ICLG

The International Comparative Legal Guide to:

International Arbitration 2017

14th Edition

A practical cross-border insight into international arbitration work

Published by Global Legal Group, in association with CDR, with contributions from:

Accuracy
Ali Budiardjo, Nugroho, Reksodiputro
AlixPartners
Andersen Tax & Legal
Anderson Mori & Tomotsune
Attorneys at law Ratiolex Ltd
Baker McKenzie
BDO LLP
Bekina, Škurla, Durmiš and Spajić Ltd.
Bizlink Lawyers
BMT LAW
Boss & Young, Attorneys-at-Law
BRISDET
Brödermann Jahn RA GmbH
Cases & Lacambra
Christophe Dugué – Avocat
CMS Cameron McKenna
Costa e Tavares Paes Advogados
DLA Piper UK LLP
Dr. Colin Ong Legal Services
Duff & Phelps
Eric Silwamba, Jalasi and Linyama Legal Practitioners
Freshfields Bruckhaus Deringer LLP
Georgiev, Todorov & Co.
Gregoriou & Associates Law Firm
HFW
Homburger
Kachwaha and Partners
König Rebholz Zechberger
Linklaters LLP
Loyens & Loeff Luxembourg S.à.r.l.
Matheson
Moroglu Arseven
Njeri Kariuki Advocate
Norburg & Scherp
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Popovici Nițu Stoica & Asociații
Portolano Cavallo Studio Legale
PUNUKA Attorneys & Solicitors
Rojs, Peljhan, Prelesnik & partners
Salazar & Asociados
SBH Law Office
Secretariat International
Sedgwick Chudleigh Ltd.
Weber & Co.
Williams & Connolly LLP
Wilmer Cutler Pickering Hale and Dorr LLP

CDR Commercial Dispute Resolution
glg global legal group

global legal group

Contributing Editors
Steven Finizio and Charlie Caher, Wilmer Cutler Pickering Hale and Dorr LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Paul Mochalski

Sub Editor
Oliver Chang

Senior Editors
Suzie Levy, Rachel Williams

Chief Operating Officer
Dror Levy

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
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
July 2017

ISBN 978-1-911367-63-5
ISSN 1741-4970

Strategic Partners

Preface:

General Chapters:

Asia Pacific:

Central and Eastern Europe and CIS:

Western Europe:

Continued Overleaf →

Western Europe, cont.:

Latin America:

Middle East / Africa:

North America:

USA

John J. Buckley, Jr.

Williams & Connolly LLP

C.J. Mahoney

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

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

"The preeminent concern of Congress in passing the [FAA] was to enforce private [arbitration] agreements into which parties had entered…". *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Thus, the Supreme Court has held that, where the FAA applies, arbitration agreements are to be enforced according to their terms. *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 683-84 (2010). Moreover, the Court has held that the FAA expresses "a national policy favoring arbitration when the parties contract for that mode of dispute resolution". *Preston v. Ferrer*, 552 U.S. 346, 349 (2008). This policy, in turn, has led the Court to conclude that, as a general matter and where the FAA applies, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration". *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). However, "there is an exception to this policy: The question 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*, 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 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 key provisions of U.S. statutory law regarding arbitration are 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 contains no express subject-matter limitation on the kinds of disputes that can be resolved in arbitration. And the Supreme Court has held that rights created by statute – e.g., securities and antitrust claims – can be resolved in arbitration. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

Traditional contract defences available under state law that may invalidate the arbitration agreement, including fraud, duress, unconscionability, and public policy concerns, must be resolved first before proceeding with the arbitration. However, "[a] challenge to the contract as a whole is not sufficient to prevent the enforcement of an arbitration clause, because an arbitration provision is severable from the rest of the contract". *Eisen v. Venulum Ltd.*, __F. Supp. 3d __, 2017 WL 1136136, at *6 (W.D.N.Y. Mar. 27, 2017) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71 (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*, Sup. Ct. No. 16-32, 85 U.S.L.W. 4235 (May 15, 2017) (internal quotation marks and citation omitted).

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

As discussed above, *see* question 1.3 *supra*, the Supreme Court has held that the FAA creates a general policy in favor of arbitration. However, "whether parties have agreed to 'submi[t] a particular dispute to arbitration' is typically an 'issue for judicial determination'." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) (alteration in original) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

Even this presumption can be overcome if the parties have indicated in "clear and unmistakable" terms their intention to arbitrate so-called "question[s] of arbitrability". *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. at 944, 946; *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 69-70 (2010) (delegation of authority to the arbitrator to decide the enforceability and scope of an agreement are valid so long as the delegation clause is clear and unmistakable); *NASDAQ OMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010, 1032 (2d Cir. 2014) (same).

Most of the leading institutional arbitral rules provide that the arbitral tribunal is competent to resolve questions about its own jurisdiction. *See*, e.g., JAMS Comprehensive Arbitration Rules & Procedures (2014) ("JAMS"), Rule 11(b). ("The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter".) In the wake of the Supreme Court's ruling in *First Options*, lower courts have held that when the parties incorporate such rules into their agreement to arbitrate the incorporation constitutes "clear and unmistakable" proof of an intention to delegate questions of arbitrability to the tribunal. *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011); *Shaw Grp. Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 124-25 (2d Cir. 2003).

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?

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. 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.), *cert. denied*, 136 S. Ct. 596 (2015).

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

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

See question 3.2 *supra*. The presumption is that the parties intend courts, not arbitrators, to decide disputes about arbitrability. 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*, 543 U.S. at 943; *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014).

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. 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; and (5) estoppel. *Arthur Andersen LLP v. Carlisle,* 556 U.S. 624 (2009) (arbitration agreements 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).

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 FAA does not contain a statute of limitations, although the parties are free to incorporate time limits into their arbitration agreement. Issues relating to the timeliness of a demand for arbitration are generally decided by the arbitrator and not by the court. *Conticommodity Servs. Inc. v. Philipp & Lion*, 613 F.2d 1222, 1224-25, 1227 (2d Cir. 1980). ("In the absence of express language in the contract referring to a court questions concerning the timeliness of a demand for arbitration, the effect of a time limitation embodied in the agreement is to be determined by the arbitrator".)

On the other hand, certain state laws allow parties to raise timeliness objections before a court in an application to bar a demand for arbitration. *See*, e.g., N.Y. C.P.L.R. § 7502(b). ("If, 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".)

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

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).

4 Choice of Law Rules

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

The FAA contains no choice-of-law rules, and the parties generally are free to select the substantive law that will apply in the arbitration. It is advisable for parties to clearly state the law applicable to the dispute in advance, to avoid complicated choice-of-law disputes. *Mastrobuno v. Shearson Lehman Hutton*, 514 U.S. 52 (1995) (parties wishing to apply state arbitration law cannot rely on a general choice-of-law provision in the contract, but must explicitly require the application of state arbitration law).

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

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

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

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

5 Selection of Arbitral Tribunal

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

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

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

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

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

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

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

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

The FAA does not contain any express disclosure requirements for arbitrators. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968), however, the Supreme Court held that an award can be vacated under Section 10(a)(2) of the FAA where the arbitrator fails to disclose a material relationship with a party, although there was no majority consensus on the exact test to be applied. Courts have since held that where an arbitrator has reason to believe that a non-trivial conflict of interest might exist, he must (1) investigate the conflict, or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate. *Applied Indus.*, 492 F.3d at 137. His failure to do either is indicative of evident partiality. The mere failure to investigate is not, by itself, sufficient to vacate an arbitral award, however; 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*, No. 16-1267-cv, __F. App'x__, 2017 WL 421944 (2d Cir. Jan. 31, 2017). An arbitrator's duty to investigate and disclose continues after his appointment, until the award is rendered.

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

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 is not the "unauthorized practice of law", and both out-of-state and foreign lawyers need not be admitted locally to participate, but will be subject to the rules of conduct of the state bar where the arbitration takes place. Some states may impose particular procedural requirements on lawyers' participation, depending on whether the arbitration is domestic or international.

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

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

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

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

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

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

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

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

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

7 Preliminary Relief and Interim Measures

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

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

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, it is accepted that courts have inherent power to order interim relief. The rules of the leading arbitral institutions provide that seeking interim relief from the court does not waive the jurisdiction of the tribunal. *See* AAA Arbitration Rule R-37(c). ("A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate"); CPR Arbitration Rule 13.2 (same).

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

See question § 7.2, *supra*. Courts require that the moving party make a showing to justify interim relief. Under New York law, for example, 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).

Courts sometimes issue interim relief orders that expire when arbitrators have been appointed, *see*, e.g., *TIBCO Software, Inc. v. Zephyr Health, Inc.*, 32 Mass. L. Rptr. 637 (Super. 2015), or have the opportunity to review the relief, *see*, e.g., *Next Step Med. Co. v. Johnson & Johnson Int'l*, 619 F.3d 67 (1st Cir. 2010).

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

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

At the threshold, the party seeking injunctive relief must at least demonstrate that the parties in the two proceedings are substantially the same and the issues are the same (although not necessarily identical). Courts have articulated the additional requirements in different ways. Under one approach, "an international antisuit injunction is appropriate whenever there is a duplication of parties and issues and the court determines that the prosecution of simultaneous proceedings would frustrate the speedy and efficient determination of the case". *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004). Other

courts have held that an anti-suit injunction is appropriate only where "the foreign action either imperils the jurisdiction of the forum court or threatens some strong national policy". *Id*.

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

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

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

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

8 Evidentiary Matters

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

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

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

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

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

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

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

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

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

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

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

9 Making an Award

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

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

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

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

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

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

10 Challenge of an Award

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

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

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

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

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

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

For decades, courts treated "manifest disregard of the law" as an additional judicially implied or common law ground for vacating an arbitral award. In *Hall Street Associates LLC v. Mattel, Inc.*, 552 U.S. 576, however, the Supreme Court held that the exclusive grounds for vacating an award are those enumerated in Section 10 of the FAA, thus casting doubt on the continued vitality of the "manifest disregard of the law" doctrine. In the aftermath of *Hall*, courts are divided on the issue. The Second, Fourth, Sixth, and Ninth Circuits still recognise the doctrine, but the Seventh, Eighth and Eleventh Circuits do not. To salvage the doctrine after the *Hall* decision, the Second Circuit "reconceptualized" it as a

gloss on the grounds for *vacatur* enumerated in the FAA. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 548 F.3d 85, 95 (2d Cir. 2008). In its subsequent ruling in that same case, the Supreme Court was willing to assume *arguendo* that manifest disregard still remained available as a ground for *vacatur*, although it concluded that it was unnecessary to reach that issue and decided the case on other grounds. *Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp*., 559 U.S. at 669-70. In any event, attempts to vacate on the basis of the doctrine are rarely successful even in those circuits where it continues to be recognised.

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

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

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

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

11 Enforcement of an Award

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

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

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

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

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

The United States has a well-established policy in favor 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. 2017), the Second Circuit recently held that, as to foreign arbitral awards rendered by tribunals seated *outside* the United States, there is no requirement to "confirm" the award in accordance with the procedures set forth in Chapter 1 of Title 9 (i.e., the FAA). Rather, the party wishing to enforce the award can bring a single action under Section 207 to recognise and enforce the award. *Id.* at 74. (The Court recognised that the text of Chapter 2 is somewhat confusing in this regard because Section 207 uses the word "confirm" to describe the recognition and enforcement process. But, again, the Court held that Section 207 was not intended to be a cross-reference to the confirmation procedures set forth in Chapter 1.)

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

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

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

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

An award may be ruled in excess of an arbitrator's power if it violates "some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests". *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987). As the Second Circuit has observed, the exception should be applied "only where enforcement would violate our most basic notions of morality and justice". *Europcar Italia S.p.A. v. Maiellano Tours, Inc*., 156 F.3d 310, 315 (2d Cir. 1998) (citation omitted).

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 authorise 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.

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. The Supreme Court has held that under the FAA arbitrators may award punitive damages unless the parties' agreement expressly prohibits such relief. *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 58, 60-61 (1995). The AAA Arbitration Rules permit any relief deemed "just and equitable" within the scope of the parties' agreement. Rule R-47(a).

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

The FAA contains no provisions regarding 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) permits the inclusion of interest in the award. International Centre for Dispute Resolution ("ICDR") Int'l Arbitration Rules (Article 28) allows the tribunal to award both pre-award and post-award interest, simple or compound, as it deems proper, taking into account the terms of the agreement and the applicable law. Pre-award interest usually follows the substantive law of the contract, unless the parties' arbitration agreement specifies a different rate. Post-award interest until a court judgment is entered confirming the award follows the same rule. Once a court judgment confirming the award is entered, however, 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, although the parties may contract around the statute if they clearly and expressly agree on a different post-judgment interest rate. *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 102 (2d Cir. 2004).

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

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

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

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

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

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

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

14 Investor State Arbitrations

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

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

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

The United States has 20 bilateral free trade agreements in force and is a party to 41 Bilateral Investment Treaties. The United States is not a contracting party to the Energy Charter Treaty.

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

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

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

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

15 General

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

Issues remain regarding the enforceability of class action waivers in arbitration agreements. The Supreme Court has granted certiorari to resolve a conflict in the circuits concerning the enforceability of such waivers in employment arbitration agreements. *Morris v. Ernst & Young, LLP,* 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017) (No. 16-300). In *Ernst & Young*, the United States Court of Appeals for the Ninth Circuit held that class action waiver provisions in employer-imposed arbitration agreements violate the National Labor Relations Act and are not enforceable. This opinion was in conflict with the opinions of three other courts of appeals, which have ruled that such waivers are enforceable under the FAA.

Institutional arbitral institutions report observing an increase in settlements from mediations, at both the pre-arbitral demand stage and pre-hearing stage, which may be attributable to the greater use of multi-step clauses in arbitration agreements. Another apparent trend is an increase in challenges to arbitrator nominations, particularly as to party-nominated arbitrators for lacking neutrality and independence.

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

In 2014, the International Institute for Conflict Prevention and Resolution ("CPR") promulgated rules for administered arbitration of international disputes. One of the most innovative features of the rules is the screened selection process for arbitrators (CPR Rule 5.4), which provides a procedure by which parties can select party-appointed arbitrators without the arbitrators knowing which party appointed them. Each party provides a ranked list of names to CPR, which then contacts the candidates to check conflicts and ascertain their availability without revealing which party put the candidate's name forward. The screened-selection procedure was intended to combat perceptions about the bias of party-appointed arbitrators while still allowing parties the opportunity to name one of the members of a three-person tribunal.

In 2014, the ICDR amended its rules to promote efficiency and greater transparency by adding, *inter alia*, rules for expedited arbitration (Articles 1(4) and E-1 to E-10) in cases where the amount in controversy does not exceed $250,000; a description of the ICDR's "strike and rank", default method of arbitration selection (Article 12(6)); and new rules regarding exchange of information (Article 21), production of electronic documents (Article 21(6)), and sanctions for tactics that cause unnecessary delay and expense (Articles 20(2), 20(7), 21(8), and 21(9)).

Similarly, in 2016, JAMS changed its rules to add Emergency Relief Procedures (Article 3); a provision (Article 26) clarifying that tribunals have power to grant dispositive motions; and a provision (Article 33) expressly authorising tribunals to impose sanctions on parties for failure to comply with the rules or a tribunal's orders.

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 a partner at Williams & Connolly LLP and heads the firm's international arbitration practice group. He is a Fellow of the American College of Trial Lawyers and a Visiting Clinical Lecturer at Yale Law School.

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).

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.

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

Tel: +1 202 434 5252
Email: cmahoney@wc.com
URL: www.wc.com

C.J. Mahoney is a partner at Williams & Connolly LLP. His areas of focus include international commercial arbitration, white-collar defence, and appellate law. Prior to joining Williams & Connolly, he clerked for Associate Justice Anthony M. Kennedy at the Supreme Court of the United States and Judge Alex Kozinski on the United States Court of Appeals for the Ninth Circuit. Mr. Mahoney holds degrees from Yale Law School, where he was Editor-in-Chief of the *Yale Law Journal*, and Harvard College, where received an A.B. in government, *magna cum laude*, and was a member of Phi Beta Kappa. Prior to attending law school, he worked as a business analyst at McKinsey & Company. Mr. Mahoney is a Visiting Clinical Lecturer at Yale Law School and a Fellow of the Chartered Institute of Arbitrators.

50TH WILLIAMS & CONNOLLY LLP®
1967–2017

Williams & Connolly LLP is a law firm of approximately 300 lawyers located in Washington, D.C. that focuses on litigation and arbitration in the U.S. and internationally. Described by *Chambers USA* as "offering unmatched strength in depth and top-level trial capabilities," the firm is widely recognised as one of the nation's premier litigation firms.

The firm's International Arbitration Practice Group represents clients in complex, high-stakes commercial arbitrations and has handled disputes under the rules of the major arbitral institutions, including: the International Chamber of Commerce (ICC); the American Arbitration Association (AAA); the International Centre for Dispute Resolution (ICDR); and the Hong Kong International Arbitration Centre (HKIAC), as well as under the UNCITRAL Arbitral Rules and other rules in *ad hoc* arbitrations. It has particular experience in disputes arising out of international contracts for intellectual property patent licensing, construction, energy, oil & gas, power plants, telecommunications, medical devices, securities, hotel management, and professional services.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

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