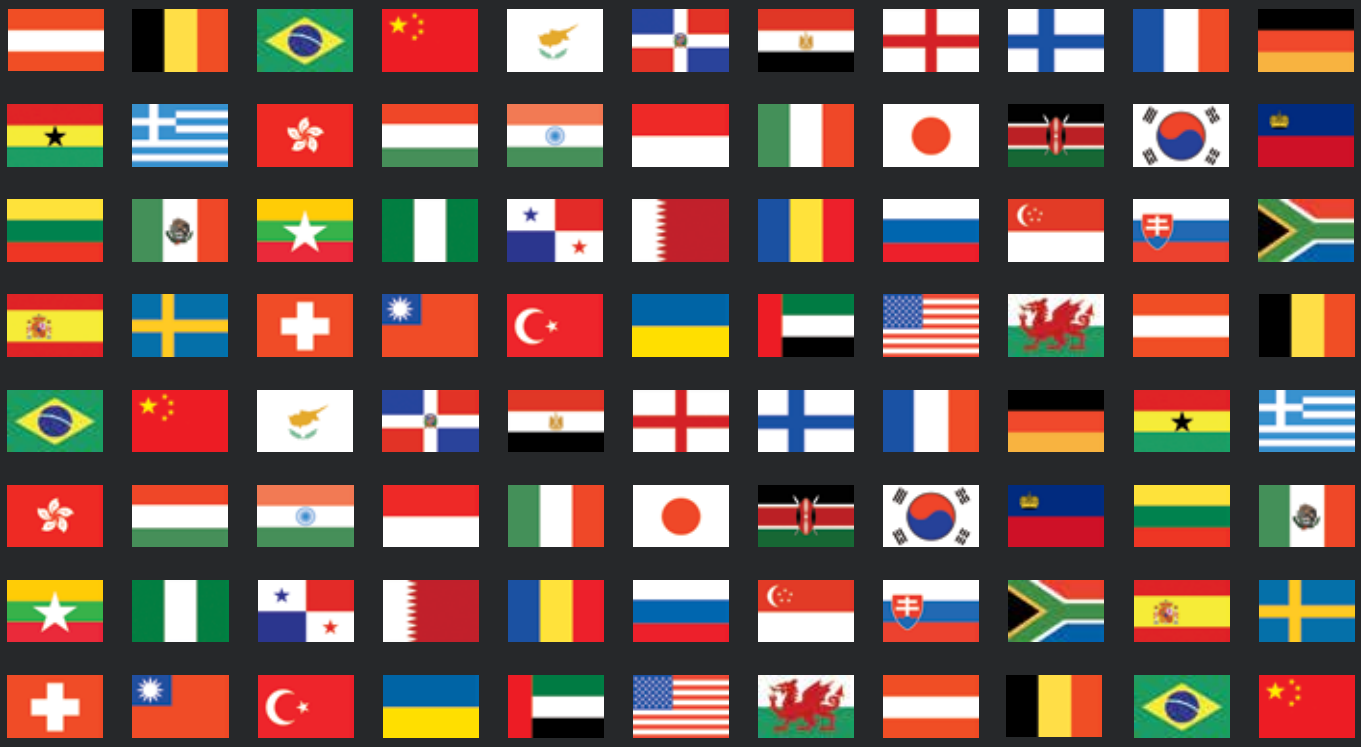
Arbitration

Contributing editors
Gerhard Wegen and Stephan Wilske



2018

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Arbitration 2018

Contributing editors

Gerhard Wegen and Stephan Wilske

Gleiss Lutz

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Preface

Arbitration 2018

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Arbitration*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Cyprus, Finland, Liechtenstein, Lithuania, Panama, Russia and South Africa.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gerhard Wegen and Stephan Wilske of Gleiss Lutz, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
January 2018

United States

Matthew E Draper
Draper & Draper LLC

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The United States is a party to the New York Convention, effective 29 December 1970. The United States took both the 'reciprocity' and 'commercial' reservations under article I of the Convention, such that the Convention applies to arbitral awards that:

- are made in the territory of another contracting state; and
- pertain to disputes considered to be 'commercial' under US law.

The United States is also a party to:

- the Inter-American Convention on International Commercial Arbitration (the Panama Convention), effective 27 October 1990. The text of the Panama Convention is similar to that of the New York Convention, and courts generally implement the two conventions in a manner designed to achieve consistent outcomes; and
- the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention), effective 14 October 1966.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

The United States is a party to bilateral investment treaties with 46 other countries, and to a number of bilateral and multilateral free trade agreements containing investor–state dispute settlement mechanisms (for example, the North American Free Trade Agreement (NAFTA)).

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Federal Arbitration Act (FAA), a federal statute, regulates both domestic and international arbitration in the United States. Chapter 1 of the FAA, 9 USC sections 1–16, governs domestic arbitrations between US citizens.

The New York or Panama Conventions (codified as Chapters 2 and 3 of the FAA, respectively) apply to 'foreign' or 'international' arbitrations – that is, where the arbitration is not wholly between citizens of the United States or has some other 'reasonable relation' to another New York or Panama Convention contracting state.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The FAA predates the UNCITRAL Model Law and is not based on that law. Nonetheless, it similarly supports the principles of party autonomy, the enforcement of arbitration agreements in accordance with their terms and limited judicial review of arbitral awards.

There are a few noteworthy differences between the FAA and the UNCITRAL Model Law. In general, the FAA is much less detailed than the UNCITRAL Model Law, leaving various matters of procedure and process to be determined by the parties, the arbitrators or the applicable institutional rules. The two regimes also provide somewhat different grounds for 'setting aside' (or vacating) an arbitration award. As another example, whereas the UNCITRAL Model Law does not grant national courts the power to modify or correct arbitral awards, the FAA does grant US courts the ability to do so in certain cases.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

US courts consider arbitration to be contractual in nature, and thus do not apply mandatory rules to conduct of arbitration proceedings.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

US-seated tribunals generally will honour the parties' choice of law applicable to the merits of a dispute. The FAA does not provide tribunals with any guidance as to which substantive law should apply to the merits of a dispute absent express agreement by the parties, and tribunals may exercise their discretion in this regard.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

Major US-based arbitral institutions include:

American Arbitration Association (AAA)
120 Broadway, Floor 21
New York, NY 10271
www.adr.org

International Centre for Dispute Resolution (ICDR) (the international branch of the AAA)
120 Broadway, Floor 21
New York, NY 10271
www.icdr.org

International Institute for Conflict Prevention and Resolution (CPR)
30 East 33rd Street, 6th Floor
New York, NY 10016
www.cpradr.org

Judicial Arbitration and Mediation Services (JAMS)
620 8th Avenue, 34th Floor
New York, NY 10022
www.jamsadr.com

The ICDR is a prominent US-based organisation for international disputes. The ICDR respects the choice of the parties with respect to the place of arbitration, the selection of arbitrators and the language or applicable law of the arbitration (as do all of the US arbitration institutions). The ICDR calculates fees based on time spent.

JAMS and CPR have international rules that likewise respect party choice in these respects.

The International Chamber of Commerce (ICC) has an office in the United States (New York), from which it administers its North American arbitrations. While the ICC is used frequently by US parties for international arbitration disputes, we have not included a discussion of its rules in this chapter as it is primarily a Paris-based institution.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

There are very few restrictions on the types of disputes that can be arbitrated under US federal law. Certain intrastate family, consumer and municipal matters may be considered non-arbitrable under state law, where applicable to the dispute.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The FAA and the New York Convention require arbitration agreements to be made in writing. However, US courts interpret this requirement in a commercially practical manner, and in appropriate cases have enforced arbitration agreements where, for example, the final contract was unsigned or where the agreement to arbitrate was entered into via email.

An agreement to arbitrate may be set out in a document other than the contract in dispute, such as when that document is incorporated by reference into the main agreement. Parties may also agree to arbitrate after a dispute has arisen.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

FAA section 2 permits challenges to arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract', such as mistake, lack of capacity, fraudulent inducement, incapacity, rescission and termination of the arbitration agreement. Nonetheless, US policy strongly favours the enforcement of arbitration agreements, and these challenges will be scrutinised closely.

It should also be noted that US courts respect the principle of 'separability', which requires that the arbitration agreement be treated as a distinct agreement that is not rendered invalid, non-existent or ineffective simply because the contract itself may be treated as such.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Under US state and federal law, third parties or non-signatories may potentially be bound to arbitrate a dispute based on common law contract and agency principles, such as incorporation by reference, assumption, agency, veil-piercing or alter ego, estoppel, succession in interest or assumption by conduct. The law governing the contract (or putative contract) is potentially relevant in such cases, as is the law of the place of incorporation and the law of the arbitral seat.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Many institutional rules provide mechanisms for joinder or consolidation of arbitration proceedings.

US courts generally have respected such mechanisms.

Class arbitration may also be permitted, but only where the parties have expressly manifested their consent to such a procedure. See *Stolt-Nielsen v Animalfeeds Int'l Corp*, 559 US 662 (2010). Waiver of class arbitration is also permitted. Consumer contracts that require arbitration but prohibit class arbitration are valid even when the cost of pursuing such claims on an individual basis would be prohibitively expensive (*AT&T Mobility LLC v Concepcion*, 131 S Ct 1740 (2012)); and even when an online user agreement notifies consumers of it simply through a hyperlink (*Meyer v Uber Tech Inc*, 868 F.3d 66 (2d Cir 17 August 2017)).

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Although US state and federal law does not recognise the 'group of companies' doctrine, a non-signatory parent, subsidiary or affiliate of a signatory company may be bound to an arbitration agreement pursuant to common law principles of agency, contract, estoppel or veil piercing, as discussed in question 11. The specific terms of the arbitration clause can be important in determining such matters.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

A multiparty arbitration agreement must meet the same validity requirements as any arbitration agreement – that is, it must be in writing and manifest the parties' intent to be bound. US courts generally will enforce valid multiparty arbitration agreements.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The FAA is silent on arbitrator eligibility. State and federal judicial ethics rules and codes of conduct generally prevent sitting judges from serving as arbitrators, however.

US state and federal law generally recognises the autonomy of the parties to require that the arbitrators have certain characteristics, and contractually stipulated requirements for arbitrators based on nationality or religion are regularly enforced.

16 Background of arbitrators

Who regularly sit as arbitrators in your jurisdiction?

It is common for practising US attorneys, retired judges, non-lawyer industry experts and foreign lawyers to serve as arbitrators in US-seated proceedings. There are increasing efforts to improve gender and other types of diversity among arbitrators. The AAA, for example, aims to provide parties with arbitrator lists that are at least one-third diverse.

17 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

US courts will defer to the applicable institutional rules regarding appointment of arbitrators. Assuming no such rules apply (or other special circumstances prevent an appointment under such rules), FAA section 5 provides a mechanism by which the parties may request court appointment of the arbitral tribunal. In such cases, courts are directed to appoint a sole arbitrator absent contrary agreement by the parties.

18 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

US courts will defer to the mechanisms provided in the parties' agreement or applicable institutional rules for challenge or replacement of an arbitrator. Absent such mechanisms, courts disagree as to the proper approach when an arbitrator dies or resigns: while some courts in the Second Circuit have required the arbitration to commence anew (eg, *Pemex-Refinacion v Tbilsi Shipping Co Ltd*, 2004 WL 194450 (SDNY 2004)), other circuit courts of appeal have permitted either party to request appointment of a replacement arbitrator under FAA section 5 (eg, *WellPoint, Inc v John Hancock Life Ins Co*, 576 F 3d 643 (7th Cir 2009)).

US courts have found the IBA Guidelines on Conflicts of Interest in International Arbitration to be a persuasive, but not binding, authority (eg, *Republic of Argentina v AWG Group*, 2016 WL 5928464 (DDC 2016)).

19 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

The FAA contains no particular requirements and defers to institutional rules and party agreement regarding the relationship between parties and arbitrators, neutrality of arbitrators and their compensation. Although arbitrators are generally required to be neutral and not engage in ex parte communications about the merits of the case, 'parties can agree to have partisan arbitrators' (eg, *Gambino v Alfonso*, 566 Fed App'x 9 (1st Cir 2014)). Some institutional rules applying solely to domestic arbitrations, such as the JAMS Comprehensive Arbitration Rules & Procedures (the JAMS Domestic Rules) and the AAA Commercial Arbitration Rules (the AAA Rules), expressly permit agreements that party-appointed arbitrators may be 'non-neutral'. However, absent such an agreement, the default under the rules is that party-appointed arbitrators must be neutral.

20 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are immune from civil liability for acts undertaken within the scope of their authority pursuant to the common law doctrine of arbitral immunity (eg, *Sacks v Dietrich*, 663 F3d 1065 (9th Cir 2011)).

Jurisdiction and competence of arbitral tribunal

21 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Upon a finding that a dispute is properly 'referable to arbitration', US federal courts are empowered to stay the proceedings before them and to compel the defaulting party to 'proceed to arbitration in accordance with the terms of the [parties'] agreement' (FAA sections 3–4). The existence of a valid arbitration agreement will be determined by the court unless there is clear and unmistakable evidence that the parties intended that the arbitrators resolve this question (*First Options of Chicago Inc v Kaplan*, 514 US 938 (1995)).

Although no strict time limits exist for jurisdictional objections, in some instances parties may waive their right to enforce an otherwise valid arbitration agreement by waiting too long before filing a motion to compel arbitration. Whether such a waiver has occurred will depend on the length of the delay and the extent to which the party seeking to compel arbitration actively participated in the ongoing litigation.

22 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Courts may review the jurisdiction of the arbitral tribunal after the proceedings have commenced, unless there is clear and unmistakeable evidence that the parties agreed to submit questions of arbitrability to the arbitrators (*First Options*, 514 US 938 (1995)). An agreement to abide by institutional rules granting arbitrators authority to rule on their own jurisdiction, such as the AAA Rules, ICDR Arbitration Rules (the ICDR Rules) and CPR Rules for Administered Arbitration of International Disputes (the CPR Rules), has in many cases been considered sufficient evidence of consent to 'arbitrate arbitrability'.

US courts may preclude parties from raising jurisdictional objections if their conduct in the ongoing arbitration indicates a waiver of their right to challenge the arbitrators' jurisdiction, such as if a party failed to maintain its jurisdictional objection consistently throughout the arbitration proceedings.

Arbitral proceedings

23 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The FAA does not provide a default mechanism for the determination of the seat or language of the arbitration. Absent agreement by the parties, the language of the proceedings generally will be the same as the language of the contract containing the parties' arbitration agreement (subject to the tribunal's overriding discretion) (ICDR Rules, article 18; CPR Rules, rule 9.5).

Many US-based institutions grant the arbitral institution authority to determine the place of arbitration at the outset, which may later be overridden by the tribunal (AAA Rules, rule 11; ICDR Rules, article 17; CPR Rules, rule 9.5).

24 Commencement of arbitration

How are arbitral proceedings initiated?

The FAA is silent regarding the initiation of arbitration proceedings. Institutional rules contain specific provisions for initiating arbitration; for example, article 2 of the ICDR Rules requires the claimant to serve a copy of the notice of arbitration upon the counterparty (in addition to the ICDR administrator) and provides that the notice of arbitration shall contain a copy of the applicable arbitration clause, a description of the claim and the facts supporting it, and the relief or remedy sought, among other things. The JAMS Rules (article 2), the AAA Rules (rule 4) and the CPR Rules (article 3) provide similar procedures.

25 Hearing

Is a hearing required and what rules apply?

The FAA contains no specific requirements for hearings, other than requiring tribunals to 'provide . . . adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator' (*Gold Reserve Inc v Venezuela*, 146 F Supp 3d 112 (DDC 2015)). Tribunals may forego in-person hearings where the 'choice to render a decision based solely on documentary evidence is reasonable, and does not render the proceeding "fundamentally unfair"' (*In re Arbitration between Griffin Indus and Petrojam*, 58 F Supp 2d 212 (SDNY 1999)).

Most institutional rules grant wide leeway with respect to the timing and conduct of oral hearings (AAA Rules, rules 24-25; ICDR Rules, article 25; CPR Rules, rule 12). In general, tribunals must give the parties reasonable notice prior to hearings, and parties and their counsel have the right to attend them.

26 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Tribunals seated in the United States are not bound by the rules of evidence that apply in US litigation (such as the Federal Rules of Evidence), and are free to make procedural decisions to admit and consider the oral or written testimony of fact witnesses and expert witnesses, as well as documentary evidence (eg, *New Jersey Building Laborers Local 325 v Molfetta Industries*, 365 Fed. App'x 347 (3d Cir 2010)).

Generally speaking, the tribunal and the parties have autonomy to structure the taking of evidence as appropriate for the matter, as guided by the applicable institutional rules. For example, articles 20(6) and 22 of the ICDR Rules provide that '[t]he tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence' while 'tak[ing] into account applicable principles of privilege' such as the attorney–client privilege under US law. The International Bar Association's Rules on the Taking of Evidence in International Arbitration are utilised by many US-seated tribunals as guidance.

27 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Section 7 of the FAA permits arbitrators to issue subpoenas for witness testimony at the hearing, including by third parties, and to compel the witness to bring documents to the hearing. Upon request, the US district court at the seat of the arbitration may compel compliance with arbitral subpoenas, or hold the recalcitrant party in contempt of court. The district court, however, must have personal jurisdiction under the law of the state in which the district court is located and the subpoena must comply with due process under the US Constitution (*Licci v Lebanese Canadian Bank*, 673 F.3d 50, 60-61 (2d Cir 2012)).

As to the territorial scope and timing of section 7 subpoenas, courts have held that section 7 does not allow for subpoenas to testify prior to a hearing (or at deposition). Courts have also expressed doubts as to whether section 7 allows subpoenas significantly beyond the vicinity of the arbitration; the scope and reach of such subpoenas must therefore be carefully considered in every case.

A statute, 28 USC section 1782, permits US district courts to order persons within their territory to provide written or oral testimony, or to produce documents, 'for use in a proceeding in a foreign or international tribunal'. US courts are split as to whether this provision allows a party to seek discovery in aid of international commercial arbitration. Therefore, careful attention must be paid to the specific court precedents in the applicable jurisdiction.

28 Confidentiality

Is confidentiality ensured?

The FAA is silent with respect to confidentiality, and US courts do not impose an automatic duty of confidentiality in arbitration. They will, however, endeavour to uphold any specific agreement by the parties (or in the arbitral rules) to make their arbitration confidential. Parties to a confidential arbitration who seek enforcement of an arbitral award in US courts should be aware of the risk that their arbitration award will become public unless they obtain a specific 'sealing order' from the court prior to filing.

Interim measures and sanctioning powers

29 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Several cases have held that the FAA permits courts to grant interim relief pending arbitration and in aid of an ongoing arbitration (eg, *Braintree Laboratories v Citigroup Global Markets*, 622 F 3d 36 (1st Cir 2010)). In limited circumstances, US courts may also issue anti-suit injunctions prohibiting parties from pursuing foreign lawsuits in breach of an arbitration agreement. Such orders are often provisional, and apply only until a fully constituted tribunal has the chance to revisit the request for interim relief.

30 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The AAA was the first institution to include the modern day version of the 'emergency arbitrator' in its institutional rules, and that approach has been followed by the ICDR, the CPR and JAMS International Arbitration Rules (JAMS Rules) (AAA Rules, rule 38; ICDR Rules, article 6; CPR Rules, rule 14; JAMS Rules, article 3), though the speed of each institution's process varies.

31 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Under the rules of US-based institutions, tribunals exercise broad discretion in ordering interim measures deemed to be necessary, such as preliminary injunctions and measures to protect or conserve property (AAA Rules, rule 37; ICDR Rules, article 24; CPR Rules, rule 13; JAMS Rules, article 32). US law recognises the right of arbitrators to issue partial or interim awards prior to the final award. US courts consider such awards to be 'final' and enforceable as long as they 'finally and definitely dispose' of at least one claim in the arbitration (even if other claims remain to be heard) (*Ecopetrol v Offshore Exploration and Production*, 46 F Supp 3d 327 (SDNY 2014)). US courts generally will respect an arbitral tribunal's interim awards, including for security for costs.

32 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Tribunals have 'inherent authority to police the arbitration process and fashion appropriate remedies to effectuate this authority' (eg, *Hamstein Cumberland Music Group v Estate of Williams*, 2014 WL 3227536 (5th Cir 2013)). Some US institutions grant arbitrators express authority to impose sanctions for party misconduct, which may include fines, adverse inferences, withdrawing or revising a prior award and awards of costs and attorney's fees (AAA Rules, rule 58; ICDR Rules, article 20(7); JAMS Rules, article 33). Other institutional rules are silent on sanctions, but allow arbitrators to award costs and fees in order to compensate a party for misconduct in the arbitration proceedings (CPR Rules, rule 19.2).

Awards

33 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Although the FAA is silent regarding whether a majority or unanimous vote is required when the tribunal consists of more than one arbitrator, US-based institutions provide that awards or other decisions by the tribunal shall be made by a majority of the arbitrators (AAA Rules, rule 46; ICDR Rules, article 29; CPR Rules, rule 15; JAMS Rules, article 34.2).

34 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Dissenting opinions are not legally binding and do not impact the award's enforceability (eg, *In re Arbitration Between Associates Transport Line v Slebent Shipping Co*, 2004 WL 2093521 (SDNY 2004)).

35 Form and content requirements

What form and content requirements exist for an award?

The FAA does not expressly prescribe any formal requirements for awards. Unlike many national arbitration statutes, the FAA does not require 'reasoned awards' explaining the basis for the tribunal's decision, and US courts will uphold and enforce unreasoned awards so long as the parties' agreement or applicable institutional rules do not require a reasoned award (eg, *D H Blair & Co v Gottdiener*, 462 F 3d 843, 847 (2d Cir 2006)). Many institutional rules do require reasoned awards absent contrary agreement by the parties (ICDR Rules, article 30(1); CPR Rules, rule 15.2; JAMS Rules, article 35.2). The AAA Rules, rule 46, on the other hand, disposes of any reasoned award requirement unless requested by the parties in writing prior to the formation of the tribunal, or if the arbitrator determines that one is appropriate.

36 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The FAA does not impose any time limits for the tribunal to render an award. The AAA and ICDR Rules require the tribunal to issue its final award within 30 and 60 days of the date of the closing of the hearing, respectively (AAA Rules, rule 45; ICDR Rules, article 30(1)).

37 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The limitations period for parties to confirm 'foreign awards' falling under the New York or Panama Conventions is three years. The limitations period for parties to confirm domestic awards is one year (see FAA sections 9, 207 and 302). The limitations period for confirming an award, whether foreign or domestic, begins running on the date that the award 'is made' (that is, the date of the award itself).

FAA section 12 requires that petitions to vacate, modify or correct an award be filed within three months 'after the award is filed or delivered'. This three-month time limit has been applied to the vacatur of international awards seated in the United States.

38 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

As discussed in question 31, the tribunal enjoys broad discretion to issue interim or partial relief.

If the parties reach a settlement during the pendency of the arbitration proceedings, institutional rules permit the arbitration to terminate with the issuance of final and binding consent award. Such consent awards are regularly recognised and enforced by US courts.

39 Termination of proceedings

By what other means than an award can proceedings be terminated?

In the event that a party fails to appear in the arbitration, most institutional rules, such as article 26 of the ICDR Rules, permit the tribunal to issue an award, but only after hearing evidence from the party seeking relief and providing the defaulting party with notice and an opportunity to participate. Article 32(3) of the ICDR Rules further allows the tribunal to terminate the proceedings if their continuation 'becomes unnecessary or impossible'.

In some circumstances, proceedings may be terminated or suspended in the event that the parties default on payment of arbitrator fees or costs. When this happens, courts occasionally have permitted the defaulting party who was 'unable to pay for [its] share of arbitration' to pursue its claims in litigation; such accommodation is not afforded, however, where a party has 'refuse[d] to arbitrate by choosing not to pay for arbitration' despite having the resources to do so (*Tillman v Tillman*, 825 F 3d 1069 (9th Cir 2016)).

40 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Absent express agreement by the parties, arbitrators have wide discretion with respect to the allocation of costs and fees, including administrative costs and attorneys' fees (AAA Rules, rule 47(c); ICDR Rules, article 34; CPR Rules, rule 19; JAMS Rules, article 37.4). Awards of costs and fees constitute part of the award and are enforceable in US courts. Generally speaking, contractual agreements for any 'fee-shifting' (including agreements that the prevailing party may recover its attorneys' fees and costs) will be respected.

41 Interest

May interest be awarded for principal claims and for costs and at what rate?

Institutional rules permit arbitrators to award pre- or post-award interest at a rate they deem appropriate (AAA Rules, rule 47(d)(i); ICDR Rules, article 31(4); CPR Rules, rule 10.6; JAMS Rules, article 35.7). US courts generally will confirm and enforce such awards.

Proceedings subsequent to issuance of award

42 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Most institutional rules grant tribunals a limited amount of time to correct or interpret minor clerical, typographical or computational errors (ICDR Rules, article 33; CPR Rules, rule 15.6; JAMS Rules, article 38.1). The ICDR and CPR Rules further grant arbitrators a short time period in which to make an 'additional award' on claims presented in the arbitration but not disposed of in the initial award.

FAA section 11 vests district courts with the power to 'modify . . . or correct' the award where the award contained a material miscalculation or mistake, where the award ruled upon a matter outside of the tribunal's jurisdiction or where the award 'is imperfect in matter of form not affecting the merits of the controversy'. Nonetheless, courts may refuse to do so on the basis that the arbitrators already considered, and declined, such a request (eg, *Daebo Int'l Shipping Co v Americas Bulk Transport (BVI) Ltd*, 2013 WL 2149591 (SDNY 2013)).

43 Challenge of awards

How and on what grounds can awards be challenged and set aside?

FAA section 10 sets forth the standard and procedure for setting aside arbitral awards made in the United States. Many US courts have held that the section 10 standards for vacatur will also be applied to international or foreign awards seated in the United States. Under section 10, awards may be vacated:

- where the award was procured by corruption, fraud or undue means;
- where there was evident partiality of the arbitrators;
- 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 misbehaviour by which the rights of any party have been prejudiced; or
- 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.

Some US courts have interpreted the arbitrators' 'excess of powers' to permit vacatur on the basis that the tribunal acted in 'manifest disregard

of the law'. In recent years, this standard has been considerably limited by many circuit courts of appeals, and it is rare for awards to be vacated on this basis. (But see *Daesang Corp v Nutrasweet Co*, 58 NYS 3d 873 (NY Sup 2017), currently on appeal.)

44 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Arbitral awards themselves normally are not subject to appeal on the merits by courts or by arbitral institutions. Parties to AAA, CPR or JAMS arbitrations may opt in to those institutions' optional appeal procedures, however.

On the other hand, court orders with respect to confirmation, vacatur or recognition and enforcement of awards are subject to the normal appeal procedures of US litigation. Parties wishing to challenge a final federal district court order can appeal to the federal circuit court of appeals in which the district court sits. In general, the circuit courts of appeals have the final word on the matters before them; in rare cases, the US Supreme Court may grant a request to review a circuit court decision.

45 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

US courts generally uphold arbitration awards, in line with the United States' strong public policy in favour of arbitration. Awards made by US-seated tribunals may be recognised and enforced (ie, 'confirmed') by any court agreed upon by the parties or, in the absence of such agreement, by a court sitting in the district in which the arbitration agreement was made, provided no ground for vacatur or modification exists under sections 10 or 11 of the FAA.

For foreign-seated arbitrations, the FAA incorporates the grounds for denial of recognition and enforcement of awards set forth in the New York and Panama Conventions (FAA sections 207 and 301). In limited circumstances, the US may also permit denial of recognition or enforcement of a foreign award on the basis of certain procedural defences, such as the court's lack of personal jurisdiction over the award debtor, or the doctrine of forum non conveniens.

46 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Citing concerns for international comity, US courts usually do not enforce foreign awards set aside by the courts at the place of arbitration. (For example, *Getma Int'l v Republic of Guinea*, 862 F.3d 45 (DC Cir 2017); *Thai-Lao Lignite (Thailand) Co v Gov't of Lao People's Democratic Republic*, 864 F.3d 172 (2d Cir 2017)).

However, several courts have held that they may enforce an award despite vacatur by the courts of the seat in 'extraordinary circumstances'. For instance, one recent decision upheld the enforcement of an award that had been vacated in Mexico on the basis of newly enacted legislation that had been applied retroactively by the Mexican courts, stating that to hold otherwise would be 'repugnant to fundamental notions of what is decent and just in this country' (*Commisa v Pemex*, 832 F 3d 92 (2d Cir 2016)).

47 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The enforceability of awards issued by emergency arbitrators is somewhat uncertain. Although US courts have enforced emergency awards on a number of occasions, some courts have refused to enforce emergency awards on the basis that they are not 'final' and therefore not reviewable under the FAA (compare *Yahoo! Inc v Microsoft Corp*, 983 F Supp 2d 310, 319 (SDNY 2013) (enforcing emergency award) with *Chinmax Medical Sys Inc v Alere San Diego Inc*, 2011 WL 2135350 (SD Cal 2011) (refusing to enforce emergency award)).

Update and trends

President Donald Trump has significantly changed US policy towards international trade agreements (FTAs). Many of these FTAs contain investor–state dispute settlement (ISDS) mechanisms providing for arbitration of disputes between investors and host countries, in addition to the general reduction of trade barriers.

On his first day in office, President Trump withdrew the US from the negotiations of the Trans-Pacific Partnership, an FTA that would have been the world's largest, and declared an end to the era of multinational trade agreements. The United States, Canada and Mexico also began renegotiating the North American Free Trade Agreement (NAFTA). The ISDS mechanisms provided in NAFTA's Chapter 11 are a controversial part of those talks. While Canada and Mexico appear to want to keep the ISDS mechanism in NAFTA, perhaps with some improvements, the US is divided and it is unclear which side of the debate the Trump administration will ultimately come down on. President Trump has also threatened to withdraw from NAFTA if the renegotiations do not produce positive results for the United States.

On 10 July 2017, the US Consumer Financial Protection Bureau published a rule, effective in 2019, that would have prevented financial firms from requiring consumers to arbitrate claims, rather than litigate them in court. The US Congress narrowly opposed this rule, and on 23 October 2017, the Senate adopted legislation to overturn it. President Trump signed the legislation into law on 1 November 2017.

48 Cost of enforcement

What costs are incurred in enforcing awards?

In general, each party bears its own costs and fees in connection with post-award litigation pursuant to the 'American Rule'. US court fees are quite minimal; the bulk of a party's costs for enforcement will be attorneys' fees, which generally will be borne by the enforcing party absent agreement to the contrary. As noted above (see question 40), however, the position may be different if the parties contractually agree to fee-shifting in post-award proceedings, or if a party opposes confirmation or enforcement on a ground deemed to be frivolous (in which case, fees may be awarded as a sanction).

Other

49 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

The scope of mandatory disclosure or 'discovery' is an important difference between judicial and arbitral proceedings in the United States. In US litigation, the Federal Rules of Civil Procedure and corresponding state practice rules allow parties to obtain wide-ranging discovery of documents or information that may be relevant to any claim or defence in the litigation. Disclosure in international arbitration generally is much less burdensome than discovery in US litigation, and it is relatively unusual for an international tribunal to permit multiple depositions or the type of broad-ranging document discovery contemplated by the Federal Rules.

50 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Attorneys practising in the United States, including in international arbitrations, are bound by the rules of professional conduct of the state bars to which they are admitted. ABA Model rule 5.5, which has been implemented in many US jurisdictions (including New York), permits lawyers admitted in one US state to represent clients in arbitration proceedings seated in another US state; however, it is silent on the ability of lawyers admitted abroad to represent clients in US-seated arbitrations.

Counsel seeking to represent a party in a US-seated arbitration should consult with a local lawyer in the relevant state jurisdiction.

51 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party litigation funding has become increasingly common in the United States, including in arbitration. Parties exploring third-party funding options should be attuned to relevant state laws, such as laws directly regulating funders, the common law doctrines of maintenance, champerty and barratry, and attorney ethics rules.

52 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign parties, non-US counsel or arbitrators involved in an international arbitration seated in the United States should consult with local counsel well in advance of the arbitration to ensure compliance with federal visa requirements.

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