ICLG

The International Comparative Legal Guide to:

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A practical cross-border insight into international arbitration work

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. ("FAA"), governs arbitration agreements in contracts involving interstate commerce and applies in both federal and state courts. The only express requirement for enforceability under the FAA is that the arbitration agreement be in writing. 9 U.S.C. §§ 2-4 (the writing need not be signed). The form of the writing can vary; it can be an arbitration clause in the underlying commercial contract; a stand-alone arbitration agreement; or some other type of memorialisation. The same contract principles that apply to contracts generally under state law apply to arbitration agreements under the FAA.

1.2 What other elements ought to be incorporated in an arbitration agreement?

An arbitration agreement can contain whatever terms the parties wish; it can be as succinct or detailed as they desire. The parties are free to limit the types of disputes that may be referred to arbitration.

To ensure the enforceability of the arbitration clause and any award, however, the agreement should:

(1) unambiguously designate arbitration as the form of dispute resolution, specifying that any award rendered is binding on the parties;

(2) clearly define the scope of the arbitration clause, i.e., the categories of the disputes subject to arbitration, so that it covers any and all such disputes arising under, in connection with, or relating to the commercial contract;

(3) designate the procedural rules of the arbitration and any administering institution;

(4) designate the place of arbitration, i.e., where the arbitration is formally located as a matter of law or its juridical seat;

(5) specify the number of arbitrators, their qualifications, and the method of their selection;

(6) specify the language of the arbitration;

(7) include a choice-of-law clause specifying the substantive law applicable to the contract and the resolution of any disputes;

(8) provide that the FAA governs the arbitration agreement and the arbitration process; and

(9) provide that judgment may be entered on the arbitral award by any federal or state court having jurisdiction.

The parties may consider additional provisions as well. Some of the more common provisions include: (1) establishing conditions precedent to arbitration in multi-step clauses requiring negotiation and/or mediation; (2) binding non-signatory parents and affiliates to the arbitration clause; (3) addressing limitations on class actions; (4) allowing for consolidation or joinder; (5) requiring confidentiality of the arbitrators and the parties; (6) specifying or limiting the scope and types of disclosure that may be ordered by the tribunal; (7) specifying or limiting the type of remedies that may be awarded; (8) providing for fee and cost allocation; (9) providing for interim or provisional relief; (10) addressing any limitations on punitive damages; (11) providing for a reasoned award; (12) specifying the pre-award, post-award and post-judgment rate of interest; (13) specifying a time limit for rendering the final award; and (14) providing for appeal of arbitration awards to another arbitration body.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

"The preeminent concern of Congress in passing the [FAA] was to enforce private [arbitration] agreements into which parties had entered…." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Thus, the Supreme Court has held that, where the FAA applies, arbitration agreements are to be enforced according to their terms. *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 683-84 (2010). Moreover, the Court has held that the FAA expresses "a national policy favoring arbitration when the parties contract for that mode of dispute resolution". *Preston v. Ferrer*, 552 U.S. 346, 349 (2008). This policy, in turn, has led the Court to conclude that, as a general matter and where the FAA applies, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration". *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). However, "there is an exception to this policy: The question of whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise'." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (alteration in original) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

See question 1.1, *supra*. The FAA governs the enforcement of

arbitration agreements involving interstate commerce, in both federal and state courts. Section 12 of the FAA provides that, where the FAA applies, an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract". 9 U.S.C. § 12.

The parties can contract to apply state arbitration law in commercial transactions. If there is a conflict between state and federal arbitration law, however, a general choice-of-law provision in the agreement, invoking the law of a particular state, will not override the FAA. *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52 (1995). Parties wishing to supplement the FAA with the provisions of state arbitration law, or to substitute a state arbitration statute for the FAA, must make their intention indisputably clear. *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ*., 489 U.S. 468, 479 (1989).

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The same arbitration law governs both domestic and international arbitration proceedings, and is set forth in three Chapters located in Title 9 of the U.S. Code.

Chapter 1 (9 U.S.C. § 1 *et seq*.) codifies the FAA and sets forth general provisions applicable to arbitration agreements involving maritime, interstate, or foreign commerce.

Chapter 2 (9 U.S.C. § 201 *et seq*.) implements the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). As the Second Circuit has observed: "Under Section 202, actions or proceedings that 'fall[] under the [New York] Convention' include 'arbitration agreement[s] or arbitral award[s] arising out of a legal relationship, whether contractual or not, which is considered as commercial' between any parties, *unless* both parties are citizens of the United States and 'that relationship involves [neither] property located abroad, [nor] envisages performance or enforcement abroad, [n]or has some other reasonable relation with one or more foreign states". *CBF Industria de Gusa S/A v. AMCI Holdings, Inc*., 850 F.3d 58, 71 (2d Cir. 2017) (quoting 9 U.S.C. § 202). The provisions of Chapter 1 apply to foreign arbitral awards and proceedings only "to the extent that chapter is not in conflict with" Chapter 2, i.e., the New York Convention. 9 U.S.C. § 208.

Chapter 3 (9 U.S.C. § 301 *et seq*.) implements the 1975 Inter-American Convention on International Arbitration ("Panama Convention"). If there is a conflict between Chapter 1 and Chapter 3, the provisions in Chapter 3 apply. 9 U.S.C. § 307. Where both the New York and Panama Conventions could apply to the enforcement of an arbitral award, the New York Convention controls, unless the parties indicate the Panama Convention should apply. 9 U.S.C. § 305.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The United States has not enacted the UNCITRAL Model Law. Eight states, however, have enacted statutes based on the Model Law. These are California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon and Texas.

The FAA and the Model Law have several similar provisions but differ in other significant respects. The main differences relate to: (1) the number of arbitrators and the method of their selection in the absence of party agreement; (2) the authority of the arbitral tribunal to rule on its own jurisdiction (*competence-competence*); (3) the power of the courts to correct or modify an award; and (4) the grounds for setting aside an award.

(1) Article 10(2) of the Model Law provides that there shall be three arbitrators unless the parties have otherwise agreed, and Article 11 states that in the event no method of selection is specified, there shall be two party-appointed arbitrators, who shall appoint the third arbitrator, failing which the court shall make the appointment. Section 5 of the FAA, 9 U.S.C. § 5, provides that, unless otherwise specified in the agreement, there shall be one arbitrator and that when the method of appointment has not been specified or timely invoked by a party, the court shall designate or appoint an arbitrator or arbitrators.

(2) Article 16 of the Model Law empowers the arbitral tribunal to rule on its own jurisdiction. If the tribunal rules that it has jurisdiction in the form of a preliminary question (as opposed to in an award on the merits), a party may within 30 days thereafter request a court to decide the matter. Under the FAA, as construed by the Supreme Court of the United States, it is for the court to decide on the arbitrator's jurisdiction, absent clear and unmistakable evidence that the parties agreed to submit the issue of arbitrability to the arbitrator. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995).

(3) Under Article 33 of the Model Law, the arbitral tribunal may correct errors in an award of a computational, clerical, typographical or similar nature and, by mutual agreement of the parties, may interpret an award. The only recourse available against an award in the courts, however, is an application to set aside. In contrast, under Section 11 of the FAA, 9 U.S.C. § 11, a court may modify or correct an award where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property or where the award is imperfect as a matter of form not affecting the merits. (The parties may also adopt arbitral rules that allow arbitrators to correct computational or typographical errors in an award or interpret an award.)

(4) Article 34 of the Model Law contains four grounds for setting aside an award that have no express FAA counterpart; and the FAA has two statutory grounds for setting aside an award that are not addressed in the Model Law: (1) the award was procured by corruption, fraud, or undue means; and (2) there was evident partiality or corruption in the arbitrators. 9 U.S.C. § 10(a) (1)-(2). In addition, some courts have held that an award can be vacated if rendered in "manifest disregard" of the law. The continued viability of this non-statutory ground has been questioned following the Supreme Court's decision in *Hall Street Associates, LLC v. Mattel, Inc*., 552 U.S. 576, 578 (2008).

There are several issues addressed by the Model Law that are not addressed by the FAA. These include: the availability of provisional measures from a court; the disclosure obligations of the arbitrators; the means of challenging an arbitrator's alleged impartiality; the arbitrator's authority, in the absence of party agreement, to determine the venue and language of the arbitration and the governing law; the tribunal's right to appoint experts; procedures to follow upon default; and the form of the arbitral award.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The FAA contains no mandatory rules governing arbitral proceedings sited in the United States but, as discussed below, failure to (for example) consider evidence is grounds for *vacatur* of the award.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The FAA does not have an express subject-matter limitation on the kinds of disputes that can be resolved through arbitration. And the Supreme Court has held that rights created by statute – e.g., securities and antitrust claims – can be resolved in arbitration. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

Traditional contract defences available under state law that may invalidate the arbitration agreement, including fraud, duress, unconscionability, and public policy concerns, must be resolved first before proceeding with the arbitration. However, "[a] challenge to the contract as a whole is not sufficient to prevent the enforcement of an arbitration clause, because an arbitration provision is severable from the rest of the contract". Accordingly, "[u]nder the FAA, the party seeking to invalidate an arbitration clause must show that the arbitration clause itself was invalid". *Eisen v. Venulum Ltd.*, 244 F. Supp. 3d 324, 335 (W.D.N.Y. 2017) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71-72 (2010)). While a court "may invalidate an arbitration agreement based on generally applicable contract defenses like fraud or unconscionability", it may not invalidate the agreement based on legal rules "that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue'". *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421 (2017).

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

The parties to a contract can agree to arbitrate so-called "gateway questions to arbitrability". *Kai Peng v. Uber Technologies, Inc.*, 237 F. Supp. 3d 36, 52 (E.D.N.Y. 2017) (quoting *Hartford Acc. & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001)). These questions include: (1) whether there exists a valid agreement to arbitrate; and (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration clause. *Id.* Courts cannot assume the parties agreed to arbitrate these issues absent "clear and unmistakable evidence that they did so". *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 79 (2010). *See Gunn v. Uber Techs., Inc.*, 2017 WL 386816, at *3 (S.D. Ind. Jan. 27, 2017) (there was clear and unmistakable evidence where the agreement stated that "disputes arising out of . . . this Arbitral Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of [it] . . . shall be decided by an Arbitrator and not by a court or judge"). "[C]hallenges to the very existence of the contract are, in general, properly directed to the court." *Kum Tat Ltd. v. Linden Ox Pasture, LLC*, 845 F.3d 979, 983 (9th Cir. 2017).

Most of the leading institutional arbitral rules provide that the arbitral tribunal is competent to resolve questions about its own jurisdiction. *See, e.g.*, Rule 8.1, International Institute for Conflict Prevention and Resolution ("CPR") Rules for Non-Administered Arbitration (the "Rules") (effective Mar. 1, 2018) (the tribunal has the authority to hear and determine challenges to its jurisdiction, "including any objections with respect to the existence, scope or validity of the arbitration agreement"); Rule 8.2 (the tribunal has the authority "to determine the existence, validity or scope of the contract of which an arbitration clause forms a part"). Courts have held that, when the parties incorporate such rules into their agreement to arbitrate, the incorporation constitutes "clear and unmistakable" proof of an intention to delegate questions of arbitrability to the tribunal. *Galilea, LLC v. AGCS Marine Ins. Co.*, 879 F.3d 1052 (9th Cir. 2018). Where the parties incorporate institutional rules that give arbitrators authority to determine their own jurisdiction, courts "must compel the arbitration of arbitrability issues in all instances in order to effectuate the parties' intent regarding arbitration". *Belnap v. Iasis Healthcare*, 844 F.3d 1286, 1292 (10th Cir. 2017); *Jones v. Waffle House, Inc.*, 866 F.3d 1257 (11th Cir. 2017); and *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522 (4th Cir. 2017).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Section 2 of the FAA states that qualifying arbitration agreements are "valid, irrevocable, and enforceable". Section 3 states that a federal court, with a valid agreement before it, "*shall* on application of one of the parties stay the trial of the action until such arbitration has been had". 9 U.S.C. §§ 2-3 (emphasis added). Thus, when a party initiates litigation despite having an arbitration clause in his or her agreement, the counterparty may move to stay the litigation, pursuant to Section 3 of the FAA, and to compel arbitration under Section 4 of the FAA. Where appropriate, a stay of litigation "enables parties to proceed to arbitration directly, unencumbered by the uncertainty and expense of additional litigation, and generally precludes judicial interference until there is a final award". *Katz v. Cellco P'ship*, 794 F.3d 341, 346 (2d Cir. 2015).

While federal policy favours arbitration, and although there is no specific limitation period for filing a motion to compel arbitration, a party may waive the right to arbitration "when it engages in protracted litigation that prejudices the opposing party". *Tech. in P'ship, Inc. v. Rudin*, 538 F. App'x 38, 39 (2d Cir. 2013) (internal quotation marks omitted). Prejudice has been found where "a party seeking to compel arbitration engages in discovery procedures not available in arbitration, makes motions going to the merits of an adversary's claims, or delays invoking arbitration rights while the adversary incurs unnecessary delay or expense". *Id.* at 40 (quoting *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993)). *Westcode, Inc. v. Mitsubishi Electric Corporation*, 2017 WL 1184200 (N.D. N.Y. Mar. 29, 2017) (denying reconsideration of a court order refusing to compel arbitration where "Westcode suffered prejudice as a result of Mitsubishi's continued pursuit of litigation").

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

See question 3.2 *supra*. The arbitral tribunal has the authority to decide its own jurisdiction only if the parties have "clearly and unmistakably" agreed to give it this authority. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1996); *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014). Where the parties have agreed that an issue is for the arbitrators to decide, the court will defer to the arbitral resolution of the question. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013). On the other hand, the court will "make[] up its mind about [an issue] independently", where the parties did not agree the issue should be arbitrated. *First Options*, 514 U.S. at 942.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

"Arbitration under the [FAA] is a matter of consent, not coercion". *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). That said, the fact that a party did not sign an arbitration agreement is not dispositive of the question of whether it is bound to such agreement. As the Second Circuit has observed, "a nonsignatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency.'" *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995). Accordingly, traditional state law contract principles govern the applicability of an arbitration agreement to non-signatories. Courts have held that non-signatories may be bound to arbitration agreements under various theories – including: (1) incorporating by reference of the agreement to arbitrate into another contract; (2) assumption; (3) agency; (4) veil-piercing/alter ego; (5) third-party beneficiary; and (6) estoppel. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009) (arbitration agreements are enforceable by and against non-signatories, under state law contract principles); *Color-Web, Inc. v. Mitsubishi Heavy Industries Printing & Packaging Machinery, Ltd*., 2016 WL 6837156 (S.D.N.Y. Nov. 21, 2016) (applying estoppel to bind non-signatory plaintiffs and defendants to arbitration, including corporate parents, agent, and successor). Independent contractors are not "agents" that can be bound as non-signatories to an arbitration clause. *Oudani v. TF Final Mile, LLC*, 876 F.3d 31 (1st Cir. 2017).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The parties are free to incorporate time limits into their arbitration agreements. The FAA does not contain a statute of limitations, and most states do not have a specific statute addressing limitation periods in the context of arbitrations. However, in many states, the language of general limitations provisions have been read to include arbitrations. *See Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186 (Fla. 2013) (the statutory term "civil action or proceeding" includes arbitrations). Under New York law, the time limitation for making a demand is the same as would have applied had the action been filed in court. N.Y. C.P.L.R. § 7502(b) ("[i]f, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court").

Issues relating to the timeliness of a demand for arbitration are generally decided by the arbitrator. *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014) (courts presume the parties intend arbitrators and not the court to decide "procedural gateway matters" such as time limits); *Conticommodity Servs. Inc. v. Philipp & Lion*, 613 F.2d 1222, 1224-25, 1227 (2d Cir. 1980) ("[i]n the absence of express language in the contract referring to a court questions concerning the timeliness of a demand for arbitration, the effect of a time limitation embodied in the agreement is to be determined by the arbitrator"). *But see Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp*., 826 N.E.2d 802 (N.Y. 2005). ("A choice of law provision, which states that New York law shall govern both 'the agreement *and its enforcement*,' adopts as binding New York's rule that threshold Statute of Limitations questions are for the courts ... In the absence of more critical language concerning enforcement, however, all controversies, including issues of timeliness, are subjects for arbitration.") (Emphasis in original.)

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

A party's pending insolvency will not invalidate an arbitration agreement but may cause other parties to seek an attachment of funds or property, or injunctive relief to prevent the transfer or liquidation of assets.

Once a bankruptcy petition is filed, the Bankruptcy Code's automatic stay provision prevents an arbitration from proceeding, unless and until the stay is lifted. The automatic stay cannot be waived and is violated by filing a motion to compel arbitration in a forum other than the bankruptcy court. An award issued in violation of the automatic stay will be vacated. *ACandS, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252 (3d Cir. 2006) (Alito, J.) (vacating award).

However, a party can petition the bankruptcy court to allow the arbitration to go forward. Some appellate courts have held that bankruptcy judges have discretion to deny requests for arbitration where the "claims directly implicated matters central to the purposes and policies of the Bankruptcy Code". *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 110 (2d Cir. 2006). In the Second Circuit, a bankruptcy court's discretion to deny a motion to compel arbitration turns on whether the dispute is "substantially" a core matter because it is based on a substantive right conferred on the debtor-in-possession or trustee by the Bankruptcy Code; and whether arbitration would conflict with the objectives of the Bankruptcy Code. *Id*. at 108-110.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The FAA contains no choice-of-law rules, and the parties generally are free to select the substantive law that will apply in the arbitration. It is advisable for parties to state clearly the law applicable to the dispute in advance, to avoid complicated choice-of-law disputes. *Mastrobuno v. Shearson Lehman Hutton*, 514 U.S. 52 (1995) (parties wishing to apply state arbitration law cannot rely on a general choice-of-law provision in the contract, but must explicitly require the application of state arbitration law). The FAA preempts state laws that directly conflict with the FAA, that single out or discriminate against arbitration, or that "stand as an obstacle to the accomplishment of the FAA's objectives". *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 334 (2011).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

There is no provision in the FAA that limits the parties' choice of procedural or substantive law. That said, the Supreme Court has not had occasion to consider the extent to which other provisions of U.S. law might limit parties' ability to apply foreign law to conduct occurring in the United States. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985) (holding that antitrust claims are arbitrable but noting the parties' concession that U.S. antitrust law applied to the claims at issue).

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

See questions 1.1 and 4.1, *supra*. The parties are free to decide what substantive law will apply to the arbitration agreement. If the parties have not specified the applicable law, arbitrators will determine the applicable substantive law. Institutional arbitral rules typically give arbitrators the discretion to apply whatever law they deem appropriate. *See* JAMS Arbitration Rule 24(c); International Institute for Conflict Prevention & Resolution ("CPR") Administered Arbitration Rules (2013), Rule 10.1.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There are generally no restrictions on the parties' autonomy to select the arbitrators. The FAA expressly favours the selection of arbitrators by the parties rather than the courts. *Shell Oil Co. v. CO_2 Comm., Inc.*, 589 F.3d. 1105, 1109 (10th Cir. 2009). In their arbitration agreement, therefore, the parties may specify the number of arbitrators, their qualifications, and the method of their selection.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Section 5 of the FAA, 9 U.S.C. § 5, authorises judicial intervention in the arbitral process to select an arbitrator, on a party's application: (1) if the arbitration agreement does not specify a method for selecting arbitrators; (2) if any party fails to follow the method specified in the agreement for selecting arbitrators; or (3) if there is a "lapse in the naming of an arbitrator or arbitrators". Unless the agreement specifies otherwise, the court shall appoint a single arbitrator. The arbitrators chosen by the court "shall act . . . with the same force and effect" as if they had been specifically named in the arbitration agreement. *Id.* State laws may also expressly empower courts to appoint arbitrators. *See* N.Y. C.P.L.R. § 7504. ("If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.")

5.3 Can a court intervene in the selection of arbitrators? If so, how?

See question 5.2, *supra*. Except in rare cases, a court will not intervene pre-award to remove an arbitrator for bias, corruption or evident partiality; the FAA does not contain any express authorisation for such intervention.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Under Section 10(a)(2) of the FAA, one of the grounds on which an award may be vacated is "where there was evident partiality…in the arbitrator[]…." 9 U.S.C. § 10(a)(2). The phrase "evident partiality" means more than merely the appearance of partiality, but does not require proof of actual bias on the part of the arbitrator. There is some disagreement among the federal courts of appeals as to how to articulate the test. In general, a majority of the circuits, including the Second Circuit, follow the rule that evident partiality means that an award will be vacated "only when a reasonable person, considering all of the circumstances, would have to conclude that an arbitrator was partial to one side". *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (emphasis and internal quotation marks omitted). The Ninth Circuit has phrased the standard somewhat differently, as requiring "facts showing a reasonable impression of partiality". *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1106 (9th Cir. 2007).

The FAA does not contain any express disclosure requirements for arbitrators. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968), however, the Supreme Court held that an award can be vacated under Section 10(a)(2) of the FAA where the arbitrator fails to disclose a material relationship with a party, although there was no majority consensus on the exact test to be applied. Courts have since held that where an arbitrator has reason to believe that a non-trivial conflict of interest might exist, he must (1) investigate the conflict, or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate. *Applied Indus.*, 492 F.3d at 137. His failure to do either is indicative of evident partiality. The mere failure to investigate is not, by itself, sufficient to vacate an arbitral award; rather, "the materiality of the undisclosed conflict drives a finding of evident partiality, not the failure to disclose or investigate *per se*". *Nat'l Indem. Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d 457, 476 (S.D.N.Y. 2016), *aff'd*, 675 F. App'x 89 (2d Cir. 2017). An arbitrator's duty to investigate and disclose continues after his appointment, until the award is rendered.

Institutional arbitral rules invariably require that arbitrators be impartial and independent of the parties (particularly in international cases) and impose disclosure requirements on arbitrators. American Arbitration Association ("AAA") Commercial Arbitration Rules & Mediation Procedures, Rule R-17(a) (2016), for example, requires disclosure of "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives". *See also* CPR Arbitration Rules 5.1(c) & 7.3 (the designated arbitrator must disclose in writing "circumstances that might give rise to justifiable doubt regarding the candidate's independence or impartiality"); JAMS Arbitration Rule 15(h) (parties and their representative shall disclose "any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence").

The timing of a challenge based on arbitrator impartiality is important. The FAA does not provide for pre-award removal of an arbitrator by the court, absent fraud in the inducement or other infirmity in the contracting process. *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg*, 748 F.3d 708, 720 (6th Cir. 2014). Moreover, a party that fails to raise a claim of bias against an arbitrator until after an award has been issued may be deemed to have waived the objection. *Goldman, Sachs & Co. v. Athena Venture Partners, L.P.*, 803 F.3d 144, 149 (3d Cir. 2015).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

There is no federal policy favouring arbitration under a certain set of procedural rules. Instead, the parties have broad freedom

to determine the procedural rules under which the arbitration will be conducted, even if those rules differ from those in the FAA. Arbitrators generally must follow the procedural rules agreed upon by the parties. Contracting parties will typically agree to arbitrate under the rules of an established arbitral institution. These rules give arbitrators discretion to manage the arbitration in the manner they deem appropriate, subject to minimum due process requirements.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

See question 6.1, *supra*.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

The practice of law in the United States is regulated by the individual states. The American Bar Association Model Rules of Professional Conduct have been adopted (often with modifications) by all states except California, which has its own ethics rules. The rules apply to lawyers' conduct in arbitrations and other contexts. Under Model Rule 8.5(a), lawyers remain subject to the disciplinary authority of the jurisdiction where they are admitted, regardless of where the conduct occurred. *See* N.Y. Rule of Prof'l Conduct 8.5(a); D.C. Rules of Prof'l Conduct 8.5(a). However, the rules of the jurisdiction where the arbitration is pending may also apply. N.Y. Rule 8.5(b)(1); D.C. Rule 8.5(b)(1).

In many jurisdictions, including New York, Florida and the District of Columbia, representation of clients in arbitration does not constitute the "unauthorized practice of law", and both out-of-state and foreign lawyers need not be admitted locally to participate, but will be subject to the rules of conduct of the state bar where the arbitration takes place. Some states may impose particular procedural requirements on lawyers' participation, depending on whether the arbitration is domestic or international.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators' powers are determined by the terms of the arbitration agreement; the designated arbitration rules; and the provisions of the FAA. State law may also potentially apply. *See* questions 1.3 and 2.1, *supra*.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

As discussed in question 6.3, the practice of law in the United States is regulated largely by individual states. The jurisdictions where arbitrations are most typically sited do not regard appearances by out-of-state or foreign lawyers in arbitrations as constituting the "unauthorized practice of law", and therefore do not require that they be admitted locally. This is especially true for international arbitrations.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

The FAA is silent on arbitrator immunity. The case law recognises that arbitrators exercise quasi-judicial duties and like judges have absolute immunity from civil suits, for acts taken within the scope of the arbitral process. *Landmark Ventures, Inc. v. Cohen*, No. 13 Civ. 9044 (JGK), 2014 WL 6784397, at *4 (S.D.N.Y. Nov. 26, 2014). ("[U]nder well-established Federal common law, arbitrators and sponsoring arbitration organizations have absolute immunity for conduct in connection with an arbitration".) Courts, moreover, cannot inquire into the bases of an arbitrator's decision or the arbitrator's decision-making process. *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57 (2d Cir. 2003) (collecting cases), *overruled on other grounds by Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *Martin Weiner Co. v. Fred Freund Co.*, 155 N.Y.S.2d 802, 805 (App. Div. 1956). ("Inquisition of an arbitrator for the purpose of determining the processes by which he arrives at an award, finds no sanction in [the] law"), *aff'd*, 3 N.Y.2d 806 (1957).

The institutional arbitral rules also provide arbitrators and arbitral institutions with immunity from liability for conduct in connection with an arbitration. For example, AAA Arbitration Rule R-52(d) provides that "[p]arties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules". *See also* CPR Arbitration Rule 20. ("Neither CPR nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules"); JAMS Arbitration Rule 30(c) (same).

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Under the FAA, courts do not have jurisdiction over procedural issues that arise during an arbitration, with the exception of arbitrator appointment issues discussed *supra* in question 5.2.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

The FAA does not address this issue, but it is generally accepted that arbitrators have inherent authority to order interim or preliminary relief pending a final award. Arbitrators may also have express authorisation to order interim relief by the terms of the arbitration agreement and/or the terms of the chosen arbitral rules. *See* AAA Arbitration Rule R-37(a) ("[t]he arbitrator may take whatever interim measures he or she deems necessary"); CPR Arbitration Rule 13.1 ("[a]t the request of a party, the Tribunal may take such interim measures as it deemed necessary, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods"). Interim relief may also include preliminary injunctions and temporary restraining orders, as well as measures intended to preserve evidence.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The only provision of the FAA that expressly deals with interim relief is Section 8, 9 U.S.C. § 8, which applies to a narrow category of admiralty and maritime disputes. However, most federal courts have held that under the FAA a court may grant interim relief pending arbitration. *Sojitz Corp. v. Prithvi Info. Solutions, Ltd*., 921 N.Y.S. 2d 14, 17 (App. Div. 2011). And most state laws authorise provisional remedies in aid of arbitration. *See* NY CPLR § 7502; *Stemcor USA Inc. v. CIA Siderurgica Do Para Cosipar*, 870 F.3d 370, 374-79 (5th Cir. 2017) (where pre-arbitration attachment was available under Louisiana law in aid of an arbitration subject to the Convention to be filed in New York).

Interim orders generally are in effect only until the arbitrators are appointed. *Next Step Med. Co. v. Johnson & Johnson Int'l*, 619 F.3d 67, 70 (1st Cir. 2010) (interim relief is permitted when there has been "a showing of some short-term emergency that demands attention while the arbitration machinery is being set in motion"). *See* NY CPLR § 7502(c) (if arbitration is not initiated within 30 days of granting the provisional relief, the order granting relief expires, and costs and fees are to be awarded to the respondents). The rules of the leading arbitral institutions provide that seeking interim relief from the court does not waive the jurisdiction of the tribunal. *See* AAA Arbitration Rule R-37(c). ("A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate"); CPR Arbitration Rule 13.2 (same).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

See question 7.2, *supra*. A minority of federal courts have declined to grant interim relief when the underlying dispute is subject to arbitration. Most courts afford interim relief. Courts require that the moving party make a showing to justify interim relief. The standard for granting preliminary injunctive relief varies slightly by jurisdiction. Under New York law, interim injunctive relief requires: (1) a showing of irreparable harm; (2) a likelihood of success in the arbitration; and (3) that the balance of equities favours the moving party. *See*, *e.g.*, *In re TapImmune Inc*., No. 654460/12, 2013 WL 1494681 (N.Y. Sup. Ct., N.Y. Cty. Apr. 8, 2013). The likelihood of success on the merits factor is measured by the likelihood of success in the arbitration.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Courts have the power to grant anti-suit injunctions in cases concerning a pending or threatened foreign arbitration. *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, No. 13 Civ. 6073 (PKC), 2013 WL 6171315 (S.D.N.Y. Nov. 25, 2013) (enjoining actions filed in Greece raising claims covered by the arbitration agreement), *aff'd*, 776 F.3d 126 (2d Cir. 2015).

In the Second Circuit, a court may enjoin a party from pursuing a foreign action if "two threshold requirements are met: first, the parties must be the same in both proceedings, and second, resolution of the case before the enjoining court must be dispositive of the action to be enjoined". *Eastman Kodak Co. v. Asia Optical Co.*, 118 F. Supp. 3d 581, 586 (S.D.N.Y. 2015). If these requirements are met, courts weigh five additional factors identified in *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987). These factors include: (1) the threat to the enjoining court's jurisdiction posed by the foreign action; (2) the potential frustration of strong public policies in the enjoining forum; (3) the vexatiousness of the foreign litigation; (4) the possibility of delay, inconvenience, expense, inconsistency, or a race to judgment; and (5) other equitable considerations.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The FAA does not address costs and fees. Certain institutional arbitral rules expressly grant arbitration tribunals the power to require security for costs. *See* AAA Arbitration Rule R-37(b); CPR Arbitration Rules 13.1 and 19.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

It is generally accepted that courts will enforce interim arbitration awards "when such confirmation is necessary to ensure the integrity of arbitration". *Companion Property and Cas. Ins. Co. v. Allied Provident Ins., Inc*., 2014 WL 4804466 (S.D.N.Y. 2014) (confirming an interim security award). The interim award must fully resolve a discrete issue. *Sperry Int'l Trade v. Government of Israel*, 532 F. Supp. 901, 909 (S.D.N.Y. 1982), *aff'd*, 689 F.2d 301 (2d Cir. 1982) (order of arbitrator requiring defendant to place letter of credit in escrow pending final determination was "a final Award on a clearly severable issue"); *Southern Seas Navigation Ltd. of Monrovia v. Petroleos Mexicanos of Mexico City*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985) ("[j]ust as a district court's grant of a preliminary injunction is reviewable as a discreet and separate ruling…so too is an arbitration award granting similar equitable relief").

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

The FAA does not refer to rules of evidence except to provide, in Section 10(a)(3), that courts have authority to vacate an award where the tribunal "refuses to hear evidence pertinent and material to the controversy". 9 U.S.C. § 10(a) (3). The parties are free to address evidentiary matters in their agreement and incorporate institutional arbitral rules that address document disclosure. Arbitral tribunals typically do not follow the Federal Rules of Evidence or the Federal Rules of Civil Procedure.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

Section 7 of the FAA, 9 U.S.C. § 7, provides that "[t]he arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or

them any book, record, document, or paper which may be deemed material as evidence in the case". 9 U.S.C. § 7. Courts are divided as to whether arbitrators can order the production of documents before the hearing or order witnesses to appear for a pre-hearing deposition. Some courts, including the Second Circuit, have held that the FAA does not grant an arbitrator authority to order non-parties to appear at depositions or provide parties with documents prior to a hearing. *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216–17 (2d Cir. 2008); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004). On the other hand, the Eighth Circuit has ruled that the FAA provides arbitration panels with authority to require pre-hearing production by non-parties. *Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 228 F.3d 865, 870–71 (8th Cir. 2000); and the Sixth Circuit has authorised a subpoena directed at a non-party for pre-hearing documents in a labour arbitration. *Am. Fed'n of Television & Radio Artists v. WJBK-TV (New World Commc'ns of Detroit, Inc.)*, 164 F.3d 1004, 1009 (6th Cir. 1999).

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Under Section 7 of the FAA, 9 U.S.C. § 7, when a party fails to comply with a tribunal's order to testify or produce documents, the party seeking to enforce the order may petition a court for enforcement. 9 U.S.C. § 7. If the subpoenaed party does not comply with the court order, the party may be held in contempt. However, Section § 7 does not provide an independent grant of federal subject-matter jurisdiction.

United States courts have the authority, pursuant to 28 U.S.C. § 1782, to compel the production of evidence for use in international proceedings. The statute requires that the documents or testimony sought by the parties must be for use "in a proceeding in a foreign or international tribunal". While courts have ruled that investor-state arbitration panels are covered by § 1782, they are divided as to whether private international arbitrations constitute tribunals. Moreover, the target of the discovery must "reside" or be "found" in the district where discovery is sought, which can raise complex jurisdictional issues. An advantage of the § 1782 procedure, however, is that it may be filed *ex parte*, and without regard to the evidentiary rules of the foreign tribunal.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

The FAA contains no formal requirements regarding the production of documents or oral witness testimony. Cross-examination, however, is regularly employed in arbitrations in the U.S.

The FAA contains no oath requirement for witness testimony. AAA Arbitration Rule R-27 requires that each arbitrator take an oath of office, if required by law to do so, and states that the arbitrator may require witnesses to testify under oath.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Privilege law in the United States varies depending on whether state or federal law applies. The FAA contains no choice-of-law provision regarding privilege issues. But the rules of most of the leading arbitral institutions reference the need to respect privilege. *See*, e.g., CPR Arbitration Rule 12.2. ("The Tribunal is not required to apply any rules of evidence used in judicial proceedings. The Tribunal shall determine the applicability of any privilege or immunity and the admissibility, relevance, materiality and weight of the evidence offered".) Generally speaking, to invoke attorney-client privilege, a party must show a communication between client and counsel; which was intended to be and was in fact kept confidential; and which was made for the purpose of obtaining or providing legal advice. *Fisher v. United States*, 425 U.S. 391, 403 (1976). In addition, state and federal courts recognise "work product protection" over documents prepared in anticipation of litigation. The privileges can be waived under various circumstances, including by disclosing the communication to someone outside of the privilege. Jurisdictions in the United States extend the attorney-client privilege to communications with in-house counsel. *See Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y. 2d 588, 592 (N.Y. 1989).

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Section 10(a)(4) of the FAA, 9 U.S.C. § 10(a)(4), provides that an arbitral award must be "mutual, final, and definite", but the statute does not impose any requirements as to form. The New York Convention, implemented through Section 201 of Chapter 2, indicates that foreign awards must be in writing. There is no requirement that the award be reasoned. *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). ("Arbitrators have no obligation to the court to give their reasons for an award".) Where the arbitrators have not provided the grounds for their decision, the court need only find "a barely colorable justification for the outcome reached" to confirm the award. *Mandell v. Reeve*, 2011 WL 4585248, at *3 (S.D.N.Y. Oct. 4, 2011), *aff'd*, 510 F. App'x 73 (2d Cir. 2013).

Institutional arbitral rules, such as AAA Arbitration Rule R-46, require that the award be in writing and signed by the arbitrators. *See also* CPR Arbitration Rule 15.2 (award must be in writing and signed by at least a majority of the arbitrators); JAMS Arbitration Rule 24(h) (award shall be written and signed).

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The FAA authorises a court to modify or correct an award in three instances: (1) "[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award"; (2) "[w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted"; or (3) "[w]here the award is imperfect in matter of form not affecting the merits of the controversy". 9 U.S.C. § 11. In addition, a court may remand an award to the arbitrator if it is so ambiguous, or indefinite, that the court does not "know what it is being asked to enforce". *Washington v. William Morris Endeavor Entm't, LLC*, 2014 WL 4401291, at *7 (S.D.N.Y. 2014) (citation omitted).

Certain institutional arbitral rules permit the arbitrators to correct minor errors not affecting the merits. *See* AAA Arbitration Rule

R-50. ("The arbitrator is not empowered to redetermine the merits of any claim already decided", but can correct "clerical, typographical, or computational errors in the award".) Some state arbitral laws, if made applicable by the parties, also provide for arbitrators to correct errors of a similar nature that do not affect the merits.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Under the FAA, a party may challenge an award by moving to vacate the award and serving the motion on the adverse party or the party's attorney, within three months of the filing or delivery of the award. A party seeking to vacate an arbitration award "bears the heavy burden of showing that the award falls within a very narrow set of circumstances delineated by statute and case law". *Mintz & Gold LLP v. Battaglia*, 2013 WL 5297093, at * 2 (S.D.N.Y. Sept. 17, 2013). Section 10 of the FAA contains the exclusive grounds for seeking *vacatur*: "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject-matter submitted was not made". 9 U.S.C. § 10(a). A party seeking to invoke one of these statutory grounds "must clear a high hurdle". *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. at 671.

(1) Section 10(a)(1), involving fraud, corruption and undue means, requires the party to prove, by clear and convincing evidence, that (1) there was actual fraudulent conduct, (2) the fraud could not have been discovered through the exercise of reasonable diligence, and (3) the conduct was materially related to the arbitrator's decision. *ARMA, S.R.O. v. BAE Systems Overseas, Inc.*, 961 F. Supp. 2d 245, 254 (D.D.C. 2013).

(2) Section 10(a)(2), involving "evident partiality" in the arbitrators, has divided the courts as to the applicable standard of proof. *See* question 5.4, *supra*. In the Second Circuit, and a majority of federal circuits, evident partiality has been held to be shown where "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration". *Morelite Const. Corp. v. New York City District Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984). Proof of evident partiality must be by "clear and convincing evidence". *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 106 (2d Cir. 2013). Moreover, because arbitration is a matter of contract, "the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen". *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 548 (2d Cir. 2016).

(3) Section 10(a)(3), involving misconduct or misbehavior by the arbitrators, has been held to be shown where the arbitrators did not "grant the parties a fundamentally fair hearing". *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007).

(4) Section 10(a)(4), involving an arbitrator's exceeding his powers, has been held to be shown where the arbitrator "dispense[s] his own brand of industrial justice". *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (*per curiam*) ("[i]f an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision") (citation omitted). An error of law or fact, even when serious, is not sufficient to justify *vacatur* under this Section. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671-72 (2010).

For decades, courts treated "manifest disregard of the law" as an additional judicially implied or common law ground for vacating an arbitral award. In *Hall Street Associates LLC v. Mattel, Inc.*, 552 U.S. 576, however, the Supreme Court held that the exclusive grounds for vacating an award are those enumerated in Section 10 of the FAA, thus casting doubt on the continued vitality of the "manifest disregard of the law" doctrine. In the aftermath of *Hall*, courts are divided on the issue. The Second, Fourth, Sixth, and Ninth Circuits still recognise the doctrine, but the Seventh, Eighth and Eleventh Circuits do not. To salvage the doctrine after the *Hall* decision, the Second Circuit "reconceptualized" it as a gloss on the grounds for *vacatur* enumerated in the FAA. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008). In its subsequent ruling in that same case, the Supreme Court was willing to assume *arguendo* that manifest disregard still remained available as a ground for *vacatur*, although it concluded that it was unnecessary to reach that issue and decided the case on other grounds. *Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp.*, 559 U.S. at 669-70. In any event, attempts to vacate on the basis of the doctrine are rarely successful even in those circuits where it continues to be recognised. *But see Daesang Corp. v. Nutrasweet Co.*, 55 Misc. 3d 1218, 58 N.Y.S.3d 873 (N.Y. Sup. 2017) (partially vacating and remanding for reconsideration an international arbitral award, when the tribunal manifestly disregarded New York law by dismissing a counterclaim for fraud in the inducement). The decision in *Daesang* has been widely criticised, and is currently on appeal.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

There is case law that the parties cannot agree to exclude any of the grounds for *vacatur* under Section 10(a) of the FAA, 9 U.S.C. § 10. *Burton v. Class Counsel (In re Wal–Mart Wage & Hour Emp't Practices Litig.)*, 737 F.3d 1262, 1267-68 (9th Cir. 2013) (statutory grounds under 9 U.S.C. § 10(a) "may not be waived or eliminated by contract"); *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 64–66 (2d Cir. 2003) (parties seeking to enforce an arbitration award cannot contract to divest courts of statutory authority under § 10), *overruled on other grounds* by *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008). One federal circuit court, however, has held that, so long as the intent is clear and unequivocal, parties can agree to waive appeals from a district court's confirmation or *vacatur* of an arbitral award. *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The Supreme Court, in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), held that the grounds for *vacatur* under Section 10 of the FAA are exclusive and cannot be supplemented by a contract. Some state courts (including California, Connecticut, New Jersey, and Rhode Island) have held that the parties can agree to an expanded judicial review under state arbitration laws. *See*

Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Cal. 2008) (requiring an explicit contract provision for expanded review); *Nafta Traders Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011). Other state courts have taken the contrary position. *Brookfield Country Club, Inc. v. St. James Brookfield, LLC*, 696 S.E.2d 663 (Ga. 2010); *HL 1, LLC v. Riverwalk LLC*, 15 A.3d 725 (Me. 2011).

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The FAA contains no procedure for "appeal" of legal or factual determinations made by an arbitrator. That said, certain arbitral institutions have optional appellate arbitration procedures that parties can incorporate into their arbitration agreement, or agree to after the arbitration is ongoing. *See*, e.g., CPR Appellate Arbitration Procedure (2015).

Moreover, as indicated, *see* questions 9.2 and 10.1 *supra*, the FAA does contain procedures to vacate, modify, or correct an award. Under Section 12 of the FAA, 9 U.S.C. § 12, a motion to vacate, modify or correct an arbitral award must be served on the opposing party within three months after the award was filed or delivered. The action must be brought in the district where the award was made. When the challenge to an award is made in federal district court, the moving party must establish that the court has both subject-matter jurisdiction over the dispute, (i.e. the claim exceeds $75,000 and the parties are citizens of different states, or the claim arises under federal law), and also has personal jurisdiction over the parties.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The United States acceded to the New York Convention in 1970, and implemented its provisions in Chapter 2 of Title 9 of the U.S. Code, with two reservations. First, the United States recognises only awards made in another state that has ratified the Convention. Second, the United States applies the Convention only to matters recognised under domestic law as "commercial". Courts have construed these reservations narrowly. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004).

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

In 1990, the United States acceded to the Panama Convention and implemented its provisions in Chapter 3 of Title 9 of the U.S. Code.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The United States has a well-established policy in favour of arbitration, but an arbitration award is not self-executing and generally cannot be executed upon absent some action by a federal or state court.

At least as to domestic arbitration awards, and international arbitration awards rendered in the United States (non-domestic awards), the award must be "confirmed" before it can be enforced. The FAA, which governs confirmation in federal courts, requires the filing of a petition to confirm along with certain supporting documents (e.g., a copy of the agreement and a copy of the award). 9 U.S.C. §§ 9, 13. A petition to confirm a domestic award "may" be filed "at any time within one year after the award is made". 9 U.S.C. § 9. Notice of the petition must be filed on the adverse party. *Id.* "[T]he burden of proof necessary to avoid confirmation of an arbitration award is very high, and the district court will enforce the award so long as there is a barely colorable justification for the outcome reached". *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 103-04 (2d Cir. 2013).

In *CBF Industria de Gusa/S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir.), *cert. denied*, 138 S. Ct. 557 (2017), the Second Circuit recently held that, as to foreign arbitral awards rendered by tribunals seated *outside* the United States, there is no requirement to "confirm" the award in accordance with the procedures set forth in the FAA. Rather, the party wishing to enforce the award can bring a single action. The court explained that "confirmation", as used in the FAA sections enabling the New York Convention, "is the equivalent of 'recognition and enforcement' as used in the New York Convention for the purposes of foreign arbitral awards". *Id.* at 72.

Where parties to an arbitration agreement provide for New York state as the place of arbitration, they consent to the jurisdiction of New York federal and state courts to enforce the arbitration award. *See, e.g.*, *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006). Where foreign and out-of-state awards are concerned, and where the parties have not consented to New York jurisdiction, personal jurisdiction over the award debtor (or *in rem* or *quasi-in-rem* jurisdiction), as well as proper venue, must be established, and any *forum non conveniens* defence must be overcome. *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F. 3d 221 (2d Cir. 2014). The rules governing the enforcement of foreign arbitration *judgments* (as opposed to awards) are less clear. There is a split in the New York decisional law as to whether a party seeking to enforce a foreign judgment in New York courts must establish personal jurisdiction over the judgment debtor. *Compare Lenchyshyn v. Pelko Elec., Inc.*, 723 N.Y.S. 2d 285, 291 (4th Dep't 2001) (no personal jurisdiction requirement) *with Albaniabeg Ambient Shpk v. Engel S.p.A.*, 160 A.D. 3d 93 (1st Dep't 2018) (jurisdiction over the defendant or defendant's property required where the defendant is asserting substantive defences to the recognition of the foreign judgment).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

A valid and final arbitral award has the same effect under the principles of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) as the judgment of a court. *Pinnacle Env't Sys., Inc. v. Cannon Bldg. of Troy Assocs.*, 760 N.Y.S. 2d 253 (App. Div. 2003) (second arbitration barred by *res judicata* since it involved the same parties and issues); *Pujol v. Shearson/Am. Express, Inc.*, 829 F.2d 1201 (1st Cir. 1987); *Commw. Ins. Co. v. Thomas A. Greene & Co.*, 709 F. Supp. 86 (S.D.N.Y. 1989). *But see Falzone v. N.Y. Cent. Mut. Fire Ins.* 15 N.Y.3d 530 (2010) (the arbitrator's failure to apply collateral estoppel to preclude reconsideration of an issue decided in prior arbitration not reviewable).

In addition, under Section 13 of the FAA, 9 U.S.C. § 13, once a court judgment is entered confirming the award, that judgment has "the same force and effect" as any other court judgment entered in an action, which necessarily includes its preclusive effects.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Violation of public policy is not one of the FAA's listed grounds for vacating an award but the courts have nonetheless recognised a public policy exception. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (refusing to enforce an arbitration award on public policy grounds is a "specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy"). The Supreme Court's ruling in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), has resulted in some uncertainty in this area, but courts continue to apply the exception. *See, e.g.*, *Immersion Corp. v. Sony Computer Entertainment*, 188 F. Supp. 3d 960, 969 (N.D. Cal. 2016) ("[t]he court is not aware of any authority in this circuit suggesting that the judicially-created public policy defense is unavailable after *Hall Street*"); *Hernandez v. Crespo*, 211 So. 3d 19 (Fla. 2016) (physician-patient arbitration agreement adopting arbitration provisions of state Medical Malpractice Act but eliminating patient-friendly terms void as against public policy), *cert. denied*, 138 S. Ct. 132 (2017). In addition, Art. V (2) (b) of the New York Convention provides that recognition may be denied where it would be contrary to the public policy of the country where recognition and enforcement are sought.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The FAA has no provision expressly addressing confidentiality, and there is no case law establishing a general duty of confidentiality in arbitrations. Parties can, however, provide for confidentiality in their arbitration agreement. Institutional arbitral rules also typically recognise arbitrators to issue orders protecting the confidentiality of materials. CPR Arbitration Rule 20, for example, requires the parties, the arbitrators and the CPR to treat proceedings, related document disclosure, and tribunal decisions as confidential, subject to limited exceptions. Many state laws recognise the authority of the tribunal to issue protective orders and confidentiality orders. Publicly held companies, however, may be required by U.S. securities law to disclose the arbitration proceeding if it is material to the company's financial condition or performance. And post-award judicial proceedings to confirm or vacate will likely make the award public.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information from an arbitral proceeding may be voluntarily disclosed by a party unless prohibited by the parties' agreement, institutional arbitral rules, or confidentiality orders issued by the arbitrators. However, upon making the appropriate showing, third parties may obtain arbitral records by subpoena. *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664, 665-66 (7th Cir. 2009); *but see Fireman's Fund Ins. V. Cunningham Lindsey Claims Mgmt., Inc.*, Nos. 03CV0531 (DLI) (MLO), 03CV1625 (MLO), 2005 WL 1522783, at *3-4 (E.D.N.Y. Jun. 28, 2005) (rejecting a third party's request for a copy of a confidential award based on a strong public interest in honouring the arbitrating parties' expectation of confidentiality and the absence of extraordinary circumstances).

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The FAA does not limit the remedies available in arbitration. Subject to the parties' agreement, arbitrators may award any type of relief, including damages, specific performance, injunctions, interest, costs and attorney's fees. On the other hand, an arbitration agreement that expressly eliminates certain relief will be enforced. *Archer & White Sales v. Henry Schein, Inc.*, 878 F.3d 488 (5th Cir. 2017) (enforcing the terms of an agreement that eliminated injunctive relief as an available remedy), petition for cert. filed, No. 17-1272 (Mar. 17, 2018). The Supreme Court has held that under the FAA arbitrators may award punitive damages unless the parties' agreement expressly prohibits such relief. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58, 60-61 (1995). The AAA Arbitration Rules permit any relief deemed "just and equitable" within the scope of the parties' agreement. Rule R-47(a).

13.2 What, if any, interest is available, and how is the rate of interest determined?

The FAA does not address interest. Whether interest is permitted, and at what rate, will depend on the agreement of the parties, the applicable institutional rules, and the substantive law governing the contract. AAA Arbitration Rule R-47(d)(i), for example, permits the inclusion of interest in the award "from such date as the arbitrator(s) may deem appropriate". *See Bergheim v. Sirona Dental Sys., Inc.*, 2017 WL 354182, at *4 (S.D.N.Y. Jan. 24, 2017). ("There is a presumption in favor of awarding pre-judgment interest running from the time of the award through the court's judgment confirming the award, at a rate prescribed by the state statutory law governing the contract.")

Federal law controls post-judgment interest in federal cases, including cases based on diversity of citizenship. Under federal law, once a court judgment confirming the award is entered, the award is merged into the judgment and the interest rate is governed by the federal post-judgment interest rate statute, 28 U.S.C. § 1961. *See Bayer Cropscience AG v. Dow Agrosciences LLC*, 680 Fed App'x 985, 1000 (Fed. Cir. 2017). ("[N]umerous circuits have concluded that once a federal court confirms an arbitral award, the award merges into the judgment and the federal rate for post-judgment interest presumptively applies"); *Tricon Energy Ltd. v. Vinmar Int'l Ltd.*, 718 F.3d 448, 456-60 (5th Cir. 2013) (same). The parties may contract around the statute if they clearly and expressly agree on a different post-judgment interest rate, and that rate is consistent with state usury laws. Or they can agree to submit the question of post-judgment interest to arbitration. *Tricon Energy*, 718 F.3d at 457.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Arbitrators may award fees and costs subject to the parties' agreement.

The general practice in U.S. courts is for the parties to bear their own costs and fees. The parties are free, however, to agree on a different rule of cost allocation in their arbitration agreement, including by adopting institutional arbitral rules that give arbitrators the authority to grant such relief. AAA Arbitration Rule R-47(c), for example, provides that the arbitrator, in the final award, shall assess fees, expenses and compensation and that the award may include attorneys' fees if all parties have requested such an award or it is authorised by law or an arbitration agreement. CPR Arbitration Rule 19 provides that the tribunal shall fix the costs of arbitration in its award, including fees.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Arbitral awards are subject to federal and state tax in the same manner as court judgments.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

The FAA does not prohibit an unrelated third party from funding a party in an arbitration. State law addresses third-party funding through: (1) laws that regulate funders; (2) the doctrines of maintenance, champerty and barratry; and (3) rules regulating attorney conduct and the application of attorney-client privilege. For example, ABA Model Rule 5.4(a) prohibits an attorney or law firm from sharing legal fees with a non-lawyer, except in narrow circumstances.

Contingency fees are allowed, pursuant to individual states' rules of professional conduct.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

The United States signed the ICSID Convention and ratified the Washington Convention in 1965; its entry was effective on Oct. 14, 1966.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

The United States has 20 bilateral free trade agreements in force and is a party to 42 Bilateral Investment Treaties. The United States is not a contracting party to the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

U.S. BITs generally provide that investors and covered investments are afforded the better of national treatment (i.e. treated as favourably as the host party treats its investors and their investments) or most favoured nation treatment.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, waives immunity and gives United States courts jurisdiction to enforce arbitral agreements entered into and awards rendered against foreign states under specified circumstances. The statute authorises attachment of U.S. property of the foreign sovereign that is "used for a commercial activity" under specified circumstances as well. *Id.* § 1610.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

A divided U.S. Supreme Court, in *Epic Sys. Corp. v. Lewis*, __U.S.__, 2018 WL 2292444 (May 21, 2018), held (5-4) that class action waiver provisions in employer-imposed arbitration agreements are enforceable and do not violate the National Labor Relations Act. The Court observed that "[i]n the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings". The controversial decision resolves a split in the federal courts of appeals on the issue.

On Jul. 19, 2017, the Consumer Financial Protection Bureau published a final rule prohibiting providers of consumer financial services and products from relying on a pre-dispute arbitration agreement that bars a consumer from filing or participating in a class action. On Nov. 1, 2017, President Trump signed legislation overturning the rule.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The CPR Rules for Non-Administered Arbitration of Domestic and International Disputes became effective as of Mar. 1, 2018. Rule 15.7 requires the parties and the arbitrator(s) to use best efforts to ensure that the dispute will be submitted to the tribunal for decision within six months after the initial pre-hearing conference, and that the final award will be rendered within one month after the close of proceedings. Rule 9.2 authorises the arbitrator(s) to establish time limits for each phase of the proceeding. Rule 14 allows for emergency measures by an emergency arbitrator prior to tribunal selection. Under Rule 17.3, arbitrators, in apportioning costs may to take into account, *inter alia*, "the circumstances of the case" and "the conduct of the parties during the proceeding". "This broad power is intended to permit the arbitrators to apportion a greater share of costs than they otherwise might to a party that has employed tactics the arbitrators consider dilatory, or in other ways has failed to cooperate in assuring the efficient conduct of the proceeding".

CPR's new "Young Lawyer Rule", Rule 12.5 of the 2018 revised rules ("Evidence and Hearings"), seeks to increase opportunities for junior lawyers to take a more active role in arbitration hearings

by, for example, examining witnesses they helped to prepare and presenting arguments on the motion papers they drafted. Several federal judges have adopted rules, or issued standing orders, with the same goal. The new rule provides as follows:

In order to support the development of the next generation of lawyers, the Tribunal, in its discretion, may encourage lead counsel to permit more junior lawyers with significantly less arbitration experience than lead counsel to examine witnesses at the hearing and present argument. The Tribunal, in its discretion, may permit experienced counsel to provide assistance or support, where appropriate, to a lawyer with significantly less experience during the examination of witnesses or argument. Notwithstanding the contents of this Rule 12.5, the ultimate decision of who speaks on behalf of the client in an arbitration is for the parties and their counsel, not the Tribunal.

According to CPR President & CEO Noah J. Hanft: "While the 'Young Lawyer' Rule applies to all young lawyers, judges who have implemented it have reported that it has indirectly but naturally increased the opportunities for women and people of color—who tend to be underrepresented at the partner level—to play more active and substantive roles in the courtroom".

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