ICLG

The International Comparative Legal Guide to:

International Arbitration 2019

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A practical cross-border insight into international arbitration work

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Rachel Williams

CEO
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Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
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USA

John J. Buckley, Jr.

Jonathan M. Landy

Williams & Connolly LLP

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; (14) providing that the arbitrator shall have exclusive authority to decide threshold issues of arbitrability; and (15) 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. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *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); *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". *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). Accordingly, the FAA "preempts any state rule discriminating on its face against arbitration—for example, a law prohibit[ing] outright the arbitration of a particular type of claim". *Id*. at 341 (internal quotation marks omitted).

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

The parties to a contract may place before an arbitrator "not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy". *Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019) (citation omitted). Courts cannot assume the parties agreed to arbitrate these issues absent "clear and unmistakable evidence that they did so". *Id*. at 531 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

In *Schein*, the Supreme Court held that when a contract delegates to arbitrators the question whether a dispute is subject to arbitration, a court must refer the matter to arbitration even if, in the court's opinion, the claim that the dispute is arbitrable is "wholly groundless". "The Act does not contain a 'wholly groundless' exception", wrote the Court, "and we are not at liberty to rewrite the statute passed by Congress and signed by the President".

The Court remanded the case to the Fifth Circuit to decide a second issue, i.e. whether the parties' incorporation of the American Arbitration Association's ("AAA") arbitration rules (which include a provision empowering arbitrators to rule on their own jurisdiction) was sufficient to constitute "clear and unmistakable" evidence that the parties agreed to delegate the question of arbitrability to the arbitrator. All of the federal courts of appeals to have considered the question have held that the incorporation of arbitral rules giving arbitrators authority to determine questions of arbitrability does constitute "clear and unmistakable" evidence. *See Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1284 (10th Cir. 2017) (collecting cases); *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074-75 (9th Cir. 2013); *Schneider v. Kingdom of Thai*, 688 F.3d 68, 72-73 (2d Cir. 2012). Not all courts, however, are of this view. *See Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 427-29 (E.D. Pa. 2016) (reaching the opposite conclusion). Moreover, the American Law Institute takes the position that the incorporation of such rules cannot be regarded as meeting the "clear and unmistakable" test because "the rules do not purport to give arbitrators the exclusive authority to rule on the enforceability of the arbitration agreement". Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, § 2-8 reporter's note b (iii) (Tentative Draft No. 4) (approved May 19, 2019). Further, some courts have limited the incorporation doctrine to cases where two sophisticated parties, rather than unsophisticated individuals, have entered into the agreement. *Stone v. Wells Fargo Bank, N.A.*, 361 F. Supp. 3d 539 (D. Md. 2019).

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). The FAA does not authorise federal courts to stay state court proceedings, although federal courts may issue orders enjoining a party from proceeding with state court litigation. *GGNSC Louisville Mt. Holly, LLC v. Turner ex rel. White*, No. 3:16-CV-00149-TBR, 2017 WL 537200, at *5 (W.D. Ky. Feb. 11, 2017).

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 by first litigating. The Second Circuit considers three factors when determining waiver: "(1) the time elapsed from when litigation was commenced until the request for arbitration; (2) the amount of litigation to date, including motion practice and discovery; and (3) proof of prejudice." *Galvstar Holdings, LLC v. Harvard Steel Sales, LLC*, No. 16 Civ. 7126 (GBD), 2018 WL 6618389 (S.D.N.Y. Dec. 18, 2018) (quoting *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010)). A delayed arbitration request can cause "two types of prejudice: substantive prejudice, and prejudice due to excessive cost and time delay". *La. Stadium*

and Expo. Dist., 626 F.3d at 159. In *Galvstar Holdings*, for example, a waiver was found and a stay denied: "Not only did Harvard Steel wait nearly two years to seek arbitration, it also vigorously litigated arbitrable claims during that time, including filing a substantive motion to dismiss all claims." 2018 WL 6618389, at *3.

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. Rather, 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).

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. Although the majority of U.S. courts to have reached the issue have ruled that statutes of limitation do not apply in arbitrations, in some states the language of general statutory limitations provisions, cast in terms of "actions" or "civil actions" or "proceedings", 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 decided by first looking to the arbitration agreement; in the absence of relevant language to the contrary, it is presumed the issue is for 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); *Johnson v. Western & Southern Life Insurance Company*, 598 Fed. App'x. 454 (Mem) ("By concluding that Johnson is 'time-barred from now attempting to pursue arbitration,' the district court improperly ruled on a matter that is presumptively reserved for the arbitrator."). However, in New York, a choice of law provision, providing that New York law shall govern both "the agreement and its enforcement", incorporates New York's rule that threshold statute of limitations questions are for the courts. *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp*., 4 N.Y.3d 251 (2005).

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

The FAA favours arbitration, and neither the Federal Bankruptcy Code nor the bankruptcy rules prohibit arbitration of disputes in bankruptcy. Indeed, Bankruptcy Rule 9019(c) provides that "[o]n stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration". 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 *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382, 388 (2d Cir. 2018), the Second Circuit observed that "'[b]ankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters.'" *Id.* at 388 (citation omitted). If the bankruptcy court determines that arbitration would create a "severe" or "inherent" conflict with the purposes of the Bankruptcy Code, the court "has discretion to conclude that 'Congress intended to override the [FAA's] general policy favoring the enforcement of arbitration agreements.'" *Id*. at 387.

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; rather, the statute "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms". *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ*., 489 U.S. 468, 478 (1989). Arbitral tribunals, therefore, apply the substantive law chosen by the parties; where the agreement is silent on this matter, U.S. courts have held that an arbitrator has broad authority to determine the appropriate choice of law rules. The tribunal often will apply the choice-of-law rules of the law of the seat of arbitration.

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); CPR Administered Arbitration 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?

"As part of the 'very limited' jurisdiction granted to the courts under the FAA to intervene in the arbitral process before an award", *PB Exploration Libya Limited v. ExxonMobil Libya*, 689 F.3d 481, 490 (5th Cir. 2012), 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. A dispute concerning whether the arbitration agreement is being enforced properly is a procedural challenge for the arbitrator to decide; a court lacks jurisdiction to decide the issue at this stage of the proceedings. *International Bancshares Corporation v. Ochoa*, 311 F.Supp.3d 876 (S.D. Tex. 2018).

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 or corruption in the arbitrators, or either of them". 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). Recently, in *Certain Underwriting Members of Lloyds of London v. Florida Department of Financial Services*, 892 F.3d 501 (2d Cir. 2018), the Second Circuit held that a party seeking to vacate an award based upon claims of evident partiality has a higher burden when the claim is lodged against a party-appointed arbitrator than when lodged against a neutral arbitrator. The court opined that an arbitrator who is appointed by a party "is expected to espouse the view or perspective of the appointed party".

The FAA does not contain any express disclosure requirements for arbitrators. However, in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968), 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.*, *supra*, 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. AAA Commercial Arbitration Rule R-17(a), 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 Administered Arbitration Rule 7.3 ("Each arbitrator shall disclose in writing to CPR and the parties any 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 Pittsburgh*, 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 Ass*ocs., *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 Commercial 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 Administered Arbitration Rule 22 ("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").

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. Courts have held that an interim arbitral award is "final" for purposes of judicial review. *See Nat'l Union Fire Ins. Co. of Pittsburgh v. Source One Staffing LLC*, No. 16 Civ. 6461, 2017 WL 2198160, at *1 (S.D.N.Y. May 17, 2017) (quoting *Rich v. Spartis*, 516 F.3d 75, 81 (2d Cir. 2008)).

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. *Toyo Tire Holdings of Americas Inc. v. Continental Tire N. Am., Inc.*, 609 F.3d 975, 982 (9th Cir. 2010) ("a district court may issue interim injunctive relief on arbitrable claims if interim relief is necessary to preserve the status quo and the meaningfulness of the arbitration process—provided, of course, that the requirements for granting injunctive relief are otherwise satisfied"). *Id.* at 981. 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) (pre-arbitration attachment available under Louisiana law in aid of an arbitration subject to the Convention to be filed in New York). Nonetheless, "where an arbitrator is authorized under the governing rules of arbitration to grant the equivalent of the interim relief sought—and is in a position to do so—it is not appropriate for a district court to grant preliminary injunctive relief". *Genias Graphics Gmbh & Co. KG v. Tecplot, Inc.*, No. C13-1064-JCC, 2013 WL 12092542, at *1 (W.D. Wash. Aug. 21, 2013) (citation omitted).

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 also* 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 Administered 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?

Anti-suit injunctions seek to prevent parties from pursuing litigation in violation of an agreement to arbitrate. In the international context, principles of comity "counsel that injunctions restraining foreign litigation be used sparingly and granted only with care and great restraint". *Keep on Kicking Music, Ltd. v. Hibbert*, 268 F. Supp.3d 585 (S.D.N.Y. 2017) (quoting *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Tech., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004)). "An anti-suit injunction against parallel litigation

may be imposed only if: (A) the parties are the same in both matters, and (B) resolution of the case before the enjoining court is dispositive of the action to be enjoined." *Paramedics*, 369 F.3d at 652; *SEC v. Pension Fund of Am., L.C.*, 396 Fed. App'x 577, 580-82 (11th Cir. 2010). If these two factors have been satisfied, courts consider additional factors including "whether the parallel litigation would: (1) frustrate a policy in the enjoining forum; (2) be vexatious; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; (4) prejudice other equitable considerations; or (5) result in delay, inconvenience, expense, inconsistency, or a race to judgment". *Keep on Kicking Music* at 590 (quoting *Ibeto Petrochemical Industries Ltd. v. M/T Beffen*, 475 F.3d 56, 64 (2d Cir. 2007)).

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, 19.1 and 19.2. In *Nat'l Union Fire Ins. Co. of Pittsburgh v. Source One Staffing LLC*, the court confirmed an arbitration panel award requiring Source One to deposit over $3.3 million in pre-hearing security, concluding that "the arbitration panel acted well within its authority to take steps to ensure that any final award against it would not be rendered meaningless". 2017 WL 2198160, at *4.

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?

The answer varies by jurisdiction. It is generally accepted, however, 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.*, No. 13–cv–7865, 2014 WL 4804466 (S.D.N.Y. 2014) (confirming an interim security award). The interim award must fully resolve a discrete issue; where that is the case, the measures are enforceable as awards. *See 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"). In *Yahoo! v. Microsoft Corporation*, 983 F. Supp. 2d 310 (S.D.N.Y. 2013), the court applied these principles to interim measures of an emergency arbitrator.

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. *See* FINRA Rule 12604(a) (giving arbitrators authority to "decide what evidence to admit" and stating that the panel "is not required to follow state or federal rules of evidence").

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. The statute does not address discovery from non-parties. Courts are divided as to whether arbitrators can order the production of documents or deposition testimony from non-parties before the hearing. The Ninth Circuit in *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703 (9th Cir. 2017); the Third Circuit in *Hay Group Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004); and the Second Circuit in *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008), held that the statute limits an arbitrator's subpoena power to situations in which a non-party has been called to appear at, and bring documents to, a hearing. On the other hand, the Eighth Circuit has held that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing". *In re Security Life Ins. Co. of America*, 228 F.3d 865, 870–71 (8th Cir. 2000). This holding, however, has been limited to pre-hearing document production. The Fourth Circuit, in *Comsat Corp. v. National Science Foundation*, 190 F.3d 269, 275-76 (4th Cir. 1999), observed that "a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery [from a non-party] upon a showing of special need". State courts also differ on this issue. *See, e.g.*, *Matter of Roche Molecular Systems, Inc.*, 60 Misc.3d 222 (Sup. Ct. 2018) (declining to follow the Second Circuit decision in *Life Receivables Trust*).

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*, Nos. 10 Civ. 6530(RJS), 10 Civ. 7389(RJS), 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 a majority of 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*, No. 10–cv–9647 PKC, 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. However, "the role of a district court in reviewing an arbitration award is 'narrowly limited' and 'arbitration panel determinations are generally accorded great deference under the [FAA].'" *CRT Capital Group LLC v. SLS Capital, S.A.*, 18-CV-3986 (VSB), 2019 WL 1437159, at *3 (S.D.N.Y. Mar. 31, 2019) (citation omitted). 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". *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co*., 668 F.3d 60, 64 (2d Cir. 2012). 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). The Second Circuit has limited a court's review under § 10(a)(3) to "determining whether the procedure was fundamentally unfair". *CRT Capital Group LLC v. SLS Capital, S.A*., 2019 WL 1437159, at *4. The party's right to be heard must have been "grossly and totally blocked". *Oracle Corp. v. Wilson*, 276 F. Supp. 3d 22, 29 (S.D.N.Y. 2017).

(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 Fifth, 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 672 n.3. However, the doctrine "is considered one of last resort and its use has been limited to only those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent". *Oldcastle Precast, Inc. v. Liberty Mut. Ins. Co*., No. 7:16-cv-01914(NSR), 2019 WL1171564, at *4 (S.D.N.Y. Mar. 12, 2019) (internal quotation marks omitted). Accordingly, attempts to vacate on the basis of the doctrine are rarely successful even in those circuits where it continues to be recognised. In *Daesang Corp. v. Nutrasweet Co*., 58 N.Y.S.3d 873 (N.Y. Sup. 2017), the trial court partially vacated and remanded for reconsideration an international arbitral award, when the tribunal manifestly disregarded New York law by dismissing a counterclaim for fraud in the inducement. On appeal, the First Department reversed, holding that the ruling under review did not meet "the high standard required to establish manifest disregard of the law"; namely, a showing that "the arbitrator[s] knew of the relevant principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it". *Daesang Corp. v. NutraSweet Co*., 85 N.Y.S.3d 6, 16-17 (1st Dep't 2018).

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). The major arbitral associations have adopted appellate rules, with differing procedures and standards of review. *See, e.g.*, JAMS Rule 34 (optional arbitration appeal procedures).

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, the major arbitration associations have adopted optional appellate rules that parties can incorporate into their arbitration agreement, or agree to after the arbitration is ongoing. Moreover, as the Supreme Court observed in *Hall Street Associates*, the FAA "is not the only way

into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable". Finally, 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 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. See *Pinnacle Env't Sys., Inc. v. Cannon Bldg. of Troy Assocs.*, 760 N.Y.S. 2d 253 (App. Div. 2003) (under New York law, arbitration awards, even those not judicially confirmed, have the same preclusive effect on subsequent litigation as final court judgments). In New York, the doctrine prevents relitigation of issues that were, or could have been, litigated in a prior action. 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. *Henry Schein, Inc. v.* Archer and White Sales, Inc., 139 S.Ct. 524 (recognising that an agreement that eliminated injunctive relief as an available remedy was enforceable). 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" and 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 19.1 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 state.

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?

On Apr. 24, 2019, the U.S. Supreme Court, in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), ruled that a court may not compel class arbitration when the arbitration agreement is ambiguous. The 5-4 decision, written by Justice Roberts, held that the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis". *Id.* at *4. The Court rejected the Ninth Circuit's contrary ruling, which relied on California's rule that an ambiguity in the agreement should be resolved against the drafter. In addition, the Court pointed out that it "has not decided whether the availability of class arbitration is a so-called question of arbitrability". *Id.* at 1417.

Almost a year earlier, on May 21, 2018, in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the Supreme Court ruled 5-4 in favour of an employer's right to include class action waivers in its arbitration agreements. The employees had argued that the "saving clause" of the FAA, which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract", precluded enforcement of class waivers because the National Labor Relations Act protected their right to act collectively in bringing a class action. While the Supreme Court conceded that "[a]s a matter of policy these questions are surely debatable", it concluded that in the FAA "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings". Nothing in the NLRA overcame that requirement. The Court's decision abrogates some state-court decisions that had followed the NLRB's analysis. *See Gold v. New York Life Ins. Co*., 32 N.Y.3d 1009 (N.Y. 2018) (recognising abrogation).

The Court in *Epic* noted that Congress could enact legislation requiring a different result, and Justice Ginsburg, in her dissent, urged Congress to do this. Thereafter, in an effort to overturn the Supreme Court's decision, Democratic representatives introduced the Restoring Justice for Work Act (H.R. 7109) (Oct. 30, 2018). This legislation would prohibit the use of class action waiver provisions in employment contracts and bar agreements requiring that future employment disputes be arbitrated. At present, the legislation appears to have little chance of success.

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

CPR's revised Rules for Administered Arbitration and Rules for Administered Arbitration of International Disputes became effective Mar. 1, 2019. Rule 9.3 provides that the tribunal "shall hold an initial pre-hearing conference for the planning and scheduling of the proceeding". Matters to be considered "may include the early identification and narrowing of the issues in the arbitration, including the possibility of early disposition of any claims, counterclaims, defences or other issues in accordance with Rule 12.6 and the CPR Guidelines on Early Disposition of Issues in Arbitration". 9.3(b).

Rule 12.6 ("Early Disposition of Claims, Counterclaims, Defences and Other Issues") provides that, subject to the tribunal's instructions, "a party may make a preliminary application to the Tribunal to file a motion for early disposition of issues, including claims, counterclaims, defences and other legal and factual questions". The application to file a motion for early disposition must include: (1) the issues to be resolved; (2) a short statement of the basis for the proposed motion for early disposition and relief requested; (3) how early disposition of the issue(s) will advance efficient resolution of the overall dispute; and (4) the applicant's proposal as to the procedure by which the issues submitted for early disposition would be resolved."

Rule 12.6 (c) requires prompt review of the application and the responses of other parties. The tribunal must then determine "whether there is a reasonable likelihood that hearing the motion for early disposition may result in increased efficiency in resolving the overall dispute while not unduly delaying the rendering of a final award". Should the tribunal find it appropriate to hear the motion, "it shall instruct the parties as to the procedures to be followed, taking into account the proposals by the parties". 12.6(d). In terms of timing, the tribunal "shall endeavor to render a decision on the motion for early disposition expeditiously, which ordinarily should be within sixty (60) days of the date of the motion".

The CPR rules do not define "dispositive". CPR Guidance, which is illustrative, provides that the type of issues "for which early disposition may be appropriate" include, but are not limited to: (1) jurisdiction and standing; (2) claims or legal theories of recovery, where the claimant cannot demonstrate that it will be able to provide evidence to satisfy a required element of the claim or theory of recovery; (3) defences such as contractual covenants, prescription/limitation periods, statutes of fraud, release, settlements, *res judicata*, or collateral estoppel; and (4) damages. The Guidance cautions that, "even if early disposition of an issue may be accomplished quickly and fairly, it nevertheless may not be appropriate if it is not likely, if granted, to result in a material reduction of the total time and cost in reaching final resolution of the case."

John J. Buckley, Jr.

Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005
USA

Tel: +1 202 434 5051
Email: jbuckley@wc.com
URL: www.wc.com

John Buckley is Senior Counsel at Williams & Connolly LLP and founder of the firm's International Arbitration practice group.

Mr. Buckley has consistently been listed as one of the leading U.S. commercial arbitration practitioners in *Euromoney's Guide to the World's Leading Experts in Commercial Arbitration*.

A Fellow of the Chartered Institute of Arbitrators, he is listed on numerous arbitrator rosters, including the International Centre for Dispute Resolution (ICDR), and the International Institute for Conflict Prevention & Resolution (CPR). Since 2015, he has been a Visiting Clinical Lecturer at Yale Law School where he teaches advocacy in international arbitration.

He earned his A.B., *magna cum laude*, Phi Beta Kappa, from Georgetown University and his J.D., with honours, from The University of Chicago, where he was Editor-in-Chief of *The University of Chicago Law Review*. Before joining Williams & Connolly, he was a law clerk to Associate Justice Lewis F. Powell, Jr. of the Supreme Court of the United States.

Jonathan M. Landy

Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005
USA

Tel: +1 202 434 5076
Email: jlandy@wc.com
URL: www.wc.com

Jon Landy is a partner at Williams & Connolly LLP. He is Co-Chair of the firm's International Disputes practice group and focuses his practice on international and domestic arbitrations. Mr. Landy also has extensive experience representing: law firms in legal malpractice matters; financial services institutions and multinational corporations in commercial litigation and government investigations; and labour unions in government investigations and civil litigation. Mr. Landy is a Visiting Clinical Lecturer at Yale Law School, where he teaches advocacy in international arbitration. Prior to joining Williams & Connolly, Mr. Landy clerked for Judge Louis F. Oberdorfer of the U.S. District Court for the District of Columbia. He holds degrees from Yale Law School, where he was Senior Editor of the *Yale Law Journal*, and Dartmouth College, where he received an A.B. in History, *magna cum laude*.

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com