

Interim Relief and International Commercial Arbitration in North Carolina: Where We Are and Where We Should Be Looking

INTRODUCTION

Arbitration, as an alternative method of dispute resolution, has become increasingly popular during the past twenty years.¹ This is especially true in the area of international commercial arbitration.² Arbitration provides parties involved in international commercial transactions with a method of resolving their disputes that takes into account issues that are peculiar to international commerce.³

In light of this increasing popularity,⁴ North Carolina enacted its International Commercial Arbitration and Conciliation Act (ICACA or the Act)⁵ in order to “promote and facilitate international trade and commerce, and to provide a forum for the resolution of disputes that may arise from participation therein.”⁶ The ICACA largely follows the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law),⁷ which was adopted by the United Nations General Assembly in 1985.⁸ However although the Model Law was recently amended in 2006,⁹ the

1. See Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role In Commercial Arbitration*, 54 FLA. L. REV. 175, 208 (2002). See also William Wang, Note, *International Arbitration: The Need for Uniform Interim Measures of Relief*, 28 BROOK. J. INT'L L. 1059, 1059 (2003).

2. See Wang, *supra* note 1, at 1059. See also Stephen M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, 12 CURRENTS: INT'L TRADE L.J. 55, 55 (2003).

3. RICHARD GARNETT ET AL., A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION 1 (Oceana Publications, Inc. 2000).

4. Daniel A. Zeft, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, 22 N.C. J. INT'L L. & COM. REG. 705, 709 (1997).

5. N.C. GEN. STAT. §§ 1-567.30-.87 (2007). This paper will address only the general provisions and those specific to arbitration. See, e.g., §§ 1-567.30-.67.

6. N.C. GEN. STAT. § 1-567.30 (2007).

7. George K. Walker, *Trends in State Legislation Governing International Arbitrations*, 17 N.C. J. INT'L L. & COM. REG. 419, 423 (1992).

8. UNCITRAL, EXPLANATORY NOTE BY THE UNCITRAL SECRETARIAT ON THE 1985 MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION AS AMENDED IN 2006 I (2007), <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf>.

9. *Id.*

ICACA's provisions addressing arbitration have remained unchanged since its adoption in 1991.¹⁰

The amended Model Law includes extensive revisions of Article 17 to include significantly greater guidance in the area of interim measures of relief.¹¹ These revisions were considered necessary "in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration."¹² Interim measures of relief are essential to international commercial arbitration due to the fact that they "have the effect of compelling parties to behave in a way that is conducive to the success of the proceedings, preserving the rights of the parties, preventing self-help, keeping peace among the parties, and ensuring that an eventual final award can be implemented."¹³ The fear is that without enforceable interim measures of protection, a favorable final award may be meaningless as assets could be hidden, sold, or removed from the jurisdiction.¹⁴

While the ICACA does contain significant provisions addressing interim measures, these provisions rely on the aid of courts in order to provide parties with interim relief or enforce orders of the arbitral tribunal granting such relief.¹⁵ When parties are required to turn to the courts for such assistance, the benefits and attractiveness of arbitration are significantly diminished.¹⁶ Moreover, the ability of an arbitral tribunal to provide enforceable interim relief without court assistance is especially significant in North Carolina in light of the Fourth Circuit's refusal to allow court-ordered pre-award attachment in aid of arbitration.¹⁷ State arbitration legislation that allows court-ordered pre-award attachment could be preempted by federal arbitration law.¹⁸ By contrast, state arbitration provisions that authorize the arbitral tribunal to order interim relief do not generally raise preemption concerns.¹⁹ Thus, in light of the relationship between federal and state

10. See N.C. GEN. STAT. §§ 1-567.30-67 (2007). While the Act was amended in 1997 to include the provisions for International Commercial Conciliation, and to modify the general provisions in order to accommodate such additions, the provisions addressing arbitration have remained unchanged.

11. UNCITRAL Explanatory Note, *supra* note 8, at 2.

12. *Id.*

13. Ferguson, *supra* note 2, at 55.

14. *Id.*

15. See N.C. GEN. STAT. § 1-567.39 (2007).

16. See Ferguson, *supra* note 2, at 57.

17. See generally *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981); *Alamria v. Telcor Int'l*, 920 F. Supp. 658 (D. M.d. 1996).

18. See Zeft, *supra* note 4, at 765.

19. *Id.* at 764.

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arbitration law, there is an even greater need for North Carolina to reduce party reliance on the courts to provide interim relief during the arbitral process.

However, it is also this relationship between federal and state arbitration law that presents an opportunity for North Carolina to craft such procedural rules. Procedural provisions, such as those providing for interim relief, are not subject to preemption concerns. As a result, states are given the opportunity to include procedural rules in their arbitration legislation that are particularly receptive to the needs of parties to international commercial arbitrations.²⁰ This not only allows states the opportunity to include in their arbitration legislation procedural rules that help in maintaining the efficiency of the arbitral process, but in doing so, states are also given the opportunity to compete for arbitration business by providing procedural rules that are increasingly receptive to the needs of parties.²¹ If North Carolina truly seeks to “promote and facilitate international trade and commerce”²² within the state, then it should take advantage of this opportunity to improve the arbitral process. Doing so will not only benefit those who presently conduct international commercial arbitrations within the state, but may also bring increased arbitration business and international commerce to North Carolina.

This Comment argues that North Carolina should reexamine the interim relief provisions under the ICACA in order to reduce reliance on court assistance during the arbitral process, thereby identifying itself as a forum for international commercial arbitration that is increasingly receptive to the needs of the parties involved. Part I will generally describe when the ICACA applies in light of the Federal Arbitration Act (FAA). Part II will further discuss why, in light of this relationship between federal and state arbitration law, North Carolina should reexamine the interim relief provisions under the ICACA. Part III will highlight four issues concerning interim relief provisions that should be examined and offer suggestions for legislators and practitioners to consider in confronting these issues.

20. See Hayford, *supra* note 1, at 203.

21. *Id.*

22. N.C. GEN. STAT. § 1-567.30 (2007).

I. NORTH CAROLINA'S INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION ACT AND ITS APPLICATION IN LIGHT OF THE FEDERAL ARBITRATION ACT

The ICACA applies to “international commercial arbitration . . . subject to any applicable international agreement in force between the United States of America and any other nation or nations, or any federal statute.”²³ The Act further provides that an arbitration is “international” if: (1) the parties to the arbitration have their places of business in different nations when the agreement is concluded; (2) the place of arbitration is in a different nation; (3) any place where a substantial part of the obligations of the commercial relationship is to be performed is in a different nation; (4) the place with which the subject matter of the dispute is most closely connected is in a different nation; or (5) the parties expressly agree that the subject matter of the arbitration agreement relates to more than one nation.²⁴ The Act states that arbitration is “commercial” if it “arises out of a relationship of a commercial nature.”²⁵

The FAA contains three chapters, each with far-reaching applications.²⁶ Chapter 1 of the FAA applies to:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or

23. N.C. GEN. STAT. § 1-567.31(a) (2007). The North Carolina Act is the only state international commercial arbitration legislation that expressly recognizes preemption by federal statute. Zeff, *supra* note 32, at 720.

24. N.C. GEN. STAT. § 1-567.31(b) (2007).

25. N.C. GEN. STAT. § 1-567.31(e) (2007). The Act further provides examples of a “relationship of a commercial nature”:

- (1) A transaction for the exchange of goods and services;
- (2) A distribution agreement;
- (3) A commercial representation or agency;
- (4) An exploitation agreement or concession;
- (5) A joint venture or other related form of industrial business cooperation;
- (6) The carriage of goods or passengers by air, sea, land, or road;
- (7) A contract or agreement relating to construction, insurance, licensing, factoring, leasing, consulting, engineering, financing, or banking;
- (8) The transfer of data or technology;
- (9) The use or transfer of intellectual or industrial property, including trade secrets, trademarks, trade names, patents, copyrights, and software programs;
- (10) A contract for the provision of any type of professional service, whether provided by an employee or an independent contractor.

Id.

26. See 9 U.S.C. §§ 1-307 (2000).

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the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal.²⁷

Chapter 1 defines “commerce” as “commerce among the several States or with foreign nations”²⁸ The United States Supreme Court has interpreted this to include the full extent of Congress’ Commerce Clause powers.²⁹ Thus, Chapter 1 would apply to an arbitration agreement included in a contract between a U.S. party and a foreign party, or two foreign parties, if such contract implicated interstate commerce.³⁰ Commerce “with foreign nations” has been interpreted broadly to include, for example, contracts between a U.S. corporation or U.S. national and a foreign corporation, negotiated in a foreign country, and performed in that country.³¹

Chapter 2 of the FAA implements the United States’ obligations under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).³² Similarly, Chapter 3 implements such obligations under the Inter-American Convention on International Commercial Arbitration (Panama Convention).³³ Chapter 3 plays a secondary role to Chapter 2, applying only when the majority of the parties to the arbitration agreement are citizens of states that have ratified the Panama Convention.³⁴ Otherwise, the New York Convention applies.³⁵

The New York Convention applies to the recognition and enforcement of arbitral awards; arbitral agreements that may result in awards “made in the territory of a [Nation] other than the [Nation] where the recognition and enforcement of such awards are sought;” and “arbitral awards not considered as domestic awards in the [Nation] where their

27. 9 U.S.C. § 2 (2000).

28. 9 U.S.C. § 1 (2000).

29. See *Allied-Bruce Terminix Cos v. Dobson*, 513 U.S. 265, 273 (1995). See also William W. Park, *Text and Context In International Dispute Resolution*, 15 B.U. INT’L L.J. 191, 203-05 (1997); Hayford, *supra* note 1, at 182-93 (tracing the development of the FAA from its early application in federal courts only to its current interpretation).

30. Zeft, *supra* note 4, at 726.

31. Zeft, *supra* note 4, at 724. However, commerce “with foreign nations” requires a U.S. nexus. *Id.* at 725.

32. See 9 U.S.C. §§ 201-208 (2000). See also Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT’L L. REV. 17, 29-42 (2002); Zeft, *supra* note 4, at 707.

33. See 9 U.S.C. §§ 301-307 (2000). See also Karamanian, *supra* note 32, at 42-43; Zeft, *supra* note 4, at 707.

34. See 9 U.S.C. § 305 (2000). See also Karamanian, *supra* note 32, at 43.

35. See 9 U.S.C. § 305.

recognition and enforcement are sought.”³⁶ United States courts have interpreted “nondomestic” awards to include arbitral awards resulting from arbitration between two foreign parties conducted in the United States pursuant to United States arbitration law.³⁷ Thus, considering both Chapters 1 and 2 of the FAA, there are few instances in which the ICACA, despite its own broad application, will apply to an international commercial arbitration that is not also within the scope of the FAA.³⁸

Despite this, state legislation may apply so long as it is not pre-empted by the FAA.³⁹ The Supreme Court has held that the FAA does not “reflect a congressional intent to occupy the entire field of arbitration.”⁴⁰ Thus, state arbitration law may apply unless it “actually conflicts with federal law.”⁴¹ As one commentator has pointed out, the state laws that have been struck down as conflicting with the FAA are those laws that regulated or restricted arbitration and thereby interfered with the FAA’s pro-arbitration policy.⁴² Thus, in order to avoid

36. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

37. Zeft, *supra* note 4, at 729.

38. *See Id.* at 720-34 (discussing when an international commercial arbitration agreement would not be within the scope of the FAA).

39. *See* Hayford, *supra* note 1; Park, *supra* note 29; Zeft, *supra* note 4.

40. *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

41. *Id.* For a further discussion of when state arbitration law “actually conflicts” with the FAA, see Zeft, *supra* note 4, at 734-783.

42. *See* Hayford, *supra* note 1, at 194. *See also* *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682-83 (1996) (invalidating a Montana statute that required front-page notice of arbitration clauses contained in a contract); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54, 64 (1995) (striking down a New York decision that precluded award of punitive damages in arbitration); *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265, 268-69 (1995) (striking down an Alabama statute that nullified pre-dispute arbitration provisions in consumer transactions); *Perry v. Thomas*, 482 U.S. 483, 484, 493 (1987) (invalidating a California statute that restricted the collection of wages to state court); *Southland Corp. v. Keating*, 465 U.S. 1, 3-5, 17 (1984) (invalidating a California statute that required that franchise conflicts be litigated only in court).

The Supreme Court has recognized the FAA’s pro-arbitration policy. *See Volt*, 489 U.S. at 479 (holding that the FAA’s primary purpose is to “ensur[e] that private agreements to arbitrate are enforced according to their terms”); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (holding that the FAA “was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”); *Scherk v. Alberto-Culver, Co.*, 417 U.S. 506, 510-511 (1974) (holding that the FAA was designed to “revers[e] centuries of judicial hostility to

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preemption concerns, state arbitration legislation must be no more restrictive of arbitration than the FAA.⁴³ Furthermore, state provisions that seek to further the arbitral process and give effect to the parties' contractual agreement do not raise significant preemption concerns.⁴⁴ "If state arbitration rules supply terms the parties would likely have bargained for had they considered the issue . . . arbitration contracts are put on similar ground as other contracts."⁴⁵ State law provisions that provide procedural rules for the conduct of the arbitration, such as interim relief provisions, perform such a function and therefore do not raise significant preemption concerns. So long as state arbitration law is not preempted, it may apply under the proper circumstances, in both state and federal court.⁴⁶

II. WHY NORTH CAROLINA SHOULD REEXAMINE THE ICACA'S INTERIM RELIEF PROVISIONS

The FAA does not contain any provisions concerning interim relief.⁴⁷ Similarly, the Supreme Court has not addressed the ability of

arbitration agreements" and "place arbitration agreements 'upon the same footing as other contracts'" (citing H.R. REP. NO. 68-96, at 1-2 (1924)).

North Carolina has also expressly recognized and followed this strong public policy in favor of arbitration. *E.g.*, *Johnston County, N.C. v. R.N. Rouse & Co.*, 414 S.E.2d 30, 32 (N.C. 1992) ("North Carolina has a strong public policy favoring the settlement of disputes by arbitration."); *Cyclone Roofing Co. v. David M. Lafave Co.*, 321 S.E.2d 872, 876 (N.C. 1984) ("Because of the strong public policy in North Carolina favoring arbitration courts must closely scrutinize any allegation of waiver of such a favored right." (citation omitted) (citing *Moses H. Cone*, 460 U.S. at 24-25)).

43. *Park*, *supra* note 29, at 204. *See also*, *Hayford*, *supra* note 1, at 201 ("The guiding preemption principle would seem to be whether the state arbitration rule is consistent with the twin purposes of the FAA: namely, to overcome hostility to arbitration and to effectuate the parties' arbitration agreement.").

44. *Hayford*, *supra* note 1, at 193.

45. *Id.* at 201.

46. As to instances where state international commercial arbitration may apply in state court, see *Zeft*, *supra* note 4, at 720-734. As to instances where such legislation may apply in federal court, see *Walker*, *supra* note 7, at 457. Note also that state international commercial arbitration legislation may apply if a particular arbitration agreement is outside of the scope of the FAA. *See supra* notes 32-35 and accompanying text. Furthermore, it appears that the Supreme Court has recognized, in light of the FAA's primary purpose of enforcing arbitration agreements according to their terms, that parties may agree to apply state arbitration law to an arbitration even if such application would frustrate an arbitration that the FAA would otherwise allow, so long as the parties have expressly selected state law over federal law. *See Zeft*, *supra* note 4, at 783-93 (discussing *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468 (1989)).

47. *Walker*, *supra* note 7, at 433.

courts to order interim relief in aid of arbitration.⁴⁸ The absence of such procedural guidance in federal arbitration law has had two significant effects. First, it has created a split among the federal circuit courts concerning the ability of courts to order interim relief in aid of arbitration.⁴⁹ Second, it has created a niche for state arbitration law, in which state statutes “apply as procedural supplements to the [FAA] in an interstate or international transaction.”⁵⁰ Both of these circumstances reveal a need for North Carolina to (1) reexamine its interim relief provisions under the ICACA in order to reduce party reliance on court-ordered interim relief in aid of arbitration, and (2) identify itself as a forum for international commercial arbitration that is particularly receptive to the needs of the parties involved.

A. *The Need To Reduce Party Reliance on Court Assistance in Aid of Arbitration*

Preemption and court precedent aside, North Carolina should attempt to reduce the amount of court involvement in arbitral proceedings due to the fact that such assistance from the judiciary is disruptive to the arbitral process, and it diminishes the advantages and attractiveness of arbitration.⁵¹ Court involvement threatens the confidentiality associated with the arbitral process, reduces the informality and neutrality of the proceedings, and increases the costs and complexity of arbitration.⁵² Furthermore, the need for court assistance results in lengthy delays, jurisdictional problems, and the possibility that courts will not order interim measures of protection for fear of interfering with the arbitral process.⁵³

It is this reluctance on the part of the courts to order interim relief in aid of arbitration that furthers the need for North Carolina to reduce party reliance on court assistance in the arbitral process. Due to the absence of any federal law addressing the ability of courts to order interim measures of relief in aid of arbitration, there is a split among the circuit courts concerning whether courts may order pre-award

48. Hayford, *supra* note 1, at 200.

49. See generally, Charles H. Brower, II, Note, *What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention*, 35 VA. J. INT'L L. 971 (1995).

50. William P. Mills, III, Note, *State International Arbitration Statutes and the U.S. Arbitration Act: Unifying the Availability of Interim Relief*, 13 FORDHAM INT'L L.J. 604, 609 (1990).

51. Ferguson, *supra* note 2, at 57.

52. Noah Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 AM. REV. INT'L ARB. 307, 319 (2000).

53. Ferguson, *supra* note 2, at 57.

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attachment in aid of arbitration.⁵⁴ The Fourth Circuit is in the minority, holding that such court-ordered pre-award attachment is not available.⁵⁵ In *I.T.A.D. Associates v. Podar Bros.*, the Fourth Circuit held that pre-award attachment granted by the district court was “contrary to the parties’ agreement to arbitrate and the [New York] Convention.”⁵⁶ While the holding in *Podar* could certainly be questioned,⁵⁷ it has been viewed as binding precedent.⁵⁸ In *Alamria v. Telcor International*, the U.S. District Court for the District of Maryland held:

The Fourth Circuit has held that an attachment . . . is contrary to a party’s arbitration agreement as well as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. . . . This court is aware that other courts have taken different approaches . . . however *Podar* is controlling in this Circuit.⁵⁹

Other than the obvious fact that the Fourth Circuit’s holding in *Podar* may be relied upon by North Carolina courts to deny pre-award attachment in aid of arbitration, this holding has further implications pertaining to provisions in the ICACA that authorize courts to order

54. See, e.g., *I.T.A.D. Assocs. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981); and *McCreary Tire & Rubber Co. v. CEAT S.P.A.*, 501 F.2d 1032 (3d Cir. 1974). *C.f.*, *Borden, Inc. v. Meiji Milk Prod. Co. Ltd.*, 919 F.2d 822 (2d Cir. 1990); and *E.A.S.T. Inc. v. M/V Alaia*, 876 F.2d 1168 (5th Cir. 1989). There is also a divergence among federal courts concerning whether courts may issue preliminary injunctions in aid of arbitration. Compare *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984) (preliminary injunction denied), with *In re Y & A Group Sec. Litig.*, 38 F.3d 380 (8th Cir. 1994). However, the Fourth Circuit has held that this form of interim relief is allowed under the FAA, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048 (4th Cir. 1985) (“[T]he language of § 3 [of the FAA] does not preclude a district court from granting one party a preliminary injunction to preserve the status quo pending arbitration.”), *dist’g Pisgah Labs, Inc. v. Pharmaforce, Inc.*, 2005 U.S. Dist. LEXIS 30523 (W.D.N.C. 2005) (denying preliminary injunction because granting it would essentially moot the arbitration because the plaintiff would obtain the very relief sought), and therefore this inconsistency among federal courts does not present as much of a threat to international commercial arbitration in North Carolina as compared to the Fourth Circuit’s refusal to order pre-award attachment in aid of arbitration.

55. See, e.g. *I.T.A.D.*, 636 F.2d at 77; *Alamria v. Telcor Int’l Inc.*, 920 F.Supp. 658, 675 (D. Md. 1996).

56. *I.T.A.D.*, 636 F.2d at 77 (citing to *McCreary*, 501 F.2d at 1038 (holding that Article II(3) of the New York Convention prohibits courts from ordering pre-award attachment in aid of arbitration)).

57. The attachment was not actually in aid of arbitration. *Id.*

58. See *Alamria*, 920 F.Supp. at 675.

59. *Id.* (citations omitted).

such interim measures.⁶⁰ Under this precedent, one might argue that a provision authorizing court-ordered pre-award attachment conflicts with the New York Convention, and therefore should be preempted.⁶¹ The possibility that pre-award attachment could be denied under *Podar* complicates the arbitral process in North Carolina by creating uncertainty as to a party's ability to actually obtain interim relief. This uncertainty, combined with the other negative impacts of court involvement in the arbitral process, suggests that North Carolina should reexamine the ICACA with an eye toward reducing party reliance on the courts when seeking interim relief in aid of arbitration.

B. *The Need to Improve the Arbitral Process in General*

While creating confusion in the courts, the silence of both the FAA and the United States Supreme Court regarding matters of procedure in arbitration has also created an opportunity for states to fill such gaps with their own procedural rules.⁶² This opportunity allows states to craft procedural rules that are increasingly receptive to the needs of parties. In doing so, states are also given the opportunity to compete with other states and arbitral institutions for arbitration business.⁶³

Under the federal arbitration system, in which any state law that conflicts with the FAA's pro-arbitration policy is preempted, there are no significant preemption concerns for state procedural rules so long as they aid the arbitral process.⁶⁴ In comparison, state legislative ability is limited on matters covered by the FAA and matters that have been addressed by the United States Supreme Court; namely, issues of enforcement or the validity of an arbitration agreement or arbitral

60. See Zeft, *supra* note 4, at 765-66 ("If the applicable court precedent in a particular case holds that Article II(3) of the New York Convention prohibits a court from ordering pre-award attachment prior to a pending arbitration, then one could argue that the New York Convention would preempt a state law provision permitting such court-ordered attachment.")

61. See Zeft, *supra* note 4, at 770-72, for a discussion of how cases like *Podar* resulted from a misreading of Article II(3) of the New York Convention, and why such an argument would fail. This comment highlights a possible problem that parties seeking interim relief in aid of arbitration may face in North Carolina.

62. See generally Hayford, *supra* note 1.

63. *Id.* at 203.

64. *Id.* at 195. In the Hayford & Palmiter article, they describe a "blueprint of 'arbitration federalism'" in which the FAA is at the core, and those issues not addressed by federal law are in a "large penumbra" where federal law is silent, and "state law in the form of default procedural rules holds out great promise, limited only by the gravitational pull of the FAA's pro-arbitration imperative." *Id.* at 177-78.

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award.⁶⁵ Because states may only mimic the provisions contained in the FAA on such substantive matters, states must attempt to differentiate their arbitration legislation from other state arbitration laws or institutional rules by providing procedural rules that are comparatively more receptive to the needs of parties.

One commentator has compared this system to that of a corporate charter “whose validity arises as a matter of federal constitutional law, but whose terms and enforcement are a matter for the state in which the parties choose to incorporate.”⁶⁶ In other words, the need for state procedural rules to act as gap-fillers in the federal arbitration system presents an opportunity for states to compete for arbitration business.⁶⁷ North Carolina, however, is not only competing with other states that have international commercial arbitration legislation,⁶⁸ but also with arbitral institutions that provide procedural rules and other services to aid parties with the arbitral process. Such institutional rules include those of the International Chamber of Commerce (ICC)⁶⁹ and the American Arbitration Association (AAA).⁷⁰

North Carolina should take advantage of the opportunity to improve arbitral procedures simply because it will benefit those who currently participate in international commercial arbitration within the state. It is also possible that by crafting arbitral procedures that are increasingly receptive to the needs of parties, North Carolina may draw increased arbitration business into the state. Such increased efficiency in international commercial arbitration may encourage those

65. *Id.* at 195. While the United States Supreme Court has held that Congress, in enacting the FAA, did not intend to occupy the entire field of arbitration, Hayford and Palmiter argue that as it relates to “questions of validity and arbitrability, the Court has left state law no room to maneuver. In effect, the Court has occupied the field.” *Id.*

66. *Id.* at 203.

67. *Id.*

68. See, e.g., CAL. CIV. PROC. CODE §§ 1297.11 to 1297.432 (West 2007); CONN. GEN. STAT. ANN. §§ 50a-100 to 50a-136 (West 2006); FLA. STAT. ANN. §§ 684.01 - 684.35 (West 2006); GA. CODE ANN. §§ 9-9-30 to 9-9-43 (2007); HAW. REV. STAT. ANN. §§ 658D-1 to 658D-9 (LexisNexis 2007); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2B-01 to 3-2B-09 (LexisNexis 2006); OHIO REV. CODE ANN. §§ 2712.01 to 2712.91 (LexisNexis 2008); OR. REV. STAT. §§ 36.450 to 36.558 (2005); TEX. CIV. PRAC. & REM. CODE ANN. §§ 172.001 to 172.310 (Vernon 2005).

69. See ICC Rules of Arbitration (1998), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf; see also ICC, Rules for a Pre-Arbitral Referee Procedure (1999), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_pre_arbitral_english.pdf.

70. See AAA International Dispute Resolution Procedures (2007), available at <http://www.adr.org/sp.asp?id=28144>.

that participate in international commerce to conduct more of their business from within North Carolina.

Thus, the absence of federal arbitration law addressing procedural matters has created both the opportunity and the need for North Carolina to reexamine the ICACA in order to provide parties with interim measures of relief that will reduce the amount of court involvement in the arbitral process, and improve the arbitral process as a whole.

III. AREAS OF INTERIM RELIEF THAT NEED TO BE ADDRESSED

In reexamining the interim relief provisions under the ICACA, North Carolina should focus on four issues that have been the subject of debate among commentators in the area of international commercial arbitration.⁷¹ These include: (1) the availability of interim relief prior to creation of the arbitral tribunal; (2) the availability of *ex parte* interim measures of protection; (3) guidelines for arbitrators to follow in determining whether to order interim relief; and (4) enforcement of interim measures of protection.⁷² Only the issues concerning the availability of interim relief prior to the creation of the arbitral tribunal and enforcement of interim measures of protection implicate the need to reduce court assistance in the arbitral process in North Carolina.⁷³ However, each of these issues reflects an opportunity for the state to provide procedural rules for the conduct of international commercial arbitrations that are increasingly receptive to the needs of the parties involved. In considering these issues, North Carolina should take note of the recent amendments to the UNCITRAL Model Law on International Commercial Arbitration,⁷⁴ as well as the recently revised rules of the ICC⁷⁵ and AAA.⁷⁶

71. See, e.g., Ferguson, *supra* note 2.

72. *Id.*

73. See N.C. GEN. STAT. § 1-567.39(b) (2005) (“In all other cases [other than where the arbitrator or arbitrators have not been appointed, or where the arbitrator or arbitrators are unavailable], a party shall seek interim measures . . . from the arbitral tribunal and shall have no right to seek interim relief from the superior court, except that a party to an arbitration governed by this Article may request from the superior court enforcement of an order of an arbitral tribunal granting interim measures . . .”).

74. See generally, UNCITRAL Model Law on International Commercial Arbitration (2006), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

75. See, *supra* note 69.

76. See, *supra* note 70.

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A. *Availability of Interim Relief Prior to Constitution of the Arbitral Tribunal*

It can take months for an arbitral tribunal to be established.⁷⁷ During this time, it is necessary for there to be procedures in place so that the parties may request interim measures in order to protect assets and evidence.⁷⁸ The ICACA provides that “where the arbitrator or arbitrators have not been appointed, or where the arbitrator or arbitrators are unavailable, a party may seek interim relief directly from the superior court . . . by the law applicable to the type of interim relief sought.”⁷⁹ While this is a step above the rules of arbitration that do not address the availability of interim relief prior to the formation of the arbitral tribunal,⁸⁰ parties are still forced to turn to the courts in order to receive interim relief.

While the revised Model Law does not offer any new guidance on this issue, both the ICC and the AAA have interim relief provisions that provide procedures for parties to follow in order to obtain interim relief prior to the formation of the arbitral tribunal.⁸¹ Article 37 of the AAA International Dispute Resolution Procedures provides for “Emergency Measures of Protection.”⁸² These are mandatory rules that will apply unless the parties agree otherwise.⁸³ Under the rules, a party in need of “emergency” relief prior to constitution of the arbitral tribunal must notify an “administrator” who will then appoint an “emergency arbitrator” from a particular panel of arbitrators designated for such a purpose.⁸⁴ This special arbitrator is limited to providing “any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property.”⁸⁵

The ICC Rules for a Pre-Arbitral Referee Procedure operate in much the same way, with the appointment of a “Pre-Arbitral Referee” rather than an “emergency arbitrator,” who is limited to awarding

77. Ferguson, *supra* note 2, at 58.

78. *Id.* at 55.

79. N.C. GEN. STAT. § 1-567.39(a) (2007).

80. Ferguson, *supra* note 2, at 58 (stepping above such rules because it expressly addresses the issue, and because it confronts many jurisdictional issues). See N.C. GEN. STAT. § 1-567.36 (2007) (discussing the venue and jurisdiction of courts).

81. See AAA International Dispute Resolution Procedures, *supra* note 70, art. 37; ICC, Rules for a Pre-Arbitral Referee Procedure, *supra* note 69.

82. AAA International Dispute Resolution Procedures, *supra* note 70, art. 37.

83. *Id.* art. 37(1).

84. *Id.* art. 37(2), (3).

85. *Id.* art. 37(4).

interim relief provisions under certain circumstances.⁸⁶ The ICC rules have been criticized as being ineffective because, as compared to the AAA rules, they are optional rather than mandatory.⁸⁷ Regardless of the effectiveness of either of these rules, they are both steps in the right direction as they offer a procedure for parties to international commercial arbitration to follow in obtaining interim relief prior to the constitution of the tribunal without the need to seek assistance from the courts.

B. Availability of Ex Parte Interim Relief

“Ex parte interim measures of protection are orders made against a party who has not been given notice or a chance to be heard, prior to the declaration of the order.”⁸⁸ Commentators have argued that “ex parte interim measures of protection are necessary in certain circumstances when there is a sense of urgency and surprise is necessary to avoid the possibility of harm to a party.”⁸⁹ There is, however, an ongoing debate concerning whether the arbitral tribunal should have the power to order such relief.⁹⁰

Some commentators argue that arbitral tribunals should have the discretion to order such measures; that parties seeking ex parte measures are often required to post security as protection of the other party’s rights; and that arbitral orders that are wrongfully made may be amended during subsequent hearings.⁹¹ However, others argue that parties to an arbitral tribunal have a right to be heard, especially in light of the fact that arbitral decisions are binding, often with no right to appeal;⁹² that the amount of security paid is often not sufficient to return the injured party to the position it was in prior to the award of ex parte interim relief; and that there is too great a danger that such power will be abused by the arbitral tribunal.⁹³

In light of this controversy, it is important for parties, arbitrators, and courts to have clearly defined procedural rules informing them of the availability of ex parte interim measures. The ICACA does not address this issue at all.⁹⁴ In fact, under the ICACA, the only instances

86. See ICC, Rules for a Pre-Arbitral Referee Procedure, *supra* note 69.

87. Ferguson, *supra* note 2, at 58-59.

88. *Id.* at 59.

89. *Id.*

90. *Id.*

91. *Id.*

92. See N.C. GEN. STAT. § 1-567.67 (2007) (discussing the right to appeal under the ICACA).

93. Ferguson, *supra* note 2, at 59.

94. See generally N.C. GEN. STAT. §§ 1-567.30-67 (2007).

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in which a party may seek interim relief from a court is prior to the constitution of the arbitral tribunal or to enforce an award of the tribunal ordering interim measures of relief.⁹⁵ Thus, if the arbitral tribunal is unwilling to award *ex parte* interim relief, then a party seeking such relief would be left with no recourse.

In addressing this issue, the revised Model Law, which includes significant revisions concerning this matter, offers guidance.⁹⁶ Section two of the revised Model Law is devoted to what UNCITRAL termed “Preliminary Orders.”⁹⁷ Article 17(B)(1) provides: “Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.”⁹⁸ The Secretariat commentary to the revised Model Law explains that preliminary orders “provide a means for preserving the status quo until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order.”⁹⁹

Article 17 addresses many of the concerns expressed by those commentators that do not believe that an arbitral tribunal should have the power to award *ex parte* interim measures of relief. For example, Article 17 attempts to prevent the tribunal’s abuse of such power by offering guidance on when preliminary orders may be granted.¹⁰⁰ Furthermore, Article 17 addresses the issue of a party’s right to be heard, and the absence of appeals in arbitration, by providing that the party against whom the preliminary order is directed *shall* have an opportunity to present its case “at the earliest practicable time.”¹⁰¹ In addition, the preliminary order is limited in duration to a maximum of twenty days after which time the tribunal must issue an interim measure “adopting or modifying the preliminary order” or simply allowing the order to expire.¹⁰²

Lastly, UNCITRAL attempted to address the issue of insufficient security provided by a party seeking *ex parte* interim relief. According

95. *Id.*

96. See UNCITRAL Model Law on International Commercial Arbitration, *supra* note 74, art. 17(B)-17(C).

97. See *id.*

98. *Id.* art. 17(B)(1).

99. UNCITRAL Explanatory Note, *supra* note 8.

100. UNCITRAL Model Law on International Commercial Arbitration, *supra* note 74, art. 17(B)(2) (“The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.”).

101. *Id.* art. 17(C)(2).

102. *Id.* art. 17(C)(3).

to UNCITRAL, a party requesting interim measures or preliminary orders “shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted.”¹⁰³ Thus, the revised Model Law offers significant guidance for the adoption of provisions addressing the ability of the arbitral tribunal to award *ex parte* interim relief. These revisions are especially helpful in that they address many of the concerns expressed by those who feel that arbitrators should not be allowed to order this form of interim relief.

C. *Guidelines for Arbitrators*

The ICACA provides that “the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.”¹⁰⁴ Thus, as is the case under most arbitral rules, arbitrators are given a great deal of discretion in ordering interim relief.¹⁰⁵ Despite this discretion, arbitrators are often reluctant to order such protective measures.¹⁰⁶ This is possibly due to fears on the part of arbitrators that such an order will make it appear as though they favor one party over another, or that they are making a premature decision on the merits, which would affect the potential for voluntary compliance by the affected party.¹⁰⁷ Similarly, there may be some fear on the part of arbitrators that valid claims will be effectively prohibited because parties will not be able to meet the financial security requirements imposed by interim measures.¹⁰⁸

Commentators have suggested, however, that if there were more guidelines for arbitrators to follow in ordering interim relief, they would not be so reluctant.¹⁰⁹ Such guidelines would allow the parties, courts, and arbitrators to know the rights and responsibilities of the arbitrators and, therefore, alleviate any doubt and reluctance on their part.¹¹⁰

103. *Id.* art. 17(G).

104. N.C. GEN. STAT. § 1-567.47 (2007).

105. *See* Ferguson, *supra* note 2, at 60.

106. *Id.*

107. *Id.*

108. Rubins, *supra* note 52, at 320.

109. Ferguson, *supra* note 2, at 60.

110. *Id.*

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Again, the revised Model Law offers significant guidance in this area.¹¹¹ Article 17(A), entitled “Conditions for granting interim measures,” provides two requirements that a party seeking interim relief has the burden of proving to the tribunal.¹¹² First, the party must satisfy the tribunal that “[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.”¹¹³ Second, the party must show that “[t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim.”¹¹⁴ While these guidelines continue to allow the arbitral tribunal a great deal of discretion in ordering interim measures of relief, it is certainly an improvement over the limited guidance currently offered in the ICACA.

D. Enforcement of Interim Relief

One of the most significant issues concerning interim relief in international commercial arbitration is that of enforcement. If interim relief is not enforceable, it is meaningless.¹¹⁵ Most rules of arbitration provide that the arbitral tribunal may order interim relief; however, they do not provide any method for the enforcement of such provisions.¹¹⁶ Thus, parties are forced to turn to the courts seeking enforcement of the tribunal’s order.¹¹⁷ The ICACA expressly provides that a party “may request from the superior court enforcement of an order of an arbitral tribunal granting interim measures.”¹¹⁸ Again, this is an improvement over many arbitral rules, as it expressly grants the courts power to respond to non-compliance with arbitral orders and, in conjunction with other provisions, solves any jurisdictional issues.¹¹⁹ However, parties remain dependent on the courts for enforcement, thereby diminishing the advantages and attractiveness of international commercial arbitration. If the arbitral tribunal were given more power to enforce its own orders for interim relief, the need for parties to seek court assistance would be significantly reduced.

111. See UNCITRAL Model Law on International Commercial Arbitration, *supra* note 74, art. 17(A).

112. *Id.*

113. *Id.* art. 17(A)(1)(a).

114. *Id.* art. 17(A)(1)(b).

115. Ferguson, *supra* note 2, at 57.

116. *Id.*

117. *Id.*

118. N.C. GEN. STAT. § 1-567.39(b) (2007).

119. See N.C. GEN. STAT. § 1-567.36 (2007).

Neither the revised Model Law, the recently revised ICC, nor the AAA rules provide guidance on these issues.¹²⁰ As one commentator has pointed out, however, the English Arbitration Act of 1996 does provide an example in which the arbitral tribunal has increased power to coerce parties to comply with orders for interim relief.¹²¹ Under Article 41, entitled “Powers of tribunal in case of party’s default,” the English Arbitration Act provides that if a party “fails to comply with any other kind of peremptory order, then . . . the tribunal” may: (1) “direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;” (2) “draw such adverse inferences from the act of non-compliance as the circumstances justify;” (3) “proceed to an award on the basis of such materials as have been properly provided to it;” or (4) “make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.”¹²² Thus, the English Arbitration Act provides at least one example of arbitral rules that have given arbitrator’s increased power to enforce their own orders for interim relief.

CONCLUSION

Legislators and practitioners should take note of these attempts to address such issues confronting interim relief in international commercial arbitration. As to each of these issues, legislators may consider these rules when reexamining the ICACA in order to create a procedure for international commercial arbitration that reduces party reliance on the courts and is more receptive to the needs of parties generally. The legislature should do so in order to better the arbitral process for those who currently participate in international commercial arbitration in North Carolina, while also increasing the likelihood that more businesses will find the state an attractive forum for conducting arbitration business and international commerce. In the meantime, practitioners may take note of the issues that they may confront while participating in an international commercial arbitration in

120. See generally UNCITRAL Model Law on International Commercial Arbitration, *supra* note 74, art. 17; ICC Rules of Arbitration, *supra* note 69, art. 23; AAA International Dispute Resolution Procedures, *supra* note 70, art. 37.

121. See Ferguson, *supra* note 2, at 58.

122. English Arbitration Act of 1996, Art. 41(7), available at http://www.opsi.gov.uk/ACTS/acts1996/ukpga_19960023_en_3#pt1-pb7-11g39.

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North Carolina and attempt to address these issues in their client's arbitration agreements.

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