



# ICLG

The International Comparative Legal Guide to:

## **International Arbitration 2013**

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A practical cross-border insight into international arbitration work

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# USA



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## 1 Arbitration Agreements

### 1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of the USA?

As a predicate to understanding this and other topics addressed in this chapter, it is important to recognise that the legal system in the United States is unique insofar as it is comprised of a dual-sovereign system. The United States Constitution grants certain powers to the federal government and reserves the rest for the states. Federal law originates with the Constitution, which gives Congress the power to enact statutes for certain purposes, such as regulating interstate commerce. The fifty U.S. states are separate sovereigns and retain plenary power to make laws covering anything reserved to the states. As if this does not lend enough confusion, state law can and does vary, sometimes greatly, from state to state. Like virtually all fields of law in the United States, arbitration is regulated at the federal and state levels, and the relationship between the federal and state laws is nuanced and complex.

With the foregoing in mind, the legal framework for arbitration in the United States principally derives from federal law, the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (“FAA”), which governs all contracts or agreements that affect interstate commerce. Section 2 of the FAA provides that:

[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be 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 (emphasis added). Section 1 defines “commerce” as “commerce among the several States or with foreign nations ...”. *Id.* §1.

The United States Supreme Court (“Supreme Court” or “Court”) has held that the FAA is to be read broadly, extending the statute’s reach to the limits of Congress’s power under the Commerce Clause (Constitution, Article I, Section 8, Clause 3). *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74, 277 (1995) (“[T]he word ‘involving’ is broad and is indeed the functional equivalent of ‘affecting.’ ... [W]e conclude that the word ‘involving,’ like ‘affecting,’ signals an intent to exercise Congress’ commerce power to the full.”); *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (“We have interpreted the term ‘involving commerce’ in the

FAA as the functional equivalent of the more familiar term ‘affecting commerce’-words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.”) (citing *Allied-Bruce*, 513 U.S. at 273-274). The Court in *Allied-Bruce* also adopted a “commerce in fact” interpretation of the FAA’s jurisdictional language, holding that the FAA governs “even if the parties did not contemplate an interstate commerce connection”. 513 U.S. 265, 274, 281. In the wake of *Allied-Bruce*, it appears obvious that the FAA applies to virtually all commercial transactions of significance. Indeed, virtually every subject matter has been brought within the broad sweep of the FAA, including federal anti-trust, securities and employment law. *See* question 1.3, *infra*.

As to legal requirements, the FAA requires a “written” agreement and provides that such 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 agreement may not need to be signed, however, and need not be in a single integrated document. *See Seawright v. American Gen. Fin. Servs., Inc.*, 507 F.3d 967, 978 (6th Cir. 2007) (“arbitration agreements under the FAA need to be written, but not necessarily signed”) (original emphasis); *Banner Entm’t, Inc. v. Superior Court (Alchemy Filmworks, Inc.)*, 72 Cal.Rptr.2d 598, 606 (Cal. App. Ct. 1998) (“it is not the presence or absence of a signature which is dispositive; it is the presence or absence of evidence of an agreement to arbitrate which matters”) (original emphasis); *Medical Dev. Corp. v. Industrial Molding Corp.*, 479 F.2d 345, 348 (10th Cir. 1973) (“Decisions under the [FAA] and under the similar New York statute have held it not necessary that there be a simple integrated writing or that a party sign the writing containing the arbitration clause.”) (citations omitted).

In addition to the “written” requirement, the Supreme Court has stated that the FAA “imposes certain rules of fundamental importance, including the basic precept that arbitration ‘is a matter of consent, not coercion’”. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 130 S.Ct. 1758, 1773 (2010) (quoting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). The FAA requires courts to apply objective contract-law standards of consent to arbitration agreements, however, and presumably, a written agreement to arbitrate (or conduct) satisfies the FAA’s consent requirement.

Although the FAA “create[d] a body of federal substantive law ... applicable in state and federal courts”, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006), state substantive law is applicable to determine whether a valid agreement to arbitrate exists. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (“When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though

with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts.”) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63, and n. 9 (1995), *Volt*, 489 U.S. at 475-476, and *Perry v. Thomas*, 482 U.S. 483, 492-493, n. 9 (1987)); see also *Peleg v. Neiman Marcus Group, Inc.*, 140 Cal.Rptr.3d 38, 65-66 (Cal. Ct. App. 2012) (“courts applying the FAA rely on state-law contract principles in determining whether an arbitration agreement exists”) (court’s emphasis) (citing *First Options*, 514 U.S. at 944).

State substantive law applies, however, only if the state law does not single out arbitration agreements. As the Supreme Court reaffirmed in a February 2012 decision, “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA”. *Marmet Health Care Ctr., Inc. v. Brown*, - U.S. -, 132 S.Ct. 1201, 1203 (2012) (quoting *AT&T Mobility LLC v. Concepcion*, - U.S. -, 131 S.Ct. 1740, 1747 (2011)); see also *Concepcion*, 131 S.Ct. at 1746 (“The final phrase of [Section 2 of the FAA] ... permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”) (citation omitted); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009) (state law applies “to determine which contracts are binding under [Section 2 of the FAA] and enforceable under [Section 3 of the FAA] ‘if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally’”) (original emphasis, quoting *Perry*, 482 U.S. at 493, n. 9); *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“Courts may not... invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”) (original emphasis).

The Court has reiterated, moreover, that “nothing in [Section 2 of the FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives”. *Concepcion*, 131 S.Ct. at 1748; see also *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (“Section 2 ‘declare[s] a national policy favoring arbitration’ of claims that parties contract to settle in that manner. That national policy ... ‘appli[es] in state as well as federal courts’ and ‘foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.’”) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10, 16 (1984)); *Volt*, 489 U.S. at 475-76 (“in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act ... due regard must be given to the federal policy favoring arbitration”).

On a related point, there is a split among the federal Courts of Appeal as to whether courts should look to state law or federal common law to determine whether there is an agreement to submit to “arbitration” under the FAA. The weight of recent authorities hold that federal common law is applicable. *Compare Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143 (2d Cir. 2013) (“the meaning of ‘arbitration’ under the Federal Arbitration Act is governed by federal common law—not state law”), *Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 693 (6th Cir. 2012) (“We agree with the First and Tenth Circuits that federal law should control the definition [of “arbitration”], basically because ‘[i]t seems counter-intuitive to look to state law to define a term in a federal statute on a subject as to which Congress has declared the need for national uniformity.’”) (citation omitted), *Salt Lake Tribune Publ’g Co., LLC v. Mgmt. Planning, Inc.*, 390 F.3d 684, 688 (10th Cir. 2004) (“In the absence of clear evidence that Congress intended state law to define ‘arbitration,’ we must assume that federal law provides the definition.”), and *Fit Tech, Inc. v. Bally*

*Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004) (“That a uniform federal definition is required is obvious to us. ... Assuredly Congress intended a “national” definition for a national policy.”), *with Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) (applying California law on the basis that “[w]hile inconsistent state law is preempted, not all state law is preempted upon application of the Act”) and *Hartford Lloyd’s Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062 (5th Cir. 1990) (citing *Wasyl* with approval and applying Texas law).

In addition to the FAA, each of the United States has its own arbitration statute, many of which enact either the Uniform Arbitration Act or the Revised Uniform Arbitration Act (“RUAA”). These statutes would apply to transactions that do not “affect” interstate commerce and therefore are outside the purview of the FAA. Even assuming the FAA is applicable, these statutes may supplement the FAA where the state law provision has no counterpart in the FAA, provided that the law does not undercut the national policy favouring arbitration. For example, state law may provide for interim remedies, default procedures for conducting an arbitration, disclosure rules, and judicial enforcement of pre-award rulings. In addition, parties apparently can agree that their arbitration agreement will be governed by a state arbitration law—at least to the extent the state law is not adverse to the pro-arbitration policy reflected in the FAA. See question 4.1, *infra*.

The reader should be aware that some state laws seek to except certain types of claims from arbitration. See, e.g., MONT. CODE 27-5-114(c) (excepting “any agreement concerning or relating to insurance policies or annuity contracts”). Since state laws that conflict with the FAA are pre-empted, however, it is questionable as to whether these or similar state laws would be enforceable as to arbitration within the purview of the FAA. See, e.g., *Bixler v. Next Financial Group, Inc.*, 858 F. Supp. 2d 1136, 1146-47 (D. Mont. 2012) (“[T]he anti-arbitration statute applicable to annuity contracts found in Mont.Code Ann. §27-5-114(2)(c) is preempted by the FAA, and therefore §27-5-114(2)(c), M.C.A., would have no application to the motion to compel arbitration even were Montana law applied.”).

## 1.2 What other elements ought to be incorporated in an arbitration agreement?

A well-drafted clause is critical to achieving the benefits of arbitration. In drafting an arbitration clause, the following elements, at a minimum, should be considered for inclusion:

- the scope of the arbitration agreement (e.g., “any controversy or claim arising out of or relating to this contract, or the breach thereof”);
- the venue (e.g., “New York, New York”);
- the choice of law (e.g., “This agreement shall be governed by and interpreted in accordance with the laws of the State of New York without regard to the conflict of law principles thereof”);
- the timing and method for the appointment and number of arbitrators (e.g., “within 15 days after the commencement of arbitration, each party shall select one person to act as arbitrator and the two selected shall select a third arbitrator within ten days of their appointment”);
- the qualification of the arbitrators (e.g., “the panel of three arbitrators shall consist of one contractor, one architect, and one construction attorney”);
- the institution, if any, that will administer the arbitration and the applicable rules (e.g., “the American Arbitration Association in accordance with its Commercial Arbitration Rules”); and

- an entry of judgment provision (e.g., “judgment upon the award may be entered by any court having jurisdiction thereof”).

There are many additional elements that the parties may wish to consider, including:

- a provision requiring negotiation or non-binding mediation as a predicate to arbitration (e.g., “in the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its International Mediation Rules”);
- a provision addressing notice requirements (e.g., “upon either party desiring to initiate arbitration, that party shall serve on the other party notice of desire to initiate arbitration”);
- a provision addressing the form of notice, claim or other submissions (e.g., “each notice and response shall include a detailed statement of each party’s position and a summary of the arguments supporting that position”);
- a provision for interim measures or emergency relief (e.g., “either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved”);
- an applicable language (e.g., “the language of the arbitration shall be English”);
- a provision addressing the form of award (e.g., “the award of the arbitrators shall be accompanied by a reasoned opinion”);
- a provision addressing the availability of certain forms of damages (e.g., “the arbitrators will have no authority to award punitive or other damages not measured by the prevailing party’s actual damages”);
- a confidentiality provision (e.g., “except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties”);
- a provision addressing discovery (e.g., “pre-hearing information exchange shall be limited to the reasonable production of relevant, non-privileged documents”); and
- a provision addressing time requirements to expedite the final award (e.g., “the award shall be rendered within nine months of the commencement of the arbitration, unless such time limit is extended by the arbitrator”).

The American Arbitration Association (“AAA”) and its International Centre for Dispute Resolution® (“ICDR”) publish model dispute resolution clauses, checklists of considerations for the drafter, and commentary intended to assist contracting parties in drafting arbitration clauses. See *ICDR Guide To Drafting International Dispute Resolution*, available at: <http://www.adr.org/> (visited Apr. 25, 2013); *Drafting Dispute Resolution Clauses: A Practical Guide* (September 1, 2007), available at: <http://www.aaauonline.org/> (visited Apr. 25, 2013); see also *R. Doak Bishop, A Practical Guide For Drafting International Arbitration Clauses*® (2000), available at: <http://www.kslaw.com/library/pdf/00000084.pdf> (visited Apr. 25, 2013).

### 1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

United States courts have exhibited a significant bias in favour of arbitration. The Supreme Court consistently has described the FAA as establishing “a national policy favoring arbitration”. *Ferrer*, 552 U.S. at 349; see also *Buckeye*, 546 U.S. at 443 (“Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts”); *Mastrobuono*, 514 U.S. at

56 (“the FAA ... ‘declared a national policy favoring arbitration’”) (quoting *Southland*, 465 U.S. at 10); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-25 (1991) (the FAA “manifest[s] a ‘liberal federal policy favoring arbitration agreements’”) (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Court likewise has held that the FAA “reflects the fundamental principle that arbitration is a matter of contract”. *Rent-A-Center, West, Inc. v. Jackson*, - U.S. -, 130 S.Ct. 2772, 2776 (2010); see also *Stolt-Nielsen*, 559 U.S. 662, 130 S.Ct. at 1773 (“[T]he central or ‘primary’ purpose of the FAA is to ensure that ‘private agreements to arbitrate are enforced according to their terms.’”) (quoting *Volt*, 489 U.S. at 479). “Underscoring the consensual nature of private dispute resolution”, therefore, the Court has “held that parties are ‘generally free to structure their arbitration agreements as they see fit’.” *Id.* at 1758 (quoting *Mastrobuono*, 514 U.S. at 57).

In April 2011, the Supreme Court reviewed its prior decisions and observed that the “cases place it beyond dispute that the FAA was designed to promote arbitration”. *Concepcion*, 131 S.Ct. at 1746. Likewise, the Court has recently reiterated in a November 2011 decision that “[t]he Federal Arbitration Act reflects an ‘emphatic federal policy in favor of arbitral dispute resolution’”. *KPMG LLP v. Cocchi*, - U.S. -, 132 S.Ct. 23, 25 (2011) (quoting *Mitsubishi Motors*, 473 U.S. at 631).

The policy favouring arbitration is even stronger in the context of international business transactions. See *Mitsubishi Motors*, 473 U.S. at 629 (“[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.”); see also *McMahon*, 482 U.S. at 254 (“failure to enforce such an agreement to arbitrate in this international context would encourage companies to file suits in countries where the law was most favorable to them, which ‘would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements’”) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974)).

Consistent with the foregoing, time and again the Court has enforced arbitration agreements in a wide variety of contexts, including with regard to statutory claims arising under federal anti-trust, securities (including RICO) and employment law. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (Age Discrimination in Employment Act (“ADEA”)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (ADEA); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act).

State courts likewise have embraced a liberal policy in favour of arbitration. See, e.g.: *Henderson v. Lawyers Title Ins. Corp.*, 843 N.E.2d 152, 162 (Ohio 2006) (“As a general rule, federal and state courts encourage arbitration to resolve disputes.”); *In Re Adhi-Lakshmi Corp.*, 138 S.W.3d 559, 561 (Tex. App. 2004) (“As a general policy, both federal and state courts favor arbitration provisions.”).

## 2 Governing Legislation

### 2.1 What legislation governs the enforcement of arbitration proceedings in the USA?

See question 1.1, *supra*. The FAA governs enforcement of domestic

arbitration proceedings in the USA. In addition to the FAA, state statutes contain their own enforcement provisions.

## 2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The FAA governs both domestic and international arbitration proceedings. The FAA implements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) through Chapter 2 and the Inter-American Convention on International Commercial Arbitration (“Panama Convention”) through Chapter 3.

For an excellent reference concerning international commercial arbitration, see Gary B. Born, *INTERNATIONAL COMMERCIAL ARBITRATION* (2009).

## 2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The FAA is not based on the UNCITRAL Model Law (“Model Law”). There are significant differences between the FAA and the Model Law. By way of example, Articles 33 and 34(2) of the Model Law set forth exclusive grounds for correcting and setting aside an arbitral award that are different from those set forth in Sections 10 and 11 of the FAA. In addition, the FAA presumes, in the absence of agreement, that a “single arbitrator” shall be appointed by the court, 9 U.S.C. §5, whereas the Model Law states that “the number of arbitrators shall be three” (Article 10(2)) and provides for court intervention only if two party-appointed arbitrators cannot reach agreement as to the chairman (Article 11(3)(a)).

The Model Law also addresses each of the following elements, none of which are expressly addressed in the FAA:

- interim measures of protection from the court (Article 9);
- arbitrator disclosure requirements, including the requirement that an arbitrator “shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence” (Article 12 (1));
- challenges to an arbitrator (Article 12 (2));
- “*compétence-compétence*”, such that “[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement” (Article 16.1); and
- immediate challenge of arbitrators’ finding of jurisdiction (Article 16.3).

As noted in question 1.1, *supra*, state arbitration statutes may apply where the arbitration is outside the purview of the FAA or where the state law provision has no counterpart in the FAA. Therefore, certain aspects of the Model Law may apply in international arbitration by virtue of the fact that a number of states, including California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, and Texas, have enacted arbitration laws largely based upon the Model Law. See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (visited Apr. 25, 2013).

## 2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in the USA?

There are no mandatory rules governing international arbitration proceedings sited in the United States. The courts have interpreted the FAA to provide broad freedom to the parties to choose the arbitral rules applicable in their proceedings.

## 3 Jurisdiction

### 3.1 Are there any subject matters that may not be referred to arbitration under the governing law of the USA? What is the general approach used in determining whether or not a dispute is “arbitrable”?

Generally, there are no subject matters that may not be referred to arbitration under the FAA. As noted in question 1.3, *supra*, the federal and state courts consistently embrace arbitration in a wide variety of settings. Even as to statutory claims, the Supreme Court placed the burden on the party seeking to avoid arbitration to demonstrate that Congress intended to preclude a waiver of the claim at issue. See *Gilmer*, 500 U.S. at 26 (“[T]he burden is on [the petitioner] to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an ‘inherent conflict’ between arbitration and the ADEA’s underlying purposes.”) (quoting *Mitsubishi Motors*, 473 U.S. at 628 and *McMahon*, 482 U.S. at 227); see also *14 Penn Plaza*, 556 U.S. at 274 (“a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law”). Compare *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 82 (1998) (a collective-bargaining agreement was not enforceable because it did “not contain a clear and unmistakable waiver of the covered employees’ rights to a judicial forum for federal claims of employment discrimination”).

The Court has stated that “any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability”. *Moses*, 460 U.S. at 24-25; see also *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986) (“[T]here is a presumption of arbitrability in the sense that ‘[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.’”) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). These decisions are consistent with the strong federal policy favouring arbitration and the principal purpose of the FAA, which is “to ensure that ‘private agreements to arbitrate are enforced according to their terms’”. *Stolt-Nielsen*, 559 U.S. 662, 130 S.Ct. at 1773 (quoting *Volt*, 489 U.S. at 479).

As arbitration is a matter of contract, the parties are free to limit the disputes that are subject to arbitration. See *Concepcion*, 131 S.Ct. at 1748-49 (“we have held that parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes”) (court’s emphasis, citing *Mitsubishi Motors*, 473 U.S. at 628, *Volt*, 489 U.S. at 479, and *Stolt-Nielsen*, 559 U.S. 662, 130 S.Ct. at 1773).

As noted in question 1.1, *supra*, some state laws seek to except certain types of claims from arbitration, but such laws are likely to be pre-empted as to matters within the purview of the FAA.

### 3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

The FAA does not expressly address a tribunal’s competence to determine its own jurisdiction.

As a matter of federal common law, absent agreement by the parties, courts, rather than arbitral tribunals, have jurisdiction in the

first instance to determine if there is a valid agreement to arbitrate. *See AT & T Technologies*, 475 U.S. at 649 (“Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.”) (citations omitted); *Granite Rock Co. v. International Broth. of Teamsters*, - U.S. -, 130 S.Ct. 2847, 2855 (2010) (“It is well settled in both commercial and labor cases that whether parties have agreed to ‘submi[t] a particular dispute to arbitration’ is typically an ‘issue for judicial determination.’”) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

In contrast to the agreement to arbitrate, the Court has reaffirmed in a recent November 2012 decision that “attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved ‘by the arbitrator in the first instance, not by a federal or state court’”. *Nitro-Lift Technologies, L.L.C. v. Howard*, - U.S. -, 133 S.Ct. 500, 503 (2012) (quoting *Ferrer*, 552 U.S. at 349)). The Court in *Nitro-Lift* further clarified that “[f]or these purposes, an ‘arbitration provision is severable from the remainder of the contract,’ and its validity is subject to initial court determination; but the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide”. *Id.* (quoting *Buckeye*, 546 U.S. at 445).

Notwithstanding the general rule that courts generally determine whether there is a valid agreement to arbitrate, the Supreme Court in *First Options* held that an agreement to be bound by the arbitrator’s decision on arbitrability is valid if there is “‘clear and unmistakabl[e]’ evidence” that the parties intended to submit the “arbitrability question itself to arbitration”. 514 U.S. at 943, 944 (quoting *AT & T Technologies*, 475 U.S. at 649).

As far as establishing the First Options “clear and unmistakable” evidentiary requirement, some courts have found that the reference to, or incorporation of, institutional rules authorising arbitrators to decide their own jurisdiction is sufficient. *See Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (“We have held that when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator.”); *Amway Global v. Woodward*, 744 F.Supp.2d 657, 664 (E.D.Mich. 2010) (“where parties have included language in their arbitration agreement authorizing the arbitrator to decide issues of arbitrability, the courts have held that such a provision serves as the requisite ‘clear and unmistakable evidence’ under First Options that the parties agreed to arbitrate arbitrability”) (citing cases). In addition, an agreement to arbitrate “all disputes” can “manifest[] the parties’ clear and unmistakable intent to submit questions of arbitrability to arbitration”. *Shaw Group Inc. v. Triplefine Intern. Corp.*, 322 F.3d 115, 121 (3d Cir. 2003).

In this regard, the AAA Commercial Arbitration Rules (effective June 1, 2009) and the CPR International Institute for Conflict Prevention and Resolution (“CPR”) Rules for Non-Administered Arbitration (effective November 1, 2007) each include a provision that reserves to the arbitrator the right to determine the scope of the arbitration agreement and the question of jurisdiction. *See* AAA Rule R-7(a) (“The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”); and CPR Rule 8.1 (“The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”).

State laws may also incorporate provisions regarding an arbitrator’s competence to determine its own jurisdiction, and this is addressed

in the RUAA, which incorporates the holdings of the cases discussed above. *See* RUAA §6 (b, c) (“The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.”).

### 3.3 What is the approach of the national courts in the USA towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Section 3 of the FAA agreement requires courts to stay litigation of arbitral claims pending arbitration of those claims “in accordance with the terms of the agreement”:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §3.

State laws contain similar provisions. *See, e.g.*, ARIZ. REV. STAT. §12-1502.D. (“Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made ...”); CAL. CODE CIV. PROC. §1281.4 (“If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.”); N.Y. C.P.L.R. §7503(a) (“A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration.”); TEX. CIV. PRAC. & REM. §171.025(a) (“The court shall stay a proceeding that involves an issue subject to arbitration if an order for arbitration or an application for that order is made under this subchapter.”); *see also* RUAA §7(f) (“the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section”).

In a complimentary fashion, Section 4 requires courts to compel arbitration “in accordance with the terms of the agreement” upon the motion of either party. Section 4 provides, in relevant part, as follows:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement .... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. §4.

Again, state laws contain similar provisions. *See, e.g.*, ARIZ. REV. STAT. §12-1502.A. (“On application of a party showing a[]

[written] agreement [to arbitrate] ... the court shall order the parties to proceed with arbitration ...”; CAL. CODE CIV. PROC. §1281.2 (“On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy...”); N.Y. C.P.L.R. §7503(a) (“Where there is no substantial question whether a valid agreement was made or complied with ... the court shall direct the parties to arbitrate.”); TEX. CIV. PRAC. & REM. §171.021(a, c). (“A court shall order the parties to arbitrate on application of a party showing: (1) an agreement to arbitrate; and (2) the opposing party’s refusal to arbitrate”); *see also* RUAA §7(a)(1) (“if the refusing party does not appear or does not oppose the [motion], the court shall order the parties to arbitrate”).

A number of state laws express that a court cannot refuse to order arbitration on the basis that the underlying claims lack merit. *See, e.g.*, CAL. CODE CIV. PROC. §1281.2 (“If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner’s contentions lack substantive merit.”); N.Y. C.P.L.R. §7501 (“the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute”); TEX. CIV. PRAC. & REM. §171.026(1) (“A court may not refuse to order arbitration because ... the claim lacks merit or bona fides.”).

### 3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal’s decision as to its own jurisdiction?

As to the questions of jurisdiction and competence, *see* question 3.2, *supra* and question 5.3, *infra*.

As to the standard of review, the Supreme Court has held that the decision of the arbitrators on the arbitrability of the dispute in question is subject to *de novo* review by the courts. *See First Options*, 514 U.S. at 949.

### 3.5 Under what, if any, circumstances does the national law of the USA allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Individuals or entities who have not agreed to submit to arbitration generally cannot be required to submit to arbitration except in limited circumstances under agency and contract law principles. *Compare AT & T Technologies*, 475 U.S. at 648 (“arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit”) (quoting *Steelworkers*, 363 U.S. at 582) *with Carlisle*, 129 S.Ct. at 1902 (“Because ‘traditional principles’ of state law allow a contract to be enforced by or against nonparties to the contract through ‘assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,’ the Sixth Circuit’s holding that nonparties to a contract are categorically barred from [FAA Section 3] relief was error.”); *see also Todd v. Steamship Mut. Underwriting Ass’n (Bermuda) Ltd.*, 601 F.3d 329, 334-35 (5th Cir. 2010) (“*Carlisle* and other cases discussing whether nonsignatories can be compelled to arbitrate under the FAA are relevant for this case governed by the New York Convention”). *See generally* Bernard Hanotiau, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS, Ch. 2, *May an Arbitration Clause be Extended to Nonsignatories: Individuals, States or Other Companies of the Group?*, at 49 – 100 (Kluwer Law International 2006).

As to discovery matters, however, 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 in the case”. 9 U.S.C. §7. Section 7 proceeds to state that the “district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators ....”. *Id.*

It is recognised that Section 7 authorises the arbitrator(s) to summon non-party witnesses to appear to give testimony and produce documents. *See Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 569 (2d Cir. 2005) (“[T]he subpoenas compelled non-parties to appear and provide testimony and documents to the arbitration panel itself at a hearing held in connection with the arbitrators’ consideration of the dispute before them. The plain language of Section 7 authorizes arbitrators to issue subpoenas in such circumstances.”).

Although Section 7 generally is not viewed as authorising pre-hearing depositions or interrogatories, there is a split in the circuits as to whether the arbitrator has the authority to compel pre-hearing document discovery from entities that are not parties to arbitration proceedings under Section 7. *Compare In re Security Life Ins. Co. of America*, 228 F.3d 865, 871 (8th Cir. 2000) (ordering pre-hearing discovery where the third party was “not a mere bystander pulled into this matter arbitrarily, but [wa]s a party to the contract that is the root of the dispute, and is therefore integrally related to the underlying arbitration, if not an actual party”) *with Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 212 (2d Cir. 2008) (“we hold that section 7 does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding”), *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004) (“Section 7’s language unambiguously restricts an arbitrator’s subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time”) *and COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999) (“we hold today that a federal court may not compel a third party to comply with an arbitrator’s subpoena for prehearing discovery, absent a showing of special need or hardship”).

Many state statutes likewise permit subpoenas for the attendance of witnesses and for the production of records and other evidence. *See, e.g.*, ARIZ. REV. STAT. §12-1507.A. (“The arbitrators may cause to be issued subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence ...”); CAL. CODE CIV. PROC. §1282.6 (“the neutral arbitrator upon his own determination may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents and other evidence”); N.Y. C.P.L.R. §7505 (“An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas...”); TEX. CIV. PRAC. & REM. §171.051(a) (“The arbitrators, or an arbitrator at the direction of the arbitrators, may issue a subpoena for: (1) attendance of a witness; or (2) production of books, records, documents, or other evidence.”).

Some statutes express that the subpoena may be enforced in the same manner as enforcement in a civil action. *See, e.g.*, ARIZ. REV. STAT. §12-1507.A. (“Subpoenas ... shall be served, and, upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.”); NEV. REV. STAT. §38.233.1 (“A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitral

proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.”).

In addition to the FAA and state statutes, various procedural rules provide arbitrators with the power to issue subpoenas. *See, e.g.*, AAA Rule 30(d) (“An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently”); CPR Rule 11 Commentary (“A party may encounter difficulties if it needs to secure documents or testimony from an uncooperative third party. The arbitrators may well be of assistance in such a situation through the exercise of their subpoena power or in other ways.”). Subpoenas are not self-executing, however, and thus require judicial involvement for enforcement purposes.

### 3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in the USA and what is the typical length of such periods? Do the national courts of the USA consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The FAA does not contain a limitation period for commencement of arbitration. Therefore, the terms of the parties’ arbitration agreement generally will govern, although it is uncommon for arbitration clauses to provide a limitation period for the commencement of arbitration in the event that a dispute triggers arbitration.

If the parties have selected a choice of law, the selected state law limitation period applicable to the claim may apply to the extent the statute of limitations is held applicable to arbitration proceedings. Statutes of limitations, however, may be held inapplicable to arbitration proceedings. *See Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*, 218 N.W.2d 751, 755 (Minn. 1974) (“Based upon the special nature of arbitration proceedings and both the statutory and common-law meaning of the term ‘action,’ we feel compelled to hold that [the statute] was not intended to bar arbitration of [the] dispute solely because such claim would be barred if asserted in an action in court.”); *Skidmore, Owings & Merrill v. Connecticut Gen. Life Ins. Co.*, 197 A.2d 83 (Conn. Super. Ct. 1963) (“Arbitration is not a common-law action, and the institution of arbitration proceedings is not the bringing of an action under any of our statutes of limitation.”). In order to preserve rights to a civil action in the event arbitration ultimately does not resolve a claim, parties may wish to consider instituting an action and staying the same, pending a final award and confirmed award in the arbitration proceeding.

In contrast, applicable law may expressly provide that if a claim would have been time-barred under the selected state’s law, a party may raise the statute of limitations as a bar to the arbitration. *See, e.g.*, N.Y. C.P.L.R. §7502(b) (“If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court ...”).

Although statutes of limitation may be deemed “substantive” for choice of law purposes, *see Guaranty Trust Co. v. York*, 326 U.S. 99, 100 (1945), the choice of law rules that govern application of limitations periods is nuanced, complex, and has been the subject of disagreement among the national courts. *See U.S. ex rel. Ackley v. International Business Machines Corp.*, 110 F.Supp.2d 395, 402-03 & n.7 (D.Md. 2000).

In the absence of agreement or statute, the issue of limitations generally will be reserved to the arbitrators.

### 3.7 What is the effect in the USA of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

The United States Bankruptcy Code (the “Bankruptcy Code”) may modify the obligation or ability to arbitrate, as it does other contractual obligations. Pursuant to the Bankruptcy Code, upon the commencement of a bankruptcy case, an automatic stay is imposed enjoining, among other things, the commencement or continuation of certain acts, including litigation, against a debtor. *See* 11 U.S.C. §362(a). While the Bankruptcy Code does not expressly provide that any pending or future arbitration is subject to the automatic stay, the legislative history makes it clear that the automatic stay was intended to encompass arbitrations involving a debtor. *See In re Gull Air, Inc.*, 890 F.2d 1255, 1262 (1st Cir. 1989) (“As the legislative history of the automatic stay provision reveals, the scope of section 362(a)(1) is broad, staying all proceedings, including arbitration ...”). Thus, a non-debtor that wishes to have its dispute with a debtor arbitrated must obtain relief from the automatic stay prior to proceeding with arbitration against a debtor.

As a general rule, bankruptcy courts have discretion to refuse to enforce arbitration agreements and this discretion is significantly greater if the matter to be arbitrated qualifies as “core” under 28 U.S.C. §157(b), which generally includes matters that are integral to the administration of a bankruptcy estate. *See In re Startec Global Commc’ns Corp.*, 300 B.R. 244, 252, 254 (D.Md. 2003) (“In a core proceeding, the bankruptcy court’s interest is greater, as is the risk of a conflict between the Bankruptcy Code and the Arbitration Act ... While finding that a claim is core is often a factor in finding that a court has discretion to refuse to compel arbitration, ‘a determination that a proceeding is core will not automatically give the bankruptcy court discretion to stay arbitration.’ Rather, the court must turn to the second prong of the inquiry and ‘carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause’. An arbitration clause should not be enforced if doing so ‘would seriously jeopardize the objectives of the Code.’”) (quoting *In re U.S. Lines*, 197 F.3d 631, 640 (2d Cir. 1999) and *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1161 (3d Cir. 1989)). If a dispute is non-core, a bankruptcy court generally will enforce an arbitration agreement by compelling arbitration over the objection of a debtor or trustee. *See In re Electric Machinery Enters., Inc.*, 479 F.3d 791, 796 (11th Cir. 2007) (“In general, bankruptcy courts do not have the discretion to decline to enforce an arbitration agreement relating to a non-core proceeding.”) (citing *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 166 (2d Cir. 2000)).

## 4 Choice of Law Rules

### 4.1 How is the law applicable to the substance of a dispute determined?

Parties generally are free to include a choice of law provision in their agreement, and the parties’ choice will be honoured unless the chosen law creates a conflict with the FAA. *See Smith Barney, Harris Upham & Co. v. Luckie*, 647 N.E.2d 1308, 1312 (N.Y. 1995) (“[T]he policy established by the FAA is to ensure that private agreements to arbitrate are enforced according to their terms. Accordingly, the parties are at liberty to include a choice of law provision in their agreement, and the parties’ choice will be honored unless the chosen law creates a conflict with the terms of, or policies underlying, the FAA.”).

Some institutional rules specifically state that the parties can select the choice of law. See International Chamber of Commerce (“ICC”) Arbitration and ADR Rules (in force as from 1 January 2012) (the “New ICC Rules”), Article 21.1 (“The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.”). Where the parties have not specified a governing law, the arbitrators may apply the choice of law principles of the jurisdiction in which they are sitting in order to determine which law to apply. Courts have given arbitrators broad discretion to determine the applicable choice of law rules and substantive law.

In contrast to state substantive law applicable to determine the merits of the parties’ dispute, the Supreme Court’s decisions regarding whether the parties can select state arbitration law indicate that parties should be specific as opposed to relying on a general choice of law provision. Compare *Volt*, 489 U.S. at 479 (“Where ... the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.”) with *Mastrobuono*, 514 U.S. at 64 (holding that a choice of law to apply “the laws of the State of New York” did “not ... include special rules limiting the authority of arbitrators” to award punitive damages).

Even if the parties have agreed upon a governing law, the law of the arbitration *situs* may govern in certain circumstances, such as those involving efforts to compel arbitration or enforce an award. On a related point, the FAA “does not independently confer subject-matter jurisdiction on the federal courts”, *Bakoss*, 707 F.3d at 142 n.4, and “there must be an independent basis of jurisdiction before a district court may entertain petitions” under the FAA. *Durant, Nichols, Houston, Hodgson & Cortese–Costa, P.C. v. Dupont*, 565 F.3d 56, 63 (2d Cir. 2009) (citations omitted). Therefore, absent an independent basis for jurisdiction, petitions in domestic arbitration proceedings generally should be brought in state court.

In contrast, the FAA confers the federal district courts with original jurisdiction with regard to proceedings falling within the purview of the New York Convention (Chapter 2) and Panama Convention (Chapter 3):

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States ... shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C. §§203, 302; see also *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71 (2d Cir. 2012) (there is “federal jurisdiction over actions to confirm or vacate an arbitral award that is governed by the [New York Convention]”).

#### 4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

There generally are no such circumstances, particularly following the Supreme Court’s decision in *Volt*. To the extent parties have not chosen the law, the FAA and/or state law may govern. In addition, self-regulatory organisations (“SROs”), such as the Financial Industry Regulatory Authority, require arbitration before an SRO forum and are subject to a comprehensive Uniform Code of Arbitration for the securities industry as developed by the Securities Industry Conference on Arbitration.

#### 4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

See questions 1.1 and 4.1, *supra*.

In the absence of an agreement, the forum choice of law rules generally will apply. For example, in evaluating whether an arbitration agreement is enforceable, federal courts sitting in diversity will apply the choice-of-law rules of the forum state for selecting the governing law. See *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 994 (9th Cir. 2010) (“Before a federal court may apply state-law principles to determine the validity of an arbitration agreement, it must determine which state’s laws to apply. It makes this determination using the choice-of-law rules of the forum state[.]”).

### 5 Selection of Arbitral Tribunal

#### 5.1 Are there any limits to the parties’ autonomy to select arbitrators?

Subject to the parties’ agreement, there generally are no restrictions on the parties’ autonomy to select arbitrators. Section 5 of the FAA expressly provides that “if in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed”. 9 U.S.C. §5. There may be some exceptions, however. Professional codes of ethics or conduct, for example, may prevent judges from accepting appointments. Awards may be overturned based on “evident partiality”. See question 5.4, *infra*.

#### 5.2 If the parties’ chosen method for selecting arbitrators fails, is there a default procedure?

If the parties have not specified a method for the appointment of an arbitrator or arbitrators or the parties have failed or refused to follow a specified method for appointment, either party can move for the appointment under Section 5 of the FAA, which provides as follows:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. §5; see also *Global Reinsurance Corp. v. Certain Underwriters at Lloyd’s*, 465 F. Supp. 2d 308, 311 (S.D.N.Y. 2006) (“A district court has the authority under §5 to select an umpire if there is a ‘lapse’ in the naming of an umpire ‘and the arbitration agreement in question does not provide a mechanism for filling the void.’”) (citation omitted).

State laws likewise typically contain “default” procedures governing situations in which the parties fail to agree. See, e.g., ARIZ. REV. STAT. §12-1503 (“if the agreed method [for appointment] fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators...”); CAL. CODE CIV. PROC.

§1281.6 (“In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator.”); N.Y. C.P.L.R. §7504 (“If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.”); TEX. CIV. PRAC. & REM. §171.041(b) (1, 2) (“The court ... shall appoint one or more qualified arbitrators if: (1) the agreement to arbitrate does not specify a method of appointment; [or] the agreed method fails or cannot be followed...”).

At least one state permits disqualification of a court-appointed arbitrator “without cause”. CAL. CODE CIV. PROC. §1281.91(b)(2) (“A party shall have the right to disqualify one court-appointed arbitrator without cause in any single arbitration, and may petition the court to disqualify a subsequent appointee only upon a showing of cause.”).

The institutional rules may also provide for default procedures for the selection of arbitrators. See AAA Commercial Rule R-11(a, b) (“If the parties have not appointed an arbitrator and have not provided any other method of appointment ... [and] [i]f the parties fail to agree on any of the persons named [by the AAA] ... the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.”); CPR Rules 5.1 and 5.2 (“the Tribunal shall consist of two arbitrators, one appointed by each of the parties [and] the two party-appointed arbitrators shall appoint a third arbitrator, who shall chair the Tribunal”); New ICC Rules, Article 12.2 (“Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators.”).

### 5.3 Can a court intervene in the selection of arbitrators? If so, how?

A court can intervene to constitute the panel as set forth in question 5.2, *supra*.

Courts generally will entertain challenges to the jurisdiction, competence and impartiality of the arbitral tribunal only following the award as set forth in Sections 10 and 11 of the FAA, which are quoted in question 10.1, *supra*, or as set forth in state statutes. Therefore, absent extraordinary circumstances, courts will not disqualify an arbitrator prior to the award. See also *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174 (2d Cir. 1984) (“The Arbitration Act does not provide for judicial scrutiny of an arbitrator’s qualifications to serve, other than in a proceeding to confirm or vacate an award, which necessarily occurs after the arbitrator has rendered his service.”); *Gulf Guar. Life Ins. Co. v. Connecticut General Life Ins. Co.*, 304 F.3d 476, 491 (5th Cir. 2002) (“a court may not entertain disputes over the qualifications of an arbitrator to serve ... unless such claim raises concerns rising to the level that the very validity of the agreement be at issue”) (following *Aviall v. Ryder Sys.*, 110 F.3d 892 (2d Cir. 1997)).

### 5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within the USA?

Section §10(a)(2) of the FAA states that an arbitration award may

be vacated on the basis of “evident partiality” on the part of one or more of the arbitrators. 9 U.S.C. §10(a)(2).

Although the FAA does not include a specific provision regulating the duty of the arbitrator to disclose information that might affect his or her impartiality, such a duty has nevertheless been recognised by the Supreme Court. See *Commonwealth Coatings Corp. v. Continental Casualty*, 393 U.S. 145, 149 (1968) (holding that parties must disclose “any dealings that might create an impression of possible bias”).

It is important to note that the FAA’s “evident partiality” standard is interpreted by the courts of the fifty U.S. states in addition to the U.S. federal courts. The courts have issued conflicting decisions as to whether, for example, something close to a finding of actual bias may be required or, alternatively, whether a “reasonable impression” of bias may suffice. Compare *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (“Finding ‘the standard of ‘appearance of bias’ ... too low’ and ‘proof of actual bias too high,’ we held [in *Morelite*] ‘that ‘evident partiality’ within the meaning of 9 U.S.C. §10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.’ ... [A]n arbitrator is disqualified only when a reasonable person, considering all of the circumstances, ‘would have to conclude’ that an arbitrator was partial to one side.”) (original emphasis, (court’s emphasis, quoting *Morelite Constr. Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir.1984) and *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 332-33 (1987)), with *Burlington Northern R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 636 (Tex. 1997) (“we hold that a prospective neutral arbitrator selected by the parties or their representatives exhibits evident partiality if he or she does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator’s partiality”). A respected commentator has recently observed that “in U.S. caselaw there is an ‘absence of consensus on the meaning of ‘evident partiality’ under the FAA’”. Gary Born & Claudio Salas, *The Different Meanings of an Arbitrator’s “Evident Partiality” Under U.S. Law*, Kluwer Arbitration Blog (Wolters Kluwer Mar. 2013), available at <http://kluwerarbitrationblog.com/blog/2013/03/20/> (visited May 2, 2013) (citation omitted).

Certain states have expressly adopted disclosure requirements. See, e.g., CAL. CODE CIV. PROC. §1281.9(a) (“when a person is to serve as a neutral arbitrator, the proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.”). This is the approach followed in the RUA. See *id.* §12(a) (“Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding...”).

It is important to note that some states expressly permit non-neutral party-appointed arbitrators in the tripartite setting, although the arbitrator may nonetheless be obliged to disclose information that might affect his or her impartiality. See, e.g., ARIZ. REV. STAT. §12-1512.2. (“the court shall decline to confirm and award and enter judgment thereon where ... [t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party”) (emphasis added); CAL. CODE CIV. PROC. §1286.2(a)(3) (“the court shall vacate the award if the court determines [that t]he rights of the party were substantially prejudiced by misconduct of a neutral arbitrator...”) (emphasis added); N.Y. C.P.L.R. §7511(b)(1)(ii) (an award may be vacated or modified “if the court finds that the rights of that party

were prejudiced by ... partiality of an arbitrator appointed as a neutral...” (emphasis added); TEX. CIV. PRAC. & REM. §171.088(a)(2)(A) (a court may vacate or modify an award if “the rights of a party were prejudiced by ... evident partiality by an arbitrator appointed as a neutral arbitrator...” (emphasis added); see also *Astoria Medical Group v. Health Ins. Plan of Greater New York*, 182 N.E.2d 85, 87 (N.Y. 1962) (“[U]sage and experience indicate that, in the type of tripartite arbitration envisaged by the contract before us, each party’s arbitrator “is not individually expected to be neutral.”).

Arbitral institutional rules typically require arbitrator independence, neutrality and/or impartiality. See AAA Commercial Rule R-17(a) (“Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for (i) partiality or lack of independence, (ii) inability or refusal to perform his or her duties with diligence and in good faith, and (iii) any grounds for disqualification provided by applicable law.”); CPR Rule 7.1 (“Each arbitrator shall be independent and impartial.”); New ICC Rules, Article 11.1 (“Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.”).

Although some arbitral institutions permit non-neutral party-appointed arbitrators if the parties expressly agree to that procedure, see AAA Commercial Rule R-12, arbitration institutions generally require full disclosure of potential conflicts. See *id.* R-16(a) (“Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.”); New ICC Rules, Article 11.2 (“Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator’s impartiality.”); CPR Rule 7.3 (“Each arbitrator shall disclose in writing to the Tribunal and the parties at the time of his or her appointment and promptly upon their arising during the course of the arbitration any circumstances that might give rise to justifiable doubt regarding the arbitrator’s independence or impartiality. Such circumstances include bias, interest in the result of the arbitration, and past or present relations with a party or its counsel.”).

## 6 Procedural Rules

### 6.1 Are there laws or rules governing the procedure of arbitration in the USA? If so, do those laws or rules apply to all arbitral proceedings sited in the USA?

The FAA does not include procedural rules. Some state statutes have adopted default procedures for conducting an arbitration, however. See, e.g., ARIZ. REV. STAT. §12-1505 (“Hearing”); CAL. CODE CIV. PROC. §1282.2 (“Hearing; time and place; witness lists; adjournment or postponement; conduct; evidence; procedure”); N.Y. C.P.L.R. §7506 (“hearing”); TEX. CIV. PRAC. & REM. §171.044 (“Time and Place of Hearing; Notice”); see also RUA §15 (“Arbitration Process”).

In addition, arbitration rules are often provided by a selected arbitration institution. The AAA, for example, has numerous different iterations of procedural rules which vary by the type of

matter. See, e.g., CPL Rule 3 (“commencement of arbitration”); AAA Commercial Rules R-20 (“preliminary hearing”), R-21 (“exchange of information”), and R-22 (“date, time, and place of hearing”), and R-30 (“conduct of proceedings”).

### 6.2 In arbitration proceedings conducted in the USA, are there any particular procedural steps that are required by law?

See question 6.1, *supra*.

### 6.3 Are there any rules that govern the conduct of an arbitration hearing?

See question 6.1, *supra*.

### 6.4 What powers and duties does the national law of the USA impose upon arbitrators?

As noted in question 3.5, *supra*, Section 7 of the FAA provides arbitrators with the power to issue subpoenas for the production of documents and the attendance of witnesses at hearings. State statutes also provide arbitrators with various powers, including powers to issue subpoenas and compel discovery. See *id.*

Arbitrators generally have a duty to be neutral and independent, unless the parties agree otherwise. In contrast to international arbitration norms, however, some states expressly accept and acknowledge the partiality of party-appointed arbitrators. See question 5.4, *supra*. In addition, arbitrators are required to provide the parties with a fair hearing. See *Bowles Financial Group v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012-13 (10th Cir. 1994) (“Courts have created a basic requirement that an arbitrator must grant the parties a fundamentally fair hearing, expressing the requirement in various forms. The courts seem to agree that a fundamentally fair hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers, and that the decisionmakers [*sic*] are not infected with bias.”).

An award can be vacated under Section 10 of the FAA, *inter alia*, if the arbitrators “exceeded their powers” or “were guilty of misconduct 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 ...”. Various state statutes are to the same effect. See question 10.1, *infra*.

Some state statutes are express concerning the parties’ rights to be heard and to present evidence. See, e.g., ARIZ. REV. STAT. §12-1505.2 (“The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.”); CAL. CODE CIV. PROC. §1282.2(d) (“The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed.”); N.Y. C.P.L.R. §7506(c) (“The parties are entitled to be heard, to present evidence and to cross-examine witnesses.”); TEX. CIV. PRAC. & REM. §171.047(1, 2) (“a party at the hearing is entitled to: (1) be heard; [and] present evidence material to the controversy...”).

### 6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in the USA and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in the USA?

Licensing and admission to the practice of law are done on a state-by-state and federal-by-federal court basis. American Bar

Association Model Rule 5.5 provides that an out-of-state lawyer can practice subject to certain requirements, but the issue will vary from state-to-state. There generally are no rules restricting counsel from other jurisdictions from appearing in international arbitrations sited in the United States.

## 6.6 To what extent are there laws or rules in the USA providing for arbitrator immunity?

The FAA does not address the issue of arbitrator immunity. However, courts generally grant immunity against suits challenging their performance. *See Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 866 (2d Cir. 1990) (“[T]he Courts of Appeals ... have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity. ... [W]e hold that arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process.”) (citations omitted).

Some state statutes also provide for arbitrator immunity, and this is the approach reflected in the RUAA. *See* RUAA Section 14(a) (“An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.”).

## 6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Aside from disputes regarding arbitrator appointment, courts generally lack jurisdiction to deal with procedural issues. State law generally provides for provisional remedies, however, such as attachments, preliminary injunctions and temporary restraining orders. *See* question 7.2, *infra*.

# 7 Preliminary Relief and Interim Measures

## 7.1 Is an arbitrator in the USA permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Although the FAA does not provide for preliminary or interim relief, arbitrators routinely award interim and injunctive relief.

A number of the institutional rules contain express provisions for interim and injunctive relief. *See, e.g.*, AAA Commercial Rule 34(a) (“The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.”); ICDR International Dispute Resolution Procedures, Article 21 (1, 2) (“At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property. Such interim measures may take the form of an interim award, and the tribunal may require security for the costs of such measures.”); CPR Rule 13.1 (“At the request of a party, the Tribunal may take such interim measures as it deems necessary, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods. The Tribunal may require appropriate security as a condition of ordering such measures.”); New ICC Rules, Article 28.1 (“Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure

shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.”).

The parties can provide specifically for interim relief if a need is anticipated by reference, for example, to the AAA “Optional Rules for Emergency Measures of Protection”.

The arbitrator has no power to enforce interim relief, however, and therefore the award for interim relief must be taken to a court for confirmation and enforcement.

## 7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Although the FAA does not provide for interim relief, state laws may expressly provide for such relief, including attachments, preliminary injunctions and temporary restraining orders. *See, e.g.*, CAL. CODE CIV. PROC. §1297.91 (“It is not incompatible with an arbitration agreement for a party to request from a superior court, before or during arbitral proceedings, an interim measure of protection, or for the court to grant such a measure.”); N.Y. C.P.L.R. §7502(c) (“The ... court ... may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration ... but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.”); TEX. CIV. PRAC. & REM. §172.175(a) (“A party to an arbitration agreement may request an interim measure of protection from a district court before or during an arbitration.”). This is the approach reflected in the RUAA. *See id.* §8(a) (“Before an arbitrator is appointed and is authorized and able to act, the court, upon [motion] of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.”).

In this context, to the extent state law is consistent with the federal policy favouring arbitration, state law should be allowed to supplement the FAA, although some courts have questioned a court’s jurisdiction in the context of international arbitration. *Compare PMS Distrib. Co. v. Huber & Suhner, A.G.*, 863 F.2d 639, 642 (9th Cir. 1988) (“The fact that a dispute is arbitrable ... does not strip [the court] of authority to grant a writ of possession pending the outcome of the arbitration so long as the criteria for such a writ are met.”) *with McCreary Tire & Rubber Co. v. Ceat S.p.A.*, 501 F.2d 1032, 1038 (3d Cir. 1974) (pre-award attachment “is prohibited by the [New York] Convention if one party to the agreement objects”).

A request for preliminary or injunctive relief will not affect the jurisdiction of the arbitral tribunal unless the parties’ request equates to a waiver. Waiver is not lightly inferred, however, and courts will require an intent not to arbitrate for a waiver to be found. Therefore, even where a court must reach the merits in order to grant an injunction, waiver generally will not be found. State statutes may be express that there is no waiver. *See, e.g.*, CAL. CODE CIV. PROC. §1281.8(D) (“An application for a provisional remedy ... shall not operate to waive any right of arbitration which the applicant may have pursuant to a written agreement to arbitrate, if, at the same time as the application for a provisional remedy is presented, the applicant also presents to the court an application that all other proceedings in the action be stayed pending the arbitration of any issue, question, or dispute which is claimed to be arbitrable under the agreement and which is relevant to the action pursuant to which the provisional remedy is sought.”). This is the approach of the RUAA, which states that “[a] party does not waive a right of

arbitration by making a [motion] [for provisional remedies] ...”. RUAA Section 8(c). The official comment states that “Section 8(c) is intended to insure that so long as a party is pursuing the arbitration process while requesting the court to provide provisional relief ... the motion to the court should not act as a waiver of that party’s right to arbitrate a matter.”.

### 7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Unless the parties have agreed to let the courts decide interim matters—and unless the court has jurisdiction over the subject matter of the dispute—a court may defer such requests to the arbitrators. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999) (“Because ... the ICC arbitral tribunal is authorized to grant the equivalent of an injunction pendente lite, it would have been inappropriate for the district court to grant preliminary injunctive relief.”). Courts are more willing to act prior to the appointment of the arbitral tribunal.

### 7.4 Under what circumstances will a national court of the USA issue an anti-suit injunction in aid of an arbitration?

*See* question 3.3, *supra*.

### 7.5 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

The FAA is silent on the authority of an arbitrator to order security for costs. Some state statutes, however, expressly provide that courts can order attachment. *See, e.g.*, TEX. CIV. PRAC. & REM. §172.175(c)(1) (“In connection with a pending arbitration, the court may take appropriate action, including ... ordering an attachment ...”). Likewise, arbitral rules may provide that the arbitration tribunal can order attachment. *See, e.g.*, New ICC Rules, Article 28.1 (“The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party.”).

Where the New York Convention applies, some decisions have held that the Convention prevents courts from ordering pre-award attachment, *see McCreary*, 501 F.2d at 1038, while other courts have held that provision relief, including pre-award attachment, is permitted. *See China Nat. Metal Products Import/Export Co. v. Apex Digital, Inc.*, 155 F.Supp.2d 1174 (C.D. Cal. 2001) (“Article II(3) of the Convention does not deprive the court of subject matter jurisdiction over this action and particularly to order provisional relief, e.g., a pre-arbitral award writ of attachment pending reference to arbitration and pending the conclusion of the arbitration proceedings.”) (discussing and disagreeing with contrary authorities).

Pending the outcome of the arbitration, parties may agree to hold in escrow money, a letter of credit, goods, or the subject matter of the arbitration. In some instances, U.S. courts have applied Article VI of the New York Convention to require positing of security pending resolution of petitions to vacate arbitral awards under the Convention.

## 8 Evidentiary Matters

### 8.1 What rules of evidence (if any) apply to arbitral proceedings in the USA?

The law is well established that, unless the parties have agreed otherwise, arbitrators are not bound by the rules of evidence that are

applicable in court cases. Arbitrators will often apply either the IBA Rules on the Taking of Evidence in International Arbitration (effective 29 May 2010) or the ICDR Guidelines For Arbitrators Concerning Exchanges Of Information (effective June 1, 2008) (“ICDR Guidelines For Arbitrators”).

Although arbitrators enjoy significant discretion regarding the taking of evidence, there are certain parameters. Section 10 of the FAA provides that an award may be vacated if the arbitrators are guilty of misconduct in refusing to hear evidence which is “pertinent and material to the controversy”. *Id.* §10(c). Various state statutes are to the same effect. *See* question 6.4, *supra*. Note, however, that arbitrators are afforded significant discretion to determine what evidence is material to a dispute. *See Petroleum Transp., Ltd. v. Yacimientos Petroliferos Fiscales*, 419 F.Supp. 1233, 1235 (S.D.N.Y. 1976) (“arbitrators are charged with the duty of determining what evidence is relevant and what is irrelevant and, absent a clear showing of abuse of discretion, the Court will not vacate an award based on improper evidence or the lack of proper evidence”).

As to discovery matters, *see* question 3.5, *supra*. Some state statutes go further than the FAA and permit an arbitrator to order depositions prior to a hearing. *See, e.g.*, CAL. CODE CIV. PROC. §1283.05(A) (“After the appointment of the arbitrator or arbitrators, the parties to the arbitration shall have the right to take depositions and to obtain discovery regarding the subject matter of the arbitration...”); NEV. REV. STAT. §38.233.2-3 (“[A]n arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed ... An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances.”). This is the approach reflected in the RUAA. *See* Section 17.

Some institutional rules likewise give arbitrators broad discretion concerning discovery. *See, e.g.*, CPR Rule 11 (“The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.”). However, the practice of depositions and interrogatories is discouraged in international arbitration. *See ICDR Guidelines For Arbitrators* ¶6.b. (“Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.”).

It should be noted that witness statements presented in advance of a hearing, in conjunction with cross-examination during the hearing, are standard in international arbitrations seated in the United States.

### 8.2 Are there limits on the scope of an arbitrator’s authority to order the disclosure of documents and other disclosure (including third party disclosure)?

*See* questions 6.4 and 8.1, *supra*.

### 8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

*See* question 3.5, *supra*.

### 8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal or is cross-examination allowed?

*See* questions 6.4 and 8.1, *supra*.

### 8.5 What is the scope of the privilege rules under the law of the USA? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Although the FAA does not address privilege issues, arbitrators generally follow U.S. law on the attorney-client privilege, which protects certain communications between a client and the client's attorney and keeps those communications confidential. In the United States, both outside and in-house counsel attract privilege, although disputes may arise as to the substance of the communication, in particular whether the communication reflects legal advice.

Various procedural rules likewise mandate that the tribunal recognise the attorney-client privilege. *See* AAA Commercial Rule 31(c) (“The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.”); CPR Rule 12.2 (“The Tribunal is not required to apply the rules of evidence used in judicial proceedings, provided, however, that the Tribunal shall apply the lawyer-client privilege and the work product immunity.”).

The ICDR Guidelines For Arbitrators expressly state that “[t]he tribunal should respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection”. *Id.* ¶7.

It is important to note that, in international arbitrations seated in the United States, U.S. law on the attorney-client privilege may not be found to apply.

## 9 Making an Award

### 9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of the USA that the Award contain reasons or that the arbitrators sign every page?

An arbitral award must be in writing, but does not need to be signed or contain reasons. Under Section 10 of the FAA, an award may be vacated if “a mutual, final, and definite award upon the subject matter submitted was not made”. *See* question 10.1, *infra*.

Some states are specific that the award must be signed and may include other requirements. *See, e.g.*, ARIZ. REV. STAT. §12-1508. (“The award shall be in writing and signed by arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement”); CAL. CODE CIV. PROC. §1283.4 (“The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy”); N.Y. C.P.L.R. §7507 (“the award shall be in writing, signed and affirmed by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders”); and TEX. CIV. PROC. & REM. §171.053(a) (“The arbitrators’ award must be in writing and signed by each arbitrator joining in the award.”).

An award must comply with the rules applicable to the arbitration. Some institutional rules, for example, require a “reasoned” award—at least if requested by the parties. *See, e.g.*, AAA Commercial Rule R-42(b) (“The arbitrator need not render a reasoned award

unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.”).

## 10 Challenge of an Award

### 10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in the USA?

The sole grounds for setting aside an arbitration award are set forth in Section 10 of the FAA as follows:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

- (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.

9 U.S.C. §10. Courts also have the power to modify an award in limited circumstances set out in Section 11 of the FAA:

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

- (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 order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

*Id.* §11. The FAA states that “[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered”. *Id.* §13.

Although U.S. courts had for a number of years included “manifest disregard of the law” as a ground upon which to reverse an award, the Supreme Court in *Hall Street* cast doubt on the continued viability of this doctrine, suggesting that awards only could be challenged on grounds expressly set out in §10 of the FAA. *See Hall Street*, 552 U.S. at 585 (“Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the §10 grounds collectively, rather than adding to them.”) (discussing *Wilko v. Swan*, 346 U.S. 427 (1953)).

More recently, the Supreme Court in *Stolt-Nielsen* expressly declined to “decide whether ‘manifest disregard’ survives [the] decision in [*Hall Street*], as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9

U.S.C. §10”. *Stolt-Nielsen*, 559 U.S. 662, 130 S.Ct. at 1768 n.8. While declining to decide that issue, at a minimum, the Court noted that, in order to vacate an award, “[i]t is not enough ... to show that the panel committed an error-or even a serious error. ‘It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’ that his decision may be unenforceable.’ In that situation, an arbitration decision may be vacated under §10(a)(4) of the FAA on the ground that the arbitrator ‘exceeded [his] powers,’ for the task of an arbitrator is to interpret and enforce a contract, not to make public policy”. *Id.* at 1767 (quoting *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001)).

Following the Supreme Court’s decision in *Hall Street*, the federal Courts of Appeal remain divided as to whether “manifest disregard” remains a basis for overturning an award. *Compare Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009) (“We conclude that Hall Street restricts the grounds for vacatur to those set forth in §10 of the [FAA], and consequently, manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA.”) and *Coffee Beanery Ltd. v. WW, LLC*, 300 Fed.Appx. 415, 418 (6th Cir. 2008) (“In [*Hall Street*], the Supreme Court significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. §10, but it did not foreclose federal courts’ review for an arbitrator’s manifest disregard of the law.”); *see also Ometto v. ASA Bioenergy Holding A.G.*, 2013 WL 174259, at \*2 (S.D.N.Y. Jan. 9, 2013) (“To the[ ] four statutory warrants for vacatur is added a fifth for ‘manifest disregard of the law,’ a doctrine that ‘remains a valid ground for vacating arbitration awards,’ in this Circuit despite somewhat elliptical guidance from the Supreme Court about its continued vitality.”) (quoting *T. Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010)).

The state statutes similarly provide for vacation and modification of awards. *See, e.g.*, N.Y. C.P.L.R. §7511(b)(1)(i-iii) (a court may vacate or modify an award if “the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral ... or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made ...”); TEX. CIV. PRAC. & REM. §171.088(a)(2) (a court may vacate or modify an award if “the rights of a party were prejudiced by: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption in an arbitrator; or (C) misconduct or wilful misbehavior of an arbitrator...”).

### 10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

U.S. courts have been reluctant to enforce provisions that would prevent a court from considering whether to vacate an arbitral award, although some courts have permitted such agreement. *Compare Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003) (“Since federal courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards for compliance with §10(a).”) with *Mactec, Inc. v. Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005) (“contractual provisions limiting the right to appeal from a district court’s judgment confirming or vacating an arbitration award are permissible, so long as the intent to do so is clear and unequivocal”).

### 10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The Supreme Court has held that parties cannot unilaterally expand the statutory limits as provided in Section 10 of the FAA. *See Concepcion*, 131 S.Ct. at 1752 (“[P]arties may not contractually expand the grounds or nature of judicial review.”) (citing *Hall Street*, 552 U.S. at 578).

### 10.4 What is the procedure for appealing an arbitral award in the USA?

Under the FAA, an appeal may be taken from, *inter alia*, an order “confirming or denying confirmation of an award or partial award, or modifying, correcting, or vacating an award” and “a final decision with respect to an arbitration that is subject to [the FAA]”. 9 U.S.C. §§16(a)(1)(D), 16(a)(3).

## 11 Enforcement of an Award

### 11.1 Has the USA signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The United States acceded to the New York Convention in 1970 subject to the “reciprocity” and “commercial” reservations. Accordingly, the United States will apply the Convention only to awards made in the territory of another signatory nation, and only to disputes that are considered “commercial” under United States.

### 11.2 Has the USA signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

The United States ratified the Panama Convention in 1990.

### 11.3 What is the approach of the national courts in the USA towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

As a matter of practice, arbitration awards are routinely confirmed and enforced. A party seeking confirmation under the FAA must file an application within one year:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. §9. A party seeking confirmation of an award subject to the New York Convention or the Panama Convention must file a petition within three years of the making of the award. *See* 9 U.S.C. §207.

State statutes are to the same effect. *See, e.g.*, ARIZ. REV. STAT. §12-1511 (“A party seeking confirmation of an award shall file and

serve an application therefor in the same manner in which complaints are filed and served in civil actions.”); CAL. CODE CIV. PROC. §1285 (“Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award.”); N.Y. C.P.L.R. §7510 (“The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.”); TEX. CIV. PRAC. & REM. §171.087 (“Unless grounds are offered for vacating, modifying, or correcting an award under Section 171.088 or 171.091, the court, on application of a party, shall confirm the award.”).

After an award has been confirmed by a court order, the court can enter judgment and enforce the award. *See, e.g.*, ARIZ. REV. STAT. §12-1511 (“Upon the expiration of twenty days from service of the application, which shall be made upon the party against whom the award has been made, the court shall enter judgment upon the award unless opposition is made in accordance with § 12-1512.”); CAL. CODE CIV. PROC. §1287.4 (“If an award is confirmed, judgment shall be entered in conformity therewith. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action of the same jurisdictional classification; and it may be enforced like any other judgment of the court in which it is entered, in an action of the same jurisdictional classification.”); N.Y. C.P.L.R. §7514 (“A judgment shall be entered upon the confirmation of an award.”); TEX. CIV. PRAC. & REM. §171.081 (“The making of an agreement described by Section 171.001 that provides for or authorizes an arbitration in this state and to which that section applies confers jurisdiction on the court to enforce the agreement and to render judgment on an award under this chapter.”).

#### 11.4 What is the effect of an arbitration award in terms of *res judicata* in the USA? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The principles of *res judicata* generally apply to arbitration awards. A confirmed award is treated as a judgment of the court, and even unconfirmed awards have been given preclusive effect provided the elements of *res judicata* are satisfied. *See Jacobson v. Fireman’s Fund Ins. Co.*, 111 F.3d 261, 267-68 (2d Cir. 1997) (“We therefore hold ... that res judicata and collateral estoppel apply to issues resolved by arbitration ‘where there has been a final determination on the merits, notwithstanding a lack of confirmation of the award.’”) (citation omitted). But *see Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985) (“it is far from certain that arbitration proceedings will have any preclusive effect on the litigation of nonarbitrable federal claims”).

#### 11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

*See* questions 10.1 and 11.3, *supra*.

## 12 Confidentiality

#### 12.1 Are arbitral proceedings sited in the USA confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The FAA is silent as to the confidentiality of arbitral proceedings.

However, arbitrations are private and the arbitrators and arbitral institutions generally are required to keep awards confidential. Awards are published, if at all, only in a form that conceals the identity of the parties. The parties can likewise agree to keep arbitral proceedings confidential.

Some institutional rules expressly provide for the confidentiality of proceedings. *See, e.g.*, CPR Rule 18 (“Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal.”).

Class action arbitrations, however, generally are not protected by confidentiality. *See Stolt-Nielsen*, 559 U.S. 662, 130 S.Ct. at 1776 (noting that under the ABA Supplementary Rules for Class Arbitrations “‘the presumption of privacy and confidentiality’ that applies in many bilateral arbitrations ‘shall not apply in class arbitrations’”).

#### 12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Generally there will need to be an independent basis for disclosure of information in subsequent proceedings.

## 13 Remedies / Interests / Costs

#### 13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The FAA does not limit the types of remedies that are available in arbitration. In the absence of an express provision in the arbitration agreement, there generally are no limits on the types of available remedies, including punitive damages. *See Mastrobuono*, 514 U.S. at 58 (“[O]ur decisions in *Allied-Bruce, Southland*, and *Perry* make clear that if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration.”).

Note that there may be enforcement issues in jurisdictions outside of the United States, however, to the extent an award is determined to offend the policy of the jurisdiction in which enforcement is sought.

#### 13.2 What, if any, interest is available, and how is the rate of interest determined?

The FAA does not prohibit the award of interest. Arbitrators generally have the power to award pre-award interest, as well as post-award interest. After confirmation of an award, the prevailing party generally will be entitled to interest at the applicable state or federal statutory rate. The rules of some institutions expressly empower arbitrators to award interest. *See, e.g.*, AAA Commercial Rules R-43(d) (i) (“The award of the arbitrator(s) may include: (i) interest at such rate and from such date as the arbitrator(s) may deem appropriate.”); CPR Rule 10.4 (“The Tribunal may award such pre-award and post-award interest, simple or compound, as it

considers appropriate, taking into consideration the contract and applicable law.”).

### 13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

In general, each party bears its own costs and legal fees, absent some contractual or statutory basis for other allocation. However, many arbitration rules permit the arbitrator to apportion costs as he or she deems appropriate and to award legal fees when law or the agreement allow for it—or where both sides seek an award of fees. *See, e.g.*, AAA Rule R-43(d) (ii) (“The award of the arbitrator(s) may include ... an award of attorneys’ fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.”); CPR Rule 17.3 (“[T]he Tribunal may apportion the costs of arbitration between or among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration”); *see also* 8.a. (“The tribunal may ... allocate the costs of providing [pre-hearing exchanges of information] information among the parties, either in an interim order or in an award.”).

### 13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The same taxation rules apply to arbitration awards as to court judgments.

### 13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of the USA? Are contingency fees legal under the law of the USA? Are there any “professional” funders active in the market, either for litigation or arbitration?

The common law doctrines of champerty and maintenance restrict the practice of third-party claim funding in the United States. While a minority of states have abandoned these rather archaic doctrines, a majority still enforce them in most contexts, albeit with differing degrees of enthusiasm and forcefulness. In addition to the doctrines of champerty and maintenance, certain ethics rules, including the prohibition against lawyers sharing fees with non-lawyers, currently stand as barriers to third-party claim funding in the United States. By way of example, Rule 5.4 of the ABA Model Rules of Professional Responsibility states that “[a] lawyer or law firm shall not share legal fees with a nonlawyer”. MODEL RULES OF PROFESSIONAL CONDUCT, RULE 5.4.

These barriers aside, third-party claim funding is, although still in its infancy, growing steadily in the United States. As noted by a recent commentator, one major U.S. legal publication has proclaimed: “Welcome to the world of third-party litigation funding”. Lawrence S. Schaner, *Third-Party Litigation Funding in the United States*, *Revista de Arbitragem e Mediação (Arbitration and Mediation Review)*, at 176 (January-March 2012), *available at*: <http://jenner.com/library/publications/9221> (visited Apr. 25, 2013) (quoting Richard Lloyd, *The New, New Thing, The American Lawyer* (May 17, 2010)).

There are professional funders that provide third-party litigation funding in the United States, including investment firms Juridica Investments Limited and Buford Capital Limited.

As far as the international arbitration context in particular is concerned, one commentator has recognised the “particular push

for litigation funding” and noted that the reason for its expansion “is partly a de facto absence of professional regulations that enables funders and attorneys to operate outside of the disciplinary reach of bar associations” in the United States. Maya Steinitz, *Whose Claim Is This Anyway?* *Third-Party Litigation Funding*, 95 *Minn. L. Rev.* 1268, 1277-78 (2010-2011).

The analogous practice of contingency fee arrangements is a legal and well-established practice in the United States.

## 14 Investor State Arbitrations

### 14.1 Has the USA signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as “ICSID”)?

The United States signed the ICSID Convention on 27 August 1965, and the Convention entered into force in the United States on 14 October 1966.

### 14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is the USA party to?

The United States is party to a significant number of BITs and other multi-party investment treaties, including the North American Free Trade Agreement. A listing of BITs currently in force is *available at*: [http://tcc.export.gov/Trade\\_Agreements/Bilateral\\_Investment\\_Treaties/index.asp](http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp) (visited Apr. 25, 2013)) and a listing of free trade agreements in force is *available at*: <http://www.ustr.gov/trade-agreements/free-trade-agreements> (visited Apr. 25, 2013). The United States is not a signatory to the Energy Charter Treaty, although it does have observer status to the Energy Charter Conference.

### 14.3 Does the USA have any noteworthy language that it uses in its investment treaties (for example in relation to “most favoured nation” or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The United States negotiates BITs on the basis of a model. The United States Department of State and the Office of the United States Trade Representative, working with other U.S. government agencies, completed an update of the U.S. model bilateral investment treaty in April 2012.

The 2012 model BIT maintains language from the 2004 model BIT, but makes a number of changes from the previous model “in order to improve protections for American firms, promote transparency, and strengthen the protection of labor rights and the environment”. Model Bilateral Investment Treaty Fact Sheet (April 20, 2012), *available at*: <http://www.ustr.gov/about-us/press-office/fact-sheets/2012/april/model-bilateral-investment-treaty> (visited Apr. 25, 2013).

The text of the 2012 U.S. model BIT is *available at*: <http://www.state.gov/e/eb/ifd/bit/index.htm> (visited Apr. 25, 2013).

### 14.4 What is the approach of the national courts in the USA towards the defence of state immunity regarding jurisdiction and execution?

Congress passed the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602, *et. seq.* (“FSIA”) in 1976. The FSIA provides foreign states with a presumptive grant of sovereign immunity, subject to

certain exceptions, and is the exclusive basis of jurisdiction in state and federal courts in the United States in suits involving foreign states. The FSIA also provides the exclusive basis on which execution is permitted to satisfy a judgment against a foreign state. Section 1605 of the FSIA creates a number of independent exceptions to immunity from jurisdiction. Section 1605(a)(1) grants federal district courts jurisdiction over foreign states in cases in which the foreign state waived its immunity either expressly or by implication. United States courts have found that a foreign state's agreement to arbitrate in the United States constitutes a waiver of immunity from actions in the United States courts to compel arbitration. Section 1605(a)(6) provides a waiver of immunity and a grant of jurisdiction for actions to enforce arbitration agreements that may be governed by a treaty calling for the recognition or enforcement of arbitral awards, such as the New York Convention.

## 15 General

### 15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in the USA (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The Supreme Court has been active in recent years in shaping the federal common law of arbitration under the FAA and considering the arbitrability of various types of disputes, including class action disputes. See, e.g., *Stolt-Nielsen*, 130 S.Ct. at 1775, (“[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so ... [W]here the parties stipulated that there was ‘no agreement’ on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.”) (court’s emphasis); see also *Concepcion*, 131 S.Ct. at 1744, 1746 (holding that the FAA “prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures” and “preempts California’s rule classifying most collective-arbitration waivers in consumer contracts as unconscionable”).

The Court has before it two cases, *Oxford Health Plans LLC v. John Ivan Sutter*, No. 12-135 (U.S.) and *American Express Co. v. Italian Colors Restaurant*, No. 12-133 (U.S.), which will further shed light on when a party will be deemed to have agreed to class action arbitration as well as the enforceability of class-arbitration waivers. In *Oxford Health Plans*, the Court will address the following question presented:

Whether an arbitrator acts within his powers under the Federal Arbitration Act (as the Second and Third Circuits have held) or exceeds those powers (as the Fifth Circuit has held) by determining that parties affirmatively “agreed to authorize class arbitration,” *Stolt-Nielsen*, 130 S. Ct. at 1776, based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract.

In *American Express*, the Court will address the following question presented:

Whether federal arbitration law recognizes an “effective vindication” exception to class-arbitration waivers that allows courts to ignore arbitration agreements and permit class-action lawsuits where individual plaintiffs’ claims are so small that no single plaintiff would rationally bring a bilateral, one-on-one arbitration to vindicate federal rights.

The Court heard arguments in these cases, respectively, on 25 March 2013 and 27 February 2013.

In addition to the cases pending before the Court, the Arbitration Fairness Act of 2009 (H.R. 1020), introduced February 12, 2009, remains pending. The bill was re-introduced and referred to committee as H.R. 1873 on May 12, 2011. If enacted, the Act declares that no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights. The Act further declares that the validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

### 15.2 What, if any, recent steps have institutions in the USA taken to address current issues in arbitration (such as time and costs)?

It is generally recognised that a key component of the successful resolution of an international commercial dispute is the role played by the administrative institution. The ICDR, which was established in 1996 as the international division of the AAA and is charged with the exclusive administration of all of the AAA’s international matters, is recognised as one of the leading international arbitration institutions. The ICDR’s International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), which were amended and effective as of June 1, 2009, are fashioned to, among other things, assist the parties in moving matters forward and controlling costs. See Article 16.2 (“The tribunal, exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute. It may conduct a preparatory conference with the parties for the purpose of organizing, scheduling and agreeing to procedures to expedite the subsequent proceedings.”). Likewise, the ICDR Guidelines For Arbitrators were adopted “to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process”.

Also on the international stage, both the ICC Rules of Arbitration and the UNCITRAL Arbitration Rules recently have been revised. The revised ICC Rules, which took effect on 1 January 2012, are intended to, among other things, increase the efficiency and cost-effectiveness of ICC arbitration. See Article 22 (“The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute. In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.”). Likewise, the new UNCITRAL Rules, which came into effect for contracts entered into after 15 August 2010, were amended to address concerns relating to the time and cost associated with *ad hoc* arbitration and, among other things, place upon the arbitral Tribunal a duty to minimise cost and delay. See Article 17.1 (“Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.”).

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