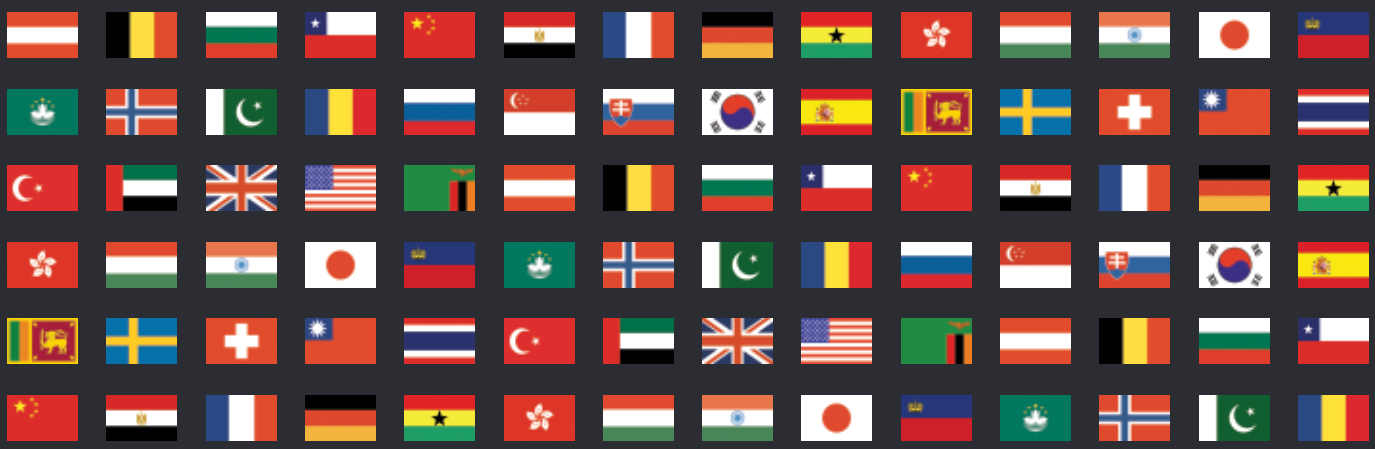
Arbitration 2021

Contributing editors
Stephan Wilske and Gerhard Wegen



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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Arbitration*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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.

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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.

Lexology 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.

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Getting The Deal Through

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United States

Matthew E Draper

Draper & Draper LLC

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction 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 has been a party to the New York Convention since 29 December 1970. The United States took both the reciprocity and commercial reservations under article I of the Convention, meaning 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 since 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 since 14 October 1966.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

The United States is a party to bilateral investment treaties with 45 other countries, and to a number of bilateral and multilateral free trade agreements (FTAs) containing investor–state dispute settlement (ISDS) mechanisms. On 1 July 2020, the US-Mexico-Canada Agreement (USMCA) came into force among the United States, Mexico and Canada. The USMCA replaced NAFTA, significantly altering NAFTA's ISDS mechanism. The countries have largely abandoned the ISDS mechanism between US and Canada and Canada and Mexico. However, The USMCA ISDS mechanism will not be fully effective immediately. NAFTA has a sunset clause, permitting investors from all three countries to have access to investor–state arbitration for the next three years, provided they made their investments while NAFTA still was in effect.

Domestic arbitration law

3 | 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 United States Code (USC) sections 1–16, governs domestic arbitrations between US citizens.

The New York and 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.

Domestic arbitration and UNCITRAL

4 | 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 it. 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.

Mandatory provisions

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

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

Substantive law

6 | 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 will generally 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.

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

Major US-based arbitral institutions include:

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

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

The 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
United States
www.jamsadr.com

The ICDR is a prominent US-based organisation for international disputes. It 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 by the arbitrators.

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

The International Chamber of Commerce (ICC) has an office in New York from which it administers its North American arbitrations. In 2020, the Singapore International Arbitration Centre (SIAC) opened an office in New York for the administration of cases. Although the ICC and SIAC are used frequently by US parties for international arbitration disputes, a discussion of their rules is not included in this chapter.

ARBITRATION AGREEMENT

Arbitrability

8 | 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 federal law. Certain intrastate family, consumer and municipal matters may be considered non-arbitrable under state law.

Requirements

9 | 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, 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 or in circumstances discussed in answer 12.

Generally, US law permits non-signatories to be bound to an arbitration agreement through application of traditional principals of state law such as assumption, corporate veil piercing, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel. This year, the US Supreme Court clarified that in arbitrations governed by the New York Convention, a non-signatory to the arbitration agreement can be compelled to arbitrate based on the doctrine of equitable estoppel (see *GE Energy Power Conversion Fr. SAS, Corp. v Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 [1 June 2020]).

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

Enforceability

10 | 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.

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.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

The Federal Arbitration Act does not expressly provide for the separability of arbitration agreements from the main agreement. However, the US Supreme Court recognised this doctrine in Prima Paint, providing that 'an arbitration clause in the contract is "separable" from the rest of the contract, and that allegations that go to the validity of the contract in general, as opposed to the arbitration clause in particular, are to be decided by the arbitrator, not the court' (*Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395, 409 (1967)).

Third parties – bound by arbitration agreement

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

Generally, third parties or non-signatories are neither bound by an arbitration agreement nor can they compel a signatory to arbitrate. There are, however, exceptions to this rule. Third parties and non-signatories can 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.

Third parties – participation

13 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 have generally respected these mechanisms.

Class arbitration may also be permitted, but only where the parties have expressly manifested their consent to such a procedure. Silence or ambiguity in the arbitration agreement is not a sufficient basis to permit class arbitration (see *Stolt-Nielsen v Animalfeeds Int'l Corp*, 559 US 662 (2010) and *Lamps Plus, Inc v Varela*, 139 S Ct 1407 (2019)). 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, or seem to conflict with US labour protections (*Epic Systems v Lewis*, 138 S Ct 1612 (2018)); and even when an online user agreement notifies consumers of it simply through a hyperlink (*Meyer v Uber Tech Inc*, 868 F 3d 66 (Second Circuit, 17 August 2017)).

Groups of companies

14 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 state and federal law do 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 the applicable law's principles of agency, contract, estoppel or veil-piercing (*Arthur Andersen LLP v Carlisle*, 556 US 624 (2009)). Specific terms of the arbitration clause can be important in determining such matters.

Multiparty arbitration agreements

15 What are the requirements for a valid multiparty arbitration agreement?

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

Consolidation

16 Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The FAA is silent on the consolidation of separate arbitral proceedings, as are the AAA Commercial Arbitration Rules and the JAMS Comprehensive Arbitration Rules and Procedures. However, the ICDR International Arbitration Rules provide for an appointment of a consolidation arbitrator under article 8, who may consolidate separate arbitral proceedings in the circumstances listed below. Rule 3.13 of the CPR Administered Arbitration Rules 2019 also provides for consolidation in certain circumstances. Further, certain state arbitration statutes, such as the California Arbitration Act (section 1281.3) (Cal Code Civ P paragraphs 1280-1294.4) also provide for consolidation.

Relevant considerations for consolidation are:

- the parties' express agreement to consolidation;
- the appointment of one or more arbitrators in one or more of the arbitrations;
- the existence of common issues of law or fact creating the possibility of conflicting decisions;
- claims and counterclaims in the arbitrations arising out of the same arbitration agreement;
- undue delay and prejudice from failing to consolidate outweighs the prejudice caused to parties opposing it; and
- interests of justice and efficiency.

The US courts have provided arbitral tribunals with a substantial amount of discretion with respect to consolidation and have placed emphasis on the language of the arbitration agreement. A federal court in Ohio recently distinguished a bilateral arbitration from a class arbitration where the consent of every party is required for consolidation and held that courts do not require every party's consent for consolidation (*Parker v Dimension Serv Corp*, 2018-Ohio-5248).

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 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. However, state and federal judicial ethics rules and codes of conduct generally prevent sitting judges from serving as arbitrators.

State and federal law generally recognise 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.

Parties to an arbitration agreement are free to choose any number of arbitrators to decide their disputes. While, in theory, parties could agree that those on one side of a dispute would select more arbitrators than the other, this is rarely the case in practice. Recently, however, the Fifth Circuit court of appeals upheld the decision of a nine-arbitrator tribunal where one side selected more arbitrators than the other. See *Soaring Wind Energy, LLC v Catic USA Inc*, 946 F3d 742 [5th Cir 2020].

Background of arbitrators

18 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.

Default appointment of arbitrators

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

Courts will defer to the applicable institutional rules regarding the 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 a court appointment of the arbitral tribunal. In such cases, courts are directed to appoint a sole arbitrator absent a contrary agreement by the parties.

Challenge and replacement of arbitrators

20 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?

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; although some courts in the Second Circuit have required the arbitration to commence anew, 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 (Seventh Circuit 2009)).

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*, 211 F. Supp. 3d 335, 355 (DDC 2016)).

Relationship between parties and arbitrators

21 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 Appx 9 (First Circuit, 2014)). Some institutional rules applying solely to domestic arbitrations, such as the JAMS Comprehensive Arbitration Rules and Procedures (the JAMS 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.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The Federal Arbitration Act is silent on the arbitrators' duties of disclosure regarding impartiality and independence; however, it recognises an 'evident partiality or corruption in the arbitrators' as a ground for vacating an arbitral award (section 10 (a)(4)). US courts have found a failure to disclose relationships with parties or counsel is relevant to determinations of evident partiality. (eg, *Scandinavian Reinsurance Co v Saint Paul Fire & Marine Ins Co*, 668 F 3d 60 (Second Circuit 2012).

The American Bar Association, in conjunction with the AAA, promulgated a Code of Ethics for Arbitrators in Commercial Disputes (revised in 2004) (the Code). JAMS has also issued the Arbitrators Ethics Guidelines by JAMS. These guidelines, though not legally enforceable, impose a continuing duty of disclosure on the arbitrators regarding their impartiality and independence throughout the arbitral proceedings, requiring them to make a reasonable effort to inform themselves of any knowledge or interest in the dispute. Canon II of the Code states: 'An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias'.

Arbitral institution rules on duties of disclosure are formulated on these lines. The AAA Commercial Arbitration Rules (Rule 17), CPR Administered Arbitration Rules (Rule 7) and the JAMS Arbitration Rules (Rule 15) require the arbitrators to disclose in writing any circumstance that might give rise to a justifiable doubt on their independence and impartiality. The duty to disclose commences before appointment and continues throughout the arbitration proceedings.

Immunity of arbitrators from liability

23 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 F 3d 1065 (Ninth Circuit, 2011)).

Additionally, a recent federal district court decision (*Wartsila N Am, Inc v Int'l Ctr for Dispute Resolution*, 2018 US Dist LEXIS 137836 (2018)) created arbitral immunity by applying a judicial immunity standard to the administrative stages prior to the appointment of an arbitration tribunal. According to the court, immunity applies unless the resolution of the arbitrability issue is 'facially obvious' and there is a 'clear absence' of jurisdiction that is so obvious that it could be resolved before the arbitrators are even empanelled.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 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?

Courts may review the jurisdiction of the arbitral tribunal after the proceedings have commenced, unless there is clear and unmistakable evidence that the parties agreed to submit questions of arbitrability to the arbitrators (*First Options of Chicago, Inc v Kaplan*). If the parties have delegated the issue to the arbitrator, the court will refuse to decide arbitrability even if there is a 'wholly groundless argument' on arbitrability and will let the arbitrators decide it (*Henry Schein, Inc v Archer & White Sales, Inc*, 139 S. Ct. 524 (2019).

An agreement to abide by institutional rules granting arbitrators authority to rule on their own jurisdiction, such as the AAA Rules, the ICDR Arbitration Rules (the ICDR Rules) and the CPR Rules for Administered Arbitration of International Disputes (the CPR Rules), has generally been considered sufficient evidence of consent to 'arbitrate arbitrability' by a majority of courts. However, the Restatement of the Law of International Commercial Arbitration by the American Law Institute (2019) considers that such rules are not sufficient in certain circumstances. The Supreme Court will decide during its current term whether arbitration clauses that incorporate such institutional rules and at the same time carve out certain disputes from the scope of arbitration, leave the gatekeeping function to the courts, as a lower court recently decided (see *Archer & White Sales, Inc v Henry Schein, Inc,* 935 F.3d 274 (Fifth Circuit 2019), or to arbitrators.

Courts may preclude parties from raising jurisdictional objections if their conduct in the 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.

In the case of a claim for fraud in the execution of the contract containing a provision delegating gateway issues to the arbitrator, under section 4 of the FAA the courts nevertheless retain the power

to decide such questions. The Third Circuit Court of Appeals held in a recent decision, for example, that 'unless the parties clearly and unmistakably agreed to arbitrate questions of contract formation in a contract whose formation is not in issue, those gateway questions are for the courts to decide'. *MZM Construction Co v New Jersey Building Laborers Statewide Benefit Funds* 974 F.3d 386 (Third Circuit 2020).

Jurisdiction of arbitral tribunal

25 | 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 unmistakable evidence that the parties agreed to submit questions of arbitrability to the arbitrators (*First Options of Chicago, Inc v Kaplan*). If the parties have delegated the issue to the arbitrator, the court will refuse to decide arbitrability even if there is a 'wholly groundless argument' on arbitrability and will let the arbitrators decide it (*Henry Schein, Inc v Archer & White Sales, Inc*, 139 S. Ct. 524 (2019)). An agreement to abide by institutional rules granting arbitrators authority to rule on their own jurisdiction, such as the AAA Rules, the ICDR Arbitration Rules (the ICDR Rules) and the CPR Rules for Administered Arbitration of International Disputes (the CPR Rules), has generally been considered sufficient evidence of consent to arbitrate arbitrability by a majority of courts. However, the Restatement of the Law of International Commercial Arbitration by the American Law Institute (2019) considers that such rules are not sufficient in certain circumstances.

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

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

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 will generally 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; and 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; and CPR Rules, Rule 9.5).

US-seated tribunals generally must 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.

Commencement of arbitration

27 | 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.

Hearing

28 | 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"' (see *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.

Courts have generally found that conducting hearings by videoconference satisfies a parties' right to be heard. See *Eaton Partners, LLC v Azimuth Capital Mgmt. IV, Ltd.*, 18 Civ. 11112 (ER), 8 (SDNY 18 Oct 2019); *Legaspy v Financial Industry Regulatory Authority*, No. 1:2020 Civ. 04700 (ND Ill 12 Aug 2020); *Research & Dev. Ctr. 'Teploenergetika,' LLC v EP Intl., LLC*, 182 F Supp 3d 556 [ED Va 2016]). But the parties' arbitration agreement and the applicable arbitration rules could dictate a different outcome.

Evidence

29 | 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 and expert witnesses, as well as documentary evidence (eg, *Kolel Beth Yechiel Mechil of Tartikov, Inc v YLL Irrevocable Tr*, 729 F 3d 99 (Second Circuit, 2013)).

Generally, 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.

Court involvement

30 | 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 district court at the seat of the arbitration may compel compliance with arbitral subpoenas, or hold the recalcitrant party in contempt of court. The court, however, must have personal jurisdiction under the law of the state in which the district court is located, and the subpoena must comport with due process under the US Constitution (see *Licci v Lebanese Canadian Bank*, 673 F 3d 50, 60–61 (Second Circuit, 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 location of the arbitration; the scope and reach of such subpoenas must therefore be carefully considered in every case.

28 USC section 1782 permits 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'. Section 1782 has even been used to reach documents outside the United States. (*In re del Valle Ruiz*, 939 F3d 520 [2d Cir 2019]).

Courts routinely grant section 1782 requests in aid of proceedings in foreign courts, as well tribunals in investor-state arbitrations (*NBC v Bear Stearns & Co,* 165 F3d 184 [2d Cir 1999]). Courts are split, however, as to whether this provision allows a party to seek discovery in aid of international commercial arbitration, and careful attention must be paid to the specific court precedents in the applicable jurisdiction. The Second Circuit recently held that section 1782 is not available in aid of private international commercial arbitration. (See *In Re Application of Hanwei Guo* Second Circuit Case No. 19-781, 8 July 2020)). The Fourth and Sixth circuits have found the opposite (see *Abdul Latif Jameel Transp. Co v FedEx Corp* (*In re Application to Obtain Discovery for Use in Foreign Proceedings*), 939 F3d 710 [6th Cir 2019]); *Servotronics, Inc v Boeing Co*, 954 F.3d 209, 210 (Fourth Circuit 2020)). The Supreme Court has so far not resolved this split, but observers expect that it will likely do so soon.

Confidentiality

31 | Is confidentiality ensured?

The FAA is silent with respect to confidentiality, and 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 keep their arbitration confidential. Leading arbitral rules vary in the level of confidentiality they require. 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

Interim measures by the courts

32 | 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 (First Circuit, 2010)). In limited circumstances, courts may also issue anti-suit injunctions prohibiting parties from pursuing foreign lawsuits in breach of an arbitration agreement and may impose monetary sanctions if violated (eg, *Jolen, Inc v Kundan Rice Mills, Ltd,* No. 19-cv-1296 (PKC) (SDNY July 9, 2019). These orders are often provisional, and only apply until a fully constituted tribunal has the chance to revisit the request for interim relief.

Interim measures by an emergency arbitrator

33 | 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 (Rule 38), and this approach has been followed by the ICDR, the CPR and JAMS (ICDR Rules, article 6; CPR Rules, Rule 14; and JAMS Rules, article 3), though the speed of each institution's process varies. In July 2020, CPR introduced a new set of Fast Track Rules that parties may adopt to shorten the length of proceedings.

Interim measures by the arbitral tribunal

34 | 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; and JAMS Rules, article 32). The law recognises the right of arbitrators to issue partial or interim awards prior to the final award. 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)). Courts will generally respect an arbitral tribunal's interim awards, including for security for costs.

Sanctioning powers of the arbitral tribunal

35 | 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 (Fifth Circuit, 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); and JAMS Rules, article 33). Other institutional rules are silent on sanctions, but allow arbitrators to award costs and fees to compensate a party for misconduct in the arbitration proceedings (CPR Rules, Rule 19.2).

AWARDS

Decisions by the arbitral tribunal

36 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; and JAMS Rules, article 34.2)).

Dissenting opinions

37 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, *Associated Transp. Line, LLC v Slebent Shipping Co*, 2004 U.S. Dist. LEXIS 18735 (SDNY 16 Sep. 2004)).

Form and content requirements

38 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 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 (Second Circuit, 2006)). Many institutional rules do require reasoned awards absent contrary agreement by the parties (ICDR Rules, article 30(1); CPR Rules, Rule 15.2; and JAMS Rules, article 35.2). Rule 46 of the AAA Rules, however, 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.

Time limit for award

39 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; and ICDR Rules, article 30(1)).

Date of award

40 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, and 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 (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.

Types of awards

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

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 a final and binding consent award. Such consent awards are often recognised and enforced by US courts.

Termination of proceedings

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

If 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 if the parties default on payment of arbitrator fees or costs. When this happens, courts have occasionally permitted the defaulting party that was 'unable to pay for [its] share of arbitration' to pursue its claims in litigation; this 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 (Ninth Circuit, 2016)).

Cost allocation and recovery

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

Absent express agreement by the parties, arbitrators have broad 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; and JAMS Rules, article 37.4). Awards of costs and fees constitute part of the award and are enforceable in US courts. Generally, contractual agreements for any 'fee-shifting' (including agreements that the prevailing party may recover its attorneys' fees and costs) will be respected.

Interest

44 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; and JAMS Rules, article 35.7). US courts will generally confirm and enforce such awards.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 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; and JAMS Rules, article 38.1). The ICDR and CPR Rules further grant arbitrators a short 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 it contained a material miscalculation or mistake, where it ruled upon a matter outside of the tribunal's jurisdiction or where it '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)).

Challenge of awards

46 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. A majority of US circuit courts have held that the section 10 standards for vacatur also apply to international or foreign awards seated in the United States (see, eg, *Yusuf Ahmed Alghanim & Sons v Toys 'R' Us, Inc*, 126 F.3d 15, 23 (Second Circuit 1997); *Ario v Underwriting Members at Lloyds*, 618 F.3d 277, 292 (Third Circuit 2010); *Gulf Petro Trading Co Inc v Nigerian National Petroleum Corp*, 512 F.3d 742 (Fifth Circuit 2008)); and *Jacada (Europe), Ltd v Int'l Mktg Strategies*, 401 F.3d 701, 709 (Sixth Circuit 2005). But see, *Inversiones y Procesadora Tropical INPROTSA, SA v Del Monte Int'l GmbH*, 921 F.3d 1291 (11th Circuit 2019), holding that FAA grounds for vacatur are inapplicable to an international arbitration award governed by the New York Convention.

Under section 10, awards may be vacated where:

- the award was procured by corruption, fraud or undue means;
- there was evident partiality of the arbitrators;
- 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
- 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 courts have interpreted the arbitrators' 'excess of powers' to permit vacatur on the basis that the tribunal acted in 'manifest disregard of the law' (eg, *Warfield v ICON Advisors, Inc*, 2020 US Dist. LEXIS 105321 [WDNC June 16, 2020, No. 3:20CV195-GCM]). But these decisions are outliers. The Fifth, Eighth and Eleventh circuits have rejected the manifest disregard doctrine. In circuits where the doctrine has not been expressly rejected, it has been considerably limited, and it is rare for awards to be vacated on this basis (see, eg, *Daesang Corporation v NutraSweet Company*, 85 NYS 3d 6 (2018) (reversing the trial court's vacatur of a foreign arbitral award on the grounds of manifest disregard of the law)).

The issue of what constitutes a reasoned award is not litigated frequently in US courts but was examined by the Second Circuit in *Smarter Tools v Chongqing Senci Import & Export Trade Inc*, 2019 US Dist LEXIS 50633 [SDNY Mar. 26, 2019, No. 18-cv-2714 (AJN)], where the Court concluded that the parties agreed that any award be reasoned, and that an award that contained no rationale for rejecting plaintiff's claims did not meet the standard for a reasoned award.

Finally, it is worth noting that courts may impose sanctions for challenges to arbitral awards that lack any real legal basis. *Inversiones y Procesadora Tropical INPROTSA, SA v Del Monte Int'l GmbH*, 921 F.3d 1291 (11th Circuit 2019).

Levels of appeal

47 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?

Normally, arbitral awards themselves are not subject to appeal on the merits by courts or arbitral institutions. Nevertheless, parties to AAA, CPR, or JAMS arbitrations may opt in to those institutions' appeal procedures.

However, 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 Supreme Court may grant a request to review a circuit court decision.

Recognition and enforcement

48 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?

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 United States 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.

Time limits for enforcement of arbitral awards

49 Is there a limitation period for the enforcement of arbitral awards?

A petition to confirm a domestic arbitral award 'may' be filed within one year from the date of the award (9 USC section 9). Whether this limitation is mandatory depends on the court in which it is brought (see *FIA Card Servs, NA v Gachiengu*, 571 F Supp 2d 799, 803-804 (SD Tex 2008)). For foreign awards, a petition to confirm must be filed within three years (9 USC sections 207 and 302). The FAA provides a three-month limit for motions to vacate, modify or correct an award (9 USC section 12).

Enforcement of foreign awards

50 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 (eg, *Getma Int'l v Republic of Guinea*, 862 F 3d 45 (DCC 2017); and *Thai-Lao Lignite (Thailand) Co v Gov't of Lao People's Democratic Republic*, 864 F 3d 172 (Second Circuit, 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 by Mexican courts on the basis of newly enacted legislation that applied retroactively, 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 (Second Circuit, 2016)). Similarly, in a recent decision, the Second Circuit found that a court can enforce an award set aside at the seat if the judgment setting aside the award is contrary to US public policy 'because it offends notions of justice from the point of view of the United States.' *Esso Exploration & Prod Nig v Nigerian Natl Petroleum Corp*, 397 F Supp 3d 323 [SDNY 2019]). The Second Circuit, articulated four factors relevant for exercising discretion under article V(1)(e): '(1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectation; 3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation.' Id.

Enforcement of orders by emergency arbitrators

51 | 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 courts have enforced emergency awards on a number of occasions, some courts have refused to enforce them 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 an emergency award) with *Chinmax Medical Sys, Inc v Alere San Diego, Inc*, 2011 WL 2135350 (SD Cal 2011) (refusing to enforce an emergency award)).

Cost of enforcement

52 | 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 will generally be borne by the enforcing party absent agreement to the contrary. 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

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

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 is generally 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.

Professional or ethical rules

54 | Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction 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. American Bar Association 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.

The conduct of arbitrators in international arbitration is regulated by ethics guidelines promulgated by the various arbitral institutions, such as the Code of Ethics for Arbitrators in Commercial Disputes (revised in 2004) recommended and approved by the AAA and ABA and the Arbitrators Ethics Guidelines by JAMS. These guidelines do not have the force of law.

Third-party funding

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

Third-party funding of arbitrations has become increasingly common in the United States, including in arbitration. Laws governing third-party funding, if any, generally exist on the state level. Parties exploring third-party funding options should be attuned, therefore, to relevant state laws, such as laws directly regulating funders, the common law doctrines of maintenance, champerty, barratry and attorney ethics rules.

Regulation of activities

56 | 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.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Treaties

The Trump Administration notified Congress, under Trade Promotion Authority (TPA), of its intent to enter into trade agreement negotiations with the United Kingdom (UK). US–UK trade negotiations aim to address tariff and nontariff barriers to trade. The first two rounds

of virtual negotiations were conducted in May and June 2020. Further rounds are planned, but may be more difficult because President-elect Biden has stated he will not sign any FTA if the UK does not respect the Good Friday Accords. More broadly, President Biden stated during his campaign that he opposes new free trade agreements before the US economy is 'competitive', and would invite the robust involvement of environmental and labour groups in FTA negotiations.

The United States signed the United Nations Convention on International Settlement Agreements Resulting from Mediation, but has yet to ratify it. The Convention provides for direct enforcement of mediated settlement Agreements. It expressly excludes arbitral awards from its scope.

Potential legal reform

In 2020, the House of Representatives passed the Forced Arbitration Injustice Repeal Act (FAIR Act, HR 1423), The Act, is unlikely to pass the Senate in its current form, would prohibit arbitration agreements covering civil rights disputes, consumer claims, employment disputes and certain types of antitrust disputes, and it would also prohibit any type of class, joint or collective action waiver in arbitration or litigation. The FAIR Act reflects a growing concern in the United States with mandatory arbitration agreements between parties with unequal bargaining power, especially between individuals and companies. The chances of legislative action have become modestly more likely with the election of Joseph Biden to the presidency.

Rule revisions

CPR issued new sets of Fast-Track Rules in July 2020.

The AAA/ICDR is engaged in considering revisions to its Rules in 2021 to include:

- an elaboration of the standard for granting emergency relief;
- the circumstances in which third-party funding may be disclosed;
- specifying an arbitrator's powers to determine the arbitribility of claims; and
- expressly providing for the early disposition of claims, virtual hearings, and the electronic signing of awards.

ICSID is currently revising its arbitration rules. It received public comment on proposed rule revisions in 2020 and the Secretariat is preparing to an updated draft.

Recent decisions in the field of international investment arbitration to which the United States was a party

The most recent investment treaty arbitration in which the United States was a respondent state was *TransCanada v USA* filed in 2016 under the NAFTA. This case was settled. The most recent case in which the United States was a respondent state and there was a decision was *Apotex III v USA*, which was filed in 2012 under NAFTA and was decided in favour of the state in 2014.

Coronavirus

58 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The pandemic has delayed in-person evidentiary arbitration hearings and increased dramatically the use of virtual hearings via video teleconferencing platforms.

Many parties have agreed to proceed remotely using one of the many available video teleconferencing platforms. In absence of an express provision relating to remote hearing in the agreement, some parties have objected that they are entitled to an in-person hearing. While the FAA, which is nearly 100 years old, is silent about remote hearings, US courts applying the FAA generally find that remote hearings do not infringe a parties' right to heard. See *Eaton Partners, LLC v Azimuth Capital Mgmt IV, Ltd*, 18 Civ. 11112 (ER), 8 (SDNY 18 Oct. 2019); *Legaspy v Financial Industry Regulatory Authority,* No. 1:2020 Civ. 04700 (ND Ill 12 Aug. 2020); *Research & Dev Ctr 'Teploenergetika', LLC v EP Intl, LLC*, 182 F Supp 3d 556 [ED Va 2016]).

Arbitral institutions have encouraged the use of virtual hearings, and have published a variety of guidance documents, including cybersecurity advice, and model procedural orders:

- AAA/ICDR:
  - Virtual Hearing Guide for Arbitrators and Parties;
  - Virtual Hearing Guide for Arbitrators and Parties Utilizing ZOOM; and
  - Order and Procedures for a Virtual Hearing via Videoconference; and
- CPR:
  - Annotated Model Procedural Order for Remote Video Arbitration Proceedings.

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