

Legal 500

Country Comparative Guides 2024

United States

International Arbitration

Contributor

NORTON ROSE FULBRIGHT

Norton Rose Fulbright
US LLP

Matthew H. Kirtland

Co-Partner-In-Charge (Washington DC) |
matthew.kirtland@nortonrosefulbright.com

Katie Connolly

Associate | katie.connolly@nortonrosefulbright.com

Esha Kamboj

Associate | esha.kamboj@nortonrosefulbright.com

Eddie Skolnick

Associate | eddie.skolnick@nortonrosefulbright.com

Ernesto M. Hernández

Associate | ernesto.hernandez@nortonrosefulbright.com

This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in United States.

For a full list of jurisdictional Q&As visit legal500.com/guides

United States: International Arbitration

1. What legislation applies to arbitration in your country? Are there any mandatory laws?

The U.S. Constitution establishes a federal system of government which gives specific powers to the federal (national) government, and all remaining power to the states. Statutory law governing arbitration exists at both the federal and state levels. Under the U.S.'s common law system, the statutory law governing arbitration is developed through case law. Thus, practitioners should note both the state and federal legislation and case law in the jurisdiction in which an arbitration is seated.

At the federal level, the Federal Arbitration Act ("FAA"), codified at Title 9 of the U.S. Code, governs arbitration in both state and federal courts. Chapter 1 of the FAA concerns arbitration generally, while Chapters 2 and 3 incorporate the New York and Panama Conventions, respectively. Chapter 1 of the FAA primarily governs domestic arbitration, but it also applies to international arbitration insofar as it does not conflict with Chapters 2 and 3. For example, an international arbitration involving a country that is not a party to either the New York or Panama Conventions (or the ICSID Convention) would likely be governed by Chapter 1 of the FAA.

In addition to the FAA, each state has its own laws that govern arbitrations seated in that state. See, e.g., New York (N.Y. C.P.L.R. 7501–7515 (2012)); Texas (Tex. Civ. Prac. & Rem. Code Ann. §§ 151.001–151.013 (2017)); Florida (Fla. Stat. §§ 682.01–682.25 (2018)). These state laws operate in conjunction with the FAA, however, if a state law conflicts with the FAA, the FAA controls. See, e.g., *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017).

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

Yes. The United States became a party to the New York Convention on September 30, 1970. The U.S. made two reservations to the Convention which limit its application (1) "to the recognition and enforcement of only those awards made in the territory of another Contracting State" and (2) "to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the

United States." See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I(3), June 10, 1958, 21 U.S.T. 2517.

3. What other arbitration-related treaties and conventions is your country a party to?

The United States is also a party to the following treaties and conventions:

- the Inter-American Convention on International Commercial Arbitration ("Panama Convention"), 9 U.S.C. § 301, *et seq.*;
- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), 22 U.S.C. § 1650, *et seq.*

The United States is also a party to various bilateral and multilateral investment treaties and free trade agreements that contain provisions regarding arbitration, including *inter alia*, the United States–Mexico–Canada Agreement ("USMCA") and the Dominican Republic–Central America Free Trade Agreement ("CAFTA-DR"). The USMCA, which entered into force on July 1, 2020, was drafted to replace the North American Free Trade Agreement ("NAFTA"). Unlike NAFTA, the USMCA exempts Canada from the investor-state dispute settlement ("ISDS") provision and significantly limits its application between the U.S. and Mexico.

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

No. The FAA was enacted before the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") was promulgated. However, several U.S. states have based their state arbitration laws on the Model Law, including California, Texas, and Florida, among others. See, e.g., Cal. Civ. Proc. Code §§ 1280–1294.4 (2019); Tex. Civ. Prac. & Rem. Code Ann. §§ 172.001–172.215 (1997); Fla. Stat. §§ 684.001–684.0048 (2019).

While the FAA is not based on the Model Law, it nevertheless shares the Model Law's presumption in

favor of arbitration. That said, there are several significant differences between the FAA and the Model Law. For example, while the Model Law allows an arbitral tribunal to rule on its own jurisdiction (art. 16), the FAA is silent on this question. However, the U.S. Supreme Court has held that when parties agree to submit the issue of arbitrability to an arbitral tribunal, including when they incorporate institutional rules that delegate the question of the arbitrability to the tribunal, a court may not override the parties' agreement. See *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

5. Are there any impending plans to reform the arbitration laws in your country?

Several pieces of proposed legislation aimed at reforming arbitration in the U.S. have been introduced in recent years. Three notable bills that are currently pending are:

- The Forced Arbitration Injustice Repeal Act, or FAIR Act, S. 505, 117th Congress (2021–2022), which would prohibit a pre-dispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute.
- The Fairness in Nursing Home Arbitration Act, H.R. 2812, 117th Congress (2021–2022), which would prohibit and nullify any existing, pre-dispute arbitration agreements with respect to Medicare skilled nursing facilities or Medicaid nursing facilities, home- and community-based services, or home health care services.
- The Ending Forced Arbitration for Victims of Data Breaches Act of 2021, H.R. 3280, 117th Congress (2021–2022), which would prohibit an entity from requiring, as part of a customer agreement or other similar agreement, that an individual agree to submit to arbitration a dispute related to a security breach. With respect to this prohibition, the bill establishes a private right of action as well as provides for enforcement by the Federal Trade Commission and by states.
- The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, S. 2342, 117th Congress (2021–2022), which would invalidate forced arbitration clauses that relate to sexual assault or sexual harassment.

6. What arbitral institutions (if any) exist in your

country? When were their rules last amended? Are any amendments being considered?

- The American Arbitration Association ("AAA"): AAA's most recent amendments became effective on August 1, 2021, and the AAA's International Centre for Dispute Resolution's ("ICDR") rules were last amended and became effective March 1, 2021.
- JAMS (formerly, Judicial Arbitration and Mediation Services): JAMS's most recent rules became effective on June 1, 2021.
- The International Institute for Conflict Prevention and Resolution ("CPR"): CPR's most recent rules became effective in April 2021.
- The Inter-American Commercial Arbitration Commission ("IACAC"): IACAC's rules were last amended on April 1, 2002.
- The International Centre for Settlement of Investment Disputes ("ICSID"): ICSID's most recent rules became effective on April 10, 2006. ICSID is currently undergoing an extensive review of its rules, including changes to reduce time and cost, and enhance transparency, as well as an additional obligation to disclose third-party funding, among others.

In addition to the above institutions, the International Chamber of Commerce, headquartered in Paris, administers arbitrations in the U.S. through its International Court of Arbitration (its rules were last amended on January 1, 2021).

There also are various arbitration "centers" based in the U.S. For example, the New York International Arbitration Center (NYIAC) is located in New York City. The NYIAC does not administer cases or have its own rules. Unless parties have agreed to different rules, cases at the NYIAC are governed by the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, which were last amended on December 16, 2013.

7. Is there a specialist arbitration court in your country?

No, there are no specialist arbitration courts at the federal level in the United States. However, because personal jurisdiction over foreign sovereigns can often be established in Washington, D.C., the federal courts there typically handle more international arbitration cases than other courts. In addition, two states, New York and Florida, have specific provisions for handling international

arbitration matters. In September 2013, New York state courts began assigning all international arbitration related cases filed in its Commercial Division to a dedicated judge. Additionally, in December 2013, Florida created an International Commercial Arbitration (ICA) Court within the state court Circuit Civil Division of its Eleventh Judicial Circuit, which hears international commercial arbitration matters.

8. What are the validity requirements for an arbitration agreement under the laws of your country?

Under the FAA, an arbitration agreement must be in writing and must be part of a valid contract. 9 U.S.C. § 2. However, it may not necessarily need to be signed, and it can be incorporated by reference. *See id.*; *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S.Ct. 1637, 1648 n.3 (2020); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009). The FAA places arbitration agreements on "equal footing" with other contracts. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443–44 (2006). In addition, arbitration agreements can be invalidated by "generally applicable contract defenses," such as fraud, duress, or unconscionability. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

9. Are arbitration clauses considered separable from the main contract?

Yes. While the FAA is silent on this question, the U.S. Supreme Court has held that "an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing*, 546 U.S. at 445; *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967).

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

The U.S. Supreme Court has recognized that as a matter of federal law any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the issue to be determined is the construction of the contract language itself or an allegation of waiver, delay, or a similar defense to

arbitrability. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). Under the FAA, arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The U.S. Supreme Court has affirmed the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010), and that section 2 of the FAA is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. The effect of Section 2 is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the FAA's coverage. *Id.*

11. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

The FAA does not discuss multi-party and multi-contract arbitration and does not provide for joinder or consolidation of multiple claims and parties. Because courts allow parties to "specify with whom they choose to arbitrate their disputes," multi-party and multi-contract arbitration agreements are generally enforceable. *Stolt-Nielsen S. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). While the issue of whether the parties have a valid arbitration agreement is typically left to the courts, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995), whether the agreement permits joinder or consolidation of parties is left to arbitral tribunals unless the parties specify otherwise in their agreement. *Green Tree v. Bazzle*, 539 U.S. 444, 452–53 (2003). Some institutional rules, which parties may incorporate into their agreements, provide for joinder or consolidation of related proceedings. For example, the JAMS International Rules state that "[w]here a Request for Arbitration is submitted between parties already involved in other arbitral proceedings pending under these rules, JAMS may decide, after consulting with parties to all proceedings, and with the arbitrators, that the new case will be referred to the Tribunal already constituted for the existing proceedings." JAMS Int'l Rules art. 7.1. *See also* Swiss Rules of International Arbitration (Swiss Rules) arts. 6 (joinder), 7 (consolidation). The AAA/ICDR, the London Court of International Arbitration ("LCIA"), the Singapore International Arbitration Centre ("SIAC"), and the Centre of the Portuguese Chamber of Commerce and Industry ("CAC") Rules provide for joinder of third parties and consolidation of arbitration proceedings, provided that any such third person and the applicant party have

consented to such in writing. AAA/ICDR Rules art. 8; LCIA Rules art. 22.1(x); SIAC Rules, R. 7.1; CAC Rules art. 25. The ICC also recently updated its rules to allow more flexibility with respect to joinder and consolidation, such as by permitting an application to join additional parties after the constitution of the arbitral tribunal which was previously prohibited unless all parties consented. ICC Arbitration Rules art. 7(5).

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

The FAA does not address whether third parties or non-signatories are bound by arbitration agreements. Courts have held that whether a non-signatory can be bound by an arbitration agreement is governed by applicable state contract law. In principal, non-signatories to an arbitration agreement are not bound by the agreement; however, the Supreme Court has concluded, in a decision issued June 1, 2020, that non-signatories may sometimes be compelled to arbitrate where applicable state contract law requires such a result. *GE Energy Power Conversion France SAS*, 140 S.Ct. 1643–44 (applying to international arbitrations); see also *Arthur Andersen LLP*, 556 U.S. at 631 (applying to domestic arbitrations). Under traditional principles of state law, a contract may be enforced against or by third parties under several legal doctrines, including: waiver and estoppel, piercing the corporate veil, assumption, alter ego, incorporation by reference, third-party beneficiary theories, assignment, agency principles, closely affiliated persons or entities, intertwined claims, and trade custom and usage. See *GE Energy Power Conversion France SAS*, 140 S.Ct. at 1645; *Arthur Andersen LLP*, 556 U.S. at 631. For example, in *Robinson v. EOR-ARK, LLC*, the Eighth Circuit found that under Arkansas law, agency and related principles permitted non-signatories to an arbitration agreement to compel arbitration when, as a result of the non-signatory's close relationship with a signatory, "a failure to do so would eviscerate the arbitration agreement." 841 F.3d 781, 785 (8th Cir. 2016). In another example, the Ninth Circuit recently held that under California law, nonsignatories can invoke arbitration under the doctrine of equitable estoppel when a signatory "attempts to avoid arbitration by suing nonsignatory defendants for claims that are based on the same facts and are inherently inseparable from arbitrable claims against signatory defendants." *Franklin v. Community Regional Medical Ctr.*, 998 F.3d 867, 870 (May 21, 2021).

13. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

The FAA provides that it does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Supreme Court recently held that a court, rather than an arbitrator, should decide a dispute regarding whether a party falls under the exemption for "contracts of employment" of transportation workers before ordering arbitration. *New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 537 (2019).

The Supreme Court also recently ruled that the FAA does not allow a court to compel class arbitration when the agreement does not explicitly provide for such because the courts may not infer consent to class arbitration through state-law interpretation of an ambiguous contract. *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1418 (2019).

Additionally, there has been recent pushback to arbitration generally in the United States from some legislators. As discussed above [5], lawmakers have proposed legislation called the Forced Arbitration Injustice Repeal Act, or the FAIR Act, which, if enacted into law, would prohibit pre-dispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes, and prohibit agreements that interfere with the right of individuals, workers, and small businesses to participate in joint, class, or collective related to an employment, consumer, antitrust, or civil rights dispute. FAIR Act, S. 610, 116th Cong. § 2 (2021). The FAIR Act has not yet been passed by the Senate or enacted into law.

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

Recent court rulings are mixed on determining the applicable choice of law to an arbitration agreement where no such law has been specified by the parties. The law applicable to the existence or validity of an arbitration agreement depends on the type of alleged defect in the agreement.

Some U.S. courts have held that where an agreement contains a general choice-of-law clause and the arbitration agreement does not contain a choice-of-law provision but provides for a foreign-seated arbitration,

the arbitration agreement creates a strong presumption that the law of the seat of the arbitration governs the arbitration agreement. See, e.g., *Balkan Energy Ltd. v. Republic of Ghana*, 302 F. Supp. 3d 144, 152–53 (D.D.C. 2018); see also *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 291 (5th Cir. 2004).

Some courts have recognized that an arbitration agreement is governed by the contract law of the state whose laws otherwise apply to it. See, e.g., *AtriCure, Inc. v. Meng*, No. 19-4067, 2021 WL 3823418, at *3 (6th Cir. Aug. 27, 2021).

Some U.S. courts have held that if a challenge is based on a party's alleged lack of capacity, the applicable law is determined by the law "applicable to the party," not the law governing the parties' agreement or the law of the seat of the arbitration agreement. See *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, 957 F.3d 487, 498 (5th Cir. 2020).

Other U.S. courts have held that the parties' agreement's general choice-of-law clause will generally govern the dispute. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58–62 (1995); *Dr. Kenneth Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243 (5th Cir. 1998).

15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

The FAA is silent as to the choice of substantive law rules, and court rulings are mixed on this issue. Some courts have held that an agreement's general choice-of-law clause will generally govern the dispute. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58–62 (1995); *Dr. Kenneth Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243 (5th Cir. 1998). Arbitrators have been found to act beyond their authority if they fail to adhere to a valid, enforceable choice of law provision in the parties' arbitration agreement. *Coutee v. Barington Cap. Grp., L.P.*, 336 F.3d 1128, 1134 (9th Cir. 2003). In some instances, courts have found that the parties impliedly consented to a choice of law, such as when the parties' briefs assume that a certain law governs the issues of contract formation. See, e.g., *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 102 n.4 (2d Cir. 2002).

Other courts have held that where an agreement contains a general choice-of-law clause and the arbitration agreement does not contain a choice-of-law provision

but provides for a foreign-seated arbitration, the arbitration agreement creates a strong presumption that the law of the seat of the arbitration governs the arbitration agreement. See, e.g., *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, 957 F.3d 487, 493–98 (5th Cir. 2020); *Balkan Energy Ltd. v. Republic of Ghana*, 302 F. Supp. 3d 144, 153 (D.D.C. 2018); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 291 (5th Cir. 2004).

The American Law Institute's *Third Restatement of U.S. Law of International Commercial and Investor-State Arbitration* agrees with the view that if the parties have not agreed (either expressly or impliedly) to a law governing the arbitration agreement, the law specified in a general choice-of-law clause generally determines the law applicable to the arbitration agreement. See *Restatement (Third) U.S. Law of Int'l Comm. Arb.* § 4.10 (2019).

If there is no choice of law provision in the agreement, tribunals may also determine the applicable substantive law to be applied to the dispute, as defined in the applicable institutional rules.

16. In your country, are there any restrictions in the appointment of arbitrators?

The FAA does not expressly impose restrictions on the appointment of arbitrators. However, evidence of partiality or corruption on the part of arbitrators can be grounds for vacating an award. See 9 U.S.C. § 10. Additionally, some state laws do have restrictions on the appointment of arbitrators. For example, California requires that arbitrators be "neutral." See Cal. Civ. Proc. Code § 1282 (2019).

17. Are there any default requirements as to the selection of a tribunal?

Under the FAA, courts will appoint an arbitrator if the arbitration agreement does not provide a method for selecting a tribunal—either expressly or by incorporation of institutional rules—or if the parties fail to do so. See 9 U.S.C. § 5. In cases where the parties have not agreed a method for appointing arbitrators (and no institutional rules apply), either party can move the court in the district in which the arbitration is seated to appoint a single arbitrator. Where the FAA does not apply, many state laws also may provide for court appointment of arbitrators, including those of New York, California, Texas, and Florida, among others. See, e.g., N.Y. C.P.L.R. § 7504 (2012); Cal. Civ. Proc. Code § 1281.6 (2019); Tex. Civ.

Prac. & Rem. Code Ann. § 172.054 (1997); Fla. Stat. § 684.0012 (2019)

18. Can the local courts intervene in the selection of arbitrators? If so, how?

As discussed above, under the FAA, courts can intervene in the selection of arbitrators when the parties have not agreed on a selection process. Where the parties have agreed a method for selecting arbitrators, courts generally will defer to the parties' agreement.

19. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

The FAA is silent on challenges to the appointment of arbitrators. Although the Supreme Court has not weighed in, a number of federal appellate courts have precluded any mid-arbitration intervention, including for arbitrator challenges. See *In re Sussex*, 781 F.3d 1065, 1073 (9th Cir. 2015) (finding that the district court's ruling was clearly erroneous as to the legal standard for "evident partiality" and the nature of the equitable concerns sufficient to justify a mid-arbitration intervention and compiling cases). However, some state courts have allowed mid-arbitration intervention where the FAA does not govern. See, e.g., *Metro. Dist. Comm'n v. Connecticut Res. Recovery Auth.*, 130 Conn. App. 132, 144 (2011) (disqualifying an arbitrator).

Some institutional rules do provide grounds for such a challenge. For example, under the UNCITRAL Arbitration Rules, a party may challenge an arbitrator's appointment if there are "justifiable doubts as to the arbitrator's impartiality or independence" and only "for reasons of which [the party] becomes aware after the appointment has been made." See UNCITRAL Arbitration Rules arts. 11–13. The challenging party must send notice of the challenge within a certain time period and communicate it to the other parties and the entire tribunal. If all parties do not agree to the challenge, or the challenged arbitrator does not withdraw, then the challenging party can ask the appointing authority to rule on the challenge.

20. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators, including the duty of disclosure?

The FAA is silent on the duty independence and

impartiality of arbitrators. However, as noted above, evidence of partiality or corruption on the part of arbitrators can be grounds for vacating an award. See 9 U.S.C. § 10. For example, in June 2020, the Supreme Court refused to hear an appeal of a decision by the Ninth Circuit, in which that court held that an arbitrator's failure to disclose his ownership interest in JAMS, coupled with the fact that JAMS had administered 97 arbitrations for the prevailing party over the previous five years, demonstrated sufficient "evident partiality" of the arbitrator to support vacatur of an award in favor of the other party. *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1136 (9th Cir. 2019), cert. denied, 141 S. Ct. 164 (2020).

21. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

The FAA contains a provision that grants courts discretionary authority to appoint an arbitrator to fill a vacancy under certain circumstances. 9 U.S.C. § 5. Even so, the authority does not appear settled and the answer depends on both the facts and the jurisdiction. The Second Circuit has held that when an arbitrator dies before the tribunal renders an award, the arbitration must start anew with a full panel, unless the parties had a contrary agreement or there are other special circumstances. See *Marine Prod. Exp. Corp. v. M.T. Globe Galaxy*, 977 F.2d 66, 68 (2d Cir. 1992). One such special circumstance is when one arbitrator dies after the tribunal has decided the issue of liability, but before it has awarded damages. In that instance, the Second Circuit has approved the appointment of a replacement arbitrator rather than requiring the process to start anew. See *Trade & Transp., Inc. v. Nat. Petroleum Charterers Inc.*, 931 F.2d 191, 195–96 (2d Cir. 1991). The Second and Seventh Circuits have held that under the FAA, the resignation of an arbitrator after the arbitration is underway, but before the panel has entered its award, does not require the arbitration to begin anew, and that an arbitrator can be appointed to fill the vacancy. *WellPoint, Inc. v. John Hancock Life Ins. Co.*, 576 F.3d 643, 644–49 (7th Cir. 2009); *Ins. Co. of N. Am. v. Pub. Serv. Mut. Ins. Co.*, 609 F.3d 122, 127 (2d Cir. 2010).

22. Are arbitrators immune from liability?

The FAA is silent on the question of liability of arbitrators. However, some U.S. courts have held that arbitrators are immune from liability for "all acts within the scope of the arbitral process." *Sacks v. Dietrich*, 663 F.3d 1065, 1069 (9th Cir. 2011); see also, e.g., *Pfannenstiel v. Merrill*

Lynch, Pierce, Fenner & Smith, 477 F.3d 1155, 1160 (10th Cir. 2007); *Honn v. Nat'l Ass'n of Sec. Dealers, Inc.*, 182 F.3d 1014, 1017 (8th Cir. 1999); *McAllister v. Disp. Prevention & Resol., Inc.*, No. 19-CV-00497-DKW-RT, 2020 WL 86434, at *4 (D. Haw. Jan. 7, 2020); *Johnson v. Thompson-Smith*, 203 F. Supp. 3d 895, 902 (N.D. Ill. 2016), *aff'd*, 700 F. App'x 535 (7th Cir. 2017). Nevertheless, arbitrators can be held liable in rare cases, such as for acting in "bad faith, with malicious purpose, or in willful and wanton disregard of human rights, safety, or property." *Postma v. First Fed. Sav. & Loan of Sioux City*, 74 F.3d 160, 163 (8th Cir. 1996).

23. Is the principle of competence-competence recognised in your country?

The FAA is silent on the principle of competence-competence. However, U.S. courts have recognized the authority of an arbitral tribunal to rule on its own jurisdiction, so long as the parties have clearly delegated the question of arbitrability to the arbitrator, either expressly or by incorporating procedural rules that recognize the principle of competence-competence. See, e.g., *Henry Schein*, 139 S. Ct. at 531; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1290–92 (10th Cir. 2017); *Terminex Intern. Co. v. Palmer Ranch Ltd.*, 432 F.3d 1327, 1332–33 (11th Cir. 2005).

24. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

Under the FAA, when a party commences litigation in apparent breach of an arbitration agreement, the adverse party can file a motion to compel arbitration with a district court of appropriate jurisdiction. 9 U.S.C. §§ 4, 206, 303. The court has authority to determine the validity of the arbitration agreement and its own jurisdiction. Upon granting a motion to compel, a court will generally either dismiss the lawsuit or stay the proceedings until the arbitration is concluded. The court may also find that the party commencing arbitration has waived its right to arbitrate, if it later seeks to enforce the arbitration agreement to the detriment of the adverse party. See, e.g., *Grumhaus v. Comerica Sec., Inc.*, 223 F.3d 648, 653 (7th Cir. 2000).

25. What happens when a respondent fails to participate in the arbitration? Can the local courts

compel participation?

Under the FAA, courts have the power to compel a party's participation in arbitration. See 9 U.S.C. § 4. Most state laws empower courts to do the same. See, e.g., N.Y. C.P.L.R. § 7503 (2012). Whereas courts may enter default judgment against a party that fails to appear, under applicable JAMS, National Arbitration and Mediation ("NAM"), and AAA rules, an arbitrator may not render an award *solely* on the basis of the default or absence of a party, but may make the award on the evidence presented to it by the appearing party. See, e.g., JAMS Rules, R.22(j); ICDR Rules art. 29. Such awards are generally enforceable in the United States.

26. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

The FAA does not address whether third parties can voluntarily join arbitration proceedings. Some institutional rules, which parties may incorporate into their arbitration agreements, provide procedures for third parties wishing to join as additional parties. See, e.g., ICC Arbitration Rules art. 7(1); AAA/ICDR Rules art. 8; JAMS Rules R.6(f); LCIA Rules art. 22.1(x).

27. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

The FAA does not contain provisions regarding interim measures. However, most arbitral institutional rules empower a tribunal to issue interim measures. These include injunctions, preservation of evidence or assets, security for costs and temporary restraining orders. These rules, however, require the arbitrators to provide both parties an opportunity to be heard and do not usually permit the type of *ex parte* restraining orders granted by U.S. courts. Increasingly, institutions have amended their rules to provide for emergency arbitrator procedures, which enable an interim arbitrator to grant such relief before the tribunal is constituted. U.S. courts can treat interim measures issued by the tribunals as enforceable final awards where the award finally and definitively disposes of the issue. See, e.g., *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 264 (2d Cir. 2003); *Publicis Commc'n v. True N. Commc'ns, Inc.*, 206 F.3d 725, 729 (7th Cir. 2000); *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019,

1022–23 (9th Cir. 1991).

In certain circumstances, federal and state courts will consider whether interim measures, such as a temporary restraining order, are justified pending the constitution of a tribunal. See, e.g., *iTalk Glob. Commc'ns, Inc. v. Hanya Star Ltd.*, No. 212-CV-03469-SVW-FFM, 2012 WL 12887555, at *4 (C.D. Cal. May 22, 2012). A party may seek interim relief from a court without waiving its right to insist that its claims be arbitrated. U.S. courts are empowered to issue preliminary injunctions and attachments of property as well as *ex parte* temporary restraining orders. Despite this broad authority, in practice, U.S. courts sometimes will deny applications for preliminary relief which could have been submitted to the arbitrator(s) given the deference to arbitral proceedings.

28. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

The FAA does not expressly authorize U.S. courts to issue anti-arbitration injunctions. However, courts can issue an anti-arbitration injunction pursuant to their general equitable powers. See *Tai Ping Ins. Co., Ltd. v. M/V Warschau*, 731 F.2d 1141, 1144 (5th Cir. 1984) ("There is no provision in the 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."); *CRT Capital Grp. v. SLS Capital, S.A.*, 63 F. Supp. 3d 367, 375 (S.D.N.Y. 2014). Such cases may arise when a party seeks to enjoin an arbitration on the ground that it did not enter into an enforceable arbitration agreement. See, e.g., *URS Corp v. Lebanese Co. for Dev. & Reconstruction of Beirut Central Dist.* SAL, 512 F. Supp. 2d 199 (D. Del. 2007). Where a valid arbitration agreement exists, some courts have found that anti-arbitration injunctions are disfavored. See *McIntire v. China MediaExpress Holdings, Inc.*, 113 F.Supp.3d 769, 775 (S.D.N.Y. 2015).

29. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

The FAA does not provide any evidentiary rules. But, "[a]rbitrators are accorded great deference in their determinations." *Kobel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99 (2d Cir. 2013). In

addition, many institutional rules include guidelines on evidentiary matters. For example, the AAA provides that "the parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute." AAA Rules, R-34(a). The AAA Rules grant the arbitrator the right to determine the "admissibility, relevance, and materiality of the evidence offered," provided that they take into account "applicable principles of legal privilege." *Id.*

Under the FAA, arbitrators do have the power to summon witnesses to appear, testify, and produce documents at an arbitration hearing. 9 U.S.C. § 7. The U.S. district court for the district in which the arbitration is seated is typically required to enforce such summons, but such enforcement is not guaranteed. See, e.g., *Jones Day v. Orrick, Herrington & Sutcliffe LLP, et al.*, Case No. 21-mc-80181-JST, 2021 WL 4069753 (Sept. 7, 2021) (court denies request to enforce arbitrator summons compelling witness to testify on grounds that court was not located at seat of arbitration). Some state statutes also provide for judicial enforcement of summons issued by arbitrators. In the event of non-compliance, the statute empowers the district court in the district in which the arbitrator sits to compel attendance before the arbitrator. Outside the context of a hearing, the FAA does not empower the arbitrators to subpoena documents from third parties. See *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 708 (9th Cir. 2017).

30. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

Ethical codes and professional standards are set by the jurisdiction in which the practitioner is licensed and the jurisdiction in which the arbitration is seated. Counsel and arbitrators should therefore familiarize themselves with the practice of law rules as well as the ethics rules in the state in which the arbitration will be seated. For example, in certain states, counsel must be licensed to practice in that state, and, if not licensed, may only participate in arbitration if the proceedings arise out of the attorneys' home state practice, see, e.g., N. J. R. 21-1(a), if they file a verified statement with the state bar association, see, e.g., Fla. Rule 1-3.11 (not applicable to international arbitrations), or if they practice in conjunction with a licensed attorney, see, e.g., Nev. Sup. Ct. Rule 42.2(a)(f).

Generally, arbitrators must abide by standards of impartiality and neutrality. Additionally, some institutions provide guidance on the ethical requirements for arbitrators. See, for example, the American Bar Association Code of Ethics for Arbitrators in Commercial Disputes, and the JAMS Arbitrators Ethics Guidelines.

31. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

The FAA does not provide specific rules governing confidentiality, but some states have adopted specific provisions for the confidentiality of an arbitration. See, e.g., Mo. Rev. Stat. § 435.14.

However, courts will generally uphold confidentiality agreements between parties, and unlike court proceedings in the United States, which are public by default, arbitral proceedings are generally private by default. Further, many institutions provide default confidentiality rules. For example, the LCIA rules provide that:

[t]he parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. The parties shall seek the same undertaking of confidentiality from all those that it involves in the arbitration, including but not limited to any authorised representative, witness of fact, expert or service provider.

LCIA Arbitration Rules, R. 30.1.

32. How are the costs of arbitration proceedings estimated and allocated? Can pre- and post-award interest be included on the principal claim and costs incurred?

The FAA is silent on costs, and courts diverge on the question of how the costs of arbitration proceedings should be estimated and allocated. Costs are generally handled as a matter of contractual agreement between the parties or according to the institutional rules that govern a proceeding.

The FAA is silent on interest. However, U.S. courts have

generally held that unless parties have specified otherwise in their agreement, arbitrators have the authority to award interest and to determine the amount of interest and the date from which the interest should be calculated. See, e.g., *Matter of Hawai'i State Teachers Ass'n*, 140 Haw. 381, 400 (2017); *Haddon v. Shaheen & Co.*, 231 Ga. App. 596, 599 (1998); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 148 (4th Cir. 1993).

Moreover, in the U.S., unless specified otherwise in the parties' arbitration agreement, once an award is confirmed, post-award interest will be governed by the federal post-judgment interest statute, 28 U.S.C. §1961. This is because the U.S. has adopted the doctrine of merge, whereby once a claim (or award) is reduced to a judgment, "the original claim is extinguished" and "a new claim, called a judgment debt, arises." *Kotsopoulos v. Asturia Shipping Co.*, 467 F.2d 91, 95 (2d Cir. 1972) (citations omitted); *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 1004 (10th Cir. 2005).

33. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

In order for an arbitral award to be enforced by the courts of the United States, it must be "confirmed" (i.e., recognized) by a court with jurisdiction. The legal requirements for confirmation/recognition and enforcement of an award differ depending on the nature of the award and the jurisdiction in which recognition is sought. There is no requirement that the award be reasoned, unless agreed by the parties.

Domestic Awards. The FAA, 9 U.S.C. § 9, provides a summary procedure where — if the parties in their arbitration agreement have agreed that a judgment of the court shall be entered upon the award — an award "shall" be confirmed if it is requested within one year of issuance unless the award is vacated, modified, or corrected. See [44] for grounds for such. Courts are split over whether the statute creates a statute of limitations. See *Photopaint Techs., LLC v. Smartlens Corp.*, 335 F.3d 152, 154 (2d Cir. 2003) (one year statute of limitations); *Val-U Const. Co. of S. D. v. Rosebud Sioux Tribe*, 146 F.3d 573, 575 (8th Cir. 1998) (finding language to be permissive); *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148 (4th Cir. 1993) (same); *Wachovia Sec., Inc. v. Gangale*, 125 F. App'x 671, 676 (6th Cir. 2005) (unpublished) (same).

International Awards. Chapter 2 of the FAA incorporates

the provisions of the New York Convention, and provides for similar summary proceedings:

Within three years after an arbitral award falling under the [New York] Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. § 207. Chapter 3 of the FAA contains similar provisions for the Panama Convention.

Enforcement of ICSID awards are governed by a separate U.S. statute (22 U.S.C. § 1650a), which provides that such awards "shall create a right arising under a treaty of the United States" and that 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."

Once a party has confirmed an arbitral award, they have in hand an enforceable U.S. court judgment, against which they can attempt to execute against the judgment debtor's assets. Such execution procedures are governed by applicable rules of both federal and state court.

34. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

Under the FAA (both Chapters 1 and 2), notice must be provided to an adverse party of confirmation proceedings and the proceedings cannot proceed *ex parte*. Notice must be provided to a sovereign pursuant to the Foreign Sovereign Immunities Act ("FSIA"). See *Mobil Cerro Negro, Ltd. v. Bolivian Republic of Venezuela*, 863 F.3d 96 (2nd Cir. 2017).

The estimated timeframe for obtaining recognition and enforcement of an award varies substantially from case to case. While petitions to confirm awards are generally considered to be summary proceedings and awards can sometimes be confirmed within a matter of weeks or months, in other cases it may take years to obtain a ruling. There are no time constraints on when a court must issue such a ruling, and numerous factors are relevant to such timing. For example, annulment proceedings in the seat, challenges to jurisdiction, objections to confirmation, and appeals all may affect the

timing. Once an award is confirmed, the time it can take to successfully enforce the resulting judgment will depend on the availability of the judgment debtor's assets and can substantially vary.

Confirming and enforcing awards against foreign sovereigns can also take time because of complexities effecting service and arising out of the FSIA's immunity and enforcement provisions. See 28 U.S.C. § 1602, *et seq.*

35. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

Yes. Under Chapter 1 of the FAA (domestic awards), if agreed by the parties, and if filed within one year of issuance, arbitral awards shall be recognized under the summary procedures unless the award is "vacated, modified, or corrected," the grounds for which are set out in [44].

Under Chapter 2 of the FAA (foreign awards), the award shall be recognized, if filed within three years, unless the party resisting confirmation proves that one of the grounds of refusal set for in the New York Convention (Art. V) applies, i.e.,:

- a. *The 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; or*
- b. *The 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; or*
- c. *The 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, provided that, if 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; or*
- d. *The 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;
or

- e. The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
- f. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- g. The recognition or enforcement of the award would be contrary to the public policy of that country.

36. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts?

The FAA does not limit available remedies. However, certain states may do so. For example, in New York, arbitrators generally may not award punitive damages. See *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (1976). Where the FAA governs the arbitration, however, such limitations are not applicable. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) (finding that New York-seated arbitration governed by the FAA is not restricted and that punitive damages could be awarded); see also Fla. Stat. § 682.11(1) (allowing punitive damages "if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim").

In certain circumstances, courts have refused to enforce remedies in international arbitral awards that violate U.S. public policy. For example, in *Laminoirs-Trefileries-Cableries de Lens, S. A. v. Southwire Co.*, 484 F. Supp. 1063, 1068 (N.D. Ga. 1980), a federal district court refused to recognize an interest rate increase awarded in a French arbitration as violating U.S. public policy. The court found that the increase was penal rather than compensatory, and bore no reasonable relation to any damage resulting from delay in recovery of the sums awarded. Instead, the court recognized only the base interest rate. Additionally, in *Hardy Expl. & Prod. (India), Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas*, 314 F. Supp. 3d 95, 113 (D.D.C. 2018), a federal district court refused to recognize an award that ordered specific performance in India, finding that doing so would violate U.S. public policy recognizing a state's sovereignty and the right to control its lands and natural resources.

37. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

Yes. Chapter 1 of the FAA (domestic awards) provides the limited circumstances in which a party to the arbitration may apply to the court for the district in which the arbitration is seated to have the award vacated, modified, and corrected. 9 U.S.C. §§ 10–12. If a court vacates an arbitration award, and the arbitration agreement is still valid, the court may direct rehearing by the arbitrators.

Under 9 U.S.C. § 10, the court may be 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
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.

Under 9 U.S.C. § 11, the court may modify or correct an award "so as to effect the intent thereof and promote justice between the parties":

- a. where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;
- b. where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted;
- c. where the award is imperfect in matter of form not affecting the merits of the controversy.

The U.S. Supreme Court has held that these grounds are exclusive, and cannot be expanded by agreement of the parties. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008). However, "federal law does not preclude 'more searching review based on authority outside the [federal] statute,' including 'state statutory or common law.'" See *id.* at 590; see also *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 589 (Cal. 2008).

Under Chapter 2 of the FAA (New York Convention

awards), U.S. courts can refuse to confirm an arbitral award for the reasons set forth above. However, the courts cannot vacate, modify, or correct the award itself.

38. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

Although the Supreme Court has not yet decided the issue, at least one federal appellate court has held that, where the FAA governs, parties cannot “eliminate all judicial review of arbitration awards” because such waiver “would not only run counter to the text of the FAA, but would also frustrate Congress’s attempt to ensure a minimum level of due process for parties to an arbitration.” *In re Wal-Mart Wage & Hour Emp’t Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013); cf. *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005) (finding that contractual provision limiting the right to appeal from a district court’s judgment confirming or vacating an arbitration award was permissible so long as it is clear and unequivocal); *Beckley Oncology Assocs., Inc. v. Abumasmah*, 993 F.3d 261, 265 (4th Cir. 2021) (finding that “nothing precludes a party from waiving appellate review” of a district court’s confirmation of an arbitration award.”).

Some states like California will allow pre-dispute waiver of judicial review where it is “clear and explicit.” See *Emerald Aero, LLC v. Kaplan*, 215 Cal. Rptr. 3d 5, 21 (Ct. App. 2017), as modified on denial of rehearing (Mar. 21, 2017), review denied (June 14, 2017). However, the courts have found that generic waivers of judicial review on the merits do not waive rights to judicial review based on the limited, enumerated circumstances in the California Arbitration Act. *Id.*; see also *HUB Int’l Ins. Servs. v. Morales*, No. E067095, 2018 WL 2978262, at *5 (Cal. Ct. App. June 14, 2018) (“we interpret the waiver as reflecting the standard appellate waiver that follows the submission to arbitration: The parties can only appeal based upon the limited grounds set forth *ante*, such as corruption and acts in excess of authority. All other issues have been waived.”).

39. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

As discussed above in response to [12], whether a non-signatory can be bound by an arbitration agreement is governed by applicable state contract law. Although it is

not settled case law, some courts have held that the same standard applies to arbitration awards.

40. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

While courts in the U.S. have not yet weighed in on third party funding in connection with arbitration, third party funding has continued to become more prevalent. ICSID has proposed amendments to its rules including a requirement that a funded party disclose that it has third party funding and the funder’s name. See *Proposals for Amendments of the ICSID Rules*, Working Paper #4, Proposed Arbitration Rule 14. The SIAC rules give tribunals the power to order the disclosure of the existence of and, where appropriate, details of the third party funder’s interest as well as liability for adverse costs. See SIAC 2017 Investment Rule 24(l). Some treaties, like the Canada-EU Trade Agreement, now include mandatory disclosure of the presence and identity of third party funders. See Article 8.26 (“1. Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder. 2. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.”) Recently, the ICCA and Queen Mary Law School published an extensive report in April 2018 on third party funding in international arbitration.

41. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

While the FAA does not address this issue, emergency arbitrator relief is provided for by most institutions that conduct arbitrations in the United States including the AAA, CPR, and JAMS. In 2020, the ICC reported that out of 946 cases registered under the ICC Rules, it received 32 applications for emergency arbitrator relief, and the LCIA reported 5 applications out of 444 referrals.

42. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

While the FAA does not provide for expedited or simplified procedures, many of the U.S.-based arbitral institutions have adopted rules for expedited procedures. For example, in 2020, out of 9,538 cases, the ICDR reported 111 expedited cases. In its 2020 report, the ICC reported that to date, 261 ICC cases have been conducted under the Expedited Procedure Provisions. The LCIA reported 13 applications for expedited procedures out of 444 total referrals.

The ICDR expedited procedures provide for the appointment of a sole arbitrator, submission of initial submissions that include "all of the evidence then available on which such party intends to rely", and an evidentiary hearing within 60 days of the procedural order — or, if the dispute is less than \$100,000, no hearing at all — and an award within 30 days of the hearing. These rules "shall" apply in any case where no disclosed claim or counterclaim exceeds \$250,000 exclusive of interest and the costs of arbitration, unless the parties agree or the ICDR determines otherwise. See ICDR International Arbitration Rules art. 1(4); ICDR International Expedited Procedures arts. E1–E10.

43. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

Yes. The U.S. is at the forefront of promoting diversity among both arbitrators and counsel. For example, the American Bar Association recently adopted a resolution urging "providers of domestic and international dispute resolution to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities ('diverse neutrals') and to encourage the selection of diverse neutrals". See American Bar Association, Res. 105. It also publishes statistics on diverse appointments. Many U.S. law firms and arbitral institutions are also signatories to the Equal Representation in Arbitration Pledge, and JAMS recently added an inclusion rider to its Clause Workbook ("The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees."). Additionally, ArbitralWomen, a non-profit that promotes women and diversity in international dispute resolution, recently launched a Diversity Toolkit, which was supported by funding from the AAA-ICDR, that offers training to help international dispute resolution professionals "see the role played by biases and explore ways to address and

overcome bias." Another initiative launched last year, the Equity Project, provides financing for commercial litigation and international arbitration matters led by women.

44. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

Three key cases in this area are *Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion y Produccion*, 832 F.3d 92, 107 (2d Cir. 2016), cert. dismissed, 137 S. Ct. 1622 (2017) and *Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, 864 F.3d 172 (2d Cir. 2017), and *Getma Int'l v. Republic of Guinea*, 862 F.3d 45 (D.C. Cir. 2017). All three cases considered the definition and application of "public policy" in the context of recognizing an annulled arbitral award.

In *Pemex*, applying the Panama Convention (FAA, Chapter 3), the Second Circuit upheld confirmation of an award that had been annulled at the seat, Mexico. Agreeing with the district court, the Second Circuit found that recognizing the annulment — which was based on a law that had been enacted in Mexico *after* the award was rendered — would violate U.S. public policy. The district court found that such an annulment violated "basic notions of justice."

In *Thai-Lao Lignite*, the Second Circuit recognized its authority to enforce awards annulled at the seat, but found that the annulment — which was based on a finding that the arbitrators exceeded their jurisdiction — did not offend basic notions of justice.

In *Getma Int'l*, applying the New York Convention (FAA, Chapter 2), the D.C. Circuit refused to confirm an award that had been annulled at the seat, the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa (the "CCJ"). The D.C. Circuit stated that it would not second-guess a competent authority absent extraordinary circumstances. It went on to clarify that extraordinary circumstances were not simply conflicts with U.S. public policy, but had to arise to the level of violating the U.S.'s "most basic notions of morality and justice."

45. Have there been any recent court decisions in your country considering the issue of corruption?

What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

Corruption is not an issue that is regularly raised in the U.S.-seated arbitrations or courts. The U.S. ranked 25 out of 180 countries on Transparency International's 2020 Corruption Perceptions Index with a score of 67/100. This is a slight drop from its rank of 23 out of 180 in 2019.

Under Chapter 1 of the FAA, awards may be vacated including, *inter alia*, "where the award was procured by corruption, fraud, or undue means;" and where there was evident partiality or corruption in the arbitrators, or either of them[.] 9 U.S.C. § 10(1) and (2). Courts have interpreted these provisions to require that the moving party show that the corruption was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence. See, e.g., *Weirton Med. Ctr., Inc. v. QHR Intensive Res., LLC*, 682 F. App'x 227, 228 (4th Cir. 2017); *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291, 1306 (11th Cir. 2019), *cert. denied sub nom. Inversiones Y Procesadora v. Del Monte Int'l GMBH*, 140 S. Ct. 124 (2019); *Certain Underwriting Members of Lloyds of London v. Fla., Dep't of Fin. Servs.*, 892 F.3d 501, 505 (2d Cir. 2018); see also *Hoolahan v. IBC Advanced Alloys Corp.*, 947 F.3d 101, 112 (1st Cir. 2020) (reviewing claim under 9 U.S.C. § 10(1) "undue means" standard).

46. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

While virtual hearings are not an entirely new concept, the AAA-ICDR has implemented new practices to create a better hearing experience, including pre-determined settings to promote privacy, security, and ease of use. The AAA has also published best-practices training guides for AAA-ICDR staff, arbitrators, counsel, and parties conducting virtual hearings and using Zoom. While JAMS has begun to reopen some of its dispute resolution centers for in-person hearings, JAMS also offers several video conferencing services and virtual ADR sessions. Like the AAA, JAMS has published training guides on topics including virtual ADR and security, navigating disputes arising from the Coronavirus, and virtual mediation and arbitration videoconferencing.

Similarly, the CPR has created a resource page on its website to assist with conflict resolution during the

COVID-19 pandemic. Topics range from best practices for video dispute resolution, dispute prevention steps during the pandemic, and safety procedures. In addition, on April 21, 2020, the CPR launched a new Annotated Procedural Order for Remote Video Arbitration Proceedings. This Order sets forth best practices with respect to the selection of a videoconferencing platform; preparatory activities; requirements during the proceeding; documents and witness examinations; and enforceability.

47. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

Within the last year, due to the COVID-19 pandemic, arbitral institutions have updated their rules to allow for more flexibility with respect to the use of technology and remote hearings. For example, in March 2021, the International Centre for Dispute Resolution ("ICDR"), the international division of the American Arbitration Association ("AAA"), updated its international arbitration rules ("2021 ICDR Rules"). Article 22(2) has been revised to include that "the tribunal and the parties may consider how technology, including video, audio, or other electronic means, could be used to increase the efficiency and economy of the proceedings." Article 22(2) includes an entirely new provision explicitly allowing for hearings to be conducted by video, audio, or other electronic means if (a) the parties agree or (b) if the tribunal determines, after consulting with the parties, that a remote hearing "would be appropriate and would not compromise the rights of any party to a fair process." Article 26(2) also provides that a "tribunal may at any hearing direct that witnesses be examined through means that do not require their physical presence."

Similarly, on April 21, 2020, the CPR launched a new Annotated Procedural Order for Remote Video Arbitration Proceedings. This order sets forth best practices with respect to the selection of a videoconferencing platform; preparatory activities; requirements during the proceeding; documents and witness examinations; and enforceability.

Institutions that administer arbitrations seated in the U.S. have issued similar updates. For example, the LCIA updated its rules to promote the use of email as the default method of communication with respect to the arbitration, expressly reference remote hearings, promote the use of electronic signature on arbitral awards, and

expressly require tribunals to consider data protection and other privacy measures. See, e.g., LCIA Rules art. 22.7. The updated LCIA rules also give the arbitral tribunal more ability to improve the efficiency of the proceedings, such as by limiting the submissions, testimony, and hearings, and shortening the time that tribunals have to render awards. See LCIA Rules art. 14.5, 14.6, 15.10.

Likewise, the ICC updated its rules in 2021 to expressly permit arbitrators to conduct hearings "by physical attendance or remotely, by means of videoconference, telephone or other appropriate means of communication," ICC Arbitration Rules art. 26(1), and eliminated a prior provision that suggested that virtual hearings could not be conducted if a party objected.

48. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

None of mention.

49. Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent decisions in your country considering the impact of sanctions on international arbitration proceedings?

N/A

50. Has your country implemented any rules or regulations regarding the use of artificial intelligence, generative artificial intelligence or large language models in the context of international arbitration?

N/A

Contributors

Matthew H. Kirtland

Co-Partner-In-Charge (Washington DC) matthew.kirtland@nortonrosefulbright.com



Katie Connolly
Associate

katie.connolly@nortonrosefulbright.com



Esha Kamboj
Associate

esha.kamboj@nortonrosefulbright.com



Eddie Skolnick
Associate

eddie.skolnick@nortonrosefulbright.com



Ernesto M. Hernández
Associate

ernesto.hernandez@nortonrosefulbright.com

