IBA ARBITRATION COMMITTEE

Arbitration Guide

UNITED STATES

UPDATED APRIL 2024

Mark W. Friedman
Madelaine J. Horn

Debevoise & Plimpton LLP
66 Hudson Boulevard
New York, NY 10001

mwfriedman@debevoise.com
mjhorn@debevoise.com

Floriane Lavaud

Withers & Bergman LLP
430 Park Avenue
New York, NY 10022

floriane.lavaud@withersworldwide.com

Table of Contents

I.	Background	3
II.	Arbitration Laws	4
III.	Arbitration Agreements	4
IV.	Arbitrability and Jurisdiction	6
V.	Selection of Arbitrators	7
VI.	Interim Measures and Emergency Arbitration	8
VII.	Disclosure/Discovery	10
VIII.	Confidentiality	10
IX.	Evidence and Hearings	11
X.	Awards	14
XI.	Costs	15
XII.	Challenges to Awards	16
XIII.	Arbitrator Liability	17
XIV.	Recognition and Enforcement of Awards	17
XV.	Sovereign Immunity	19
XVI.	Investment Treaty Arbitration	20
XVII.	Resources	20
XVIII.	Trends and Developments	21

I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

Arbitration is a popular alternative to litigation in the United States. The principal advantages of arbitration are that it allows the parties to avoid the lengthy and costly discovery process in U.S. courts, often constitutes a more cost-effective means of resolving disputes, avoids civil juries, and is generally more likely to be kept confidential. The main disadvantage of arbitration is that it does not provide the parties with all of the protections of courts, including appeal rights, broad power to compel access to witnesses and documents, ability to join additional parties, and continuous availability of courts.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

Both domestic and international arbitrations take place in the United States. Domestic arbitration is common in several sectors, including construction, employment, and financial services. The Financial Industry Regulatory Authority (FINRA), which operates the largest arbitration forum in the United States for the resolution of disputes between and among investors, brokerage firms and individual brokers, handles over 3,000 new cases every year.

Aside from domestic arbitration, the United States also constitutes a popular forum for the resolution of international disputes through arbitration. The number of disputes handled by the International Center for Dispute Resolution (ICDR) of the American Arbitration Association (AAA) has increased substantially in recent years, with the ICDR/AAA handling one of the largest numbers of arbitral disputes in the world. Other U.S.-based arbitral institutions include the Judicial Arbitration and Mediation Services (JAMS) and the International Institute for Conflict Prevention and Resolution (CPR). Arbitrations administered by the International Center for the Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce (ICC) also frequently take place in the United States, and the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) remain prominent for *ad hoc* arbitrations.

(iii) What types of disputes are typically arbitrated?

A wide range of disputes can be arbitrated in the United States, including commercial disputes, intellectual property disputes, employment disputes and even consumer disputes. However, recent court decisions and newly enacted legislation have invalidated pre-arbitration agreements for certain employees working in interstate or foreign commerce and for employee claims regarding sexual harassment and assault.

(iv) How long do arbitral proceedings usually last in your country?

Arbitral proceedings vary in length depending on many factors, including the complexity of the issues presented, the extent of discovery, the availability of the tribunal, and the parties' willingness to expedite the process by, for example, agreeing to apply expedited arbitral rules. *See, eg,* JAMS Rules 16.1 and 16.2. Proceedings can last from several months to several years.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

There are no restrictions on the nationality of counsel or arbitrators in the United States. In the United States, state laws and rules largely govern the practice of law (which includes acting as counsel in arbitrations). These laws and/or rules may place restrictions on those not admitted to practice law in that state to act as counsel in arbitration located there. By contrast, acting as an arbitrator is generally not considered practicing law in the United States. As such, the laws and rules regulating the practice of law should not prevent individuals who are not admitted to practice law in the United States from acting as arbitrators.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

The Federal Arbitration Act (FAA), enacted in 1925 and codified at Title 9 of the United States Code, governs arbitration proceedings in the United States and incorporates the U.S. obligations under several international treaties. The FAA is not based on the UNCITRAL Model Law and largely predates it. Its most recent update was in March 2022. Additionally, all 50 states have adopted their own arbitration statutes based on the Uniform Arbitration Act or the Revised Uniform Arbitration Act.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

The FAA distinguishes between domestic and international arbitration. Chapter 1 applies to domestic arbitration. Chapters 2 and 3 govern international arbitration by implementing the New York and Panama Conventions, respectively, with residual application of Chapter 1. U.S. courts have held that the vacatur grounds proscribed in Chapter 1, Section 10 apply to both domestic arbitration and arbitration under the New York and Panama Conventions. *Corporación AIC, SA v. Hidroeléctrica Santa Rita SA*, 66 F.4th 876, 880 (11th Cir. 2023). A notable difference is a longer limitation period to seek confirmation for foreign awards (three years from the issuance of the award) than for domestic awards (one year from the issuance of the award).

(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

The United States has ratified the New York, Washington, and Panama Conventions, but not the Geneva Convention.

(iv) 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?

No. The FAA is silent on this issue.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

Section 2 of the FAA requires that arbitration agreements be 'in writing.' The term 'agreement in writing' refers, in the context of awards subject to the New York Convention, to 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.' Article II(2) of the New York Convention.

To be valid substantively, the arbitration agreement must evidence the parties' intention to submit their dispute to binding arbitration resulting in an enforceable award. An agreement to arbitrate must otherwise meet the requirements to form a contract under state law.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?

The United States has adopted a strong federal policy in favor of arbitration. Accordingly, courts will deny enforcement of arbitration agreements only in limited circumstances, such as (1) when the agreement is subject to an internationally recognized defense (including duress, mistake, fraud, unconscionability, and waiver) or (2) when it contravenes fundamental policies of the forum state. *See Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 121 (2d Cir. 2010). In addition, as of 2022, the FAA prohibits employers from enforcing mandatory arbitration clauses against employees bringing claims of sexual harassment or assault.

(iii) Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

Some U.S. arbitration agreements contain multi-tier or multi-step arbitration clauses. Arbitration agreements are subject to general contract law and will be enforced so long as all parties have consented to the multi-tier arbitration clause and the contract language is sufficiently definite. If an arbitration clause provides for mandatory negotiation or mediation as a condition precedent to arbitration, the court may find that it lacks jurisdiction and remand the case to the arbitrator to satisfy the requirements of the multi-tier clause. Failure to comply with such a provision may also lead a court to vacate an arbitral award rendered without the condition having been satisfied. The interpretation and application of any conditions precedent to arbitration are primarily left to the arbitrators, and courts in the U.S. will defer to their decisions. *See, eg, BG Grp. V. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014).

(iv) What are the requirements for a valid multi-party arbitration agreement?

There are no special requirements for multi-party arbitration agreements. An arbitration may involve multiple parties if and to the extent those parties have agreed to arbitrate with each other.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

As of 2022, the FAA prohibits employers from requiring employees to arbitrate disputes related to sexual assault or harassment. Otherwise, the enforceability of clauses providing for a unilateral right to arbitrate is subject to general contract law, and such clauses may be void for unconscionability depending on the circumstances. Several state courts have refused to enforce such clauses in recent years. However, other courts considering this issue have upheld the unilateral right to arbitrate despite the lack of mutuality, especially between parties with equal bargaining power.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

Arbitration agreements may bind non-signatories under several theories. The doctrine of equitable estoppel may prevent a party that has enjoyed rights and benefits conferred by a contract from later denying the application of an arbitration clause contained in the contract. In order to bind the non-signatory, the benefit must flow directly from the agreement. *Kamin Health LLC v. Halperin*, No. 20-cv-05574, 2021 WL 964949, at *14 (E.D.N.Y. Mar. 15, 2021). Under the theory of assumption, a non-signatory may also be compelled to arbitrate where its conduct suggests that it has assumed the obligation to arbitrate. The doctrine of veil piercing (also known as *alter ego*) may bind non-signatory parent companies or shareholders, where the control exerted by the non-signatory is such that the two entities cannot be treated as separate legal persons. Under the incorporation by reference doctrine, a non-signatory may incorporate by reference an arbitration clause in a prior contract or in a general set of rules or policies. Finally, the signature of an arbitration agreement by an agent may bind a non-signatory principal under the theory of agency. Whether a non-signatory is bound by an arbitration agreement is a matter for the court to decide.

(vii) How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Courts determine the law governing arbitration agreements by applying state law principles. Section 2 of the FAA, which governs cases involving interstate commerce, applies to arbitration agreements and subsequent proceedings. Courts will enforce choice of law provisions as long as they bear a reasonable relationship to the parties or to the transaction. *See, eg, Flores v. NFL,* No. 22-cv-0871, 2023 WL 2301575, at *4, n.7 (S.D.N.Y. Mar. 1, 2023).

Different rules govern where the parties disagree about which substantive law applies, where there is no choice-of-law provision or where one party is a non-signatory to the arbitration agreement. In such cases, U.S. federal courts will apply the choice-of-law doctrine of the forum state. *Follman v. World Fin. Network Nat'l Bank*, 721 F. Supp. 2d 158, 161 (E.D.N.Y. 2010).

(viii) Do courts in your jurisdiction distinguish between the seat (or legal place) of the arbitration and the venue of meetings/hearings?

Yes, although the seat and the venue are often the same. U.S. courts recognize the arbitral 'seat' as the jurisdiction that provides the substantive law governing the arbitration. On judicial review, the laws of the seat will apply even if the hearing is located elsewhere. Venue, by contrast, is not relevant to this determination for arbitration purposes. It should not be confused with the federal venue determination that dictates which court has jurisdiction to hear a case.

(ix) Are blockchain- and NFT-related disputes arbitrable in your jurisdiction?

Yes. There is no law prohibiting arbitration of blockchain, crypto, or NFT-related disputes. Many blockchain, NFT, and cryptocurrency companies based in the United States include arbitration provisions in their terms and conditions, which courts have enforced. *See, eg, Donovan v. Coinbase Glob., Inc.*, 2023 WL 2124776, at *5 (N.D. Cal. Jan. 6, 2023).

(x) Are there circumstances in which courts find that a valid arbitration agreement has become inoperable?

A valid arbitration agreement may become inoperable via waiver. In 2022, the U.S. Supreme Court unanimously ruled that a party waives the right to arbitrate by proceeding with litigation even if there is no prejudice to the opposing party. *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708, 1714 (2022). Thus, an arbitration agreement can be waived and become inoperable under the same circumstances as an ordinary contractual provision.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

Arbitration agreements are generally unenforceable when substantive rights, embodied by statute, express a strong public policy that must be judicially enforced. For instance, non-arbitrable disputes include criminal matters and those for which a civil penalty is provided. Several matters, which were previously deemed 'non-arbitrable,' can now be referred to arbitration, including claims arising under antitrust laws, securities laws, employee protection laws, the Carriage of Goods by Sea Act, and the Racketeer Influenced and Corrupt Organizations Act.

Unless the parties have 'clearly and unmistakably' agreed to submit this question to the arbitral tribunal, courts generally retain jurisdiction to decide whether the parties have submitted to arbitration. Courts may also review the tribunal's decision on arbitrability at the enforcement or confirmation stage.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

When a party initiates litigation despite an arbitration agreement, the other party may move to stay litigation and compel arbitration. If the court does not have jurisdiction over the parties, the suit will be dismissed in its entirety. A party's appeal from the denial of a motion to compel arbitration automatically stays the merits of the underlying court proceedings. *Coinbase, Inc. v. Bielski,* 143 S.Ct. 1915, 1923 (2023).

Although there is no specific limitation period to file a motion to compel, waiver generally occurs when a party seeking arbitration substantially participates in litigation to a point inconsistent with an intent to arbitrate. *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708, 1714 (2022).

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

The arbitral tribunal has the authority to decide on its own jurisdiction if the parties have 'clearly and unmistakably' agreed to delegate this authority to the tribunal. A court may not override a clear delegation in favor of the arbitrator. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019). In the absence of such an agreement, U.S. courts retain jurisdiction to decide a pre-arbitration challenge where (1) there is a valid arbitration agreement and (2) the scope of the arbitration agreement encompasses the parties' dispute. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995). U.S. courts also retain the authority to review the validity and the scope of the arbitration agreement at the annulment or enforcement stages.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

In most cases, the arbitration agreement sets forth the procedure for appointing arbitrators, either expressly or by reference to arbitral rules. Section 5 of the FAA also permits courts to appoint arbitrators at the request of either party when (1) the agreement fails to specify the procedure for appointing the arbitrators, (2) a party fails to abide by the designated procedure or (3) if for any other reason there is a lapse in appointing an arbitrator or filling a vacancy.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

There are no statutory requirements regarding disclosure of conflicts. Some U.S. courts have held that a failure to investigate and disclose conflicts warranted vacatur of an award for 'evident partiality' under Section 10 of the FAA. The precise standard for evident partiality remains unclear: some courts have found that it exists 'where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration,' while others have adopted a less stringent 'reasonable impression of bias' test. *See, eg, Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n.*, 820 F.3d 527, 548 (2d Cir. 2016); *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1138-39 (9th Cir. 2019). Certain courts have also applied a higher standard for evident partiality to party-appointed arbitrators 'who are expected to serve as *de facto* advocates,' concluding that in such cases, the challenging party must show that arbitrator's partiality 'had a prejudicial effect on the award.' *Certain Underwriting Members of Lloyds of London v. Florida*, 892 F.3d 501, 508, 510 (2d Cir. 2018).

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

Any person may serve as an arbitrator to the extent that person is impartial. Courts have the authority to question an arbitrator's impartiality when faced with a motion to vacate the resulting award. Section 10 of the FAA allows vacatur of a domestic award for 'evident partiality' of the arbitrator or 'other prejudicial misbehavior.'

Additionally, certain arbitral institutions require specific qualifications to appear on the national roster of arbitrators. For instance, the AAA requires a minimum of 10 years of senior-level business or professional experience or legal practice, educational degree(s) and/or professional license(s) appropriate to the field of expertise, honors, awards and citations indicating leadership in that field, training or experience in arbitration and/or other forms of dispute resolution, membership in a professional association(s), and other relevant experience or accomplishments.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

There are no legally mandated codes or rules concerning conflicts of interest for arbitrators. Courts may refer to guidelines such as the IBA Guidelines on Conflicts of Interest or the AAA Code of Ethics for Arbitrators for guidance in determining whether an arbitrator's behavior warrants vacatur of an award.

VI. Interim Measures and Emergency Arbitration

(i) Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

Although the FAA does not specifically provide for preliminary or interim relief, arbitrators may award any type of interim measure they deem necessary (eg, preliminary injunction, temporary restraining order and prejudgment attachment). *See, eg, British Ins. Co. of Cayman v. Water Street Ins. Co., Ltd.,* 93 F. Supp. 2d 506, 516 (S.D.N.Y. 2000) ('Courts in this Circuit have firmly established the principle that arbitrators operating pursuant to [arbitration agreement] provisions have the authority to order interim relief in order to prevent their final award from becoming meaningless.'). Most arbitral rules used in the United States grant arbitrators the authority to order such measures. *See, eg,* AAA Commercial Arbitration Rule 37(a); International Institute for Conflict Prevention & Resolution (CPR) Arbitration Rule 13.1; JAMS Rule 24(e). The parties may also define the applicable rules concerning the availability of provisional measures in their arbitration agreement.

There is no requirement that the tribunal's decision on interim measures take the form of an award or an order. Courts in the United States generally enforce interim measures ordered by arbitral tribunals. *See, eg, Am. Zurich Ins. Co. v. Caton Park Nursing Home*, No. 21-cv-4698, 2022 WL 1136579, at *4 (N.D. Ill. Apr. 18, 2022) (enforcing interim measure requiring party to post pre-hearing security and collecting similar cases).

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?

Although the FAA does not expressly address the courts' authority to order interim measures in aid of arbitration, most courts have held that they retain the authority to do so. Even in jurisdictions that have not upheld courts' inherent authority to issue interim relief, courts will likely give effect to the parties' express agreement to permit court-ordered provisional measures or to otherwise preserve the status quo in aid of arbitration.

Some institutional arbitration rules allow the parties to seek court-ordered interim measures even after the tribunal has been constituted. *See, eg,* JAMS Rule 24(e); CPR Rule 13.2. However, these rules apply only in limited circumstances—for example, an injunction to preserve evidence that is susceptible to loss or destruction. Certain courts are also

reluctant to consider requests for interim relief after the arbitrators have been empowered to grant such remedies. Thus, the presumption is that after the tribunal has been constituted, it will provide interim relief. Whether court-ordered provisional measures will remain in effect after the constitution of the arbitral tribunal will depend on the parties' agreement and the court's discretion.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

Courts may grant evidentiary assistance in aid of the arbitration only when 'exceptional circumstances' or 'special needs' so require, or when discovery is needed to determine the arbitrability of the dispute. Absent such circumstances, the court will typically deny evidentiary assistance unless the arbitrator consents to such measure.

Statutes in most states now provide that an arbitrator may issue subpoenas requiring a person to appear as a witness or requiring the production of documents. U.S. courts are split, however, as to whether the FAA allows arbitrators to compel third-party document discovery outside the context of an evidentiary hearing. Where the applicable statute does not grant subpoena power to the arbitrator, a party may apply to the court for an enforceable subpoena.

As described further below, the U.S. Supreme Court recently foreclosed the use of 28 U.S.C. § 1782 as an avenue to obtain evidence for private commercial arbitration tribunals and *ad hoc* arbitration panels seated abroad. *ZF Auto. US, Inc. v. Luxshare, Ltd.,* 142 S. Ct. 2078 (2022).

(iv) Are decisions by emergency arbitrators enforceable in your country?

U.S. courts are divided on the enforceability of emergency arbitrator decisions. In some cases, courts have found that such orders are enforceable because they are sufficiently final and therefore reviewable under the FAA. *See, eg, Vital Pharm., Inc. v. Pepsico, Inc.*, 528 F.Supp.3d 1304, 1309 (S.D. Fla. 2020) (enforcing emergency arbitrator order because it definitively 'resolves the issue of whether the parties are required to maintain the status quo and continue to perform their contractual obligations during the pendency of the arbitration.').

In other cases, however, U.S. courts have declined to enforce similar orders on the grounds that they are merely 'placeholders' that do 'not purport to resolve finally any of the issues submitted to arbitration.' *See, eg, Al Raha Grp. For Tech. Servs. v. PKL Servs. Inc.*, No. 1:18-cv-04194, 2019 WL 4267765, at *2-3 (N.D. Ga. Sept. 6, 2019) (finding that emergency arbitrator order intended 'to preserve the status quo' was not enforceable).

(v) What is the approach in your country to anti-suit injunctions or injunctions by arbitrators preventing parties from initiating litigation proceedings?

Parties may seek anti-suit injunctions from a federal court with jurisdiction. Courts will grant these injunctions if they find that the parties are subject to a valid, binding arbitration agreement. Anti-suit injunctions issued by arbitral tribunals are unusual in the United States but are generally considered proper as long as they are authorized by the arbitration agreement in question or the arbitral rules that govern the dispute. *See, eg,* ICDR/AAA, Article 27(1); JAMS, Rule 24(e).

(vi) Do courts provide assistance in aid of foreign-seated arbitrations, including for disclosure of documents?

The U.S. Supreme Court has held that federal-court discovery assistance is not available in aid of private commercial arbitration or *ad hoc* arbitration located abroad. *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S.Ct. 2078, 2089 (2022). The Court concluded that commercial arbitration tribunals and *ad hoc* investor-State tribunals seated abroad do not constitute 'foreign international tribunals' that may be given access to discovery materials by U.S. courts under federal law, because they do not exercise governmental authority.

Although the U.S. Supreme Court left open the possibility that institutional investor-state tribunals might still qualify for discovery assistance under this standard, two lower courts have since ruled that discovery assistance is not available for ICSID arbitrations. *See, eg, In re Alpene, Ltd.*, No. 1:21-mc-02547, 2022 WL 15497008, at *4 (E.D.N.Y. Oct. 27, 2022) (finding that the tribunal convened pursuant to the China-Malta BIT did not exercise governmental authority); *In*

re Webuild S.P.A., No. 22-mc-140, 2022 WL 17807321, at *3 (S.D.N.Y. Dec. 19, 2022) (reaching the same result with respect to the tribunal convened pursuant to the Panama-Italy BIT).

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

Although arbitration agreements may sometimes include specific discovery procedures, parties commonly refer to institutional rules for a definition of the arbitral tribunal's authority to order discovery. Often, parties will agree with the arbitral tribunal on a set of discovery procedures appropriate for their arbitration. Discovery tools like those provided for in the Federal Rules of Civil Procedure—including pre-trial depositions and broad document discovery—generally are not available in international arbitration unless otherwise agreed by the parties but remain common in domestic arbitration.

Section 7 of the FAA provides that arbitrators may 'summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him . . . any book, record, document, or paper which may be deemed material as evidence in the case.' Some uncertainties remain as to whether arbitrators can order pre-hearing discovery, particularly with respect to nonparties, since Section 7 of the FAA states only that an arbitrator may summon a witness to appear 'before them' and 'bring with him' documents. However, many courts tend to treat Section 7 broadly, in conjunction with the parties' arbitration agreement and applicable rules, to permit arbitrators to order pre-hearing discovery.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

There are very few limitations on the permissible scope of arbitrators' discovery orders. U.S. courts typically treat Section 7 of the FAA as authorizing arbitrators to order and conduct such discovery as they deem 'necessary' and show considerable deference to the determination by arbitrators in this regard. More recently, courts have also reinforced the arbitrator's authority under Section 7 to issue subpoenas for 'any person to attend before them.' *See, eg, Broumand v. Joseph*, 522 F.Supp.3d 8 (S.D.N.Y. 2021). Although the FAA and state arbitration statutes permit a court to set aside an award when the arbitrators have refused to hear 'pertinent and material' evidence, U.S. courts almost always defer to the arbitrators' decision.

(iii) Are there special rules for handling electronically stored information?

There are no specific rules for handling electronically stored information, but some arbitral institutions have developed tools to assist arbitrators in managing electronic discovery. For example, the ICDR Dispute Resolution Procedures provide that requests for electronic information 'should be narrowly focused and structured to make searching for them as economical as possible,' and that a tribunal 'may direct testing or other means of focusing and limiting any search.' Article 24(6).

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

The FAA contains no explicit provision regarding the confidentiality of arbitral proceedings, and case law does not establish any general duty of confidentiality in arbitration. Many states have developed or adopted laws (often modeled on the Revised Uniform Arbitration Act) that expressly recognize the authority of the arbitral tribunal to issue protective

orders to prevent the disclosure of confidential information. Absent such an order or agreement of the parties, a party cannot expect the arbitration proceedings to be treated as confidential.

The confidentiality of proceedings, materials and awards therefore depends on the agreement between the parties and the institutional rules governing the dispute. The parties often negotiate a particular scope of protection and may request the tribunal to endorse a confidentiality stipulation. Securing a confidentiality order from the tribunal is often a prudent approach for parties concerned about protecting the confidentiality of materials used in arbitration proceedings.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

The FAA makes no explicit reference to the arbitral tribunal's authority to protect trade secrets and confidential information. If the parties do not consent to the application of institutional rules protective of trade secrets and confidential information, most frequently, they will attempt to reach an agreement regarding confidentiality prior to disclosing such information.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

The FAA does not address the issue of privilege in arbitration proceedings. Some courts have, however, held that they may decline to enforce arbitral subpoenas issued under Section 7 of the FAA that call for the disclosure of clearly privileged information. *Turner v. CBS Broad. Inc.*, 599 F.Supp.3d 187, 195 (S.D.N.Y. 2022). Courts will nevertheless generally defer to the arbitrator's reasoned privilege determinations. *Id*.

The prevailing practice among international practitioners in the United States adopts the approach to privilege set forth in the IBA Rules on the Taking of Evidence in International Arbitration, which is to exclude from evidence any documents covered by 'privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.' Article 9(2)(b).

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

Parties frequently choose to be guided by the IBA Rules in international arbitration, and tribunals generally retain discretion to modify these rules to fit the particular situation.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Arbitrators are required to conduct the hearings in a fair and impartial manner. Section 10 of the FAA provides for vacatur of domestic awards (1) where the award was procured by corruption, fraud, or undue means; (2) where the partiality of the arbitration tribunal was 'evident'; (3) when the tribunal refused 'to postpone the hearing' in certain circumstances or refused 'to hear evidence pertinent and material to the controversy,' or 'any other behavior by which the rights of any party have been prejudiced'; or (4) where the arbitrators exceeded their powers.

In the international context, Article V(1)(b) of the New York Convention and Article 5(1)(b) of the Panama Convention provide that a party may challenge a foreign award on the basis that it was prevented from presenting its case during the arbitral proceedings. Apart from these limitations, arbitrators exercise wide discretion regarding the conduct of arbitration proceedings.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

The parties and the arbitrators retain wide discretion to structure the presentation of witness evidence. In practice, the parties provide witness statements to the tribunal in advance of a hearing, while others prefer oral examination. Regardless of whether direct evidence is introduced by witness statement or orally, the witness must, absent exceptional circumstances, be subject to cross-examination when part of his testimony is in dispute. In addition, arbitrators may solicit testimony from witnesses through direct questioning and have broad discretion to refuse to hear cumulative or unnecessary testimony.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

There are no general rules on who may serve as a witness. Traditionally, witnesses are required to swear or affirm that they will give truthful testimony; however, the procedure for oath or affirmation may vary, depending on state law and the particular institutional rules adopted by the parties.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative, director or employee) and the testimony of unrelated witnesses?

The FAA does not provide for a different treatment for witnesses based on their relation to a party. Employees, representatives, and other people connected to a party may serve as witnesses. Arbitral tribunals retain wide discretion to determine the appropriate weight to afford a testimony by taking into account a witness' relationship, or lack thereof, with a party.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

The parties and the arbitrators are free to determine the presentation of expert witnesses, save for the observance of general fairness considerations grounded in due process. The rules governing the selection and the conduct of expert witnesses are prescribed by the institutional rules adopted by the parties, and by the parties' agreement.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

The parties (through their initial agreement or later consent) and the institutional rules chosen by the parties determine the rules applicable to the selection of experts, including whether experts must be selected from a particular list. Arbitral tribunals have discretion to appoint experts in addition to, or in lieu of, the party-appointed experts, depending on the applicable rules, but rarely do so in practice. *See, eg,* CPR Arbitration Rule 12.3 (an arbitral tribunal may 'in its discretion' appoint a neutral expert). The evidence provided by a tribunal-appointed expert should not be treated differently than the evidence provided by the party-appointed expert.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

Witness conferencing – that is, multiple witnesses offered by opposing parties taking the stand simultaneously – remains rare in the United States.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

Although arbitral secretaries are common in the United States, there are no specific rules regulating their use or appointment, save that the arbitrators generally seek the consent of the parties prior to appointing a secretary and charging for his or her time.

(x) Are there any ethical codes or other professional standards applicable to counsel and arbitrators conducting proceedings in your jurisdiction?

Yes, though the applicable standards will vary depending on the applicable rules and law, as well as the circumstances of the case.

For arbitrators, Section 10 of the FAA creates an implicit ethical standard by allowing vacatur of a domestic award in the event of 'evident partiality' or other prejudicial misbehavior. The ICDR/AAA and the American Bar Association (ABA) maintain a Code of Ethics for Arbitrators in Commercial Disputes, and there is a separate Code of Responsibility for Arbitrators in Labor-Management Disputes. Some individual states have also promulgated their own ethical rules for arbitrators. *See, eg*, Ethical Standards for Arbitrators & Neutral Evaluators, N.Y. Commercial Division.

For counsel, arbitration practitioners are subject to relevant state ethics codes, which generally follow the ABA's Model Rules of Professional Conduct. *See, eg,* NYSBA NY Rules of Professional Conduct (2022), Rule 2.4, Comment 5 ('Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct.').

(xi) Have arbitral institutions in your jurisdiction implemented rules empowering arbitral tribunals to exclude counsel based on conflicts of interest or other reasons?

While most arbitral rules do not empower tribunals to exclude counsel, JAMS does allow the arbitrator to withhold approval for any change or addition to counsel that could compromise the arbitrator's ability to serve, the composition of the tribunal or the finality of the Award by introducing a possible conflict. Rule 12.

(xii) Has your jurisdiction adopted any rules with regard to remote hearings and have there been any court decisions on same?

Several U.S. arbitral institutions have adopted formal rules and procedures for virtual hearings, including ICDR/AAA, JAMS, and CPR. The National Academy of Arbitrators (NAARB), which specializes in labor and employment disputes, also issued an advisory opinion permitting arbitrators to order a remote hearing at one party's request where 'necessary in order to provide a fair and effective hearing.' *See* Advisory Opinion No. 26, NAARB (April 1, 2020).

In addition to these rules, some state and federal courts have their own policies for handling remote arbitrations. *See, eg,* EDNY Remote Guidelines for Arbitration Participants (2021). FINRA has a resource guide for virtual hearings, and U.S. courts have rejected complaints by investors requesting in-person proceedings before the agency. *See, eg, Cristo v. Charles Schwab Corp.,* No. 17-cv-1843, 2021 WL 2633624 (S.D. Cal. June 25, 2021).

U.S. courts have not, however, been uniformly receptive towards virtual arbitration options, having ruled that a witness providing testimony remotely does not satisfy the presence requirement for arbitral subpoenas in Section 7 of the FAA. *Broumand v. Joseph*, 552 F.Supp.3d 11-12 (S.D.N.Y. Feb. 27, 2021).

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

Section 10(a)(4) of the FAA provides that arbitral awards be 'mutual, final, and definite,' but does not expressly impose any formal requirements. The New York Convention, which is incorporated in the FAA, provides that foreign awards must be in writing in order to be enforceable. Courts have held that the arbitration award should also contain the names of the parties and the signatures of the arbitrators, as well as the issues decided, and the relief granted by the tribunal.

Absent an agreement between the parties, arbitrators may award any type of legally permissible relief. Courts have broadly construed the arbitrators' authority to provide such relief. Arbitrators may craft any remedy consistent with the scope of the arbitration agreement and the limited grounds for setting aside an award. In commercial arbitrations, monetary damages are the most common type of relief. Arbitrators may also grant compensatory damages under the FAA, including consequential damages (such as operating losses, expenses, and lost profits). Arbitrators may further compel specific performance consistent with state law. *Telecom Bus. Sol., LLC v. Terra Towers Corp.*, No. 22-cv-1761, 2023 WL 257915, at *8 (S.D.N.Y. Jan. 18, 2023).

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Arbitrators may award punitive damages unless the parties agree otherwise. The parties may preclude award of punitive damages by including a provision to that effect in their agreement or by adopting rules that prohibit arbitrators from awarding punitive damages (such as ICDR Arbitration Rule Article 34(5)). An arbitrator's broad remedial authority also includes the power to award both pre-award and post-award interest, which may be simple or compound.

(iii) Are interim or partial awards enforceable?

Section 10(a)(4) of the FAA provides that arbitral awards, both interim and on the merits, must be 'final' in order to be enforceable. As a general rule, an award is final when it is intended by the arbitrators to reflect their complete determination of all claims submitted to them. Courts have accordingly enforced interim awards that finally and definitely dispose of a separate independent claim or are necessary to preserve assets needed to make a potential final award meaningful.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

Arbitrators are allowed to issue dissenting opinions. The arbitration clause and the rules selected by the parties may impose certain requirements as to the form and content of dissenting opinions.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Awards by consent are permitted. The parties may agree to settle a dispute at any stage prior to the issuance of the award and request the endorsement of the settlement agreement by the tribunal in the form of a consent award. If the tribunal denies endorsement, the parties may withdraw the case from the arbitral proceeding and settle the dispute outside the arbitration setting.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Most institutional rules and many state arbitration laws in the United States allow the parties to request that the arbitral tribunal correct or interpret minor errors. In addition, a party may pursue vacatur under Section 10(a)(4) of the FAA and seek remand under Section 10(b) in order to request clarification from the tribunal, so long as the time limit to issue the award has not expired. Absent an agreement between the parties, permissive institutional rules, or an authorizing statute, a tribunal does not have the authority to correct an award previously issued (known as the *functus officio* doctrine).

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

Each party is presumed to bear its own costs for bringing or defending an arbitration. Nevertheless, the parties, institutional rules or the governing law may permit cost shifting.

(ii) What are the elements of costs that are typically awarded?

Commonly awarded costs include the arbitrators' fees, as well as other administrative costs incurred by the parties during the course of the arbitration (eg, the costs for the arbitral institution, the court reporters, and the secretary to the tribunal, as well as the parties' expert fees, counsels' fees, and expenses).

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

In institutional arbitration, the institution will typically assess costs and expenses. In *ad hoc* arbitration, the arbitral tribunal may determine its own costs and expenses. To avoid any surprises, individual arbitrators routinely provide the parties with their hourly rates at the outset of the arbitration.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

In the absence of any agreement or rules limiting the arbitrator's discretion, the arbitral tribunal generally has wide discretion to award costs, including attorneys' fees. When apportioning costs, the tribunal may look into the merits of the claims brought by the parties and the conduct of the parties during the proceedings.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

Courts may review awards on costs on the same limited grounds as any other challenge to the arbitral award. Courts may interpret the parties' competing requests for costs as evidence that the arbitral tribunal has the authority to rule on the issue, thereby insulating the award from any claim that it exceeds the scope of the arbitrators' powers.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

A party may challenge a domestic or a foreign award before U.S. courts by moving to vacate the award and serving the motion on the adverse party or its attorney within three months of the filing or delivery of the award. (Sections 12 and 208 of the FAA). Section 10 of the FAA sets forth the following exclusive grounds for vacating an award: '(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.' These grounds apply to domestic and foreign awards. *Corporación AIC, SA v. Hidroeléctrica Santa Rita SA,* 66 F.4th 876, 880 (11th Cir. 2023). Whether a court may rely on grounds not specified in the FAA to vacate an award, such as public policy or manifest disregard of the law, remains unsettled in the United States.

When ruling on a motion to set aside an award, courts may decide to stay enforcement proceedings. Section 12 of the FAA provides that 'any judge who might make an order to stay the proceedings in an action brought in the same court may make an order . . . staying the proceedings of the adverse party to enforce the award.' The stay of enforcement proceedings is also permitted—yet not mandatory—under the New York Convention when an application to suspend or set aside the award has been filed in the country in which, or under the law of which, the challenged award was rendered.

The average duration of challenge proceedings varies widely, from under one year to several years, depending on the complexity of the issues and other considerations.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

A waiver of the right to challenge an arbitration award generally does not prohibit review of the arbitrator's conduct pursuant to Section 10(a) of the FAA. Waivers that purport to eliminate federal review pursuant to Section 10(a) are unenforceable. *In re Wal-Mart Wage & Hour Emp. Pracs. Litig.*, 737 F.3d 1262, 1266 (9th Cir. 2013).

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

Arbitral awards are not subject to appeal in the United States, and the FAA's provisions for vacatur are not intended to create an avenue for appeal of the merits of an award. U.S. courts will not 'sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.' *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). '[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.' *Id.* The parties may not by agreement create a right to appeal to a court.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

A court may remand an award to the tribunal if 'the time within which the agreement required the award to be made has not expired,' as set forth in Section 10(b) of the FAA. Remand for clarification is warranted where the decision, as written, is indefinite, incomplete, or ambiguous. On remand, the tribunal is limited to the matter being remanded and may not rehear or redetermine those matters not in question.

(v) Is there a specialist arbitration court in your jurisdiction?

There is no federal specialist arbitration court in the United States. All Article III federal judges are empowered to decide cases involving international and domestic arbitrations, although their jurisdiction is limited by the broader requirement that the case must either 'arise under' federal law or meet the criteria for diversity. *Badgerow v. Walters,* 142 S.Ct. 1310, 1314-15 (2022). State courts are not so limited and can hear arbitration cases under their general jurisdiction.

(vi) To what extent do courts in your jurisdiction allow arbitrators to amend and/or replace wrongly invoked law or the law not invoked by the parties (iura novit arbiter)? Could this be a basis to set aside the award?

The principle of *jura novit arbiter* is not widely accepted or applied in the United States and is not a basis for vacatur under the FAA. That said, U.S. courts have occasionally held that an award may be set aside if the decision was rendered in 'manifest disregard for the law,' which 'encompasses situations where the arbitrator's award is in manifest disregard of the terms of the [parties' relevant] agreement.' *Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 109 (2d Cir. 2019).

XIII. Arbitrator Liability

(i) Does the arbitration law in your jurisdiction expressly provide for the immunity of arbitrators, experts, translators, interpreters and/or other participants in arbitration proceedings from civil liability in connection with their mandate? If so, are there exceptions to this immunity?

The FAA does not address immunity for arbitrators or other participants in arbitration proceedings. However, domestic case law has recognized that arbitrators and arbitral institutions enjoy absolute immunity from civil liability for conduct that is within the scope of the arbitral process. *See, eg, Lanza v. FINRA*, 953 F.3d 159, 163 (1st Cir. 2020) (explaining that '[b]ecause the role of an arbitrator is functionally equivalent to that of a judge, courts . . . consistently have extended quasi-judicial immunity to arbitrators and organizations that sponsor arbitrations').

Certain institutional arbitral rules also codify the principle of non-liability for arbitrators and for the institutions themselves. *See, eg*, AAA Commercial Arbitration Rule R-52(d); CPR Administered Arbitration Rule 22.

(ii) Does this immunity, if any, extend to criminal liability?

No.

XIV. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

Although in many countries, 'recognition' and 'enforcement' are conceptually distinct, both concepts are captured by the procedure for 'confirmation' set forth in Section 9 of the FAA.

With respect to domestic awards, a motion for confirmation must be made within one year of the award's issuance. The party seeking confirmation must file an application and copies of the arbitration agreement, the award and any order modifying or correcting the award, and serve these documents pursuant to the applicable rules governing service.

A motion to confirm a domestic award may be brought in the U.S. federal district court specified in the arbitration agreement or, if no court is specified, the court for the district in which the award was rendered. There must be an independent basis of federal jurisdiction before a federal district court can entertain a motion to vacate. A party may oppose enforcement of a domestic award by demonstrating that 'the award is vacated, modified, or corrected as prescribed in' Sections 10 and 11 of the FAA.

With respect to foreign awards subject to the New York Convention, a party must seek recognition and enforcement within three years of the issuance of the award. (Section 207 of the FAA). Article IV of the New York Convention requires a party seeking recognition and enforcement to provide a 'duly authenticated original award or a duly certified copy thereof' and 'the original agreement . . . or a duly certified copy thereof.' The proper court is either the court specified in the arbitration agreement or, if no court is specified, any court in which the dispute giving rise to the arbitration could have been brought. The grounds for opposing enforcement or recognition of a foreign award are set forth in Article V(1) of the New York Convention, namely: (a) the arbitration agreement 'is not valid under the law to which the parties have subjected it or . . . under the law of the country where the award was made'; (b) the party against whom the award is invoked was not afforded adequate notice of the proceedings, a hearing on the evidence or an impartial decision by the arbitrator; (c) the award exceeded the scope of the arbitration agreement; or (d) the award has been set aside or suspended by an authority of the country in which, or under the laws of which, it was made. A court may also decline recognition and enforcement of a foreign award under Article V(2) of the New York Convention (a) if the subject matter of the arbitration is not arbitrable under U.S. law, or (b) if recognition or enforcement is otherwise adverse to public policy. Aside from the said grounds, some courts have held that recognition and enforcement of an arbitration award may also be denied on *forum non conveniens* or other purportedly 'procedural' grounds. *See, eg, Figueiredo Ferraz v. Republic of Peru*, 665 F.3d 384 (2d. Cir. 2011).

Opposition to enforcement or recognition of an award does not automatically stay the enforcement of an award, but the court may grant a stay of enforcement.

(ii) If an exequatur is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

A foreign award recognized in the United States can be enforced in the same manner as any other judgment of the national courts. An award can be enforced in U.S. courts by following the procedures for the recognition of foreign judgments of the State in which enforcement is sought. Most states have adopted their own version of the 2005 Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA), which provides specific grounds for denying enforcement, including the failure to observe due process. In 2021, New York became the most recent jurisdiction to update its state law in accordance with the UFCMJRA.

(iii) Are conservatory measures available pending enforcement of the award?

Courts may order conservatory measures, such as a freezing injunction, if the party seeking relief demonstrates a likelihood of dissipation of the claimed assets or some other inability to recover monetary damages.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Federal law requires 'a strong policy in favor of arbitration,' and, consequently, U.S. courts apply a presumption in favor of enforcement of arbitral awards. With respect to domestic awards, U.S. courts 'must' confirm the award unless it has been vacated, modified, or corrected pursuant to the FAA. Section 9 of the FAA. Likewise, U.S. courts 'shall' enforce foreign awards unless one of the grounds set forth in the New York Convention for denying enforcement applies. Section 207 of the FAA.

On rare occasions, U.S. courts have exercised their discretion to enforce awards that have been set aside at the seat of arbitration, where the foreign court's judgment is 'repugnant to fundamental notions of what is decent and just' in the United States. *See Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petroleum Corp.*, 40 F.4th 56, 61 (2d Cir. 2022) (citing *Commisa v. Pemex*, 832 F.3d 92, 106 (2d Cir. 2016)).

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

The duration of an enforcement proceeding varies widely, from under one year to several years depending on the complexity of the issues and other considerations.

A party seeking to enforce an award must act within the prescribed time limits to enforce an award: one year for domestic awards under the FAA and three years for foreign awards enforced pursuant to the New York Convention.

XV. Sovereign Immunity

(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?

The Foreign Sovereign Immunities Act (FSIA) governs jurisdictional civil immunity for foreign state parties, including foreign states' agencies or instrumentalities. Unless one of FSIA's exceptions applies, U.S. courts are prohibited from hearing claims brought against sovereign states. Under 28 U.S.C. § 1605(a)(6) '[a] foreign state shall not be immune from the jurisdiction' of federal or state courts in any action (1) to enforce an arbitration agreement 'made by the foreign state with or for the benefit of a private party' regarding matters that are arbitrable 'under the laws of the United States,' or (2) 'to confirm an award made pursuant to such an agreement to arbitrate.'

This immunity from jurisdiction is distinct from immunity from execution, which prevents courts from taking measures to constrain the property of other states. The denial of immunity from execution requires that at least one of the following conditions be satisfied: (1) the seat of the arbitration is in the United States; (2) the arbitration agreement or award 'is or may be governed' by a treaty to which the United States is a party calling for the recognition and enforcement of arbitral awards (eg, the New York Convention); (3) the underlying claim could have been brought in a federal court under the FSIA's other provisions denying immunity to foreign states or (4) the foreign state has waived its sovereign immunity.

(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?

The FSIA generally allows a party to attach, or execute an award against, the property of a foreign state used for commercial activity, but not against consular or diplomatic property, or against property held by a central bank for its 'own account.' In determining whether property is used for a commercial activity, courts focus on the use rather than the origin of the property. That property derives from revenue generated by commercial activity does not render it subject to attachment if the state does not use the property for commercial purposes.

U.S. courts apply a strong presumption against allowing states' award creditors from enforcing against the assets of state-owned entities. Courts may lift that presumption, however, where the law treats the state-owned entity as the state's *alter ego*, or where distinguishing between the state-owned entity and the state would 'work fraud or injustice'. *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 US 611, 629 (1983).

(iii) Are there any requirements for arbitrations involving sovereign entities?

While the FAA does not contain any specific requirements for arbitration involving foreign sovereign entities, the FSIA addresses this issue with respect to the political subdivisions, agencies, and instrumentalities of foreign states. Section 1605(a)(6) of the FSIA, known as the 'arbitration exception,' allows U.S. courts to hear actions that are brought to either enforce an arbitration agreement made with a foreign state or to confirm an award made pursuant to an arbitration agreement.

U.S. courts have taken a broad view of the arbitration exception in recent years, applying it to enforce awards that were annulled by a foreign court and awards based on arbitration agreements that a foreign court deemed invalid. *See, eg, Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 776 (D.C. Cir. 2022); *Nextera Energy Glob. Holdings B.V. v. Kingdom of Spain*, No. 19-cv-01618, 2023 WL 2016932, at *7 (D.D.C. Feb. 15, 2023); *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 19-cv-01871, 2023 WL 2016933, at *6 (D.D.C. Feb. 15, 2023).

XVI. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

The United States is a party to the Washington Convention and to several free trade agreements providing for arbitration of investor-state disputes, including the United States-Mexico-Canada Agreement (USMCA) and the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR). The United States is not a party to the Energy Charter Treaty (ECT).

(ii) Has your country entered into bilateral investment treaties with other countries?

The United States is a party to 42 Bilateral Investment Treaties, each of which provides for arbitration of investor-state disputes. The United States is also a party to 14 Free Trade Agreements with 20 countries. Most of the Free Trade Agreements signed by the United States provide for arbitration of investor-state disputes.

(iii) Have there been any recent court decisions in your country in relation to intra-European investor-state arbitration?

In the U.S., the first decision to consider the enforceability of an intra-EU investor-state arbitration award was *Ioan Micula et al v. Gov't of Romania*, 404 F.Supp.3d 265 (D.D.C. 2019), *aff'd*, 805 Fed Appx 1 (D.C. Cir. 2020). The federal courts in D.C. upheld enforcement of the award, distinguishing *Achmea* on the facts. On 22 December 2022, the D.C. district court rejected Romania's second request for relief from that judgment. *Micula v. Gov't of Romania*, No. 17-CV-02332, 2022 WL 18356669 (D.D.C. Dec. 22, 2022). The case is pending in the D.C. Circuit.

More recent decisions from the D.C. district court have been split. In two cases decided by the same judge on the same day, the D.C. district court upheld its jurisdiction to enforce ICSID awards that renewable infrastructure developers from Luxembourg and the Netherlands obtained against Spain pursuant to the ECT. The court rejected Spain's *Achmea*-based jurisdictional defense as 'a question of arbitrability and therefore an issue of the award's merits' and stated that the ICSID Convention prevented it from re-examining the tribunals' jurisdictional findings. *See Nextera Energy Glob. Holdings B.V. v. Kingdom of Spain*, No. 19-cv-01618, 2023 WL 2016932, at *7, *11 (D.D.C. Feb. 15, 2023); *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 19-cv-01871, 2023 WL 2016933, at *6, *10 (D.D.C. Feb. 15, 2023).

In a third case, however, a different judge on the same court denied confirmation of an UNCITRAL award that Dutch renewable energy investors had obtained under the ECT. *Blasket Renewable Invs., LLC v. Kingdom of Spain*, No. 21-3249, 2023 WL 2682013, at *4-*7 (D.D.C. March 29, 2023). The two sets of cases diverged on whether an objection that a party lacked capacity to enter into an arbitration agreement ought to be treated as a challenge to the agreement's existence or as a challenge to its arbitrability. The three cases are also currently pending in the D.C. Circuit.

XVII. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

The main reference materials on arbitration in the United States are:

- 'AAA Handbook on Commercial Arbitration-Third Edition' (Juris, 2016).
- 'Domke on Commercial Arbitration,' by Martin Domke, Larry Edmonson and Gabriel M. Wilner (Westlaw, 2012).
- 'Grenig on Alternative Dispute Resolution,' by Jay E. Grenig (Westlaw, 2016).

- 'Moore's Federal Practice' (LexisNexis, 2020).
- 'Oehmke on Commercial Arbitration,' by Thomas H. Oehmke (Westlaw, 2012).

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

Several major arbitration educational events and conferences are organized annually in the United States by arbitral institutions (such as ICDR/AAA, CPR, the New York International Arbitration Center, the ICC, and ICSID), the international, state, and local bar associations (such as the IBA and the ABA (International Section)) as well as law institutes (such as the Institute for Transnational Arbitration, the Practicing Law Institute, and Juris).

XVIII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Arbitration remains an attractive alternative to court-based litigation in the United States, in particular for disputes involving non-U.S. parties. Many foreign parties prefer international arbitration to litigation in U.S. courts as a means of avoiding trial by jury, public access to disputes in courts, expensive and intrusive pre-trial discovery, and punitive damages. Arbitration is also a popular alternative to litigation from a domestic standpoint, with robust arbitration institutions present in the United States in areas such as construction, employment, and financial services.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

Mediation has become a viable alternative to litigation for various types of disputes, including those related to small businesses, matrimonial matters, and even foreclosure. Mediation is often considered a cheaper and more effective way to settle many types of disagreements.

The laws governing court-ordered mediation vary greatly on a state-by-state basis, with some providing detailed guidelines on the certification of mediators, their ethical standards and protections preserving the confidential nature of mediation. In some instances, courts may compel parties to attempt to mediate their disputes before permitting litigation.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

Restrictions on the Availability of Discovery Under Section 1782

The U.S. Supreme Court held that private commercial arbitration tribunals and *ad hoc* arbitration panels do not constitute 'foreign or international tribunals' for the purpose of discovery assistance under Section 1782. *ZF Auto. US, Inc. v. Luxshare, Ltd.,* 142 S. Ct. 2078 (2022). In doing so, it severely reduced the expanded discovery procedures available for foreign arbitration proceedings. The Court also did not expressly rule out that some non-*ad hoc* investor-state arbitrations could still be covered by Section 1782, leaving the door open for interpretation by lower courts in the coming years.

Eliminating Mandatory Arbitration in Federal Law for Employment-Based Sexual Harassment and Sexual Assault Claims

On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which was the first major substantive amendment to the FAA since it was enacted in 1925. The amendment prohibits mandatory arbitration clauses in employment cases involving sexual misconduct claims. It is indicative of a growing trend disfavoring mandatory arbitration in the U.S. employment context, which has become increasingly visible across numerous state legislatures that have passed similar measures. *See, eg,* N.Y. C.P.L.R. §7515 (2019); 21 V.S.A. §495h. It remains unclear whether these laws will pass judicial muster— several federal courts have already struck them down as inconsistent with the FAA. *See, eg, Chamber of Com. of the U.S. of Am. v. Bonta*, 62 F.4th 473 (9th Cir. 2023).

(iv) Are there any official plans to reform the arbitration laws and practice in your jurisdiction?

Federal lawmakers re-introduced the Forced Arbitration Injustice Repeal Act (FAIR) in April 2023. FAIR would eliminate unilateral arbitration clauses in employment, consumer, and civil rights cases. Consumers and workers would instead have the option to choose between arbitration and seeking redress through litigation. The U.S. House of Representatives passed prior versions of the law in 2019 and in 2022 before approval stalled in the U.S. Senate.

There have also been efforts to reform arbitration at the state level. In New York, a handful of bills pending before the state legislature would—among other things—prohibit mandatory arbitration agreements in consumer, employment or financial services contracts and provide for vacatur of an award based on an arbitrator's personal or financial conflicts of interest.

(v) Are there any rules governing third-party funding in your jurisdiction? Is there an obligation to disclose the identity of any non-party who has an economic interest in the outcome of the proceedings, including any third party funder? Have there been any recent court decisions in your jurisdiction in relation to third-party funding?

Third-party funding in international arbitrations is generally permitted in the United States, with certain limitations.

First, some states—including New York—have 'champerty' laws prohibiting or placing restrictions on third-party funders that do not have an underlying legal interest in the dispute. Of note, however, New York's law applies only to amounts under $500,000, which is a lower bar than most litigation funding transactions. *Second*, third-party funding arrangements can trigger rules of professional conduct regarding conflicts of interest, which are applicable to attorneys acting as counsel in arbitration proceedings. *See, eg,* NYSBA NY Rules of Professional Conduct (2022), Rule 1.8, Comments 11-12 (recognizing that '[t]hird-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's professional judgment and there is informed consent from the client.').

There is no uniform rule requiring disclosure of third-party funders. As a practical matter, routine disclosure of third-party funding at an early stage of arbitration proceedings is recommended. N.Y. City Bar Association Working Group on Litigation Funding Report at 69-72 (2020). The ICDR/AAA permits the tribunal to order disclosure on its own initiative or on the application of a party. 2021 ICDR Arbitration Rules, Article 14(7)(a). The tribunal may also ask parties to identify any third party that has an economic interest in the outcome of the arbitration, even if the third party is not an active funder. 2021 ICDR Arbitration Rules, Article 14(7)(b).

As for recent decisions, in 2022, a Dutch property investor sued his former law firm in Texas federal court, alleging that his attorneys had executed a secret side agreement with the third-party funder of his successful UNCITRAL proceeding against Vietnam. The court granted the law firm's motion to compel arbitration, finding that the arbitration clause in the financing agreement between the investor and the third-party funder covered the dispute. *Binh v. King & Spalding LLP*, No. 4:21-cv-02234, 2022 WL 130879, at *3 (S.D. Tex. Jan. 10, 2022).

(vi) Has your country implemented a sanctions regime? Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent court decisions in your country in relation to the impact of sanctions on international arbitration proceedings?

The U.S. has implemented extensive sanctions targeting activities, individuals, and foreign countries. The Office of Foreign Assets Control (OFAC) in the U.S. Department of the Treasury, as well as various other government agencies, administers and enforces these sanctions. U.S. courts have generally not considered sanctions a matter of 'international public policy' for purposes of enforcement of arbitral awards. Instead, they have carefully analyzed whether entry of judgment on an arbitral award would require a license from OFAC under the particular terms of the applicable sanctions regime, taking into account the strong policy favoring recognition and enforcement of foreign arbitral awards. *See, eg, Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.,* 665 F.3d 1091, 1097 (9th Cir. 2011) (confirming ICC award rendered in favor of the Iran on the grounds that it did not violate public policy, where the U.S. represented to the court that OFAC would grant a license for payment); *United Media Holdings, NV v. Forbes Media, LLC*, No. 16-cv-5926, 2017 WL 9473164 at *11 (S.D.N.Y. Aug. 9, 2017) (enforcing award against sanctioned company would not violate public policy because OFAC granted a license for

issuance of the award). Along these lines, courts have authorized preliminary steps, such as sales procedures, that do not amount to transferring of a sanctioned state's assets and do not require an OFAC license. *See Crystallex Int'l. Corp v. Venezuela,* No. 1:17-mc-00151, 2022 WL 611586 at *14-16 (D. Del. March 2, 2022).

However, even when a court has entered judgment on an arbitral award, a specific license from OFAC will normally be required for enforcement of the judgment against blocked (ie, frozen) property of a sanctioned person. *See Tenaris, S.A. v. Venezuela*, No. 1:18-cv-0137, 2021 WL 1177996, at *4 (D.D.C. March 29, 2021) (refusing to stay enforcement of ICSID award against Venezuela on the grounds that a stay would be redundant because '[p]etitioners are currently prohibited from attaching or executing on any Venezuelan assets in the United States without first obtaining a license to do so from OFAC.').