International Arbitration 2022

USA: Law & Practice
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1. GENERAL

1.1 Prevalence of Arbitration
The USA strongly favours arbitration, which has long been a common choice of forum for parties to domestic and international commercial agreements. Arbitration is often the preferred method of resolving business disputes since litigation can be expensive and time consuming, while arbitration proceedings generally eliminate time-consuming and costly discovery.

1.2 Impact of COVID-19
In the United States, as elsewhere, the COVID-19 pandemic has affected arbitration procedures. US-based arbitral institutions have issued guidance regarding the use of remote platforms for virtual hearings. The guidance addresses topics such as general preparation, platform selection, costs, confidentiality and security, access to exhibits, technical support, and enforcement of an award.

It appears that this guidance has led to a re-evaluation of the traditional practice of holding in-person hearings, since remote hearings save time and costs. Nonetheless, in Broumand v Joseph, 522 F. Supp. 3d 8 (S.D.N.Y. 2021), the district court held that, notwithstanding COVID, the geographic limits established by the federal rules of civil procedure apply to arbitral subpoenas. The court observed that “to avoid Rule 45(c)’s geographical limitations, the Court would have to conclude that testimony via teleconference somehow ‘moves a trial to the physical location of the testifying person’”.

1.3 Key Industries
Arbitration is the method of dispute resolution chosen most frequently in a broad range of areas, including:

- insurance and reinsurance;
- intellectual property;
- telecommunications;
- real estate;
- energy and infrastructure projects;
- financial services;
- life sciences;
- technology;
- aviation and aerospace; and
- entertainment.

1.4 Arbitral Institutions
The major alternative dispute resolution providers in the United States are the American Arbitration Association (AAA) and its international arm, the International Centre for Dispute Resolution (ICDR); JAMS; and the International Institute for Conflict Prevention and Resolution (CPR).

Parties often use the International Chamber of Commerce (ICC) and, to a lesser extent, the London Court of International Arbitration (LCIA), the Hong Kong International Arbitration Centre (HKI-AC) and the Singapore International Arbitration Centre (SIAC). Disputes involving securities are often arbitrated by the Financial Industry Regulatory Authority (FINRA).

1.5 National Courts
There are no courts specifically designated to hear arbitration disputes. Disputes concerning applicability and scope of arbitration agreements, as well as post-arbitral proceedings, may be heard in state or federal court. Disputes arising out of arbitrations with foreign sovereigns or their state-owned entities are typically heard in federal court in the District of Columbia.

2. GOVERNING LEGISLATION

2.1 Governing Law
The Federal Arbitration Act, 9 U.S.C. §§ 1–16 (FAA), governs arbitration agreements in contracts involving foreign or interstate commerce.
The FAA applies in federal and state courts. The same legal principles that apply under state contract law apply to arbitration agreements under the FAA.

While the United States has not enacted the United Nations Commission on International Trade Law (UNCITRAL) Model Law, eight individual states have statutes based on UNCITRAL’s model: California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon and Texas.

The FAA and the UNCITRAL Model Law have several similar provisions. Differences primarily concern:

- the number of arbitrators and, in the absence of party agreement, the method of their selection;
- the authority of the tribunal to rule on its own jurisdiction;
- the power of the courts to correct or modify an award; and
- the grounds for setting aside an award.

There are several issues addressed by UNCITRAL that are not covered by the FAA, including the availability of provisional measures from a court; the disclosure obligations of the arbitrators; and, in the absence of agreement, the arbitrator’s authority to determine venue and governing law.

2.2 Changes to National Law
On 10 February 2022, Congress amended Chapter 4 of the FAA to provide that pre-dispute arbitration clauses, as well as pre-dispute joint action waivers concerning sexual assault and harassment, are (at the election of the plaintiff or class action representative) unenforceable.

Under 9 U.S.C. § 402(a), the court, not the arbitrator, must determine the applicability of Chapter 4 to the agreement at issue. This means many questions will be left to the courts to define. For example, the statute provides that the case must “relate” to a sexual harassment or assault dispute, and therefore the meaning of “relate” will have to be determined through litigation. The statute may, in some instances, defeat the efficiencies gained through arbitration since, in theory, some issues would be arbitrated while others would be litigated in court.

3. THE ARBITRATION AGREEMENT

3.1 Enforceability
The only express requirement for enforceability under the FAA is that the arbitration agreement be in writing (9 U.S.C. §§ 2–4). The writing need not be signed, and the form of the writing can vary; it can be an arbitration clause in the underlying commercial contract, a standalone arbitration agreement, or some other type of memorialisation.

3.2 Arbitrability
The US Supreme Court has held that parties to a contract may not only place the merits of a dispute before an arbitral panel, but also so-called gateway questions of jurisdiction or arbitrability, “such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy” (Henry Schein, Inc. v Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019); citation omitted).

Courts, however, cannot assume that the parties agreed to arbitrate these issues in the absence of “clear and unmistakable evidence that they did so” (id at 531; citing First Options of Chicago, Inc. v Kaplan, 514 U.S. 938, 944 (1995) (“First Options’’)). And the threshold question concerning whether an arbitration agreement was actually formed is a question to be resolved by the court (see Doctor’s Associates, Inc. v Ale-
One important issue is whether the incorporation by reference of arbitral rules giving arbitrators authority to determine questions of arbitrability constitutes the required “clear and unmistakable” evidence required by the Supreme Court in First Options. All federal courts of appeals to have considered this question have answered it in the affirmative, as have several state courts. The American Law Institute, however, has taken a different position, arguing that the incorporation of such rules does not meet the “clear and unmistakable” test of First Options because “the rules do not purport to give arbitrators the exclusive authority to rule on the enforceability of the arbitration agreement” (Restatement of the Law: the United States Law of International Commercial and Investor-State Arbitration §§ 2–8 reporter’s note b(iii) (Tentative Draft No 4) (approved 19 May 2019)).

Furthermore, courts are divided as to whether a delegation clause that incorporates arbitral rules, but includes an exemption or carve-out (eg, for injunctive relief), meets the “clear and unmistakable” requirement of First Options (see, eg, Ultra Premium Services, LLC v Kompaniya, No H-21-305, 2021 WL 4440323, at *3 (S.D. Tex. 20 August 2021); citation omitted; provision incorporating rules delegates the arbitrability of all disputes except those in the carve-out) (see also Kentucky Peerless Distilling, LLC v Fetzer Vineyards Corp., No 3:22-CV-037-CBH, 2022 WL 1156963, at * 4 (W.D. Ky. 19 April 2022) (distinguishing between a carve-out from the agreement in general, and a carve-out from the provision that incorporates the arbitral rules)).

The incorporation and carve-out issues were squarely presented to the Supreme Court in 2020, but the Court declined to hear the case (Archer & White Sales, Inc. v Henry Schein, Inc., 935 F.3d 274, 283 (5th Cir. 2019), cert. denied, 141 S. Ct. 113 (2020)).

### 3.3 National Courts’ Approach

The FAA does not provide choice-of-law rules. Agreements are to be enforced according to their terms. Therefore, arbitral tribunals apply the substantive law chosen by the parties. Where the agreement does not specify the substantive law to be applied, an arbitrator has the authority to determine the appropriate choice of law rules. Indeed, institutional rules generally give arbitrators discretion to apply whatever law they deem appropriate (see, eg, CPR Rule 10.2).

The Supreme Court has held that the FAA expresses “a national policy favoring arbitration when the parties contract for that mode of dispute resolution” (Preston v Ferrer, 552 U.S. 346, 349 (2008)). Accordingly, where the FAA applies, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration” (Moses H. Cone Memorial Hospital v Mercury Construction Corp., 460 U.S. 1, 24–25 (1983)).

However, one appellate court rejected this presumption as not supported by the language of the FAA (Calderon v Sixt Rent a Car, LLC, 5 F.4th 1204,1212–14 (11th Cir. 2021)). And the Supreme Court recently ruled that the FAA’s policy favouring arbitration simply means courts must treat arbitration agreements like all other contracts, and does not embody a preference for arbitration as an alternative dispute resolution mechanism (Morgan v Sundance, Inc., __U.S. __, 142 S. Ct. 1708 (23 May 2022)). Accordingly, “a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation” (id at 1713).
3.4 Validity
Unless the parties provide otherwise, an arbitration provision is severable from the remainder of the contract and independently enforceable. Accordingly, to avoid arbitration, a party must attack the arbitration clause itself.

The rule, however, is not absolute. At least one federal court of appeals has held that when there is a legitimate question about whether the underlying contract exists, courts, not arbitrators, must decide the threshold issue of contract formation (MZM Construction Co. v New Jersey Building Laborers Statewide Benefits Funds, 974 F.3d 386 (3d Cir. 2020)).

4. THE ARBITRAL TRIBUNAL

4.1 Limits on Selection
There are no restrictions on the parties’ autonomy to select arbitrators. The FAA expressly favours the selection of arbitrators by the parties rather than the courts. In their arbitration agreement, the parties may specify the number of arbitrators, their qualifications, and the method of their selection.

4.2 Default Procedures
Section 5 of the FAA, 9 U.S.C. § 5, authorises judicial intervention in the arbitral process to select an arbitrator on a party’s application if:

- the arbitration agreement does not specify a method for selecting arbitrators;
- any party fails to follow the method specified in the agreement for selecting arbitrators; or
- there is a “lapse in the naming of an arbitrator or arbitrators”.

Unless the agreement specifies otherwise, the court will appoint a single arbitrator. The arbitrators chosen by the court “shall act... with the same force and effect” as if they had been specifically named in the arbitration agreement (id). State laws may also empower courts to appoint arbitrators.

4.3 Court Intervention
Except in rare cases, a court will not intervene pre-award to remove an arbitrator, even for bias, corruption or evident partiality. The FAA does not contain any express authorisation for such intervention.

4.4 Challenge and Removal of Arbitrators
The FAA is silent on removal, but federal courts have consistently ruled that they lack authority to remove arbitrators during an arbitration (Sussex v United States District Court for the District of Nevada (in re Sussex), 781 F.3d 1065 (9th Cir. 2015) (the district court erred by intervening mid-arbitration to remove an arbitrator for conflict of interest; intervention should only occur in extreme cases)). Some courts have held that they have “inherent” authority to disqualify an arbitrator before an award is rendered if there is a possibility that an injustice will result.

The rules of the arbitral institutions, on the other hand, expressly address the removal of arbitrators (see AAA Rule 18(a), “Disqualification of Arbitrator” (an arbitrator can be subject to disqualification for partiality or lack of independence, inability or refusal to perform their duties with diligence and in good faith, and “any grounds for disqualification provided by applicable law”), and JAMS Rule 15(i) (“at any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause”).

4.5 Arbitrator Requirements
The FAA does not have express arbitrator disclosure requirements, except to provide that an award can be set aside on the ground of evident
partiality or corruption on the part of the arbitra-
tors (see 9 U.S.C. § 10).

The rules of the arbitral institutions require that
arbitrators be impartial and independent of the
parties and impose disclosure requirements on
arbitrators. For example, Rule R-17(a) of the
AAA’s Commercial Arbitration Rules & Mediation
Procedures (2019) requires disclosure of
“any circumstance likely to give rise to justifiable
doubt as to the arbitrator’s impartiality or inde-
pendence, including any bias or any financial or
personal interest in the result of the arbitration
or any past or present relationship with the par-
ties or their representatives”. These rules also
provide that a party who fails to raise a claim of
bias against an arbitrator in a timely fashion may
be deemed to have waived the objection.

5. JURISDICTION

5.1 Matters Excluded From Arbitration
In the US, there is no specific subject matter
excluded from arbitration. The Supreme Court
has held that even rights created by statute – for
example, securities and antitrust claims – may
be resolved through arbitration. In some states,
certain disputes over divorce and child custody
have been held to be non-arbitrable. However,
when state law prohibits arbitration of specific
claims, the state law may be pre-empted by the
FAA.

While the FAA generally requires courts to
enforce arbitration clauses in employment con-
tracts, the statute does not apply to “contracts
of employment of seamen, railroad employees,
or any other class of workers engaged in foreign
or interstate commerce” (see Southwest Airlines
Co. v Saxon, 596 U.S.__, 142 S. Ct. 1103 (2022)
为空间 cargo loaders meet the statutory defini-
tion and are exempt from arbitration)).

5.2 Challenges to Jurisdiction
There is a presumption that courts will decide
whether the parties have agreed to arbitration
and whether a particular dispute falls within the
scope of the arbitration clause. According to the
Supreme Court, however, an arbitral tribunal may
rule on a party’s challenge to the tribunal’s juris-
diction so long as the parties have clearly and
unmistakably so provided in their agreement.

The federal courts of appeals have consistently
held that parties meet this standard by refer-
encing, in the arbitration clause, arbitral rules
that assign gateway questions to the arbitra-
tors, in the first instance. For example, Article
21(1) of the ICDR Rules, promulgated in 2021,
provides: “The arbitral tribunal shall have the
power to rule on its own jurisdiction, including
any objections with respect to arbitrability, to
the existence, scope, or validity of the arbitra-
tion agreement(s), or with respect to whether all
of the claims, counterclaims, and [set-offs] made
in the arbitration may be determined in a single
arbitration, without any need to refer such mat-
ters first to a court.”

The arbitral rules also address the timing of a
party’s challenge to jurisdiction. For example,
AAA Rule R-7(c) provides as follows: “A party
must object to the jurisdiction of the arbitrator or
to the arbitrability of a claim or counterclaim no
later than the filing of the answering statement
to the claim or counterclaim that gives rise to
the objection.”

5.3 Circumstances for Court
Intervention
A trial court has the authority to determine
whether there is a valid arbitration agreement
between the parties and, if so, whether the cur-
rent dispute is within its scope, except where the
arbitration agreement clearly and unmistakably
gives such “gateway” issues to the arbitrators
to decide.
A party that objects to the arbitral tribunal’s jurisdiction and has not delegated that issue to the arbitration panel can seek an injunction from a court of competent jurisdiction, prohibiting the claimant from proceeding with the arbitration.

An arbitral tribunal’s determination that it lacks jurisdiction to hear a dispute may be reviewed by a court of competent jurisdiction.

5.4 Timing of Challenge
A party may go to court to challenge the jurisdiction of the arbitral tribunal only after an award has been rendered.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility
Courts review de novo questions of arbitral jurisdiction; ie, whether the parties validly agreed to binding arbitration.

Questions of admissibility – ie, “whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement” (First Options of Chicago, Inc. v Kaplan, 514 U.S. 938, 944–45 (1995)) – are subject to varying degrees of review. If the parties have clearly and unmistakably delegated that question to the arbitral tribunal, then the courts will generally not reconsider the merits of the tribunal’s decision. If the parties have not delegated the question of arbitrability, the courts will review the tribunal’s decision de novo.

5.6 Breach of Arbitration Agreement
When a party initiates litigation despite having an arbitration clause in their agreement, the counterparty may move to stay the litigation pursuant to Section 3 of the FAA and to compel arbitration under Section 4 of the FAA (in these circumstances, a court may be asked to rule on the existence or validity of the arbitration agreement or whether the agreement applies to the parties’ particular dispute).

The Supreme Court has counselled that, for jurisdictional purposes, a court considering a motion to compel arbitration under Section 4 of the FAA must “look through” the arbitration agreement to the underlying controversy. If that controversy is one over which the federal court has jurisdiction, it may consider the motion to compel arbitration. If not, only state courts have jurisdiction to consider the motion.

Even when a stay is not requested, the district court has discretion to determine whether to stay or dismiss the case pending arbitration. A court’s discretion to stay litigation pending a related arbitration is not limited by a requirement that the litigating parties all be signatories to the relevant arbitration agreement.

The FAA does not authorise federal courts to stay proceedings pending in state courts, and the Anti-Injunction Act, 28 U.S.C. § 2283, generally prohibits federal courts from enjoining proceedings in state courts. However, the court does have the authority to enjoin a litigant from proceeding in state court.

US courts will issue anti-suit injunctions to prevent parties from pursuing litigation in the courts of a foreign country in violation of an agreement to arbitrate. That power must be used “sparingly” (Citigroup Inc. v Sayeg, No 21 Civ. 10413 (JPC), 2022 WL 179203, at *8, *9 (S.D.N.Y. 20 January 2022)).

To issue an injunction, a federal district court must have the requisite personal and subject
matter jurisdiction. The injunction operates in personam, meaning the court enjoins the claimant, not the foreign court. The parties must be the same in both matters, and “resolution of the case before the enjoining court must be dispositive of the action to be enjoined” (China Trade & Development Corporation v M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987)). Once these threshold requirements are met, courts consider additional factors, which vary from court to court, such as whether adjudication of the same issues in separate actions “would result in delay, inconvenience, expense, inconsistency, or a race to judgment” (in re Skat Tax Refund Scheme Litigation, Nos 18-md-2865 (LAK) et al, 2020 WL 400718, at *5 (S.D.N.Y. 23 January 2020)). The moving party must also satisfy the usual requirements for injunctive relief, especially irreparable harm.

5.7 Jurisdiction Over Third Parties
State law contract principles control the applicability of an arbitration agreement to non-sig- natories. Courts have held that non-signatories may be bound to arbitration agreements under several principles, including (i) incorporation by reference, (ii) assumption, (iii) agency, (iv) veil piercing/alter ego, (v) third-party beneficiary and (vi) estoppel (see Arthur Andersen LLP v Carlisle, 556 U.S. 624 (2009) (arbitration agreements are enforceable by and against non-signatories, under state law contract principles); De Gracia v Royal Caribbean Cruises Ltd., No 21-CV-22948-PCH, 2022 WL 91945 (S.D. Fla. 7 January 2022) (the law chosen to govern the arbitration agreement determines whether a non-signatory can require the plaintiff to arbitrate claims)). Courts may take a different approach when a non-signatory seeks to rely on an arbitration agreement against a signatory, as opposed to when a signatory invokes the agreement against a non-signatory (see Thompson-CSF, SA v American Arbitration Association, 64 F.3d 773, 778 (2d Cir. 1995) (explaining differences in theory's application)).

The Supreme Court, pursuant to the New York Convention as implemented by Chapter 2 of the FAA, has permitted non-signatories to international arbitration agreements to compel arbitration, on the basis of domestic-law equitable estoppel principles (see GE Energy Power Conversion France SAS, Corp. v Outokumpu Stainless USA, LLC, 140 S. Ct. 1637 (2020)).

6. PRELIMINARY AND INTERIM RELIEF

6.1 Types of Relief
It is generally accepted that arbitrators have inherent authority to order interim or preliminary relief pending a final award. As the Southern District of New York ruled in Stone v Theatrical Investment Corp., 64 F. Supp. 3d 527, 541 (S.D.N.Y. 2014), “an arbitrator is empowered to grant any relief reasonably fitting and necessary to a final determination of the matter submitted to him, including legal and equitable relief” (emphasis and citation omitted). Arbitrators may also have express authorisation to order interim relief by the terms of the arbitration agreement itself and/or the terms of the chosen arbitral rules (see, eg, AAA Arbitration Rule R-37(a) (“[t] he arbitrator may take whatever interim measures he or she deems necessary”)).

6.2 Role of Courts
Courts can enter orders in aid of arbitration, including pre-arbitration interim orders, which generally are in effect only until the arbitrators are appointed (Next Step Medical Co. v Johnson & Johnson International, 619 F.3d 67, 70 (1st Cir. 2010) (interim relief is permitted when there has been “a showing of some short-term emergency that demands attention while the arbitration machinery is being set in motion”)). If an arbi-
Central tribunal orders preliminary or interim relief, courts can enter orders implementing that relief. Furthermore, the arbitration clause may have a carve-out providing that while all disputes must be submitted to arbitration, the parties may seek injunctive relief in court, which can be sought on an emergency basis.

Courts can grant interim relief in aid of foreign-seated arbitrations (see Sojitz Corp. v Prithvi Information Solutions Ltd., 921 N.Y.S.2d 14, 17 (App. Div. 2011) (Japanese creditor could attach, for security purposes only, the New York assets of an alleged debtor whose principal place of business was India, in aid of an award the creditor anticipated securing in an arbitration in Singapore)). Interim relief includes orders of attachment and injunctions.

The FAA does not expressly address the topic of emergency arbitrators, but the rules of the arbitral associations provide for their appointment (see AAA Arbitration Rule R-38(a) & (b)). Decisions of emergency arbitrators are binding on the parties by terms of their agreement but are reviewed by the tribunal once constituted.

In appropriate situations, courts will review interim orders of emergency arbitrators (see Vital Pharmaceuticals v PepsiCo., Inc., No 20-CIV-62415-RAR, 2020 WL 7625226 (S.D. Fla. 21 December 2020) (confirming an interim injunctive order of an emergency arbitrator appointed under the AAA rules); Yahoo Inc. v Microsoft Corp., 983 F. Supp. 2d 310 (S.D.N.Y. 2013) (upholding an emergency arbitral order requiring Yahoo to continue its contractual performance during the pendency of the arbitration)).

6.3 Security for Costs
The FAA does not have a provision governing costs and fees. However, certain institutional arbitral rules expressly grant arbitral tribunals the power to require security for costs (see AAA Arbitration Rule R-37(b); CPR Arbitration Rules 13.1, 19.1 and 19.2). Moreover, the courts have upheld interim arbitration orders requiring a party to post pre-arbitration security (see Preble-Rish Haiti, S.A. v Republic of Haiti, No 4:21-CV-1953, 2021 WL 3516243, at *4 (S.D. Tex. Aug. 10, 2021) (collecting cases)).

7. PROCEDURE

7.1 Governing Rules
There is no federal policy favouring arbitration under a certain set of procedural rules, nor does the FAA prescribe specific procedures for arbitrations. Rather, the parties have leave to determine the procedural rules under which the arbitration will be conducted. Arbitrators generally must follow the procedural rules agreed upon by the parties. Contracting parties will typically agree to arbitrate under the rules of an established arbitral institution. These rules give arbitrators discretion to manage the arbitration in the manner they deem appropriate, subject to minimum due process requirements.

7.2 Procedural Steps
Federal law does not require any particular procedure or procedural steps for arbitrations, and parties may include in their arbitration agreements whatever procedural terms they wish, so long as those procedures comply with fundamental fairness and afford the parties minimum due process.

7.3 Powers and Duties of Arbitrators
In terms of arbitrator powers, Section 7 of the FAA provides that 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”. As concerns duties, Section 10 of the FAA, in setting forth the
grounds for vacatur of an arbitral award, requires arbitrators to be impartial and to avoid any form of misconduct.

7.4 Legal Representatives
A party representative in arbitration need not be a lawyer. Parties may represent themselves or choose non-lawyers to represent them. However, since the dispute resolution process is adversarial, the rules and procedures can be complex, and there is usually a great deal at stake, it is no surprise that lawyers overwhelmingly are chosen to represent parties in arbitration in the US.

The practice of law in the United States is regulated by the individual states. The American Bar Association Model Rules of Professional Conduct have been adopted (often with modifications) by all states except California, which has its own ethics rules. The rules apply to lawyers’ conduct in arbitrations and other contexts. Under Model Rule 8.5(a), lawyers remain subject to the disciplinary authority of the jurisdiction where they are admitted, regardless of where the conduct occurred (see New York Rule of Professional Conduct 8.5(a); District of Columbia Rules of Professional Conduct 8.5(a)). However, the rules of the jurisdiction where the arbitration is pending may also apply (New York Rule 8.5(b)(1); District of Columbia Rule 8.5(b)(1)). Some states may impose particular procedural requirements on lawyers’ participation, depending on whether the arbitration is domestic or international.

8. EVIDENCE

8.1 Collection and Submission of Evidence
Section 7 of the FAA gives arbitrators the authority to “summon... 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... document... which may be deemed material as evidence in the case” (9 U.S.C. § 7). Beyond that, the FAA has no formal requirements regarding the production of documents, the disclosure process more generally, or the manner in which testimony or evidence is presented in arbitration.

As a general matter, however, parties are free to address matters of discovery and the presentation of testimony and evidence in their agreement, and may incorporate by reference arbitral rules that address these matters with specificity. Usually, arbitrations conducted in the US entail some amount of document discovery, with the parties typically producing those documents upon which they intend to rely and then exchanging requests for the production of documents. Legal privileges are consistently enforced in arbitrations in the US. Witness testimony is presented orally at the hearing, or in witness statements in advance of the hearing, but in either event, cross-examination is permitted and regularly employed.

8.2 Rules of Evidence
The FAA does not impose any rules of evidence on arbitral proceedings. It does, however, provide, in Section 10(a)(3), that courts have authority to vacate an award where the tribunal “refus[es] to hear evidence pertinent and material to the controversy” (9 U.S.C. § 10(a)(3)).

In the absence of an agreement of the parties, who may address evidentiary matters in their agreement and are free to incorporate institutional arbitral rules that address document disclosure, arbitrators are not bound by the Federal Rules of Evidence.

8.3 Powers of Compulsion
Section 7 of the FAA provides that “[t]he arbitrators selected either as prescribed in this title or otherwise, or a majority of them, 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” (9 U.S.C. § 7).

The statute does not otherwise provide for discovery from non-parties. Courts are divided as to whether arbitrators can order the production of documents or deposition testimony from non-parties before the hearing. However, in Managed Care Advisory Group, LLC v Cigna Healthcare, Inc., 939 F.3d 1145 (11th Cir. 2019) (per curiam), the Eleventh Circuit joined the Second, Third, Fourth, and Ninth Circuits in ruling that Section 7 allows arbitrators to compel a non-party witness to attend an arbitration hearing and bring documents with them, but does not permit subpoenas for pre-hearing depositions or for documents only. The Sixth and Eighth Circuits have held that Section 7 implicitly allows arbitrators to subpoena documents from non-parties, even prior to an arbitration hearing. State courts also differ on this issue.

Although, at least in the first instance, discovery and evidentiary issues that arise in the context of a pending arbitration are committed to the discretion of the arbitrators, arbitrators lack the authority to compel compliance with their subpoenas. Under Section 7 of the FAA, when a party fails to comply with a tribunal’s order to testify or produce documents, the party seeking to enforce the order may petition a court for enforcement (9 U.S.C. § 7). If the subpoenaed party does not comply with the court order, the party may be held in contempt. However, Section 7 does not provide an independent grant of federal subject-matter jurisdiction. Accordingly, a separate federal statute must provide the statutory basis for subject-matter jurisdiction.

US courts have authority, pursuant to 28 U.S.C. § 1782, to compel the production of evidence “for use in a proceeding in a foreign or international tribunal” (id). The target of discovery must “reside” or be “found” in the district where discovery is sought, which can raise nettlesome jurisdictional questions. Moreover, the Supreme Court recently ruled that private international commercial and investment treaty arbitrations do not qualify as tribunals within the meaning of the statute. Rather, the statute reaches only governmental or intergovernmental adjudicative bodies (see ZF Automotive US, Inc. v Luxshare, Ltd., No 21-401, __U.S__, __S. Ct__, 2022 WL 2111355 (U.S., 13 June 2022)).

9. CONFIDENTIALITY

9.1 Extent of Confidentiality

The FAA does not address confidentiality, and there is no case law establishing a general duty of confidentiality in arbitrations. The parties, however, can provide for confidentiality in their arbitration agreement. And institutional arbitral rules typically authorise arbitrators to issue orders protecting the confidentiality of materials. CPR Arbitration Rule 20, for example, requires the parties, the arbitrators and the CPR to treat proceedings, related document disclosure and tribunal decisions as confidential, subject to limited exceptions. Most state laws allow the tribunal to issue protective orders and confidentiality orders. Some states have statutes that address confidentiality.

Courts defer to arbitral rulings on confidentiality and privilege, at least in so far as parties are concerned (see Turner v CBS Broadcasting Inc., __ F.3d __, 2022 WL 1209680, at *5 (S.D.N.Y. Apr. 25, 2022)) (“non-parties generally have not consented to have their legal rights adjudicated by an arbitrator rather than a court”)).

Publicly held companies may be required by US securities law to disclose the arbitration proceeding if it is material to the company’s financial condition or performance. Post-award judi-
cial proceedings to confirm or vacate will likely make the award public.

Information from an arbitral proceeding may be voluntarily disclosed by a party unless disclosure is prohibited by the parties’ agreement, institutional arbitral rules, or confidentiality orders issued by the arbitrators. However, there is a strong public interest in preserving the confidentiality of arbitration proceedings.

10. THE AWARD

10.1 Legal Requirements
Section 10(a)(4) of the FAA, 9 U.S.C. § 10(a)(4), provides that an arbitral award must be “mutual, final, and definite”. There is no requirement that the award be reasoned. The New York Convention provides that foreign awards must be in writing.

Institutional arbitral rules, such as AAA Arbitration Rule R-46, require that the award be in writing and signed by a majority of the arbitrators (see also CPR Arbitration Rule 15.2 (award must be in writing and signed by at least a majority of the arbitrators); JAMS Arbitration Rule 24(h) (award shall be written and signed)).

10.2 Types of Remedies
The FAA does not limit the types of remedies available in arbitration. Subject to the parties’ agreement, arbitrators may award any type of relief. This includes damages, specific performance, injunctions, interest, costs and attorney’s fees. The Supreme Court has held that under the FAA, arbitrators may award punitive damages unless the parties’ agreement expressly prohibits such relief.

An arbitration agreement that expressly eliminates certain relief will be enforced. For example, in Henry Schein, Inc. v Archer & White Sales, Inc., 139 S. Ct. 524 (2019), the Supreme Court held that an agreement removing injunctive relief from the jurisdiction of the tribunal was enforceable.

10.3 Recovering Interest and Legal Costs
Arbitrators may award fees and costs subject to the parties’ agreement. However, the general practice in US courts is for the parties to bear their own costs and fees. The parties may agree on a different rule of cost allocation in their arbitration agreement, including by adopting institutional arbitral rules that give arbitrators the authority to grant such relief.

The FAA does not address interest. Whether interest is permitted, and at what rate, will depend on the agreement of the parties, the applicable institutional rules, and the substantive law governing the contract. There is a presumption in favour of awarding pre-judgment interest from the time of the award through the court’s judgment confirming the award, at a rate prescribed by the state statutory law governing the contract.

Federal law controls post-judgment interest in federal cases, including cases based on diversity of citizenship. Once a court judgment confirming the award is entered, the award is merged into the judgment and the interest rate is governed by the federal post-judgment interest rate statute, 28 U.S.C. § 1961. The parties may contract around the statute if they clearly and expressly agree on a different post-judgment interest rate and that rate is consistent with state usury laws.

11. REVIEW OF AN AWARD

11.1 Grounds for Appeal
While trial court decisions may ordinarily be appealed as of right, that is not the case with
respect to arbitrations. The FAA has no procedures for appealing the legal or factual determinations of an arbitrator.

However, the major arbitral associations have promulgated optional appellate rules that parties can incorporate into their arbitration agreements.

Moreover, under the FAA, a party may challenge an award by moving to vacate, modify, or correct an award. Under the FAA, the award may be vacated where:

- it was procured by corruption, fraud, or undue means;
- there was evident partiality or corruption on the part of the arbitrators;
- the arbitrators were guilty of misconduct; for example, in refusing to hear evidence or other prejudicial conduct; or
- where the arbitrators exceeded their powers.

Under 9 U.S.C. § 12, a motion to vacate, modify, or correct an arbitral award must be served on the opposing party within three months after the award was filed or delivered. The action must be brought in the district where the award was made. When the challenge to an award is made in federal district court, the moving party must establish that the court has subject-matter jurisdiction over the dispute (i.e., the claim exceeds USD75,000 and the parties are citizens of different states, or the claim arises under federal law) and personal jurisdiction over the parties.

Once an arbitration award is entered, “the finality of arbitration weighs heavily in its favour and cannot be upset except under exceptional circumstances” (Mid Atlantic Capital Corporation v Bien, 956 F.3d 1182, 1189-90 (10th Cir. 2020; citation omitted). Moreover, “review of arbitral awards is among the narrowest known to law” (id at 1189; citation omitted).

### 11.2 Excluding/Expanding the Scope of Appeal

In Hall Street Associates, LLC v Mattel, Inc., 552 U.S. 576 (2008), the Supreme Court held that the grounds for vacatur under Section 10 of the FAA are exclusive and that they cannot be supplemented by a contract. However, federal courts are divided on the issue of expanded judicial review of arbitration awards, and some state courts – including California, Connecticut, New Jersey and Rhode Island – have held that the parties can agree to an expanded judicial review under state arbitration laws (see Cable Connection, Inc. v DIRECTV, Inc., 190 P.3d 586 (Cal. 2008) (requiring an explicit contract provision for expanded review)). The major arbitral associations have adopted appellate rules, with differing procedures and standards of review (see, e.g., JAMS Rule 34 (optional arbitration appeal procedures)).

As for exclusion, there is case law holding that parties cannot agree to exclude any of the grounds for vacatur under Section 10(a) of the FAA, 9 U.S.C. § 10. Burton v Class Counsel (in re Wal-Mart Wage & Hour Employment Practices Litigation), 737 F.3d 1262, 1267-68 (9th Cir. 2013) (non-appealability clause in arbitration agreement that eliminated all federal court review of an award, including review under § 10, unenforceable).

### 11.3 Standard of Judicial Review

Jurisdictional issues are reviewed de novo.

Apart from questions of jurisdiction, arbitration panel determinations are accorded great deference under the FAA. As the Supreme Court explained, Section 10(a)(4) of the FAA allows a district court to vacate an arbitrator’s decision “only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly” (Oxford Health Plans LLC v Sutter, 569 U.S. 564, 572 (2013)).
If the arbitrator is “even arguably construing or applying the contract”, their decision must stand “regardless of a court’s view of its (de)merits,” (id at 569; citations omitted). “The arbitrator’s construction holds, however good, bad, or ugly” (id at 573).

12. ENFORCEMENT OF AN AWARD

12.1 New York Convention
The United States acceded to the New York Convention in 1970 and implemented its provisions in Chapter 2 of Title 9 of the US Code, with two reservations. First, the United States recognises only awards made in another state that has ratified the Convention. Second, the United States applies the Convention only to matters recognised under domestic law as “commercial”. These reservations are narrowly construed. In 1990, the United States acceded to the Inter-American Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “Panama Convention”) and implemented its provisions in Chapter 3 of Title 9 of the US Code.

Under Badgerow v Walters, 142 S. Ct. 1310 (2022), a federal district court lacks jurisdiction over a petition to confirm or vacate an arbitral award under Sections 9 and 10 of the FAA unless the jurisdictional basis appears on the “face of the application itself” (Badgerow, 142 S. Ct. at 1317–18). Accordingly, there must be diversity jurisdiction or a federal question with respect to the award’s confirmation or vacatur. Unlike with Section 4 petitions, courts may not find federal question jurisdiction by looking through to the underlying controversy. As a result of this ruling, many more petitions will be adjudicated in state courts.

The New York Convention and the Panama Convention, as implemented by Chapters 2 and 3 of the FAA, require that US courts honour the agreement to arbitrate and the resulting award, with certain exceptions. US courts have held that, in arbitration cases, they may refuse to recognise a foreign court’s decision if it “clearly misinterprets the... Convention, contravenes the Convention’s fundamental premises or objectives, or fails to meet a minimum standard of reasonableness” (Cerner Middle East Limited v iCapital, LLC, 939 F.3d 1016, 1024 (9th Cir. 2019)).

Article V of the New York Convention allows recognition to be declined in various circumstances, including when the award “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”. But the Convention does not expressly prohibit enforcement in these circumstances.

Under the Foreign Sovereign Immunities Act, a sovereign state is immune from court proceedings under the FAA unless one or more of the enumerated exceptions to state immunity apply. One exception arises when the state has entered into an agreement to arbitrate, subject to additional restrictions (see 28 U.S.C. § 1605(a)(6)). Similarly, when a state has agreed to arbitration, a claimant may enforce the resulting judgment against state assets (see 28 U.S.C. § 1610(a)(6)).

12.3 Approach of the Courts
The United States has a well-recognised policy in favour of arbitration. Violation of public policy is not one of the FAA’s listed grounds for vacating an award, but courts have recognised a public policy exception (see Welch Foods, Inc. v General Teamsters Local No 397, No 19-cv-00322, 2021 WL 780147, at *2 (W.D. Pa. Jan. 25, 2021) (remanding for clarification but observing that before vacating an arbitral award on public policy grounds the court must identify “a well-defined and dominant public policy” and then determine if it has been violated (citation omitted))).

In addition, Article V(2)(b) of the New York Convention provides that recognition may be denied where it would be contrary to the public policy of the country where recognition and enforcement are sought, but the term “public policy” is not defined.

13. MISCELLANEOUS

13.1 Class Action or Group Arbitration
Class action or group arbitration generally is permitted in the US. However, the Supreme Court ruled (5-4) in Lamps Plus, Inc. v Varela, 139 S. Ct. 1407 (2019) that the FAA does not allow a court to compel class arbitration when the agreement is ambiguous and does not clearly provide for class arbitration. The Court emphasised that an agreement to arbitrate claims on an individual basis is the type of arbitration proceeding envisioned by the FAA. And the Court further ruled that the FAA pre-empted California’s contra proferentem rule – requiring ambiguities in a contract to be construed against the drafter – when the rule is used “to impose class arbitration in the absence of the parties’ consent”.

13.2 Ethical Codes
Counsel in the United States are bound by the ethics rules of the states in which they practise, which largely are based on the Model Rules of Professional Conduct issued by the American Bar Association. These rules typically cover conflicts of interest, financial arrangements, conduct before a tribunal and confidentiality.

13.3 Third-Party Funding
The FAA does not prohibit an unrelated third party from funding a party in an arbitration. State law addresses third-party funding through:

- laws that regulate funders;
- the doctrines of maintenance, champerty and barratry; and
- rules regulating attorney conduct and the application of attorney-client privilege.

ABA Model Rule 5.4(a) prohibits an attorney or law firm from sharing legal fees with a non-lawyer, except in narrow circumstances. However, courts have held that third-party funding
arrangements do not constitute improper fee splitting.

Article 11(7) of the ICC Rules of Arbitration (2022) provides that: “[E]ach party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.”

13.4 Consolidation
The FAA does not have a provision that addresses multiparty or multi-contract arbitration. Most US-based arbitral institutions, however, have rules that provide for joining additional parties or consolidating arbitrations between the same parties under more than one contract. The ICDR, for example, provides in Article 9(1) for the appointment of a special consolidation arbitrator: “At the request of a party or on its own initiative, the Administrator may appoint a consolidation arbitrator, who will have the power to consolidate two or more arbitrations pending under these Rules, or these and other arbitration rules administered by the AAA or ICDR, into a single arbitration...”

Some states have similar procedures allowing courts to order consolidation of cases where appropriate.

13.5 Binding of Third Parties
As already discussed, federal and state courts, applying principles of contract law, have held that third-party non-signatories can be bound by arbitration agreements based on various theories, including estoppel, agency, assumption of the contract containing the arbitration agreement, third-party beneficiary status, and piercing the corporate veil principles. A different test may apply for determining whether a signatory can force a non-signatory into arbitration, as opposed to whether a non-signatory can force a signatory into arbitration.
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