UNITED STATES

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Chapter I. Introduction[1]

1. LAW ON ARBITRATION

United States law reflects an "emphatic federal policy in favor of arbitral dispute resolution".[2] That policy applies "with special force" to agreements to arbitrate in international transactions.[3]

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1. Except when otherwise indicated, this Report has been revised to reflect developments through October 2018. The statutes reproduced in **Annexes I** to **III** are those in effect as of October 2018; **Annex V** lists statutes in effect as of October 2018.

The law applicable to arbitration in the United States consists both of federal statutes enacted by the US legislature (the Congress) and statutes enacted by the legislatures of the various states that constitute the United States (i.e., state law). Arbitration law also derives from court decisions interpreting the governing statutes.[4] This Report focuses mainly on international commercial arbitration and, therefore, will not cover subjects that are of interest primarily in domestic arbitration.

a. Federal law

The federal statutory law of arbitration is found mainly in the Federal Arbitration Act (the FAA),[5] which Congress enacted in 1925 and has amended several times since. (The full text of the FAA is reprinted herein as **Annex I**.) Chap. 1 of the FAA governs arbitrations conducted within US borders, while Chap. 2 implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention),[6] and Chap. 3 implements the Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention).[7] The FAA covers agreements to arbitrate future disputes (i.e., controversies that have not yet arisen at the time of the agreement to arbitrate), as well as agreements to arbitrate existing disputes (i.e., controversies that are not subject to an agreement to arbitrate when they arise but that the parties subsequently agree to arbitrate).[8]

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2. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 729 (1996) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (summarized in ICCA *Yearbook Commercial Arbitration* XI (1986) p. 555 (hereinafter *Yearbook*))).
3. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (summarized in *Yearbook* XI (1986) p. 555); see also *id.* at 628-640; *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995) (summarized in *Yearbook* XXI (1996) p. 773); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515-18 (1974) (summarized in *Yearbook* I (1976) p. 203).
4. The US federal court system is divided into eleven circuits identified by number (i.e., First Circuit, Second Circuit, etc.), as well as the District of Columbia Circuit and the Federal Circuit; within each circuit are courts of first instance (known as district courts) and appellate courts (known as circuit courts). The decisions of the circuit courts are binding on the district courts in the circuit, but not on district courts or circuit courts in other circuits. Circuits may reach different decisions on the same question of law, and when that occurs in serious matters, a case raising the question on which circuits are divided may be heard by the US Supreme Court, whose ruling then binds all other courts, whether federal or state. On matters of federal law, state courts will also generally consider themselves bound by decisions of federal district courts in their state, and the corresponding circuit court.
5. 9 U.S.C. Sect. 1 et seq.
6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force for the United States on 29 December 1970) (implemented by the Federal Arbitration Act, 9 U.S.C. Sect. 201).
7. Inter-American Convention on International Commercial Arbitration, 30 January 1975, O.A.S.T.S. No. 42, 14 ILM 336 (entered into force for the United States on 27 October 1990) (implemented by the Federal Arbitration Act, 9 U.S.C. Sect. 301).
8. 9 U.S.C. Sect. 2.

In addition to the FAA, provisions relating to arbitration are found in the Patent Act (see Chapter II.3.*a* below and **Annex II**) and the Foreign Sovereign Immunities Act (see Chapter II.2.*c* below and **Annex III**).

b. State law

Every state of the United States has an arbitration statute enacted by its state legislature. Forty states and the District of Columbia have adopted a version of the Uniform Arbitration Act (the UAA), a model law, which, like the FAA, provides for arbitration of both future and existing disputes. Eight other states and Puerto Rico have adopted arbitration statutes that also allow for arbitration of both future and existing disputes, though not modeled after the UAA.[9] Two additional states have adopted arbitration statutes that allow for the arbitration only of existing controversies.[10]

The UAA was first prepared in 1955, and then amended in 1956. Much like the FAA, this version of the UAA, upon which nineteen state statutes are currently based,[11] is limited to such basic procedural issues as enforcement of arbitration agreements, appointment of arbitrators, and review of arbitration awards. A revision to the UAA, approved by the National Conference of Commissioners on Uniform State Laws (the "Uniform Law Commission") in 2000, contains provisions addressing a range of procedural issues that the 1955 version of the Law did not cover, such as consolidation of separate arbitration proceedings, disclosure of arbitrator conflicts, arbitrator immunity, and forms of discovery.[12] Twenty-one states and the District of Columbia have adopted the revised UAA thus far.[13] (The full text of the UAA of 1955, as amended by the Uniform Law Commission of 2000, is reprinted as **Annex IV** hereto. A list of arbitration statutes of the states, the District of Columbia and Puerto Rico appears as **Annex V** hereto.)

Thirteen states have also adopted international arbitration statutes that are separate from their laws for domestic arbitration.[14] Eight of those states –

9. California, Georgia, Louisiana, New Hampshire, New York, Ohio, Rhode Island, and Wisconsin.
10. Alabama and Mississippi.
11. Delaware, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, and Wyoming.
12. See, e.g., 2000 UAA Sect. 6(c) (arbitrator determines arbitrability); Sect. 8 (provisional remedies); Sect. 10 (allowing consolidation of separate arbitration proceedings); Sect. 12 (arbitrator must disclose conflicts); Sect. 14 (arbitrator immunity); Sect. 17 (discovery).
13. Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Kansas, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington, and West Virginia have adopted and codified the Revised Uniform Arbitration Act. Pennsylvania has adopted the Revised Uniform Arbitration Act, which will become effective 1 July 2019. A bill to adopt the Revised Uniform Arbitration Act has also been introduced in Massachusetts.
14. California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Louisiana, Maryland, North Carolina, Ohio, Oregon, and Texas.

California, Connecticut, Illinois, Louisiana, Florida, North Carolina, Oregon, and Texas – have enacted laws governing international arbitration that are based on, though not identical to, the UNCITRAL Model Law on International Commercial Arbitration.[15] Notably, in an effort to avoid conflict with federal law, both Maryland and North Carolina have enacted statutes that make federal law applicable to international arbitrations conducted in their states and to the enforcement of international awards in their state courts.[16] Unless parties explicitly choose to have a state international arbitration statute govern their dispute, these statutes will rarely impact an international arbitration, given the supremacy of federal law, which largely governs that arena (see Chapter I.1.*c* below).[17]

c. Relationship between federal and state law

Arbitration cases arising from international transactions are governed by the FAA. Sect. 2 of that statute provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract [or] transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The effect of this provision is to make an agreement to arbitrate enforceable as a matter of substantive federal law, which overrides inconsistent state law.[18]

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15. The UNCITRAL Model Law on International Commercial Arbitration was revised in 2006. UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (11 December 1985), amended G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (4 December 2006). Florida is the only state to have adopted the amended UNCITRAL Model Law.
16. See Md. Code Ann., Cts. & Jud. Proc. Sect. 3-2B-03(a) (2012) ("In all matters relating to the process and enforcement of international commercial arbitration and awards, the laws of Maryland shall be the arbitration statutes and laws of the United States."); N.C. Gen. Stat. Sect. 1-567.31(a) (1999) ("This Article applies to international commercial arbitration and conciliation, subject to any applicable international agreement in force between the United States of America and any other nation or nations, or any federal law."); see also, generally, Daniel A. Zeft, "The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns", 22 N.C.J. Int'l L. & Com. Reg. (1997) pp. 709, 719.
17. See, e.g., *Rintin Corp., S.A. v. Domar, Ltd.*, 476 F.3d 1254, 1261 (11th Cir. 2007) (confirming arbitral award under Florida International Arbitration Act where parties agreed it applied); *Tanning Research Labs., Inc. v. Hawaiian Tropic Pty. Ltd.*, 617 So. 2d 1090, 1090-91 (Fla. Dist. Ct. App. 1993) (same); cf. *Geranghadr v. Entagh*, 77 P.3d 323, 326-27 (Or. Ct. App. 2003) (enforcing money judgment entered on Iranian arbitral award).
18. See *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S.Ct. 500, 504 (2012) (holding that, consistent with the Supremacy Clause of the US Constitution, no conflicting state-law rule can displace the requirements of the FAA, a federal statute).

The Supreme Court has held that Congress intended Sect. 2 to extend to the full reach of congressional authority to regulate commerce, which is so broad as to bring virtually any commercial transaction in the United States and certainly any international transaction within the purview of federal law.[19] The FAA also governs any case falling within the New York Convention or the Panama Convention.[20] As a result, an arbitration concerning a commercial transaction will rarely, if ever, fall outside the scope of the FAA.

That federal law may apply to a particular arbitration, however, does not mean that all cases in which the FAA applies are heard in federal court. In particular, the FAA does not provide for federal court jurisdiction in cases relating to arbitrations governed only by Chap. 1 of the FAA, i.e., primarily domestic arbitrations.[21] Thus, unless there is an independent ground for federal court jurisdiction, a case relating to such an arbitration will be heard in state court.[22] By contrast, any case governed by the New York Convention or the Panama Convention (and hence by Chaps. 2 or 3, respectively, of the FAA) falls within the jurisdiction of the federal courts.[23] As a result, generally speaking, the majority of cases involving international commercial arbitration tend to be heard in federal court.

Since the FAA embodies the federal substantive law of arbitrability, it is applicable in both federal and state courts.[24] Under the legal system of the United States, state law may apply to certain issues even though a case is in federal court. One circumstance in which this may occur is when questions arise concerning the existence or enforceability of an arbitration agreement. In such a case, both federal and state courts will apply state contract law to the resolution of such questions, to the extent that state law would otherwise apply to contract law issues in the same agreement.[25] In accordance with Chap. 2 of

19. See *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003) (overruling a narrow construction of the commerce clause as applied to the FAA by the Supreme Court of Alabama in *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759 (2000)); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281-82 (1995); *Perry v. Thomas*, 482 U.S. 483, 491-92 (1987). See also *Wickard v. Filburn*, 317 U.S. 111 (1942) and *Gonzales v. Raich*, 545 U.S. 1 (2005) for a discussion of the breadth of Congress's power to regulate commerce.
20. 9 U.S.C. Sects. 201, 301.
21. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983) (FAA does not, by itself, confer federal question subject matter jurisdiction to the district courts to entertain claims brought under the Act.).
22. Generally, there are three bases for subject-matter jurisdiction in federal courts in the United States: (1) the dispute presents a question of federal law ("federal question" jurisdiction); (2) there is diversity of citizenship of the parties, i.e., generally the dispute is between citizens of different states or between citizens of one state and citizens of a foreign country, and the dispute involves an amount in excess of a specified threshold (currently US$ 75,000); or (3) the dispute is one in admiralty. See 28 U.S.C. Sects. 1331-33.
23. 9 U.S.C. Sects. 203, 302.
24. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32 (1983).
25. See, e.g., *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009) ("[Sect.] 2 [of the FAA] explicitly retains an external body of law governing revocation (such grounds 'as exist at law or in equity').... '[S]tate law,' therefore, is applicable to determine which contracts are

the FAA, however, state law may only be applied to agreements to arbitrate in the same manner as it is applied to other contracts. In other words, a state law that makes an agreement to arbitrate more difficult to enforce than other contracts or that imposes special conditions on an agreement to arbitrate will be overridden by the FAA.[26]

Once a party has established the existence of an agreement to arbitrate, federal law imposes a presumption of arbitrability that requires that "any doubts concerning the scope of arbitrable issues ... be resolved in favor of arbitration".[27] Thus, although state contract law principles govern, federal law requires that in applying them "the parties' intentions [be] generously construed as to issues of arbitrability".[28] However, in the case of a "narrow" arbitration clause, which defines a specific, limited category of disputes the parties intended to arbitrate, a court must scrutinize the underlying controversy more closely to determine whether the subject matter of the dispute falls within the arbitration clause.[29] In either case, the scope of the arbitration clause is a

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binding under § 2 and enforceable under § 3 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally'." (internal citations omitted)); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract'." (quoting FAA Sect. 2)); *Perry v. Thomas*, 482 U.S. 483, 493 n. 9 (1987) ("[T]he text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, ... 'save upon such grounds as exist at law or in equity for the revocation of any contract.' ... Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." (internal citations omitted)).

26. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (summarized in *Yearbook* XXIII (1998) p. 204); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 n. 9 (1995) (summarized in *Yearbook* XXI (1996) p. 191); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281-82 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987).
27. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The presumption is reversed, however, with regard to the question of whether a court or the tribunal itself should determine whether a given controversy is arbitrable, i.e., whether it falls within the tribunal's jurisdiction (an issue that is sometimes referred to in US judicial decisions as "arbitrability of arbitrability" but that is also referred to as "jurisdiction to determine jurisdiction" or "competence-competence"). *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (summarized in *Yearbook* XXII (1997) p. 278). See also Chapter V.4 below.
28. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (summarized in *Yearbook* XI (1986) p. 555).
29. See *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 223-24 (2d Cir. 2000); *Fleet Tire Serv. v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997). But see *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1320-22 (11th Cir. 2002) (declining to distinguish between broad and narrow arbitration clauses); *Battaglia v. McKendry*, 233 F.3d 720, 727 (3d Cir. 2000) (same).

question of the intent of the parties, and the FAA does not require parties to arbitrate issues they have not agreed to submit to arbitration.[30]

Because arbitration agreements are simply contracts, parties are "generally free to structure their arbitration agreements as they see fit".[31] Among other things, they may mutually agree upon a choice of the arbitration law that will apply to their arbitration agreement. Thus, if the parties choose a state arbitration statute to govern their agreement to arbitrate, the FAA requires that their choice be given effect.[32] In light of the presumption of arbitrability imposed by federal law, however, the courts have generally held that a general choice-of-law clause designating a state law to govern substantive aspects of the contract should not be interpreted to constitute a choice of that state's arbitration law, if that interpretation would limit the agreement to arbitrate or if the parties have chosen to arbitrate under a specified set of arbitration rules distinct from state law.[33]

In sum, in international cases, the federal policy favoring and supporting arbitration prevails in the United States, and state arbitration laws have little juridical or practical effect.

2. PRACTICE OF ARBITRATION

a. General

Arbitration is used extensively in the United States in commercial disputes, and there are a number of institutions that facilitate arbitration by providing arbitration rules, appointing arbitrators, and administering arbitral proceedings. Arbitration may also be conducted without institutional rules or the assistance of an institution that administers the case. This section surveys the principal institutions in the United States that assist in international arbitration. In addition to the institutions and rules described below, it is also possible to

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30. See *EEOC v. Wafflehouse, Inc.*, 534 U.S. 279, 294 (2002); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

31. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (summarized in *Yearbook* XV (1990) p. 131); see also *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1773 (2010) (summarized in *Yearbook* XXXV (2010) p. 617); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (summarized in *Yearbook* XXXV (2010) p. 621).

32. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 470 (1989). Such a choice must be "abundantly clear". *UHC Mgmt. Co., Inc. v. Comp. Scis., Corp.*, 148 F.3d 992, 996-97 (8th Cir. 1998); see also, e.g., *Johnson v. Gruma Corp.*, 614 F.3d 1062, 1066-67 (9th Cir. 2010).

33. See *Preston v. Ferrer*, 552 U.S. 346, 362-63 (2008); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 49 (1997). But cf. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (refusing to re-examine a state court's determination that a generic choice-of-law clause incorporated state law rules limiting arbitration).

arbitrate in the United States under the Arbitration Rules of the United Nations Commission on International Trade Law (the UNCITRAL Rules) and under the rules and with the assistance of institutions that have headquarters in other countries, such as the International Court of Arbitration of the International Chamber of Commerce and the London Court of International Arbitration.

b. Arbitral institutions

American Arbitration Association

The principal arbitration institution in the United States is the American Arbitration Association (AAA). The AAA administers cases, appoints arbitrators when called upon to do so, and engages in extensive activities to promote arbitration and educate users of arbitration. Its headquarters are located at:

120 Broadway, Floor 21
New York, NY 10271
Telephone: +1-212-716-5800
Website: <www.adr.org>

The AAA's International Center for Dispute Resolution (ICDR), which administers the AAA's international cases, is headquartered at the same address and may be reached at:

Telephone: +1-212-484-4181
Website: <www.icdr.org>

The AAA was founded in 1926 in response to the need for an arbitration institution able to administer all kinds of cases in all parts of the United States. The AAA is an independent, nongovernmental, nonprofit organization. It is administered by a full-time professional staff and governed by a board of directors chosen from a wide range of industries and professions throughout the nation. Since its founding, the AAA has become the largest arbitration institution in the United States – and one of the largest in the world – measured in terms of total number of cases administered, offices established, persons employed, and amounts expended. In 2017, it administered 290,486 cases, including 8,560 commercial cases.[34]

In 1996, the AAA consolidated the administration of all of its international cases in the ICDR, headquartered in New York City, with other offices in Singapore, Houston and Miami, a presence in offices in Mexico City and

34. *See* American Arbitration Association, *2017 Annual Report* (24 May 2018), pp. 6, 20, 22, 24, available at <http://www.adr.org/annual-reports>; American Arbitration Association, *2017 B2B Dispute Resolution Infographic* (9 March 2018), available at <http://go.adr.org/rs/294-SFS-516/images/AAA220_2017_B2B_Key_Statistics.pdf>.

Seoul, and cooperative agreements with organizations in around sixty other countries around the world. The ICDR is run by a specialized staff of multilingual attorneys, all of whom are expert in the various rules of procedure that are applied in international cases and are sensitive to the cultural and legal differences attendant to international disputes. In 2017, the ICDR administered 1,026 new cases.[35]

For international cases, the AAA offers parties a choice among several different sets of rules. First, the ICDR administers international cases under its International Arbitration Rules, most recently amended effective 1 June 2014 (the AAA International Rules). These Rules were prepared specifically for international transactions, are based largely on the UNCITRAL Arbitration Rules, and include provisions that reflect the views of many users of international arbitration who were consulted by the AAA. The rules provide that they will govern where the parties have agreed in writing "to arbitrate disputes under these International Arbitration Rules or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution (ICDR) or the American Arbitration Association (AAA) without designating particular rules".[36]

Second, parties may agree to arbitrate international cases under rules that the AAA has promulgated primarily for domestic cases, including its Commercial Arbitration Rules and its specialized rules, such as those for construction disputes, the wireless telecommunications industry, or disputes over the validity and infringement of patents.

Third, the AAA can also provide administered arbitration for international cases under the UNCITRAL Rules pursuant to its "Procedures for Cases under the UNCITRAL Arbitration Rules". To facilitate cases under the UNCITRAL Rules, the AAA will perform the functions of the appointing authority whenever it has been so designated by the parties. The arbitrators who serve on the AAA's various rosters and panels have been selected based on criteria developed by the AAA. The AAA and the ICDR will also make appointments from their relevant rosters and panels as provided in rules chosen by the parties or otherwise by the parties' agreement.[37] In cases under the UNCITRAL Rules, the AAA, when requested by the parties or by the arbitral tribunal, will also provide various administrative services, such as assisting in scheduling hearings, transmitting communications between parties, and arranging for hearing rooms, interpretation, stenographic transcripts, and other services.

Fourth, unless the parties agree otherwise, in cases under its Commercial Arbitration Rules where a disclosed claim or counterclaim totals at least US$ 500,000, the AAA automatically applies a special program designed to

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35. American Arbitration Association, *2017 Annual Report* (24 May 2018), p. 20, available at <http://www.adr.org/annual-reports>.
36. AAA International Rules, Art. 1.1, available at <www.adr.org/active-rules>.
37. See, e.g., Procedures for Cases under the UNCITRAL Arbitration Rules, 15 September 2015, Art. 6, available at <www.adr.org/active-rules>.

facilitate the arbitration of large, complex disputes. The program has a panel of specially selected arbitrators with experience in such matters who apply the AAA's "Procedures for Large, Complex Commercial Disputes".[38]

Finally, the AAA will perform functions under the Rules of the Commercial Arbitration and Mediation Center of the Americas and the Rules of the Inter-American Commercial Arbitration Commission, which are described below.

New York International Arbitration Center

Launched in the spring of 2013, the New York International Arbitration Center ("NYIAC") serves as a center for the conduct of international arbitrations located in New York City. The NYIAC provides high-tech hearing rooms, breakout rooms and other amenities that can accommodate arbitrations of any size, including large, multi-party arbitrations. The NYIAC is not an administering institution and welcomes arbitrations of all types, including *ad hoc* proceedings and arbitrations administered by any institution, as well as mediations, expert proceedings and other gatherings.

The NYIAC also serves as a clearinghouse for information related to arbitration in New York and, more generally, the United States. Its website contains links to helpful information and articles about New York as an arbitral forum, as well as information about the choice of New York law as governing substantive law.

The NYIAC is located at:

150 East 42nd Street
New York, NY 10017
Telephone: +1-917-300-9550
E-mail: info@nyiac.org
Website: <www.nyiac.org>

Commercial Arbitration and Mediation Center for the Americas

In 1995, spurred by the encouragement of arbitration and other means of alternative dispute resolution provided by Art. 2022 of the North American Free Trade Agreement (NAFTA), the Commercial Arbitration and Mediation Center for the Americas (CAMCA) was founded jointly by the American Arbitration Association, the British Columbia International Commercial Arbitration Centre, the Mexico City National Chamber of Commerce, and the Quebec National and International Commercial Arbitration Centre. CAMCA's mission is to assist in the resolution of private commercial disputes involving parties within the NAFTA region.

38. Procedures for Large, Complex Commercial Disputes, 1 October 2013, available at <www.adr.org/active-rules>.

CAMCA is governed by representatives of each of its founding institutions. It has adopted a set of Arbitration Rules, effective 15 March 1996, based on the UNCITRAL Rules.[39]

Information about CAMCA can be obtained through the AAA, which administers those arbitrations conducted under the CAMCA Rules that are located in the United States.

Inter-American Commercial Arbitration Commission

The Inter-American Commercial Arbitration Commission (IACAC) was established in 1934 by resolution of the Seventh International Conference of American States held in Montevideo, Uruguay, the previous year. The Inter-American Commission is composed of delegates chosen by its National Sections. The AAA is the National Section of the United States.

The Panama Convention provides that, in the absence of an express choice by the parties, arbitrations governed by the Convention shall be conducted under the IACAC Rules. The current rules of procedure of the IACAC entered into force on 1 April 2002, after a lengthy review process by the US State Department.[40]

All arbitrations under the IACAC Rules, regardless of locale, are administered by the ICDR. The IACAC may be contacted through the ICDR.

CPR Institute for Dispute Resolution

The International Institute for Conflict Prevention and Resolution (CPR) is an independent, nonprofit organization formed by global corporations and law firms to promote the avoidance and resolution of commercial disputes. It publishes a set of rules for international disputes, last updated in 2018, which are designed for use by practitioners who prefer that the arbitral tribunal and the parties perform the administrative functions generally handled by administering institutions such as the AAA. When these rules are used, CPR limits its role to appointing arbitrators and deciding challenges in accordance with the procedures set forth in its rules. In 2014, CPR introduced new Rules for Administered Arbitration of International Disputes for users who require CPR to act as an administering authority. CPR also publishes rules for non-administered and administered domestic arbitration. CPR may be contacted at:

575 Lexington Avenue
New York, NY 10022
Telephone: +1-212-949-6490
Facsimile: +1-212-949-8859
E-mail: info@cpradr.org
Website: <www.cpradr.org>

39. Mediation and Arbitration Rules Effective 15 March 1996. Available at <www.sice.oas.org/dispute/comarb/camca/camtoc_e.asp>.
40. 9 U.S.C. Sect. 306(b); see 22 C.F.R. Sect. 194.1 (2002).

The Society of Maritime Arbitrators
The Society of Maritime Arbitrators (SMA) is a nonprofit association of maritime arbitrators. The SMA does not administer arbitration proceedings, but it maintains a set of rules, last updated in 2010, and roster of arbitrators, and it will serve as appointing authority. SMA awards are published unless the parties agree otherwise in advance. The SMA may be contacted at:

One Penn Plaza, 36th Floor
New York, NY 10119
Telephone: +1-212-786-7404
E-mail: info@smany.org
Website: <www.smany.org>

For-profit organizations
A number of private, for-profit arbitration institutions also exist in the United States. The largest such institution is JAMS. Founded in 1979, JAMS specializes in multi-party business and commercial cases, and has extensive experience in domestic arbitrations in the United States. It may be contacted at:

18881 Von Karman Avenue, Suite 350
Irvine, CA 92612
Telephone: +1-949-224-1810
Facsimile: +1-949-224-1818
Website: <www.jamsadr.com>

In January 2011, JAMS formed JAMS International to provide mediation services and arbitration of cross-border disputes. JAMS International has its headquarters in London, with additional locations in Amsterdam, Milan, New York and Rome. In September 2011, JAMS International announced that it had established a panel of over forty new mediators and arbitrators, many of whom built their careers in specific market sectors as accomplished attorneys or judges. JAMS International may be contacted in the United States at:

620 Eighth Avenue, 34th Floor
New York, NY 10018
Telephone: +1-212-751-2700
Facsimile: +1-212-751-4099
E-mail: info@jamsinternational.com
Website: <www.jamsinternational.com>

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c. AAA Library

The AAA's Library and Information Center on the Resolution of Disputes has a collection of over 23,000 publications, including works in several languages on various aspects of arbitration practice. The AAA also compiles documents, legislation, court cases, and other significant materials to aid those with questions involving international commercial arbitration. In addition, the Library makes available bibliographies in several categories of arbitration law and practice. One that may be of particular interest is *Basic Documents of International Commercial Arbitration*. The AAA Library and Information Center was recently acquired by the Harnish Law Library located at Pepperdine University School of Law:

Harnish Law Library
24255 Pacific Coast Highway
Malibu, CA 90263
Telephone: +1-310-506-4643
Website: <law.pepperdine.edu/library>

Further, the American Arbitration Association's educational program (<www.aaau.org>) provides a variety of useful information, including AAA publications, a compilation of laws and statutes, and training courses on domestic and international arbitration.

d. ITA Monthly Report/Kluwer Arbitration

Kluwer Arbitration <www.kluwerarbitration.com> provides an extensive online database of international arbitration research materials, including the ICCA *International Handbook on Commercial Arbitration*, the ICCA *Yearbook Commercial Arbitration* and the *ICCA Congress Series*. Within the Kluwer Arbitration site is the ITA Monthly Report, a monthly update on international arbitration law developments throughout the world (including the United States), published in association with the Institute for Transnational Arbitration.

Chapter II. Arbitration Agreement

1. FORM AND CONTENTS OF THE AGREEMENT

a. Existing and future disputes

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) and most state statutes expressly govern agreements to arbitrate both existing and future disputes.[41] No distinction is made in their treatment of the two forms of agreements.

b. Form requirements

The FAA and most state statutes require that an agreement to arbitrate be in writing to be enforceable.[42] The written agreement need not be signed or be in any particular form,[43] and the writing may be evidenced by electronic means.[44] Courts have found an intent to arbitrate on the basis of references to arbitration in unsigned forms, or other printed sales documents, upon which both parties have acted.[45] Traditional principles of contract and agency – including

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41. 9 U.S.C. Sect. 2; 2000 UAA Sect. 6; 1955 UAA Sect. 1. But see Alabama Code Sect. 6-6-2; Mississippi Code Ann. Sect. 11-15-1; West Virginia Code Sect. 55-10-1.
42. 9 U.S.C. Sects. 2 and 4; 2000 UAA Sect. 6; 1955 UAA Sect. 1. Note, however, that the 2000 UAA only requires that the agreement be "contained in a record", allowing for subsequent oral agreement regarding terms of an arbitration contract. See 2000 UAA Sect. 6, cmt. 1.
43. See *Fisser v. Int'l Bank*, 282 F.2d 231, 233 (2d Cir. 1960). See also *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 978 & n. 5 (6th Cir. 2007); *Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359, 1369 (11th Cir. 2005); *Tinder v. Pinkerton Sec*., 305 F.3d 728, 736 (7th Cir. 2002); *Walsh v. WOR Radio*, 537 F. Supp. 2d 553, 555 (S.D.N.Y. 2008).
44. See *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 556 (1st Cir. 2005); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 27 n. 11 (2d Cir. 2002). See also Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C. Sect. 7001 et seq.
45. See *Hill v. Gateway 2000, Inc*., 105 F.3d 1147, 1148–50 (7th Cir. 1997) (party bound to arbitrate by accepting delivery of purchase accompanied by additional terms, including an arbitration agreement); *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 733 (4th Cir. 1991) (though textile manufacturer did not read and sign the contract that contained the arbitration clause, agreement to arbitrate existed with the fabric manufacturer where there was an established course of dealing); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir.

equitable estoppel, assumption, veil-piercing, incorporation by reference, agency and third party beneficiary theory – may also serve to bind a party to an arbitration agreement.[46]

The New York and Panama Conventions require not only a written agreement, but also that it be signed by the parties,[47] or contained in an exchange of writings.[48] Courts have held that the signature requirement applies both to a contract in which an arbitration clause resides and to a standalone arbitration agreement.[49] An international arbitration agreement that is not enforceable under the New York or Panama Conventions because of the absence of a signed agreement may still be enforceable under the FAA or a state statute.[50]

The US Supreme Court has held that, under the FAA, laws of the individual US states may not impose additional formal requirements on agreements to arbitrate, such as a requirement that arbitration clauses must be set in large type.[51]

1987) (experienced purchaser was bound to arbitrate disputes arising under signed and unsigned sales confirmation forms from sellers, where purchaser received forms without objection and use of arbitration clauses was widespread in the industry).

46. See *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009).
47. N.Y. Convention Art. II(2); Panama Convention Art. 1. See also *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1291 (11th Cir. 2004) (refusing to enforce arbitration award without strict compliance with agreement-in-writing requirement of Art. IV(b) of the New York Convention); *China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 292-93 (3d Cir. 2003) (same). But see *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 591 (7th Cir. 2001) (agreement-in-writing requirement under New York Convention waived if party participated in arbitration).
48. N.Y. Convention Art. II(2); Panama Convention Art. 1. See *Standard Brent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447-48 (3d Cir. 2003) (arbitration agreement formed where buyer demonstrated a definite expression of acceptance of seller's contract and both parties performed on their contractual relationship); *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 148-50 (2d Cir. 2001) (arbitration agreement formed when one party faxed "recap" or "fixture" to the other, which had effect of agreeing to charter party's essential terms, including arbitration clause).
49. *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd*., 186 F.3d 210, 218 (2d Cir. 1999) (no agreement in writing where purchase order containing arbitration clause was signed by only one of the parties). See also *Standard Brent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447-448 (3d Cir. 2003); *AGP Indus. SA v. JPS Elastromerics Corp*., 511 F. Supp. 2d 212, 214-215 (D. Mass. 2007); *Chloe Z Fishing Co. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 1247 (S.D. Cal. 2000); *Bothell v. Hitachi Zosen Corp*., 97 F. Supp. 2d 1048, 1051-1052 (W.D. Wash. 2000). But see *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 670 (5th Cir. 1994) (summarized in *Yearbook* XX (1995) p. 937) (holding that signature requirement only applies to stand-alone arbitration agreements and not to contracts that contain arbitration clauses).
50. See N.Y. Convention Art. VII(l). Cf. *In re Arbitration Between Chromalloy Aeroservices and Arab Republic of Egypt*, 939 F. Supp. 907, 914 (D.D.C. 1996) (enforcing international award under FAA, but not New York Convention) (summarized in *Yearbook* XXII (1997) p. 1001).
51. *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996) (state law imposing typography requirement for arbitration clauses in franchise agreements was invalid). See also *Kindred Nursing Ctr. Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1426-27 (2017) (state-law

c. Model arbitration clause

It is customary for published sets of rules also to include a model clause designating those rules. For example, the ICDR recommends the following clause to provide for arbitration of future disputes under its International Rules:

> "*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.*
>
> The parties may wish to consider adding:
> **a.** *The number of arbitrators shall be (one or three);*
> **b.** *The place of arbitration shall be [city, (province or state), country]; and*
> **c.** *The language(s) of the arbitration shall be ________.*"[52]

The AAA's drafting guide for dispute resolution clauses recommends the following clause to provide for arbitration of existing disputes in which the contract does not already contain an arbitration clause:

> "We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its [International] Arbitration Rules the following controversy: [describe briefly]. We further agree that a judgment of any court having jurisdiction may be entered upon the award."[53]

The parties also should consider adding language specifying the number of arbitrators, place of arbitration, and language of arbitration by means of the clauses set forth above.

The ICDR recommends the following clause to provide for arbitration under the UNCITRAL Rules when the parties wish the ICDR to serve both as appointing authority and administrator:

> "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules in effect on the date of this contract. The appointing authority shall be the International Centre for Dispute Resolution. The case shall be administered

requirement that power of attorney explicitly authorize waiver of jury trial and access to courts was invalid).

52. International Centre for Dispute Resolution, International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) (2018), p. 6, available at <www.adr.org/active-rules>.
53. American Arbitration Association, Drafting Dispute Resolution Clauses: A Practical Guide (2013), p. 10 (original refers to "Commercial [or other] Rules"), available at <www.adr.org/Clauses>.

> by the International Centre for Dispute Resolution in accordance with its 'Procedures for Cases under the UNCITRAL Arbitration Rules."[54]

Again, the parties may wish to consider adding language regarding the number of arbitrators, place of arbitration, and language of arbitration per the above clauses. Parties who agree that the ICDR shall act as appointing authority under the UNCITRAL Rules but do not wish to utilize the administrative services of the ICDR may simply omit the last sentence of the suggested clause.

Regardless of the arbitration clause used, if enforcement of an award may be sought in the United States, it is generally advisable to include an "entry-of-judgment" provision, which states that a "judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof". This clause, based on similar wording in Sect. 9 of the FAA, makes clear that the parties intend the award be enforceable by a court, because some courts have refused to enforce an award where the contract failed to include the entry-of-judgment provision.[55] Even without this language, however, most international awards should be enforceable under the separate enforcement regime for the New York and Panama Conventions.[56]

2. PARTIES TO THE AGREEMENT

a. Generally/capacity

As explained in Chapter I.1.*c* above, the Federal Arbitration Act (the FAA) (see **Annex I** hereto) requires that arbitration agreements be treated like any other type of contract. Therefore, any person, physical or legal, who can enter into a contract can also agree to arbitrate. This is equally true for persons who are not citizens or residents of the United States.

b. Bankruptcy

Bankruptcy courts generally treat arbitration agreements like other contracts arising before the commencement of a bankruptcy case: "pre-petition contract rights are enforceable in a bankruptcy proceeding except to the extent the [Bankruptcy] Code specifically provides otherwise".[57] Thus, where arbitration

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54. International Centre for Dispute Resolution, Procedures for Cases under the UNCITRAL Arbitration Rules (15 September 2005), pp. 4-5, available at <www.adr.org/active-rules>.
55. See *PVI Inc. v. Ratiopharm GmbH*, 135 F.3d 1252, 1254 (8th Cir. 1998) (arbitration award cannot be confirmed under Sect. 9 of the FAA without entry-of-judgment clause); *Okla. City Assocs. v. Wal-Mart Stores, Inc*., 923 F.2d 791, 794-95 (10th Cir. 1991); *Home Ins. Co. v. RHA/Pennsylvania Nursing Homes, Inc.*, 113 F. Supp. 2d 633, 634-35 (S.D.N.Y. 2000).
56. 9 U.S.C. Sects. 207, 302. See also *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d 433, 436 (2d Cir. 2004); *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 588-89 (5th Cir. 1997).
57. *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1157 (3d Cir. 1989). See also *In re Elec. Mach. Enters.*, 479 F.3d 791, 799 (11th Cir. 2007) (compelling

would conflict with the purposes of the Bankruptcy Code, it will not be compelled by the bankruptcy court.[58]

c. Sovereigns and State entities

The FAA does not restrict the capacity of government entities in the United States to arbitrate, but federal, state, and local statutes or regulations may restrict governmental entities' authority to enter into agreements to arbitrate. Federal agencies have explicit statutory authorization to arbitrate disputes relating to their administrative programs, although in practice they seldom do so.[59]

The Foreign Sovereign Immunities Act (FSIA) (see **Annex III** hereto) lifts the jurisdictional immunity of foreign States and foreign State entities for actions in US courts seeking to enforce an agreement to arbitrate or to confirm an arbitral award when (1) the arbitration takes place or is intended to take place in the United States; (2) the agreement or award is or may be governed by a treaty or other international agreement in force in the United States calling for the recognition and enforcement of arbitral awards, such as the New York Convention or Panama Convention; (3) the foreign State has waived its immunity either explicitly or by implication; or (4) the underlying claim would not have given rise to immunity, such as when based on the foreign State's commercial activity.[60]

The Act of State doctrine in the United States constitutes a prudential limitation on the exercise of a court's power to adjudicate a dispute that would require the court to declare invalid an official act by a foreign State.[61] The FAA explicitly prevents a foreign State from avoiding enforcement of an arbitration agreement or award by invoking the doctrine.[62]

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arbitration in "non-core" bankruptcy proceedings); *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 109-110 (2d Cir. 2006) (referring "core" bankruptcy proceedings to arbitration would not jeopardize objectives of the Bankruptcy Code and could adequately resolve any dispute concerning the Bankruptcy Code's automatic stay provision).

58. *In re White Mountain Mining Co., L.L.C.*, 403 F.3d 164, 168-170 (4th Cir. 2005) (denial of motion to compel arbitration appropriate where arbitration would conflict with purpose of Bankruptcy Code to centralize disputes concerning a debtor's legal obligations); *In re U.S. Lines, Inc.*, 197 F.3d 631, 639-641 (2d Cir. 1999) (refusing to refer proceeding to arbitration where doing so would lead to inequitable asset allocation, contravening the Bankruptcy Code's objective to preserve and equitably distribute assets in a bankruptcy).
59. See Administrative Dispute Resolution Act, 5 U.S.C. Sect. 576.
60. 28 U.S.C. Sect. 1605(a)(6). The relevant portions of the FSIA appear as **Annex III** to this Report. Note that in enforcing an award against a sovereign, once an exception to jurisdictional immunity has been established, a separate exception to immunity of the sovereign's assets also must be established to execute the award. See Chapter IX.3 for a discussion on enforcing awards against sovereigns.
61. See *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409-410 (1990); *United States v. Giffen*, 326 F. Supp. 2d 497, 501-503 (S.D.N.Y. 2004).
62. 9 U.S.C. Sect. 15.

d. Multi-party arbitration

The FAA is silent on the issues of joinder of non-parties to an arbitration and consolidating separate arbitration proceedings into one. Since arbitration is fundamentally a matter of contract law, non-consenting parties are generally protected from being compelled to join an arbitration proceeding, but traditional principles of contract and agency – including equitable estoppel, assumption by conduct, veil-piercing/alter ego, incorporation by reference, agency, and third-party beneficiary theory – may allow an arbitration contract to be enforced by or against non-parties to the contract.[63] However, efforts by non-signatories to enforce an agreement to arbitrate are often unsuccessful.[64] As with arbitration agreements governed solely by the FAA, courts have also held that traditional principles of contract and agency may bind a party to an arbitration agreement covered by the New York or Panama Convention.[65]

Like other matters of contract, consolidation of arbitrations is also governed by the agreement of the parties. It is generally presumed that parties to an arbitration agreement intend that all disputes falling within the scope of the arbitration agreement may be heard by the same arbitral tribunal. Thus, where the obligation of multiple parties to arbitrate arises out of a single contract, all disputes between those parties can generally be resolved in a single arbitration proceeding.[66] In addition, if an arbitration agreement specifically provides for consolidation, then courts or arbitrators may order consolidation of disputes arising out of more than one arbitration agreement in accord with the parties' agreement or agreements to arbitrate.[67] Consolidation may also be ordered if the parties incorporate arbitral rules that provide for such a procedure.[68]

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63. See *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-632 (2009). See also *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995).
64 See, e.g., *White v. Sunoco, Inc.*, 2017 WL 3864616 (3d Cir. 5 Sept. 2017); *In Re Henson*, 2017 WL 3862458 (9th Cir. Sept. 5, 2017); *Waymo LLC v. Uber Technologies, Inc.*, 2017 WL 4018404 (Fed. Cir. 13 Sept. 2017).
65. See *Century Indem. Co. v. Certain Underwriter's at Lloyd's*, 584 F.3d 513, 534 (3d Cir. 2009); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 45-47 (1st Cir. 2008); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005); *Westmoreland v. Sadoux*, 299 F.3d 462, 465-67 (5th Cir. 2002); *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993) (summarized in *Yearbook* XIX (1994) p. 825); *Borsack v. Chalk & Vermillion Fine Arts, Ltd.*, 974 F. Supp. 293, 301 (S.D.N.Y. 1997) (summarized in *Yearbook* XXIII (1998) p. 1038).
66. See *Compañía Española de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 973-974 (2d Cir. 1975) (guarantor bound by arbitration clause in underlying agreement obligated to participate in consolidated arbitration); *O & Y Landmark Assocs. v. Nordheimer*, 725 F. Supp. 578, 581-584 (D.D.C. 1989) (same). But see *Weyerhauser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.1984) (federal courts cannot order consolidation unless the parties agree not only to arbitrate but to consolidate as well, since the jurisdiction of federal courts over arbitration is predicated on private agreement of the parties).
67. See *Hartford Accident & Indem. Co. v. Swiss Reins. Am. Corp.*, 246 F.3d 219, 229-230 (2d Cir. 2001); *Maxum Founds., Inc. v. Salus Corp.*, 817 F.2d 1086, 1087-1088 (4th Cir. 1987).
68. See *Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 347-348 (4th Cir. 2008) (AAA Class Rules empower arbitrator to determine "whether an arbitration agreement permits an

Most state statutes do not specifically address the issue of consolidated arbitration proceedings. The 2000 UAA, by contrast, has a new default provision that authorizes consolidation where there are separate arbitration proceedings or agreements between the same persons.[69] It gives courts the discretion to consolidate proceedings as to all or some claims upon motion of a party where common factual or legal issues create the possibility of conflicting rulings. It is an open question whether this provision of the UAA would be preempted by the FAA.

Related to the topic of consolidation is that of "class arbitration", in which a group (or "class") of claimants or respondents with similar or related claims against a common adversary have those claims adjudicated within a single arbitration proceeding. This is the arbitration equivalent to US court class actions. US courts have acknowledged the validity of class arbitration under certain circumstances,[70] and some of the major arbitration institutions provide special sets of rules to govern the conduct of class arbitration.[71] The US Supreme Court has clarified that class arbitration may not be ordered by the tribunal when an arbitration agreement is "silent" on consolidation or class arbitration, since imposing class arbitration on parties that have not agreed to it would contravene the principle that arbitration is a matter of consent.[72]

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arbitration proceeding to be conducted as a class arbitration"); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 295-96 (5th Cir. 2004) (UNCITRAL rules permit consolidation if "appropriate"). See also AAA Supplementary Rule for Class Arbitration 1(a), available at <www.adr.org>; cf. UNCITRAL Rules Art. 17.1 (granting arbitrators broad powers to manage arbitration proceedings as they see fit); CPR Int'l Rule 3.13 (allowing consolidation of arbitrations when the parties have agreed to consolidation, all claims in the arbitrations are made under the same agreement, or where the claims in the arbitrations arise in connection with the same legal relationship and the arbitrations are between the same parties).

69. 2000 UAA Sect. 10.
70. See, e.g., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion finding class arbitration was not clearly precluded by a commercial lending contract's broad arbitration clause, the FAA did not foreclose class arbitration, and the question of whether class arbitration was permissible under the clause was a matter of contract interpretation under state law).
71. See, e.g., American Arbitration Association, Supplementary Rules for Class Arbitrations (2003), available at <www.adr.org>; JAMS, Class Action Procedures (2009), available at <www.jamsadr.com/rules-class-action-procedures>.
72. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1775 (2010) (summarized in *Yearbook* XXXV (2010) p. 617). But see *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2069 (2013) (so long as arbitrator construed contract to permit class arbitration, even mistakenly so, court may not disturb that finding); *Jock v. Sterling Jewelers, Inc*., 646 F.3d 113, 127 (2d Cir. 2011) (arbitrator did not exceed authority in ruling that arbitration agreement that did not specifically provide for class arbitration nonetheless implied it). However, courts have recently generally concluded it is a question for the courts, not arbitrators, whether the parties' arbitration agreement permits class arbitration. See *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013); *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 332 (3d Cir. 2014); *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 873 (4th Cir. 2016).

Generally, class arbitration may be ordered only where there is a "contractual basis" for concluding that the parties so agreed.[73] Recently, the Supreme Court granted certiorari to review a case raising the issue of whether specific consent is required for class arbitrations and, specifically, whether the FAA prevents application of California state law contract principles to infer that a generally-worded arbitration clause authorizes class arbitration.[74]

The validity of class arbitration waivers in arbitration agreements has been the source of much litigation under federal arbitration law, although in a series of cases, the US Supreme Court has rejected multiple challenges to such waivers. Because of the concern for the cost that class arbitration may impose, many companies insert clauses into their arbitration agreements in which the parties waive their right to class arbitration as well as class actions in court. The legality of these waivers is often challenged, particularly when they are included in contracts of adhesion, in which one party (typically, an individual consumer entering into a "standard form" agreement) has little or no bargaining power to alter the arbitration agreement. The enforceability of a class action waiver presents a question of arbitrability, which under federal arbitration law is a question for the courts to determine unless there is "clear and unmistakable evidence" that the parties intended the question to be resolved by the tribunal.[75]

Class arbitration waivers have been challenged primarily based on two theories. Under a vindication of rights theory, courts analyze whether the inability to arbitrate on a class-wide basis would defeat the remedial purpose of a statute.[76] Under an unconscionability theory, courts have considered

73. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1775 (2010) (summarized in *Yearbook* XXXV (2010) p. 617). But see *id.* at 1776 n. 10 ("We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."); *id.* at 1783 ("[T]he Court does not insist on express consent to class arbitration.") (Ginsburg, J., dissenting).

74. *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 1697 (2018). The US Court of Appeals for the Ninth Circuit, applying California law, distinguished *Stolt-Nielsen*'s holding requiring a contractual basis to compel class arbitration by ruling that the language of the agreement at issue was ambiguous. *Id.* at 672.

75. See *In re Am. Express Merchs. Litig.*, 554 F.3d 300, 310-12 (2d Cir. 2009); *Kristian v. Comcast Corp.*, 446 F.3d 25, 55 (1st Cir. 2006); *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868, 877 (11th Cir. 2005); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 558-59 (7th Cir. 2003).

76. See *In re Am. Express (Amex I)*, 554 F.3d 300, 304 (2d Cir. 2009) (class arbitration waiver unenforceable "because enforcement would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs"), vacated and remanded, *Am. Express Co. v. Italian Colors Rest.*, 130 S.Ct. 2401 (2010), aff'd, *In re Am. Express* (*Amex II*), 634 F.3d 187 (2d Cir. 2011), reaff'd after hold, *In re Am. Express (Amex III)*, 667 F.3d 204 (2d Cir. 2012), vacated and remanded, *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304 (2013); *Gay v. CreditInform*, 511 F.3d 369, 379-383 (3d Cir. 2007) (class arbitration waiver upheld because plaintiff failed to show irreconcilable conflict between arbitrating claims and enforcing plaintiff's statutory rights); *Kristian v. Comcast Corp.*, 446 F.3d 25, 61 (1st Cir. 2006) ("If the class mechanism prohibition here is enforced, Comcast will be essentially

whether class arbitration waivers are unconscionable on the grounds that the arbitration agreement is adhesive; that the amount of each claimant's damages is not sufficient to justify pursuing multiple, individual arbitrations; and that there is unequal bargaining power between the parties.[77] The US Supreme Court has rejected both theories as grounds for invalidating class arbitration waivers. In *AT&T v. Concepcion*, the Supreme Court held that the FAA preempted a California state law providing that class arbitration waivers in consumer contracts are unconscionable.[78] The Supreme Court found that the state law had the effect of requiring the availability of class arbitration, and thus created a scheme inconsistent with the FAA and its principal purpose of ensuring the enforcement of arbitration agreements according to their terms. In *American Express Co. v. Italian Colors Restaurant*, the Supreme Court held that the antitrust laws do not evince an intent to preclude a waiver of class-action procedure in commercial contracts, and that as a general matter, the fact that individual claims may not be worth the cost of individualized adjudication is not enough to justify setting aside a contractually agreed-upon waiver of class arbitration.[79] In 2018, the Supreme Court in *Epic Systems Corp. v. Lewis* considered class action waivers specifically in the context of employment arbitration.[80] The Court found that class action waivers in employment arbitration agreements are enforceable under the FAA and do not violate the National Labor Relations Act, a federal labor law.[81] Unless such contracts are unconscionable or entered under fraud or duress, employers may thus require employees to settle collective disputes through individual arbitration, rather than class arbitration or class-action lawsuits.

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shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502-503 (4th Cir. 2002) (class arbitration waiver enforceable because litigant had not met burden of demonstrating financial burden imposed by the waiver compromised his statutory rights). See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 (1985) (summarized in *Yearbook* XI (1986) p. 555) ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."); *id.* n. 19 ("[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies ... we would have little hesitation in condemning the [arbitration] agreement").

77. See *Homa v. Am. Express Co*., 558 F.3d 225, 230-33 (3d Cir. 2009); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 59 (1st Cir. 2007); *Shroyer v. New Cingular Wireless Servs*., 498 F.3d 976, 992 (9th Cir. 2007).
78. *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333, 340-52 (2011).
79. *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2306-07 (2013). See also *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (upholding the validity of class action arbitration waivers in consumer agreements and finding California law that invalidated the waiver was preempted by the FAA).
80. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).
81. *Id.* at 1619.

3. DOMAIN OF ARBITRATION

a. Arbitrability

US law recognizes the basic freedom of parties to enter into any form of commercial contract they desire, subject only to restraints of fundamental public policy.[82] This freedom to contract includes the ability to agree that a wide range of disputes shall be submitted to arbitration.

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) contains virtually no restrictions on the disputes that may be arbitrated; on the contrary, it provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract".[83] The Supreme Court has made clear that a party contending that an agreement to arbitrate cannot be enforced as to a particular claim must show – by reference to the text of a statute, its legislative history, or an inherent conflict between arbitration and the underlying purposes of the statute – that Congress specifically intended that the claim not be arbitrable.[84] Applying that test, the Supreme Court has held that parties can agree to arbitrate antitrust claims,[85] securities claims,[86] employee protection claims,[87]

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82. See, e.g., *Harbor Court Assocs. v. Leo A. Daly Co*., 179 F.3d 147, 150 (4th Cir. 1999) (describing courts' "considerable reluctance to strike down voluntary bargains on public policy grounds" in light of the need "to protect the public interest in having individuals exercise broad powers to structure their own affairs by making legally enforceable promises").
83. 9 U.S.C. Sect. 2.
84. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989) (summarized in *Yearbook* XV (1990) p. 141); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987) (summarized in *Yearbook* XIII (1988) p.165); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 627-28 (1985) (summarized in *Yearbook* XI (1986) p. 555). Parties rarely carry the burden of demonstrating congressional intent to preclude arbitration. See, e.g., *Harrington v. Atlanta Sounding Co.*, 602 F.3d 113, 121-122 (2d Cir. 2010) (declining to read Federal Employers' Liability Act "to include a blanket prohibition on seamen arbitration agreements when, at the time of enactment, that provision did not contemplate, either in letter or spirit, the existence of an arbitral forum").
85. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 628-629 (1985) (summarized in *Yearbook* XI (1986) p. 555).
86. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484-486 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (summarized in *Yearbook* XIII (1988) p.165); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515-520 (1974).
87. See, e.g., *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257-58 (2009) (Age Discrimination in Employment Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (same); *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 150 (2d Cir. 2004) (Title VII discrimination claims); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472-1483 (D.C. Cir. 1997) (same); *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 297-298 (5th Cir. 2004) (Fair Labor Standards Act); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002) (same); *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877, 882 (9th Cir. 1992) (Employee Polygraph Protection Act).

claims under the Carriage of Goods by Sea Act,[88] claims under the Truth in Lending Act,[89] claims under the Credit Repair Organizations Act,[90] and claims under the Racketeer Influenced and Corrupt Organizations Act (a law often used to challenge general business activities).[91] Copyright claims are also arbitrable,[92] as are claims by a debtor in bankruptcy.[93] In addition, Congress has specifically provided by statute that patent claims are arbitrable, although the statute provides that the award is binding only upon the parties to the arbitration.[94]

The FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce",[95] but the courts have read this exclusion narrowly, as applying only to "contracts of employment of transportation workers."[96] Employment contracts that are governed by the New York and Panama Conventions are not subject to this limitation.[97] In an unusual example of an exclusion of a particular type of claim from arbitration, Congress has provided that a controversy arising out of or relating to a motor vehicle franchise contract may be resolved by arbitration only if all parties consent to arbitration in writing after the controversy has arisen, even in a case where the relevant contract contains a pre-dispute arbitration clause.[98]

As a general matter, states do not have the authority to exempt state-law claims from arbitration pursuant to the FAA.[99] The one exception lies in the

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88. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995) (summarized in *Yearbook* XXI (1996) p. 773).
89. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-92 (2000).
90. See *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 673 (2012).
91. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238-42 (1987) (summarized in *Yearbook* XIII (1988) p. 165). See also *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406-07 (2003); *Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58, 69-71 (2d Cir. 2005).
92. See *McMahan Secs. Co. L.P. v. Forum Capital Mkts. L.P.*, 35 F.3d 82, 89 (2d Cir. 1994) superseded, in part, by a change in institutional rules, as stated in *World Fin. Grp. v. Steele*, No. IP 02-248-C H/ K, 2002 U.S. Dist. LEXIS 17376, at *11-12 (S.D. Ind. 15 August 2002).
93. See Chapter II.2.*b* above.
94. 35 U.S.C. Sect. 294 (see **Annex II**). The statute permits parties to agree that they can apply to have the arbitration award modified by a court in the event a patent is held valid in an arbitration award, but invalid in a subsequent court action. *Id.* Sect. 294(c). See generally David W. Plant, "Binding Arbitration of U.S. Patents", 10 J. Int'l Arb. (1993) p. 79.
95. 9 U.S.C. Sect. 1.
96. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).
97. See *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1155 (9th Cir. 2008) (where collective bargaining agreement between Royal Caribbean and the Norwegian Seafarers' Union provided for arbitration "pursuant to" the New York Convention, Chapter 2 of the FAA allowed employer to compel arbitration); *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 903-906 (5th Cir. 2005) (arbitral award arising under agreement between a Philippine worker employed by Louisiana corporation for work on a Vanuatu-flagged vessel was enforceable under Chapter 2 of the FAA, implementing the New York Convention).
98. 15 U.S.C. Sect. 1226(a)(2).
99. See *Perry v. Thomas*, 482 U.S. 483, 489-492 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 10-17 (1984).

McCarran-Ferguson Act, a federal law that provides that, contrary to the normal rule, a federal statute shall not preempt a state statute enacted for the purpose of regulating the "business of insurance" unless, unlike the FAA, the federal statute specifically relates to the business of insurance.[100] The effect of the McCarran-Ferguson Act, favoring state insurance laws over certain federal laws, is often referred to as "reverse preemption". Under the McCarran-Ferguson Act, state statutes specifically restricting the enforcement of arbitration agreements in insurance and reinsurance contracts are enforceable notwithstanding the FAA.[101] A state law restricting arbitration that is not specific to insurance, however, will be preempted by the FAA even in its application to insurance contracts.[102]

Courts are divided on whether the New York and Panama Conventions are subject to "reverse preemption" under the McCarran-Ferguson Act. Some courts have held that the McCarran-Ferguson Act, which by its terms only limits the application of an "Act of Congress",[103] does not affect the application of treaties.[104] Others have held that since the New York and Panama Conventions were implemented by federal statute, they are effectively the same as federal statutory law and therefore subject to "reverse preemption" by the McCarran-Ferguson Act.[105]

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100. McCarran-Ferguson Act Sect. 2(b), 15 U.S.C. Sect. 1012(b).

101. See *Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 494 (5th Cir. 2006) (Mississippi law precluding arbitration of disputes regarding uninsured motorist coverage not preempted); *McKnight v. Chicago Title Ins. Co., Inc.*, 358 F.3d 854, 859 (11th Cir. 2004) (state law prohibiting arbitrations between insurance companies and insured not preempted by FAA); *Standard Sec. Life Ins. Co. of N.Y. v. West*, 267 F.3d 821, 823 (8th Cir. 2001) (same); *Mut. Reins. Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 934 (10th Cir. 1992) (same); *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*, 138 P.3d 936, 937-941 (Wash. 2006) (same); *Love v. Money Tree, Inc.*, 614 S.E.2d 47, 49 (Ga. 2005) (same); *Smith v. PacifiCare Behavioral Health of Cal., Inc.*, 113 Cal. Rptr. 2d 140, 157 (2001) (same). See also *DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71, 81 (1st Cir. 2000) (interpreting Massachusetts law not to prevent enforcement of arbitration clause in insurance contract).

102. See *Bullock v. United Benefit Life Ins. Co.*, 165 F. Supp. 2d 1259, 1262 (M.D. Ala. 2001) (Alabama anti-arbitration statute preempted, even as applied to insurance contracts); *Little v. Allstate Ins. Co.*, 705 A.2d 538, 540-41 (Vt. 1997) (FAA preempted general Vermont arbitration statute as applied to insurance policies).

103 15 U.S.C. § 1012(b).

104. See, e.g., *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 388-390 (4th Cir. 2012) (holding that the McCarran-Ferguson Act's reverse-preemptive effect is limited to legislation within the domestic realm and does not apply to Chapter 2 of the FAA, which addresses matters having to do with an international treaty); *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 723-724 (5th Cir. 2009) (same); *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co., Inc.*, 466 F. Supp. 2d 1293, 1304-1306 (N.D. Ga. 2006) ("[T]he McCarran-Ferguson Act's preservation of state insurance law defenses does not apply in the context of international arbitration because the text of the [New York] Convention is supreme.").

105. See, e.g., *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 45 (2d Cir. 1995) (McCarran-Ferguson Act reverse-preempts the New York Convention because "the Convention is not self-

b. Gap-filling and adaptation

Because arbitration in the United States is a matter of contract, under generally applicable principles of contract law, arbitrators have the authority to fill gaps in the contract or adapt the contract to fundamentally changed circumstances if the contract, the applicable law, or the arbitration agreement confers the authority to do so.[106]

4. SEPARABILITY OF ARBITRATION CLAUSE

Under the Federal Arbitration Act (the FAA) (see **Annex I** hereto), the agreement to arbitrate is considered, as a matter of legal theory, to be separate from the rest of the commercial agreement in which it is contained. Therefore, if a party claims that a contract containing a broad arbitration clause is invalid because it was induced by fraud or for similar reasons, that question is to be determined by the arbitrators, not by the court. The Supreme Court endorsed this principle in the *Prima Paint* case:

> "[E]xcept where the parties otherwise intend—arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded, and ... where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud."[107]

The Supreme Court held in *Prima Paint* that the arbitration clause at issue was a "broad arbitration clause", which expressed the intent of the parties that the arbitrators have the power to determine whether the contract is valid. A "broad" arbitration clause is generally one that permits the arbitral tribunal to resolve any disputes relating to, arising under, or in connection with the underlying contract. A state law inconsistent with the separability doctrine would be overridden by the FAA. While the 1955 UAA was silent on the issue, the 2000 UAA explicitly adopts the separability doctrine.[108]

Consistent with the separability doctrine, if a claim is asserted that the arbitration clause itself was induced by fraud or was otherwise invalid, that

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executing, and therefore, relies upon an act of Congress for its implementation"); *Foresight Energy, LLC v. Certain London Mkt. Ins. Companies*, No. 4:17-CV-2266 CAS, 2018 WL 1942222, at *12 (E.D. Mo. Apr. 25, 2018) (chapter of the FAA providing for the enforcement of the Convention was reverse preempted by Missouri anti-arbitration statute under the McCarran-Ferguson Act).

106. See, e.g., *Manville Forest Prod. Corp. v. United Paperworkers Int'l Union, AFL-CIO*, 831 F.2d 72, 76 (5th Cir. 1987) (finding the arbitrator was authorized to draw on the parties' past practices and negotiating history to fill a gap in the parties' written collective bargaining agreements).
107. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967).
108. 2000 UAA Sect. 6(c).

issue – which relates to the making of the agreement to arbitrate – is to be determined by the court, not by the arbitrators.[109] However, there must be a "substantial relationship between the fraud or misrepresentation and the arbitration clause in particular", so that a party may not simply reformulate a claim of contract invalidity as one of invalidity of the arbitration agreement.[110] Even where it is claimed that the entire contract is void, rather than merely voidable, this issue is for the arbitrators to decide.[111]

If it is claimed, however, that there was no contract in the first place, such that the parties did not agree to arbitration, then the court will resolve that issue first before referring the dispute to arbitration, along with any remaining issues concerning the validity of the contract.[112] The distinction between contract formation issues and contract validity issues is not always clear.[113] Where a portion of an arbitration agreement is found to be invalid, courts may sever that

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109. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967).

110. *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 667 (2d Cir. 1997). See also *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1278 (6th Cir. 1990) (The complaint must "contain[] a well-founded claim of fraud in the inducement of the arbitration clause itself, *standing apart from the whole agreement*, that would provide grounds for the revocation of the agreement to arbitrate".).

111. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447-49 (2006) (summarized in *Yearbook* XXXI (2006) p. 326). See also *Rent-A-Center, W., Inc. v. Jackson*, 130 S.Ct. 2772, 2778 n. 2 (2010) (summarized in *Yearbook* XXXV (2010) p. 621).

112. See *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S.Ct. 2847, 2855-2860 (2010) (holding that contract formation issues are generally reserved for review by the courts, and distinguishing the holding in *Buckeye* because there the party resisting arbitration admitted to executing a contract in which the arbitration clause plainly covered the dispute at issue, whereas in *Granite Rock* there was no such admission); *Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 989-990 (11th Cir. 2012) ("[A]rbitration of a dispute should only be ordered where 'the court is satisfied that neither the formation of the parties' arbitration agreement *nor* ... its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, the court must resolve the disagreement.'" (quoting *Granite Rock*, 130 S.Ct. at 2857-2858)). See also *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 406 n. 5 (2d Cir. 2009) (questions about existence of a contract "are presumptively to be decided by the court even *without* a specific challenge to the agreement to arbitrate"); *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 219 (5th Cir. 2003) ("[W]here a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute."); *Sandvik AB v. Advent Int'l. Corp.*, 220 F.3d 99, 107 (3d Cir. 2000) ("Because under both the CREFAA and the FAA a court must decide whether an agreement to arbitrate exists before it may order arbitration, the District Court was correct in determining that it must decide whether [the signature of an allegedly unauthorized Advent representative] bound Advent before it could order arbitration.").

113. See *Toledano v. O'Connor*, 501 F. Supp. 2d 127, 140 n. 2 (D.D.C. 2007) (noting the tension between the two purported sets of cases); *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 219 (5th Cir. 2003) (distinction between nonexistence and invalidity claims subject to separability doctrine "will occasionally be elusive"); cf. *Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 992-993 (11th Cir. 2012) (distinguishing between formation and validity issues).

portion and allow the dispute to proceed to arbitration, provided that the "primary purpose" of the arbitration agreement remains valid.[114]

When there is clear and convincing evidence that parties have agreed to arbitrate questions of arbitrability, i.e., when they have granted the tribunal the power to determine its own jurisdiction, courts will permit an arbitral tribunal to rule on challenges to the validity of the arbitration agreement itself, notwithstanding the traditional application of the doctrine of separability.[115]

Even in such circumstances, however, the separability doctrine functions to isolate the provision granting the tribunal the power to determine its own jurisdiction from the remainder of the arbitration agreement, so that a court may determine the validity of that provision, ensuring that the parties in fact agreed to grant the tribunal such power, before the court declines to rule on the validity of the entire arbitration agreement.[116]

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114. See e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25, 61-64 (1st Cir. 2006) (severing limitation on treble damages, limitation on recovery of attorney's fees and costs, and ban on class arbitration where such provisions would prevent the vindication of rights under federal antitrust law); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 219 (3d. Cir. 2003) (affirming severance of arbitration provisions on attorney's fees and costs); *Morrison v. Circuit City Stores, Inc*., 317 F.3d 646, 674-675 (6th Cir. 2003) (invalid cost-splitting and limitation-of-remedies provisions severable from arbitration agreement); *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1032 (11th Cir. 2003) (invalidity of provision limiting borrower's remedies did not affect validity of the arbitration agreement).

115. See *Rent-A-Center, W., Inc. v. Jackson*, 130 S.Ct. 2772, 2779-2780 (2010) (summarized in *Yearbook* XXXV (2010) p. 621) (permitting tribunal to decide whether arbitration agreement was unconscionable); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1333 (11th Cir. 2005) (permitting tribunal to decide whether restrictions on remedial rights rendered arbitration agreement unenforceable); *Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821, 824 (8th Cir. 2003) (permitting tribunal to decide whether restrictions on procedural and remedial rights rendered arbitration agreement unenforceable); *Apollo Computer v. Berg*, 886 F.2d 469, 473-474 (1st Cir. 1989) (permitting tribunal to decide whether non-signatory bound by arbitration agreement). Some courts require that they first determine whether the arbitral remedy would be illusory or wholly groundless, such that there would be no practical ability for the claimant to pursue its claim in arbitration or no possible argument that the arbitration agreement governs the parties' dispute. See *Awuah v. Coverall N. Am., Inc*., 554 F.3d 7, 11-13 (1st Cir. 2009) (whether arbitration agreement was unconscionable for tribunal to decide, upon court determination that arbitral remedy not illusory); *Qualcomm Inc. v. Nokia Corp*., 466 F.3d 1366, 1371, 1373 n. 5 (Fed. Cir. 2006) (even where there is clear and unmistakable evidence of the intent to delegate arbitrability decisions to the arbitral tribunal, courts must inquire whether assertions of arbitrability are "wholly groundless", to satisfy themselves pursuant to FAA Sect. 3 that the issue is arbitrable); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 209-11 (2d Cir. 2005) (permitting tribunal to decide whether non-signatory bound by arbitration agreement, upon finding that "the parties have a sufficient relationship to each other and to the rights created under the agreement"). For further discussion of this topic, see Chapter V.4, below.

116. See *Rent-A-Center, W., Inc. v. Jackson*, 130 S.Ct. 2772, 2779 (2010) (summarized in *Yearbook* XXXV (2010) p. 621).

5. EFFECT OF THE AGREEMENT (SEE ALSO CHAPTER V.4 – JURISDICTION)

a. Duty of court

If one party sues in court with respect to a dispute covered by an agreement to arbitrate, the court must, on the request of the other party, stay the court action so that arbitration may be held in accordance with the terms of the agreement.[117] Similarly, if a party to an arbitration agreement refuses to arbitrate, the other party may apply to a court for an order directing that the arbitration proceed in the manner provided in the agreement. In practice, it should not be necessary to seek a court order compelling arbitration in the absence of a competing court action, because arbitration rules typically provide that the arbitration can proceed even without the participation of a recalcitrant respondent.[118]

As explained in Chapters I.1 and II.3 above, the Federal Arbitration Act (the FAA) (see **Annex I** hereto) requires the enforcement of agreements to arbitrate to the same extent, and in the same manner, as contracts generally. Thus, a court in the United States, either state or federal, has no authority to deny enforcement of an agreement to arbitrate on the basis of discretionary factors (such as efficiency concerns regarding piecemeal resolution of the dispute) or public policy determinations (such as a determination that a given claim is inappropriate for arbitration). The Supreme Court has explained:

> "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."[119]

Further, as explained in Chapter I.1 above, under federal law, once a party has established the existence of an agreement to arbitrate, the presumption of arbitrability, where applicable, requires that all doubts concerning the scope of arbitrable issues be resolved in favor of arbitration.

Notwithstanding the above, agreements to arbitrate are contracts, and as such, their provisions may be waived either explicitly or implicitly by conduct. A party implicitly waives its right to arbitrate under an otherwise enforceable agreement by taking action inconsistent with this right. The question of waiver often arises where a party, now seeking to invoke the arbitration agreement, first pursued its claim in litigation before a court. If a party pursues sufficiently

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117. 9 U.S.C. Sect. 3; 2000 UAA Sect. 7; 1955 UAA Sect. 2. This obligation applies in state courts as well. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n. 34 (1983). The United States Court of Appeals for the Second Circuit has ruled the FAA requires a court to stay, rather than dismiss outright, a case following a successful motion to compel arbitration. *Katz v. Cellco Partnership*, 794 F. 3d 341, 345 (2d. Cir. 2015).
118. See AAA Int'l Rules Art. 26; UNCITRAL Rules Art. 30; CAMCA Rules Art. 25; IACAC Rules Art. 25.
119. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citing 9 U.S.C. Sects. 3-4).

protracted court litigation in this manner, resulting in either substantive prejudice to its opponent or prejudice through delay, courts will generally deem it to have waived its right to arbitrate that claim.[120] This doctrine, however, generally should not limit a party's recourse to the courts to seek a preliminary injunction or other interim relief necessary to preserve the status quo pending arbitration, and pursuing such action should not result in a waiver of the party's right to arbitrate.[121] This outcome is bolstered by institutional rules that expressly provide parties with the right to go to court for interim and conservatory relief in certain circumstances, without leading to a waiver of the right to arbitrate.[122]

Finally, once a federal court has held a dispute to be arbitrable and ordered a party to arbitrate that dispute, the court has authority to enjoin a state court from proceeding on the arbitrable controversy.[123]

b. Court examination of arbitration agreement

When a party sues in court with respect to a dispute covered by an agreement to arbitrate, the role of the court in such circumstances is strictly limited, as it may only determine whether an agreement to arbitrate exists and, if so, whether it covers the dispute at hand.[124] The role of the court is similarly limited when a party to an arbitration refuses to arbitrate: it may determine only whether there is a valid agreement to arbitrate covering the dispute and whether one party has failed to arbitrate.[125]

Doubts concerning whether a party has waived its right to arbitrate should be resolved in favor of arbitration and against waiver.[126] While questions of

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120. See *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010); *Nicholas v. KBR, Inc.*, 565 F.3d 904, 910-11 (5th Cir. 2009); *Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, 588 F.3d 963, 968-69 (8th Cir. 2009); *In re Citigroup, Inc.*, 376 F.3d 23, 26 (1st Cir. 2004).
121. See *Murray Oil Prods. Co. v. Mitsui & Co.*, 146 F.2d 381, 384 (2d Cir. 1944). See also *Toyo Tire Holdings of Americas, Inc. v. Cont'l Tire N. Am., Inc.*, 609 F.3d 975, 981-82 (9th Cir. 2010); *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 116 (2d Cir. 2009); *P.R. Hosp. Supply, Inc. v. Boston Sci. Corp.*, 426 F.3d 503, 505 (1st Cir. 2005); *Specialty Bakeries Inc. v. Halrob, Inc.*, 129 F.3d 726, 727 (3d Cir. 1997).
122. See, e.g., AAA Int'l Rules Art. 24.3; UNCITRAL Rules Art. 26.9; IACAC Rules Art. 23.3; CPR Int'l Rule 13.2.
123. See, e.g., *Specialty Bakeries, Inc. v. HalRob, Inc.*, 129 F.3d 726, 727 (3d Cir. 1997); *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 984-85 (2d Cir. 1996).
124. See, e.g., *Mehler v. Terminix Int'l Co.*, 205 F.3d 44, 47 (2d Cir. 2000).
125. 9 U.S.C. Sect. 4; *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 396 (5th Cir. 2006); *Medcam, Inc. v. MCNC*, 414 F.3d 972, 974 (8th Cir. 2005); *Zurich Am. Ins. Co. v. Watts Indus. Inc.*, 417 F.3d 682, 687 (7th Cir. 2005); *Jacobs v. USA Track & Field*, 374 F.3d 85, 88 (2d Cir. 2004). See also 9 U.S.C. Sects. 206 and 303(a).
126. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). See also *PPG Indus. v. Webster Auto Parts Inc.*, 128 F.3d 103, 107 (2d Cir. 1997) (finding waiver).

waiver are generally reserved for the tribunal,[127] where there is an allegation that a waiver arose from a party's resort to court litigation, courts will likely decide the question.[128]

c. Kompetenz-kompetenz

The United States takes a contractual view of *kompetenz-kompetenz*. On application of a party, a court will decide if an arbitral tribunal has authority to hear the parties' dispute over jurisdiction unless the parties agreed to submit the question of the arbitrators' authority itself to arbitration.[129] Tribunals may consider challenges to their own jurisdiction, but their determination is not binding on the parties in the absence of "clear and unmistakable" evidence that the parties intended to submit the question of the arbitrators' jurisdiction to binding arbitration.[130] Courts in the United States have often held that "clear and unmistakable" evidence can be found when the parties' contract designates arbitral rules, such as most of the major institutional rules, which expressly give the arbitrators power to decide questions of their own jurisdiction.[131] In

127. See *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84 (2002) (summarized in *Yearbook* XXIX (2004) p. 232) ("[T]he presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability." (internal quotations omitted)); cf. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (reaffirming *Howsam*'s basic framework). See also *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393-994 (6th Cir. 2008) (contract-based waiver argument an issue for the arbitrator, whereas waiver by conduct argument an issue for the court).

128. See *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 221 (3rd Cir. 2007) ("[W]e hold that waiver of the right to arbitrate based on litigation conduct remains presumptively an issue for the court to decide in the wake of *Howsam* and *Green Tree*."); *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 14 (1st Cir. 2005) ("We hold that the Supreme Court in *Howsam* and *Green Tree* did not intend to disturb the traditional rule that waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court."). See also *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393-394 (6th Cir. 2008); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 F. App'x 462, 464 (5th Cir. 2004). But see *Woodland Ltd. P'ship v. Wulff*, 868 A.2d 860, 864-65 (D.C. Cir. 2005) (waiver of right to arbitration due to participation in litigation is matter for the arbitrator); *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003) (citing *Howsam* and referring waiver issue to arbitrator with little discussion where litigation-related conduct was before a different court); *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206-07 (2014) (Supreme Court writes that courts are to decide disputes about "arbitrability," whereas arbitrators are to decide disputes about the "meaning and application of particular procedural preconditions for the use of arbitration", including waiver, and does not explicitly carve out an exception for waiver questions related to litigation conduct).

129. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

130. *Id.* at 944. See also *VRG Linhas Aereas S.A. v. MatlinPatterson Glob. Opportunities Partners II L.P.*, 717 F.3d 322, 325-326 (2d Cir. 2013).

131. See, e.g., *Shaw Group Inc. v. Triplefine International Corp.*, 322 F.3d 115, 122 (2d Cir. 2003) (an arbitration clause subjecting disputes to the rules and procedures of the ICC International Court of Arbitration clearly and unmistakably commits to arbitration any questions about the arbitrability of particular disputes). But see *China Minmetals Import & Export Co. Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003) (a provision of the

the absence of incorporation of such arbitral rules or clear language in the contract, there is a presumption that the court will decide jurisdictional disputes.[132]

Chapter III. Arbitrators

1. QUALIFICATIONS

a. Requirements

Most arbitration statutes in the United States (see **Annex V** hereto) do not include detailed provisions regulating the qualifications of arbitrators. The 2000 UAA, however, provides that an arbitrator who has a known, direct material interest in the outcome of the proceeding or a known, existing and substantial relationship with a party may not serve as a neutral arbitrator.[133] Like its predecessor and the Federal Arbitration Act (the FAA) (see **Annex I** hereto), the 2000 UAA also provides that an award may be set aside upon a showing of "evident partiality" on the part of an arbitrator.[134] The circumstances in which a court may vacate an award on this ground are discussed in Chapter VII.2.*a* below. While most statutes in the United States do not regulate the qualifications of arbitrators, an arbitral institution may impose its own qualifications for individuals who wish to appear on its national roster of arbitrators.[135] In this way, arbitral institutions may effectively impose additional qualifications on arbitrators beyond the neutrality requirement of the 2000 UAA if the arbitration agreement or the rules chosen by the parties call for the selection of arbitrators from an institutional roster.

b. Restrictions

US law does not require that arbitrators in cases conducted in the United States be US citizens or residents. Arbitrators who are neither citizens nor residents of

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CIETAC rules giving arbitrators authority to determine their own jurisdiction did not prevent the court from deciding independently whether there was a valid agreement to arbitrate).

132. *Republic of Iraq v. ABB AG*, 769 F. Supp. 2d 605, 610 (S.D.N.Y. 2011), aff'd sub nom. *Republic of Iraq v. BNP Paribas USA*, 472 F. App'x 11 (2d Cir. 2012).
133. 2000 UAA Sect. 11.
134. 2000 UAA Sect. 23; 1955 UAA Sect. 12; 9 U.S.C. Sect. 10.
135. For example, the AAA requires applicants for membership to have (1) a minimum of ten years of senior-level business or professional experience or legal practice; (2) an educational degree and/or professional license appropriate to the arbitrator's field of expertise; (3) honors, awards, and citations indicating leadership in the arbitrator's field; (4) training or experience in arbitration and/or other forms of dispute resolution; (5) membership in a professional association; and (6) other relevant experience or accomplishments (such as published articles). See Qualification Criteria for Admittance to the AAA National Roster of Arbitrators, available at <www.adr.org>.

the United States are frequently appointed in international cases seated in the United States. Indeed, the AAA Commercial Rules and AAA International Rules both provide that if one of the parties is a national of a country other than the United States, neutral arbitrators may, upon the timely request of either party, be appointed from among nationals of a country other than that of any of the parties.[136]

There also is no requirement that arbitrators be admitted to the practice of law in the United States. The FAA, the 2000 UAA, and the AAA Commercial and International Rules do not require arbitrators to be admitted to the bar in the United States or any other jurisdiction.

Active judges in the United States typically are not permitted to act as arbitrators, consistent with the general prohibition on judges serving in other legal capacities.[137] The prohibition does not extend to retired judges who are not eligible to be recalled to active judicial service.

c. Disclosure

There are no statutory requirements regarding an arbitrator's disclosure of conflicts in the United States. To assist the development of generally recognized standards of arbitrator conduct and ethics, the AAA and the American Bar Association jointly publish a *Code of Ethics for Arbitrators in Commercial Disputes*.[138] The Code provides guidelines on, among other matters, (1) disclosure of interests and relationships that are likely to affect impartiality or create an appearance of bias; (2) communications with the parties; (3) the independent, fair, and diligent conduct of proceedings; and (4) confidentiality of proceedings. Each arbitrator must affirmatively disclose any interests or relationships likely to affect impartiality or create an appearance of partiality, and must determine his or her own competence and availability to serve in the case. Once appointed, an arbitrator "should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality".[139]

The Code does not form a part of the AAA Rules, and it has not been enacted as law in any jurisdiction. Rather, the Code is advisory only. The Preamble to the Code contains the following express disclaimer:

> "Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other

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136. AAA Int'l Rules Art. 12.4; AAA Commercial Rules Art. R-15.
137. See, e.g., Code of Conduct for United States Judges, Canon 4(A)(4); *Diagnostic Radiology Assoc. v. Jeffrey M. Brown, Inc.*, 193 F.R.D. 193, 195 (S.D.N.Y. 2000).
138. Code of Ethics for Arbitrators in Commercial Disputes, 2013 Revision (American Arbitration Association/American Bar Association), available at <www.americanbar.org>.
139. *Id.*, Canon I(C).

> applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitral awards."

Indeed, courts have held that the failure of an arbitrator to comply with such codes of conduct does not automatically require vacatur of an award rendered by that arbitrator.[140] Nevertheless, courts may find its provisions useful guidance in an area in which there is little case law to illuminate practice.[141]

2. APPOINTMENT OF ARBITRATORS

The method of selecting arbitrators is usually determined either by the agreement or by the rules specified in the agreement. Generally, arbitration rules leave the parties free to agree on a method of appointment but provide a default method of appointment failing agreement of the parties or participation by any of them.[142] In this regard, it is important to draft the arbitration agreement carefully, as a poorly drafted arbitration agreement can lead to costly delays while the parties litigate the meaning and enforceability of the agreement.[143]

A court may appoint arbitrators at the request of either party in certain circumstances.[144] These circumstances include: if the agreement fails to specify how arbitrators will be appointed,[145] if the designated procedures are

140. See, e.g., *Scandinavian Reins. Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 77 n. 22 (2d Cir. 2012); *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 984 (8th Cir. 2001).

141. The International Bar Association has also approved guidelines applicable to arbitrator conflicts. See IBA Guidelines on Conflicts of Interest in International Arbitration (2014), available at <www.ibanet.org>. The Guidelines require all arbitrators to be "impartial and independent" from the time they initially accept cases until the final award. *Id.* at 4. Like the 2013 AAA/ABA Code of Ethics, the IBA Guidelines specify that they do not have the force of law, and that they are preempted by any applicable national laws or arbitral rules chosen by the parties. *Id.* at 3.

142. AAA Int'l Rules Art. 12; UNCITRAL Rules Arts. 6, 8-10; CAMCA Rules Art. 7; IACAC Rules Art. 5; CPR Int'l Rule 6.1.

143. See, e.g., *Marks 3-Zet-Ernst Marks GMBH & Co. KG v. Presstek, Inc.*, 455 F.3d 7, 9-13 (1st Cir. 2006) (four years of litigation and arbitral proceedings over enforceability of arbitration clause where parties did not specify a supervising institution to appoint arbitrators, nor a set of arbitration rules to provide a method by which they would be selected).

144. 9 U.S.C. Sect. 5. See also *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 464-666 (8th Cir. 2003); *In re Salomon Inc. S'holders Derivative Litig.*, 68 F.3d 554, 560-61 (2d Cir. 1995) (discussing various bases for allowing the court to appoint arbitrators). Most state statutes also permit such a procedure. See 2000 UAA Sect. 11(a); 1955 UAA Sect. 3.

145. See *Jain v. De Mere*, 51 F.3d 686, 692 (7th Cir. 1995); *Trade & Transp., Inc. v. Natural Petro. Charterers, Inc.*, 931 F.2d 191, 196 (2d Cir. 1991) (when agreement "silent as to the method by which a replacement arbitrator should be designated, it was within the authority conferred by the Act for the court to appoint" new arbitrator).

inadequate,[146] if a party or parties prevent the appointment of an arbitrator by refusing to cooperate with appointment procedures,[147] and if the parties cannot agree on the appointment of an arbitrator and no other appointment mechanism is provided.[148] Courts also have been willing to appoint replacement arbitrators when the parties' contract designates a specific arbitrator or arbitral institution that subsequently becomes unavailable.[149] Most sets of arbitration rules, such

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146. See *Marine Prods. Exp. Corp. v. M.T. Globe Galaxy*, 977 F.2d 66, 68 (2d Cir. 1992) (where the arbitration agreement did not anticipate a member of the arbitration panel dying before the judgment was rendered, district court properly ruled that general rule requiring arbitration to commence anew with a full panel was applicable); *Chattanooga Mailers Union, Local No. 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1315 (6th Cir. 1975) (agreement's procedure for selecting arbitrator no longer in effect), abrogated on other grounds, *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987). But see *BP Exploration Libya Ltd. v. Exxonmobil Libya Ltd.*, 689 F.3d 481, 496 (5th Cir. 2012) (holding that although the FAA permits federal courts to intervene in arbitrator appointment processes when there is a "lapse" or impasse in the naming of arbitrators, the courts' authority is limited to the terms of the parties' original agreement, including the number of arbitrators).

147. See *Stop & Shop Supermarket Co. LLC v. UFCW Local 342*, 246 F. App'x 7, 11 (2d Cir. 2007); *Pac. Reins. Mgmt. Co. v. Ohio Reins. Corp.*, 814 F.2d 1324, 1328 (9th Cir. 1987).

148. See *Pac. Reins. Mgmt. Co. v. Ohio Reins. Corp*., 814 F.2d 1324, 1328 (9th Cir. 1987) (affirming appointment of arbitrator after "five months of stalemate"); *Trustmark Ins. Co. v. Clarendon Nat'l Ins. Co.*, No. 09 C 6169, 2010 WL 431592, at *5 (N.D. Ill. 1 February 2010) (arbitrator appointed after four-month delay); *Levy v. Cain, Watters & Assocs., P.L.L.C*., 2010 U.S. Dist. LEXIS 9537, at *18 (S.D. Ohio 15 January 2010) (holding that if arbitrator was not appointed within thirty days, the court would appoint one).

149. See *Khan v. Dell Inc.*, 669 F. 3d 350, 357 (3d Cir. 2012) (unavailability of designated arbitrator not integral element of arbitration agreement, permitting court to appoint replacement arbitrator); *Ins. Co. of N. Am. v. Pub. Serv. Mut. Ins. Co*., 609 F.3d 122, 128 (2d Cir. 2010) (appointing substitute arbitrator to fill vacancy from resignation); *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 464-66 (8th Cir. 2003) (same); *Brown v. ITT Consumer Fin. Corp*., 211 F.3d 1217, 1222 (11th Cir. 2000) (where specified forum no longer available, and not integral to the parties' arbitration agreement, court has authority to compel arbitration before alternate forum); *Trade & Transp., Inc. v. Natural Petroleum Charterers, Inc*., 931 F.2d 191, 196 (2d Cir. 1991) (where agreement silent as to method for replacing deceased arbitrator, court has authority to appoint replacement); *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 974-977 (D. Minn. 2012) (unavailability of forum could be remedied by appointing a substitute arbitrator under the FAA, because the designation of the NAF was not integral to the agreement); *Clerk v. First Bank of Del.*, 735 F. Supp. 2d 170, 180 (E.D. Pa. 2010) ("In general, Section 5 of the FAA permits a court to appoint a substitute arbitrator, where the chosen arbitrator is unavailable."); *New United Motor Mfg. v. UAW Local 224*, 617 F. Supp. 2d 948, 962 (N.D. Cal. 2008) ("[W]hen an arbitrator dies, a new arbitrator may be appointed. . . ."). But see *In re Salomon Inc. S'holders Derivative Litig.*, 68 F.3d 554, 560-61 (2d Cir. 1995) (declining to appoint replacement arbitrator after determining that appointment of specific arbitration forum, which had declined to arbitrate, was central to the parties' arbitration agreement); *Ranzy v. Extra Cash of Tex., Inc.*, No. H-09-3334, 2010 WL 936471 at *4-5 (S.D. Tex. 1 March 2010) (declining to compel arbitration where selection of arbitral forum, which was no longer available, was integral to arbitration agreement); *Carideo v. Dell Inc.*, No. C06-1772JLR, 2009 WL 3485933 at *3-4 (W.D. Wash. 26 October 2009) (same); *Pemex – Refinancion v. Tbilisi Shipping Co.*, No. 04-02705, 2004 U.S. Dist. LEXIS 17478 at

as the AAA Commercial Rules and AAA International Rules, provide a means for the administering institution to appoint arbitrators even in the absence of cooperation of the parties, so that resort to the courts for appointment of arbitrators should be unnecessary if the parties have agreed that the arbitration will be governed by those rules.

3. NUMBER OF ARBITRATORS (SEE ALSO CHAPTER V.2 – MAKING OF THE AWARD)

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) provides that the number of arbitrators shall be as set forth in the parties' agreement and that, if no number is specified, one arbitrator shall be appointed.[150] The UAA contains no provision on the number of arbitrators. The Panama Convention, however, incorporates by reference the rules of the Inter-American Commercial Arbitration Commission (IACAC) as the default rules to be used when none are specified,[151] and the default number of arbitrators under the IACAC rules is three.[152] The AAA Commercial and International Rules provide that if the parties have not agreed otherwise, one arbitrator will be appointed unless the AAA determines that three arbitrators would be more appropriate given the circumstances of the case.[153]

As a practical matter, the number of arbitrators will virtually always be determined either directly by the arbitration agreement or by the rules designated in the agreement.[154] While in theory the parties could agree to any number of arbitrators, parties nearly always agree to arbitration before either one or three arbitrators. Although as a practical matter parties would also be extremely unlikely to select an even number of arbitrators due to the risk of split decisions, the United States, unlike some jurisdictions, does not prohibit the appointment of an even number of arbitrators.[155]

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*16-25 (S.D.N.Y. 31 August 2004) (denying motion to appoint new arbitrator after ten years of arbitration proceedings when one arbitrator died and parties' agreement did not provide for appointment of replacement arbitrators).

150. 9 U.S.C. Sect. 5.
151. Panama Convention Art. 3; see also 9 U.S.C. Sect. 303(b).
152. IACAC Rules Art. 5.1.
153. AAA Commercial Rules Art. R-16; AAA Int'l Rules Art. 11 ("[O]ne arbitrator shall be appointed unless the Administrator determines in its discretion that three arbitrators are appropriate because of the size, complexity, or other circumstances of the case.").
154. See AAA Int'l Rules Art. 11 (single arbitrator default rule); CAMCA Rules Art. 6 (same); UNCITRAL Rules Art. 7.1 (three-arbitrator default rule); CPR Int'l Rule 5.1 (same).
155. See 9 U.S.C. Sect. See also *Avic Int'l USA, Inc. v. Tang Energy Group et al.*, 614 F. App'x 218 (5th Cir. 2015) (rejecting an argument that required the court to ignore the "unambiguous wording" of an arbitration agreement that contemplated the possibility of an even number of arbitrators).

In 2017, the AAA released a new optional procedure for arbitrations conducted by three-arbitrator panels that allows parties to cut costs by agreeing that a single arbitrator will preside over preliminary procedural and discovery stages. Under the new Streamlined Three-Arbitrator Panel Option for Large Complex Cases, the parties may agree either (1) to select and appoint the arbitration's three-person panel, with the chair to serve as the sole arbitrator in the preliminary procedural stages of the arbitration, or (2) to select and appoint a single arbitrator to manage the preliminary procedural stages and serve as the chair, with the two remaining arbitrators to be selected at least sixty days prior to any hearing.[156]

4. CHALLENGE TO ARBITRATORS

Neither the Federal Arbitration Act (the FAA) (see **Annex I** hereto) nor the UAA contains specific provisions for challenging or removing arbitrators. Relying on the absence of an express statutory provision and the general policy of minimizing obstruction and delay, courts generally will not hear challenges to an arbitrator's appointment prior to the award.[157] After an award has been rendered, court review of the qualifications of an arbitrator may occur when a party seeks to set aside an award on the ground that an arbitrator should have been disqualified.[158] If a party has failed to object in a timely manner to an arbitrator's qualifications or alleged bias before the issuance of the award, however, the party may be deemed to have waived the challenge in court.[159]

On occasion, courts have applied general contract principles, such as changed circumstances, mutual mistake, or fraudulent inducement to reform a contract prior to the award where the appointment procedure specified in the contract

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156. Streamlined Three-Arbitrator Panel Option for Large Complex Cases (American Arbitration Association), available at <www.adr.org>.

157. See *Adam Techs. Int'l S.A. de C.V. v. Sutherland Glob. Servs., Inc.*, 729 F.3d 443, 452 (5th Cir. 2013); *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life. Ins. Co.*, 304 F.3d 476, 490 (5th Cir. 2002); *Smith v. Am. Arbitration Ass'n,* 233 F.3d 502, 506 (7th Cir. 2000); *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997); *Global Reins. Corp. v. Certain Underwriters at Lloyd's*, 465 F. Supp. 2d 308, 311-12 (S.D.N.Y. 2006); *Certain Underwriters at Lloyd's v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 935 (N.D. Cal. 2003).

158. 9 U.S.C. Sect. 10(a). For a discussion of the evident partiality ground for vacating awards see Chapter VII.2 below.

159. See *Lucent Techs., Inc. v. Tatung Co*., 379 F.3d 24, 28 (2d Cir. 2004); *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004); *Rai v. Barclays Capital, Inc*., 739 F. Supp. 2d 364, 374 (S.D.N.Y. 2010).

would lead to a plainly unsuitable arbitrator.[160] Typically, pre-award challenges to arbitrators will occur before the appointing authority rather than a court.[161]

5. TERMINATION OF THE ARBITRATOR'S MANDATE

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) does not address the issue of termination of an arbitrator's mandate. However, three states – California, Florida, and North Carolina – have arbitration statutes which provide that if an arbitrator becomes *de jure* or *de facto* unable to perform his functions or fails to act without undue delay, then the arbitrator's mandate terminates either if the arbitrator withdraws or if the parties agree to the termination.[162] If a controversy exists about whether the arbitrator's mandate should be terminated, then a court will decide the issue.[163] Where the mandate of an arbitrator terminates, a substitute arbitrator will be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.[164]

The doctrine of *functus officio* also applies to US arbitrations once an arbitrator has rendered a clear and unambiguous award.[165] Under *functus officio*, once a decision has been made that disposes of all issues on the merits, the arbitrator is unable to revise the decision or issue a new one.[166]

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160. See *Erving v. Va. Squires Basketball Club*, 349 F. Supp. 716, 719 (E.D.N.Y. 1972) (arbitrator designated in parties' agreement had conflict of interest), aff'd, 468 F.2d 1064 (2d Cir. 1972); *Porter v. City of Flint*, 736 F. Supp. 2d 1095, 1098-99 (E.D. Mich. 2010) (designated arbitrator disqualified because had previously represented a plaintiff in an unrelated lawsuit against one of the arbitrating parties); *Third Nat'l Bank in Nashville v. WEDGE Grp. Inc.*, 749 F. Supp. 851, 854-55 (M.D. Tenn. 1990) (arbitrator disqualified because it had business and fiduciary relationship with party in arbitration); *Masthead Mac Drilling Corp. v. Fleck*, 549 F. Supp. 854, 856 (S.D.N.Y. 1982) (replacing arbitrators where plaintiffs alleged they were fraudulently induced into agreeing to arbitration before arbitrators connected to defendants). But see *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co*., 304 F.3d 476, 491 (5th Cir. 2002) ("[A] court may not entertain disputes over the qualifications of an arbitrator . . . unless such claim raises concerns rising to the level that the very validity of the agreement be at issue."); *Black v. Nat'l Football League Players Ass'n*, 87 F. Supp. 2d 1, 6 (D.D.C. 2000) (where party was "aware of and freely agreed to the arbitration terms", it may not challenge neutrality of arbitrator).
161. See AAA Int'l Rules Art. 14; UNCITRAL Rules Arts. 11-13; CAMCA Rules Arts. 9-10; IACAC Rules Arts. 8-9; CPR Int'l Rule 7.5-7.8.
162. Cal. Civ. Pro. Code Sect. 1297.141; Fla. Stat. Sect. 684.0015; N.C. Gen. Stat. Sect. 1-567.44. See also UNCITRAL Rules Art. 12.3.
163. Cal. Civ. Pro. Code Sect. 1297.142; Fla. Stat. Sect. 684.0015; N.C. Gen. Stat. Sect. 1-567.44.
164. Cal. Civ. Proc. Code Sect. 1297.152; Fla. Stat. Sect. 684.0016; N.C. Gen. Stat. Sect. 1-567.45.
165. Federal courts, however, less strictly apply the doctrine of *functus officio* to labor disputes. *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 991 (3d Cir. 1997).
166. See *Citizens Bldg. of W. Palm Beach v. W. Union Tel. Co*., 120 F.2d 982, 984 (5th Cir. 1941); *Mercury Oil Ref. Co. v. Oil Workers Int'l Union, CIO*, 187 F.2d 980, 983 (10th Cir.

The doctrine may not apply, however, where (1) an arbitrator made a mistake which is apparent on the face of her award; (2) the award does not adjudicate an issue that has been submitted; or (3) the award leaves doubt whether the submission has been fully executed.[167]

6. LIABILITY OF ARBITRATORS

Prior to the 2000 UAA, arbitration statutes in the United States (see **Annex V** hereto) did not address the liability of arbitrators for their actions. Courts nevertheless developed a general rule that an arbitrator, like a judge, is immune from civil liability for acts related to her decision-making function.[168] The 2000 UAA explicitly provides for this immunity.[169] The 2000 UAA and some court decisions also extend arbitrator immunity to arbitral institutions.[170]

Chapter IV. Arbitral Procedure

1. PLACE OF ARBITRATION (SEE ALSO CHAPTER V.3 – FORM OF THE AWARD)

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) includes only one provision concerning the place of arbitration. That provision limits the authority of federal district courts to compel arbitration to the federal judicial district in which they sit.[171] This geographical limitation does not apply to

1951), disapproved of on other grounds by *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

167. See *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 332 (3d Cir. 1991).
168. See *Cahn v. Int'l Ladies' Garment Union*, 311 F.2d 113, 114-15 (3d Cir. 1962); *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886-87 (2d Cir. 1990); *Kabia v. Koch*, 186 Misc. 2d 363, 371 (N.Y. Civ. Ct. 2000).
169. 2000 UAA Sect. 14(a) ("An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.").
170. 2000 UAA Sect. 14(a); *Int'l Med. Grp., Inc. v. Am. Arbitration Ass'n, Inc.*, 312 F.3d 833, 843-844 (7th Cir. 2002); *Hawkins v. Nat'l Ass'n of Sec. Dealers, Inc.*, 149 F.3d 330, 332 (5th Cir. 1998), abrogated on other grounds by *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016); *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886-887 (2d Cir. 1990); *Prudential-Bache Secs. (H.K.) Ltd. v. Nat'l Ass'n of Secs. Dealers Dispute Res. Inc.*, 289 F. Supp. 2d 438, 440 (S.D.N.Y. 2003).
171. 9 U.S.C. Sect. 4; *Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1219-1220 (10th Cir. 2005); *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1018 (6th Cir. 2003); *Bauhinia Corp. v. China Nat'l Mach. & Equip. Imp. & Exp. Corp.*, 819 F.2d 247, 250 (9th Cir. 1987) (summarized in *Yearbook* XV (1990) p. 550); *Snyder v. Smith*, 736 F.2d 409, 418-420 (7th Cir. 1984), overruled on other grounds, *Felzen v. Andreas*, 134 F.3d 873, 877 (7th Cir. 1998); *Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391, 1394 (3d Cir. 1974); *Internaves de Mexico S.A. de C.V. v. Andromeda Steamship Corp.*, 247 F. Supp. 1294, 1300-1301 (S.D. Fla. 2017).

arbitrations subject to the New York or Panama Conventions. A court may issue an order compelling arbitration under these treaties in any place the arbitration agreement specifies.[172] The limitation also does not prevent a court from staying litigation in favor of an arbitration pending elsewhere.[173]

Normally, the place of arbitration will be agreed upon by the parties in their agreement to arbitrate. In the event the parties have not agreed on a place and fail to do so after the dispute arises, arbitral rules typically provide for the institution or tribunal to determine the place of arbitration.[174] Many state statutes provide that, unless otherwise determined by the parties or by applicable rules, the arbitrators may designate the *situs* of the arbitration.[175]

Arbitral hearings need not be held at the legal place of arbitration. Most arbitral rules grant the arbitrators authority to hold hearings and other proceedings in different locations.[176] However, the legal place of arbitration will determine the procedural law applicable to the arbitration proceedings, so it is important that the parties and tribunal make clear that by conducting hearings, inspections, or consultations among the members of the tribunal in other locations, they have not changed the place of arbitration.

In international and domestic arbitrations, the law of the place of arbitration will govern any proceedings for setting aside an award.[177] Therefore, arbitrators generally state in their award that it was made at the place of arbitration.[178]

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172. 9 U.S.C. Sects. 206 and 303; see also *InterGen N.V. v. Grina*, 344 F.3d 134, 142 (1st Cir. 2003).
173. 9 U.S.C. Sect. 3; see also *Tai Ping Ins. Co., Ltd. v. M/V Warschau*, 713 F.2d 1141, 1144 (5th Cir. 2012) ("There is no provision in the [Federal Arbitration] Act for a stay of arbitration. Nonetheless, the case law clearly establishes that, in the appropriate circumstances, such an order is within the power of the district court."); *Builders Federal (Hong Kong) Ltd. v. Turner Constr.*, 655 F. Supp. 1400, 1407-1408 (S.D.N.Y. 1987) (staying litigation proceedings in favor of pending arbitration abroad between the parties).
174. AAA Int'l Rules Art. 17.1; UNCITRAL Rules Art. 18.1; CPR Int'l Rule 9.5.
175. See, e.g., Tex. Civ. Prac. & Rem. Code Sect. 171.044.
176. AAA Int'l Rules Art. 17.2; UNCITRAL Rules Art. 18.2; CAMCA Rules Art. 14.2; IACAC Rules Art. 13.2; CPR Int'l Rule 9.5.
177. N.Y. Convention Art. V(1)(e) (recognition and enforcement of an award may be refused if the award has been set aside by "a competent authority of the country in which, or under the law of which, that award was made"); Panama Convention Art. 5(1)(e) (same); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 489 (1989) ("Where … the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.").
178. See, e.g., AAA Int'l Rules Art. 17.2; CAMCA Rules Art. 29.3; IACAC Rules Art. 29.4.

2. ARBITRAL PROCEEDINGS IN GENERAL

Arbitration statutes and court decisions in the United States impose few specific requirements on the actual conduct of the arbitration. By specifying certain procedural irregularities that may serve as grounds for setting aside an award, such as an improper refusal to postpone a hearing or to hear pertinent evidence, the Federal Arbitration Act (the FAA) (see **Annex I** hereto) imposes minimal procedural standards on arbitrations subject to the statute.[179] Courts applying those grounds recognize, however, that arbitrators have virtually unlimited discretion to handle procedural issues as they deem fit, subject only to the provisions of any applicable rules, the agreement of the parties, and each party's fundamental right to be heard.[180]

State arbitration statutes frequently contain provisions relating to notices of hearings, adjournments, procedures if one party fails to appear, waiver of right to the hearing, and presentation of evidence.[181] The 2000 UAA provides that an arbitrator may conduct the arbitration in such a manner as he or she considers appropriate to the fair and expeditious disposition of the proceeding – an express and expansive authorization that does not appear in the 1955 Act.[182] The 2000 UAA also gives an arbitrator the power to make summary dispositions of claims or issues as long as appropriate notice and a reasonable opportunity to respond have been given to the parties.[183]

3. EVIDENCE

In arbitrations conducted in the United States, it is not necessary to follow formal legal rules of evidence as they would be applied in court proceedings.[184] While the Federal Arbitration Act (the FAA) (see **Annex I** hereto) and the UAA permit a court to set aside an award where the arbitrators have refused to hear "pertinent and material" evidence, courts almost always defer to the decisions of arbitrators on questions of what evidence is pertinent and

179. See 9 U.S.C. Sect. 10(a).
180. See Chapter VI.3.a below.
181. See 2000 UAA Sect. 15; 1955 UAA Sects. 5(a)-5(b).
182. 2000 UAA Sect. 15(a).
183. 2000 UAA Sect. 15(b). However, since federal law grants parties the right to structure their arbitrations as they see fit, these provisions should not be interpreted to restrict the authority given by the parties to the arbitrators or an arbitral institution. All of the provisions governing the arbitration process found in Sect. 15 of the 2000 UAA are waivable by the parties to the extent permitted by law. See 2000 UAA Sect. 4.
184. See, e.g., AAA Commercial Rules R-34(a) ("Conformity to legal rules of evidence shall not be necessary."); CPR Int'l Rule 12.2 ("The Tribunal is not required to apply the rules of evidence used in judicial proceedings."); *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir. 2001) ("[P]arties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena.").

material.[185] For example, courts have held that arbitrators need not consider oral testimony at a hearing if they determine that they can reach their decision on a ground that can be determined on written submissions.[186]

As with other evidentiary issues, procedures governing witness testimony are largely absent from the FAA. Thus, the parties and the tribunal are free to structure the presentation of witness testimony as they see fit. The right to cross-examine witnesses, however, is specifically provided for in the UAA and many state arbitration statutes.[187] This right is waivable under the UAA.[188]

Arbitrators may permit or require the parties to present a witness's written statement instead of having the witness provide his or her direct testimony live at the hearing.[189] In the United States, persons who might be interested in the outcome of a case, such as a party or the officer or employee of a party, are permitted to be witnesses, and the arbitral tribunal may take that interest into account when considering the testimony. This practice differs from that in many civil law countries where interested persons are not permitted to testify as witnesses.

Neither the FAA nor state arbitration statutes contain provisions relating specifically to expert witnesses. As a matter of practice, experts are treated like other witnesses. They are usually presented by the party who relies on their testimony and are subject to questions by the opposing party and the arbitrators.

Section 7 of the FAA empowers arbitrators to compel the appearance of witnesses and the production of evidence.[190] The importance of this provision is that it permits parties and arbitrators to seek judicial enforcement of arbitral tribunals' subpoenas for testimony or documents whether the order is against a party or a non-party to the arbitration.[191]

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185. See Chapter VI.3.*a* below.
186. *Howard Univ. v. Metro. Campus Police Officer's Union*, 512 F.3d 716, 721-722 (D.C. Cir. 2008); *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d 433, 438 (2d Cir. 2004); *Intercarbon Bermuda, Ltd. v. Callex Trading & Transp. Corp.*, 146 F.R.D. 64, 72-74 (S.D.N.Y. 1993) (summarized in *Yearbook* XIX (1994) p. 802).
187. See 2000 UAA Sect. 15(d); 1955 UAA Sect. 5(b).
188. See 2000 UAA Sect. 4(a) ("Except as otherwise provided in subsections (b) and (c), a party to an agreement to arbitrate or to an arbitration proceeding may waive or, the parties may vary the effect of, the requirements of this [Act] to the extent permitted by law."); Raymond G. Bender, *Presenting Witness Testimony in U.S. Domestic Arbitration: Should Written Witness Statements Become the Norm?* 69 Dispute Resolution J 39, 43 (2014) ("Parties can agree, of course, to waive cross-examination, which might occur in the case of secondary witnesses whose testimony is straightforward and non-controversial.").
189. See, e.g., AAA Int'l Rules Art. 23.4; CAMCA Rules Art. 22.5; IACAC Rules Art. 22.5.
190. 9 U.S.C. Sect. 7 ("The arbitrators ... may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.").
191. *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 44-45 (M.D. Tenn. 1994); see also *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-871 (8th Cir. 2000); *Am. Fed'n of Television & Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999); *Amgen, Inc. v. Kidney Ctr of Del. Cty.*

Courts disagree, however, about whether Sect. 7, which, by its literal terms, only permits arbitrators to compel a witness to appear "before them" and to "bring with him" documents, also permits courts to enforce orders for pre-hearing discovery. While most courts will enforce orders to compel pre-hearing production of evidence by one of the parties[192] – and most arbitration rules specifically empower arbitrators to do so[193] – courts are generally reluctant to enforce arbitral orders to compel third parties to produce pre-hearing documents[194] or to appear at depositions.[195]

Ltd., 879 F. Supp. 878, 883 (N.D. Ill. 1995); *Hires Parts Serv., Inc. v. NCR Corp.*, 859 F. Supp. 349, 353-354 (N.D. Ind. 1994); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242-1243 (S.D. Fla. 1988); *Thompson v. Zavin*, 607 F. Supp. 780, 782 (C.D. Cal. 1984).

192. See *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000) ("We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing [pursuant to FAA § 7] is the power to order the production of relevant documents for review by a party prior to the hearing."); *Brazell v. Am. Color Graphics*, No. M-82 AGS, 2000 WL 364997, at *1-2 (S.D.N.Y. 7 April 2000) ("Section 7 of the FAA ... gives broad authority to arbitrators in terms of discovery ... [and] has been interpreted ... to include pre-hearing discovery among parties."); *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 72 (S.D.N.Y. 1995) ("Though the language of the statute speaks only to the arbitrators power to summon a witness ... courts have permitted arbitrators to order pre-hearing discovery of *parties.*").

193. AAA Int'l Rules Art. 21.8; UNCITRAL Rules Art. 27.3; CAMCA Rules Art. 21.3; IACAC Rules Art. 21.3; CPR Int'l Rule 12.3.

194. See *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216-217 (2d Cir. 2008) ("[FAA § 7] does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings."); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004) (arbitrators have no power to compel pre-hearing production of documents from third parties); *COMSAT Corp. v. Nat. Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999) (arbitrators' subpoena compelling pre-hearing production of documents should be enforced only when a "special need" is shown); *Gresham v. Norris*, 304 F. Supp. 2d 795, 796-797 (E.D. Va. 2004) (same); *Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342, 1344 (S.D. Fla. 2009) ("[T]he Court finds that an arbitrator is not statutorily authorized under the FAA to issue summonses for pre-hearing depositions and document discovery from non-parties."); *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078, 1083 (N.D. Ill. 2008) (non-parties cannot be compelled to participate in discovery without their consent); *Odfjell ASA v. Celanese AG*, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004) ("[I]nasmuch as arbitration is largely a matter of contract, it would seem particularly inappropriate to subject parties who never agreed to participate in the arbitration in any way to the notorious burdens of pre-hearing discovery."). But see *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-871 (8th Cir. 2000) (arbitrators have implicit power to order pre-hearing production of documents from third parties); *Festus & Helen Stacy Found., Inc. v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006) (same); *Brazell v. Am. Color Graphics*, No. M-82 AGS, 2000 WL 364997, at *1-2 (S.D.N.Y. 7 April 2000) (same), *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 44-45 (M.D. Tenn. 1994) (same); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242-1243 (S.D. Fla. 1988) (same).

195. See *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004); *COMSAT Corp. v. Nat. Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999); *Kennedy v. Am. Express Travel Related Servs. Co.*, 646 F. Supp. 2d 1342, 1344 (S.D. Fla. 2009); *Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F. Supp. 2d 402 (S.D.N.Y. 2005) (collecting cases);

Courts show considerable deference to the arbitrators' determinations regarding the scope of discovery between the parties.[196] Parties generally cannot challenge an arbitrator's discovery order in court, nor can they obtain a court-issued subpoena seeking discovery upon the failure of the arbitrator to issue one, since the parties have voluntarily subjected themselves to the jurisdiction of the arbitrators.[197]

Federal district courts may enforce subpoenas only against persons located in the state in which the court sits or within one hundred miles of the court.[198] This effectively limits the enforceability of an arbitrator's discovery order because petitions to enforce a discovery order must be brought in the federal district court for the district in which the arbitrators are sitting.[199] One potential means of obtaining an enforceable discovery order where evidence is located outside the subpoena power of the court at the seat of the arbitration is for the tribunal to hold a hearing in the judicial district in which the witness or other evidence is located.

Most state statutes have similar provisions concerning enforcement of arbitration discovery orders. The 1955 UAA provides for arbitrators to issue subpoenas of witnesses to appear at the hearing and for depositions.[200] The 2000 UAA empowers arbitrators to issue any discovery related orders appropriate for resolution of the dispute.[201]

In addition to FAA Sect. 7, the possibility exists under a separate federal statute (codified at 28 U.S.C. Sect. 1782) for a district court to order someone residing or found in its district to "give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."[202] The statute allows for such orders to be made upon request of the foreign tribunal or upon application of any interested party. The extent to which Sect. 1782 may be available in aid of private arbitration seated outside of the United States, however, is unclear, with courts taking divergent views. In its only decision to address Sect. 1782, *Intel Corporation v. Advanced Micro Devices, Inc.*, the Supreme Court quoted a definition of

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Odfjell ASA v. Celanese AG, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004); *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995).

196. See, e.g., *Guyden v. Aetna, Inc.*, 544 F.3d 376, 386-87 (2d Cir. 2008) (arbitrators are to resolve disputes regarding discovery); *Kristian v. Comcast Corp.*, 446 F.3d 25, 43 (1st Cir. 2006) (any dispute regarding discovery is procedural and thus left to an arbitrator to resolve); *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 871 (8th Cir. 2000) (refusing to second guess arbitrators' determination of relevance); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 44 (M.D. Tenn. 1994) (same).

197. *Nat'l Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999); *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1242-1243 (S.D. Fla. 1988); *Thompson v. Zavin*, 607 F. Supp. 780, 783 (C.D. Cal. 1984).

198. See Fed. R. Civ. P. 45.

199. See 9 U.S.C. Sect. 7.

200. 1955 UAA Sect. 7(a)-(b).

201. 2000 UAA Sect. 17(g).

202. 28 U.S.C. Sect. 1782(a).

"tribunal" by one of the drafters of the provision, which included "arbitral tribunals" as an example of a tribunal covered by Sect. 1782.[203] Although the inclusion of arbitral tribunals in the definition of the term "tribunal" was *dicta* for the purposes of *Intel*,[204] the mention of arbitral tribunals in *Intel* has led some courts to conclude that Sect. 1782 does in fact allow US courts to order discovery in aid of foreign private arbitrations, at least where they find that there is potential for judicial review of the award, or where the parties are arbitrating under the UNCITRAL rules (based on the argument that the UNCITRAL rules were promulgated by an international body to render the arbitration more public).[205] Other courts, however, continue to hold that

203. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004) (quoting definition of Sect. 1782 foreign and international tribunals as "includ[ing] investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts" (emphasis added)).

204. *Intel* examined whether Sect. 1782 covered a European Commission administrative proceeding.

205. See *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 990 (11th Cir. 2012) ("The arbitral panel acts as a first-instance decisionmaker; it permits the gathering and submission of evidence; it resolves the dispute; it issues a binding order; and its order is subject to judicial review. The discovery statute requires nothing more."); *In re Application of Pola Maritime, Ltd.*, No. 416-333, 2017 WL 3714032, at *2 (S.D. Ga. 29 August 2017) ("[W]hile the London Maritime Arbitrators Association 'is much like a purely private arbitration,' its reviewability by a true judicial body brings it within the [Sect.] 1782 definition of a 'foreign tribunal'."); *In re Ex Parte Application of Kleimar N.V.*, 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016) (holding that the London Maritime Arbitrators is a foreign tribunal within the meaning of Sect. 1782); *In re Owl Shipping, LLC*, No. 14-5655, 2014 WL 5320192, at *3 (D.N.J. 17 October 2014) (same); *In re Winning (HK) Shipping Co.*, No. 09-22659-MC-UNGARO/SIMONTON, 2010 U.S. Dist. LEXIS 54290, at *22 (S.D. Fla. 30 April 2010) (unlike purely private arbitration, "arbitral body in this instance actually acts as a first-instance decision maker whose decisions are subject to judicial review, and thus operates as a foreign tribunal for purposes of section 1782"); *OJSC Ukrnafta v. Carpatsky Petroleum Corp*., No. 3:09 MC 265 JBA, 2009 U.S. Dist. LEXIS 109492, at *12-13 (D. Conn. 27 August 2009) (arbitration within purview of 1782 because arbitration panel "acting as a 'first-instance decision maker,' whose decision may be subject to review [by courts]"); *In re Arbitration in London, England*, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) ("[A] reasoned distinction can be made between arbitrations such as those conducted by UNCITRAL, 'a body operating under the United Nations and established by its member states,' and purely private arbitrations established by private contract." (quoting *In re Matter of the Application of Oxus Gold PLC*, No. MISC. 06-82, 2006 WL 2927615, at *6 (D.N.J. 11 October 2006))); *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 238-240 (D. Mass. 2008) (ICC tribunal is a "tribunal" because it is "first-instance decisionmaker" that conducts proceedings which lead to dispositive rulings reviewable in court); *In re Roz Trading Ltd*., 469 F. Supp. 2d 1221, 1226-1228 (N.D. Ga. 2006) ("Where a body makes adjudicative decisions responsive to a complaint and reviewable in court, it falls within the widely accepted definition of 'tribunal,' the reasoning of *Intel*, and the scope of [Sect.] 1782(a), regardless of whether the body is governmental or private."); cf. *In re Arbitration in London, England*, 626 F. Supp. 2d 882, 885-886 (N.D. Ill. 2009) (private arbitral tribunal not within scope of Sect. 1782 because not subject to judicial review of merits, and not conducted by UNCITRAL). But see *In re Broadsheet LLC*, No. 11–cv–02436–PAB–KMT, 2011 WL 4949864, at *2 (D. Colo. 18 October 2011) (granting 1782 relief for private

Sect. 1782 is not available in connection with private arbitrations.[206] The argument that decision-making bodies of a quasi-governmental nature should be covered by Sect. 1782 has led some courts to conclude that arbitrations conducted pursuant to a bilateral investment treaty do fall within Sect. 1782's ambit.[207]

Even where Sect. 1782 is applicable, the Supreme Court has cautioned that meeting the statutory prerequisites for Sect. 1782 merely authorizes, but does not require, a federal district court to provide judicial assistance;[208] district courts retain discretion over whether to grant a discovery request. In *Intel*, the Court set forth four factors for courts to consider in determining whether to grant Sect. 1782 relief: (1) whether the person from whom discovery is sought is a participant in a foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings, and the receptivity of the foreign government or court to US federal court assistance; (3) whether the request conceals an attempt to foil foreign proof-gathering restrictions or policies of either the

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arbitration without requiring potential for judicial review or arbitration under UNCITRAL rules); *Gov't of Ghana v. Proenergy Servs., LLC*, No. 11-9002-MC-SOW, 2011 WL 2652755, at *3 (W.D. Mo. 6 June 2011) (same); *Comisión Ejecutiva Hidroeléctrica del Río Lempa v. Nejapa Power Co., LLC*, No. 08-135-GMS, 2008 WL 4809035, at *1 (D. Del. 14 October 2008) (same); *In re Hallmark Capital Corp*., 534 F. Supp. 2d 951, 956-57 (D. Minn. 2007) (same).

206. See *La Comision Ejecutiva Hidroelectrica del Rio Lempa v. El Paso Corp*., 617 F. Supp. 2d 481, 485-487, aff'd, 341 F. App'x 31 (5th Cir. 2009); *In Re Rhodianyl S.A.S*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at *21 (D. Kan. Mar. 25, 2011); *Norfolk S. Corp. v. Gen. Sec. Ins. Co*., 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009); *In re Winning (HK) Shipping Co*., No. 09-22659-MC-UNGARO, 2010 U.S. Dist. LEXIS 54290, at *21 (S.D. Fla. 30 April 2010); *In re Operadora DB Mexico, S.A. de C.V.*, No. 6:09-CV-383-ORL-22GJK, 2009 U.S. Dist. LEXIS 68091, at *28 (M.D. Fla. 4 August 2009). Prior to the *Intel* decision this was the position that courts generally took. See *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 189-91 (2d Cir. 1999) (examining legislative history and concluding that Sect. 1782 covers only governmental or intergovernmental arbitral tribunals, conventional courts, and other state-sponsored bodies, not private tribunals); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999) (following Second Circuit).

207. See, e.g., *In re Veiga*, 746 F. Supp. 2d 8, 22-23 (D.D.C. 2010); *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010); *In re Application of Chevron Corp*., 762 F. Supp. 2d 242, 250-252 (D. Mass. 2010); *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 MC 265 JBA, 2009 U.S. Dist. LEXIS 109492, at *12-13 (D. Conn. 27 August 2009); *Norfolk S. Corp. v. Gen. Sec. Ins. Co*., 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009); *In re Matter of the Application of Oxus Gold PLC*, No. MISC. 06-82, 2006 WL 2927615, at *6 (D.N.J. 11 October 2006). See also *Republic of Ecuador v. Connor*, 708 F.3d 651, 653 (5th Cir. 2013) (intervening party judicially estopped from denying that a BIT tribunal is an "international tribunal" for the purposes of Sect. 1782 where it had "benefitted repeatedly by arguing … that the arbitration is a 'foreign or international tribunal'").

208. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004).

United States or a foreign country; and (4) whether the Sect. 1782 request is unduly intrusive or burdensome.[209]

4. TRIBUNAL-APPOINTED EXPERTS (SEE CHAPTER IV.3 FOR PARTY-APPOINTED EXPERT WITNESSES)

In the United States, arbitral tribunals generally do not designate their own experts, although most rules used in international cases provide that they have the authority to do so.[210]

5. INTERIM MEASURES OF PROTECTION (SEE ALSO CHAPTER I.1 – LAW ON ARBITRATION)

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) does not expressly address the authority of courts to provide preliminary relief in a controversy subject to arbitration, except to authorize seizure of a vessel in maritime cases.[211] Most courts have held that they retain the power to order provisional measures in aid of arbitration.[212] Some state laws, including the 2000 UAA, specifically allow a court to order provisional measures before an arbitrator is selected.[213]

A court's choice of preliminary relief in aid of arbitration is not restricted, other than the limitations and equitable considerations that apply to preliminary relief generally. Courts have ordered preliminary injunctions,[214] attachment of

209. *Id.* at 264-65; see also *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 290 (S.D.N.Y. 2010).
210. AAA Int'l Rules Art. 25; UNCITRAL Rules Art. 29; CAMCA Rules Art. 24; IACAC Rules Art. 24; CPR Int'l Rule 12.3.
211. 9 U.S.C. Sect. 8.
212. See, e.g., *Toyo Tire Holdings of Americas, Inc. v. Cont'l Tire N. Am., Inc.*, 609 F.3d 975, 981-982 (9th Cir. 2010); *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 116 (2d Cir. 2009); *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989); *RGI, Inc. v. Tucker & Assocs., Inc.*, 858 F.2d 227, 230 (5th Cir. 1988) (courts may order interim measures as long as these measures maintain the status quo and do not address the merits of the dispute); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986) (district courts can grant injunctive relief pending arbitration because contrary decision would frustrate Congress's desire to enforce arbitration agreements and make the arbitral process meaningful); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1053-1054 (4th Cir. 1985); *Sauer-Getriebe K.G. v. White Hydraulics, Inc.*, 715 F.2d 348, 350 (7th Cir. 1983). But see *UBS PaineWebber, Inc. v. Stone*, No. 02-471, 2002 U.S. Dist. LEXIS 5162, at *7 (E.D. La. 8 March 2002) (interim measures pending arbitration are available only until the tribunal is constituted).
213. See 2000 UAA Sect. 8(a). Like the federal statute, the 1955 UAA is silent on the subject.
214. See, e.g., *Roche Diagnostics Corp. v. Med. Automation Sys., Inc*., 646 F.3d 424, 426-27 (7th Cir. 2011); *Teradyne, Inc. v. Mostek Corp*., 797 F.2d 43, 51 (1st Cir. 1986).

property,[215] and *ex parte* temporary restraining orders (if the moving party can show urgent need) in support of arbitration.[216] However, courts will usually deny an application for preliminary relief that could have been submitted to, or was rejected by, the arbitrators themselves.[217]

US courts have held that they have the inherent power to grant interim relief in an arbitral controversy, even when the arbitration is governed by the New York Convention, although they may keep the scope of interim relief narrow in order to avoid deciding on substantive issues they determine are appropriately left for the arbitrator.[218] Courts are especially willing to grant provisional relief where the preliminary measures being sought are to aid

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215. See, e.g., *Murray Oil Prods. Co. v. Mitsui & Co.*, 146 F.2d 381, 384 (2d Cir. 1944); *Bahrain Telecoms. Co. v. DiscoveryTel, Inc.*, 476 F. Supp. 2d. 176, 182 (D. Conn. 2007).

216. See *Fed. R. Civ. P.* 65(b) (allowing *ex parte* issuance if "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or that party's attorney can be heard in opposition"); see also, e.g., *Am. Food & Vending Corp. v. Ups Oasis Supply Corp.*, No. 02 C 9439, 2003 U.S. Dist. LEXIS 1464, at *5-8 (N.D. Ill. 31 January 2003) (denying motion to dismiss and upholding state court's issuance of *ex parte* injunctive relief, issued to preserve status quo pending arbitration). Temporary restraining orders issued *ex parte* are subject to safeguards against abuse. See, e.g., *Fed. R. Civ. P.* 65(b) (setting time limit of fourteen days, unless extended "for good cause" by the court, and providing for opposing party to be heard as soon as possible after issuance).

217. See, e.g., *China Nat'l Metal Prods. Imp./Exp. Co. v. Apex Digital, Inc.*, 155 F. Supp. 2d 1174, 1181-82 (C.D. Cal. 2001); *Al Nawasi Trading Co. v. BP Amoco Corp.*, 191 F.R.D. 57, 58-59 (S.D.N.Y. 2000); *Park City Assocs. v. Total Energy Leasing Corp.*, 396 N.Y.S.2d 377, 378 (N.Y. App. Div. 1977).

218. See *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 (4th Cir. 2012) ("[A] court's authority to entertain an injunction request … applies to Convention Act cases as well."); *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990); *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044, 1052 (N.D. Cal. 1977); see also *Bahrain Telecomms. Co. v. DiscoveryTel, Inc.*, 476 F. Supp. 2d 176, 180-82 (D. Conn. 2007); *China Nat'l Metal Prods. Imp./Exp. Co. v. Apex Digital, Inc.*, 155 F. Supp. 2d 1174, 1178-1180 (C.D. Cal. 2001); *James Assocs. v. Anhui Mach. & Equip. Imp. & Exp. Corp.*, 171 F. Supp. 2d 1146, 1148-1150 (D. Colo. 2001); *RoadTechs, Inc. v. MJ Highway Tech., Ltd.*, 79 F. Supp. 2d 637, 640-641 (E.D. Va. 2000); cf. *E.A.S.T., Inc. of Stamford, Conn. v. M/V ALAIA*, 876 F.2d 1168, 1173 (5th Cir. 1989) (courts may order interim measures in admiralty cases); *Tenn. Imps., Inc. v. Filippi*, 745 F. Supp. 1314, 1325 (M.D. Tenn. 1990) (*obiter dictum* that it may sometimes be necessary for courts to order interim measures in aid of arbitration). But see *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1038 (3d Cir. 1974) ("[T]he Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate. Thus the contention that arbitration is merely another method of trial, to which state provisional remedies should equally apply, is unavailable."); *I.T.A.D. Assoc. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981) (finding that a district court may not refuse to order arbitration whenever "the parties agreed in writing that all disputes arising from their contractual relationship would be submitted to arbitration"). But see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-541 (1995) (noting that in foreign arbitration cases, courts could retain jurisdiction after compelling arbitration); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 377 n. 19 (4th Cir. 2012) ("Because the Supreme Court has rejected the *McCreary* premise, *Podar Bros.* has been effectively overruled by the Court on the jurisdictional point and is not controlling precedent.").

arbitration.[219] In any event, decisions disallowing provisional measures in aid of arbitration should have no impact where, as is often the case, the parties have agreed to arbitrate pursuant to rules that expressly recognize that an application to a court for preliminary measures is not inconsistent with the agreement to arbitrate.[220]

Most courts in the United States have held that arbitral tribunals also have the inherent power to order interim relief,[221] and most arbitration rules explicitly grant arbitrators that power.[222] Courts have generally been willing to enforce interim measures ordered by arbitral tribunals, either on the theory that such awards "finally and definitively dispose[] of a separate independent claim" for preliminary relief in the arbitration, and thus constitute an enforceable award,[223] or because such relief is necessary to render a subsequent, final award meaningful.[224]

219. See *Borden, Inc. v. Meiji Milk Prods. Co, Ltd..*, 919 F.2d 822, 826 (2d Cir. 1990) ("[E]ntertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to [the Convention]."); *Bahrain Telecomms. Co. v. DiscoveryTel, Inc.,* 476 F. Supp. 2d 176, 180-182 (D. Conn. 2007) (where plaintiff moved for prejudgment attachment of defendant's assets pending resolution of the arbitration, court held it had jurisdiction and authority to grant injunctions); *Matrenord, S.A. v. Zokor Int'l Ltd.*, No. 84 C 1639, 1984 U.S. Dist. LEXIS 21097, at *10-11 (N.D. Ill. 19 December 1984) (where plaintiff filed for arbitration and then sought a pre-arbitration attachment order, the court held that plaintiff was not trying to bypass arbitration and had fulfilled the requirements necessary for obtaining an order of attachment).

220. AAA Int'l Rules Art. 6.7; UNCITRAL Rules Art. 26.9; CAMCA Rules Art. 23.3; IACAC Rules Art. 23.3; CPR Int'l Rule 13.2; see also *P.R. Hosp. Supply, Inc. v. Boston Scientific Corp.*, 426 F.3d 503, 505 (1st Cir. 2005); *HSBC Bank USA v. Nat'l Equity Corp.*, 719 N.Y.S.2d 20, 22-23 (N.Y. App. Div. 2001).

221. *Yasuda Fire & Marine Ins. Co. of Europe, Ltd. v. Cont'l Cas. Co.*, 37 F.3d 345, 351 (7th Cir. 1994) ("Since the arbitrator derives all his powers from the agreement, the agreement must implicitly grant him remedial powers when there is no explicit grant." (internal quotation marks and citation omitted)); see also *Next Step Med. Co, Inc.. v. Johnson & Johnson Int'l*, 619 F.3d 67, 70 (1st Cir. 2010); *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 579 (2d Cir. 2005); *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1022-1023 (9th Cir. 1991).

222. See AAA Int'l Rules Art. 6.4; AAA Commercial Rules R-37(a); CPR Int'l Rule 13.1; UNCITRAL Rules Art. 26(a); CAMCA Rules Art. 23.1; IACAC Rules Art. 23.1; 2000 UAA Sect. 8(b).

223. *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283 (2d Cir. 1986); see also *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007); *Hart Surgical, Inc. v. UltraCision*, Inc., 244 F.3d 231, 234 (1st Cir. 2001); *Publicis Commc'n v. True N. Commc'ns, Inc.*, 206 F.3d 725, 729 (7th Cir. 2000). But see *Halliburton Energy Servs. v. NL Indus*., 553 F. Supp. 2d 733, 778 (S.D. Tex. 2008) (interim order did not "purport to characterize the finality of the initial phase award").

224. *Yasuda Fire & Marine Ins. Co. of Europe, Ltd. v. Cont'l Cas. Co.*, 37 F.3d 345, 347-348 (7th Cir. 1994); *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1022-1023 (9th Cir. 1991); *Hall Steel Co. v. Metalloyd Ltd.*, 492 F. Supp. 2d 715, 720 (E.D. Mich. 2007); *Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 936-937 (N.D. Cal. 2003).

6. REPRESENTATION AND LEGAL ASSISTANCE

Although a party's right to be represented by a lawyer at the party's own cost is not expressly mentioned in the Federal Arbitration Act (the FAA) (see **Annex I** hereto), it is considered to be a fundamental right in arbitration in the United States. Many state arbitration statutes contain specific provisions that a party has a right to be represented by a lawyer at its own cost, and that this right cannot be waived in advance.[225] Reflecting the same principle, arbitration rules typically provide that any party may be represented by a lawyer or other authorized person.[226]

The FAA and most state statutes do not require a person who acts for another in an arbitration to have any particular legal training or to be admitted to practice law at the place of arbitration.[227] A party's counsel need not be authorized by a written power of attorney to represent it in an arbitration.

7. DEFAULT

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) does not address the subject of the failure of a party to participate in the arbitration. It is generally recognized, however, that if a party has received sufficient and timely notice of the time and place of the arbitration hearing but nevertheless

225. See 2000 UAA Sect. 16 (except that an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration according to Sect. 4(b)(4)); 1955 UAA Sect. 6.

226. See AAA Int'l Rules Art. 16; IACAC Rules Art. 4; CAMCA Rules Art. 13; CPR Int'l Rule 4.1.

227. See *Williamson v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982) (admission to New York bar not required to represent party in arbitration in New York). In a much-questioned decision, however, the California Supreme Court held that California law requires a person representing a party in a non-international arbitration to be admitted to the State Bar of California. See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 9 (Cal. 1998), cert. denied, 525 U.S. 920 (1998). In 1999, the California legislature passed legislation in response to the *Birbrower* decision, permitting an out-of-state lawyer admitted and in good standing in another US jurisdiction to conduct in-state arbitration, if that lawyer satisfies a series of requirements, including being associated with local counsel who is designated as counsel of record and agreeing to be subject to local jurisdiction for disciplinary purposes. See Cal. Civ. Proc. Code Sect. 1282.4. (The status of foreign lawyers conducting international arbitration in California is less clear. See, e.g., David D. Caron and Leah D. Harhay, "A Call to Action: Turning the Golden State into a Golden Opportunity for International Arbitration", 28 Berkeley J. Int'l Law (2010) p. 497.) Florida permits out-of-state foreign attorneys to represent clients in an arbitration proceeding in Florida provided the attorney meets certain qualifications. See Florida Bar Rules 1-3.11, 4-5.5. The Arizona Supreme Court has held that an attorney may not represent a party in an arbitration they have been disbarred; it is not clear what further qualifications are necessary. *In re Creasy,* 12 P.3d 214, 216 (Ariz. 2000).

fails to be present, the arbitration may proceed in the party's absence.[228] Most state statutes contain express provisions allowing the arbitral tribunal to hear a case in the absence of a defaulting party.[229] Arbitration rules also typically provide that the arbitration may proceed in the absence of a party who, after proper notice, fails to be present or to obtain an adjournment.[230]

8. CONFIDENTIALITY OF THE AWARD AND PROCEEDINGS

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) contains no provisions on the confidentiality of arbitral proceedings or awards. State laws also rarely provide for the privacy of information or documents produced during arbitration. Customarily, commercial arbitration is considered to be confidential, primarily because the proceedings are not conducted in public, and the disputing parties can contractually provide for the confidentiality of the proceedings.[231] Confidentiality is typically provided for in the parties' agreement or by the arbitration rules the parties select.[232] In the absence of such an agreement, however, there may not be an enforceable right to prevent disclosure of confidential information from the arbitration.[233]

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228. See, e.g., *Corallo v. Merrick Cent. Carburetor, Inc.*, 733 F.2d 248, 251 n. 1 (2d Cir. 1984); *Standard Magnesium Corp. v. Fuchs*, 251 F.2d 455, 458 (10th Cir. 1957); *Kanmak Mills, Inc. v. Soc'y Brand Hat Co.*, 236 F.2d 240, 252 (8th Cir. 1956); *Ky. River Mills v. Jackson*, 206 F.2d 111, 119 (6th Cir. 1953).
229. See 2000 UAA Sect. 15(c) ("[T]he arbitrators may hear and determine the controversy upon the evidence produced even if a party duly notified fails to appear."); 1955 UAA Sect. 5.
230. See AAA Commercial Rules Art. 29; AAA Int'l Rules Art. 23; UNCITRAL Rules Art. 30.2; CAMCA Rules Art. 25; IACAC Rules Art. 25.
231. See, e.g., Richard. C. Reuben, "Confidentiality in Arbitration: Beyond the Myth", 54 U. Kan. L. Rev. (2006) p. 1255, 1259-1260.
232. See 2000 UAA Sect. 17(e) ("An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State."); AAA Int'l Rules Art. 37.1 ("Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator … unless otherwise agreed by the parties or required by applicable law."); CAMCA Rules Art. 36 ("Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator."); CPR Int'l Rules Rule 20 ("[T]he parties, the arbitrators and CPR shall treat the proceedings, any related disclosure and the decisions of the Tribunal, as confidential ... unless otherwise required by law.").
233 See *Contship Containerlines, Ltd. v. PPG Indus., Inc.*, No. 00 Civ. 0194 RCCH BP, 2003 WL 1948807, at *1 (S.D.N.Y. Apr. 23, 2003) (denying movant's claim that an obligation of confidentiality is implied under English law as part of an agreement to arbitrate); *Caringal v. Karteria Shipping, Ltd.*, No. Civ.A. 99-3159, 2001 WL 874705, at *1 (E.D. La. 24 Jan. 2001) ("[T]he Court may order disclosure when appropriate. Even if documents are confidential, a Court may order disclosure if (1) the documents are relevant and (2) disclosure is necessary for disposing fairly of the cause or matter or for saving costs."

Regardless of the degree to which the parties undertake to maintain the confidentiality of their arbitration, if disclosure of information related to or produced in the arbitration is legally compelled, a confidentiality clause will not bar the disclosure of arbitration documents.[234] If such disclosure is sought in discovery in a civil case in court, parties may ask the court to issue protective orders to prevent or limit discovery of confidential materials or forbid their disclosure beyond the parties to the case.[235]

Chapter V. Arbitral Award

1. TYPES OF AWARD

Under United States law, arbitrators have broad powers to fashion appropriate remedies. Typically, arbitrators can issue any remedy that is within the purview of the parties' agreement.[236]

(internal quotation marks and citation omitted)); *Am. Cent. E. Tex. Gas Co., Ltd. P'ship. v. Union Pac. Res. Group, Inc.*, No. 2:98CV0239-TJW, 2000 WL 33176064, at *1 (E.D. Tex. 27 July 2000) ("The arbitrator stated his view that it did not believe it could impose a confidentiality order or force a party to comply with the JAMS rules absent an agreement by the parties."); *United States v. Panhandle E. Corp.*, 117 F.R.D. 346, 350 (D. Del. 1988) (court rejected arguments that arbitration required confidentiality because movant "fail[ed] to point to any actual agreement of confidentiality, documented or otherwise").

234. See *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664, 665-666 (7th Cir. 2009) (confidentiality agreements may protect against disclosure by the parties to the agreement but do not bar third parties who have a legal right to access); *Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc.*, No. Civ. A. 04-N-1228, 2004 WL 1821968, at *1-3 (D. Colo. 13 August 2004); *Urban Box Office Network, Inc. v. Interfase Managers, L.P.*, No. 01 Civ. 8854, 2004 WL 2375819, at *5 (S.D.N.Y. 21 October 2004); cf. *XPO Intermodal, Inc. v. Am. President Lines, Ltd.*, No. 17-2015, 2017 U.S. Dist. LEXIS 176820, *3-4 (D.D.C. 16 October 2017) (where defendant moved to seal court records, court concluded that the matter "can and should be open to the public to the greatest extent possible"); *Contship ContainerLines, Ltd. v. PPG Indus., Inc.*, No. 00 Civ. 0194, 2003 WL 1948807, at *1-2 (S.D.N.Y. 23 April 2003) (where defendant moved to compel production of documents exchanged between plaintiffs during their arbitration involving the same incident, court compelled discovery and rejected plaintiffs' argument that confidentiality implied at law was part of their agreement to arbitrate); *United States v. Panhandle E. Corp*., 118 F.R.D. 346, 349-351 (D. Del. 1988) (where plaintiff sought discovery of documents from an ICC arbitration, court rejected defendant's arguments that arbitration rules required confidentiality, or that the parties had a "general understanding" of confidentiality, and held the arbitration communications to be discoverable).

235. Fed. R. Civ. P. 26(c)(1) (permitting federal district judges to impose protective orders when "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"). Most state courts have similar rules.

236. See *Banco de Seguros del Estado v. Mut. Marine Office, Inc.,* 344 F.3d 255, 262 (2d Cir. 2003) ("Where an arbitration clause is broad, as here, arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself."); cf. *Three S Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 531 (4th Cir. 2007) ("In evaluating whether an arbitrator has exceeded

Arbitrators frequently issue interim or interlocutory awards on preliminary matters. Most commonly, arbitrators may first rule on their jurisdiction to hear a claim and later consider its merits, or they may first rule on liability and later determine the relief to be awarded. The 1955 UAA and the Federal Arbitration Act (the FAA) (see **Annex I** hereto) speak only of the arbitral award and do not distinguish between interim or interlocutory awards, on the one hand, and final awards on the other.[237] Thus, such awards are enforced in the same manner as final awards. The 2000 UAA and most sets of arbitral rules expressly provide that arbitrators are entitled to make interim, interlocutory, and partial awards in addition to final awards.[238]

When issuing interim, interlocutory, or partial awards, arbitrators should label them as such. Courts have held that once an arbitral tribunal renders a final award, the tribunal is *functus officio*, i.e., without further authority and thus unable to amend or alter the award.[239] By appropriately labeling interim awards, arbitrators can avoid the argument that they have no further authority. The situation may be simpler with respect to partial awards.[240] A partial award that finally determines one, but not all, of the claims in a case – i.e., that is final as to the matter resolved – will be enforced.[241]

Arbitrators may also issue awards granting punitive damages unless the parties agree otherwise. The 2000 UAA expressly permits this, "if such an award is authorized by law in a civil action involving the same claim".[242] The 1955 UAA and the FAA do not expressly address punitive damages, but case

his power, we have generally recognized that 'any doubts concerning ... the scope of the arbitrators' remedial authority, are to be resolved in favor of the arbitrators' authority as a matter of federal law and policy.'" (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co*., 991 F.2d 141, 147 (4th Cir. 1993))); see also, e.g., AAA Int'l Rules Art. 39; CPR Int'l Rule 10.4.

237. See 1955 UAA Sect. 8; 9 U.S.C. Sect. 9.
238. See 2000 UAA Sect. 8(b)(1); AAA Int'l Rules Arts. 24, 29.1; UNCITRAL Rules Arts. 26, 34.1; CAMCA Rules Arts. 23, 29.7; IACAC Rules Arts. 23, 29.1; CPR Int'l Rules 13.1, 15.1.
239. See *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 370 (2d Cir. 1999) (quoting *Trade & Transp., Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991)); *McClatchy Newspapers v. Cent. Valley Typographical Union*, 686 F.2d 731, 734 (9th Cir. 1982) (quoting *La Vale Plaza, Inc. v. R. S. Noonan, Inc*., 378 F.2d 569, 572 (3d Cir. 1967)). But see *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, Local 182B v. Excelsior Foundry, Co*., 56 F.3d 844, 846 (7th Cir. 1995) ("Today, riddled with exceptions, [*functus officio*] is hanging on by its fingernails and whether it can even be said to exist in labor arbitration is uncertain."); *E. Seaboard Constr. Co. v. Gray Constr., Inc*., 553 F.3d 1, 4 (1st Cir. 2008) (noting that the continuing existence of the *functus officio* doctrine is "an open [question]"); see also Chapter V.8 below (discussing exceptions to *functus officio* doctrine).
240. See, e.g., *Trade & Transp., Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 193-194 (2d Cir. 1991) (arbitral panel that made "final partial award" on liability lacked authority to revisit the liability issue).
241. See Chapter IV.5 above.
242. 2000 UAA Sect. 21(a).

law has established the power to award punitive damages unless otherwise agreed by the parties; in particular, the US Supreme Court has held that the FAA preempts state laws that prevent arbitrators from awarding punitive damages.[243] Although most sets of arbitral rules are silent on the question of punitive damages, the AAA International Rules and the CPR International Rules specifically bar arbitrators from awarding punitive damages unless the parties' agreement explicitly allows for the tribunal to award them.[244]

Arbitrators have also issued awards granting, among other things, provisional relief,[245] pre-award and post-award interest,[246] and attorneys' fees and arbitration costs.[247]

2. MAKING OF THE AWARD

a. Decision-making

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) does not impose any requirements on how a decision will be made by a multi-member arbitral tribunal but leaves that question to the parties' agreement.[248] The Uniform Arbitration Act, which serves as a model for many state laws, states that a majority of the tribunal is required to render a valid award, but this requirement may be varied by agreement of the parties.[249] Most of the commonly used sets of arbitral rules specifically address this issue, either by requiring a majority of

243. See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 473 n. 1 (2015) ("[S]tate laws are preempted by the FAA only to the extent they conflict with the contracting parties' intent."); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56-59 (1995) ("[I]f contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." (emphasis omitted)); *Americorp Secs., Inc. v. Sager*, 656 N.Y.S.2d 762, 765 (N.Y. App. Div. 1997) (noting that the FAA preempts the contrary New York state-law rule where an arbitration agreement is governed by the FAA). In some states, arbitrators have authority to award punitive damages independently of federal preemption, even in the absence of express statutory authority. See, e.g., *Winkelman v. Kraft Foods, Inc.*, 639 N.W.2d 756, 764-767 (Wis. 2005); *Drywall Sys., Inc. v. ZVI Constr. Co., Inc.*, 761 N.E.2d 482, 486-487 (Mass. 2002); *Russell v. Kerley*, 978 P.2d 446, 449 (Or. Ct. App. 1999).

244. AAA Int'l Rules Art. 31.5; CPR Int'l Rule 10.5.

245. See Chapter IV.5 above.

246. See, e.g., *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 111-12 (2d Cir. 2006) (no error in granting post-award interest on punitive damages); *Gibson Guitar Corp. v. MEC Imp. Handelsgesellschaft GmbH*, No. 98-6046, 1999 WL 1073651, at * 3 (6th Cir. 17 November 1999) (confirming award granting pre-award interest); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.,* 991 F.2d 141, 148 (4th Cir. 1993) (confirming arbitral award that included pre-award interest); *Fort Hill Builders, Inc. v. Nat'l Grange Mut. Ins. Co.*, 866 F.2d 11, 14-15 (1st Cir. 1989) (affirming award with post-award interest).

247. See Chapter V.8 below.

248. See also Chapter V.3 below.

249. See 2000 UAA Sect. 4, 13; 1955 UAA Sect. 4.

the tribunal for a valid award[250] or by authorizing the presiding arbitrator to issue an award in the event that a majority cannot agree on the outcome.[251]

b. Time limits

The FAA contains no provisions concerning a time limit for the making of the award; any agreement by the parties therefore governs. Most state statutes provide that the award must be made within the time specified by the agreement of the parties or, if no time is specified, within the time set by the court on application of a party.[252]

c. Dissenting opinions

Arbitration rules generally do not address the availability of dissenting opinions.[253] In practice, arbitrators in US domestic arbitrations typically do not write opinions stating the reasons for their dissents, and often do not write opinions stating the reasons for their awards.[254] Neither rules nor statutes regulate the form of dissents, and they are not generally regarded as having operative legal effect. Practice varies, with some dissenting opinions being physically attached to the award and others being placed in a separate document that is either delivered simultaneously with the award or at a later time.

3. FORM OF THE AWARD

The Federal Arbitration Act (the FAA) (see **Annex I** hereto), most state statutes, and all rules under which the AAA conducts domestic and international commercial arbitrations, require that awards be in writing.[255] Those rules also typically require that the award indicate the date and place it was made.[256] Although the FAA has no explicit provision requiring that an award be signed, many states' laws and most arbitration rules require that an award be signed by a majority of the arbitrators, unless otherwise agreed by the parties.[257]

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250 See, e.g., AAA Int'l Rules Art. 29.2.

251 See, e.g., ICC Arbitration Rules Art. 32.1.

252. See 2000 UAA Sect. 19(b); 1955 UAA Sect. 8(b).

253. But see CPR Int'l Rule 15.3 ("A member of the Tribunal who does not join in an award may issue a dissenting opinion. Such opinion shall not constitute part of the award.").

254. See Chapter V.3 below.

255. See 9 U.S.C. Sect. 13; 2000 UAA Sect. 19(a); 1955 UAA Sect. 8(a); AAA Int'l Rules Art. 30.1; CAMCA Rules Art. 29.1; CPR Int'l Rule 15.2; IACAC Rules Art. 29.2; UNCITRAL Rules Art. 34.2.

256. See AAA Int'l Rules Art. 30.2; CAMCA Rules Art. 29.3; IACAC Rules Art. 29.4; UNCITRAL Rules Art. 34.4.

257. See 2000 UAA Sect. 19(a); AAA Int'l Rules Art. 30.2; CAMCA Rules Art. 29.3; CPR Int'l Rule 15.2; IACAC Rules Art. 29.4; UNCITRAL Rules Art. 34.4.

Unlike the laws of many other countries, neither US law[258] nor the AAA rules for domestic commercial arbitration[259] require that arbitrators state the reasons upon which the award is based. Generally, awards in domestic commercial cases state only the conclusion (i.e., what in some countries is called the *dispositif*), unless an agreement of the parties requires a reasoned award.

However, most commonly used sets of international arbitration rules generally require a reasoned award unless the parties agree otherwise.[260] International arbitration rules generally also require that an arbitrator who declines to sign an award provide a statement explaining his or her reasons for declining to sign the award.[261] Practice varies as to whether the majority should make a statement concerning the lack of signature by one arbitrator and whether such a statement should be included in the award or be made separately.[262] A dissenting arbitrator cannot block the issuance of an award by refusing to sign it.

When one member of a tribunal fails to act or fails to perform duties in the proceedings, rules used in international arbitrations in the United States generally provide that the arbitrator may be replaced.[263] Some rules also give the remaining members of the tribunal the option of proceeding without the arbitrator who is refusing to participate.[264] Although there have been exceptions, the few courts that have evaluated the validity of awards rendered in such circumstances have typically upheld them, particularly where the arbitrator's withdrawal was intended to obstruct the proceeding.[265] If the

258. See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956); see also, e.g., *Green v. Ameritech Corp.*, 200 F.3d 967, 976 (6th Cir. 2000) (concluding that if parties wished arbitrators to write more detailed opinions, that should be stated with specificity in the contract); *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 412 (5th Cir. 1990) ("It has long been settled that arbitrators are not required to disclose or explain the reasons underlying an award.").

259 See AAA Comm'l Arb. Rules (2018), Rule R-46(b) ("The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.").

260. See AAA Int'l Rules Art. 30.1; CAMCA Rules Art. 29.2; CPR Int'l Rule 15.2; IACAC Rules Art. 29.3; UNCITRAL Rules Art. 34.3.

261. See AAA Int'l Rules Art. 30.2; CAMCA Rules Art. 29.3; IACAC Rules Art. 29.4; UNCITRAL Rules Art. 34.4.

262. Compare UNCITRAL Rules Art. 34.4 ("Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.") and IACAC Rules Art. 29.4 (requiring that the award "state the reasons for the absence of [an arbitrator's] signature") with CAMCA Rules Art. 29.3 (requiring only that the award "be accompanied by a statement of whether the third arbitrator was given the opportunity to sign").

263. See CPR Int'l Rule 7.10; IACAC Rules Art. 10.2; UNCITRAL Rules Art. 14.1.

264. See AAA Int'l Rules Art. 15.3; CAMCA Rules Art. 12.1; IACAC Rules Art. 10.3.

265. *Republic of Colombia v. Cauca Co.*, 190 U.S. 524, 527-528 (1903) (confirming arbitral award issued by truncated commission where resignation was manifestly obstructive); *Zeiler v. Deitsch*, 500 F.3d 157, 166-168 (2d Cir. 2007) (arbitration agreement did not

parties have not provided for action by a truncated tribunal, either expressly or by adopting rules that permit such action, the better approach would be to appoint a replacement arbitrator.[266]

4. JURISDICTION (SEE ALSO CHAPTER II.5 – EFFECT OF THE AGREEMENT)

An arbitral tribunal may rule on a challenge to its jurisdiction.[267] However, the Supreme Court has held that there must be "clear and unmistakable evidence" that the parties intended to submit the arbitral jurisdiction question to the arbitral tribunal, otherwise the issue is for the court to decide without deference to the tribunal.[268] On the other hand, if it is clear that the parties intended to

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prevent two remaining arbitrators from rendering valid award after third arbitrator withdrew late in the proceedings).

266. See, e.g., G. Born, *International Commercial Arbitration* 1592 (2009) ("The better analysis, in the absence of an express or implied agreement by the parties to a truncated tribunal, is that the obstructive arbitrator must be replaced and that a truncated tribunal is not permissible…. Any other approach ignores the parties' agreement (to arbitrate before three arbitrators)."); cf. H.M. Holtzmann, "Preventing Delay and Disruption of Arbitration", Proceedings of the Tenth International Arbitration Congress, *ICCA Congress Series No. 5* (1990) at pp. 252-253, 280, 339, 345 (discussing the issue and noting that awards issued by truncated tribunals should be enforced if the parties agreed to such a procedure). For a discussion of courts' authority to appoint replacement arbitrators, see Chapter II.2.

267. See *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995) (summarized in *Yearbook* XXII (1997) p. 278) (parties may contractually agree to arbitrate jurisdictional issues and such agreements must be enforced by courts); see also AAA Int'l Rules Art. 19.1; CAMCA Rules Art. 16.1; CPR Int'l Rule 8.1; IACAC Rules Art. 18.1; UNCITRAL Rules Art. 23.1.

268. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (summarized in *Yearbook* XXII (1997) p. 278). In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002) (summarized in *Yearbook* XXIX (2004) p. 232), the Court explained that a question of arbitral jurisdiction arises "in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* Thus, for example, questions about whether a particular party is bound by an arbitration clause are questions of arbitral jurisdiction presumptively for the courts to decide. However, "'procedural' questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Id.* at 84 (internal quotation marks omitted). Such procedural questions include waiver (see discussion above), delay, time limits, notice, estoppel and other conditions precedent to arbitration. See *id.* at 84-85 (citing 2000 UAA and commentary thereto). In other words, questions of arbitral jurisdiction, properly submitted to a court, are those that ask whether the parties agreed to arbitrate a matter, while questions pertaining to the type of arbitral proceeding the parties agreed to are properly left to the arbitrator. On this reasoning, the Court in *Howsam* held that application of a National Association of Securities Dealers rule imposing a six-year time limit for arbitration was a question presumptively for the arbitrator, not the court, to decide. *Id.* See also *VRG Linhas Aereas S.A. v. MatlinPatterson*

submit the arbitral jurisdiction question for final and binding decision by the arbitral tribunal, then the court should refer the issue to arbitration, and upon an application to enforce the resulting award, review the arbitrators' decision deferentially in the same manner as any other issue submitted to arbitration.[269] Most arbitration rules provide that an objection to a tribunal's jurisdiction must be made promptly.[270]

In the absence of explicit language in the arbitration agreement referring jurisdictional matters to the tribunal, courts must determine whether the parties' agreement provides any other "clear and unmistakable" evidence of an intent to submit questions concerning the scope of arbitral jurisdiction to the arbitrators. Some courts, for example, have held that the explicit incorporation in an arbitration agreement of institutional arbitration rules giving the arbitrator the power to determine his or her own competence is "clear and unmistakable evidence" of the parties' intent to delegate arbitral jurisdiction to the arbitrator.[271] Several courts have also held that broadly worded arbitration

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Global Opportunities Partners II L.P., 717 F.3d 322, 324 (2d Cir. 2013) ("The question of *who* is to decide whether a dispute is arbitrable is one that must necessarily precede the question of *whether* a dispute is arbitrable.").

269. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (summarized in *Yearbook* XXII (1997) p. 278).

270. See AAA Int'l Rules Art. 19.3 (no later than filing of statement of defense); CPR Int'l Rule 8.3 (no later than filing of notice of defense or reply to counterclaim); IACAC Rules Art. 18.4 (same); UNCITRAL Rules Art. 23.2 (same); CAMCA Rules Art. 16.3 (thirty days after commencement of the arbitration or filing the counterclaim).

271. See, e.g., *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017) (finding that "the explicit incorporation of JAMS Rules serves as 'clear and unmistakable' evidence of the parties' intent to arbitrate arbitrability"); *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 73 (2d Cir. 2012) (incorporation of UNCITRAL Rules into arbitration agreement "clearly and unmistakably" referred questions of arbitrability to arbitration panel); *Oracle America Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074-1075 (9th Cir. 2013) (UNCITRAL Rules); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 13 (1st Cir. 2009) (unconscionability decision for arbitral tribunal where parties incorporated AAA rules, but only upon court determination that arbitral remedy not illusory); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878, 880 (8th Cir. 2009) (AAA rules); *Qualcomm Inc. v. Nokia Corp*., 466 F.3d 1366, 1372-1373 (Fed. Cir. 2006) (AAA rules); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (AAA Rules); *Shaw Grp., Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 125 (2d Cir. 2003) (ICC Rules); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996) (NASD Rules); *Apollo Computer v. Berg*, 886 F.2d 469, 473-474 (1st Cir. 1989) (ICC rules). But see *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003) (court must decide whether parties agreed to arbitration clause at all; rule giving arbitrators authority to decide their own jurisdiction "is relevant only if the parties actually agreed to its incorporation"); *Eisen v. Venulum Ltd.*, 244 F. Supp. 3d 324, 338 (W.D.N.Y. 2017) (finding that, under the ICC rules, "only when the party against whom a claim is asserted challenges the validity of an arbitration agreement is the issue of arbitrability decided by the arbitrator"). See also *B.G. Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206 (2014) ("On the one hand, courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about 'arbitrability.' … On the other hand, courts

clauses committing resolution of all disputes to arbitration satisfy the "clear and unmistakable" standard,[272] as long as there is nothing else in the parties' agreement suggesting a contrary intent.[273]

The Supreme Court has stated that "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, i.e., a willingness to be bound by the arbitrator's decision on that point."[274] As other courts have noted, imposing such a waiver would be fundamentally unfair in light of the fact that a party must raise the issue first in the arbitration to preserve it for later court proceedings.[275]

5. APPLICABLE LAW

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) and state arbitration statutes are all silent on whether the arbitrator must act in accordance with the rules of law, and if so, what law should be applied. The question of whether arbitrators are required to decide the substance of a dispute in accordance with the law is first determined by reference to the parties' agreement and any rules to which the parties have agreed. Although the AAA

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presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration.").

272. See, e.g., *Shaw Grp., Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 121-122 (2d Cir. 2003) (submission to arbitration of "all disputes concerning or arising out of" agreement) (internal quotation marks omitted); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199-1200 (2d Cir. 1996) (provision referring to arbitration of "any and all" controversies concerning the agreement).

273. See, e.g., *Katz v. Feinberg*, 290 F.3d 95, 97 (2d Cir. 2002) (the combination of "a broadly worded arbitration clause and a specific clause assigning a certain decision to an independent accountant" creates an ambiguity that requires assigning questions of arbitrability to the district court).

274. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995) (summarized in *Yearbook* XXII (1997) p. 278); see also *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005); *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1171 (11th Cir. 2004) (summarized in *Yearbook* XXX (2005) p. 872); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 290 (3d Cir. 2003).

275. See *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1171 (11th Cir. 2004) (summarized in *Yearbook* XXX (2005) p. 872) (noting unfairness of forcing parties objecting to arbitral jurisdiction to choose between raising objections before arbitrator or court); *China Minmetals Materials Imp. & Exp. Co. Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 290 (3d Cir. 2003) (party did not waive objection to arbitrability when it raised that objection before tribunal). Cf. *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 591 (7th Cir. 2001) (quoting *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000)) ("If a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter."); *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994) (plaintiff could not challenge the authority of the arbitrator because the plaintiff had "initiated the arbitration, attended the hearings with representation, presented evidence, and submitted a closing brief of fifty pages" before filing suit in state court).

Commercial Rules contain no requirement that arbitrators decide in accordance with law, most international arbitration rules do.[276] In cases conducted under these rules, the arbitrators are required to apply the substantive law or laws designated by the parties or, if the parties have not designated the governing law, the law or laws the arbitrators determine to be appropriate.

An important limitation on the parties' ability to choose the applicable law by agreement is that certain US laws – such as the antitrust and securities laws – are nonwaivable by statute or for public policy reasons.[277] An arbitration clause in which parties elected to waive the application of such laws presumably would not be enforced by US courts.[278]

Courts do not scrutinize arbitration awards closely to make sure that the appropriate law has been applied correctly. An award will be set aside only if it is shown that the tribunal exceeded its powers, which is very difficult to prove – even a clear and important error of fact or law provides no basis for setting aside an award.[279]

6. SETTLEMENT

Public policy in the United States favors and encourages settlement of all disputes by the parties themselves, rather than having them resort to judgments of courts or awards of arbitrators. The Federal Arbitration Act (the FAA) (see **Annex I** hereto) and most state arbitration statutes do not address the issue of settlement. Upon the parties' settlement, most arbitral rules call for the termination of the arbitration and empower the tribunal to issue an award reflecting the agreed upon terms.[280] This power is permissive, not mandatory, thereby protecting arbitrators from having to lend their names and reputations to an agreement they believe to be unfair, illegal, improper, or contrary to the public interest.

276. See AAA Int'l Rules Art. 31.1; CAMCA Rules Art. 30.1; CPR Int'l Rule 10.1; IACAC Rules Art. 30.1; UNCITRAL Rules Art. 35.1.
277. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n. 19 (1985) (summarized in *Yearbook* XI (1986) p. 555) (finding that antitrust claims are arbitrable but noting that "in the event the choice-of-forum and choice-of-law clauses operate[] in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy"); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 228, 238-242 (1987) (summarized in *Yearbook* XIII (1988) p. 165) (extending *Mitsubishi* to claims under the Securities Exchange Act and the Racketeer Influenced and Corrupt Organizations Act).
278. *Id.*
279. See Chapter VI.3.*a* below.
280. See AAA Int'l Rules Art. 32.1; CAMCA Rules Art. 31.1; IACAC Rules Art. 31.1; UNCITRAL Rules Art. 36.1.

The practice of engaging the tribunal in settlement negotiations or mediation, common in some other countries, is not routinely practiced in the United States.

7A. CORRECTION AND INTERPRETATION OF THE AWARD

Under the doctrine of *functus officio*, once an arbitral tribunal has rendered a final award, it has no further power and therefore cannot modify or add to the award.[281] There are some exceptions, however, to the doctrine.

First, if the arbitration agreement or applicable arbitration rules provide for modification of the award, then the arbitrators may do so. For example, the AAA International Rules provide that within thirty days after an award is rendered, a party may ask the tribunal "to interpret the award or correct any clerical, typographical, or computation errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award."[282] Other arbitration rules have similar provisions.[283] Second, the laws of some states permit arbitrators to modify their awards upon application of a party.[284] Finally, the Federal Arbitration Act (the FAA) (see **Annex I** hereto) provides that if an award is vacated and the time within which the agreement required for an award to be rendered has not expired, the court may remand the matter for rehearing by the arbitrators.[285] Courts have used this provision, in conjunction with their own power to modify or correct an award,[286] to remand matters for clarification by the tribunal.[287]

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281. See *E. Seaboard Constr. Co., Inc. v. Gray Constr., Inc.*, 553 F.3d 1, 4 n. 2 (1st Cir. 2008); *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982) ("It is [a] fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is functus officio and can do nothing more in regard to the subject matter of the arbitration.") (quoting *La Vale Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967)).
282. AAA Int'l Rules Art. 33.1; see also *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 342-343 (2d Cir. 2010) (arbitrator's authority to correct original award governed by AAA International Rules specified in the arbitration agreement, not by *functus officio* doctrine).
283. See CAMCA Rules Art. 32.1; CPR Int'l Rule 15.5; IACAC Rules Art. 33.1; UNCITRAL Rules Art. 38.1.
284. See 2000 UAA Sect. 20; 1955 UAA Sect. 9.
285. 9 U.S.C. Sect. 10(b).
286. 9 U.S.C. Sect. 11.
287. See, e.g., *U.S. Energy Corp. v. Nukem, Inc*., 400 F.3d 822, 830-831 (10th Cir. 2005) (remanding because tribunal's description of "purchase rights" was vague); *York Research Corp. v. Landgarten*, 927 F.2d 119, 123 (2d Cir. 1991) (remand granted to clarify whether tribunal intended "expenses" to include attorneys' fees); *Mut. Fire, Marine & Inland Ins. Co. v. Norad Reins. Co*., 868 F.2d 52, 58 (3d Cir. 1989) ("A district court itself should not clarify an ambiguous arbitration award but should remand it to the arbitration panel for clarification."); *Oil, Chemical & Atomic Workers Int'l Union v. Rohm & Haas, Inc.*, 677 F.2d 492, 495 (5th Cir. 1982) ("[R]emand to the arbitrator is the appropriate disposition of

7B. ADDITIONAL AWARD

Because arbitrators who have made a final award are considered *functus officio,* they have no power to make an additional award as to claims presented in the arbitral proceedings but omitted from the award, unless the parties have agreed that such an additional award shall be made, or additional awards are permitted by the rules to which the parties have agreed, or a statute so permits.

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) and the UAA include no provisions for additional awards; however, state international arbitration statutes based on the UNCITRAL Model Law permit additional awards unless the parties have otherwise agreed.[288] Some arbitration rules provide that within thirty days of the rendering of an award, a party can request that the tribunal make an additional award concerning claims presented to the tribunal but not addressed in the award.[289]

8. FEES AND COSTS

a. Costs in general

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) contains no provisions concerning allocation of the costs of arbitration. Many state arbitration statutes provide that, unless otherwise agreed by the parties, the arbitration expenses and fees (not including fees of lawyers for the parties) will be paid as set forth in the award.[290] Most arbitration rules have provisions addressing the payment and allocation of arbitration fees and costs.[291]

b. Deposit

Many arbitration rules empower the administering institution and the tribunal to require parties to deposit in advance sums of money that they deem necessary to cover the expenses of the arbitration, including the arbitrators'

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an enforcement action when an award is patently ambiguous, when the issues submitted were not fully resolved, or when the language of the award has generated a collateral dispute."); *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1111 (2d Cir. 1980) (remanding to clarify scope and duration of injunction); *Galt v. Libbey-Owens-Ford Glass Co.*, 397 F.2d 439, 442 (7th Cir. 1968) ("This method [of vacating and directing rehearing pursuant to 9 U.S.C. Sect. 10] commendably avoided any judicial guessing as to the meaning of the award. It did not constitute a judicial invasion of the arbitrators' province but rather served to give the parties what they bargained for—a clear decision from the arbitrators." (internal citations omitted)).

288. See UNCITRAL Model Law Art. 39.1. For a discussion of such statutes see Chapter I.1.*b*.
289. See, e.g., AAA Int'l Rules Art. 33.1; CAMCA Rules Art. 32.1.
290. See, e.g., 2000 UAA Sects. 21(b)–(d); 1955 UAA Sect. 10.
291. See, e.g., AAA Commercial Rules Arts. 53-54, Administrative Fee Schedules; AAA Int'l Rules Arts. 34-35, Administrative Fee Schedules; UNCITRAL Rules Arts. 40-42; CAMCA Rules Art. 33; CPR Int'l Rules 17-19; IACAC Rules Arts. 35-37.

fees.[292] If one party fails to make a requested deposit, the other party may make the entire deposit in order that the arbitration may proceed.[293]

c. Fees of arbitrators

The AAA Administrative Fee Schedules do not include the fee paid to arbitrators. In practice in the United States, fees are usually based largely on the time spent by the arbitrators. To avoid fee discussions between parties and the arbitrators, the AAA International Rules provide that arrangements for fees must be made through the AAA, which will set an hourly or daily rate for the arbitrators based on their customary rates and the size and complexity of the case.[294] The AAA will, upon request of a party, perform similar functions in cases that it conducts under the UNCITRAL Rules.[295] The CAMCA Rules are substantially the same as those of the AAA, while the CPR and IACAC Rules provide a greater role for the arbitrators to set their own fees.[296]

d. Awards on costs, including attorneys' fees

Although the FAA is silent on the awarding of costs in an arbitration, courts have found that arbitrators have discretion to award costs, including attorneys' fees.[297] This contrasts with the practice in US courts, where each party pays the fees of its own counsel. One court has even held that an arbitral tribunal may award attorneys' fees as a sanction for a party's bad faith conduct, notwithstanding a clause in the arbitration agreement that each party would bear its own attorneys' fees.[298]

The 2000 UAA permits a tribunal to award "reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to

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292. See, e.g., AAA Commercial Rules Art. 56; AAA Int'l Rules Art. 36; UNCITRAL Rules Art. 43; CAMCA Rules Art. 35; CPR Int'l Rule 17; IACAC Rules Art. 38.
293. See *id*.
294. See AAA Int'l Rules Art. 35.1.
295. See UNCITRAL Rules Art. 41.
296. See CAMCA Rules Art. 34; CPR Int'l Rule 17.1; IACAC Rules Art. 36. Art. 36 of the IACAC Rules provides criteria for setting the arbitrators' fees, but does not explicitly provide a role for an administrator or other institution in the negotiation or establishment of the fees. The Commentary to CPR International Rule 17 indicates that, in accordance with that rule, the arbitrators set their own fees in agreement with the parties. See Commentary on Individual Rules, available at <https://www.cpradr.org/resource-center/rules/arbitration/non-administered/2007-cpr-non-administered-arbitration-rules >.
297. See *Netknowledge Techs. LLC v. Rapid Transmit Techs.*, 269 F. App'x 443, 444 (5th Cir. 2008) (affirming award of attorneys' fees where the parties' contract authorized arbitrators to award fees and both parties requested fees before the arbitrator); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996) (arbitrators empowered by FAA to award attorneys' fees where parties' agreement did not foreclose such remedy); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064-1065 (9th Cir. 1991) (affirming an attorneys' fees award where one party acted in bad faith).
298. *ReliaStar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81, 88-89 (2d Cir. 2009).

the arbitration proceeding."[299] It also permits courts to award attorneys' fees against the losing party in contested judicial actions to confirm, vacate, modify, or correct an award.[300] The 1955 Act permits the tribunal to apportion arbitration fees and expenses, exclusive of attorneys' fees, in the award, unless otherwise agreed by the parties.[301] Under the rules of several arbitral institutions, the tribunal may apportion the costs, including the prevailing party's reasonable attorneys' fees, among the parties, while taking into account the circumstances of the case.[302]

9. NOTIFICATION OF THE AWARD AND REGISTRATION

The Federal Arbitration Act (the FAA) (see **Annex I** hereto) does not address the delivery of awards, but most state statutes provide that the award is to be delivered to the parties personally or by registered mail, unless otherwise agreed.[303]

Some arbitration rules provide that the administering institution shall transmit the award to the parties,[304] while others provide that the tribunal shall do so.[305] The administering institution or the arbitral tribunal should determine if the state law at the place of arbitration specifies a method for delivery of awards and, if so, should utilize that method unless that law permits parties to choose different methods.

There are no requirements in the FAA or in most state arbitration statutes for registering or filing awards issued in the United States. Notice of awards on patent validity, infringement, or interference must be given to the Director of the US Patent and Trademark Office.[306] Where judgment is entered upon an award, the judgment is filed in the records of the court in the same manner as other judgments of the court and is typically publicly available.[307]

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299. 2000 UAA Sect. 21(b).
300. 2000 UAA Sect. 25(c); see also *Blitz v. Beth Isaac Adas Israel Congregation*, 720 A.2d 912, 918-919 (Md. 1998) (interpreting Maryland's Uniform Arbitration Act to permit awarding attorneys' fees in action to confirm arbitration award).
301. 1955 UAA Sect. 10.
302. See AAA Int'l Rules Art. 34; CAMCA Rules Art. 33; IACAC Rules Art. 35; UNCITRAL Rules Art. 42.
303. See 1955 UAA Sect. 8(a) (notice to be given personally or by registered mail); 2000 UAA Sect. 19(a) (requiring that parties be provided with copy of award but not specifying means permitted for doing so). See also comment 1 to 2000 UAA Sect. 2 (noting that parties may "use systems of notice that become technologically feasible and acceptable, such as fax or electronic mail").
304. See AAA Int'l Rules Art. 30.4; CAMCA Rules Art. 29.5; CPR Int'l Rule 15.4.
305. See IACAC Rules Art. 29.6; UNCITRAL Rules Art. 34.6.
306. See 35 U.S.C. Sect. 135(f) (see **Annex II**).
307. See 9 U.S.C. Sect. 13.

10. ENFORCEMENT OF DOMESTIC AND INTERNATIONAL AWARDS RENDERED IN THE UNITED STATES (SEE ALSO CHAPTER VI – ENFORCEMENT OF FOREIGN ARBITRAL AWARDS)

a. Domestic and non-domestic awards

The precise procedures and standards for enforcing an award rendered in the United States depend upon whether the award is (1) a "non-domestic" award, meaning an award arising from an arbitration that involves a foreign party, involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states,[308] or (2) a domestic award.

A non-domestic award can be enforced in federal court under the New York Convention within three years of issuance.[309] The proceedings can be brought in the federal district court for the district designated as the place of arbitration, if it is within the United States, in the district court where the parties have agreed in the arbitration agreement to the entry of judgment on the award (if any), or in any other district court that satisfies the requirements of the general federal venue statute,[310] so long as personal jurisdiction over the defendant exists.[311]

Domestic awards can be enforced within one year of issuance,[312] and they must be enforced in state courts, unless there is an independent basis for

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308 See *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir.1983) (summarized in *Yearbook* IX (1984) p. 487); *Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir. 1995). See also 9 U.S.C. Sect. 202.

309. 9 U.S.C. Sects. 203, 207; see also Chapter VI.1.*a* below.

310. See 9 U.S.C. Sects. 204, 207 & 302; 28 U.S.C. Sect. 1391 (general federal venue statute). But see *3573522 Canada, Inc. v. N. Country Natural Spring Water, Ltd.*, 210 F.R.D. 544, 545 (E.D. Pa. 2002) (ruling that venue does not lie in district where arbitration occurred if it is not designated as the place of arbitration and the parties lack significant ties to the location and transferring case to district where defendant maintains principal place of business).

311. See Chapter VI.1.*a.i-ii*.

312. 9 U.S.C. Sect. 9 ("If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration … then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award …."). Courts have disagreed over whether the "may apply" language of Sect. 9 is mandatory (meaning that it functions as a statute of limitations) or permissive (meaning that parties can still confirm awards after the time-periods specified). Compare *Photopaint Techs., LLC v. Smartlens Corp.*, 335 F.3d 152, 156-158 (2d Cir. 2003) (FAA Sect. 9 creates mandatory one year time-limit); *In re Consol. Rail Corp.*, 867 F. Supp. 25, 30-32 (D.D.C. 1994) (same), with *Comm'ns. Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 327-328 (D.C. Cir. 2014) (time limit in FAA Sect. 9 is permissive); *Wachovia Sec., Inc. v. Gangale*, 125 F. App'x 671, 676 (6th Cir. 2005) (same); *Val-U Constr. Co. of S.D. v. Rosebud Sioux Tribe*, 146 F.3d 573, 581 (8th Cir. 1998) (same); *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 151-156 (4th Cir. 1993) (same); *Ky. River Mills v. Jackson*, 206 F.2d 111, 120 (6th Cir. 1953) (same); *Kolowski v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, No. 07 C 4964, WL 4372711, at

federal court jurisdiction.[313] In those cases where there is federal subject-matter jurisdiction, the proceedings may be brought in any federal district court that the parties have specified in their agreement to arbitrate, or if no such court is specified, the court for the district in which the award was rendered.[314] They may also be brought in any district in which an action may be brought under the general federal venue statute.[315] Where the basis of federal court subject matter jurisdiction is diversity of citizenship, under 28 U.S.C. Sect. 1332,[316] the action must also satisfy the "amount in controversy" requirement under that statute,[317] though courts disagree about whether to look to the initial amount demanded in the arbitration or the amount of the ultimate award to determine the relevant "amount in controversy."[318]

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*2 (N.D. Ill., Mar. 20, 2008) *Optimal Markets Inc. v. FTI Consulting, Inc.*, Case No. 08-5765 SC, WL 12639912, at *1 (N.D. Cal., Jan. 28, 2014) (same).

313. See Chapter I.1.*c*.

314. See 9 U.S.C. Sects. 9-11.

315. See *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000) (Sects. 9-11 of the FAA allow application of general venue statute).

316. 28 U.S.C. Sect. 1332(a) provides, in relevant part, that "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of US$ 75,000, exclusive of interest and costs, and is between – (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state … ; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States."

317. 28 U.S.C. Sect. 1332(b).

318. It has been said that courts use three different methods to calculate the amount in controversy: the "award" method, the "demand" method, and the "remand" or "mixed" method. See *Karsner v. Lothian*, 532 F.3d 876, 882 (D.C. Cir. 2008). Under the "award" method, the court relies on the amount of the arbitral award. See, e.g., *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1472 (11th Cir. 1997) (when the remedy sought was vacatur of an award of US$ 36,284.69, "[d]iversity jurisdiction did not exist because it was a 'legal certainty' that the amount in controversy was less than $ 50,000, the amount required for federal diversity jurisdiction at the time the [plaintiffs] filed suit"). Under the "demand" method, the court uses the amount sought in the arbitration demand or the original complaint, regardless of the amount actually granted. See *Pershing, L.L.C. v. Kiebach*, 819 F.3d 179, 183 (5th Cir. 2016) (concluding that the amount in controversy [should be] measured the same way in federal court for litigation and for matters submitted on petitions to compel arbitration: [by looking at] the plaintiff's pleading"); *Karsner v. Lothian*, 532 F.3d 876, 884 (D.C. Cir. 2008) (using the amount sought in the underlying arbitration to determine the amount in controversy for diversity purposes); *Smith v. Tele-Town Hall, LLC*, 798 F. Supp. 2d 748, 752-756 (E.D. Va. 2011) (concluding "that the demand approach is soundest because it avoids anomalous and unwarranted inconsistencies in a federal court's jurisdiction"). Under the "remand" or "mixed" method, the court uses the "demand" method if the petitioner is seeking to reopen the arbitration hearing and have the tribunal reconsider the award, and the "award" method if the petitioner is not. See, e.g., *Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc.,* 431 F.3d 1320, 1325 (11th Cir. 2005) ("[A] federal court has subject matter jurisdiction where a party seeking to vacate an arbitration award is also seeking a new arbitration hearing at which he will demand a sum which exceeds the amount in controversy for diversity jurisdiction purposes."); see also *Smith v. Tele-Town Hall, LLC*, 798 F. Supp. 2d 748, 753 n. 6 (E.D. Va. 2011) (noting the

b. Procedure

The procedure to initiate proceedings to confirm or enforce an award (and similarly to vacate one) is straightforward. It requires, in addition to filing an application for an order of the court, filing with the clerk of the court copies of basic documents such as the agreement, the award, and any court order modifying or correcting the award.[319] When the court enters its final decision confirming an award – commonly called "judgment on the award" – it has the same force and effect, in all respects, as a judgment in a lawsuit in the same court, and it may be enforced as if it were a judgment rendered in a lawsuit in that court.[320] In other words, the award has been transformed into a judgment of the court.

A court's order or judgment confirming or vacating an award can be appealed in the same manner as any other judgment of the court.[321]

11. PUBLICATION OF THE AWARD

Commercial arbitration is considered a private procedure, and awards in the United States are usually not published, except for some maritime awards. This practice is in contrast to labor awards, which are commonly published. The AAA has a strong tradition of maintaining the privacy of parties in commercial arbitration cases and, unless authorized by the parties, will not publish an award or anything that would associate a party with an award. Similarly, arbitrators are expected not to publicly disclose awards, except with permission of all parties.[322] This concern with privacy does not prevent publication of summaries of awards that do not identify the parties. Unlike the laws of some other countries, however, US law does not require the parties to an arbitration to keep the arbitration or award confidential, absent an agreement between the parties to that effect.[323] An agreement that an award is confidential does not

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questionable precedential value of *Baltin* and the "award" method given the subsequent Eleventh Circuit decision in *Peebles*).

319. 9 U.S.C. Sect. 13; see also NY Convention Art. IV (requiring presentation of award and written arbitration agreement at time of application to court for recognition and enforcement); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 (11th Cir. 2004) (noting mandatory requirements of New York Convention Art. IV and holding that conformity with such requirements is necessary to obtain jurisdiction of the court).

320. See 9 U.S.C. Sect. 13. See also, e.g., 2000 UAA Sects. 22, 25; 1955 UAA Sects. 11, 14 and 15.

321. See 9 U.S.C. Sect. 16(a)(1)(D)-(E).

322. See Canon VI.C., Code of Ethics for Arbitrators in Commercial Disputes, cited in Chapter III.1 above.

323. Neither the FAA nor the US Federal Rules of Civil Procedure requires or otherwise addresses confidentiality. *See* Restatement (Third) of the U.S. Law of International Commercial and Investor-State Arbitration, § 3-11, Reports' Note (b)(i) ("Only a handful of cases have addressed whether an arbitration agreement includes an implied confidentiality obligation, and they have consistently rejected such a contention."); *see also*

prevent public disclosure of the award if legally required (for example, by the disclosure requirements of the securities laws) or if necessary to enforce the award.[324]

When an award is sought to be enforced or vacated in court, it will typically become publicly available, as with most documents filed in connection with litigation in the United States.

Chapter VI. Enforcement of Foreign Arbitral Awards

1. ENFORCEMENT UNDER CONVENTIONS AND TREATIES

The law in the United States favors the recognition and enforcement of agreements to arbitrate in other countries and of arbitral awards rendered abroad.

a. Conventions in Force

i. Multilateral conventions

The New York Convention

The United States is a signatory to the New York Convention, subject to the reservations that the Convention is applicable only to (1) awards made in the territory of a signatory to the Convention, and (2) disputes arising out of contractual or other commercial relationships.[325] US courts have strongly and consistently given effect to the New York Convention, which has been implemented by enactment of Chap. 2 of the Federal Arbitration Act (the FAA) (see **Annex I** hereto).[326]

Filip de Ly, Mark Friedman & Luca Radicati di Brozolo, *International Law Association International Commercial Arbitration Committee's Report and Recommendations on Confidentiality in International Commercial Arbitration*, 28 Arb. Int'l 355, 365 (2012) ("[N]either the Federal Arbitration Act nor the Uniform Arbitration Act impose a confidentiality obligation on the parties. The position of the courts is that, unless the parties' agreement or applicable arbitration rules provide otherwise (and even then the result is far from certain), there is no requirement under US law for the arbitration proceedings and matters transpiring within them to be treated as confidential by the parties.").

324. See Chapter IV.8 above.
325. See Presidential Proclamation, 21 U.S.T. 2517, 2560, T.I.A.S. No. 6997 (11 December 1970); see also New York Convention, Art. I(3) (directly authorizing the restriction); 9 U.S.C. Sect. 202 (restricting the application of the Convention to differences arising out of foreign commercial legal relationships).
326. 9 U.S.C. Sects. 201-208; see also Chapter I.1.*a* above.

Other conventions

The United States is also a party to the Panama Convention, which has been implemented by enactment of Chap. 3 of the FAA.[327] Like the New York Convention, the Panama Convention ensures enforcement of arbitration agreements and awards, and the implementing legislation provides for federal jurisdiction.[328] In cases in which the Panama and New York Conventions may both apply, the latter will apply unless a majority of the parties to the arbitration are citizens of states that have ratified the Panama Convention and are members of the Organization of American States.[329]

FAA Chap. 3 expressly incorporates the provisions of FAA Chap. 2 relating to the New York Convention, including Sect. 202's definition of "non-domestic" agreements and awards as those involving a foreign party, involving property located abroad, envisaging performance or enforcement abroad, or having some other reasonable relation with one or more foreign states.[330] Thus, the Panama Convention, like the New York Convention, applies to "non-domestic" awards rendered in the United States but foreign in character.[331] In addition, the grounds for resisting enforcement of an award enumerated in Arts. 5 and 6 of the Panama Convention are nearly identical to those listed in the New York Convention. As a result, case law concerning the enforcement of awards under the New York Convention is often equally applicable in Panama Convention enforcement proceedings.[332]

The Panama Convention provides that unless the parties agree otherwise, arbitration shall be conducted under the IACAC Rules of Procedure.[333]

327. 9 U.S.C. Sects. 301-307. The text of the Convention is also reproduced in the ICCA *International Handbook on Commercial Arbitration* as Annex I to the "General Introduction on Inter-American Arbitration".
328. See 9 U.S.C. Sects. 203, 205, 302.
329. See U.S.C. Sect. 305; see also *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1371 (S.D. Fla. 2003).
330. See 9 U.S.C. Sect. 302. Chap. 3 also permits residual application of FAA Chap. 1 pertaining to domestic arbitrations to the extent that Chap. 1's terms do not conflict with the Panama Convention. See 9 U.S.C. Sect. 307.
331. See *Emp'rs Ins. of Wausau v. Banco de Seguros del Estado*, 199 F.3d 937, 941-942 (7th Cir. 1999); *Productos Mercantiles E Industriales v. Faberge USA, Inc.*, 23 F.3d 41, 44-45 (2d Cir. 1994); *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1372 (S.D. Fla. 2003).
332. See, e.g., *Emp'rs Ins. of Wausau v. Banco de Seguros del Estado*, 199 F.3d 937, 942-944 (7th Cir. 1999) (relying on New York Convention case law to comprehend analogous provisions in the Panama Convention); *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994); *Empresa Constructora Contex Limitada v. Iseki, Inc.*, 106 F. Supp. 2d 1020, 1024 (S.D. Cal. 2000); *Trans. Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 294 n. 122 (S.D. Tex. 1997); *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 105 (2d Cir. 2016).
333. For the full text of these Rules, see ICCA *International Handbook on Commercial Arbitration*, "General Introduction to Inter-American Commercial Arbitration", Annex II. For a useful analysis of the Panama Convention, see A.J. van den Berg, *The New York*

Because adoption of the Panama Convention thus incorporates the IACAC Rules into US law, the US Congress was concerned, for both policy and constitutional reasons, that any future modification of the IACAC Rules might automatically become United States law. Accordingly, FAA Chap. 3 states that for the purpose of ratification of the Panama Convention, the IACAC Rules of Procedure are those in effect on 1 July 1988.[334] To provide flexibility for future modification of the IACAC Rules, however, FAA Chap. 3 provides that if IACAC amends or modifies its Rules, the Secretary of State of the United States, "consistent with the aims and purposes of … [the] Convention, may prescribe that such modifications or amendments shall be effective for purposes of [US law]".[335] IACAC amended its Rules effective in 1998, and the Department of State adopted the amended Rules as binding US law on 1 April 2002.[336]

The United States is also a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington, 1965) (ICSID Convention). An arbitral award issued under the ICSID Convention is directly enforceable in the United States in the same manner as a judgment of a US state court.[337] Treaty arbitration in the United States is discussed in Chapter IX below.

The United States is not a party to the Geneva Protocol on Arbitration Clauses (1923), the Geneva Convention on the Execution of Foreign Arbitral Awards (1927), or the European Convention on International Commercial Arbitration (1961).

ii. Bilateral treaties

The United States is a party to over thirty bilateral treaties, usually known as Treaties of Friendship, Navigation, and Commerce,[338] some of which provide

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Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?, 3 Arb. Int'l (1989) p. 214.

334. 9 U.S.C. Sect. 306.

335. 9 U.S.C. Sect. 306.

336. 22 C.F.R. Sect. 194.1.

337. See 22 U.S.C. Sect. 1650a(a) ("An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID] convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention."); see also *Liberian E. Timber Corp. v. Gov't of the Republic of Liberia*, 650 F. Supp. 73, 76 (S.D.N.Y. 1986) (summarized in *Yearbook* XIII (1988) pp. 661-667), aff'd, 854 F.2d 1314 (2d Cir. 1987).

338. See US Dep't of State, Office of the Legal Adviser, Treaties in Force on 1 January 2018, available at <www.state.gov/documents/organization/282222.pdf>. These treaties go by a variety of additional names including "Treaty of Amity, Economic Relations, and Consular Rights" between the Unites States and Iran and the "Treaty of Amity and Economic Relations" between the United States and Vietnam. The United States Department of

that the enforcement of arbitration awards will not be refused on the ground that the arbitration took place abroad or because of the nationality of the arbitrators.[339] Such treaties with Japan, the Federal Republic of Germany and Denmark have been referred to in court decisions that enforced arbitration awards.[340] Reliance on these treaties should rarely be necessary, as most countries are currently parties to the New York Convention.

There also has been an explosion of bilateral investment treaties in recent years. The United States is a party to forty-one such active treaties, many of which provide for investor-state dispute resolution and for enforcement of arbitral awards under the New York Convention, the Panama Convention or the ICSID Convention, as applicable.[341]

b. Procedure

By its terms, the New York Convention governs the enforcement of all awards "made in the territory of a [signatory] State other than the State where the recognition and enforcement [is] sought" and to awards "not considered as domestic awards in the State where their recognition and enforcement [is] sought".[342] In addition to awards, arbitration agreements themselves may also be enforced under the New York Convention.[343]

Commerce maintains links to the majority of these treaties. See US Dep't of Commerce, List All Trade Agreements, <tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp>.

339. The treaties entered into with the following countries contain such provisions: Ireland, Greece, Israel, Italy, Denmark, Japan, the Federal Republic of Germany, Iran, The Netherlands, Korea, Pakistan, Belgium, Luxembourg, Togo, and Thailand. See Treaty of Friendship, Commerce, and Navigation, Ir.-U.S., Art. X, 21 Jan. 1950, Treaty Series 7; Treaty of Friendship, Commerce, and Navigation, Greece-U.S., Art. VI, 26 Dec. 1951, TIAS 3057; Treaty of Friendship, Commerce, and Navigation, Isr.-U.S., Art. V, 23 Aug. 1951; Treaty of Friendship, Commerce, and Navigation, It.-U.S., Art. VI, 2 Feb. 1948; Treaty of Friendship, Commerce, and Navigation, Den.-U.S., Art. V, 1 Oct. 1951; Treaty of Friendship, Commerce, and Navigation, Japan-U.S., Art. IV, 9 Apr. 1953, TIAS 2863; Treaty of Friendship, Commerce, and Navigation, Ger.-U.S., Art. VI, 29 Oct. 1954, U.N.T.S. 3943; Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Art. III, 15 Aug. 1955, TIAS 3853; Treaty of Friendship, Commerce, and Navigation, Neth.-U.S., Art. V, 27 Mar. 1956; Treaty of Friendship, Commerce, and Navigation, S. Kor.-U.S., Art. V, 28 Nov. 1956; Treaty of Friendship and Commerce, Pak.-U.S., Art. V, 12 Nov 1959; Treaty of Friendship, Establishment, and Navigation, Belg.-U.S., Art. III, 21 Feb. 1961, U.N.T.S. 6967; Treaty of Friendship, Establishment, and Navigation, Lux.-U.S., Art. III, 23 Feb. 1962; Treaty of Amity and Economic Relations, Togo-U.S., Art. III, 8 Feb. 1966; Treaty of Amity and Economic Relations, Thai.-U.S., Art. II, 29 May 1966; see also Henry P. DeVries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 Tul. L. Rev. 42, 55 n. 56 (1982).

340. *In re Fotochrome, Inc.*, 377 F. Supp. 26, 29-33 (E.D.N.Y. 1974) (Japan); *Landegger v. Bayerische Hypotheken und Wechsel Bank*, 357 F. Supp. 692, 694-95 (S.D.N.Y. 1972) (Germany); *Sumaza v. Coop. Ass'n*, 297 F. Supp. 345, 349-50 (D.P.R. 1969) (Denmark).

341. See Chapter IX below.

342. N.Y. Convention Art. I; 9 U.S.C. Sect. 202.

343. N.Y. Convention Art. II; 9 U.S.C. Sect. 202.

As implemented by the FAA in Sect. 202, the New York Convention also governs the enforcement of arbitration agreements and awards "arising out of ... a relationship which is entirely between citizens of the United States ... [if] that relationship involves property located abroad, envisages performance or enforcement abroad or has some other reasonable relation with one or more foreign states".[344] Awards rendered in the United States are "not considered as domestic" if they are "pronounced in accordance with foreign law or involv[e] parties domiciled or having their principal place of business" outside the United States.[345] Consequently, the Convention can apply to awards rendered in the United States but in an arbitration between non-US parties[346] or in an arbitration involving US parties where performance of the underlying contract is or was to occur abroad.[347] An agreement by US parties to arbitrate in a foreign nation that is a signatory to the New York Convention, however, will not be governed by the Convention if the relationship giving rise to the arbitration has no reasonable connection with the foreign State.[348]

The provisions of the New York Convention are largely similar to the provisions of the FAA that are applicable to all arbitrations. One difference is that a party has three years (rather than one) to enforce an award governed by the New York Convention.[349] A second difference is that federal courts have jurisdiction over the enforcement of any arbitration agreement or award governed by the New York Convention.[350]

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344. 9 U.S.C. Sect. 202.
345. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983) (summarized in *Yearbook* IX (1984) p. 487).
346. *Id.* See also *Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir. 1995).
347. *Lander Co. v. MMP Investments, Inc.*, 107 F.3d 476, 482 (7th Cir. 1997) (summarized in *Yearbook* XXII (1997) p. 1049); see also *Jacada, Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 708-709 (6th Cir. 2005) (arbitral award rendered in Michigan was "non-domestic" because the relationship between the parties concerned performance abroad, one of the parties was not a US citizen, the contract was signed abroad, and alleged breach took place outside the United States), rev'd on other grounds by *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Freudensprung v. Offshore Tech. Servs.*, 379 F.3d 327, 340-341 (5th Cir. 2004)
348. See *Jones v. Sea Tow Servs. Freeport NY Inc.*, 30 F.3d 360, 365-366 (2d Cir. 1994) (summarized in *Yearbook* XX (1995) p. 994); *Matabang v. Carnival Corp.*, 630 F. Supp. 2d 1361, 1365-1367 (S.D. Fla. 2009); *Armstrong v. NCL (Bah.), Ltd.*, 998 F. Supp. 2d 1335, 1338-1339 (S.D. Fla. 2013); *Ensco Offshore Co. v. Titan Marine L.L.C.*, 370 F. Supp. 2d 594, 601 (S.D. Tex. 2005) (refusing to find subject matter jurisdiction under the New York Convention for case involving US parties where disputed property was located in international waters).
349. Compare 9 U.S.C. Sect. 207 (three years) with 9 U.S.C. Sect. 9 (one year); see also *Photopaint Techs., LLC v. Smartlens Corp.*, 335 F.3d 152, 158 (2d Cir. 2003); Chapter V.10 above.
350. See 9 U.S.C. Sects. 203, 205; *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 (2d Cir. 2005) ("[B]y statute, district courts have subject matter jurisdiction over cases brought to enforce arbitration awards issued under the [New York] Convention." (internal citation omitted)); *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005) ("A case covered by the Convention confers federal subject matter jurisdiction upon a district court because

A court asked to enforce an award under the New York Convention must also have personal jurisdiction over the person (or property) against whom enforcement is sought.[351] Although one court has hinted that an arbitration clause containing a generalized entry of judgment clause might serve as a waiver of personal jurisdiction defenses, most courts have required an independent showing of personal jurisdiction.[352] In order to enforce an award against a person or entity, that person must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[353] This standard is usually easily satisfied if there is some connection between the dispute and the United States.[354] However, when the dispute has no connection with the United States, a court may refuse to enforce the award, even where the party against

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such a case is deemed to arise under the laws and treaties of the United States.") (quotation marks omitted); *Bendlis v. NCL (Bah.), Ltd.*, 112 F. Supp. 3d 1339, 1342-1345 (S.D. Fla. 2015). See also Chapter V.10 above.

351. See *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Rep.*, 582 F.3d 393, 397 (2d Cir. 2009) ("[The New York Convention] does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought."); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 212 (4th Cir. 2002); *Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 126-127 (D.C. Cir. 1999); *First Inv. Corp. v. Fujian Mawei Shipbuilding Ltd.*, 703 F.2d 742, 744-757 (5th Cir. 2012).

352. Compare *Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202, 207-208 (2d Cir. 2003) (remanding to district court to consider whether entry of judgment clause permitting "[j]udgment on an award ... in any court having appropriate jurisdiction" and waiving "any defense of sovereign immunity or similar defense", constitutes consent to jurisdiction) with *Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 126-27 (D.C. Cir. 1999) (mere agreement to arbitrate under ICC rules does not constitute waiver of personal jurisdiction defenses).

353. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Courts generally examine minimum contacts with respect to the state in which they sit. See, e.g., *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 212-213 (4th Cir. 2002); *Crescendo Mar. Co. v. Bank of Communs. Co*., 2016 U.S. Dist. LEXIS 21824, at *11-29 (S.D.N.Y. 2016). But see *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 267 F. Supp. 2d 1335, 1348 (S.D. Fla. 2003) (summarized in *Yearbook* XXI (2004) p. 882), vacated on other grounds, 377 F.3d 1164 (11th Cir. 2004) (summarized in *Yearbook* XXX (2005) p. 872) (jurisdiction over a party in a petition to confirm New York Convention award can be obtained under Fed. R. Civ. P. 4(k)(2), based on contacts with the United States as a whole); see also *Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202, 207 (2d Cir. 2003) (suggesting, but not deciding, that jurisdiction could be proper under Rule 4(k)(2)).

354. See, e.g., *Gen. Elec. v. Deutz AG*, 270 F.3d 144, 150-152 (3d Cir. 2001) (German corporation's "purposeful direction" of business activity in the forum sufficient to confer personal jurisdiction to enforce award); *Nw. Airlines, Inc. v. R&S Co. S.A.*, 176 F. Supp. 2d 935 (D. Minn. 2001) (court had jurisdiction to compel arbitration where contract was negotiated in the United States); *Walker & Zanger (W. Coast) Ltd. v. Stone Design S.A.*, 4 F. Supp. 2d 931 (N.D. Cal. 1997) (upholding default judgment against foreign company where company had "substantial contacts" with forum, despite fact that parties' contract called for arbitration in France).

whom enforcement is sought engages in commercial relations with United States entities.[355]

Increasingly, United States courts are reluctant to find that they have personal jurisdiction over foreign parties that have limited contacts with the United States. Recently, in *Daimler AG v. Bauman*, the Supreme Court found that, in order for personal jurisdiction to be exercised over a foreign corporation on a cause of action unrelated to the corporation's transaction of business in the United States, that corporation must have contacts with the jurisdiction where the case is proceeding that are so "continuous and systematic" as to render it "at home" in the jurisdiction.[356] It remains to be seen what the ramifications of this decision will be, but there is evidence that personal jurisdiction is becoming increasingly circumscribed in the United States as a result of the *Daimler* ruling, with courts requiring greater evidence of a foreign defendant's contacts with the US jurisdiction.[357] It is unclear, however, whether *Daimler* will affect enforcement of arbitral awards against a foreign party where the underlying dispute has no nexus with the United States. The enforcement of an arbitral award often involves nothing more than the presence of assets in the United States and presents different considerations than a case like *Daimler* in which a plaintiff seeks to litigate the merits of the underlying dispute in a US court.

Parties should generally be able to enforce awards against property in the United States.[358] Even where personal jurisdiction exists, however, some courts may refuse to enforce an award under the doctrine of *forum non conveniens*, i.e., that the dispute over enforceability of an award is more conveniently litigated elsewhere, although the application of this doctrine to the enforcement of arbitral awards is controversial.[359]

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355. See, e.g., *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1125-1126 (9th Cir. 2002) (regular shipments of considerable amounts of rice through port of San Francisco insufficient to obtain jurisdiction to enforce an unrelated award); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 214-215 (4th Cir. 2002) (shipment of aluminium to Maryland port insufficient to establish jurisdiction); *Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118,127-128 (D.C. Cir. 1999) (contract with United States entity for performance abroad and sporadic contacts resulting from that contract insufficient to establish personal jurisdiction to enforce award).

356. *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014).

357. See generally, *Sonera Holding B.V. v. Çukurova Holding A.S.*, 750 F.3d 221 (2d Cir. 2014).

358. See *CME Media Enterprises B.V. v. Zelezny*, No. 01 CIV. 1733(DC), 2001 WL 1035138 (S.D.N.Y. 2001) (enforcing arbitral award on the basis of *quasi in rem* jurisdiction to the extent of respondent's assets).

359. See *Figueiredo Ferraz v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011); *TermoRio S.A. E.S.P. v. Electrificadora del Atlantico S.A.*, 421 F. Supp. 2d 87, 103-104 (D.D.C. 2006). But see *Figueiredo Ferraz v. Republic of Peru*, 665 F.3d 384, 397 (2d Cir. 2011) (Lynch, J., dissenting) ("Given that forum non conveniens is not listed as a defense to enforcement in either the New York or the Panama Convention, a strong case can be made that, by acceding to the treaties, the United States has made the doctrine inapplicable to enforcement proceedings that they govern. Moreover, because forum non conveniens is a

Venue must also be proper. FAA Sect. 204, which governs venue in actions to confirm foreign awards and differs somewhat from the provisions applicable to domestic awards, provides:

> "An action or proceeding over which the district courts have jurisdiction ... may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States."[360]

While this section permits parties to select venue in a manner consistent with the federal venue statute, 28 U.S.C. Sect. 1391, at least one court has interpreted the language of Sect. 204 to mean that venue does not lie in the district where the arbitration occurred if the parties have no significant ties to that district apart from the fact that the arbitration occurred there, unless their contract specifically designates a place in the district as the place of arbitration.[361]

When considering the effect of entry-of-judgment clauses on personal jurisdiction, it is important to note that under US law, parties can agree by contract to submit to personal jurisdiction and to waive objections to venue.[362] Thus, a clause that provides for entry of judgment in a particular court will be deemed a valid submission by the parties to the personal jurisdiction of that court and agreement to the venue. Similarly, courts have held that an agreement to arbitrate at a particular seat constitutes an agreement by the parties to be subject to the jurisdiction of the court of that seat for purposes of enforcing the agreement to arbitrate or the arbitral award.[363]

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discretionary doctrine ... its application in these circumstances would seem to dramatically undercut the treaty drafters' efforts to foster confidence in the reliability and efficacy of international arbitration.").

360. 9 U.S.C. Sect. 204.
361. See 3573522 *Canada, Inc. v. N. Country Natural Spring Water, Ltd.*, 210 F.R.D. 544, 545 (E.D. Pa. 2002).
362. See, e.g., *Mirofibres, Inc. v. McDevitt-Askew*, 20 F. Supp. 2d 316, 322 (D.R.I. 1998) ("The great weight of authority is to the effect that a defendant may waive her right to challenge personal jurisdiction through a contract such as the one at issue here.").
363. See, e.g., *Scandinavian Reins. Co., Ltd. v. St. Paul Fire & Marine Ins. Co.*, 732 F. Supp. 2d 293, 305 (S.D.N.Y. 2010) ("[W]hen parties enter into an agreement to arbitrate in a particular forum, they consent to personal jurisdiction in the courts of that forum."); *Menorah Ins. Co., Ltd. v. INX Reins. Corp.*, 72 F.3d 218, 222 n. 6 (1st Cir. 1995) ("[A] forum selection clause, even one for arbitration, confers personal jurisdiction ...."); *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 363 (2d Cir. 1964) (by agreeing to arbitrate in New York, defendant "must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York"); *TransAtlantic Lines LLC v. Amergent Techs, LLC*, 2017 U.S. Dist. LEXIS 2217, at *10 (S.D.N.Y. 2017) ("Amergent is correct that an agreement to arbitrate in New York could support personal jurisdiction for a lawsuit in New York compelling compliance

The grounds for refusing to enforce an award under the New York Convention, enumerated in Art. V of the Convention, are not identical to the grounds for vacating an award under Chap. 1 of the FAA, which applies to awards rendered in the United States. Courts nevertheless tend to find instructive cases construing similar provisions in the FAA and the Convention.[364] Art. V of the Convention and the US implementing legislation both provide that enforcement of an award may be refused only if the party resisting enforcement establishes one of the defenses set forth in Art. V.[365] US courts have construed these defenses narrowly and have held that they represent the exclusive means for challenging a foreign award.[366]

The bases for refusing enforcement of an award under the New York Convention are discussed below.

(1) Incapacity of the parties or invalidity of the arbitration agreement

Art. V(1)(a) of the Convention permits courts to refuse enforcement of an award when a party contests the existence of a valid arbitration agreement.[367] This is because "the Convention contemplates that a court should enforce only valid agreements to arbitrate and only awards based on those agreements".[368] Thus a challenging party is entitled to a *de novo* review by a federal district

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with that agreement"). But see *Johns v. Taramita, Inc.*, 132 F. Supp. 2d 1021, 1028-1029 (S.D. Fla. 2001) (noting that "Florida law differs from that of other states in that it does not confer personal jurisdiction upon a court simply because the parties have executed a forum selection clause" but noting that "most other jurisdictions" would find agreement to arbitrate sufficient to waive personal jurisdiction defense).

364. See, e.g., *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1442, n. 10 (11th Cir. 1998); *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 976 (2d Cir. 1974) (summarized in *Yearbook* I (1976) p. 205) (noting that Art. V(1)(C) of the New York Convention "tracks in more detailed form Sect. 10(d) of the Federal Arbitration Act").

365. See 9 U.S.C. Sect. 207; *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004) (summarized in *Yearbook* XXX (2005) p. 872); *Four Seasons Hotels and Resorts B.V. v. Consorcio Barr, S.A.*, 613 F. Supp. 2d 1362, 1366 (S.D. Fla. 2009) (summarized in *Yearbook* XXXIV (2009) p. 1088); *CEEG (Shanghai) Solar Sci. & Tech. Co. v. Lumos LLC*, 829 F.3d 1201, 1206 (10th Cir. 2016).

366. See, e.g., *Bayer Cropscience AG v. Dow Agrosciences LLC*, 2016 U.S. Dist. LEXIS 5571, at *15 (E.D.Va. 2016); *Seung Woo Lee v. Imaging3, Inc.*, 283 F. App'x 490, 492 (9th Cir. 2008); *Gulf Petro Trading Co., Inc., v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742, 746-747 (5th Cir. 2008); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997) (summarized in *Yearbook* XXIII (1998) p. 1058); *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 851 (6th Cir. 1996).

367. See N.Y. Convention Art. V(1)(a) (Recognition and enforcement of the award may be refused if "[t]he parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made….").

368. *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 286 (3d Cir. 2003).

court of the arbitral tribunal's jurisdiction as long as there is no "clear and unmistakable evidence" that the parties intended to submit the arbitrability question to the arbitral tribunal.[369]

(2) Absence of proper notice

Art. V(1)(b) of the Convention provides that an award may be refused enforcement at the behest of a party who was never notified of the arbitration proceedings.[370] One federal appeals court has held that Art. V(1)(b)'s notice requirement affords a party the right to notice consistent with due process in the arbitral forum, but does not require notice to meet a US forum state's statutory requirements for service of process.[371] US courts will not refuse enforcement of awards if parties comply with notice procedures specified in arbitration agreements.[372] Art. V(1)(b) was invoked successfully in a case in which a claimant sought enforcement of an award *in rem* against a ship previously owned by the respondent in the arbitration. Since the mortgagee of the ship had not been adequately notified of the arbitration, the award could not be enforced to defeat its interest in the vessel.[373] A court has also denied enforcement of an award because a plaintiff did not give the defendant sufficient notice of the arbitration in a language that the defendant understood.[374] If a party has notice of an arbitration, however, refusing to participate in an arbitration is a dangerous course, since courts have enforced default awards against absent parties.[375]

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369. See *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 281, 289 (3d Cir. 2003) (citing *First Options v. Kaplan*, 514 U.S. 938, 943 (1995) (summarized in *Yearbook* XXII (1997) p. 278)); see also Chapter V.4 above (discussing the power of a tribunal to determine its own jurisdiction).

370. N.Y. Convention Art. V(1)(b) (Recognition and enforcement of the award may be refused if "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case….").

371. See *Emp'rs Ins. of Wausau v. Banco de Seguros del Estado*, 199 F.3d 937, 942-944 (7th Cir. 1999).

372. See *Intel Capital (Cayman) Corp. v. Shan Yi*, 2015 U.S. Dist. LEXIS 153495, at *7 (E.D. Mich. 2015); *First State Ins. Co. v. Banco de Seguros Del Estado*, 254 F.3d 354, 357 (1st Cir. 2001); *Ferrara SpA v. United Grain Growers, Ltd.*, 441 F. Supp. 778, 782-783 (S.D.N.Y. 1977).

373. See *Sesostris, S.A.E. v. Transportes Navales*, S.A., 727 F. Supp. 737, 741-743 (D. Mass. 1989) (summarized in *Yearbook* XVI (1991) p. 640).

374. See *Qingdao Free Trade Zone Genius Int'l Trading Co. v. P & S Int'l, Inc*., No. 08-1292-HU, 2009 WL 2997184, at *3-5 (D. Or. 2009) (no adequate notice where documents US company received did not explain in English that an arbitration had been initiated against it by a Chinese counterparty and did not provide the names of the parties, the amount in dispute or the relevant deadlines for the proceedings).

375. See, e.g., *Consorcio Rive, S.A. v. Briggs of Cancun, Inc.*, 82 F. App'x 359, 364 (5th Cir. 2003); *Emp'rs Ins. of Wausau v. Banco de Seguros del Estado*, 199 F.3d 937, 946 (7th Cir. 1999); *Energoinvest DD v. Democratic Republic of Congo*, 355 F. Supp. 2d 9, 12 (D.D.C. 2004); *Geotech Lizenz AG v. Evergreen Sys., Inc.*, 697 F. Supp. 1248, 1253 (E.D.N.Y. 1988); *Biotronik Mess-und Therapiegeräete GmbH v. Medford Med. Instrument Co.*, 415

(3) Inability to present one's case

Art. V(1)(b) also allows a court to refuse enforcement if a party has been prevented from presenting its case. This provision is intended to permit an enforcing country "to apply its own standard of due process".[376] Under this standard, US courts have held that a fundamentally fair hearing is one that "meets the minimal requirements of fairness – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator".[377] These statements should not be taken to mean that the parties to an arbitration must have the benefit of the same procedures that would be required in a court.[378] To the contrary, courts recognize that "[b]y agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights ... in favor of arbitration 'with all of its well known advantages and drawbacks.'"[379] For example, an arbitrator's

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F. Supp. 133, 140 (D.N.J. 1976) (summarized in *Yearbook* II (1977) p. 250); *Yukos Capital S.A.R.L. v. Samaraneftegaz*, 963 F. Supp. 2d 289, 297 (S.D.N.Y. 2013).

376. *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier* (RAKTA), 508 F.2d 969, 975 (2d Cir. 1974) (summarized in *Yearbook* I (1976) p. 205); see also *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 298 (5th Cir. 2004) ("Article V(1)(b) 'essentially sanctions the application of the forum state's standards of due process….'") (quoting *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992) (quoting Parsons)); *BSH Hausgeräte GMBH v. Kamhi*, 282 F. Supp. 3d 668, 673 (S.D.N.Y. 2017).

377. *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir. 2001) (quoting *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1295 (9th Cir. 1987); see also *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 298-299 (5th Cir. 2004); *Intel Capital (Cayman) Corp. v. Shan Yi*, 2015 U.S. Dist. LEXIS 153495, at *5 (E.D.Mich. 2015).

378. See *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir. 2001) ("[P]arties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena."); *Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 310 (S.D. Tex. 1997), aff'd, 161 F.3d 314 (5th Cir. 1998) ("The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure."); *Nacional de Ahorro y Seguros in Liquidation v. Deutsche Ruckversicherung AG*, No. 06 Civ. 5826 (PKL), 2007 WL 2219421, at *5 (S.D.N.Y. 1 August 2007) ("In arbitration, parties are entitled to a fundamentally fair hearing; however, arbitration by its nature does not have all of the procedural niceties of litigation. It is the parties' choice to arbitrate their disputes and once they have made that choice 'they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid.'" (quoting *Am. Almond Prods. Co. v. Consol. Pecan Sales*, 144 F.2d 448, 451 (2d Cir. 1944) (Hand, J.))); *Shakman v. Democratic Org.*, 2014 U.S. Dist. LEXIS 75641, at *36 (N.D.Ill. 2014) (arbitrators are not bound by the rules of evidence, and agreeing to arbitration means losing the right to "seek redress for all but the most exceptional errors at arbitration").

379. *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier* (RAKTA), 508 F.2d 969, 975 (2d Cir. 1974) (summarized in *Yearbook* I (1976) p. 205) (quoting *Wash.-Balt. Newspaper Guild Local 35 v. Wash. Post Co.*, 442 F.2d 1234, 1238 (D.C. Cir. 1971)); see also *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1444 (11th Cir. 1998) ("Arbitration rules ... are intentionally written loosely, in order to allow arbitrators to resolve disputes without the many procedural requirements of litigation."); *Shakman v. Democratic Org.*, 2014 U.S. Dist. LEXIS 75641, at *36 (N.D.Ill. 2014).

refusal to hear testimony is generally not grounds for declining enforcement since the arbitrators themselves are vested with the discretion to determine when testimony should be heard.[380] Similarly, a claim that testimony was false or misleading will not be a basis for refusing enforcement where the arbitrators themselves had the opportunity to evaluate the testimony.[381]

Perhaps the only case in which an American court refused to enforce an arbitral award under the New York Convention on the basis of a procedural decision made by the arbitral tribunal is *Iran Aircraft Industries v. Avco Corporation*.[382] There, the Iran-US Claims Tribunal had denied Avco's claims because it had submitted an audit of certain invoices rather than the invoices themselves. Avco contended that the arbitrator who had chaired the prehearing conference, but then retired prior to the hearing on the merits, had suggested that procedure. Over a dissent, the court refused to enforce the award, holding that the tribunal had "denied Avco the opportunity to present its claim in a meaningful manner".[383]

(4) Award exceeding scope of arbitration agreement

Art. V(1)(c) provides that an award may not be enforced to the extent it deals with matters beyond the scope of the issues submitted to arbitration.[384] Though an arbitral tribunal will itself rule on the scope of the arbitral clause, a US court will consider this issue *de novo* unless the parties have agreed to allow the tribunal to determine its own jurisdiction.[385] Art. V(1)(c) is comparable to a

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380. See *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1129-1130 (7th Cir. 1997) (summarized in *Yearbook* XXIII (1998) p. 1076); *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier* (RAKTA), 508 F.2d 969, 975-976 (2d Cir. 1974) (summarized in *Yearbook* I (1976) p. 205); *Commercial Risk Reins. Co. Ltd. v. Sec. Ins. Co. of Hartford*, 526 F. Supp. 2d 424, 428 (S.D.N.Y. 2007) ("Arbitrators generally are not bound by the rules of evidence, but possess broad latitude to determine the procedures governing their proceedings, to hear or not hear additional evidence, to decide what evidence is relevant, material or cumulative, and otherwise to restrict the scope of evidentiary submissions."); *Urquhart v. Kurlan*, 2017 U.S. Dist. LEXIS 28601, at *15 (N.D.Ill. 2017) (arbitrators enjoy wide latitude in the conduct of the hearing, and are not bound to hear all evidence).

381. See *Nat'l Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 813-816 (D. Del. 1990) (summarized in *Yearbook* XVI (1991) p. 651).

382. *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992) (summarized in *Yearbook* XVIII (1993) p. 596).

383. *Id.* The Iran-US Claims Tribunal, all nine members sitting, later held that the court's failure to enforce the award constituted a breach by the United States of the international agreements establishing the Tribunal. *Islamic Republic of Iran v. United States*, Award No. 586-A27-FT (5 June 1998).

384. See N.Y. Convention Art. V(1)(c) (Recognition and enforcement of the award may be refused if "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration….").

385. See *Mgmt. & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp.*, 820 F.2d 1531, 1534 (9th Cir. 1987) (summarized in *Yearbook* XIV (1989) p. 543 ("We review *de novo* a contention that the subject matter of the arbitration lies outside the scope of a contract,

provision in Sect. 10(a)(4) of the FAA, which permits vacatur of an award if the tribunal has exceeded its power, but Art. V(1)(c) is narrower in scope.[386] Courts "construe arbitral authority broadly to comport with the enforcement-facilitating thrust of the Convention and the policy favoring arbitration",[387] thus they strictly construe Art. V(1)(c).[388] Art. V(1)(c) provides that if only a portion of an award exceeds the scope of the arbitration agreement and that portion is severable, the remainder of the award shall still be recognized and confirmed under the Convention.[389]

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since the arbitrability of a dispute concerns contract interpretation and only those disputes which a party has agreed to submit to arbitration may be so resolved."); see also *Capelli Enters. v. Fantastic Sams Salons Corp.*, 2017 U.S. Dist. LEXIS 5600, at *8 (N.D.Ca. 2017). See also Chapter V.4 above (discussing the power of a tribunal to determine its own jurisdiction).

386. See *Republic of Argentina v. BG Grp. PLC*, 764 F. Supp. 2d 21, 30 (D.D.C. 2011) (summarized in *Yearbook* XXXVI (2011) p. 420) ("Unlike Section 10(a)(4) of the FAA, which states that an award may be vacated 'where the arbitrators exceeded their powers', Article V(1)(c) is not so broad; rather, Article V(1)(c) authorizes the Court to deny confirmation of an award if '[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration'." (internal citations omitted)), rev'd on other grounds, 665 F.3d 1363 (D.C. Cir. 2012) (summarized in *Yearbook* XXXVII (2012) p. 361); *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.,* 403 F.3d 85, 92 (2d Cir. 2005) (lower court erred by not enforcing a New York Convention award on the ground that the arbitrators "exceeded their powers", which "is not ... one of the seven exclusive grounds for denying enforcement under the New York Convention".). But see *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 481 (7th Cir. 1997) (analogizing 9 U.S.C. Sects. 10(a)(4) and 11(b), with Art. V(1)(c) of the Convention and finding that "[t]he wording is slightly different but there is no reason to think the meaning different").

387. *Mgmt. & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp.*, 820 F.2d 1531, 1534 (9th Cir. 1987); *BU8 Sdn. Bhd. v. CreAgri, Inc.*, 2015 U.S. Dist. LEXIS 27950, at *11 (N.D.Ca. 2015).

388. See *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 976 (2d Cir. 1974) (summarized in *Yearbook* I (1976) p. 205) ("[Art. V(1)(c)(2)] should be construed narrowly…. [A] narrow construction would comport with the enforcement-facilitating thrust of the Convention."); see also *CBS Corp. v. WAK Orient Power & Light Ltd. (Pakistan)*, 168 F. Supp. 2d 403, 415 (E.D Pa. 2001) ("[There is a] heavy burden of proof associated with claiming the arbitral award went beyond the terms of submission to arbitration."); *PDV Sweeny, Inc. v. ConocoPhillips Co.*, 670 Fed. Appx. 23, 24 (2d Cir. 2016). But see *Four Seasons Hotels and Resorts B.V. v. Consorcio Barr, S.A.*, 613 F. Supp. 2d 1362, 1367-1369, 1371 (S.D. Fla. 2009) (summarized in *Yearbook* XXXIV (2009) p. 1088) (declining to enforce an award where the arbitral tribunal used an arbitration clause in one contract to grant damages for breaches under a separate contract).

389. N.Y. Convention Art. V(1)(c) ("[I]f the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced…."); see, e.g., *Four Seasons Hotels and Resorts B.V. v. Consorcio Barr S.A.*, 613 F. Supp. 2d 1362, 1367-1369, 1371 (S.D. Fla. 2009) (summarized in *Yearbook* XXXIV (2009) p. 1088) (severing portion of award that pertained to claims under agreement not subject to arbitration, while retaining remainder of award relating to claims over which the tribunal did have jurisdiction).

(5) Procedure or composition of tribunal inconsistent with agreement or governing law

Art. V(1)(d) of the Convention provides a defense to enforcement of an award where defects in the composition of the arbitral tribunal or procedures inconsistent with the agreement of the parties or the governing law occurred.[390] Generally, however, US courts will not vacate an award on the basis of procedural technicalities unless they substantially prejudice the rights of the complaining party.[391] Thus, courts will enforce awards rendered after a contractual deadline, or when the parties' arbitrator selection procedure was not adhered to, if the party resisting enforcement cannot show that it was prejudiced.[392] In addition, procedural objections not made to the tribunal will be deemed to have been waived.[393] Where a party contends that an arbitrator was biased due to a prior relationship with an opposing party, the standards are essentially consistent with those applied in the domestic context, which permit significant tolerance for prior contacts, particularly if disclosed.[394]

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390. N.Y. Convention Art. V(1)(d) (Recognition and enforcement of the award may be refused if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place….").

391. See *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 841-842 (9th Cir. 2010) (refusing to confirm the arbitral award because the arbitrator failed to apply the agreement's choice of *situs* with respect to the respondent's counter-claims); *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 91 (2d Cir. 2005) (Art. V(1)(d) applicable where procedure at issue was "more than a trivial matter of form" and affected parties' substantive rights); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 296 (5th Cir. 2004) ("Courts are reluctant to set aside arbitral awards under the New York Convention based on procedural violations…."); *Al-Haddad Commodities Corp. v. Toepfer Int'l Asia Pte.,* 485 F. Supp. 2d 677, 685-686 (E.D. Va. 2007) (defense against enforcement failed where tribunal's allowance of prohibited telephonic testimony was not prejudicial); *Calbex Mineral Ltd. v. ACC Res. Co., L.P.*, 90 F. Supp. 3d 442, 465 (W.D.Pa. 2015) (arbitral panel's violation of its own governing rules during adjudication not enough for court to invalidate award without showing of prejudice).

392. See *Zeiler v. Deitsch*, 500 F.3d 157, 166-168 (2d Cir. 2007); *Lanmnoirs-Tréfileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1066 (N.D. Ga. 1980) (summarized in *Yearbook* VI (1981) p. 247).

393. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 298 (5th Cir. 2004); *La Société Nationale Pour la Recherche, La Production, Le Transport, La Transformation & La Commericalisation Des Hydrocarbures v. Shaheen Natural Res. Co.*, 585 F. Supp. 57, 62 (S.D.N.Y. 1983) (summarized in *Yearbook* X (1985) p. 540), aff'd, 733 F.2d 260 (2d Cir. 1984).

394. See *Int'l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2d Cir. 1981) (neutral arbitrator need not be disqualified although he is a witness in another arbitration handled by the same law firms that represent the parties in the present proceedings)*; Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 337 (5th Cir. 1976) (no bias where arbitrator had helped write civil code of country that was party to arbitration) (summarized in *Yearbook* II (1977) p. 252); *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1374-1375 (S.D. Fla. 2003) (arbitrator's past work experience in one party's line of business did not bias decision); *Lummus Global Amazonas, S.A. v. Aguaytia Energy Del*

(6) Award not binding or subject to review

Art. V(1)(e) of the Convention provides that a court may refuse enforcement of an award if the award has not yet become binding on the parties. Whether an award is not yet binding depends upon the domestic law of the country in which the award was rendered.[395] An award is binding when "no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal)".[396] Since one purpose of the Convention is to permit direct enforcement of arbitral awards, an award can be enforced without having been confirmed in the country in which it was rendered.[397]

(7) Award set aside

Art. V(1)(e) of the Convention also provides that a court may refuse enforcement if the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made". An award may be set aside only by courts of the country whose procedural law of arbitration was chosen to govern the resolution of the dispute, i.e., the *situs* of the arbitration; accordingly, US courts have generally refused to give effect to decisions in countries other than the *situs* of the arbitration that refuse to enforce or purport to vacate an award.[398]

Peru, S.R., 256 F. Supp. 2d 594, 622 (S.D. Tex. 2002) (using FAA domestic arbitration precedent regarding undisclosed relationships to evaluate similar issue in an international arbitral dispute context); see also Chapter VII.2.*a* below.

395. See *Ziad Sakr Fakhri v. Marriot Int'l Hotels, Inc.*, 201 F. Supp. 3d 696, 710-711 (D. Md. 2016); *Steel Corp. of the Philippines v. Int'l Steel Servs. Inc.*, 354 F. App'x 689, 692 (3rd Cir. 2009); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 289 (5th Cir. 2004); *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 847-848 (6th Cir. 1996).

396. *Ministry of Def. and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def.*, 665 F.3d 1091, 1100 (9th Cir. 2011) (quoting *Fertilizer Corp. of India v. IDI Mgmt., Inc.*, 517 F. Supp. 948, 958 (S.D. Ohio 1981)).

397. See *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 846 F.3d 35, 50-51 (2d Cir. 2017); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366-67 (5th Cir. 2003) (summarized in *Yearbook* XXVIII (2003) p. 908) ("When the Convention was drafted, one of its main purposes was to facilitate the enforcement of arbitration awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs."); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 22 (2d Cir. 1997) (summarized in *Yearbook* XXIII (1998) p. 1058) ("The [New York] Convention ... eradicat[ed] the requirement that a court in the rendering state recognize an award before it could be taken and enforced abroad."); *Oriental Commercial & Shipping Co. (U.K.) Ltd. v. Rosseel, N.V.*, 769 F. Supp. 514, 516-517 (S.D.N.Y. 1991) (summarized in *Yearbook* XVII (1992) p. 696); *Fertilizer Corp. v. IDI Mgmt., Inc.*, 517 F. Supp. 948, 955-958 (S.D. Ohio 1981) (summarized in *Yearbook* VII (1982) p. 282). If such a proceeding is pending, however, Art. VI of the Convention permits a court to stay enforcement proceedings pending the outcome.

398. See, e.g., *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287-288, 308-310 (5th Cir. 2004) (Indonesian court's annulment of award not a defense to enforcement where award made under Swiss procedural law); *Int'l*

When an award has been set aside at the arbitral *situs*, most US courts have refused to enforce it, typically reasoning that there were no “adequate reason[s]” for refusing to recognize the decision of the other country’s competent authority.[399] Recently, a US court set aside its own final judgment enforcing a foreign arbitral award on the ground that the award was annulled at the place of the arbitration; the decision to set aside the judgment was affirmed on appeal.[400] Nonetheless, there have been a few instances in which a US court has enforced an award despite an annulment at the arbitral *situs*.[401] The US Court of Appeals for the Second Circuit, for instance, has upheld the enforcement of an arbitral award, despite its annulment at the place of arbitration, on the ground that giving effect to the foreign annulment “would run counter to United States public policy and would … be ‘repugnant to fundamental notions of what is decent and just’ in this country.”[402] US courts have noted, however, that this remains a high bar which is often not met.[403]

Arbitration awards rendered in the United States, but governed by the New York Convention because they involve foreign parties or subject matter, have historically been enforced either under US domestic arbitration law, i.e., FAA Chap. 1, or the New York Convention, as implemented by FAA Chap. 2,[404]

Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. y Comercial, 745 F. Supp. 172, 176-178 (S.D.N.Y. 1990) (interpreting V(1)(e) to permit set asides only by courts of the country whose procedural law governs the arbitration) (summarized in *Yearbook* XVII (1992) p. 639); *Am. Constr. Mach. & Equip. Corp. v. Mechanised Constr. of Pakistan Ltd.*, 659 F. Supp. 426, 429-430 (S.D.N.Y. 1987) (summarized in *Yearbook* XV (1990) p. 539) (refusing to set aside an award made by Swiss panel despite substantive challenge ongoing in Pakistan), aff’d, 828 F.2d 117 (2d Cir. 1987).

399. See *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 937 (D.C. Cir. 2007) (refusing to enforce award that had been rendered and set aside in Colombia); *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 197 (2d Cir. 1999) (denying enforcement of two awards that had been rendered and set aside in Nigeria); *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F. Supp. 2d 279, 286-289 (S.D.N.Y. 1999) (refusing to enforce award that had been rendered and set aside in Italy);

400. *Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of Lao People’s Democratic Republic*, 864 F.3d 172, 182-189 (2d Cir. 2017).

401. See *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907, 908, 912 (D.D.C. 1996) (summarized in *Yearbook* XXII (1997) p. 1001) (enforcing award notwithstanding annulment by Egyptian court where US court found that defendant had breached contractual commitment not to appeal the award and because refusing to enforce the award would be contrary to US policy favoring arbitration); see also *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 369 (5th Cir. 2003) (summarized in *Yearbook* XXVIII (2003) p. 908) (“As an enforcement jurisdiction, our courts have discretion under the Convention to enforce an award despite annulment in another country, and have exercised that discretion in the past.”) (dictum) (citing *Chromalloy*).

402. *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 97 (2d Cir. 2016).

403. *Getma International v. Republic of Guinea*, 862 F.3d 45, 48-49 (D.C. Cir. 2017).

404. See *Jacada (Eur.), Ltd. v. Int’l Mktg. Strategies, Inc.*, 401 F.3d 701, 708-09 (6th Cir. 2005), rev’d on other grounds by *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*,

although some cases have suggested that the New York Convention alone is applicable.[405] A party resisting enforcement of a non-domestic award rendered in the United States may, in the same proceeding, petition to vacate the award under FAA Chap. 1 and oppose enforcement of the award under to Art. V(1)(e) of the New York Convention.[406]

(8) Subject matter not arbitrable under domestic law

Art. V(2)(a) of the Convention permits a country to refuse enforcement of an award whose subject matter is not arbitrable under its own laws.[407] As discussed in Chapter II.3 above, the United States Supreme Court has concluded that claims under a wide variety of federal statutes, including securities and antitrust laws, are arbitrable, with only extremely limited exceptions. US courts virtually always deny applications to set aside awards on this ground.[408]

(9) Enforcement of award contrary to public policy

Art. V(2)(b) of the Convention permits a contracting state to refuse enforcement of an arbitral award when it would be contrary to its public policy.[409] The application of this provision in the United States is discussed in Chapter VI.3 below.

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335 F.3d 357, 368 (5th Cir. 2003) (summarized in *Yearbook* XXVIII (2003) p. 908); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 22-23 (2d Cir. 1997) (summarized in *Yearbook* XXIII (1998) p. 1058).

405. *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441-1443, 1445-1447 (11th Cir. 1998) (actions regarding enforcement of "non-domestic" awards rendered in the United States are exclusively governed by the New York Convention); *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1170-1171 (11th Cir. 2004) (summarized in *Yearbook* XXX (2005) p. 872) (same); *Privacy-Assured Inc. v. AccessData Corp., Ltd.*, 2015 U.S. Dist. LEXIS 53944, at *5-10 (D. Ut. 2015) (non-domestic awards governed by New York Convention.).
406. See, e.g., *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 22-23 (2d Cir. 1997) (summarized in *Yearbook* XXIII (1998) p. 1058).
407. N.Y. Convention Art. V(2)(a) ("Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that ... [t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country….").
408. See, e.g., *Saudi Iron & Steel Co. v. Stemcor USA Inc.*, No. 97 Civ. 5976, 1997 U.S. Dist. LEXIS 16129, at *8 (S.D.N.Y. 1997) ("[T]he incapable of settlement exception has been narrowly construed in light of the strong judicial interest in encouraging the use of arbitration."); cf. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 629-631 (1985) (summarized in *Yearbook* XI (1986) p. 555) (compelling international arbitration of statutory claims, "even assuming that a contrary result would be forthcoming in a domestic context" and noting that US policy favoring arbitration "applies with special force in the field of international commerce").
409. N.Y. Convention Art. V(2)(b) ("Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that ... [t]he recognition or enforcement of the award would be contrary to the public policy of that country.").

(10) Stays of enforcement under Article VI

Art. VI of the Convention provides that a court before which enforcement is sought may, in its discretion, adjourn enforcement proceedings pending the resolution of a proceeding to suspend or set aside an award by a competent authority of the country in which, or under the law of which, the award was made.[410] A number of US courts have granted stays pursuant to Art. VI.[411] While one court has suggested that such stays are appropriate unless the foreign annulment proceedings are "transparently frivolous",[412] others weigh such comity interests against other facts, including the interest in "expeditious resolution of disputes" through arbitration, and grant stays sparingly "lest it encourage abusive tactics by the party who lost in arbitration".[413] When a stay is granted, courts have required the party requesting the stay to post security, as explicitly permitted by Art. VI.[414]

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410. New York Convention Art. VI ("If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.").

411. See, e.g., *Hulley Enters. v. Russian Fed'n*, 211 F. Supp. 3d 269, 286-288 (D.D.C. 2016); *In re Telcordia Techs., Inc. v. Telkom SA, Ltd.*, 95 F. App'x 361, 362-363 (D.C. Cir. 2004) (unpublished summary order); *C.P. Constr. Pioneers Baugesellschaft Anstalt (Liechtenstein) v. Gov't of Republic of Ghana, Ministry of Rds. & Transp.*, 578 F. Supp. 2d 50, 53-55 (D.D.C. 2008); *Spier v. Calzaturificio Tecnica, S.p.A.*, 663 F. Supp. 871, 875 (S.D.N.Y. 1987); *Fertilizer Corp. of India v. IDI Mgmt., Inc.*, 517 F. Supp. 948, 961-962 (S.D. Ohio 1981). But see *MGM Prods. Grp. v. Aeroflot Russian Airlines*, 573 F. Supp. 2d 772, 778 (S.D.N.Y. 2003), aff'd, 91 F. App'x 716 (2d. Cir. 2004) (stay did not advance an expeditious resolution of the dispute); *Interdigital Commc'ns Corp. v. Samsung Elec.*, 528 F. Supp. 2d 340, 360-62 (S.D.N.Y. 2007) (stay undermines an expeditious resolution of the dispute as Respondent's parallel arbitration likely to be protracted and highly contentious); *Ukrvneshprom State Foreign Econ. Enter. v. Tradeway, Inc.*, No. 95 Civ. 10278, 1996 U.S. Dist. LEXIS 2827, at *20-23 (S.D.N.Y. 1996) (stay inappropriate because defendant's evidence for Ukraine appeal was weak).

412. *Spier v. Calzaturificio Tecnica, S.p.A.*, 663 F. Supp. 871, 875 (S.D.N.Y. 1987).

413. *Hardy Exploration & Prod. (India) v. Gov't of India*, 2018 U.S. Dist. LEXIS 95965, at *18-20 (D.D.C. 2018); *Europcar Italia, S.P.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 317-318 (2d Cir. 1998) (summarized in *Yearbook* XXIV (1999) p. 860) (courts should consider and balance a series of factors including, among others, the general objectives of arbitration, the status, the purpose, and the standard of review of the foreign proceedings, and the possible hardships to each party, before refusing the stay); see also *C.P. Constr. Pioneers Baugesellschaft Anstalt (Liechtenstein) v. Gov't of Republic of Ghana, Ministry of Rds. & Transp.*, 578 F. Supp. 2d 50, 54 (D.D.C. 2008); *Interdigital Commc'ns Corp. v. Samsung Elec.*, 528 F. Supp. 2d 340, 360 (S.D.N.Y. 2007).

414. See *InterDigital Communs., Inc. v. Huawei Inv. & Holding Co.*, 166 F. Supp. 3d 463, 473-474 (S.D.N.Y. 2016); *Jorf Lasfar Energy Co., S.C.A. v. AMCI Exp. Corp.*, No. 05-0423, 2005 U.S. Dist. LEXIS 34969, at *10-11 (W.D. Pa. 2005); *Alto Mar Girassol v. Lumbermens Mut. Cas. Co.*, No. 04 C 7731, 2005 U.S. Dist. LEXIS 7479, at *7, 11 (N.D. Ill. 2005); *Nedagro B.V. v. Zao Konversbank*, No. 02 Civ. 3946, 2003 U.S. Dist. LEXIS 787, at *23 (S.D.N.Y. 2003); *Consorcio Rive, S.A. v. Briggs of Cancun, Inc.*, No. 99-2204, 2000 U.S. Dist. LEXIS 899, at *10-11 (E.D. La. 2000).

In addition, US courts have held that they have the inherent power to stay enforcement proceedings in circumstances that do not fit squarely within Art. VI.[415]

Appeal of Enforcement Decisions by US Courts

US court decisions on enforcement of domestic and foreign arbitral awards are subject to the normal appellate process.[416] An appeal may be taken by any party aggrieved by the final judgment of the trial court. In the federal court system and the courts of most states, an appellate court will review a lower court's decision *de novo* where the disputed question is a question of law; in other words, it will decide the question independently, as if it were considering the matter in the first instance.[417] But where the question is one of fact, the appellate court will uphold the trial court's decision unless it was "clearly erroneous," a standard that involves substantial deference to the trial court's determination.[418]

2. ENFORCEMENT WHERE NO CONVENTION OR TREATY APPLIES

A foreign arbitration award generally may be enforced even if no convention or bilateral treaty applies. Such an award could be enforced under the Federal Arbitration Act (the FAA) (see **Annex I** hereto),[419] although some cases have suggested that the FAA may not apply, in the absence of a treaty, to awards arising from contracts with no connection to US commerce, or where the

415. See *Hewlett-Packard Co. v. Berg*, 61 F.3d 101, 106 (1st Cir. 1995) (district court had inherent authority to stay enforcement of arbitration award until resolution of potential set-off in second arbitral proceeding); see also *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1172 n. 7 (11th Cir. 2004) (summarized in *Yearbook* XXX (2005) p. 872) (citing *Hewlett-Packard* and indicating that district court had inherent authority to issue a stay pending foreign proceedings on the arbitration agreement's validity for purposes of Art. V(1)(a)); but see *Hardy Exploration & Prod. (India) v. Gov't of India*, 2018 U.S. Dist. LEXIS 95965, at *15-16 (D.D.C. 2018) (although some circuits give their district courts inherent authority to grant stays for purposes of docket management, the DC circuit does not).
416. See 9 U.S.C. Sect. 16.
417. See *CEEG (Shanghai) Solar Sci. & Tech. Co. v. Lumos LLC*, 829 F.3d 1201, 1205-1206 (10th Cir. 2016); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 278-279 (3d Cir. 2003).
418. See *CEEG (Shanghai) Solar Sci. & Tech. Co. v. Lumos LLC*, 829 F.3d 1201, 1205-1206 (10th Cir. 2016); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 278-279 (3d Cir. 2003).
419. See, e.g., *Standard Magnesium Corp. v. Fuchs, K.G.*, 251 F.2d 455, 457-458 (10th Cir. 1957) (contract); *Henrijean ex rel. Colonia-Mar. Ins. v. S & I Diamonds, Inc.*, No. 96MC-297, 1997 U.S. Dist. LEXIS 2471, at *17 (E.D. Pa. 1997); *Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 253 F. Supp. 359, 363-364 (S.D.N.Y. 1966).

parties did not agree that a US court may enter judgment on the award.[420] If the FAA does not apply, the award will ordinarily be enforceable under a state arbitration statute or in an action on the award under state common law.[421] It also may be possible to enforce in US court a foreign court's judgment enforcing the award.[422]

3. RULES OF PUBLIC POLICY

The New York Convention permits a court to refuse enforcement of an arbitration award if it is contrary to public policy.[423] US courts have strictly limited the scope of public policy as a ground for refusing to enforce an arbitration award, denying enforcement only when it "would violate the forum state's most basic notions of morality and justice"[424] or "some

420 See *Int'l Bechtel Co. v. Dep't of Civil Aviation of the Gov't of Dubai*, 360 F. Supp. 2d 136, 137-138 (D.D.C. 2005) (dismissing petition for enforcement of an arbitration award not covered by any international convention for failure to state a claim on which relief could be granted because the parties did not agree that judgment would be entered upon the award as required by the domestic FAA); cf. *Int'l Bechtel Co. v. Dep't of Civil Aviation of the Gov't of Dubai*, 300 F. Supp. 2d 112, 118 (D.D.C. 2004) (staying, on comity grounds, proceedings to confirm an arbitration award not covered by any international convention pending resolution of annulment proceedings abroad).

421. See, e.g., *Rintin Corp., S.A. v. Domar, Ltd.*, 476 F.3d 1254, 1261 (11th Cir. 2007) (confirming award between foreign parties pursuant to the Florida International Arbitration Act); *Tanning Research Labs., Inc. v. Hawaiian Tropic Pty. Ltd.*, 617 So. 2d 1090, 1090-1091 (Fla. Dist. Ct. App. 1993) (same); *Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 253 F. Supp. 359, 363-364 (S.D.N.Y. 1966) (stating that arbitration agreement could be enforced under New York law when no transaction involving the foreign commerce of the United States was anticipated and none resulted, but concluding that the arbitration agreement did not apply by its terms to the parties' dispute) (predating US ratification of New York Convention).

422. See, e.g., *Geranghadr v. Entagh*, 77 P.3d 323, 326-327 (Or. Ct. App. 2003) (enforcing money judgment entered on Iranian arbitral award); cf. *Seetransport Wiking Trader SchiffahrtsgesellschaftmbH v. Navimpex Centrala Navala*, 29 F.3d 79, 81 (2d Cir. 1994) (enforcing foreign judgment refusing to set aside arbitral award as "functional equivalent" of judgment in amount of award, where direct enforcement of award under New York Convention was time-barred); *Island Territory of Curacao v. Solitron Devices*, 489 F.2d 1313 (2d Cir. 1973) (enforcing foreign judgment on arbitral award, where direct enforceability of award under New York Convention was questioned).

423. N.Y. Convention Art. V(2)(b) ("Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that ... [t]he recognition or enforcement of the award would be contrary to the public policy of that country."); see also Panama Convention Art. 5(2)(b).

424. *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier* (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (summarized in *Yearbook* I (1976) p. 205); see also *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004); *Republic of Argentina v. BG Grp. PLC*, 764 F. Supp. 2d 21, 31 (D.D.C. 2011) (summarized in *Yearbook* XXXVI (2011) p. 420), rev'd on other grounds, 665 F.3d 1363 (D.C. Cir. 2012) (summarized in *Yearbook* XXXVII (2012) p. 361); *NTT DoCoMo, Inc. v. Ultra d.o.o.,* No. 10 Civ. 3823 (RMB) (JCF), 2010 WL 4159459, at *3

explicit public policy that is well defined and dominant”.[425] Misapplication of established legal principles does not violate public policy,[426] nor does fact-finding based on inconsistent testimony, since allowing the court to inquire into the credibility of the evidence before the arbitrators “would render the allegedly simple and speedy remedy of arbitration a mockery”.[427] A potential conflict between an arbitral decision and the foreign policy goals of the United States also does not necessarily implicate questions of public policy.[428] Cases in which enforcement has been denied on public policy grounds are rare, though existent. At least one court declined to enforce an award on public policy grounds where it concluded that

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(S.D.N.Y., 2010) (“Respondent’s conclusory invocation of ‘due process concerns’ and ‘the threat of contempt proceedings’ does not establish that ‘enforcement [of the Award] would violate our most basic notions of morality and justice.’”); *Corvo v. Carnival Corp.*, 2018 U.S. Dist. LEXIS 57836, at *5-6 (S.D.Fla. 2018).

425. *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 264 (2d Cir. 2003) (quoting *United Paperworks Int’l Union v. Misco, Inc.,* 484 U.S. 29, 43 (1987)); see also *Telenor Mobile Commc’ns AS v. Storm LLC*, 584 F.3d 396, 411 (2d Cir. 2009); *Comedy Club, Inc. v. Improv W. Assoc.*, 553 F.3d 1277, 1287 (9th Cir. 2009); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998) (citing *Drummond Coal Co. v. United Mine Workers*, 748 F.2d 1495, 1499 (11th Cir.1984)); *Roy v. Buffalo Philharmonic Orchestra Soc'y, Inc*., 161 F. Supp. 3d 187, 199 (W.D.N.Y. 2016).

426. See, e.g., *Republic of Argentina v. BG Grp. PLC*, 764 F. Supp. 2d 21, 31-32 (D.D.C. 2011) (summarized in *Yearbook* XXXVI (2011) p. 420) (breach of US statute required by arbitral award not ground for public policy exception), rev’d on other grounds, 665 F.3d 1363 (D.C. Cir. 2012) (summarized in *Yearbook* XXXVII (2012) p. 361); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004) (“Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.”); *Costa v. Celebrity Cruises, Inc.*, 768 F. Supp. 2d 1237, 1241 (S.D. Fla. 2011) (estoppel or waiver of the right to exhaust grievance procedures is an application of law issue not a public policy violation); *Am. Constr. Mach. & Equip. Corp. v. Mechanised Constr. of Pakistan Ltd.*, 659 F. Supp. 426, 429 (S.D.N.Y. 1987) (no public policy violation to enforce award adjudged to be void in a foreign jurisdiction); *PDV Sweeny, Inc. v. ConocoPhillips Co.*, 2015 U.S. Dist. LEXIS 116175, at *26-27 (S.D.N.Y. 2015) (misapplication of New York contract law by arbitrators does not violate public policy unless fundamental due process rights were also impugned).

427. *Waterside Ocean Navigation Co. v. Int’l Navigation Ltd.*, 737 F.2d 150, 153 (2d Cir. 1984) (summarized in *Yearbook* XI (1986) p. 568). For a listing of other public policy exception arguments that have been denied by US courts see *Karen Mar. Ltd. (Liberia) v. Omar Int’l. Inc.*, 322 F. Supp. 2d 224, 226-227 n. 1 (E.D.N.Y. 2004).

428. See *Parsons & Whittemore Overseas Co. v. Société Générale de l’Industrie du Papier* (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (summarized in *Yearbook* I (1976) p. 205); see also *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def.*, 665 F.3d 1091, 1099 (9th Cir. 2011); *Nat’l Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 819-820 (D. Del. 1990); *Ameropa AG v. Havi Ocean Co. LLC*, No. 10 Civ. 3240 (TPG), 2011 U.S. Dist. LEXIS 15803, at *6 (S.D.N.Y. 2011) (“‘[P]ublic policy’ and ‘national policy’ are not synonymous. Foreign policy disputes with another country are not enough to overcome the ‘supranational’ policy of providing predictable enforcement of international arbitral awards.” (internal citations omitted)); *MGM Prods. Grp., Inc. v. Aeroflot Russian Airlines*, 573 F. Supp. 2d 772, 776 (S.D.N.Y. 2003) (enforcing arbitral award issued by panel that rejected defense of illegality under US law).

enforcement would require the foreign sovereign award-debtor's rights to control the territory within its own border.[429] Some courts have stated that enforcing an arbitral award where a party agreed to arbitration as a result of fraud or coercion would be contrary to public policy, although at least one court has taken the view that a claim of duress in the formation of the agreement is normally a question for the arbitrators.[430]

Chapter VII. Means of Recourse

1. APPEAL ON THE MERITS FROM AN ARBITRAL AWARD

a. Appeal to a second arbitral instance

Neither the federal and state statutes, nor any of the rules administered by the AAA for international cases, provide for appeals of arbitral awards to other arbitrators. There is nothing in US law, however, that would prevent parties from agreeing to such an appeal process, were it so desired.[431]

b. Appeal to a court

A party cannot appeal an arbitration award to a court; it can only request that a court set aside or modify an award on the narrow grounds available under the Federal Arbitration Act (the FAA) (see **Annex I** hereto).[432] These grounds are

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429. See *Hardy Exploration & Prod. (India) v. Gov't of India*, 2018 U.S. Dist. LEXIS 95965 (D.D.C. 2018) (declining to enforce an award against India that imposed damages for India's failure to return an oil block the tribunal held had been expropriated, on the ground that interference with India's sovereign activities within its own territory was in violation of US public policy).

430. See *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co.*, 480 F. Supp. 352, 358-361 (S.D.N.Y. 1979) (summarized in *Yearbook* VI (1981) p. 244); see also *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 519 n. 14 (1974) (suggesting that fraud or coercion could be raised as a defense under Art. V(2)(b)); *Europcar Italia, S.P.A. v. Maiellano Tours*, 156 F.3d 310, 315 (2d Cir. 1998) (summarized in *Yearbook* XXIV (1999) p. 860) (fraud perpetuated on tribunal may permit invocation of Article V(2)(b)); *Ameropa AG v. Havi Ocean Co.*, No. 10 Civ. 3240 (TPG), 2011 U.S. Dist. LEXIS 15803, at *6 (S.D.N.Y. 16 February 2011) ("Enforcement would violate this country's 'most basic notions of morality and justice' if the defendant's due process rights had been violated – for example, if defendant had been subject to coercion or any part of the agreement had been the result of duress."); *PDV Sweeny, Inc. v. ConocoPhillips Co.*, 2015 U.S. Dist. LEXIS 116175, 116201-116202 (S.D.N.Y., 2015) (enforcing arbitration entered into under duress may violate fundamental due process rights, so that the court may refuse to enforce the arbitral award on public policy grounds). But see *Haardt v. Binzagr*, Civ. A. No. H-83-5846, 1986 WL 14836, at *3 (S.D. Tex. 19 December 1986) (claim of duress in the formation of the agreement was an issue for the arbitrator to decide).

431. See CPR Rules of Appeal Procedure, Rule 1.1, available at <https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure>.

432. See 9 U.S.C. Sects. 10, 11; see also Chapter VII.3 below.

exclusive; parties may not expand the grounds on which a court may review an award.[433]

2. SETTING ASIDE OF THE ARBITRAL AWARD (ACTION FOR ANNULMENT, VACATION OF THE AWARD)

a. Grounds for setting aside

Under the Federal Arbitration Act (the FAA) (see **Annex I** hereto), an arbitral award may be set aside only on limited and exclusive grounds, which largely focus on considerations of basic fairness. US courts construe these grounds narrowly.[434] In addition, a party's failure to preserve a complete record of arbitration despite its ability to do so may prevent a court from granting that party's set-aside application.[435]

The FAA provides that a court has power to vacate 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

433. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 583-584 (2008).

434. See, e.g., *Scandinavian Reins. Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71-72 (2d Cir. 2012) ("A court's review of an arbitration award is ... 'severely limited,' so as not to frustrate the 'twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'" (internal citations omitted) (quoting *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009)); *First Options of Chicago v. Kaplan*, 514 U.S. 938, 942 (1995) (summarized in *Yearbook* XXII (1997) p. 278); *Cytyc Corp. v. DEKA Prods. Ltd. P'ship*, 439 F.3d 27, 29 (1st Cir. 2006); *IDS Life Ins. Co. v. Royal Alliance Assocs.*, 266 F.3d 645, 649 (7th Cir. 2001) ("[T]he grounds for challenging an arbitration award are narrowly limited, reflecting the voluntary contractual nature of commercial arbitration."); *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs.*, 146 F.3d 1309, 1311 (11th Cir. 1998) ("The Federal Arbitration Act ... provides that a federal district court can vacate an arbitration award, but only in extremely narrow circumstances."); *Republic of Argentina v. BG Grp. PLC*, 715 F. Supp. 2d 108, 116 (D.D.C. 2010) ("In relying on these standards to determine whether vacatur or modification of the Award is warranted, the Court must remain mindful of the principle that 'judicial review of arbitral awards is extremely limited,'…." (quoting *Teamsters Local Union No. 61 v. United Parcel Serv., Inc.*, 272 F.3d 600, 604 (D.C. Cir. 2001)), *rev'd on other grounds*, 665 F.3d 1363 (D.C. Cir. 2012) (summarized in *Yearbook* XXXVII (2012) p. 361).

435. See *Physicians Inc. Capital v. Praesidium All. Grp.*, 562 F. App'x 421, 426 (6th Cir. 2014).

> (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.[436]

This language does not fully reflect the deference that US courts give to arbitral decisions in practice. In light of the strong public policy favoring arbitration, courts are highly deferential to arbitrators' decisions.[437] Thus, courts "will confirm the arbitrator's award even if [they] are convinced that the arbitrator committed serious error, so long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority".[438]

(1) The award was obtained through "corruption, fraud, or undue means"

This provision encompasses perjury, bribery of witnesses, falsification of evidence or expert credentials, and bribery of, threats to, or other forms of undue influence on the arbitrators.[439] A party alleging fraud must establish (1) the improper behavior by clear and convincing evidence; (2) that the improper behavior was materially related to an issue in the arbitration; and (3) that the improper behavior could not have been discovered upon the exercise of due diligence prior to or during the arbitration.[440] If the fraud is one that was or could have been discovered and called to the attention of the arbitrators, the court will deny relief.

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436. 9 U.S.C. Sect. 10(a).
437. *McGrann v. First Albany Corp.*, 424 F.3d 743, 748 (8th Cir. 2005) (noting the "extraordinary level of deference" courts provide to arbitral awards) (citation omitted); *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003) ("The net result of a court's application of [9 U.S.C. Sect. 10(a)] standard is generally to affirm easily the arbitration award under this extremely deferential standard[.]"); *Coutee v. Barington Capital Grp., L.P.*, 336 F.3d 1128, 1132 (9th Cir. 2003) ("With respect to the underlying arbitration decision, however, our review is both limited and highly deferential.").
438. *McGrann v. First Albany Corp.*, 424 F.3d 743, 748 (8th Cir. 2005) (quoting *Schoch v. InfoUSA, Inc.* 341 F.3d 785, 788 (8th Cir. 2003); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.").
439. See, e.g., *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1021-1023 (5th Cir. 1990) (misrepresentation); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383-1384 (11th Cir. 1988) (falsification of expert credentials); *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9th Cir. 1982) (perjury).
440. See *Envtl. Barrier Co., LLC v. Slurry Sys.*, 540 F.3d 598, 608 (7th Cir. 2008); *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir. 1992); *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5th Cir. 1990); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988); *Karppinen v. Karl Kiefer Mach. Co.*, 187 F.2d 32, 35 (2d Cir. 1951).

(2) "Evident partiality" of an arbitrator

Courts are generally unwilling to infer that an arbitrator has been partial based on her rulings or on the appearance of bias alone (the partiality standard for judges).[441] Thus, they have declined to vacate awards in cases involving allegations of inattentiveness to a party's presentation of evidence, alleged advocacy for one party through statements or questioning of witnesses, comments suggesting ethnic or gender bias, generalized characterizations of bias, allegations based on insignificant former business relationships, or an excessive award.[442] Instead, evident partiality may be established in three limited situations.

First, evident partiality will be found where, after considering all the circumstances, "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration".[443] For example, a court vacated an award where an arbitrator's father headed the international union that encompassed the local union that was a party to the arbitration.[444] The court concluded that the particular father-son relationship is "such that reasonable people would have to believe it provides strong evidence of partiality by the arbitrator".[445] The burden of proof rests on the party challenging the award.[446]

441. See *Morelite Const. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) ("appearance of bias" too low a standard for determining "evident partiality" under the FAA); see also *Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012) (contrasting evident partiality standard with partiality standard for a judge "who can be disqualified in any proceedings in which his impartiality might reasonably be questioned") (quoting *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007)); cf. *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) ("The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges.") (White, J., concurring).

442. See *Mandell v. Reeve*, No. 10 Civ. 6530 RJS, 2011 WL 4585248, at *10 (S.D.N.Y. Oct. 4, 2011), aff'd, 510 F. App'x 73 (2d Cir. 2013) (generalized characterizations); *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 306-307 (6th Cir. 2008) ("trivial" relationship); *Nordell Int'l Res., Ltd. v. Triton Indonesia, Inc.*, 999 F.2d 544 (9th Cir. 1993) (magnitude of award); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264-1265 (7th Cir. 1992) (advocacy); *Spector v. Torenberg*, 852 F. Supp. 201, 209 (S.D.N.Y. 1994) (summarized in *Yearbook* XX (1995) p. 962) (ethnic bias); *Austin S. I, Ltd. v. Barton-Malow Co.*, 799 F. Supp. 1135, 1143 (M.D. Fla. 1992) (inattentiveness).

443. *Morelite Const. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984); see also *Scandinavian Reins. Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012); *HSM Constr. Servs. v. MDC Sys.*, 239 F. App'x 748, 752-753 (3d Cir. 2007) (noting the "reasonably construed" bias standard adopted by First, Second, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits).

444. See *Morelite Const. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 80-81 (2d Cir. 1984).

445. *Morelite Const. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 85 (2d Cir. 1984).

446. See *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 306-307 (6th Cir. 2008); *Three S Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527, 530 (4th Cir. 2007); *Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 427 (9th Cir. 1996); *Andros Compania*

The mere appearance of bias is not enough, but the party asserting evident partiality it need not prove actual, subjective bias if the circumstances would demonstrate to a reasonable observer that the arbitrator was partial.[447]

Second, evident partiality will be found when an arbitrator is aware of a material interest or relationship with a party, but fails to disclose it.[448] The non-disclosure must relate to a "significant compromising connection to the parties"[449] and it must compel a reasonable person to conclude that the arbitrator was biased.[450] Consequently, courts have not found evident partiality where an arbitrator did not disclose the fact that he had several years earlier worked under the president of one of the parties, but had little actual contact with him,[451] or where an arbitrator did not disclose a dispute he had with a member of the firm representing one of the parties,[452] or where two arbitrators failed to disclose their participation in another arbitration with similar issues.[453] Courts have dismissed this defense where an arbitrator did not disclose the fact that he and a party's attorney, along with thirty-four other attorneys, had represented a client seven years earlier,[454] or where an arbitrator failed to disclose "attenuated" connections such as the fact that he was adverse to one of the party's counsel in another proceeding.[455] Courts have also refused to vacate

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Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 700 (2d Cir. 1978); *Sanford Home for Adults v. Local 6*, 665 F. Supp. 312, 316 (S.D.N.Y. 1987).

447. *Morelite Const. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 85 (2d Cir. 1984) ("If the standard of 'appearance of bias' is too low for the invocation of [9 U.S.C.] Section 10, and 'proof of actual bias' too high, with what are we left? … '[E]vident partiality' within the meaning of 9 U.S.C. Sec. 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.").

448. See *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 146 (1968) (reversing lower court's confirmation of arbitral award where supposedly neutral arbitrator did not disclose a significant business relationship with one party); *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1106 (9th Cir. 2007); *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201-1202 (11th Cir. 1982).

449. *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 646-647 (9th Cir. 2010); *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007); *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 282-283 (5th Cir. 2007).

450. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007); see also *Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 76 (2d Cir. 2012); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1106 (9th Cir. 2007); *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982).

451. *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir. 1983).

452. *Lifecare Int'l, Inc., v. CD Med., Inc.*, 68 F.3d 429, 434 (11th Cir. 1995).

453. *Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 78 (2d Cir. 2012).

454. *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285 (5th Cir. 2007).

455. *ALS & Assocs., Inc. v. AGM Marine Constructors, Inc.*, 557 F. Supp. 2d 180, 183-184 (D. Mass. 2008).

arbitral awards on this basis when an arbitrator did not disclose the fact that he had formerly and occasionally served as co-counsel with the attorney of one of the parties,[456] or when an arbitrator did not disclose the fact that his son's law firm represented one of the parties in a different arbitration.[457]

To find that an arbitrator was evidently partial based upon his failure to disclose evidence giving rise to such partiality, courts consider a number of factors. These include:

> (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding.[458]

Thus, courts have found evident partiality where an arbitrator failed to disclose the fact that a party had been a frequent client of the arbitrator's consulting business,[459] and that a company owned by an arbitrator's family was involved in a dispute with a party.[460]

If disclosed, past professional relationships between arbitrators and parties are generally tolerated. Courts recognize that "[t]he expert adjudicator is more likely than a judge or juror not only to be precommitted to a particular substantive position but to know or have heard of the parties."[461] For example, courts did not find evident partiality where an arbitrator disclosed the fact that he had accounts with a brokerage firm owned by a party,[462] or where an arbitrator disclosed to the AAA that he had been a paid expert witness for party in unrelated case, even though opposing party never received a copy of the arbitrator's disclosure form from the AAA.[463]

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456. *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 306-307 (6th Cir. 2008).
457. *Transportes Coal Sea de Venezuela C.A. v. SMT Shipmanagement & Transp. Ltd.*, No. 05-CV-9029 (KMK), 2007 WL 62715, at *10 (S.D.N.Y. 9 January 2007).
458. *Three S Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 530 (4th Cir. 2007) (quoting *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999)); see also *Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 74 (2d Cir. 2012) (citing these factors approvingly but noting they are not exhaustive).
459. *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 146 (1968).
460. *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201-1202 (11th Cir. 1982).
461. *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983); see also *Lucent Techs., Inc. v. Tatung Co.*, 379 F.3d 24, 30-31 (2d Cir. 2004) ("[A] principal attraction of arbitration is the expertise of those who decide the controversy and that familiarity with a discipline often comes at the expense of complete impartiality.") (internal quotation marks omitted); *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1340 (11th Cir. 2002) ("[F]amiliarity due to confluent areas of expertise does not indicate bias ... it may be an asset, since 'an arbitrator's experience in an industry ... is one of the factors that can make arbitration a superior means of resolving disputes.'" (quoting *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1016 (11th Cir. 1998))).
462. *Smith v. Prudential Sec. Inc.*, 846 F. Supp. 978, 980 (M.D. Fla. 1994).
463. *Lucent Techs., Inc. v. Tatung Co.*, 379 F.3d 24, 31-32 (2d Cir. 2004).

Finally, some courts have also found evident partiality where an arbitrator had reason to investigate a potential conflict of interest but failed to do so, holding that "where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed ...) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate".[464] For example, a court vacated an award in favor of a party that was wholly owned by a government represented by the arbitrator's firm, even though the arbitrator did not know of his firm's relationship with the government at the time of the arbitration.[465] Another court found evident partiality where an arbitrator failed to investigate what he knew to be a possible business relationship between his corporation and a party's parent company or to inform the parties of his reasons for failing to do so.[466] And a court vacated an award rendered by an arbitrator who failed to investigate or disclose a possible conflict of interest when he began a new job with a company negotiating a deal with one of the parties.[467]

In all circumstances, a party may not seek to vacate an award if the party had reason to know or could have easily discovered the alleged partiality but failed to make an objection before the arbitral tribunal.[468]

464. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S*., 492 F.3d 132, 138 (2d Cir. 2007) (vacating award where arbitrator should have investigated or disclosed his lack of investigation when he suspected a potential business relationship between his corporation and that of a party); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1103 (9th Cir. 2007) ("We conclude that the lack of evidence of the arbitrator's actual knowledge of the ongoing negotiation does not prevent a finding of evident partiality because, under the circumstances of this case, the arbitrator had a duty to investigate possible conflicts resulting from his new employment and to disclose that employment to the parties."); *Schmitz v. Zilveti*, 20 F.3d 1043, 1049 (9th Cir. 1994). But see *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312-1313 (11th Cir. 1998) (evident partiality exists only when an arbitrator is aware of a potential conflict but fails to disclose it); *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 683 (D.C. Cir. 1996) (rejecting failure to investigate as ground for evident partiality).

465. See *HSMV Corp. v. ADI Ltd.*, 72 F. Supp. 2d 1122, 1132 (C.D. Cal. 1999), abrogated on other grounds by *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004).

466. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 136-139 (2d Cir. 2007).

467. *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105-1111 (9th Cir. 2007).

468. See *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1313 (9th Cir. 2004) ("[The] waiver doctrine applies where a party to an arbitration has constructive knowledge of a potential conflict but fails to timely object."); see also *Dealer Computer Servs., Inc. v. Michael Motor Co., Inc.*, 485 F. App'x 724, 727-728 (5th Cir. 2012); *Lucent Techs., Inc. v. Tatung Co.*, 379 F.3d 24, 28 (2d Cir. 2004); *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1340 (11th Cir. 2002); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1263 (7th Cir. 1992); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1359 (6th Cir. 1989); *Rai v. Barclays Capital Inc.*, 739 F. Supp. 2d 364, 374 (S.D.N.Y. 2010).

(3) Refusing to postpone a hearing

To vacate an award on this ground, a party must establish that the arbitrator was guilty of misconduct in denying a request to postpone the hearing.[469] Deference is given to an arbitrator's decision, as arbitration is intended to be speedy and inexpensive and arbitrators have substantial discretion in how they conduct the proceeding.[470] Courts are particularly unsympathetic to complaints from parties who were responsible for delay.[471] On rare occasions,[472] a court will find the circumstances of an arbitral tribunal's refusal to postpone the hearing justifies setting aside the award. In one such case, a crucial witness had become ill during the hearing and had been rushed to the hospital.[473] In another, an important witness was temporarily unavailable because his wife had been diagnosed with cancer.[474] Far more common are instances in which courts do not find the circumstances so compelling, such as a party's change of attorneys immediately before the hearing,[475] or the hospitalization of a party's daughter for a broken arm.[476] Typically, courts are more sympathetic to parties complaining that a witness was prevented from testifying by the refusal to grant a postponement when the witness was important[477] or her absence was unavoidable.[478]

(4) Failure to hear pertinent evidence

This is a ground for setting aside an award only if the party who objects to the award "shows that he was denied a fundamentally fair hearing and

469. See *Agrawal v. Agrawal*, 775 F. Supp. 588, 590 (E.D.N.Y. 1991) ("[A] court's review is limited to a determination of whether the arbitrators were guilty of misconduct in denying the request for an adjournment."), aff'd sub nom., 969 F.2d 1041 (2d Cir. 1992); cf. *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398, 400 (5th Cir. 2006); *Sungard Energy Sys. v. Gas Transmission N.W. Corp.*, 551 F. Supp. 2d 608, 613 (S.D. Tex. 2008) (to prove vacatur is warranted, requesting party "must establish that there was no reasonable basis for the panel's refusal to postpone the hearing and that [the party] suffered prejudice because of that refusal").
470. See, e.g., *Agrawal v. Agrawal*, 775 F. Supp. 588, 591 (E.D.N.Y. 1991), aff'd sub nom., 969 F.2d 1041 (2d Cir. 1992); *C.T. Shipping, Ltd. v. DMI (U.S.A.) Ltd.*, 774 F. Supp. 146, 149 (S.D.N.Y. 1991); *Concourse Beauty Sch., Inc. v. Polakov*, 685 F. Supp. 1311, 1319 (S.D.N.Y. 1988).
471. See, e.g., *Schmidt v. Finberg*, 942 F.2d 1571, 1574 (11th Cir. 1991); *Roche v. Local 32B-32J Serv. Emps. Int'l Union*, 755 F. Supp. 622, 625 (S.D.N.Y. 1991).
472. See *ALS & Assocs. v. AGM Marine Constructors, Inc.*, 557 F. Supp. 2d 180, 182 (D. Mass. 2008) ("[T]he threshold for vacatur based on a failure to postpone is high.").
473. See *Allendale Nursing Home, Inc. v. Local 1115 Joint Bd.*, 377 F. Supp. 1208, 1213-14 (S.D.N.Y. 1974).
474. See *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 17-18 (2d Cir. 1997).
475. See *Agrawal v. Agrawal*, 775 F. Supp. 588, 590-591 (E.D.N.Y. 1991), aff'd sub nom., 969 F.2d 1041 (2d Cir. 1992).
476. See *Berlacher v. PaineWebber Inc.*, 759 F. Supp. 21, 24 (D.D.C. 1991).
477. See, e.g., *Schmidt v. Finberg*, 942 F.2d 1571, 1574 (11th Cir. 1991).
478. See, e.g., *ARW Expl. Corp. v. Aguirre*, 45 F.3d 1455, 1463-1464 (10th Cir. 1995).

consequently suffered prejudice".[479] Courts generally will not second-guess an arbitrator's decision that evidence is cumulative, irrelevant, or otherwise inadmissible.[480] For example, a court declined to set aside an award for an arbitrator's refusal to hear evidence concerning mitigation of damages because the arbitrator could have concluded that mitigation was not proper in the case.[481] Of course, appropriate facts can lead to contrary results. For example, an award was vacated where an arbitrator assured a party that certain documents were fully accepted into evidence without the need for foundational testimony, and later issued an award containing a lengthy "diatribe on the unreliability of hearsay".[482]

(5) Other misbehavior that prejudiced the rights of any party

The most frequent complaints falling under this category concern *ex parte* communications between a party and an arbitrator. To provide a basis for vacating an award, *ex parte* communications must have "deprived [a party] of a

479. *Grinnell Hous. Dev. Fund Corp. v. Local 32B-32J*, 767 F. Supp. 63, 67 (S.D.N.Y. 1991); see also *Lessin v. Merrill Lynch*, 481 F.3d 813, 816, 818 (D.C. Cir. 2007); *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992), overruled on other grounds by *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (summarized in XXII *Yearbook* (1997) p. 278); *Grahams Serv. Inc. v. Teamsters Local 975*, 700 F.2d 420, 422 (8th Cir. 1982) (collecting cases); *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968); *Sungard Energy Sys. Inc. v. Gas Transmission N.W. Corp.*, 551 F. Supp. 2d 608, 617 (S.D. Tex. 2008) ("To warrant vacatur of an arbitration award, [a]n evidentiary error must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing.") (internal quotation marks omitted); *Fairchild & Co. v. Richmond Fredericksburg & Potomac R.R.*, 516 F. Supp. 1305, 1314 (D.D.C. 1981).

480. See *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 547 (2d Cir. 2016) ("[T]here is simply no fundamental unfairness in affording the parties precisely what they agreed on."); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003) (no statutory basis for attacking the arbitration panel's determination of evidentiary relevancy), abrogated on other grounds by *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584-585 (2008); *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998) ("An arbitrator need not consider all the evidence the parties seek to introduce but may reject evidence that is cumulative or irrelevant."); *Nat'l Post Office, Mailhandlers, Watchmen, Messengers & Grp. Leaders Div., Laborers Int'l Union of N. Am., AFL-CIO v. U.S. Postal Serv.*, 751 F.2d 834, 841 (6th Cir. 1985); *Fine v. Bear, Stearns & Co.*, 765 F. Supp. 824, 829 (S.D.N.Y. 1991).

481. See *Mut. Redev. Houses, Inc. v. Local 32B-32J*, 700 F. Supp. 774, 777 (S.D.N.Y. 1988).

482. See *Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 849-850 (5th Cir. 1995); see also *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901*, 763 F.2d 34, 39-40 (1st Cir. 1985) (arbitrator's refusal to consider evidence that was both "central and decisive" to a party's position was "so destructive of [the party's] right to present [its] case, that it warrants the setting aside of the arbitration award") (internal quotation marks omitted); *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 19-21 (2d Cir. 1997) (tribunal improperly excluded evidence that was "pertinent and material to the controversy").

fair hearing and influenced the outcome of the arbitration".[483] Such communications "must have gone to the heart of the dispute's merits [rather than] a merely peripheral matter".[484] Thus, an award was vacated for an *ex parte* communication concerning earnings figures relevant to damages,[485] but not where it concerned seating arrangements at a hearing,[486] an unrelated computer problem,[487] or information "readily accessible" to both sides.[488] Even where *ex parte* communications go to the heart of the matter, they must have caused prejudice to the party seeking to vacate the award on the basis of the misbehavior.[489] Courts are more likely to find misconduct if the *ex parte* contacts are secretive or seemingly conspiratorial.[490]

(6) Arbitrators exceeded their powers

Arbitrators exceed their powers when they act beyond the scope of the arbitration agreement from which their jurisdiction derives.[491] Courts faced

483. *Spector v. Torenberg*, 852 F. Supp. 201, 209-210 (S.D.N.Y. 1994) (citing *M & A Elec. Power Coop. v. Local 702, Int'l Bhd. of Elec. Workers*, 977 F.2d 1235, 1237-1238 (8th Cir. 1992)) (summarized in *Yearbook* XX (1995) p. 962); see also *U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1176 (9th Cir. 2010); *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991); *Mut. Fire, Marine & Inland Ins. Co. v. Norad Reins. Co.*, 868 F.2d 52, 56-57 (3d Cir. 1989).
484. *Spector v. Torenberg*, 852 F. Supp. 201, 210 (S.D.N.Y. 1994) (citing *M & A Elec. Power Coop. v. Local 702*, 977 F.2d 1235, 1238 (8th Cir. 1992)); see also *U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1176 (9th Cir. 2010); *Lefkovitz v. Wagner*, 395 F.3d 773, 780 (7th Cir. 2005); *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1271 (10th Cir. 1999) (noting that there is no rule of "*per se* nonenforcement upon a showing of *ex parte* contact" and that a party must also show prejudice); *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991).
485. See *Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc.*, 607 F.2d 649, 650, 652-653 (5th Cir. 1979).
486. See *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994).
487. See *Spector v. Torenberg*, 852 F. Supp. 201, 209-210 (S.D.N.Y. 1994).
488. See *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991).
489. See *U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1176, 1176-1177 (9th Cir. 2010) (*ex parte* meeting with neutral witnesses not ground to set aside award); *Lefkovitz v. Wagner*, 395 F.3d 773, 779-780 (7th Cir. 2005) (improper *ex parte* communications with neutral expert witness "harmless"); *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1271-1272 (10th Cir. 1999) (*ex parte* communication with union representative improper but non-prejudicial); *M & A Elec. Power Coop. v. Local 702*, 977 F.2d 1235, 1237-1238 (8th Cir. 1992) (*ex parte* posthearing communication with party official inappropriate but did not "taint" decision).
490. See, e.g., *Emp'rs Ins. of Wausau v. Nat'l Union Fire Ins. Co.*, 933 F.2d 1481, 1490-1491 (9th Cir. 1991); *Spector v. Torenberg*, 852 F. Supp. 201, 210 n. 9 (S.D.N.Y. 1994).
491. See *Smith v. Transp. Workers Union*, 374 F.3d 372, 375 (5th Cir. 2004) (tribunal exceeded authority granted to it by modifying original award); *Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs*, 357 F.3d 272, 279 (3d Cir. 2004) ("'[A]n arbitrator may not venture beyond the bounds of his or her authority,' which is defined not only by the terms of the [parties' agreement], but also by the scope of the issues submitted by the parties." (quoting *Matteson v. Ryder Sys., Inc.*, 99 F.3d 108, 112 (3d Cir. 1996))); *W. Emp'rs Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 262 (9th Cir. 1992) (tribunal exceeded its powers when it "clearly failed to arbitrate the dispute according to the terms of the

with a challenge to an arbitration award on this basis will focus on "whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue", but will not consider "whether the arbitrators correctly decided that issue".[492] Thus, for example, courts have vacated awards that were made based on a "policy choice" and not an interpretation and enforcement of the contract;[493] that purported to determine the rights and obligations of individuals who were not parties to the arbitration agreement;[494] that ordered that stock be sold although the arbitration agreement provided only for determination of the stock's fair market value in the event of sale;[495] and that made determinations on issues outside the scope of the arbitration agreement.[496] Courts have also found arbitrators to have exceeded their power when they granted remedies prohibited by the agreement.[497] However, "any doubts concerning the scope of arbitrable issues should be

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arbitration agreement"); *Interchem Asia 2000 PTE. Ltd. v. Oceana Petrochemicals AG*, 373 F. Supp. 2d 340, 355-356 (S.D.N.Y. 2005) (arbitral tribunal exceeded its authority in levying sanctions on one party's attorney where the parties' submissions did not grant such authority); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 945 (N.D. Cal. 2003) (tribunal exceeded its authority in issuing sanctions because there was no basis for them in "the FAA or the arbitration agreement").

492. *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir. 1997) (citing *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 515-516 (2d Cir. 1991)); see also *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013) ("[T]he question for a judge [under Sect. 10(a)(4)] is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all."); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 122 (2d Cir. 2011) ("Put simply, '[s]ection 10(a)(4) does not permit vacatur for legal errors.'" (quoting *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 220 (2d Cir. 2002))).

493. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1767-1768, 1770, 1774-1775 (2010) (summarized in *Yearbook* XXXV (2010) p. 617).

494. See *NCR Corp. v. Sac-Co.*, 43 F.3d 1076, 1080 (6th Cir. 1995); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1256-1257 (7th Cir. 1994).

495. See *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 167 (D.C. Cir. 1981).

496. See, e.g., *Roadway Package Sys. Inc. v. Kayser*, 257 F.3d 287, 300-301 (3d Cir. 2001) (arbitrator empowered only to evaluate the lawfulness of employee's termination went beyond the scope of the arbitration agreement when he also evaluated fairness of employer's pretermination procedures), abrogated on other grounds by *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

497. See *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.,* 400 F. App'x 654, 656 (3d Cir. 2010) (arbitrators exceeded their authority by rewriting material term of parties' contract); *Mo. River Servs. v. Omaha Tribe*, 267 F.3d 848, 855 (8th Cir. 2001) (arbitrators exceeded power by granting profits from an impermissible source); *S.D. Warren Co., a Div. of Scott Paper Co. v United Paperworkers' Int'l Union, Local 1069*, 845 F.2d 3, 8 (1st Cir. 1988) (collective bargaining agreement did not give arbitrator power to order employee suspended instead of discharged); *Coast Trading Co. v Pac. Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982) (arbitrator exceeded power by granting extension of delivery time instead of the damages remedy specified in agreement); *Augusta Capital, LLC v. Reich & Binstock, LLP*, No. 3:09-CV-0103, 2009 WL 2065555, at *4 (M.D. Tenn. 10 July 2009) (tribunal exceeded power by modifying terms of arbitral agreement to avoid an "unconscionable" result).

resolved in favor of arbitration",[498] and an arbitrator may decide any issue that is "inextricably tied up with the merits of the underlying dispute".[499] Courts will uphold an award "so long as the arbitrator offers a barely colorable justification for the outcome reached".[500] Thus, courts have permitted arbitrators to award damages for emotional distress in a contract dispute,[501] and to rule on the validity of individual shipping charters pursuant to arbitration of the validity of a separate, master charter.[502]

Arbitrators also exceed their authority when they contravene express provisions in an arbitration clause governing how their award should be issued, such as a requirement that the award be accompanied by findings of fact and conclusions of law,[503] or that arbitration be mandatory but the award be non-binding, where the arbitrators then purported to issue a binding award.[504]

(7) A final and definite award was not made

An award is "final and definite" if "no further litigation is necessary to finalize the obligations of the parties under the award", and if the award is "clear enough to indicate what each party is required to do".[505] Courts will vacate an

498. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (summarized in *Yearbook* XI (1986) p. 555); *Three S Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 531 (4th Cir. 2007); *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 343 (5th Cir. 2004); *Kurt Orban Co. v. Angeles Metal Sys.*, 573 F.2d 739, 740 (2d Cir. 1978).

499. *McAllister Bros. v. A & S Transp. Co.*, 621 F.2d 519, 523 (2d Cir. 1980); see also *Local 285 v. Nonotuck Res. Assocs., Inc.*, 64 F.3d 735, 740 (1st Cir. 1995) (noting that arbitrators should decide peripheral procedural questions because they are "often inextricably bound up with the merits of the dispute"); *Dighello v. Busconi*, 673 F. Supp. 85, 87 (D. Conn. 1987), aff'd, 849 F.2d 1467 (2d Cir. 1988).

500. *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 122 (2d Cir. 2011) (arbitrator did not exceed her power when she concluded agreement between the parties demonstrated intent to allow for class arbitration) (quoting *ReliaStar Life Ins. Co. of New York v. EMC Nat'l Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009)); see also *Three S Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 528 (4th Cir. 2007); *Jimmy John's Franchise, LLC v. Kelsey*, 549 F. Supp. 2d 1034, 1039 (C.D. Ill. 2008).

501. See *Jih v. Long & Foster Real Estate, Inc.*, 800 F. Supp. 312, 317-319 (D. Md. 1992).

502. See *Fed. Commerce & Nav. Co. v. Kanematsu-Gosho, Ltd.*, 457 F.2d 387, 390 (2d Cir. 1972).

503. See *W. Emp'rs Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 261-262 (9th Cir. 1992).

504. See *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 747 (8th Cir. 2003).

505. *Dighello v. Busconi*, 673 F. Supp. 85, 90 (D. Conn. 1987), aff'd, 849 F.2d 1467 (2nd Cir. 1988); see also *Gas Aggregation Servs. v. Howard Avista Energy*, 319 F.3d 1060, 1069 (8th Cir. 2003); *Smart v. Local 702*, 315 F.3d 721, 725 (7th Cir. 2002) ("The purpose of the section is merely to render unenforceable an arbitration award that is either incomplete in the sense that the arbitrators did not complete their assignment (though they thought they had) or so badly drafted that the party against whom the award runs doesn't know how to comply with it."); *Fradella v. Petricca*, 183 F.3d 17, 19 (1st Cir. 1999); *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 686 (2d Cir. 1996); *Dalal v. Goldman Sachs & Co.*, 541 F. Supp. 2d 72, 75 (D.D.C. 2008). Cf. *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co.*, 820 F.3d 527, 547 (2d Cir. 2016) ("Finally, we

award that is "incomplete, ambiguous, or contradictory".[506] Courts will also vacate monetary awards that are couched in general terms, leaving the exact amounts open to dispute,[507] though not where the record indicates an indisputable method of calculating a precise dollar amount.[508] However, a grant of equitable relief will not be vacated solely because its implementation may cause disputes requiring continuing supervision by the arbitral tribunal,[509] and an award will not be set aside when the opinion accompanying it is ambiguous while the award itself is clear.[510] Thus, an award of damages in a lump sum is "final and definite" even if the opinion is silent or ambiguous regarding the resolution of specific claims.[511]

(8) Manifest disregard of the law

Although courts will not set aside an award for misinterpreting the law, some courts will set aside awards in the event that the tribunal manifestly disregarded the law. The "manifest disregard" ground is not explicitly reflected in the FAA; its origin is in dictum found in an early Supreme Court opinion.[512] The validity of this ground for vacating an award was placed in

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acknowledge that our court does not exalt form over function in determining whether an arbitration award is "final" for purposes of judicial review.").

506. *Bell Aerospace Co. v. Local 516*, 500 F.2d 921, 923 (2d Cir. 1974); see also *Brown v. Witco Corp.*, 340 F.3d 209, 216 (5th Cir. 2003) ("[I]f the arbitration award in question is ambiguous in its scope or application, it is unenforceable."); *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 279 (7th Cir. 1992) ("It is well-settled that the district court generally may not interpret an ambiguous arbitration award."); *Diapulse Corp. v. Carba, Ltd.*, 626 F.2d 1108, 1111 (2d Cir. 1980).

507. See, e.g., *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1069 (8th Cir. 2003) (award left amount of prejudgment interest for judicial determination); *P.R. Mar. Shipping Auth. v. Star Lines, Ltd.*, 454 F. Supp. 368, 373-374 (S.D.N.Y. 1978) (award ordered party to "pay over ... such other freight monies as are or may come into its possession"); *Cofinco. Inc. v. Bakrie Bros., N.V.*, 395 F. Supp. 613, 616 (S.D.N.Y. 1975) (award granted "accrued expenses" and interest at unspecified rate).

508. See, e.g., *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 280 (7th Cir. 1992); *Lummus Global Amazonas, S.A. v. Aguaytia Energy Del Peru, S.R. Ltda.*, 256 F. Supp. 2d 594, 641 (S.D. Tex. 2002); *Local 114, Hotel Servs. Union v. Am. Nursing Home*, 631 F. Supp. 354, 359-360 (S.D.N.Y. 1986).

509. See *Dighello v. Busconi*, 673 F. Supp. 85, 90-91 (D. Conn. 1987), aff'd, 849 F.2d 1467 (2d Cir. 1988).

510. See *United Steelworkers v. Enter. Wheel & Car Co.*, 363 U.S. 593, 598 (1960) ("A mere ambiguity in the opinion accompanying an award ... is not a reason for refusing to enforce the award."); *Amoco Overseas Oil Co. v. Astir Navigation Co.*, 490 F. Supp. 32, 38 (S.D.N.Y. 1979) (summarized in *Yearbook* VII (1982) p. 375).

511. See *Kurt Orban Co. v. Angeles Metal Sys.*, 573 F.2d 739, 740 (2d Cir. 1978) ("[C]ourts will not look beyond the lump sum award in an attempt to analyze the reasoning processes of the arbitrators." (citing *Ballantine Books, Inc. v. Capital Distrib. Co.*, 302 F.2d 17, 21-22 (2d Cir. 1962))); *Gonzalez v. Shearson Lehman Bros., Inc.*, 794 F. Supp. 53, 54-55 (D.P.R. 1992); *Svoboda v. Negey Assocs.*, 655 F. Supp. 1329, 1333 (S.D.N.Y. 1987).

512. See *Wilko v. Swan*, 346 U.S. 427, 436-437 (1953) ("[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."). Prior to *Hall St. Assocs., L.L.C. v. Mattel, Inc.*,

doubt by the US Supreme Court's 2008 decision in *Hall Street*, in which the Court held that the FAA provides the exclusive grounds for vacating arbitral awards.[513]

This doubt has led to divergent views taken by the Courts of Appeals as to the status of this ground for vacatur. Five circuits have held that manifest disregard remains a viable ground for vacating an award,[514] three have held that it is not,[515] and the remaining circuits have not yet addressed the issue.[516]

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552 U.S. 576 (2008), most federal courts interpreted *Wilko* as establishing manifest disregard as a common law ground for vacatur, one that was independent from the enumerated grounds in the FAA. See *Wachovia Sec. LLC v. Brand*, 671 F.3d 472, 481 n. 6 (4th Cir. 2012). One Court of Appeals opposed this approach. See *Wise v. Wachovia Sec. LLC*, 450 F.3d 265, 268 (7th Cir. 2006) ("[A]lthough courts will also set aside arbitration awards that are in manifest disregard of the law, and this is often described as a nonstatutory ground, we have defined 'manifest disregard of the law' so narrowly that it fits comfortably under the first clause of the fourth statutory ground—'where the arbitrators exceeded their powers.'").

513. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) ("We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification."); see also *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1768 n. 3 (2010) (summarized in *Yearbook* XXXV (2010) p. 617) ("We do not decide whether 'manifest disregard' survives our decision in *Hall St. Assocs.*, *L.L.C. v. Mattel*, as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." (internal quotation marks and citations omitted)).

514. Of these circuits, three have concluded manifest disregard exists as a "shorthand" for or "judical gloss" on provisions of Sect. 10 of the FAA. *See Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008) (summarized in *Yearbook* XXXIV (2009) p. 319) (while no longer a non-statutory ground for judicial review, manifest disregard could be "reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA"), rev'd on other grounds, 130 S. Ct. 1758 (2010); see also *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) ("[A]fter *Hall Street Associates*, manifest disregard of the law remains a valid ground for vacatur because it is a part of § 10(a)(4)"); cf. *Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 284-285 (7th Cir. 2011) (defining manifest disregard of the law so narrowly that it may only be used to set aside an award that "directs the parties to violate the legal rights of third persons who did not consent to the arbitration"). In an unpublished and non-precedental opinion, one court appeared to suggest that manifest disregard remained a viable non-statutory ground for vacatur. See *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418-419 (6th Cir. 2008) (finding that *Hall St.* only applied to contractual expansion of the grounds of review and not to manifest disregard – a common law expansion of such grounds). Finally, one court has found manifest disregard to survive *Hall St.* but has not determined whether it exists as "an independent ground for review or as a judicial gloss". *Wachovia Sec. LLC v. Brand*, 671 F.3d 472, 482 (4th Cir. 2012) (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1768 n. 3 (2010) (summarized in *Yearbook* XXXV (2010) p. 617)).

515. See *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) ("In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected."); *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) ("[A]n arbitral award may be vacated only for the reasons enumerated in the FAA"); *Frazier v.*

The circuits that continue to apply the "manifest disregard" standard maintain, as they did in the past, that it must be construed narrowly.[517] As a result, an objection that the arbitrators acted in manifest disregard of the law remains difficult to establish and is rarely sustained. In most courts that still recognize the "manifest disregard" standard, a two-part test must be met for an award to be vacated. First, the applicable legal principle must be "clearly defined and not subject to reasonable debate".[518] Second, the arbitrator must have "refused to heed that legal principle",[519] or in other words, the arbitrator recognized the applicable law and then ignored it.[520] A New York state appellate court, drawing heavily from federal jurisprudence, recently recognized the same "manifest disregard" standard.[521] The Court of Appeals for the Seventh Circuit, however, has adopted a different and narrower approach. Under its approach, an award may be set aside for manifest disregard of the law only if it "directs the parties to violate the legal rights of third persons who did not consent to the arbitration".[522]

CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010) ("We hold that our judicially-created bases for vacatur are no longer valid in light of *Hall Street*.").

516. *Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 22-23 (1st Cir. 2010) ("The continued vitality of the manifest disregard doctrine in FAA proceedings is a difficult and important issue that the courts have only begun to resolve…. We have referred to the issue in dicta ... but have not squarely determined whether our manifest disregard case law can be reconciled with *Hall St.*"); *Paul Green Sch. of Rock Music Franchising, L.L.C. v. Smith*, 389 F. App'x 172, 177 (3d Cir. 2010); *Abbott v. Law Office of Patrick J. Mulligan*, 440 F. App'x 612, 620 (10th Cir. 2011) ("[I]n the absence of firm guidance from the Supreme Court, we decline to decide whether the manifest disregard standard should be entirely jettisoned.").
517. See, e.g., *Wachovia Sec. LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012) ("Whether manifest disregard is a 'judicial gloss' or an independent ground for vacatur, it is not an invitation to review the merits of the underlying arbitration. Therefore, we see no reason to depart from our two-part test which has for decades guaranteed that review for manifest disregard not grow into the kind of probing merits review that would undermine the efficiency of arbitration." (internal citation omitted)).
518. *Id.*
519. *Id.*
520. See *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011) ("[T]o apply the manifest disregard test a court must first determine 'whether the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable,' and second, 'whether the arbitrator knew about the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it.'" (quoting *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 n. 1 (2d Cir. 2011))); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009).
521. *Matter of Daesang Corp. v. NutraSweet Co.*, 2018 NY Slip Op. 06331, Dkt. 655019/16 5973 (1st Dep't 27 Sept. 2018).
522. *Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 284-285 (7th Cir. 2011).

b. Procedure

An award may be set aside by application to a court of competent jurisdiction for an order to vacate the award.[523] Under the FAA and most state statutes the application must be made within ninety days after the delivery of the award.[524] Notice of the application must be served in the manner established by law. If a party seeks to enforce an award, a party opposing enforcement can make a motion in the same action to set aside the award, and the court will not enforce the award until it has considered the motion to set it aside.

c. Waivers

There is a split in authority between the few courts that have reviewed waivers of judicial review in arbitration agreements. Some courts have held that exclusion agreements cannot foreclose *any* of the statutorily authorized grounds for judicial review under of the FAA.[525] As one court reasoned:

> "An agreement that contemplates confirmation but bars all judicial review presents serious concerns. Arbitration agreements are private contracts, but at the end of the process the successful party may obtain a judgment affording resort to the potent public legal remedies available to judgment creditors. In enacting § 10(a) [of the FAA], Congress impressed limited, but critical, safeguards onto this process, ones that respected the importance and flexibility of private dispute resolution mechanisms, but at the same time barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct. This balance would be eviscerated, and the integrity of the arbitration process could be compromised, if parties could require that awards, flawed for any of these reasons, must nevertheless be blessed by federal courts. Since

523. As described above in Chapter V.10, a party seeking to vacate or enforce an arbitral award in a domestic case must either establish an independent basis for federal jurisdiction or seek to enforce the award in state court. However, a claim for vacatur of an award premised on the non-statutory basis of manifest disregard of (federal) law may create a federal question. See *Luong v. Circuit City Stores*, 368 F.3d 1109, 1112 (9th Cir. 2004); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 27 (2d Cir. 2000) ("[When a petition to vacate] complains principally and in good faith that the award was rendered in manifest disregard of federal law, a substantial federal question is presented and the federal courts have jurisdiction to entertain the petition.").

524. See 9 U.S.C. Sect. 12; 2000 UAA Sect. 23(b); 1955 UAA Sect. 12.

525. See *In re Wal-Mart Wage & Hour Emp. Pracs. Litg.*, 737 F.3d 1262, 1267 (9th Cir. 2013) ("Just as the text of the FAA compels the conclusion that the grounds for vacatur of an arbitration award may not be supplemented, it also compels the conclusion that these grounds are not waivable, or subject to elimination by contract."); *Rollins, Inc. v. Black*, 167 F. App'x 798, 799 n. 1 (11th Cir. 2006); *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 63-66 (2d Cir. 2003), overruled on other grounds by *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Team Scandia, Inc. v. Greco*, 6 F. Supp. 2d 795, 798 (S.D. Ind. 1998).

> federal courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards for compliance with § 10(a)."[526]

Other courts have found that, depending on the language of the agreement, exclusion agreements may limit *some* but not all of the grounds of vacatur under the FAA. For example, an exclusion agreement that required an award to be "final and unreviewable for error of law or legal reasoning of any kind", was found to limit judicial review only to issues of arbitrator corruption, fraud, partiality and failure "to provide a hearing to consider each party's views", but not the fourth ground for vacating an award under the FAA, i.e., claims that the arbitrator exceeded his or her power.[527] The logic of this approach is that review for corruption, fraud, partiality or failure to allow the parties to be heard are all grounds that deal with the "arbitrator's conduct/the process of the arbitration", while a determination of whether the award exceeded the arbitrator's power required a review of the "substance" of the award.[528]

Parties have sometimes also sought to exclude *appellate* review of trial court judgments to confirm or vacate an arbitral award. This has been held to be valid so long as the parties' agreement to do so is "clear and unequivocal".[529] An agreement that the court's judgment will be "final" is generally not sufficient to waive appellate review, but the term "nonappealable" should be sufficient.[530]

d. Effect of an award that has been set aside

Once vacated, an arbitral award has no legal effect.[531] The court may, in its discretion, direct the arbitrators to rehear the matter if the time (if any) in which they were obliged to issue their award has not expired.[532]

526. *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 63 (2d Cir. 2003), overruled on other grounds by *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).
527. See *Commc'ns Consultant, Inc. v. Nextel Commc'ns of the Mid–Atl., Inc.*, 146 F. App'x 550, 552-553 (3d Cir. 2005); see also *Kim-C1, LLC v. Valent Biosciences Corp.*, 756 F. Supp. 2d 1258, 1266-1267 (E.D. Cal. 2010).
528. *Kim-C1, LLC v. Valent Biosciences Corp.*, 756 F. Supp. 2d 1258, 1266 (E.D. Cal. 2010).
529. *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005).
530. *Id.*; see also *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 301 (6th Cir. 2008) (the word "final" without express language of nonappealability was not sufficient to waive appellate court review).
531. *TermoRio S.A. v. Electranta S.P.*, 487 F.3d 928, 936 (D.C. Cir. 2007) ("[A]n arbitration award does not exist to be enforced ... if it has been lawfully 'set aside' [where it] was made.").
532. 9 U.S.C. Sect.10(b).

3. OTHER MEANS OF RECOURSE

Sect. 11 of the Federal Arbitration Act (the FAA) (see **Annex I** hereto) provides that, upon application of a party, the federal court in the district in which the award was made may make an order modifying or correcting the award "(a) [w]here there was an evident material miscalculation of figures or ... mistake in the description of any person, thing, or property referred to in the award";[533] "(b) [w]here the arbitrators have awarded upon a matter not submitted to them";[534] or "(c) [w]here the award is imperfect in matter of form not affecting the merits of the controversy."[535] Like the grounds for vacating an award under the FAA, the grounds for modifying and correcting the award are exclusive[536] are construed narrowly, and may not be used to dislodge an arbitrator's errors of law and fact.[537] Additional limited circumstances in which courts are permitted to modify awards in certain cases involving patents are discussed in Chapter II.3.*a* above.

Chapter VIII. Conciliation / Mediation

1. GENERAL

a. ADR in the United States

In the United States, parties have in recent years increasingly sought to resolve disputes by conciliation, mediation and similar procedures, which are known by a number of different names. In the United States, "mediation" is the most commonly used term for processes of this kind. Although some commentators

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533. 9 U.S.C. Sect. 11(a). An evident miscalculation or mistake is a computational or mathematical error that appears on the face of the award. See *Grain v. Trinity Health*, 551 F.3d 374, 378 (6th Cir. 2008); *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 999-1001 (11th Cir. 2007).
534. 9 U.S.C. Sect. 11(b); cf. *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 725-727 (8th Cir. 2003) (declining to modify the award because, even though district court's order compelling arbitration did not refer to attorneys' fees, that issue could be decided by arbitrators); *Davis v. Prudential Sec.*, 59 F.3d 1186, 1194 (11th Cir. 1995) (electing to vacate and remand under Sect. 10(a) instead of modify under Sect. 11(b) an award that rendered fees not submitted for arbitral determination).
535. 9 U.S.C. Sect. 11(c). See e.g., *Fischer v. GCA Computer Assoc.*, 612 F. Supp. 1038, 1041-1042 (S.D.N.Y. 1985) (modifying the award to resolve issues of semantics).
536. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) ("We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification.").
537. See *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960) ("The statutory provisions, 9 U.S.C. §§ 10, 11, in expressly stating certain grounds for either vacating an award or modifying or correcting it, do not authorize its setting aside on the grounds of erroneous finding of fact or of misinterpretation of law.").

have attempted to draw distinctions between mediation and conciliation, this Chapter uses the word “mediation” in a broad sense to include all processes in which one or more independent third persons assist disputing parties to reach a mutual agreement to settle their disputes.

Mediation takes many different forms and utilizes various techniques and procedures. It differs from negotiation, in which the disputing parties seek to agree to a settlement without the aid of third persons, and from arbitration, in which the parties submit the dispute to one or more third persons who are authorized to render a legally binding award. Other terms, such as “mini-trial” or “neutral evaluation”, are often used to describe forms of mediation, or processes related to mediation, in which third persons assist the parties to reach agreed settlements but do not have the power to make binding awards.

Another term often heard in the United States is “Alternative Dispute Resolution”, or “ADR”. The AAA and many commentators use the term “ADR” to include all forms of dispute resolution other than recourse to national courts. According to that use of the term, “ADR” includes arbitration as well as conciliation, mediation and similar processes, and also a number of variations – for example, “medarb” (a hybrid of mediation and arbitration) and “medloa” (a hybrid of mediation and last-offer arbitration). Others exclude arbitration from the definition, limiting the term “ADR” to mediation and similar processes in which the parties resolve disputes by mutual agreement.

b. Institutions

A large number of organizations and individuals offer services to promote and conduct mediation. Among the leaders are the AAA and the CPR, both of which are nonprofit institutions. (These organizations are described and their addresses appear in Chapter I.2 above.) The AAA promotes the possibility of mediation in its International Dispute Resolution Procedures manual, noting:

> “The parties may seek to settle their dispute through mediation. Mediation may be scheduled independently of arbitration or concurrently with the scheduling of the arbitration. In mediation, an impartial and independent mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. The [AAA] Mediation Rules that follow provide a framework for the mediation.”[538]

A similar invitation to consider mediation appears in the Introduction to the AAA Commercial Arbitration Rules and Mediation Procedures. The CPR also has promoted the use of mediation by encouraging corporations and law firms to sign in advance a policy statement supporting use of mediation and similar ADR

538. International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), Introduction, Rules Amended and Effective 1 June 2014, available at <https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf>.

processes.[539] Thus far, more than 4,000 corporations and 1,500 law firms have adopted that policy.[540]

The AAA and CPR each have adopted their own rules and procedures for use in mediation, as has the CAMCA.[541]

(1) Agreements to conciliate

The Introduction to the AAA Commercial Arbitration Rules and Mediation Procedures includes the following model clause for use "[i]f parties want to adopt mediation as a part of their contractual dispute settlement procedure ... in conjunction with a standard arbitration provision":

> "If a dispute arises out of or relates to this contract, or the breach thereof, and if said dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure."[542]

Other institutions also have similar clauses for use when parties wish to submit an existing dispute to mediation.[543]

Agreements to mediate, however, are enforceable only to the extent provided by general principles of contract law. This contrasts with arbitration clauses, which are specifically made enforceable by statute. Parties may find agreements to mediate difficult to enforce under these principles because contract law in the United States does not favor court-mandated specific performance of contractual obligations, such as ordering participation in

539. International Institute for Conflict Prevention and Resolution, Corporate Policy Statement (as amended and in effect 1984), available at < https://www.cpradr.org/resource-center/adr-pledges/corporate-policy-statement>; International Institute for Conflict Prevention and Resolution, Law Firm Policy Statement (as amended and in effect 1991), available at <https://www.cpradr.org/resource-center/adr-pledges/law-firm-policy-statement>.
540. Institute for Conflict Prevention and Resolution, Pledges, available at <https://www.cpradr.org/programs/pledges>.
541. See American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures (as amended and in effect 1 October 2013), available at <https://www.adr.org/sites/default/files/Commercial%20Rules.pdf>; International Institute for Conflict Prevention and Resolution, Mediation Procedures (as amended and in effect 1 April 1998), available at <https://www.cpradr.org/resource-center/rules/mediation/ cpr-mediation-procedure>; CAMCA Mediation and Arbitration Rules (as in effect 15 March 1996), available at <www.sice.oas.org/dispute/comarb/camca/ cammar1e.asp>.
542. See AAA Model Conciliation Clause, Commercial Arbitration Rules and Mediation Procedures 9 (1 October 2013), available at <https://www.adr.org/sites/default/files/Commercial%20Rules.pdf>.
543. See CPR Model Conciliation Clause, Mediation Procedure (1 April 1998), available at <https://www.cpradr.org/resource-center/model-clauses/mediation-model-clauses>; and CAMCA Model Conciliation Clause, available at <www.sice.oas.org/dispute/comarb/camca/cammar1e.asp>.

mediation. Instead, courts tend to award monetary damages for breach of contract – damages that may be difficult or impossible to prove and quantify if one party refuses to participate in mediation. Moreover, courts may well consider it futile to order a reluctant party to commence mediation when the success of the conciliation is dependent on the consent and cooperation of the parties. Additionally, mediation agreements frequently incorporate rules permitting the parties or the mediator to terminate the mediation at will.

(2) Confidentiality

A core feature in mediation is the confidentiality of proceedings. In the United States, the need for confidentiality in mediation is considered "almost axiomatic", as it promotes candor and the free flow of information.[544] All fifty states have rules or statutes of varying scope to protect mediation communications from being disclosed in subsequent legal proceedings.[545]

Texas, for example, has far-reaching mandatory confidentiality provisions that prevent disclosure of mediation communications in other proceedings.[546] Its statute provides that "[u]nless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court."[547] Laws in some other states, such as Rhode Island, focus exclusively on the confidentiality obligations of the mediator, preventing only the mediator from disclosing mediation communications.[548]

The Uniform Mediation Act (see **Annex VI** hereto), adopted in many states, requires that mediation communications are to be kept confidential "to the extent agreed by the parties or provided by other law or rule of this State".[549] With some exceptions, the Act makes mediation communications privileged and inadmissible as evidence in later proceedings.[550] Privilege can be waived with the express consent of all parties.[551]

Common exceptions to confidentiality include the disclosure of communications that: (1) prevent a crime likely to result in death or substantial bodily injury;[552] (2) serve to defend against charges of mediator misconduct;[553]

544. Ellen E. Deason, "The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach", 54 U. Kan. L. Rev. (2006) p. 1387.
545. *Id.*
546. See Tex. Civ. Prac. & Rem. Code Ann. Sect. 154.073 (2017) ("Except [in the case of four specified exceptions] a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.").
547. *Id.* Sect. 154.053.
548. R.I. Gen. Law Sect. 9-19-44 (2017).
549. UMA Sect. 8 (2003).
550. See *id.* Sect. 4 for the privilege rule and Sect. 6 for the exceptions.
551. UMA Sect. 5 (2003).
552. See, e.g., Or. Rev. Stat. Sect. 36.220 (6) (2017).

or (3) establish or refute grounds for voiding a settlement agreement reached during the mediation.[554]

Courts have enforced confidentiality laws,[555] and violating confidentiality provisions can lead to judicial sanctions.[556] Even absent an applicable statute, parties can provide for a degree of confidentiality by including privacy provisions in their agreements to conciliate or by agreeing to conciliate under rules that include confidentiality requirements.[557]

In addition, the AAA, the American Bar Association, and the Association for Conflict Resolution have jointly adopted Model Standards of Conduct for Mediators, which "are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes."[558] Standard V(A) of the Standards of Conduct establishes the ethical principle that a "mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law".

2. LEGAL PROVISIONS

a. Legal regime in the United States

Mediation of commercial disputes is largely governed by contract law. Unlike arbitration, there is no federal law of general application that governs the conduct of mediation of commercial disputes. Many states, however, have enacted statutes that encourage mediation of domestic and international commercial disputes and that regulate the conduct of the procedure and the enforceability of settlements reached as a result.[559]

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553. See, e.g., Okla. Stat. Ann. tit. 12 Sect.1805 (f) (2017).
554. See, e.g., Fla. Stat. Ann. Sect. 44.405(4)(a)(5) (2018).
555. *In re Empire Pipeline Corp*., 323 S.W. 3d 308, 314 (Tex. App. 2010) (discovery relating to parties' mediation barred by the alternative dispute resolution privilege); *Simmons v. Ghaderi*, 44 Cal. 4th 570, 578-584 (2008) (mediation evidence of alleged oral settlement agreement is statutorily inadmissible); *Alfieri v. Solomon*, 358 Or. 383, 404-406 (2015) (statements made by mediator and attorney during mediation proceedings are "mediation communications" that are confidential).
556. See, e.g., *Paranzino v. Barnett Bank of S. Fla. N.A.*, 690 So. 2d 725, 729 (Fla. Dist. Ct. App. 1997) (affirming trial court's dismissal of case where plaintiff had disclosed mediation settlement offer to newspaper reporter).
557. See AAA Commercial Mediation Procedures Art. 10; UNCITRAL Conciliation Rules Arts. 10, 14 and 20.
558. American Bar Ass'n et al., Model Standards of Conduct for Mediators 2 (August 2005), available at <www.mediate.com/pdf/ModelStandardsofConductforMediatorsfinal05.pdf>.
559. Scott H. Hughes, "The Uniform Mediation Act: To the Spoiled Go the Privileges", 85:9 Marq. L. Rev. (2001) pp. 16-17.

In an effort to reduce the discrepancies among state mediation statutes, the National Conference of Commissioners on Uniform State Laws and the American Bar Association's Section of Dispute Resolution adopted the Uniform Mediation Act ("UMA") (see **Annex VI** hereto) in 2001 and revised it in 2003. The District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington all have largely adopted the UMA.[560] Comparable statutes have been adopted by Delaware, Florida, Montana, Nevada, New Mexico, Oregon, and Wyoming.[561] The requirements of the UMA are limited, consistent with allowing the parties and the mediator maximal flexibility in the conduct of the mediation. Principally, the UMA (1) requires mediators to disclose conflicts of interest; (2) prevents mediators from submitting a report to an authority that may make a ruling on the subject of the dispute; and (3) prevents mediation communications from being disclosed in later adjudicative proceedings.[562]

Section 11 of the UMA, which was adopted as part of the 2003 revision, provides that, unless parties agree otherwise, international commercial mediations should be governed by the UNCITRAL Model Law on International Commercial Conciliation.[563] The District of Columbia, Hawaii, Idaho, South Dakota and Utah have adopted this provision of the UMA.[564] Other states have adopted separate statutes that apply only to international commercial disputes. California, a leader in the promotion of mediation in the United States, was the first. Enacted in 1988, its Act on Arbitration and Conciliation of International Commercial Disputes applies "if the place of arbitration or conciliation is in the State of California".[565] The Act states:

> "[I]t is the policy of the State of California to encourage parties to an international commercial agreement or transaction which qualifies for arbitration or conciliation pursuant [to this Act] to resolve disputes arising

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560. See DC Code Sect. 16 (2018); Haw. Rev. Stat. Chap. 658H (2017); Idaho Code Sect. 9-8 (2017); 710 Ill. Comp. Stat. 35 (2016); Iowa Code Chap. 679C (2018); Neb. Rev. Stat. Sect. 25-2930 (2018); N.J. Rev. Stat. Sect. 2A-23C (2017); Ohio Rev. Code Ann. Chap. 2710 (2016); S.D. Codified Laws Sect. 19-13A (2018); Utah Code Ann. Sect. 78B-10 (2018); Vt. Stat. Ann. Tit. 12 Sect. 194 (2017); Wash. Rev. Code Sect. 7 (2018). Bills to adopt the UMA are currently pending in New York and Massachusetts. See S.B. 1017, 202nd St. Leg., Reg. Sess. (N.Y. 2017); H 49, 190th Gen. Ct., Reg. Sess. (Mass. 2017).
561. Del. Code. Ann. Tit. 10 Sect. 3.347 (2018); Fla. Stat. Sect. 5.44 (2018); Mont. Code. Ann. Sect. 26-1-813 (2017); Nev. Rev. Stat. Sect. 38 (2017); N.M. Stat. Ann. Sect. 44-7B-1 (2017); Or. Rev. Stat. Sect. 36.185 (2017); Wyo. Stat. Ann. Sect. 1-43 (2017).
562. See UMA Sects. 4, 7, 9 (2003).
563. See UNCITRAL Model Law on International Commercial Conciliation, U.N. Doc. A/RES/57/18, U.N. Sales No. E.05.V.4 (2002), available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html>.
564. See D.C. Code Sect. 16-4210 (2018); Haw. Rev. Stat. Chap. 658H-11 (2017); Idaho Code Ann Sect. 9-811 (2017); S.D. Codified Laws Sect. 19-13A-11 (2018); Utah Code Ann. Sect. 78B-10-111 (2018).
565. Cal. Civ. Proc. Code Sect. 1297.12 (2017) et seq.

> from such agreements or transactions through conciliation ... [in which] the conciliator or conciliators ... shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute."[566]

Many provisions of the California Act are modeled on the UNCITRAL Rules of Conciliation.[567] North Carolina, Ohio, Oregon, and Texas, have each enacted statutes similar to the California act.[568] Although these states' laws encourage parties to agree to submit their disputes to mediation, no law in the United States mandates any attempt at amicable settlement before resort to arbitration in the case of international commercial disputes.

If mediation fails, parties often resort to arbitration to resolve their dispute. In such cases, some state statutes provide that a person who has been a conciliator or mediator may not be appointed as an arbitrator, or otherwise take part, in an arbitration of the same dispute, unless the parties or rules agreed to by the parties provide otherwise.[569]

Various federal and state courts and administrative agencies have programs to encourage, or in some cases to require, use of mediation and other ADR techniques in disputes before them.[570] These programs, which are designed to

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566. *Id.* Sect. 1297.341.
567. See UNCITRAL Conciliation Rules, U.N. Doc. A/RES/35/52, U.N. Sales No. E.81.V.6 (1980), available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980 Conciliation_rules.html>. The UNCITRAL Rules of Conciliation provide procedures parties can voluntarily use to facilitate commercial mediations. For example, the rules establish a mediator appointment process, provide rules on confidentiality and evidence admissibility, and include a model conciliation clause. The 2002 UNCITRAL Model Law covers a number of the same areas as the 1980 UNCITRAL Rules of Conciliation; the primary purpose of the former is to serve as a default set of conciliation provisions when parties have not specified their own rules, as well as to address the admissibility of evidence produced during conciliation in other proceedings. See UNCITRAL Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation, Sect. 1.A, para. 11, U.N. Sales No. E.05.V.4 (2002), available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html>.
568. See N.C. Gen. Stat. Sect. 1-45B (2016); Ohio Rev. Stat. Chap. 2712 (2017); Or. Rev. Stat. Sect. 36.450 (2017); Tex. Civ. Prac. & Rem. Code Ann. Sects. 172.201-.215 (2017).
569. See Cal. Civ. Proc. Code Sect. 1297.393; UNCITRAL Model Law on International Commercial Conciliation at Art. 12, U.N. Doc. A/RES/57/18, U.N. Sales No. E.05.V.4 (2002); see also UNCITRAL Conciliation Rules, U.N. Doc. A/RES/35/52, U.N. Sales No. E.81.V.6 (1980), available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980 Conciliation_rules.html>.
570. Most significantly, Congress took an important step to promote the nationwide use of ADR procedures, including conciliation, by enacting the Alternative Dispute Resolution Act of 1998. 28 U.S.C. Sects. 651-658. The Act instructs federal district courts to make ADR processes available and to require civil litigants to consider their use at appropriate stages in litigation. The Act authorizes federal district courts to establish rules about confidentiality, *id.* Sect. 652(d), the selection and compensation of neutrals, *id.* Sects. 653, 658, the scope of cases in which ADR referrals will be made, *id.* Sects. 652(a), (b), and the powers of court-annexed arbitrators under the Act, *id.* Sects. 655-657. See also *In re Atl. Pipe Corp.*, 304 F.3d 135, 138 (1st Cir. 2002) (holding that as a result of a court's inherent

reduce the costs and delays of litigation, apply in the context of court or administrative proceedings. While they are significant because they demonstrate widespread approval of mediation, most of them have little direct application to major international commercial disputes.

Chapter IX. Investment Treaty Arbitration

1. CONVENTIONS AND TREATIES

a. Multilateral investment treaties

The United States is party to several multilateral investment treaties that provide for arbitration of investment disputes. These include the ICSID Convention,[571] the North American Free Trade Agreement (NAFTA),[572] and the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR).[573]

The ICSID Convention came into force on 14 October 1966 and has as parties over one hundred and fifty contracting states. The goal of the Convention is to facilitate conciliation and arbitration of international investment disputes between contracting parties and nationals of contracting parties. ICSID arbitrations are facilitated through the International Centre for Settlement of Investment Disputes (Centre) and use the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Rules).[574] The scope of the ICSID Convention is explained in Art. 25(1): "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." The Centre

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power to manage and control its docket, courts can compel mediation). For a description of how these federal district court rules differ in function and form, see Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 Ohio St. J. on Disp. Resol. (2011) pp. 363, 368-373.

571. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature, 18 March 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270. The text of the agreement is available at <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx>.

572. See North American Free Trade Agreement, U.S.–Can.–Mex., pt. 5, Chap. 11, 17 December 1992, 32 I.L.M. 605, 639-649 (1993). The text of the agreement is available at <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement>. Canada, Mexico, and the United States are currently in negotiations to replace NAFTA with the United States-Mexico-Canada Agreement.

573. See Free Trade Agreement, U.S.–Cent. Am.–Dom. Rep., Chap. 10, 5 August 2004. The text of the agreement is available at <www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>.

574. The ICSID Rules were adopted by the Centre under ICSID Convention Art. 6(1)(b). The rules are available at <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx>.

also administers arbitrations that fall outside of the scope of the ICSID Convention under the ICSID Arbitration (Additional Facility) Rules (ICSID Additional Facility Rules).[575] The ICSID Additional Facility Rules may apply between a state and a national of another state if at least one of the two states is a contracting state to the ICSID Convention and the parties agree to their application.

NAFTA is a free trade agreement between the United States, Canada, and Mexico, which entered into force on 1 January 2004. CAFTA-DR is a free trade agreement among the United States, El Salvador, Guatemala, Honduras, Nicaragua, the Dominican Republic, and Costa Rica. CAFTA-DR entered into force between signatories on a rolling basis from 2006-2009. The goals of both NAFTA and CAFTA-DR are to stimulate investment, to guarantee investors' enumerated substantive rights, and to facilitate the settlement of investment disputes between investors and Party States if those substantive rights are breached. Chapter Eleven of NAFTA and Chapter Ten of CAFTA-DR permit investors to seek monetary damages for breaches of the treaties.

The United States, Mexico, and Canada are currently negotiating the United States-Mexico-Canada Agreement (USCMA). Although not final or signed, a draft announced as of October 2018 eliminated certain types of investor-state claims allowed under Chapter Eleven of NAFTA, though it preserved comparable commercial dispute resolution mechanisms.[576]

On 17 March 2015, the United States signed the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency), which entered into force on 18 October 2017.[577] Parties to this convention express their consent to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which provide for information about treaty-based investor-state arbitration to be made available to the public via a central repository.

575. See International Center for Settlement of Investment Disputes: Additional Facility for the Administration of Conciliation, Arbitration and Fact Finding Proceedings, 21 I.L.M. 1443, 1458-1468 (1982). The text of the ICSID Additional Facility Rules is available at <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Arbitration-(Additional-Facility)-Rules.aspx>.

576. See Office of the US Trade Representative, United States-Mexico-Canada Agreement at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico>. The draft continues to allow for national treatment, most-favored nation, and direct expropriation claims, but fair and equitable treatment, indirect expropriation, and other claims will only be allowed for disputes arising out of government contracts in certain sectors.

577. The text of the agreement can be found at <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028040a108&clang=en>. The treaty has not yet been published in a UNTS volume.

b. Bilateral investment treaties

The United States is currently a party to forty-one Bilateral Investment Treaties (BITs).[578] The US State Department and Department of Commerce publish links to these BITs on their websites.[579] The United States is also a party to twenty bilateral Free Trade Agreements (FTAs), seventeen of which provide for arbitration of investor-state disputes.[580]

The United States uses a model BIT when negotiating its BITs. The US Model BIT was most recently updated in April 2012 (see **Annex VII**)[581] after an inter-agency review process involving the US State Department and the Office of the United States Trade Representative. The 2012 Model BIT varies only slightly from the last iteration, which was published in 2004. The 2004 Model BIT incorporated the objectives of the Bipartisan Trade Promotion Authority Act of 2002 (TPA), which was enacted (1) to provide the President of the United States with "fast track trade" negotiating authority[582] and (2) to articulate the country's trade negotiating objectives.[583] With regard to foreign investment, the TPA stated that the country's principal objectives were "to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure

578. These treaties are with Albania, Argentina, Armenia, Azerbaijan, Bahrain, Bangladesh, Bolivia, Bulgaria, Cameroon, the Democratic Republic of Congo, the Republic of Congo, Croatia, the Czech Republic, Ecuador, Egypt, Estonia, Georgia, Grenada, Honduras, Jamaica, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, Morocco, Mozambique, Panama, Poland, Romania, Rwanda, Senegal, Slovakia, Sri Lanka, Trinidad & Tobago, Tunisia, Turkey, Ukraine and Uruguay. On 10 June 2012, the Government of Bolivia terminated the BIT with the United States, although under a sunset provision, it will continue to apply for ten years to covered investments that existed as of termination. The United States also has six additional BITs that were signed but have not yet entered into force. These treaties are with Belarus, El Salvador, Haiti, Nicaragua, Russia and Uzbekistan.

579. A list of US BITs currently in force can be found at <www.state.gov/e/eb/ifd/bit/117402.htm> and <tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp>.

580. A list of US FTAs currently in force can be found at <https://www.state.gov/e/eb/tpn/bta/fta/fta/index.htm>. The FTAs with investor-state dispute provisions are with Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Singapore and South Korea. The FTAs without such provisions are with Australia, Bahrain and Israel.

581. The BIT is also available at <http://www.state.gov/e/eb/ifd/bit/index.htm>.

582. TPA gives the president the authority to negotiate trade agreements and removed Congress' ability to amend those agreements before voting on them. While this power initially expired in 2007, TPA was reauthorized as part of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 for three years, with an additional three years upon request by the president. On 20 March 2018, the President requested an extension; because Congress did not enact a disapproval resolution by 1 July 2018, TPA was reauthorized through 1 July 2021.

583. 19 U.S.C. Sect. 3801-13.

for investors important rights comparable to those that would be available under United States legal principles and practice ... ”.[584]

With respect to investor-state rights, the 2012 Model BIT differs from the 2004 Model BIT in two substantive ways. First, the 2012 Model BIT extends the prohibitions on “performance requirements” in connection with the establishment or management of an investment within a Party’s territory. States are now prohibited from requiring investors “to purchase, use, or accord a preference to ... technology of the Party or of persons of the Party”, nor can States “prevent[] the purchase or use of, or the according of a preference to, in its territory, particular technology, so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party”.[585] Second, the new model expands the financial services regulation defense available to States. States can now argue that the impugned regulation was justifiably implemented to maintain the “safety” as well as the “financial and operational integrity of payment and clearing systems”.[586] The 2012 Model BIT also provides that the treaty cannot be interpreted to prevent measures in financial institutions “that are necessary to secure compliance with laws or regulations that are not inconsistent with [the] Treaty, including those related to the prevention of deceptive and fraudulent practices or that deal with the effects of a default on financial services contracts ... ”.[587] The 2012 Model BIT also modifies and lengthens the provisions on Party transparency, environmental obligations, and labor rights, but these articles can be enforced only through state-to-state arbitration or consultation, and not by investor-state arbitration.[588]

2. INVESTMENT ARBITRATION

a. Procedure

An investor seeking to bring a claim under a multilateral or bilateral international investment treaty must abide by the rules of the relevant instrument. Under NAFTA, investors can bring an arbitration claim under the UNCITRAL Rules or the ICSID Additional Facility Rules. Under CAFTA-DR, investors can institute arbitration under the ICSID Rules or the UNCITRAL Rules. The 2012 US Model BIT (see **Annex VII** hereto) provides the investor the option of bringing a claim under the ICSID Convention and the ICSID Rules of Procedure for Arbitration, under the ICSID Additional Facility Rules, under the UNCITRAL Arbitration Rules, or “if the claimant and

584. 19 U.S.C. Sect. 3802(b)(3).
585. 2012 US Model BIT, Art. 8(1)(h).
586. *Id.* Art. 20(1) n.18.
587. *Id.* Art. 20(8).
588. *Id.* Arts. 11, 12, 13.

respondent agree, to any other arbitration institution or under any other arbitration rules”.[589]

b. The United States as the respondent

The United States has been named as a respondent in two BIT arbitrations, one commenced by Ecuador and one by an investor from Uruguay.[590] Investors have filed seventeen NAFTA arbitration claims and a CAFTA-DR notice-of-intent to file an arbitration claim against the United States.[591] Of these nineteen investor-state claims and one state-to-state claim, the United States has not lost a case to date.[592]

3. NATIONAL INVESTMENT LEGISLATION

a. Enforcement of ICSID awards

International investment awards issued under the ICSID Convention are enforced under Art. 54 of the Convention, which provides for nearly automatic recognition and enforcement of these awards in domestic courts.[593] In the United States, federal district courts have exclusive jurisdiction to confirm ICSID awards.[594] The Federal Arbitration Act (the FAA) (see **Annex I** hereto) does not govern their enforcement; rather, federal district courts must enforce

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589. *Id.* Art. 24(3).
590. See US Dept. of State, Bilateral Investments, Other Bilateral Claims and Arbitrations, available at <https://www.state.gov/s/l/c7344.htm>.
591. For a list of arbitrations commenced against the United States, see NAFTA Investor-State Arbitrations, available at <https://www.state.gov/s/l/c3741.htm> and CAFTA-DR Investor-State Arbitrations, available at <https://www.state.gov/s/l/c56918.htm>.
592. See Office of the United States Trade Representative, The Facts on Investor-State Dispute Settlement, available at <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors>.
593. ICSID Convention, Art. 54(1) (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”).
594. 22 U.S.C. Sect. 1650a ((a) “An award of an arbitral tribunal rendered pursuant to chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9 U.S.C. Sect. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.” (b) “The district courts of the United States (including the courts enumerated in section 460 of Title 28) shall have exclusive jurisdiction over actions and proceedings under paragraph (a) of this section, regardless of the amount in controversy.”); *Mar. Int’l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1103 n.14 (D.C. Cir. 1983) (“ICSID arbitrations are to be enforced as judgments of sister states.”).

their pecuniary obligations as if the awards were final judgments of a US state court.[595] While federal courts treat ICSID awards as final judgments of US state courts, the Federal Rules of Civil Procedure apply when seeking to enforce such awards.[596] The only way to challenge an ICSID award is through the internal remedies provided by the ICSID Convention.[597]

While ICSID awards are generally to be enforced automatically by the courts, Art. 55 of the ICSID Convention preserves the defense of foreign sovereign immunity in proceedings to enforce and execute such awards.[598] In the United States, the Foreign Sovereign Immunities Act (FSIA) (see **Annex III** hereto) provides foreign sovereigns: (1) jurisdictional immunity from suit in US courts and (2) immunity from execution and attachment in the satisfaction of judgments, unless an enumerated exception applies.[599] One exception provides that sovereign states are not immune from US court jurisdiction where an action is brought to confirm an arbitration award if "(A) the arbitration takes place or is intended to take place in the United States, [or] (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards".[600] This provision has been

595. 22 U.S.C. Sect. 1650a. Although the implementing legislation only addresses enforcement of pecuniary remedies, ICSID tribunals have determined they have the power to order non-pecuniary remedies as well. See, e.g., *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, Decision on Jurisdiction, para. 81 (14 January 2004) ("The Tribunal accordingly concludes that, in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts."). Commentators believe that should such awards be sought to be enforced in the United States, courts would permit enforcement, though potentially pursuant to the New York Convention, rather than the ICSID Convention. See Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration* (2003) Sect. 28-111 ("Orders for specific performance or other non-pecuniary obligations must be enforced under the New York Convention or the law of the state of enforcement."); Christopher Schreuer, "Commentary on the ICSID Convention", 14 ICSID Rev (1999) pp. 46, 101-102 (ICSID award with non-pecuniary obligation can potentially be enforced under the New York Convention).

596. See *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 124 (2d Cir. 2017) (holding that 22 U.S.C. Sect. 1650a "requires federal courts to enforce ICSID awards as if they were final judgments of state courts—that is, pursuant to civil actions brought under the Federal Rules of Civil Procedure on such awards").

597. See ICSID Convention, Art. 51(3).

598. See *id.* Art. 55 ("Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.").

599. 28 U.S.C. Sect. 1605; 28 U.S.C. Sect. 1610. See, e.g., *Mobil Cerro Negro, Ltd. V. Bolivarian Republic of Venezuela*, 863 F.3d. 96 (2d Cir. 2017) (holding that the FSIA provided the sole basis for subject matter jurisdiction over ICSID enforcement actions against foreign sovereigns and that parties seeking to enforce arbitral awards against foreign states in US courts must comply with the FSIA's procedural requirements, including serving notice on the foreign state).

600. 28 U.S.C. Sect. 1605(a)(6); see also Chapter II.2.*c* above.

used successfully to obtain subject matter jurisdiction over foreign states in enforcement actions governed by the New York Convention[601] and over ICSID awards.[602] However, to obtain jurisdiction over a sovereign state, a petitioner seeking to enforce an award against a state must effect service according to the rules of the FSIA and may not confirm an award on an *ex parte* application.[603]

Once an exception to jurisdictional immunity has been established, a plaintiff must establish a separate exception to the immunity of a sovereign's assets in order to execute an award against them.[604] The FSIA has a specific exception for the attachment of property in aid of execution of a judgment confirming an arbitral award, but the property sought to be attached must still have been used for commercial activity.[605] Thus, notwithstanding this exception to sovereign immunity, it remains difficult to execute arbitral awards against the assets of foreign sovereigns in the United States.[606] For example, in 1986, a French company sought to enforce an ICSID award in its favor against the government of Liberia, in a federal district court in New York.[607] The court found that, by signing the ICSID Convention, Liberia had triggered one of FSIA's jurisdictional immunity exceptions and waived its sovereign immunity, and thus directed entry of judgment on the award.[608] Nevertheless, the court drew a distinction between enforcement and execution, and held that Liberia's assets were unavailable for execution since they did not fall within the "commercial use" exception to immunity from execution.[609]

b. Enforcement of non-ICSID awards

All non-ICSID treaty arbitration awards, including those governed by the ICSID Additional Facility Rules and the UNCITRAL Rules, are ordinarily

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601. See, e.g., *Int'l Thunderbird Gaming Corp. v. United Mexican States*, 473 F. Supp. 2d 80, 83 n.2 (D.D.C. 2007).
602 See *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96 (2d Cir. 2017).
603 See *id.* (holding that the FSIA provides the sole procedural mechanism under 28 U.S.C. Sect. 1605(a)(6) for obtaining jurisdiction over a foreign state); *Micula v. Gov't of Romania*, 104 F. Supp. 3d 42 (D.D.C. 2015) (holding that a petitioner must file a plenary action with proper service on the foreign government under FSIA for a federal court to recognize and enforce an ICSID award).
604. See 28 U.S.C. Sect. 1610.
605. See 28 U.S.C. Sect. 1610(a)(6).
606. See, e.g., Molly Steele and Michael Heinlen, "Challenges to Enforcing Arbitral Awards against Foreign States in the United States", 42 Int'l Law. (2008) pp. 87, 112 ("[D]espite the FSIA's restrictive approach to sovereign immunity, immunity from execution still frustrates efforts to obtain payments for arbitral awards against foreign states and state agencies. Indeed, sovereign immunity from execution and attachment remains 'the last fortress ... the last bastion of State immunity.'").
607. *Liberian E. Timber Corp. v. Republic of Liberia*, 650 F. Supp. 73, 76-77 (S.D.N.Y. 1986) (summarized in *Yearbook* XIII (1988) pp. 661-67), aff'd, 854 F.2d 1314 (2d Cir. 1987).
608. *Id.* at 76-77 (by consenting to ICSID arbitration Liberia implicitly waived its sovereign immunity under 28 U.S.C Sect. 1605(a)(1)).
609. *Id.* at 77-78.

enforceable in the same manner as commercial arbitral awards, that is, typically pursuant to the New York Convention and the FAA.[610] As mentioned above, US courts can obtain subject matter jurisdiction over foreign states to enforce arbitral awards under the FSIA,[611] and personal jurisdiction may be acquired by service on the foreign country.[612] In recent years, US courts have confirmed a NAFTA award[613] and recognized a BIT award,[614] both rendered under the UNCITRAL Rules.

610. *BG Grp, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1208–09 (2014) (looking to the FAA and the New York Convention for rules regarding confirmation of an award made under a UK-Argentina BIT).

611. See 28 U.S.C. Sects. 1605(a)(1), (6).

612. 28 U.S.C. Sect. 1330; see also *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 n.11 (D.C. Cir. 1987) ("[U]nder the FSIA, 'subject matter jurisdiction plus service of process equals personal jurisdiction.'" (internal citation omitted)).

613. *Mesa Power Grp., LLC v. Gov't of Canada*, 255 F. Supp. 3d 175 (D.D.C. 2017); Int'l *Thunderbird Gaming Corp. v. United Mexican States*, 473 F. Supp. 2d 80 (D.D.C. 2007).

614. *Republic of Argentina v. AWG Grp. Ltd.*, 211 F. Supp. 3d 335 (D.D.C. 2016); *Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365 (D.C. Cir. 2011).