend the proceedings beyond the date fixed by the parties for issuance of a final award unless the parties extend that date.

(6) The arbitral tribunal may dismiss any claim, counterclaim or crossclaim which the moving party fails to prosecute with reasonable diligence as determined by the tribunal. If a person against whom a claim, counterclaim or crossclaim is filed fails, without good cause shown, to appear or proceed with a defense against that claim, the tribunal shall decide the claim, counterclaim or crossclaim on the basis of the evidence before it. No award shall issue based solely upon the default of a party.

684.14. Representation by Attorney.

A party to an arbitration shall have the right to be represented by an attorney in any arbitral proceeding. A waiver of that right prior to any proceeding is ineffective.

684.15. Evidence, Witnesses, Subpoenas, Depositions.

(1) The arbitral tribunal shall determine the relevance and materiality of the evidence and need not follow formal rules of evidence. The tribunal may utilize any lawful method it deems appropriate to obtain evidence additional to that produced by the parties, and the parties shall comply with any request of the tribunal for additional evidence.

(2) The arbitral tribunal may issue subpoenas or other demands for the attendance of witnesses or for the production of books, records, documents and other evidence, may administer oaths, may order depositions to be taken or other discovery obtained, without regard to the place where the witness or other evidence is located, and may appoint one or more experts to report to it.

(3) The arbitral tribunal may fix such fees for the attend-

ance of witnesses as it deems appropriate.

(4) In exercising the powers conferred upon it by this Section, the arbitral tribunal may apply for assistance from any court, tribunal or governmental authority in any jurisdiction.

684.16. Interim Relief.

(1) Upon application by a party, and after all other parties have been notified and given an opportunity to comment (unless notice proves impossible after the exercise of due diligence), the arbitral tribunal may grant such interim relief as it considers appropriate and, in so doing, may require the applicant to post bond or give other security. The power herein conferred upon the tribunal is without prejudice to the right of a party under applicable law to request interim relief directly from any court, tribunal or other governmental authority, within or without this state, and to do so without prior authorization of the arbitral tribunal. Unless otherwise provided in the written undertaking to arbitrate, such a request shall not be deemed incompatible with, nor a waiver of, any rights under that undertaking.

(2) In lieu of an order granting interim relief, or in aid of any order granted, the arbitral tribunal may itself apply, or may authorize a party to apply, to any court, tribunal or other governmental authority within or without this state for such assistance in securing the objectives intended by the order or request for interim relief as the arbitral tribunal determines appropriate.

(3) If the arbitral tribunal determines that participation by one or more parties in its review of an application for interim relief might jeopardize the effectiveness of the relief requested, it shall, notwithstanding the requirements of subsection (1), make its decision without notice to, and in the absence of, such parties, and shall also, without notice to such parties, take any action authorized by subsection (2); *provided*, that immediately following issuance of an order for interim relief by the arbitral tribunal or by a court, tribunal or other governmental authority, whichever is the last to occur, the arbitral tribunal shall extend to all parties not notified of the application for interim relief adequate opportunity to seek termination or modification of any relief granted.

(4) The arbitral tribunal may at any time modify or terminate any interim relief granted by it. The tribunal shall also take, or cause to be taken, all appropriate steps to conform any order of a court, tribunal or other governmental authority to its

decision.

684.17. Applicable Law.

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

684.18. Interest.

The arbitral tribunal may award interest as agreed to in writing by the parties, or in the absence of such agreement, as the tribunal deems appropriate.

684.19. Awards.

(1) The arbitral tribunal shall issue its final award within such time as is specified by the parties in writing or, in the absence thereof, within such time as the tribunal determines appropriate. In addition to a final award, a tribunal may issue interim, interlocutory or partial awards. Each award shall be in writing, shall state the date and place of issuance, and shall be signed prior to issuance by each member of the tribunal unless, in the case of a tribunal consisting of more than one member, the award is signed by a majority and an explanation for each missing signature is given. Members' signatures need not be affixed at the place of arbitration.

(2) The arbitral tribunal shall deliver a signed counterpart of the award to each party to the arbitration personally or by registered or certified mail, unless such delivery proves impossible after the exercise of due diligence.

(3) A written statement of the reasons for an award shall be issued only if all parties agree to the issuance thereof or the tribunal determines that a failure to do so could prejudice recognition or enforcement of the award. An award may be made public by the tribunal or by a party only if (a) all parties to the arbitra-

tion consent thereto in writing, or (b) disclosure is required by law, or (c) disclosure is necessary in connection with any judicial or other official proceeding concerning the award.

(4) The arbitral tribunal may award reasonable fees and expenses actually incurred, including without limitation fees and expenses of legal counsel, to any party to the arbitration, and shall allocate the costs of the arbitration among the parties as it determines appropriate.

(5) The arbitral tribunal shall take all additional steps as it determines appropriate to assure confirmation or other recognition and enforcement of its awards.

684.20. Change of Award.

Upon application by a party filed within thirty days' of the issuance of an award, the arbitral tribunal may vacate, clarify, correct or amend an award. A copy of the application shall be delivered to all parties to the arbitration personally or by registered or certified mail unless such delivery proves impossible after the exercise of due diligence. Thereafter the parties shall be given adequate opportunity to respond in writing. In reaching its decision the tribunal may hold further hearings, take additional evidence and accept written submissions from the parties.

Part III. *Court Proceedings in Connection with Arbitration.*

684.21. Scope of this Part.

This Part shall apply to any arbitration within the scope of this Act, whether or not the arbitration is subject to the provisions of Part II hereof.

684.22. Court Proceedings to Compel Arbitration and to Stay Certain Court Proceedings.

(1) A person may apply to a circuit court of this state for an order compelling arbitration if that person claims that another party to a dispute has entered into a written undertaking to arbitrate that dispute and after notice has refused or otherwise failed to arbitrate in accordance with the undertaking. If the court, sitting without a jury, finds that the party refusing or otherwise failing to arbitrate has, in fact, given the undertaking claimed, the order compelling arbitration shall issue without regard to whether the place of arbitration is within or without this state or the arbitration is subject to Part II of this Act, unless the court finds:

(a) that there was fraud in the inducement of the written undertaking to arbitrate; or

(b) that submission of the dispute to arbitration would be contrary to the public policy of this state or of the United States; or

(c) that an arbitral tribunal empaneled in accordance with the written undertaking to arbitrate has previously determined that the dispute is not arbitrable or that the undertaking is invalid or unenforceable.

All other questions, including whether the dispute is arbitrable or the written undertaking to arbitrate is subject to defenses or is otherwise invalid or unenforceable, shall be for the arbitral tribunal to decide. If any part of a dispute which cannot be submitted to arbitration by reason of clauses (a) to (c) above is severable from the remainder of the dispute, the court may order arbitration to proceed with regard to the remainder.

(2) Upon timely application by a party, an action or proceeding in a court of this state involving a dispute that is subject to arbitration shall be stayed by the court if an order compelling arbitration of the dispute could issue under subsection (1). The stay may, upon application by a party, be accompanied by an order compelling arbitration. This subsection shall not apply to any court proceeding pursuant to Section 684.23 or Section 684.24.

(3) Upon timely application by a party, a circuit court of this state may enjoin another party from proceeding with an action before any court within or without this state involving a dispute that is subject to arbitration if an order compelling arbitration of the dispute could issue under subsection (1). The in-

junction may, upon application by a party, be accompanied by an order compelling arbitration. This subsection shall not apply to any court proceeding pursuant to Section 684.23 or Section 684.24, or for comparable relief in a court not of this state.

(4) Upon timely application by a party, a circuit court of this state may stay the arbitration of a dispute if an order compelling arbitration could not issue under subsection (1). Such stay shall issue whether the place of arbitration is within or without this state.

684.23. Court Proceedings During Arbitration.

(1) Upon application by a party to a written undertaking to arbitrate, a circuit court of this state may appoint an arbitral tribunal or any member thereof or successor thereto if the parties have failed to agree upon a method of appointment or if the method agreed upon fails or cannot be followed and, in either case, the parties have not otherwise agreed upon a named arbitrator or arbitrators. Any arbitrator so appointed shall exercise all powers and functions provided for in the written undertaking to arbitrate.

(2) Upon application by an arbitral tribunal, a circuit court of this state shall enforce any subpoena, demand or order of the tribunal for the attendance of witnesses, the production of books, records, documents or other evidence, the taking of depositions or the obtaining of other discovery, in the manner provided by law for the enforcement of subpoenas, demands or other such orders in civil actions, and shall, to the fullest extent of its powers, render any other assistance as the arbitral tribunal may request, including issuance of letters rogatory or other requests for foreign judicial assistance.

(3) Upon application by an arbitral tribunal (or by a party authorized by a tribunal to make the application), a circuit court of this state may grant any interim relief, including without limitation temporary restraining orders, preliminary injunctions, attachments, garnishments or writs of replevin, which it is empowered by law to grant. All actions under this subsection shall be subject to such procedural requirements and not other conditions as would apply in a comparable action not pertaining to an arbitration.

(4) The provisions of subsection (3) are without prejudice to the right of a party to an arbitration to seek interim relief directly from any court of competent jurisdiction, provided that

no such relief shall be granted by the courts of this state 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. The tribunal shall be deemed a party in interest in any such action. Any court of this state that issues an order for interim relief as provided above shall, upon application by the tribunal, modify or terminate its order as appropriate.

(5) Upon application by a party showing that the arbitral tribunal has unduly delayed issuance of its final award, a circuit court of this state may fix a time within which a final award must issue, but only if the place of arbitration is within this state or the arbitration is subject to Part II of this Act. The tribunal shall be deemed a party in interest in any such action.

(6) The powers conferred upon the courts by this section may be exercised without regard to whether the place of arbitration is within or without this state, unless expressly otherwise provided.

684.24. Court Proceedings upon Final Awards.

(1) Any party to an arbitration within the scope of this Act may apply to a circuit court of this state for an order to confirm or vacate any final award or to declare that the award is not entitled to confirmation by the courts of this state. The court shall dispose of all such applications as provided in paragraphs (a) through (c) below without regard to the law of the place of arbitration, the law governing the award, or whether a court of law or equity would apply the law or decisional principles applied by the arbitral tribunal or would grant the relief provided for in the award.

(a) The court shall confirm the award without regard to the place of arbitration unless one or more of the grounds set forth in Section 684.25 is established by way of an affirmative defense. If such a defense is established and the conditions set forth in paragraph (b) below are met, the court, upon application, shall vacate the award without regard to any time limit contained in subsection (3)(b) below; otherwise it shall issue an order declaring that the award is not entitled to confirmation by the courts of this state.

(b) The court shall grant an application to vacate the award if (i) the applicant establishes one or more of the

grounds set forth in Section 684.25 and (ii) either the place of arbitration was in this state or the arbitration was subject to Part II of this Act. If the applicant fails to establish one or more of the grounds set forth in Section 684.25, the court, upon application by any party, shall enter an order confirming the award.

(c) The court shall declare that the award is not entitled to confirmation by the courts of this state if the applicant establishes one or more of the grounds set forth in Section 684.25, but the place of arbitration was outside this state and the arbitration was not subject to Part II of this Act.

(2) In any action under subsection (1), the judgment of a court in a foreign country determining whether one or more of the grounds set forth in Section 684.25 is established shall be accorded the effect normally given foreign country judgments by the courts of this state.

(3) The applications referred to in subsection (1) shall be brought within the following time limits:

(a) An application to confirm an award shall be brought within the time provided in Section 95.011(1) for the enforcement of judgments;

(b) An application to vacate an award or for a declaration that the award is not entitled to confirmation by the courts of this state shall be brought within 90 days of receipt of the final award by the applicant, or, in the case of an application based on Sections 685.25(e) or (f) below, within 90 days of the date when the circumstances giving rise to the application were discovered or should with due diligence have been discovered by the applicant.

(c) If any party to an arbitration shall die or become incompetent, a court may extend the foregoing time limits.

(4) In considering an application filed under subsection (1), a court may request the arbitral tribunal to clarify its award and may modify or correct the award for any evident miscalculation or mistake in the description of any person or property or for any imperfection of form not affecting the merits.

(5) A judgment or decree of a court of this state confirming an award may, upon application, be vacated at any time on the grounds set forth in Section 684.25(e) and (f), provided the application is made within 90 days of the date when the circumstances which are the basis for the application were first discov-

ered or should with due diligence have been discovered by the applicant.

(6) If a final award has been reduced to judgment or made the subject of official action by any court, tribunal or other governmental authority outside the United States, the courts of this state shall, except as provided in subsection (2), confirm, vacate or declare the award not entitled to confirmation by the courts of this state without regard to any term or condition of the foreign judgment or official action and without regard to whether the award may be deemed merged into the judgment.

(7) For purposes of this Section and of Section 684.25, an arbitral award shall be deemed a final award unless:

(a) it is expressly designated an interim or interlocutory award or by its terms is not final; or

(b) an application to vacate, clarify, correct or amend the award is pending before the arbitral tribunal; or

(c) under the rules applicable to the arbitration it is subject to further review by any arbitral authority.

For purposes of the law of this state, an award which is final as described above shall be deemed final regardless of whether judicial confirmation or other official action is necessary to render that award final within the contemplation of any foreign law which may be applicable to the arbitration.

684.25. Grounds for Vacating an Award or Declaring It Not Entitled to Confirmation.

(1) A final award shall be vacated or declared not entitled to confirmation by the courts of this state only if one or more of the following grounds is established:

(a) if there was no written undertaking to arbitrate, or there was fraud in the inducement of that undertaking, or an arbitral tribunal empaneled in accordance with the undertaking had previously determined that the dispute was nonarbitrable or that the undertaking was invalid or unenforceable, unless the party challenging the award participated on the merits in the arbitral proceedings leading to the award without first having submitted such questions to the arbitral tribunal; or

(b) if the party challenging the award was not given notice of the appointment of the arbitral tribunal or of the

arbitral proceedings, unless notice proved impossible after the exercise of due diligence or that party participated in those proceedings on the merits of the dispute; or

(c) if by refusing to hear material evidence or otherwise, the arbitral tribunal conducted its proceedings so unfairly as to 'prejudice substantially the party challenging the award; or

(d) if the award was obtained by corruption, fraud or undue influence or is contrary to the public policy of the United States or of this state; or

(e) if any neutral arbitrator had a material conflict of interest with the party challenging the award, unless that party had timely notice of the conflict and proceeded without objection to arbitrate the dispute; or

(f) if the award purports to resolve a dispute which the parties have not agreed to refer to the arbitral tribunal; *provided*, that a court may determine instead to vacate or to declare not entitled to confirmation only that portion of the award that deals with the excluded dispute; or

(g) if the arbitral tribunal was not constituted in accordance with the written undertaking to arbitrate, unless the party challenging the award participated in the arbitral proceedings without first objecting thereto.

(2) A court in issuing an order to vacate an award or to declare that an award is not entitled to confirmation by the courts of this state may also order that all or part of the dispute between the parties be resubmitted to the same or a new arbitral tribunal, as it deems appropriate.

684.26. Award in a Foreign Currency.

The courts of this state shall confirm a final award notwithstanding the fact that it grants relief in a currency other than United States dollars. In such case the court, in addition to entering the order in the foreign currency designated by the award, shall, upon application by a party also enter that order in United States dollars determined by reference to the market rate of exchange prevailing in this state on the date the award was issued, unless the award itself fixes some other date. If no such market rate of exchange is available, the court shall fix the rate it deems appropriate. Judgment or decree may be entered upon such an or-

der as provided in Section 684.27.

684.27. Judgment of Decree on a Final Award.

Once an order confirming or vacating an award or declaring that an award is not entitled to confirmation by the courts of this state has been rendered, a judgment or decree shall be entered in conformity with that order to be enforced like any other judgment or decree. Upon entry of a judgment or decree, the court may also, in its discretion, award costs and disbursements.

684.28. Judgment Roll, Docketing.

(1) Upon entry of a judgment or decree, the clerk shall prepare the judgment roll consisting, to the extent filed, of the following:

- (a) the final award; and
- (b) a copy of the order; and
- (c) a copy of the judgment or decree.

(2) The judgment or decree may be docketed as if rendered in a civil action.

684.29. Application to Circuit Court; Form and Process.

An application to a circuit court of this state under this Act shall be by motion and shall be heard in the manner provided by law or rule of court for the making and hearing of motions. Process in connection with such an application shall be served as provided in Section 48.196.

684.30. Consent to Jurisdiction.

The conduct of an arbitration within this state, or the making of a written undertaking to arbitrate which provides for arbitration within this state or subject to Part II of this Act, shall constitute a consent by the parties to that arbitration or undertaking to the exercise of *in personam* jurisdiction by the courts of this state in any action authorized by this Part. In such cases, the agreement by a member of the arbitral tribunal to serve as arbitrator shall likewise constitute a consent by that member to the exercise of *in per-*

sonam jurisdiction over that member by the courts of this state in any action authorized by this Part.

684.31. Venue.

An application under this Act shall be made to the circuit court for the county in which any party to the arbitration resides or has a place of business, or within which is located the place of arbitration. If no such party resides or has a place of business within this state and if the place of arbitration is outside this state, then the application may be made to any circuit court of this state. All applications made subsequent to an initial application under this Act shall be made to the court hearing the initial application, unless it shall order otherwise.

684.32. Appeals.

(1) An appeal may be taken from:

(a) an order under Section 684.22 granting or denying an application to compel or to stay arbitration, or to stay judicial proceedings; or

(b) an order granting or denying an application under Section 684.23(2) for assistance in obtaining evidence or an application under Section 684.23(3) for interim relief; or

(c) an order under Section 684.24 confirming or vacating a final award, or declaring that an award is not entitled to confirmation by the courts of this state; or

(d) a judgment or decree entered pursuant to Section 684.27.

(2) Appeals shall be taken in the manner and be subject to the same scope of review as appeals from orders or judgments in civil actions. All appeals shall be confined to questions within the competence conferred by this Act upon the court from which the appeal is taken or to the question whether the court below exceeded that competence.

684.33. Transitional Rule.

This Act shall apply to all written undertakings to arbitrate within the scope of this Act, whether entered into before or after

the effective date hereof; *provided*, that Part III of this Act shall not apply to any judicial proceeding commenced prior to that date, and Part II of this Act shall not apply to any arbitration commenced prior to that date unless the parties agree to the contrary in writing.

684.34. Severability and Characterization.

(1) If any provision of this Act or its application to any particular person or circumstance is held invalid, that provision or its application shall be deemed severable and shall not affect the validity of other provisions or applications of this Act.

(2) If, in any arbitral, judicial or other official proceeding within or without this state it shall become necessary to classify any provision of this Act as substantive or procedural within the meaning of those terms in the conflict of laws, all provisions of this Act relating to the obligation of the parties to arbitrate, to the conduct of the arbitral proceedings and to the validity of arbitral awards shall be classified as substantive.

684.35. Immunity and Indemnity for the Arbitrators.

No person may sue in the courts, or assert a cause of action under the law, of this state against any arbitrator arising from the performance of that arbitrator's duties. Notwithstanding the foregoing, any arbitrator in an arbitration subject to Part II of this Act shall be liable to any party to that arbitration for compensatory damages arising out of fraud, corruption or breach of confidentiality in violation of Section 684.19(4) by that arbitrator, and an action to recover such damages may be brought in the courts of this state. Any person who commences such an action shall indemnify and hold the accused arbitrator harmless from all costs and expenses incurred or consequences suffered by the latter as a result of that action unless that arbitrator is found to have committed the fraud, corruption or breach of confidentiality charged. The court in which such action is filed shall require the complaining party to post such bond as it determines appropriate to secure the obligation to indemnify.

Part IV. *Changes to Other Florida Statutes.*

Chapter 48 of the Florida Statutes would be amended by ad-

ding a new Section 48.196 to read as follows:

48.196. Service of Process in Connection with Actions under the Florida International Arbitration Act.

(1) Any process in connection with the commencement of an action before the courts of this state under the Florida International Arbitration Act, Chapter 684 of the Florida Statutes, shall be served:

(a) in the case of a natural person, by service upon:

(i) that person; or

(ii) any agent for service of process appointed in or pursuant to any applicable agreement or by operation of any law of this state; or

(iii) any person authorized by the law of the jurisdiction where process is being served to accept service for that person.

(b) in the case of any person other than a natural person, by service upon:

(i) any agent for service of process appointed in or pursuant to any applicable agreement or by operation of any law of this state; or

(ii) any person authorized by the law of the jurisdiction where process is being served to accept service for that person; or

(iii) any person, whether natural or otherwise and wherever located, who by operation of law or internal action is an officer, business agent, director, general partner or managing agent or director of the person being served; or

(iv) any partner, joint venturer, member or controlling shareholder, wherever located, of the person being served if the latter does not have by law or internal action any officer, business agent, director, general partner or managing agent or director.

(2) The process served under subsection (1) shall include a copy of the application to the court together with all attachments thereto.

(3) Process under subsection (1) shall be served in the following manner:

(a) in any manner agreed upon, whether service occurs within or without this state; or

(b) if service is within this state, in the manner provided in Sections 48.021 and 48.031, or, if applicable under their terms, in the manner provided in Sections 48.161, 48.183, 48.23 or Chapter 49; or

(c) if service is outside this state:

(i) by personal service by any person authorized to serve process in the jurisdiction where service is being made, or appointed to do so by any competent court in that jurisdiction; or

(ii) in any other manner prescribed by the laws of the jurisdiction where service is being made for service in an action before a local court of competent jurisdiction; or

(iii) in the manner provided in any applicable treaty to which the United States is a party; or

(iv) in the manner prescribed by order of the court; or

(v) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the person being served; or

(vi) if applicable, in the manner provided in Chapter 49.

(4) No order of the court is required for service of process outside this state. The person serving process shall make proof of service to the court by affidavit, or as prescribed by the law of the jurisdiction where process is being served or in an order of the court. Such proof shall be made prior to expiration of the time within which the person served must respond. If service was by mail, the proof of service shall state the date and place of mailing, and shall include a receipt signed by the addressee or other evidence of delivery satisfactory to the court.

Chapter 95 of the Florida Statutes would be amended by adding a new Section 95.051(g) to read as follows:

(g) The pendency of any arbitral proceeding pertaining to a dispute that is the subject of the action.

3. EXTENDED COMMENTARY ON THE FLORIDA INTERNATIONAL ARBITRATION ACT

A. *Introduction.*

As a general rule, the early reaction of the state and federal courts of the United States to arbitration was one of hostility, prompted by concern over usurpation of the judiciary's role. However, over the past few decades that reaction has dramatically changed, and the judiciary now generally favors arbitration as a means of reducing the burden on, and the congestion of, the courts. Arbitration has the additional benefit of largely shifting the cost of the dispute-resolution process from the courts, which are supported by the taxpayers, to the parties, who themselves bear the cost.

Florida's existing arbitration law - the Florida Arbitration Code, Chapter 682 of the Florida Statutes - was enacted in 1957, and has not been significantly amended since that time. Since the growth and development of Florida as a center for international business and commerce has largely occurred over the past fifteen years, it is not surprising that the Florida Arbitration Code was not drafted with an eye to international arbitration. As a result, for the reasons set forth in the ensuing pages of this commentary, the Florida Arbitration Code is inadequate as a legal framework for modern international arbitration.

Since arbitration is a creature of contract between parties, it must exist and operate within the context of a system of law. In selecting the jurisdiction for international arbitrations, experienced parties and their legal counsel take into consideration first and foremost the laws of that jurisdiction pertaining to arbitration. If those laws do not enforce or respect arbitration agreements, or allow excessive judicial interference in the arbitral process, or do not permit a party to obtain judicial assistance where appropriate in preventing the other party from ignoring the arbitration agreement and resorting to litigation, as well as in enforcing any award which may result, that jurisdiction will usually be rejected.

The members of the task force, as well as many other people, believe that Florida could, over a period of time, emerge as a significant center for international arbitration particularly as concerns disputes involving Latin America and the Caribbean. Such a

development would naturally complement the emergence of Florida over the past fifteen years as a regional center for international banking and commerce. However, for this to happen Florida must have a modern statute which facilitates, rather than hindering, international arbitration. That is the objective of the Florida International Arbitration Act.

While it is beyond the competency of the task force to assess the economic impact that the emergence of Florida as a regional center for international arbitration could have upon this state, it seems possible that that impact could over a period of years be significant. Parties to international arbitrations conducted in Florida would in many instances stay in hotels and frequent restaurants and other entertainment facilities in the state. The arbitrations might frequently involve service industries (lawyers, accountants, translators and other experts and consultants) located in the state. In contrast to these possible benefits, it is difficult to imagine any negative economic consequences that could result from the enactment of the Florida International Arbitration Act.

B. *General Discussion of the Act.*

Currently, the legal framework in Florida for an international arbitration consists of the Florida Arbitration Code, the Federal Arbitration Act, 9 U.S.C. Section 1 *et seq.*, and the New York Convention, which was implemented by 9 U.S.C. Section 201 *et seq.*

The Federal Arbitration Act (the "FAA"), which was enacted by Congress in 1925 and was last significantly amended in 1947, generally makes written arbitration agreements enforceable by the federal and state courts of the United States. The FAA also contains minimal provisions concerning the conduct of an arbitration subject to the FAA, as well as various provisions concerning the role of the courts in connection with arbitrations subject to the FAA and with awards issued in those arbitrations.

By its terms, however, the FAA is limited to contracts involving the foreign, interstate or maritime commerce of the United States. The result is that, for example, an arbitration agreement between a French company and a Colombian company relating to a joint venture in Colombia would not be subject to the FAA even if the agreement called for arbitration in Florida.

The gap which results from this limitation on the scope of the FAA must be filled by state law. Yet the Florida Arbitration Code,

as interpreted by the courts of this state, far from filling this gap only makes enforceable those arbitration agreements which by their terms are not governed by a law other than Florida law, and which call for arbitration in this state.

To apply this limitation to the example given above, assume that the arbitration agreement between the French and Colombian companies was governed by French or Colombian law, or called for arbitration outside of Florida. That agreement would not be enforceable under the Florida Arbitration Code.

There is no logical reason why the laws of Florida should be so parochial as to render enforceable in Florida only those arbitration agreements which are governed by Florida law and call for arbitration in Florida. Instead, if Florida is to become a center for international arbitration and play a leadership role in this field, the laws of this state must permit enforcement of arbitration agreements governed by the laws of other jurisdictions regardless of where the arbitration may be conducted. In point of fact, the parties to an arbitration agreement in international commerce often select the laws of one jurisdiction to govern their agreement, while selecting a different jurisdiction as the site for any arbitration that may take place. Florida must not close its doors to such arbitrations.

Once an award is issued in an international arbitration, its enforceability in jurisdictions other than the jurisdiction where it was issued may become an important consideration. In many cases, the enforcement of an arbitral award outside the jurisdiction where it was issued can be problematic. To help deal with this problem, the New York Convention was adopted in 1958 under the auspices of the United Nations. Subject to certain exceptions, the New York Convention requires the courts of a country which is a party to the Convention to enforce arbitral awards emanating from any other country that is also a party.

However, most of the nations in Latin America and the Caribbean are not parties to the New York Convention. As a result, enforcement in Florida of arbitral awards issued in those countries is not governed by the New York Convention, but by Florida law. Although this situation will be ameliorated somewhat upon eventual ratification by the United States of the Inter-American Convention on International Commercial Arbitration, which has already been ratified by various Latin American countries, it is uncertain when ratification by the United States and other major

Latin American countries will occur.

The Florida Arbitration Code makes no provision for the enforcement of arbitral awards other than those issued under the Code itself. In other words, arbitral awards issued outside of Florida, or in connection with arbitration agreements governed by a law other than Florida law, fall outside the scope of the enforcement provisions of the Florida Arbitration Code. As a result, it is questionable whether awards issued abroad currently could be enforced by the courts of this state unless the New York Convention applied.

The task force believes that awards issued in international arbitrations should be enforceable by the courts of this state regardless of the law that governed the arbitration agreement or the place where the arbitration was conducted. Having freely selected international arbitration as the method for resolution of disputes, a party to an arbitration should not be able to escape the consequences of having an award issued against him due to subtleties such as the place of arbitration or the law governing the arbitration agreement. The Florida International Arbitration Act, while maintaining safeguards to ensure compliance with fairness and due process concepts, will allow the enforcement by the Florida courts of awards issued in international arbitrations conducted in any jurisdiction and under any governing law.

Another significant difference between the Florida Arbitration Code and the new Florida International Arbitration Act is that the Act has deliberately been drafted to encompass and encourage the possibility that arbitrations may be conducted outside of Florida under its provisions. In other words, the parties to an international arbitration to be conducted in Country X, which does not have an arbitration statute or whose arbitration statute is unsatisfactory, may voluntarily elect to conduct that arbitration under the applicable provisions of the Florida International Arbitration Act.

To this end, the task force has substantially modified and updated in the Act the provisions of the Florida Arbitration Code pertaining to the conduct of arbitrations. As a result, the provisions of Part II of the Act, while generally subject to preemption by any system of arbitral rules (such as the UNCITRAL rules, the American Arbitration Association rules, or the International Chamber of Commerce rules) selected by the parties to govern their arbitration, themselves create a flexible, comprehensive and modern framework for international arbitration.

It should also be emphasized that, as currently drafted, the Act does not contemplate the repeal of the Florida Arbitration Code. Instead, that Code would continue to exist, only with its scope limited to domestic arbitrations, while international arbitrations would be governed by the Florida International Arbitration Act.

The task force is aware that certain sectors of the business community in this state may have become accustomed to arbitration under the Florida Arbitration Code, and may for various reasons prefer its provisions to those of the Act. The task force believes that almost all the arbitrations engaged in by those sectors are domestic, and would be excluded from the scope of the Florida International Arbitration Act under its terms. Rather than modifying provisions of the Act which are important if Florida is to attract international arbitrations in order to adapt the Act to somewhat different considerations involved in domestic arbitration, the task force would urge the retention of the Florida Arbitration Code for domestic arbitrations.

The Act consists of four Parts. Part I sets forth the title of the Act, the legislative policy underlying its enactment, and the scope of the Act. Part II sets forth procedural rules for an arbitration within the scope of the Act (as defined in Part I) which is also subject to Florida law under the choice of law rules set forth in Part II. Part III contains provisions pertaining to actions before the courts of Florida or under Florida law relating to arbitrations of disputes within the scope of the Act (as defined in Part I). Part IV consists of necessary amendments to other laws. To facilitate comparison with the Florida Arbitration Code, reference will be made for each section of the Act to the corresponding provisions of that Code, if any.

C. *Part I. Title, Policy, Scope and Definitions.*

1. Section 684.01. Title. (Corresponding provisions in Florida Arbitration Code: 682.01 and 682.02)

This section identifies the common name by which the Act is to be known and cited.

2. Section 684.02. Policy.

a. *Subsection (1)* announces the two basic legislative objectives that the Act is intended to serve: namely, to encourage the use of arbitration in settling international disputes, and to confer upon the courts of Florida all the powers that they might need to assist in making arbitration a genuinely useful means of settling those disputes. More broadly, this subsection makes clear that the law of Florida no longer harbors that hostility toward arbitration that Florida courts have at times past displayed. Indeed, the Act places the courts of this state under a positive injunction to do all in their power to encourage arbitration and to interpret the Act with that broad object foremost in mind.

b. *Subsection (2)* makes clear that written undertakings to arbitrate future as well as existing disputes are valid and enforceable whether or not the dispute is sufficiently justiciable to be the subject of judicial resolution. Unlike the Florida Arbitration Code, however, the Act does not make this declaration in unqualified terms. The Act instead contains two formulations. First, it declares that all such undertakings, if within the scope of the Act (see discussion of Section 684.03 below), are enforceable by the Florida courts "in accordance with Section 684.22" (discussed below). This is a far more accurate statement than that set forth in the Florida Arbitration Code, since arbitral undertakings are not unqualifiedly enforceable, any more than any other type of undertaking. Second, with regard to any arbitral undertaking the validity of which is, under applicable conflict of laws principles, to be governed by Florida law, the Act declares that the question of validity will be determined according to ordinary principles of contract law. In other words, arbitral undertakings controlled by the law of this state are as valid as any other contract. This sets aside the traditional common law rule under which agreements to arbitrate were always revocable, but at the same time makes clear that the usual contractual defenses (such as lack of consideration, frustration or breach) are available. It must be emphasized, however, that the availability of a defense to a contract cannot be used to impair the obligation to arbitrate that defense. The written undertaking to arbitrate survives a challenge to its or the underlying contract's validity or enforceability for the purpose of determining those questions. The role of the Florida courts in determining those questions is set out in Sections 684.22 and 684.25.

Last, unlike the Florida Arbitration Code, the Act does not limit enforcement solely to arbitral undertakings that are "subject to" the law of Florida. This is the language in the Florida Arbitration Code that has created the very gap in the authority of the Florida courts which the Act is designed to close. In other words, any written undertaking to arbitrate a dispute that is within the scope of the Act and meets the requirements of Section 684.22 is enforceable by the Florida courts provided that the court has personal jurisdiction over the defendant. This is so even if the arbitration is to take place outside Florida or under the law of some other jurisdiction.

3. Section 684.03. Scope of this Act. (Corresponding provision in Florida Arbitration Code: none)

This section limits the Act solely to international arbitrations. As noted above, purely domestic arbitrations will remain subject to the existing Florida Arbitration Code with its attendant body of judicial interpretations.

To understand the function of this section within the overall scheme of the Act, it should be observed that even if a particular arbitration pertains to a dispute arising from an international relationship and is, therefore, within the scope of the Act as defined by this section, that does not necessarily mean that the arbitration is "subject to" all of the provisions of the Act. The question whether a particular provision of the Act will actually apply can only be answered by reference to the scope provisions set forth at the outset of each of the two principal Parts of the Act (for Part II, see Section 684.05; for Part III, see Section 684.21). In other words, Section 684.03 does no more than establish a broad threshold requirement.

If in the course of the legislative process it should be deemed appropriate to expand or contract the scope of the Act vis-a-vis the existing Florida Arbitration Code, that can be achieved by modifying this section.

a. *Subsection (1)* sets forth the factual elements that must be present for an arbitration to be considered "international." It sets the essential boundary lines of the Act, but the lines drawn are very broad. The Act is intended to apply to virtually any arbitration that exhibits some "foreign" or "international" element, and it is expected that the Act will be interpreted in keeping with this

broadly inclusive intention. The language in paragraph (b) is drawn from 9 U.S.C. Section 202, which implements the New York Convention.

b. *Subsection (2)* further withdraws from the scope of the Act certain matters. Paragraph (a) withdraws all arbitrations relating to real property located in Florida, unless the parties expressly stipulate that they wish the arbitration to proceed under the Act. This would include disputes relating to construction contracts. Note, however, that even if the parties enter into such a stipulation, the arbitration must still satisfy the elements of an "international" arbitration set out in subsection (1) if the Act is to apply at all. Paragraph (b) excludes arbitration of disputes involving domestic relations or of a political nature between governments. Most legal systems around the world would look askance at the use of arbitration to settle disputes arising out of domestic relations, such as inheritance, divorce, property settlements, child custody, etc. Indeed, an attempt to arbitrate such matters would be viewed in many countries as contrary to public policy. In like fashion, the arbitration of political disputes between governments, while widely approved, is generally considered by the international community to be a process requiring special rules differing from those normally employed in arbitrating disputes between private parties, or between a private party and a government acting in a proprietary or commercial capacity. Therefore, it is not considered appropriate for arbitration of such disputes to fall under a general arbitration statute such as the Act.

c. *Subsection (3)* is a guide to arbitrators and courts — particularly foreign courts. If, for example, a foreign court under its own conflict of laws rules is required to refer to the arbitral law of Florida, this subsection guides the court to the Act rather than to the Florida Arbitration Code or the common law of Florida, provided that the arbitration comes within the scope of the Act.

4. Section 684.04. Definitions. (Corresponding provision in Florida Arbitration Code: none)

a. *Subsection (1)* ("person"). The Act draws upon the standard definition contained in the Florida Statutes, while emphasizing that governments and their agencies, instrumentalities and subdivisions are included.

b. *Subsections (2) and (3)* ("resident" and "non-resident" of

the United States). Consistent with the earlier stated intention of giving the Act the broadest possible application, subsection (3) would permit a natural person (including a United States citizen) who maintains two residences, one in the United States and one abroad, to be considered a "nonresident of the United States" if that were necessary to classify an arbitration as an international arbitration within the scope of the Act (see Section 684.03).

c. *Subsection (4) ("written undertaking to arbitrate")*. This is a critical term used frequently throughout the Act. First, note that the term is unlikely to encompass the whole of a contract in which a promise to arbitrate appears. If, for example, a contract for the sale of goods contains an arbitration clause, only that clause, and not the remainder of the contract, will constitute the "written undertaking to arbitrate". Note, second, that the definition requires only bare written words undertaking to arbitrate. It requires only an "undertaking", not an agreement or contract, to arbitrate. For the purposes of some of its provisions, the Act makes clear that a valid, fully enforceable contract or agreement to arbitrate is required. However, an inquiry into validity or enforceability is not necessary to determine whether a written undertaking to arbitrate exists. The reason for this definition is technical. With so basic a definition to work with, it is much easier to specify with precision elsewhere in the Act the line between those questions pertaining to the promise that are for the courts to determine, and those questions that should be left to the arbitrators.

D. Part II. *Conduct of Arbitrations under this Act.*

Part II contains rules of procedure which, taken together, provide a comprehensive framework for the conduct of international arbitration. Yet, the procedural rules in Part II are not, with one exception (Section 684.14), mandatory. Reflecting a fundamental principle of international arbitration — the principle of "party autonomy" — the parties may choose to modify or supplement these rules. Nevertheless, as a framework Part II is a vital part of the Act. It assures that the arbitrators will have the power and the guidance necessary to perform their task should the parties, by oversight or design, choose not to specify their own rules, or should they, in specifying rules, leave gaps which the arbitrators are subsequently called upon to fill.

1. Section 684.05. Scope of this Part. (Corresponding provision in Florida Arbitration Code: none)

Section 684.05 defines when the framework contained in Part II comes into play; provided, of course, that the arbitration involves a dispute within the scope of the Act as set forth in Section 684.03.

In prescribing these circumstances, Section 684.05 sets out, in descending order of preference, three separate "choice of law" rules which are broadly reflective of an emerging international consensus. First, if the parties in the "written undertaking to arbitrate" expressly provide that the Act will control, that instruction is to be followed and Part II of the Act will apply. Second, if the "written undertaking to arbitrate" is silent as to the law that controls that undertaking, but is part of a larger contract the interpretation of which is governed by Florida law, then Florida arbitral law will also control and Part II of the Act will apply. This latter provision constitutes a departure from the old rule under which the conduct of an arbitration was controlled by the law of the place of arbitration. That rule was largely a vestige of what, in the context of arbitration, is the distinctly outmoded idea that procedural questions must be resolved according to the law of the forum. Accordingly, many jurisdictions have concluded that if the rights and duties of the parties to a contract are to be determined by reference to a particular law, then normally the arbitration of any dispute arising out of that contract should also be conducted under that law. Third, even if the underlying contract is not governed by Florida law, Part II of the Act will apply if the conflict of laws rules which the arbitral tribunal deems applicable mandate that the arbitral law of Florida should apply to the arbitration. In this situation, it will be up to the arbitrators to decide what conflict of laws rules to follow. A number of modern conflicts theories could, under appropriate circumstances, lead the arbitral tribunal to select the Act to govern the arbitration even though the parties' substantive obligations were to be governed by some other law.

It should be emphasized that any arbitration of a dispute within the scope of the Act which is to be conducted in accordance with Florida law will be subject to Part II of the Act. This is the result of Section 684.03(3) and Section 684.05 combined. In other words, if the dispute being arbitrated is within the scope of Section 684.03, to say that the arbitration is to be conducted in accordance

with Florida law is synonymous with saying that it is subject to Part II of the Act, and *vice-versa*. Note also that an arbitration which is subject to Part II of the Act under Section 684.05 (and whose conduct is therefore governed by Florida law) is considered to be so subject even if the parties to the arbitration, by selecting a system of rules to govern the arbitration, opt out of all or most of the procedural sections of Part II.

2. Section 684.06. Conduct of the Arbitration. (Corresponding provision in Florida Arbitration Code: none)

a. *Subsection (1)* is based upon another fundamental principle of international arbitration — namely, that the arbitral tribunal should be given wide discretion to conduct the arbitration as it deems best, constrained only by any rules which the parties adopt either expressly or by implication. The flexibility that can be achieved by giving broad discretion to the arbitrators is among the principal reasons why arbitration is so useful in settling international disputes.

b. *Subsection (2)* simply confirms the traditional power of arbitrators to be the judge of their own jurisdiction. The question of whether a Florida court, in a proceeding to compel or stay arbitration, may also judge these issues is dealt with in Section 684.22, which is discussed below, and not in this subsection. Nevertheless, this subsection and Section 684.22 read together evidence a strong policy in favor of giving the arbitral tribunal exclusive authority over as many of these threshold jurisdictional issues as possible and confining the courts to a very limited role.

3. Section 684.07. Freedom of Parties to Fix Rules for the Arbitration. (Corresponding provision in Florida Arbitration Code: none)

Reflecting the principle of party autonomy, this section confers upon the parties the right to deviate in any way they choose from the rules set out in Part II of the Act. There is only one exception to this. The parties may not waive in advance their right to counsel.

In exercising the powers conferred upon them by this section, the parties can either adopt rules promulgated by some arbitral authority, such as the International Chamber of Commerce, the

American Arbitration Association, or the United Nations Commission on International Trade Law (UNCITRAL), or they can "custom make" their own rules.

It should be noted that the authority conferred upon the parties by this section only comes into play if it is first determined, under the "choice of law" rules set out in Section 684.05, that Part II of the Act is applicable. If Part II is not applicable, the right of the parties to formulate their own rules will depend upon what law applies to the arbitration. The arbitral laws of many jurisdictions contain so-called "mandatory provisions" which place definite limits upon the freedom of the parties to formulate rules.

Note that the term "written undertaking to arbitrate" is, under this section, given an additional meaning to that set forth in Section 684.04(5), discussed above; so that for the purposes of Part II of the Act that term includes any system of arbitral rules selected by the parties. It should be emphasized that the term is intended to comprehend both any such rules as may have been referred to in the written undertaking to arbitrate at the time it was entered into, as well as any rules agreed to by the parties subsequent to that moment, including after the commencement of the arbitration. All such rules are deemed to form part of the "written undertaking to arbitrate" under which the arbitration which is subject to this Part is being conducted.

4. Section 684.08. Notice Commencing Arbitration, Answer and Notices During Arbitration. (Corresponding provision in Florida Arbitration Code: none)

This section deals with three basic matters: commencing arbitration, the filing of an answer, counterclaim or crossclaim, and the giving of notices and exchange of documents during arbitration. More specifically:

a. *Subsection (1)* provides for the commencement of an arbitration by the giving of notice to all parties to the written undertaking to arbitrate, and also specifies the minimum content of that notice.

b. *Subsection (2)* specifies how the notice commencing arbitration is to be served.

c. *Subsection (3)* deals with the death or incapacity of a party to a written undertaking to arbitrate.

d. *Subsection (4)* authorizes the arbitral tribunal, once constituted, to determine the period of time within which answers, counterclaims and crossclaims must be filed in an arbitration. The reason why failure to answer constitutes a general denial of the claim set forth in the notice of arbitration is that in an arbitration subject to this Part there can be no default judgment. See discussion of Section 684.13(6) below.

e. *Subsection (5)* provides, consistent with subsection (4), that notices and documents during the arbitration are to be served upon the parties and the arbitral tribunal in the manner provided in the written undertaking to arbitrate, or in the absence thereof, as determined by the tribunal. It should be emphasized that the term "notice" as used in this subsection is intended to comprehend any type of communication that may be exchanged among the parties themselves, or among the parties and the tribunal, during the proceedings.

5. Section 684.09. Appointment of the Arbitral Tribunal. (Corresponding provision in Florida Arbitration Code: 682.04)

This section is noteworthy for three reasons. First, it contemplates and allows the possibility that the parties may, notwithstanding the provisions of the written undertaking to arbitrate, designate particular named individuals to constitute the arbitral tribunal. Second, it permits court intervention under Section 684.23(1) in the event the parties fail to agree on a method to appoint the tribunal, or the method selected by the parties fails. Third, the section adopts the rule that unless the parties otherwise agree, the tribunal shall consist of a single arbitrator. A similar rule is contained in the Federal Arbitration Act. 9 U.S.C. § 5.

6. Section 684.10. Mediation, Conciliation and Settlement. (Corresponding provision in Florida Arbitration Code: none)

This section is intended to encourage the amicable resolution of disputes among the parties. Unlike arbitration, mediation or conciliation do not involve an adjudication of the dispute between the parties, but rather a process of reconciliation and a resolution of the dispute by the parties themselves.

a. *Subsection (1)* is intended to encourage observance of agreements for mediation or conciliation among the parties. To

this end the arbitral tribunal is instructed, given the existence of such an agreement and a timely claim, to hold the arbitral proceedings in abeyance pending mediation or conciliation.

b. *Subsection (2)* allows the arbitral tribunal to propose settlement terms or to offer to act as mediator or conciliator.

c. *Subsection (3)* deals with the memorializing of any settlement of the dispute reached by the parties. If the settlement is embodied in an award, it becomes enforceable through court action in the same way as any other final award.

7. Section 684.11. Majority Action by the Arbitral Tribunal. (Corresponding provision in Florida Arbitration Code: 682.05)

This section calls for decision by a majority of the members of an arbitral tribunal, while authorizing the tribunal to give the presiding arbitrator authority to deal with procedural issues arising in the course of the arbitration, subject to review by the full tribunal.

8. Section 684.12. Consolidation of Arbitrations. (Corresponding provision in Florida Arbitration Code: none)

This section will permit greater efficiency in the arbitral process by permitting, subject to the limitations it specifies, consolidation of arbitrations in a manner roughly corresponding to the consolidation of court actions.

9. Section 684.13. Hearings; Place of Arbitration. (Corresponding provision in Florida Arbitration Code: 682.02)

This section sets forth certain procedural guidelines for the arbitration.

a. *Subsection (1)* requires the arbitral tribunal to hold a hearing if any party requests it. In the absence of a request, the tribunal may hold a hearing on its own initiative or may reach its decision on the basis of documents and other materials. If a hearing is to be conducted, notice of the hearing must be given to each party not less than fourteen days before the hearing, unless such notice proves impossible after the exercise of due diligence (for example, because the whereabouts of a party cannot be discovered after reasonable efforts). This can be a more aggravated problem in international arbitration because there are, simply put, more places to

hide. Appearance at a hearing without timely objection waives the notice requirement.

b. *Subsection (2)* provides for a cut-off date for amendments of claims, answers, counterclaims or crossclaims, or assertion of additional claims, counterclaims or crossclaims, by the parties. After that date, any addition or amendment is allowed only at the discretion of the arbitral tribunal.

c. *Subsection (3)* empowers the parties to determine the place of arbitration, or if the parties fail to make a determination, leaves it to the arbitral tribunal to determine that place having regard to the circumstances of the arbitration. The second sentence of this subsection affirms the choice of laws rules discussed above in the context of Section 684.05.

d. *Subsection (4)* allows the arbitral tribunal to meet at any place and by any means of communication it deems appropriate.

e. *Subsection (5)* provides for periodic adjournments of arbitral proceedings upon the arbitral tribunal's initiative or for good cause shown by a party, as long as the proceedings do not extend beyond the date fixed by the parties for issuance of a final award.

f. *Subsection (6)* allows the arbitral tribunal to dismiss claims, counterclaims or crossclaims which are not prosecuted with reasonable diligence. In addition, in accordance with international arbitration practice, this subsection prohibits the issuance of awards based solely on the default of a party, requiring the tribunal in cases where a party fails to defend a claim, crossclaim or counterclaim, to make its decision on the basis of the evidence before it.

10. Section 684.14. Representation by Attorney. (Corresponding provision in Florida Arbitration Code: 682.07)

This section is based on Section 682.07 of the Florida Arbitration Code.

11. Section 684.15. Evidence, Witnesses, Subpoenas, Depositions. (Corresponding provision in Florida Arbitration Code: 682.08)

This section pertains to evidence in an arbitral proceeding.

a. *Subsection (1)* makes clear that the arbitral tribunal determines the relevance and materiality of evidence, and need not follow formal rules of evidence. It also provides that, in making its

decision, the tribunal is not limited to evidence produced by the parties, but may use any lawful method to obtain additional evidence. This is consistent with international arbitration practice, under which the tribunal is responsible for establishing the facts necessary to its decision, rather than relying solely on evidence preferred by the parties.

b. *Subsection (2)* allows the arbitral tribunal to issue subpoenas, administer oaths, order depositions or discovery, and appoint experts to report to it.

c. *Subsection (3)* allows the arbitral tribunal to fix fees for the attendance of witnesses.

d. *Subsection (4)* authorizes the arbitral tribunal to obtain judicial or other official assistance in any jurisdiction in exercising the foregoing powers. How such assistance must be requested, and whether it will be forthcoming, will depend on the law of the jurisdiction involved. As concerns assistance to be rendered by Florida courts, see Section 684.23(2), discussed below.

12. Section 684.16. Interim Relief. (Corresponding provision in Florida Arbitration Code: none)

Traditionally, one of the major drawbacks to arbitration, as compared to litigation, has been the absence in many jurisdictions of effective measures of interim relief. This is because, in many jurisdictions, parties who select arbitration are precluded from having access to the courts for interim relief. This section is intended to cure this defect.

a. *Subsection (1)* authorizes the arbitral tribunal to grant appropriate interim relief after notice and comment from the parties to the arbitration. In granting that relief, the tribunal may require that a bond or other security be posted. The subsection also makes clear that the power in the tribunal to grant interim relief does not foreclose the parties from obtaining that relief directly from a court if available under applicable law.

b. *Subsection (2)* authorizes the arbitral tribunal, in lieu of an order granting interim relief or in aid of any order granted, to apply, or authorize a party to apply, to any court, tribunal or governmental authority for assistance in securing the objectives sought by the interim relief. As noted above, in certain jurisdictions the law forecloses a party to an arbitration from obtaining interim relief

from the courts. Similarly, several court decisions in the United States have construed the New York Convention as preventing a party to an arbitration subject to that treaty from obtaining interim relief from the courts. The task force does not endorse that construction of the New York Convention, and notes that other courts have interpreted the New York Convention otherwise. However, this subsection may help to avoid the obstacles raised by those decisions and those laws, since under this subsection the request for interim relief will be made by the tribunal itself or by a party authorized by the tribunal. Therefore, a request for interim relief to a court under this subsection will be an intrinsic part of, and not independent from, the arbitration. Consequently, any relief granted will not constitute undue judicial interference in the arbitral process, which those decisions and laws are intended to avoid.

c. *Subsection (3)* permits *ex parte* interim relief by the arbitral tribunal under certain limited circumstances, with subsequent notice to the excluded parties and an opportunity to obtain termination or modification of any interim relief granted. The tribunal's decision that participation by a party in the interim relief process might jeopardize the effectiveness of the relief granted may be based either on concern as to any action that that party might take to impede or frustrate that relief, or on the urgency of the situation or the limited time available.

d. *Subsection (4)* allows the arbitral tribunal at any time to modify or terminate any interim relief it may have granted, and to take all appropriate steps to conform the orders of any court, tribunal or other governmental authority to its decision.

13. Section 684.17. Applicable Law. (Corresponding provision in Florida Arbitration Code: none)

This section contains the conflict of laws rules that the arbitral tribunal must follow in deciding the merits of the dispute. It provides, first, that the arbitral tribunal must apply the law or other decisional principles agreed to by the parties, including acting *ex aequo et bono* or as *amiable compositeur* — i.e., deciding the merits of the dispute in the manner that the tribunal deems just, without necessarily reaching the decision that would have been mandated by applicable principles of law and equity. In the absence of such agreement, the tribunal is to decide the merits of

the dispute according to the law, including equitable principles, which it determines should control. In making this determination the tribunal is free to employ the conflict of laws principles which it deems most appropriate to the arbitration, and is not obligated, for example, to apply the conflict of laws principles provided by the law of the place of arbitration.

Finally, it should be emphasized that this section only authorizes the tribunal to apply decisional principles such as acting *ex aequo et bono* or as *amiable compositeur* if the parties have so agreed. Otherwise, the tribunal must decide the merits of the dispute on the basis of the applicable law, which may itself include equitable principles.

14. Section 684.18. Interest. (Corresponding provision in Florida Arbitration Code: none)

In accordance with international practice, the arbitral tribunal is authorized to award interest as agreed to in writing by the parties or, in the absence of such agreement, as it deems appropriate. It would be inappropriate to limit further the tribunal's discretion with regard to such matters as the point in time from which interest is to be computed or the rate of interest, since numerous factors (including the currency of the award and market interest rates for that currency) will come into play. Thus, for example, if the award is issued in Argentine pesos, the appropriate interest rate may be significantly different than if the award were issued in Swiss francs.

15. Section 684.19. Awards. (Corresponding provisions in Florida Arbitration Code: 682.09 and 682.11)

This section deals with the various awards that an arbitral tribunal may issue.

a. *Subsection (1)* requires the arbitral tribunal to issue the final award within any time specified by the parties in writing. It also authorizes the tribunal to issue, in addition to a final award, interim, interlocutory or partial awards. Finally, it contains certain procedural requirements for awards.

b. *Subsection (2)* requires delivery of a signed counterpart of the award to each party to the arbitration personally or by registered or certified mail unless such delivery proves impossible after

the exercise of due diligence.

c. *Subsection (3)* is designed to ensure confidentiality for the award. As noted earlier in this commentary, many parties select arbitration rather than litigation because of the increased confidentiality of arbitration. This will frequently mean that the parties will prefer not to have a written statement of the reasons for an award. Under this subsection such a statement will be issued by the arbitral tribunal only if all parties agree in writing to the issuance of such a statement, or the tribunal determines that a failure to do so could prejudice recognition or enforcement of the award. The second sentence of this subsection provides that an award may be made public by the tribunal or by a party only if all parties have consented in writing, or disclosure is required by law or is necessary in connection with some judicial or official proceeding concerning the award. The subsection advisedly omits any reference to any arbitral authority under whose auspices an arbitration may be conducted. Any obligation of that authority to maintain the confidentiality of the award will be determined by its own rules, to which the parties will have agreed in electing to arbitrate under its auspices.

d. *Subsection (4)* provides, in accordance with international practice, that the arbitral tribunal may award reasonable fees and expenses actually incurred by any party to the arbitration, including the fees and expenses of legal counsel, and shall allocate the costs of the arbitration among the parties as it determines appropriate. The costs of the arbitration are understood to include the fees and expenses of the tribunal, as well as of any arbitral authority under whose rules or auspices the arbitration is conducted.

e. *Subsection (5)* authorizes the arbitral tribunal to take all additional steps as it determines appropriate to assure confirmation or other recognition and enforcement of its awards.

16. Section 684.20. Change of Award. (Corresponding provision in Florida Arbitration Code: 682.10)

This section allows an award to be vacated, modified, clarified, corrected or amended by the arbitral tribunal upon application by a party filed within thirty days of issuance of the award. This authority encompasses changes on the merits as well as matters of form.

E. Part III. *Court Proceedings in Connection with Arbitration.*

With one exception, this Part only concerns proceedings brought in the Florida courts. It delineates when and under what conditions those courts will enforce written undertakings to arbitrate, grant requests for interim relief pending arbitration, and confirm or vacate arbitral awards. The only provision applicable to court proceedings outside Florida is Section 684.35, which extends to arbitrators in any case governed by Florida law a qualified immunity from suit by disgruntled parties whether the suit is brought in Florida or elsewhere.

It is, of course, axiomatic, that before the courts of Florida can exercise any of the powers conferred upon them in this Part they must have jurisdiction over the defendant, who must have been served with process, or over the defendant's assets. In this vein, see Section 684.30, discussed below.

With respect to service of process, Part IV of the proposed Act would amend Chapter 48 of the Florida Statutes by adding a new Section 48.196, which prescribes a number of very specific rules for the service of process in court proceedings pertaining to arbitration.

Many of the points dealt with in this Part are also dealt with in the New York Convention, in Title II of the Federal Arbitration Act implementing that Convention, and in the Inter-American Convention on International Commercial Arbitration, currently before the United States Senate for the latter's consent to ratification. On many points the Act follows the New York Convention. Where they differ, however, federal law, if mandatory, must prevail. And, in fact, on one rather fundamental principle there is a basic difference between the New York Convention and the Act.

Under Article V of the Convention a court in the United States is *permitted* to deny enforcement to an arbitral award if (i) the parties thereto were under an "incapacity" or the arbitral agreement was invalid under the law where the award was made, (ii) the composition of the arbitral authority or the arbitral procedure was not in accord with the law of the place of arbitration, or (iii) the award has not become binding on the parties under the law of, or has been set aside by a competent authority in, the country in which the award was made. Most of these provisions are contingent upon the absence of a contrary stipulation by the parties.

However, the Act, except for a partial adoption of rule (iii) (see Section 684.24(2)), rejects the principle that, in the absence of a contrary stipulation by the parties, the enforceability of foreign arbitral awards by the Florida courts is automatically dependent upon the law of the place of arbitration or award. It may be, under the Act, that the applicable choice of law rule would result in the validity of an award being determined by the law of the place of arbitration. That, however, would be purely coincidental, because the Act rejects the idea that in the absence of contrary stipulation by the parties the validity of an arbitral award or questions of arbitral procedure are automatically to be governed by the law of the place of arbitration or award (see discussion of Section 684.05 above). The New York Convention, on the other hand, relies heavily upon this principle.

This is readily understandable. The Convention was signed in 1958, at a time when the law of the place of arbitration was quite widely accepted as determining the validity of an award and as controlling on questions of arbitral procedure. In the years since, however, criticism of the rule has grown. As already noted, courts and commentators alike (including, for example, the *Second Restatement of Conflicts*) have come increasingly to abandon that rule. On this record, it is unequivocally clear that Florida could not be accused of doing violence to any principle of international law or even customary international practice, by refusing to accord to the law of the place of arbitration controlling effect on questions pertaining to the competence of the parties to arbitrate, the arbitrability of the dispute, the fairness of arbitral procedures and the validity of the award. More importantly, the Act in breaking the hold that the law of the place of arbitration has traditionally had on these questions is part of a much larger movement toward internationalizing arbitration. It is not the place where the arbitration occurs, but the total circumstances of the arbitration, including the nationality of the parties, their expectations, where the events giving rise to the dispute occur, and where the consequences of the arbitral award, or lack thereof, are likely to be felt, that should control the law chosen. It is for the arbitral tribunal to decide which of these circumstances is most compelling and what result they dictate. That is why the parties chose arbitration. They wanted their dispute resolved through this kind of non-territorial and non-legalistic decisional process. They therefore eschewed litigation with its ties to the law of the forum, and chose arbitration.

In sum, and in broadest terms, the Act would have the courts of Florida enforce any written undertaking to arbitrate if satisfied that the recalcitrant party in fact promised to submit to arbitration and that such submission would not offend some deeply held ethical or moral principle of the people of Florida or some urgent public policy of this state or of the United States. Likewise, broadly stated, the Act would have the Florida courts enforce any arbitral award unless that award violated some fundamental precept or policy of this state or emanated from procedures that were patently unfair or corrupt or to which the parties had not consented. With these basic requirements met, the Act would have the courts of Florida ignore the idiosyncracies of the law of the place of arbitration. Paradoxically, this approach makes the Act look very much like the existing Florida Arbitration Code.

Lastly, the practical impact of this difference should be noted. Obviously, if it were a mandatory requirement of federal law that a particular foreign arbitral award be denied confirmation, that requirement would, under the Supremacy Clause of the United States Constitution, supersede any contrary rule contained in the Act. However, most of the provisions of the New York Convention are stated in permissive terms; a signatory country *may*, if it chooses, deny recognition to a foreign award on the grounds stated in the Convention. The unanswered question is whether, as a matter of federal law, courts in this country, including state courts, *must* deny recognition to an award if the Convention *permits* them to do so. Does federal law, in other words, compel the courts to take advantage of what the Convention only permits? This point is unresolved. So long as it remains so, it is important to observe that an affirmative answer would be anomalous. It would mean that a Florida court would be compelled to deny recognition and enforcement to a foreign award, even if the latter did not offend federal public policy and was otherwise acceptable under Florida law. This would certainly run counter to the purpose of which underlies the New York Convention — engendering a wider international acceptance of arbitral agreements and awards. For this reason, it would seem appropriate for the Florida courts to conclude, until instructed to the contrary, that federal law does not impose this anomaly upon them; that they must follow the criteria set forth in the Act in deciding whether to recognize a foreign arbitral award even if the Convention, under its criteria, would allow them to refuse recognition or enforcement to that award. If, however, the Convention requires that an award be recognized because none of

its criteria for denying recognition are met, the award must be recognized notwithstanding any prohibition in the Act.

1. Section 684.21. Scope of this Part. (Corresponding provision in Florida Arbitration Code: none)

This section makes it clear that the provisions of this Part apply to any arbitration within the scope of the Act, even if that arbitration was not subject to Part II of the Act. Consequently, except as otherwise provided in the various sections of this Part, the provisions of this Part will apply, for example, to an international arbitration governed by foreign law, or which is conducted abroad. It should be emphasized again that whether an arbitration is subject to Part II of the Act is to be determined solely in accordance with Section 684.05, discussed above. Thus, if an arbitration is subject to Florida law under the choice of law rules of Section 684.05, it is subject to Part II of the Act even if the parties preempted all or some of the procedural provisions set forth in Part II by selecting a different set of arbitral rules.

2. Section 684.22. Court Proceedings to Compel Arbitration and to Stay Certain Court Proceedings. (Corresponding provision in Florida Arbitration Code: 682.03)

a. *Subsection (1)* instructs a circuit court of this state to issue an order compelling an arbitration within the scope of the Act if it finds that the party who is the object of that order entered into a written undertaking to arbitrate, unless one of the circumstances set forth in paragraphs (a), (b) or (c) is present. This subsection stresses that whether the place of arbitration is within or without this state and whether or not the arbitration is governed by Part II of the Act are not relevant considerations. It also emphasizes that all questions relating to the validity or enforceability of the written undertaking to arbitrate (other than fraud in the inducement of the written undertaking to arbitrate, which is encompassed by paragraph (a)) are for the arbitral tribunal, and not for the courts of this state, to decide. As concerns paragraph (a), the point to emphasize is that the fraud involved must have been directed specifically at the "written undertaking to arbitrate." If the fraud involved instead was directed at the entire underlying contract, and not just at the contestant's promise to arbitrate, a court may not refuse to compel arbitration. In this latter event the contestant's

only recourse is to raise the issue of fraud with the tribunal, and the tribunal's decision will be final. While this constitutes a departure from the existing law of Florida, it is in keeping with the rule applied under the Federal Arbitration Act. As to paragraph (b), it is not intended to be a license for the courts to refuse to compel arbitration merely because they determine that arbitration is not the most desirable mode of dispute settlement. A court should invoke this paragraph only if submission of the dispute to arbitration would thwart some basic legislative regime. Subsection (1) goes on to permit the court to order the arbitration of only part of a dispute, if severable.

b. *Subsection (2)* requires the courts of this state to stay court proceedings before them upon timely application by a party if an order compelling arbitration could issue under subsection (1). To avoid an inherent contradiction within the Act, the subsection excludes actions expressly authorized under Sections 684.23 or 684.24, discussed below.

c. *Subsection (3)* permits the circuit courts of this state to exercise their inherent equity powers to enjoin parties from litigating matters properly referable to arbitration. This power is discretionary and should be exercised in accordance with the normal rules generally governing such interventions in civil actions.

d. *Subsection (4)* is the corollary to subsection (1). It permits a circuit court of this state to stay the arbitration of a dispute if any of the circumstances referred to in paragraphs (a), (b) and (c) of subsection (1) is present.

3. Section 684.23. Court Proceedings During Arbitration. (Corresponding provision in Florida Arbitration Code: none)

This section sets forth the various proceedings which will be possible before the courts of this state during the conduct of an arbitration.

a. *Subsection (1)* permits a Florida circuit court to appoint an arbitral tribunal or any member thereof or successor thereto under limited circumstances. This subsection should be read in conjunction with Section 684.09, discussed above.

b. *Subsection (2)* instructs the circuit courts of this state to assist an arbitral tribunal in the production of evidence. This subsection should be read in conjunction with Section 684.15(2), dis-

cussed above.

c. *Subsection (3)* is the corollary of Section 684.16(2), discussed above. Note that any interim relief to be granted by the circuit courts of this state are subject to the same procedural requirements and other conditions as would apply in an action for such relief not pertaining to an arbitration.

d. *Subsection (4)* deals with the question of access to the courts for interim relief by a party to an arbitration, and should be read in conjunction with Section 684.16(1), discussed above. This subsection does two things. First, it makes it clear that the provisions of subsection (3) above are without prejudice to any right that a party might have to obtain such interim relief directly from any court within or without this state. Whether and to what extent such a right exists will have to be determined outside the confines of the Act. Second, as concerns the courts of this state this subsection goes on to limit the right of a party to obtain such interim relief. It requires that the party seeking relief establish that an application to the tribunal would prejudice his rights, and relief from the court is necessary to protect those rights. The reason for this approach is, of course, to limit undue judicial interference with the ongoing arbitral process, while leaving recourse to judicial action in extenuating circumstances.

e. *Subsection (5)* authorizes a circuit court to fix a time within which a final award must issue in an arbitration upon a showing by a party that the arbitral tribunal has unduly delayed the issuance of that award. This is meant to be an unusual remedy. Given the breadth of the Act, the power conferred by this subsection had to be limited to arbitrations being conducted in this state or which are governed by Part II of the Act. Otherwise, the courts of this state might be faced with applications that should instead be made to a foreign court having a closer nexus to that arbitration.

f. *Subsection (6)* merely clarifies that the powers conferred upon the courts of this state by this section may ordinarily be exercised without regard to the place of arbitration.

4. Section 684.24. Court Proceedings upon Final Awards. (Corresponding provisions in Florida Arbitration Code: 682.12, 682.13 and 682.14)

This section provides the proceedings before the courts of this state on final awards. It should be emphasized that this section

only permits such proceedings in connection with *final* awards, and not with interim or interlocutory awards. As to non-final awards, no proceedings (other than proceedings authorized by Section 684.23, discussed above) will be available before the courts of this state. This, again, is to prevent excessive judicial interference in the arbitral process.

a. *Subsection (1)* provides for three different types of orders: an order confirming the award, an order vacating the award, and an order declaring that the award is not entitled to confirmation by the courts of Florida. Note that this section states that such orders shall issue without regard to the law of the place of arbitration, the law governing the award, or whether a court of law or equity would apply the law or decisional principles (see Section 684.17, discussed above) applied by the arbitral tribunal, or would grant the relief provided for in the award. Finally, note that the court proceedings authorized by this subsection are not conditioned on the parties to an arbitration having agreed that judgment could be entered on an award issued by the tribunal. Compare the contrary provision of the Federal Arbitration Act, 9 U.S.C. § 9.

(1) *Paragraph (a)* provides for confirmation of a final award by the Florida courts unless one of the grounds set forth in Section 684.25 is established by way of an affirmative defense. Once an applicant presents an award for confirmation and establishes that it is a "final" award (see subsection (7), below) issued in conformity with the applicable rules on the issuance of awards, the burden of proof shifts. It will be incumbent upon the party contesting confirmation to establish that one of the grounds set forth in Section 684.25 is present. If that party is successful, one of two things will happen. Upon application by any party (most probably the party contesting confirmation) the court will vacate the award if the conditions specified in paragraph (b) are present. Otherwise the court will declare that the award is not entitled to confirmation by the Florida courts.

(2) *Paragraph (b)* states that a Florida circuit court must grant an application to vacate a final award if the applicant establishes one or more of the grounds set forth in Section 684.25 and either the place of arbitration was in this state or the arbitration was governed by Part II of this Act. Note that an application to vacate an award under this paragraph may be brought even if an application to confirm the award has not been brought under para-

graph (a). Because of the breadth of the Act, the power of Florida courts to vacate final awards is limited to arbitrations governed by Florida law or conducted in Florida. Otherwise, these courts might be asked to vacate awards issued abroad, governed by foreign law, and with no logical nexus to this state. In these cases, the application should more properly be addressed to a foreign court with a closer nexus to the arbitration. Even in such cases, however, a contestant who can show that the award is defective under Section 684.25, can apply under paragraph (c) below for a judicial declaration that the award is not entitled to confirmation in Florida and thereby forestall any attempt by the proponent to enforce a defective award against assets located in this state.

(3) *Paragraph (c)* allows a party who establishes that one or more of the grounds set forth in Section 684.25 is present, to obtain a declaration from a Florida circuit court that a final award is not entitled to confirmation by the courts of this state in the event that those courts are unable to vacate the award under paragraph (b) above because the place of arbitration was outside of Florida and the arbitration was not subject to Part II of the Act. The reason for allowing such a declaration by a Florida circuit court is to permit the losing party to an award tainted by one of the grounds set forth in Section 684.25 to protect any assets he might have in this state or his credit and reputation.

b. *Subsection (2)* deals with the question of how the Florida courts are to treat an award that has been the subject of an adjudication in one or more foreign countries. There may be outstanding foreign judgments denying confirmation to an award for any number of reasons, some for defects of substance, some for defects of form. This subsection is quite straightforward and readily administrable by the courts. Such foreign judgments are to be ignored and the underlying award granted or denied confirmation in Florida strictly on basis of the criteria set out in the Act unless a foreign court has, after a full adjudication, determined whether or not the award is defective for one or more of the reasons enumerated in Section 684.25. In that event the foreign court's judgment will be dispositive of that question in Florida, but only if the foreign court's judgment is entitled to recognition under the principles of international comity by which the Florida courts generally determine whether a foreign country judgment is entitled to recognition in this state.

There are a number of reasons for this position. First, it avoids

the confusion that currently plagues administration of Title II of the Federal Arbitration Act, implementing the New York Convention; are judgments on foreign arbitration awards to be treated as judgments or awards? The Act treats them as awards. Secondly, this approach is consistent with the modern conflict of laws doctrines discussed in the Introduction to this Part. Yet, if the parties to the arbitration have already had a full and fair opportunity to adjudicate the question of whether the award is defective under the criteria laid down in Florida law (as set forth in Section 684.25), and to do so before an impartial tribunal with full jurisdiction over them, then international comity and the practical principle that litigation should come to an end, merit granting controlling effect in Florida to the foreign judgment.

It should also be noted that this subsection and subsection (6) refer only to the judgments of courts in foreign countries. These subsections have no application to the judgments, or other actions, of courts in sister states of the United States, since the treatment to be accorded the latter is a question governed by the Full, Faith and Credit Clause of the United States Constitution.

c. *Subsection (3)* sets forth the statute of limitations applicable to actions under subsection (1). Under paragraph (a) an application to confirm an award is treated as analogous to an action on a judgment and therefore may, as provided in Section 95.11(1) of the Florida Statutes, be brought at any time within twenty years of the issuance of the award. The measurement of that period, including any tolling thereof, will also be governed by the rules contained in Chapter 95 of the Florida Statutes relating to an action on a judgment. Under paragraph (b), however, an application to vacate or to have an award declared not entitled to confirmation, must be brought within 90 days of the issuance of the award or discovery of the fraud or conflict of interest that is the basis of the application. This is the period prescribed by the Florida Arbitration Code. Finally, under subsection (1)(a) a party who believes an award defective is not barred from offering that defense in a proceeding brought to confirm an award, even if that proceeding is brought after expiration of the 90 day period for actions to vacate an award. If in such a case the defense is proven, the court will, upon an appropriate application, enter an order vacating or declaring the award not entitled to confirmation, whichever is applicable.

The provisions of this subsection reflect a number of considerations. The vast majority of arbitral awards are adhered to by the

parties voluntarily. Even in those circumstances, however, time may be needed for the parties to work out a satisfactory means of fulfilling the award. Hence, because confirmation sets the stage for execution of the award as a judgment, any limitation on the right to seek confirmation should be quite lengthy. For this purpose the period allowed for actions on ordinary court judgments would seem to set an appropriate standard. On the other hand, an application to vacate an award or to declare it not entitled to confirmation by the courts of this state serves a different function. It gives a party against whom an award has been issued a means of protecting his credit standing and assets against the adverse effects of an outstanding but defective award. Normally, therefore, the contesting party will bring such a proceeding promptly after the award has been issued. To encourage promptness and avoid clouds on outstanding awards, the 90-day limitation period would seem appropriate. At the same time, it would be unfair to bar the contesting party from interposing the award's defects as a defense in a subsequent confirmation proceeding merely because he failed to move affirmatively to have the award vacated or declared not entitled to confirmation within the required 90-day period.

Finally, paragraph (c) adds a needed element of flexibility by permitting the court to extend the limitation period where, because of the death or incompetence of a party, justice would so require.

d. *Subsection (4)*. Under this subsection the courts, instead of denying confirmation to an award because of some technical defect or lack of clarity in description or form, can return the award to the arbitral tribunal for modification or clarification. This would include, for example, returning the award for proper signature by the arbitrators or for clarification as to the place of arbitration or of issuance or for correction in the description of property, sum of money stated or identification of a person. This power should not be used to change the decision reached by the tribunal on the merits.

e. *Subsection (5)*. If an award has been confirmed by a Florida court and it is subsequently discovered that the award was defective for fraud or conflict of interest, a party wishing to avoid the award on the newly discovered grounds is, under this subsection, given 90 days within which to move to set aside the judgment confirming the award. Note, however, that an action to set aside the confirmation will not lie even if brought within 90 days of discov-

ery of the fraud or conflict of interest if more than 90 days has transpired from the date when due diligence would have discovered the defect.

f. *Subsection (6)*. Under the law of some foreign countries, arbitral awards are not valid or enforceable unless reduced to judgment by a local court or approved by some administrative tribunal or other governmental authority. Under this subsection a Florida court, in deciding whether to confirm that award, is instructed to ignore any such requirement and also to ignore any terms or conditions that the foreign court or other authority may have superimposed onto the award. The one exception pertains to the judgment of a foreign court entitled to recognition under subsection (2). In sum, and in broadest terms, this subsection is intended to assure that the decisions of arbitral tribunals will come to the Florida courts and be judged by those courts according to the criteria for the recognition of arbitral awards and not the criteria for the recognition of foreign judgments, subject only to the exception noted in subsection (2).

The reason for this is straightforward. The rule that an arbitral award is only valid when acted upon by some court or administrative authority is increasingly disappearing from the arbitral laws of the major commercial nations of the world. This is in part because it has never been clear what consequence failure to comply with that rule should have, at least internationally. Moreover, to the extent local courts or other reviewing authorities superimpose upon the award additional terms and conditions, no general international practice suggests that those conditions must be honored as much as the award itself. Also, the position taken by the Act avoids the confusion, already noted, that has plagued Title II of the Federal Arbitration Act.

The rule in this subsection that the Florida courts will judge an award on its own merits, irrespective of any action by a foreign court, cannot be circumvented by the merger doctrine. Again, however, this subsection is confined to judgments or other actions by courts in foreign countries. The treatment to be accorded judgments and other actions of courts in the sister states of the United States is a matter governed by the Full, Faith and Credit Clause of the United States Constitution.

g. *Subsection (7)* defines a "final" award. The requirement that only "final" awards may be the subject of judicial action in Florida reflects, of course, the basic policy of avoiding any prema-

ture intrusion of the courts into the arbitral process. It has its analogue in the general rule of administrative law that only "final" agency actions are reviewable and that no action may be reviewed until all administrative remedies have been exhausted. This principle, however, necessarily requires that a "final" award be defined. Again, part of the problem arises from the fact that under the laws of some countries finality does not attach until the award has been submitted for judicial or other official approval. Consistent with the principles underlying subsections (2) and (6), this subsection provides that the Florida courts will ignore any such requirement in determining "finality." Another source of definitional difficulty, of course, is the fact that the arbitral tribunal itself may decide to issue an award which is in some respect "non-final." In these instances this subsection requires the courts to examine the terms of the award itself and the structure of the arbitral process. If by its own terms the award is non-final or if the award is still subject to review by some arbitral authority — either the tribunal itself or the entity under whose auspices the arbitration is being conducted — it is not "final." Otherwise it is "final" and subject to judicial review by the Florida courts under this section. In this connection it should be noted that an award may qualify as a "final" award even if it pertains only to part of the dispute before the tribunal and has been designated by them as a "partial" award.

5. Section 684.25. Grounds for Vacating an Award or Declaring It Not Entitled to Confirmation. (Corresponding provisions in Florida Arbitration Code: 682.13 and 682.14)

a. *Subsection (1)* sets out seven separate grounds upon which a Florida court may vacate or refuse to confirm an award. Under Florida law, no other grounds may be relied upon for that purpose. In other words, as concerns Florida law all applications to confirm final awards must be granted except as one or more of these seven grounds is established by way of affirmative defense. Strict adherence to this rule is essential to establish in the public mind that the Florida courts will not unduly interfere with or frustrate either the arbitral process itself or the awards that emerge from that process.

Adherence to this limited role poses no danger that Florida will end up honoring unjust or otherwise objectionable awards. The grounds assigned in this subsection are ample enough to encompass the results of any arbitration not conducted in a fair and de-

liberative manner. And, the time has long passed since it was thought necessary to protect those who typically go to arbitration from errors of arbitral judgment regarding the merits of a dispute. If there is a need for such protection it would seem amply satisfied by the power to refuse confirmation to any award that violates Florida's public policy. While in most respects the grounds contained in this subsection are similar to those found in the New York Convention, there are some differences. As already noted, in some important respects the Act is more hospitably disposed toward foreign arbitral awards than the New York Convention. In a few instances, however, the Act could result in the denial of confirmation to a foreign award that would be entitled to recognition under the Convention. In that event, the Convention must obviously prevail.

(1) *Paragraph (a)* carries over into the review of awards the powers conferred upon the courts by Section 684.22 (1) when asked to enforce arbitral undertakings. As such it is critical to an understanding of the line drawn by the Act between the responsibilities of the courts and the responsibilities of the arbitral tribunal. First, it empowers a court to vacate or declare not entitled to confirmation any award emerging from an arbitration conducted without benefit of a "written undertaking to arbitrate," unless the contesting party participated in the merits of the arbitration without objection. The key here lies in the definition of a "written undertaking to arbitrate." In this context, that definition means that if the party contesting the award expressed in writing any words that can be construed as a promise to arbitrate, the "undertaking" exists and the challenge fails. Whether that promise constitutes a valid and enforceable agreement, or whether it is subject to defenses such as lack of mutuality or consideration, is a matter solely for the tribunal to decide. If these defenses are raised in the arbitral proceedings, the tribunal's decision is final. If not raised, they are irrevocably waived. The only exceptions to this are fraud and violations of public policy (see below) and an exception necessitated largely by the fact that the Act authorizes *ex parte* arbitral proceedings. If one tribunal empanelled under the "written undertaking to arbitrate" determines that the undertaking is invalid, and then a second tribunal is formed which ignores (or is not aware of) this determination, the court in reviewing any award of the latter is empowered to vacate or deny confirmation to that award.

In like manner, this paragraph authorizes a court to deny confirmation to an award if the underlying "written undertaking to arbitrate" was induced by fraud. See discussion of the analogous point under Section 684.22(1).

Lastly, whether based upon fraud in the inducement or upon the non-existence of the "written undertaking to arbitrate," an objection under this paragraph will be deemed waived if the contesting party participated in the merits of the arbitration without objection. In other words, the objection is cognizable by the courts only if the contesting party did not participate in the merits of the arbitration (i.e., the arbitration was conducted *ex parte*) or participated, objected and lost on a decision by the arbitral tribunal.

(2) *Paragraph (b)* provides that award will be confirmed if the arbitration was conducted without notice to the party challenging the award and notice could have been given with the exercise of due diligence, unless the challenger participated in the arbitration without objection.

(3) *Paragraph (c)* gives the Florida courts a necessary reserve power to deny confirmation to any award which, in the court's judgment, could only have resulted from the use by the arbitral tribunal of unfair procedures, including substantial deviations from the rules in Part II or those chosen by the parties. Before invoking this paragraph, however, a Florida court must be convinced that there was a direct causal link between the outcome of the arbitration and the defective procedure. While this provision must necessarily be written in broad terms, it does not confer upon the courts a license to supervise or "second guess" the tribunal. That the court would have followed different procedures is immaterial, unless the tribunal's choice of procedure both offended some basic principle of fairness and was critical to the outcome. This paragraph does not warrant any judicial inquiry into the substantive fairness of the award itself.

(4) *Paragraph (d)* empowers the courts to inquire into the integrity of the arbitral tribunal or the arbitral process, and to assure that the award is not offensive to some basic moral or legal principle of this state or of the United States. However, this paragraph does not address conflicts of interest, which are dealt with in paragraph (e) below. Again, the court must be convinced that there was a causal connection between any fraud or corruption shown and the outcome of the arbitration, although if the corruption is convincingly proven one would not expect the court to put too fine a

point on the proof of causality. Fraud, within the meaning of this paragraph, can consist of fraud on the tribunal (e.g., proof based on fraudulent documents), on the parties (e.g., fraudulently inducing the other party to stipulate to or abandon a critical point) or by the tribunal. An example of the latter is where one member of the tribunal, relied upon by the others because of his expertise or because as presiding arbitrator he has been delegated certain powers (see Section 684.11), deliberately misleads the other members on a critical point of substance or procedure.

In judging whether an award is contrary to public policy, the courts are not free to substitute their own idea of what would constitute a fair or just outcome for that of the arbitral tribunal. Nor will an award offend the public policy of this state or of the United States merely because it is contrary to the judgment that would have issued if the dispute had been tried in a court under the laws of this state or of the United States. An award's deviation from the law must offend some basic principle of justice or morality or threaten to frustrate some urgent public necessity before it can be deemed offensive to public policy. Again, for this paragraph to function as intended, the courts must exercise a large measure of self-restraint.

(5) *Paragraph (e)* permits a court to deny confirmation to an award tainted by a conflict of interest between a neutral arbitrator and the person challenging the award, unless the latter was advised of the conflict and did not object. In many arbitrations it is understood that one or more members of the tribunal are representatives of the parties' interests. This paragraph does not apply to conflicts of interest of those arbitrators. In addition, before this paragraph can be invoked 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. Once this is established, the critical question concerns the linkage that must be established between that arbitrator's conflict of interest and the outcome. The mere appearance of a conflict will not suffice to merit vacating an award. On the other hand, convincing proof that but for the conflict that arbitrator would have reached a result favorable to the challenger overstates the latter's burden. Where the challenged arbitrator's interests would rationally lead him to serve two substantial and conflicting interests, one of which would be adversely affected by an award favoring the challenger, a Florida court would be justified in denying confirmation to the award even if that arbitrator could

point to reasons, independent of any interest he might have, that would justify the award.

(6) *Paragraph (f)* contains grounds for objecting to an award going to the arbitrability of the dispute, a crucial requirement, and one in which the arbitral tribunal is not unlikely to have a certain self-interest, rendering it properly referable to the courts. On the other hand, if the issue has been passed upon by the tribunal, the latter's determination should be accorded great deference by the courts.

(7) *Paragraph (g)* is self-explanatory. Because it goes to the legitimacy of the arbitral tribunal, it is properly a matter that can be brought to the courts. Again, however, a mere technical defect in the constitution of the tribunal should not be used as a basis for denying confirmation to that tribunal's award.

b. *Subsection (2)*. Once a court has determined that all or part of an arbitral award must be vacated or denied confirmation, the court must then determine whether mere issuance of that order suffices or whether it would materially advance the cause of a fair settlement of the dispute between the parties to send them back to arbitration. This paragraph simply assures that the court will have the authority to take the latter step if it is practicable and would serve the interests of justice.

6. Section 684.26. Award In a Foreign Currency. (Corresponding provision in Florida Arbitration Code: none)

The courts of the United States have traditionally taken the position that as instrumentalities of the United States — either state or federal — they lacked the power to render monetary judgments in any currency other than United States dollars, unless specifically authorized to do so by legislation. This position is in part based upon an outmoded formalism and, in part, upon certain legitimate practical concerns regarding the enforcement of such judgments. This section addresses both. First, it makes clear that the Florida courts may confirm arbitral awards denominated in a currency other than United States dollars. In practical terms this authority can prove useful as an assurance to foreign firms, whose claim is denominated in a foreign currency, that they can have their foreign currency denominated arbitral awards confirmed by a Florida court. Second, this section allows a Florida court to confirm a foreign currency award not only in the currency of the

award but also in its United States dollar equivalent, if a party requests the latter. This is important if a party to a foreign currency award anticipates the need to execute against assets located in the United States. It is questionable whether a sheriff could even execute on the judgment unless the court had first made the conversion. Certainly there would be practical difficulties if the sheriff attempted to do so.

7. Section 684.27. Judgment or Decree on a Final Award. (Corresponding provision in Florida Arbitration Code: 682.15)

This is a technical provision which provides for the entry of a judgment or decree upon an order confirming, vacating or declaring an award not entitled to confirmation. The practical effect of this provision, which is also found in the Florida Arbitration Code, is to assure that the court's order will have all the force and effect of a judgment without further judicial proceedings.

8. Section 684.28. Judgment Roll, Docketing. (Corresponding provision in Florida Arbitration Code: 682.16)

This is another technical provision, taken largely from the existing Florida Arbitration Code, and pertaining to the preparation by the clerk of the court of the judgment roll and the docketing of the judgment.

9. Section 684.29. Application to Circuit Court; Form and Process. (Corresponding provision in Florida Arbitration Code: 682.17)

At common law any petition to a court to enforce an arbitral agreement was treated as an action for specific performance upon a contract, while an action to confirm an award was treated as either an action upon a liquidated debt or, again, for specific performance. Following the existing Florida Arbitration Code, this section states that proceedings brought to the Florida courts under the Act are not to be governed by these traditional common law forms, but are to be treated as motions under the rules governing motion practice.

10. Section 684.30. Consent to Jurisdiction. (Corresponding pro-

vision in Florida Arbitration Code: 682.18)

This section provides that if a person over whom the court would not otherwise have such jurisdiction, actually arbitrates in Florida or agrees to arbitrate in or under the laws of this state, that person will thereby be deemed to have consented to the jurisdiction of the Florida courts in any proceeding pertaining to that arbitration and authorized by this Part. This principle has been employed in the arbitral laws of a number of states, including New York. It is in full conformity with the due process requirements of the United States Constitution. In all other cases, jurisdiction will have to be established according to the rules generally applicable in civil actions in the Florida courts, including the rules found in Florida's long-arm statutes (see Chapter 48 of the Florida Statutes).

11. Section 684.31. Venue. (Corresponding provision in Florida Arbitration Code: 682.19)

Under this section the venue of any proceeding authorized by the Act to be brought before a circuit court of this state, must be laid first in a court for either the county in which *any* party to the arbitration resides or in which the place of arbitration is located and second, if there is no such county, then in any circuit court in the state. Once a proceeding has been brought in a particular court all further proceedings pertaining to that arbitration shall be brought in the same court, unless that court orders otherwise.

12. Section 684.32. Appeals. (Corresponding provision in Florida Arbitration Code: 682.20)

a. *Subsection (1)* is a technical provision intended to make clear that appeals may be taken to an appropriate appeals court from any of the enumerated orders of a circuit court.

b. *Subsection (2)* makes clear that the manner and scope of review on the appeals authorized under subsection (1) are to be the same as in any other appeal from a judgment in a civil action. However, the appeals court may not entertain any question pertaining to the enforceability of a written undertaking to arbitrate, to a request for interim relief or to an application to confirm, vacate or deny confirmation of an award, unless the trial court could have entertained that same issue upon an initial application under

Sections 684.22, 684.23 and 684.24, discussed above.

13. Section 684.33. Transitional Rule.

The Act will immediately apply to any written undertaking to arbitrate within the scope of the Act, whether that undertaking was entered into before or after this Act takes effect. Under this provision, however, Part III will not apply to a judicial proceeding, and Part II to an arbitration, already in progress on that date. Existing law will continue to control unless, in the case of an arbitration, the parties stipulate in writing that Part II will apply.

14. Section 684.34. Severability and Characterization.

a. *Subsection (1)*, is a standard provision. It should be emphasized that any decision invalidating the Act as applied should be as strictly confined as possible to the precise person or circumstances that gave rise to that decision. Nor is the fact that two or more provisions may have a close functional relationship to be taken as evidence that the provisions are so linked that the invalidity of one must necessarily invalidate the other. Only if, by ignoring the first provision, the second is rendered inoperative or radically distorted, should the demise of the former invalidate the latter.

b. *Subsection (2)*. (Comparable provision in Florida Arbitration Code: Section 682.22)

This provision is essentially a guide to arbitrators and courts alike, especially courts outside this state. Not infrequently, under the conflict of laws rules applied by foreign courts, the law of another jurisdiction such as Florida will apply to a case only if it can be characterized as "substantive" rather than procedural. If characterized as procedural the foreign court is likely to ignore the Florida rule in favor of its own. Generally, the proper characterization of a law is a matter for the law being characterized; hence, this subsection. Any court or arbitrator looking at the Act and attempting to decide whether the enumerated provisions thereof are to be characterized as substantive or procedural, is simply instructed by this subsection to consider them substantive. This characterization is accurate and follows the Florida Arbitration Code. Unlike that Code, however, this subsection omits as unnecessary any disclaimer that the characterization of Florida law as substantive could result in setting aside the public policy of the forum.

15. Section 684.35. Immunity and Indemnity for the Arbitrators. (Comparable provision in Florida Arbitration Code: none)

This section does two things. First, it confers upon arbitrators a broad but qualified immunity from suit based upon the performance of their duties as arbitrators if the suit is brought in the Florida courts or under Florida law. Only upon proof that in the performance of their duties in an arbitration subject to Part II, they committed fraud, were guilty of corruption or violated the rule of confidentiality stated in Section 684.19(4), would the arbitrators be subject to such a suit. Second, to deter spurious suits asserting one or more of these grounds, the section holds the plaintiff liable for any expenses incurred or damages suffered by the arbitrator as a result of the suit, including damages to his reputation, unless the plaintiff can prove his charge.

There does not appear to be any statutory or case law on this subject in Florida. Elsewhere in the United States and abroad a number of different rules obtain, and there appears to be no clear majority position. In some countries the arbitrators seem to have absolute immunity, although this may only mean that a particularly egregious case of arbitral corruption has never arisen or been reported. In others the immunity is qualified. Against this background the position taken in the Act reflects a balancing of two basic considerations. On the one hand, it is absolutely necessary to give arbitrators strong protection against the kind of charges that parties can and are prone to level against any tribunal that hands down a judgment against them. Arbitrators are no less vulnerable on this score than are judges. Unless they are protected it will be difficult to get good people willing to serve as arbitrators. Indeed, a lack of adequate protection can also cause arbitrators to be something less than willing to decide against the party they perceive most likely to sue in the event of an adverse judgment.

On the other hand, arbitrators who are found guilty of corruption, fraud or breach of confidentiality should not be immune. The integrity of the arbitral process requires no less, and especially so in the present context. To become the center for international arbitration that its human and natural endowments suggest it could become, Florida must appeal to the legal and business communities of Latin America and the Caribbean. Insofar as those communities are still unfamiliar with or reluctant to resort to arbitration in settling their international disputes, they are very likely to re-

main unpersuaded unless given some assurance of protection against dishonest or indiscreet arbitrators. It is this need, in other words, balanced against the equally pressing need to protect the arbitrators, that explains the content of this provision and the line that it seeks to draw.

F. Part IV. *Changes to Other Florida Statutes.*

1. Section 48.196. Service of Process in Connection With Actions under the Florida International Arbitration Act.

The Act would also add a new Section 48.196 to prescribing the service of process required to commence any proceeding in a Florida court relating to an arbitration. The new Section 48.196 is divided into four separate subsections dealing with (i) who is to be served, (ii) what is to be served, (iii) how service is to be made, and (iv) what proof of service is required.

There are a number of reasons why existing law regarding service of process is inadequate for the judicial proceedings contemplated by the Act. First, it should always be possible for the parties to stipulate the "who and how" of any service necessary to commence a judicial proceeding related to arbitration. Arbitration and its related judicial proceedings, unlike ordinary litigation, can only happen if the parties have agreed to arbitrate. If the parties have made such an agreement, it is entirely fair and appropriate for them also to determine how the notice of any judicial proceeding related to the arbitration shall be served. Existing Florida law on service of process, not having been drafted with arbitration particularly in mind, simply does not confer this kind of authority on the parties. Section 48.196 is intended to cure that defect.

Second, service of process by mail is not permitted by existing Florida law, although widely accepted by the federal system and by courts abroad. The use of such service is especially appropriate in judicial proceedings related to arbitration, doubly so if the arbitration is international. The parties will not only have been in communication with each other but are very likely to have been continuously so, a circumstance not always present in ordinary litigation. At the same time, if the arbitration is international, distances are likely to be great, and personal service costly and attended by delays.

Finally, existing Florida law in dealing with the service of process on foreign entities (e.g., corporations, partnerships, etc.), seems to have been drafted with an eye exclusively upon legal entities familiar to United States lawyers. Entities in other legal systems differ from the United States model, as do the responsibilities of persons involved in the management of those entities. It is appropriate and necessary that the rules for commencing judicial proceedings in Florida relating to an international arbitration take account of these differences.

Of course, if the party being served is a foreign government or instrumentality thereof, service will have to be made as provided in the federal Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1601 et seq.

a. *Subsection 1.* This subsection prescribes the persons upon whom service may be made. Where reference is made to an agent appointed by operation of law, this includes any agent designated by the various provisions of Chapter 48 of the Florida Statutes.

(1) *Paragraph (a)* indicates who can be served where the party being served is a natural person.

(2) *Paragraph (b)* states who can be served when the party being served is not a natural person. Particular attention should be paid to subparagraphs (iii) and (iv), which are responsive to the fact that foreign entities and the persons responsible for their operations do not always follow the United States model. Thus, subparagraph (iii) permits service on persons who hold a designated status with regard to the entity being served, whether that status is by operation of law or by action internal to the entity itself, while subparagraph (iv) permits service on a much wider group of persons if no one in the group designated by subparagraph (iii) exists. In either event the person served can be a natural person or another juridical entity and does not have to reside, be located in or organized under the laws of the same country as the entity which is the object of the service.

b. *Subsection 2.* This subsection prescribes what is to be served.

c. *Subsection 3.* This subsection prescribes how service is to be made. Most notable are:

- (i) the provision for service in the manner agreed to by the parties;

(ii) the provision for service abroad as authorized by local law or by a local court;

(iii) service abroad in accordance with a treaty to which the United States is a party (the principal treaty is the United Nations Convention on the Service of Documents Abroad, the so-called Hague Convention); and

(iv) service by mail.

If service is made in a manner permitted by Florida law but not permitted by the law of the country where the service is being made, any judgment issued by the Florida court will be valid in Florida and presumably in the sister states of the United States under the Full, Faith and Credit Clause of the United States Constitution, but will not necessarily be so in the country whose law has been offended. (Also consult the special rules under the Hague Convention regarding the rendering and recognition of default judgments in these circumstances.)

d. *Subsection (4)* prescribes how proof of service is to be made, including the use of affidavits or such other means as may be prescribed by the law of the jurisdiction where service is being made.

2. Section 95.051(1)(g). When Limitations Tolled.

The Act would add a new paragraph (g) to Section 95.051(1) of the Florida Statutes to toll any statute of limitations during the pendency of an arbitration. Obviously, if a claim is the subject of a valid undertaking to arbitrate and is otherwise arbitrable, suit on that claim is in all events likely to be barred. Consequently, the statute of limitations will not come into play. If, however, the validity of the undertaking to arbitrate or the arbitrability of the underlying claim is challenged and the arbitral tribunal ultimately decides that the claim is not to be arbitrated, the law must make clear that the statute of limitations will not run while the arbitration is in progress or the question of submission to the tribunal is being adjudicated.

