PANORAMIC

ARBITRATION

USA

LEXOLOGY

Contributors

USA

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Arbitration

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The United States has been a party to the New York Convention since 29 December 1970. The United States took both the reciprocity and commercial reservations under article I of the Convention, meaning that the Convention applies to arbitral awards that are made in the territory of another contracting state and pertain to disputes considered to be commercial under US law.

The United States is also a party to:

- the Inter-American Convention on International Commercial Arbitration (the Panama Convention), effective since 27 October 1990. The text of the Panama Convention is similar to that of the New York Convention, and courts generally implement the two conventions in a manner designed to achieve consistent outcomes; and
- the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention), effective since 14 October 1966.

Law stated - 15 January 2025

Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

The United States is a party to bilateral investment treaties with 45 other countries and to a number of bilateral and multilateral free trade agreements (FTAs) containing investor-state dispute settlement (ISDS) mechanisms. On 1 July 2020, the US–Mexico–Canada Agreement (USMCA) came into force among the United States, Mexico and Canada. The USMCA replaced the North American Free Trade Agreement (NAFTA), significantly altering NAFTA's ISDS mechanism; the countries have largely abandoned the ISDS mechanism between US and Canada and Canada and Mexico. NAFTA had a three-year sunset clause, during which investors from all three countries had access to investor-state arbitration, provided that they made their investments while NAFTA was still in effect. The sunset clause expired on 1 July 2023.

Law stated - 15 January 2025

Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Federal Arbitration Act (FAA) regulates both domestic and international arbitration in the United States. Chapter 1 of the FAA, 9 United States Code (USC) sections 1–16, governs domestic arbitrations between US citizens.

The New York and Panama Conventions (codified as Chapters 2 and 3 of the FAA, respectively) apply to 'foreign' or 'international' arbitrations (ie, where the arbitration is not wholly between US citizens or has some other 'reasonable relation' to another New York or Panama Convention contracting state).

Law stated - 15 January 2025

Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The FAA predates the UNCITRAL Model Law and is not based on it. Nonetheless, it similarly supports the principles of party autonomy, the enforcement of arbitration agreements in accordance with their terms and limited judicial review of arbitral awards.

There are a few noteworthy differences between the FAA and the UNCITRAL Model Law. In general, the FAA is much less detailed than the UNCITRAL Model Law, leaving various matters of procedure and process to be determined by the parties, the arbitrators or the applicable institutional rules. The two regimes also provide somewhat different grounds for setting aside (or vacating) an arbitration award. Further, whereas the UNCITRAL Model Law does not grant national courts the power to modify or correct arbitral awards, the FAA does grant US courts the ability to do so in certain cases.

Law stated - 15 January 2025

Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The courts consider arbitration to be contractual in nature and therefore do not apply mandatory rules to the conduct of arbitration proceedings.

Law stated - 15 January 2025

Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

US-seated tribunals will generally honour the parties' choice of law applicable to the merits of a dispute. The FAA does not provide tribunals with any guidance as to which substantive

law should apply to the merits of a dispute absent express agreement by the parties, and tribunals may exercise their discretion in this regard.

Law stated - 15 January 2025

Arbitral institutions

What are the most prominent arbitral institutions situated in your jurisdiction?

Major US-based arbitral institutions include:

The American Arbitration Association (AAA)

120 Broadway, 21st Floor

New York, NY 10271

United States

www.adr.org

The International Centre for Dispute Resolution (ICDR) (the international branch of the AAA)

120 Broadway, 21st Floor

New York, NY 10271

United States

www.icdr.org

SICANA Inc

International Chamber of Commerce

International Court of Arbitration

140 East 45th Street, Suite 14c

New York, NY 10017

United States

www.iccwbo.org

The International Institute for Conflict Prevention and Resolution (CPR)

30 East 33rd Street, 6th Floor

New York, NY 10016

United States

www.cpradr.org

Judicial Arbitration and Mediation Services (JAMS)

620 8th Avenue, 34th Floor

New York, NY 10022

United States

www.jamsadr.com

The ICDR is a prominent US-based organisation for international disputes. It respects the choice of the parties with respect to the place of arbitration, the selection of arbitrators and the language or applicable law of the arbitration (as do all the US arbitration institutions). It calculates fees based on time spent by the arbitrators.

JAMS and the CPR have international rules that likewise respect party choice in these respects. The International Chamber of Commerce (ICC) has an office in New York from which it administers its North American arbitrations.

In 2020, the Singapore International Arbitration Centre (SIAC) opened an office in New York for the administration of cases. Although a discussion of their rules is not included in this chapter, both the ICC and SIAC are used frequently by US parties for international arbitration disputes.

Law stated - 15 January 2025

ARBITRATION AGREEMENT

Arbitrability
Are there any types of disputes that are not arbitrable?

There are very few restrictions on the types of disputes that can be arbitrated under federal law. Certain intra-state family, consumer and municipal matters may be considered non-arbitrable under state law.

Law stated - 15 January 2025

Requirements
What formal and other requirements exist for an arbitration agreement?

The Federal Arbitration Act (FAA) and the New York Convention require arbitration agreements to be made in writing. However, courts interpret this requirement in a commercially practical manner and, in appropriate cases, have enforced arbitration agreements where, for example, the final contract was unsigned or where the agreement to arbitrate was entered into via email or in certain other circumstances.

Generally, US law permits non-signatories to be bound to an arbitration agreement through the application of traditional principles of state law, such as assumption, corporate veil piercing, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel. In 2020, the Supreme Court clarified that in arbitrations governed by the New York Convention, a non-signatory to the arbitration agreement can be compelled to arbitrate based on the doctrine of equitable estoppel (see ***GE Energy Power Conversion Fr SAS, Corp v Outokumpu Stainless USA, LLC***, 140 S Ct 1637 (1 June 2020)).

An agreement to arbitrate may be set out in a document other than the contract in dispute, such as where that document is incorporated by reference into the main agreement, or in an

exchange of emails (see ***Jiangsu Beier Decoration Materials Co v Angle World LLC***, 52 F4th 554 (Third Circuit, 2022)). Parties may also agree to arbitrate after a dispute has arisen.

Law stated - 15 January 2025

Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Section 2 of the FAA permits challenges to arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract', such as mistakes, lack of capacity, fraudulent inducement, incapacity, rescission and termination of the arbitration agreement. Nonetheless, US policy strongly favours the enforcement of arbitration agreements, and these challenges are scrutinised closely.

Law stated - 15 January 2025

Separability

Are there any provisions on the separability of arbitration agreements from the main agreement?

The courts respect the principle of separability, which requires that the arbitration agreement be treated as a distinct agreement that is not rendered invalid, non-existent or ineffective simply because the contract itself may be treated as such.

The FAA does not expressly provide for the separability of arbitration agreements from the main agreement. However, the Supreme Court recognised this doctrine in ***Prima Paint***, providing that 'an arbitration clause in the contract is "separable" from the rest of the contract, and that allegations that go to the validity of the contract in general, as opposed to the arbitration clause in particular, are to be decided by the arbitrator, not the court' (***Prima Paint Corp v Flood & Conklin Mfg Co***, 388 US 395, 409 (1967)).

Law stated - 15 January 2025

Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Generally, third parties or non-signatories are not bound by an arbitration agreement, nor can they compel a signatory to arbitrate. There are, however, exceptions to this rule. Third parties and non-signatories can be bound to arbitrate a dispute based on common law contract and agency principles, such as incorporation by reference, assumption, agency, veil-piercing or alter ego, estoppel, succession in interest or assumption by conduct. The law governing the contract (or putative contract) is potentially relevant in such cases, as is the law of the place of incorporation and the law of the arbitral seat.

Law stated - 15 January 2025

Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Many institutional rules provide mechanisms for joinder or consolidation of arbitration proceedings. US courts have generally respected these mechanisms.

Class arbitration may also be permitted, but only where the parties have expressly manifested their consent to such a procedure. Silence or ambiguity in the arbitration agreement is not a sufficient basis to permit class arbitration (see ***Stolt-Nielsen v Animalfeeds Int'l Corp***, 559 US 662 (2010) and ***Lamps Plus, Inc v Varela***, 139 S Ct 1407 (2019)). Waiver of class arbitration is also permitted. Consumer contracts that require arbitration but prohibit class arbitration are valid even when the cost of pursuing such claims on an individual basis would be prohibitively expensive or seem to conflict with US labour protections (***Epic Systems v Lewis***, 138 S Ct 1612 (2018)), and even when an online user agreement notifies consumers of it simply through a hyperlink (***Meyer v Uber Tech Inc***, 868 F3d 66 (Second Circuit, 2017)).

Law stated - 15 January 2025

Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Although state and federal law do not recognise the group of companies doctrine, a non-signatory parent, subsidiary or affiliate of a signatory company may be bound to an arbitration agreement under the applicable law's principles of agency, contract, estoppel or veil-piercing (***Arthur Andersen LLP v Carlisle***, 556 US 624 (2009)). Specific terms of the arbitration clause can be important in determining such matters.

Law stated - 15 January 2025

Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

A multiparty arbitration agreement must meet the same validity requirements as any arbitration agreement. It must be in writing and manifest the parties' intent to be bound. The courts will generally enforce valid multiparty arbitration agreements.

Law stated - 15 January 2025

Consolidation

Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

The FAA is silent on the consolidation of separate arbitral proceedings, as are the Commercial Arbitration Rules of the American Arbitration Association and the Comprehensive Arbitration Rules and Procedures of the Judicial Arbitration and Mediation Services. However, the International Arbitration Rules of the International Centre for Dispute Resolution provide for an appointment of a consolidation arbitrator under article 9, who may consolidate separate arbitral proceedings in the circumstances listed below. Rule 3.13 of the Administered Arbitration Rules 2019 of the International Institute for Conflict Prevention and Resolution also provides for consolidation in certain circumstances. Further, certain state arbitration statutes, such as the California Arbitration Act (section 1281.3) (Cal Code Civ P paragraphs 1280-1294.4) also provide for consolidation.

Relevant considerations for consolidation are:

- the parties' express agreement to consolidation;
- the appointment of one or more arbitrators in one or more of the arbitrations;
- the existence of common issues of law or fact creating the possibility of conflicting decisions;
- claims and counterclaims in the arbitrations arising out of the same arbitration agreement;
- undue delay and prejudice from failing to consolidate outweighs the prejudice caused to parties opposing it; and
- interests of justice and efficiency.

The US courts have provided arbitral tribunals with a substantial amount of discretion with respect to consolidation and have placed emphasis on the language of the arbitration agreement. In 2018, a federal court in Ohio distinguished a bilateral arbitration from a class arbitration where the consent of every party is required for consolidation and held that courts do not require every party's consent for consolidation (***Parker v Dimension Serv Corp***, 2018-Ohio-5248).

Law stated - 15 January 2025

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The Federal Arbitration Act (FAA) is silent on arbitrator eligibility. However, state and federal judicial ethics rules and codes of conduct generally prevent sitting judges from serving as arbitrators.

State and federal law generally recognise the autonomy of the parties to require that the arbitrators have certain characteristics, and contractually stipulated requirements for arbitrators based on nationality or religion are regularly enforced.

Parties to an arbitration agreement are free to choose any number of arbitrators to decide their disputes. While, in theory, parties could agree that those on one side of a dispute would select more arbitrators than the other, this is rarely the case in practice. In recent years, however, the Fifth Circuit Court of Appeals upheld the decision of a nine-arbitrator tribunal where one side selected more arbitrators than the other (see ***Soaring Wind Energy, LLC v Catic USA Inc***, 946 F3d 742 (Fifth Circuit, 2020)).

Law stated - 15 January 2025

Background of arbitrators

Who regularly sit as arbitrators in your jurisdiction?

It is common for practising US attorneys, retired judges, non-lawyer industry experts and foreign lawyers to serve as arbitrators in US-seated proceedings. There are increasing efforts to improve gender and other types of diversity among arbitrators. The American Arbitration Association (AAA), for example, aims to provide parties with arbitrator lists that are at least one-third diverse.

Law stated - 15 January 2025

Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The courts will defer to the applicable institutional rules regarding the appointment of arbitrators. Assuming no such rules apply (or other special circumstances prevent an appointment under such rules), section 5 of the FAA provides a mechanism by which the parties may request a court appointment of the arbitral tribunal. In those cases, the courts are directed to appoint a sole arbitrator absent a contrary agreement by the parties.

Law stated - 15 January 2025

Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The courts will defer to the mechanisms provided in the parties' agreement or applicable institutional rules for challenge or replacement of an arbitrator. Absent such mechanisms, courts disagree as to the proper approach when an arbitrator dies or resigns: although some

courts in the Second Circuit have required the arbitration to commence anew, other circuit courts of appeal have permitted either party to request the appointment of a replacement arbitrator under section 5 of the FAA (eg, ***WellPoint, Inc v John Hancock Life Ins Co***, 576 F3d 643 (Seventh Circuit, 2009)).

Courts have found the IBA Guidelines on Conflicts of Interest in International Arbitration to be a persuasive, but not binding, authority (eg, ***Republic of Argentina v AWG Group***, 211 F Supp 3d 335, 355 (DDC 2016)).

Law stated - 15 January 2025

Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

The FAA contains no particular requirements and defers to institutional rules and party agreement regarding the relationship between parties and arbitrators, neutrality of arbitrators and their compensation. Although arbitrators are generally required to be neutral and not engage in ex parte communications about the merits of the case, 'parties can agree to have partisan arbitrators' (eg, ***Gambino v Alfonso***, 566 Fed Appx 9 (First Circuit, 2014)). Some institutional rules applying solely to domestic arbitrations, such as the Comprehensive Arbitration Rules and Procedures (the JAMS Rules) of the Judicial Arbitration and Mediation Services (JAMS) and the AAA Commercial Arbitration Rules (the AAA Rules), expressly permit agreements that state that party-appointed arbitrators may be non-neutral. However, absent such an agreement, the default under the rules is that party-appointed arbitrators must be neutral.

Law stated - 15 January 2025

Duties of arbitrators

What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The FAA is silent on the arbitrators' duties of disclosure regarding impartiality and independence; however, it recognises an 'evident partiality or corruption in the arbitrators' as a ground for vacating an arbitral award (section 10 (a)(4)). US courts have found a failure to disclose relationships with parties or counsel to be relevant to determinations of evident partiality (eg, ***Scandinavian Reinsurance Co v Saint Paul Fire & Marine Ins Co***, 668 F3d 60 (Second Circuit, 2012).

The American Bar Association, in conjunction with the AAA, promulgated a Code of Ethics for Arbitrators in Commercial Disputes (revised in 2004) (the Code), and JAMS issued the Arbitrators Ethics Guidelines. These guidelines, although not legally enforceable, impose a continuing duty of disclosure on the arbitrators regarding their impartiality and independence throughout the arbitral proceedings, requiring them to make a reasonable effort to inform themselves of any knowledge or interest in the dispute. Canon II of the Code states: 'An

arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias'.

As one US court recently concluded, 'the existence of a duty to investigate and disclose, along with the subsequent failure to do so – are sufficient in and of themselves to support a finding of "reasonable impression of partiality" warranting vacatur' (see ***Equicare Health Inc v Varian Med Sys, Inc***, No. 5:21-mc-80183-EJD, 2023 US Dist LEXIS 74818, at *12 (ND Cal, 19 Apr 2023)).

Likewise, US courts will apply and enforce the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration in cases where they are found to have been applicable to the arbitration (see, eg, ***Pao Tatneft v Ukraine***, Civil Action No. 17-582, (DDC 2020)).

Arbitral institution rules on duties of disclosure are formulated on these lines. The AAA Commercial Arbitration Rules (Rule 17), the International Institute for Conflict Prevention and Resolution's Administered Arbitration Rules (Rule 7) and the JAMS Arbitration Rules (Rule 15) require arbitrators to disclose in writing any circumstance that might give rise to a justifiable doubt on their independence and impartiality. The duty to disclose commences before appointment and continues throughout the arbitration proceedings.

Law stated - 15 January 2025

Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are immune from civil liability for acts undertaken within the scope of their authority pursuant to the common law doctrine of arbitral immunity (eg, ***Sacks v Dietrich***, 663 F3d 1065 (Ninth Circuit, 2011)).

Additionally, a 2018 federal district court decision (***Wartsila N Am, Inc v Int'l Ctr for Dispute Resolution***, 2018 US Dist LEXIS 137836 (2018)) created arbitral immunity by applying a judicial immunity standard to the administrative stages prior to the appointment of an arbitration tribunal. According to the court, immunity applies unless the resolution of the arbitrability issue is 'facially obvious' and there is a 'clear absence' of jurisdiction that is so obvious that it could be resolved before the arbitrators are even empanelled.

Law stated - 15 January 2025

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Courts may review the jurisdiction of the arbitral tribunal after the proceedings have commenced, unless there is clear and unmistakable evidence that the parties agreed to

submit questions of arbitrability to the arbitrators (***First Options of Chicago, Inc v Kaplan***, 514 US 938 (1995)). If the parties have delegated the issue to the arbitrator, the court will refuse to decide arbitrability even if there is a 'wholly groundless argument' on arbitrability and will let the arbitrators decide it (***Henry Schein, Inc v Archer & White Sales, Inc***, 139 S Ct 524 (2019)). Where a court denies a motion to compel arbitration, the court proceedings must be stayed pending appeal (***Coinbase v Bielski***, 599 US 736 (2023)).

An agreement to abide by institutional rules granting arbitrators authority to rule on their own jurisdiction, such as the American Arbitration Association (AAA) Rules, the International Centre for Dispute Resolution (ICDR) Arbitration Rules (the ICDR Rules) and the International Institute for Conflict Prevention and Resolution (CPR) Rules for Administered Arbitration of International Disputes (the CPR Rules), has generally been considered sufficient evidence of consent to 'arbitrate arbitrability' by a majority of courts. However, the American Law Institute's ***Restatement of the Law: The U.S. Law of International Commercial and Investor-State Arbitration*** (2023) considers that such rules are not sufficient in certain circumstances.

Courts may preclude parties from raising jurisdictional objections if their conduct in the arbitration indicates a waiver of their right to challenge the arbitrators' jurisdiction, such as if a party failed to maintain its jurisdictional objection consistently throughout the arbitration proceedings.

In the case of a claim for fraud in the execution of the contract containing a provision delegating gateway issues to the arbitrator, under section 4 of the Federal Arbitration Act, the courts nevertheless retain the power to decide such questions. The Third Circuit Court of Appeals held, for example, that 'unless the parties clearly and unmistakably agreed to arbitrate questions of contract formation in a contract whose formation is not in issue, those gateway questions are for the courts to decide' (see ***MZM Construction Co v New Jersey Building Laborers Statewide Benefit Funds***,974 F3d 386 (Third Circuit, 2020)).

Law stated - 15 January 2025

Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

Courts may review the jurisdiction of the arbitral tribunal after the proceedings have commenced, unless there is clear and unmistakable evidence that the parties agreed to submit questions of arbitrability to the arbitrators (***First Options***, 514 US). If the parties have delegated the issue to the arbitrator, the court will refuse to decide arbitrability even if there is a 'wholly groundless argument' on arbitrability and will let the arbitrators decide it (***Henry Schein***, 139 S Ct). An agreement to abide by institutional rules granting arbitrators authority to rule on their own jurisdiction, such as the AAA Rules, the ICDR Rules and the CPR Rules, has generally been considered sufficient evidence of consent to arbitrate arbitrability by a majority of courts (see, eg, ***Olin Holdings Ltd v State of Libya***, No. 21-CV-4150 (SDNY 22 Mar 2022)). However, the American Law Institute's ***Restatement of the Law: The U.S. Law of International Commercial and Investor-State Arbitration*** (2023) considers that such rules are not sufficient in certain circumstances.

Courts may preclude parties from raising jurisdictional objections if their conduct in the ongoing arbitration indicates a waiver of their right to challenge the arbitrators' jurisdiction, such as if a party failed to maintain its jurisdictional objection consistently throughout the arbitration proceedings.

Law stated - 15 January 2025

Distinction between admissibility and jurisdiction of tribunal

Is there a distinction between challenges as to the admissibility of a claim and as to the jurisdiction of the tribunal?

A limited distinction is made when there is a challenge to the existence of a valid arbitration agreement. Before referring a dispute to an arbitrator, a court determines whether a valid arbitration agreement exists (see 9 United States Code section 2). 'But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue' (see ***Henry Schein***, 139 S Ct at 530). In general, questions of arbitrability include whether a particular claim falls within the scope of the arbitration agreement and whether a party is subject to the arbitration agreement.

Law stated - 15 January 2025

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

The Federal Arbitration Act (FAA) does not provide a default mechanism for the determination of the seat or language of the arbitration. Absent agreement by the parties, the language of the proceedings will generally be the same as the language of the contract containing the parties' arbitration agreement (subject to the tribunal's overriding discretion) (International Centre for Dispute Resolution (ICDR) Arbitration Rules (the ICDR Rules), article 18; and International Institute for Conflict Prevention and Resolution (CPR) Rules for Administered Arbitration of International Disputes (the CPR Rules), Rule 9.5).

Many US-based institutions grant the arbitral institution authority to determine the place of arbitration at the outset, which may later be overridden by the tribunal (American Arbitration Association (AAA) Commercial Arbitration Rules (the AAA Rules) Rules, Rule 11; ICDR Rules, article 17; and CPR Rules, Rule 9.5).

US-seated tribunals generally must honour the parties' choice of law applicable to the merits of a dispute. A party may avoid enforcement of an arbitral-forum clause on the grounds of impracticability if conditions in the selected jurisdiction render arbitration impracticable, and the party could not force those conditions when it entered into the contract (***Northrop Grumman Ship Sys v Ministry of Def of the Republic of Venez***, 850 F App'x 218, 227 (Fifth Circuit, 2021)).

The FAA does not provide tribunals with any guidance on which substantive law should apply to the merits of a dispute absent express agreement by the parties, and tribunals may exercise their discretion in this regard.

Law stated - 15 January 2025

Commencement of arbitration

How are arbitral proceedings initiated?

The FAA is silent regarding the initiation of arbitration proceedings. Institutional rules contain specific provisions for initiating arbitration; for example, article 2 of the ICDR Rules requires the claimant to serve a copy of the notice of arbitration on the counterparty (in addition to the ICDR administrator) and provides that the notice of arbitration shall contain a copy of the applicable arbitration clause, a description of the claim and the facts supporting it, and the relief or remedy sought, among other things. The Judicial Arbitration and Mediation Services (JAMS) Comprehensive Arbitration Rules and Procedures (article 2), the AAA Rules (Rule 4) and the CPR Rules (article 3) provide similar procedures.

Law stated - 15 January 2025

Hearing

Is a hearing required and what rules apply?

The FAA contains no specific requirements for hearings, other than requiring tribunals to 'provide . . . adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator' (***Gold Reserve Inc v Venezuela***, 146 F Supp 3d 112 (DDC 2015)). Tribunals may forego in-person hearings where the 'choice to render a decision based solely on documentary evidence is reasonable, and does not render the proceeding "fundamentally unfair"' (see ***In re Arbitration between Griffin Indus and Petrojam***, 58 F Supp 2d 212 (SDNY 1999)). Most institutional rules grant wide leeway with respect to the timing and conduct of oral hearings (AAA Rules, Rules 24–25; ICDR Rules, article 25; CPR Rules, Rule 12). In general, tribunals must give the parties reasonable notice prior to hearings, and parties and their counsel have the right to attend them.

Courts have generally found that conducting hearings by videoconference satisfies a parties' right to be heard (see***Eaton Partners, LLC v Azimuth Capital Mgmt. IV, Ltd***, 18 Civ 11112 (ER), 8 (SDNY 18 Oct 2019); ***Legaspy v Financial Industry Regulatory Authority***, No. 1:2020 Civ 04700 (ND Ill 12 Aug 2020); ***Research & Dev Ctr 'Teploenergetika,' LLC v EP Intl., LLC***, 182 F Supp 3d 556 (ED Va 2016)). But the parties' arbitration agreement and the applicable arbitration rules could dictate a different outcome.

Law stated - 15 January 2025

Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Tribunals seated in the United States are not bound by the rules of evidence that apply in US litigation (eg, the Federal Rules of Evidence) and are free to make procedural decisions to admit and consider the oral or written testimony of fact and expert witnesses, as well as documentary evidence (eg, ***Kolel Beth Yechiel Mechil of Tartikov, Inc v YLL Irrevocable Tr***, 729 F3d 99 (Second Circuit, 2013)).

Generally, the tribunal and the parties have autonomy to structure the taking of evidence as appropriate for the matter, as guided by the applicable institutional rules. For example, articles 20(6) and 22 of the ICDR Rules provide that '[t]he tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence' while 'tak[ing] into account applicable principles of privilege' such as the attorney–client privilege under US law. The IBA Rules on the Taking of Evidence in International Arbitration are utilised by many US-seated tribunals as guidance.

Law stated - 15 January 2025

Court involvement

In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

Section 7 of the FAA permits arbitrators to issue subpoenas for witness testimony at the hearing, including by third parties, and to compel the witness to bring documents to the hearing. Upon request, the district court at the seat of the arbitration may compel compliance with arbitral subpoenas or hold the recalcitrant party in contempt of court. The court, however, must have personal jurisdiction under the law of the state in which the district court is located, and the subpoena must comport with due process under the Constitution (see ***Licci v Lebanese Canadian Bank***, 673 F3d 50, 60–61 (Second Circuit, 2012)).

Regarding territorial scope and timing of section 7 subpoenas, courts have held that section 7 does not allow for subpoenas to testify prior to a hearing (or at deposition). Courts have also expressed doubts about whether section 7 allows subpoenas significantly beyond the location of the arbitration; the scope and reach of such subpoenas must therefore be carefully considered in every case.

Under 28 United States Code section 1782, district courts can order persons within their territory to provide written or oral testimony, or to produce documents 'for use in a proceeding in a foreign or international tribunal'. Until 2022, US courts routinely granted section 1782 requests in aid of proceedings in foreign courts and tribunals in investor-state arbitrations. The Supreme Court determined, however, that 'only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under §1782', not private commercial arbitral panels (see ***ZF Auto US, Inc v Luxshare, Ltd***, 142 S Ct 2078, 2091-92 (2022)). At least one lower court has since found that even ICSID arbitration tribunals are not international tribunals entitled to discovery aid from US courts, either (***Webuild SPA v WSP USA Inc***, 108 F.4th 138 (2d Cir. 2024)).

Law stated - 15 January 2025

Confidentiality
Is confidentiality ensured?

The FAA is silent with respect to confidentiality, and the courts do not impose an automatic duty of confidentiality in arbitration. They will, however, endeavour to uphold any specific agreement by the parties (or in the arbitral rules) to keep their arbitration confidential. Leading arbitral rules vary in the level of confidentiality they require. Parties to a confidential arbitration who seek enforcement of an arbitral award in US courts should be aware of the risk that their arbitration award will become public unless they obtain a specific 'sealing order' from the court prior to filing.

Law stated - 15 January 2025

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts
What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Several cases have held that the Federal Arbitration Act permits courts to grant interim relief pending arbitration and in aid of an ongoing arbitration (eg, ***Braintree Laboratories v Citigroup Global Markets***, 622 F3d 36 (First Circuit, 2010)). In limited circumstances, courts may also issue anti-suit injunctions prohibiting parties from pursuing foreign lawsuits in breach of an arbitration agreement and may impose monetary sanctions if violated (eg, ***Jolen, Inc v Kundan Rice Mills, Ltd,*** No. 19-cv-1296 (PKC) (SDNY 9 July 2019). These orders are often provisional and only apply until a fully constituted tribunal has the chance to revisit the request for interim relief.

Law stated - 15 January 2025

Interim measures by an emergency arbitrator
Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The American Arbitration Association (AAA) was the first institution to include the modern-day version of the emergency arbitrator in its institutional rules (Rule 38), and this approach has been followed by the International Centre for Dispute Resolution (ICDR), the International Institute for Conflict Prevention and Resolution (CPR) and Judicial Arbitration and Mediation Services (JAMS) (ICDR Arbitration Rules (the ICDR Rules), article 6; CPR Rules for Administered Arbitration of International Disputes (the CPR Rules), Rule 14; and JAMS Comprehensive Arbitration Rules and Procedures (the JAMS Rules), article 3), though the speed of each institution's process varies. In July 2020, the CPR introduced a new set of Fast Track Rules that parties may adopt to shorten the length of proceedings.

Law stated - 15 January 2025

Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Under the rules of US-based institutions, tribunals exercise broad discretion in ordering interim measures deemed to be necessary, such as preliminary injunctions and measures to protect or conserve property (AAA Commercial Arbitration Rules (the AAA Rules), Rule 37; ICDR Rules, article 24; CPR Rules, Rule 13; and JAMS Rules, article 32). The law recognises the right of arbitrators to issue partial or interim awards prior to the final award. The courts consider such awards to be final and enforceable as long as they 'finally and definitely dispose' of at least one claim in the arbitration (even if other claims remain to be heard) (see *Ecopetrol v Offshore Exploration and Production*, 46 F Supp 3d 327 (SDNY 2014)). The courts will generally respect an arbitral tribunal's interim awards, including for security for costs.

Law stated - 15 January 2025

Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Tribunals have 'inherent authority to police the arbitration process and fashion appropriate remedies to effectuate this authority' (eg, *Hamstein Cumberland Music Group v Estate of Williams*, 2014 WL 3227536 (Fifth Circuit, 2013)). Some US institutions grant arbitrators express authority to impose sanctions for party misconduct, which may include fines, adverse inferences, withdrawal or revision of a prior award, and awards of costs and attorneys' fees (AAA Rules, Rule 58; ICDR Rules, article 20(7); and JAMS Rules, article 33). Other institutional rules are silent on sanctions but allow arbitrators to award costs and fees to compensate a party for misconduct in the arbitration proceedings (CPR Rules, Rule 19.2).

Law stated - 15 January 2025

AWARDS

Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Although the Federal Arbitration Act (FAA) is silent regarding whether a majority or unanimous vote is required when the tribunal comprises more than one arbitrator, US-based institutions provide that awards or other decisions by the tribunal shall be made by a majority of the arbitrators (American Arbitration Association (AAA) Commercial Arbitration Rules (the

AAA Rules), Rule 46; International Centre for Dispute Resolution (ICDR) Arbitration Rules (the ICDR Rules), article 29; International Institute for Conflict Prevention and Resolution (CPR) Rules for Administered Arbitration of International Disputes (the CPR Rules), Rule 15; and Judicial Arbitration and Mediation Services (JAMS) Comprehensive Arbitration Rules and Procedures (the JAMS Rules), article 34.2)).

Law stated - 15 January 2025

Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Dissenting opinions are not legally binding and do not impact the award's enforceability (eg, *Associated Transp Line, LLC v Slebent Shipping Co*, 2004 US Dist LEXIS 18735 (SDNY 16 Sept 2004)).

Law stated - 15 January 2025

Form and content requirements

What form and content requirements exist for an award?

The FAA does not expressly prescribe any formal requirements for awards. Unlike many national arbitration statutes, it does not require reasoned awards explaining the basis for the tribunal's decision, and the courts will uphold and enforce unreasoned awards so long as the parties' agreement or applicable institutional rules do not require a reasoned award (eg, *D H Blair & Co v Gottdiener*, 462 F3d 843, 847 (Second Circuit, 2006)). Many institutional rules do require reasoned awards absent contrary agreement by the parties (ICDR Rules, article 30(1); CPR Rules, Rule 15.2; and JAMS Rules, article 35.2). Rule 46 of the AAA Rules, however, disposes of any reasoned award requirement unless requested by the parties in writing prior to the formation of the tribunal, or if the arbitrator determines that one is appropriate.

Law stated - 15 January 2025

Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The FAA does not impose any time limits for the tribunal to render an award. The AAA and ICDR Rules require the tribunal to issue its final award within 30 and 60 days of the date of the closing of the hearing, respectively (AAA Rules, Rule 45; and ICDR Rules, article 30(1)).

Law stated - 15 January 2025

Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The limitation period for parties to confirm foreign awards falling under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration is three years. For parties to confirm domestic awards, the limitation period is one year (see FAA, sections 9, 207 and 302). The limitation period for confirming an award, whether foreign or domestic, begins on the date that the award is made (the date of the award itself).

Section 12 of the FAA requires that petitions to vacate, modify or correct an award be filed within three months of the award being filed or delivered. This three-month time limit has been applied to the vacatur of international awards seated in the United States.

Law stated - 15 January 2025

Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The tribunal enjoys broad discretion to issue interim or partial relief.

If the parties reach a settlement during the pendency of the arbitration proceedings, institutional rules permit the arbitration to terminate with the issuance of a final and binding consent award. Such consent awards are often recognised and enforced by US courts.

Law stated - 15 January 2025

Termination of proceedings

By what other means than an award can proceedings be terminated?

If a party fails to appear in the arbitration, most institutional rules, such as article 26 of the ICDR Rules, permit the tribunal to issue an award, but only after hearing evidence from the party seeking relief and providing the defaulting party with notice and an opportunity to participate. Article 32(3) of the ICDR Rules further allows the tribunal to terminate the proceedings if their continuation 'becomes unnecessary or impossible'.

In some circumstances, proceedings may be terminated or suspended if the parties default on payment of arbitrator fees or costs. When this happens, the courts have occasionally permitted the defaulting party that was 'unable to pay for [its] share of arbitration' to pursue its claims in litigation; this accommodation is not afforded, however, where a party has 'refuse[d] to arbitrate by choosing not to pay for arbitration' despite having the resources to do so (*Tillman v Tillman*, 825 F3d 1069 (Ninth Circuit, 2016)).

Law stated - 15 January 2025

Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Absent express agreement by the parties, arbitrators have broad discretion with respect to the allocation of costs and fees, including administrative costs and attorneys' fees (AAA Rules, Rule 47(c); ICDR Rules, article 34; CPR Rules, Rule 19; and JAMS Rules, article 37.4). Awards of costs and fees constitute part of the award and are enforceable in US courts. Generally, contractual agreements for any 'fee-shifting' (including agreements that the prevailing party may recover its attorneys' fees and costs) will be respected.

Law stated - 15 January 2025

Interest
May interest be awarded for principal claims and for costs, and at what rate?

Institutional rules permit arbitrators to award pre- or post-award interest at a rate they deem appropriate (AAA Rules, Rule 47(d)(i); ICDR Rules, article 31(4); CPR Rules, Rule 10.6; and JAMS Rules, article 35.7). US courts will generally confirm and enforce such awards.

Law stated - 15 January 2025

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards
Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Most institutional rules grant tribunals a limited amount of time to correct or interpret minor clerical, typographical or computational errors (the International Centre for Dispute Resolution Arbitration Rules (the ICDR Rules), article 33; International Institute for Conflict Prevention and Resolution (CPR) Rules for Administered Arbitration of International Disputes (the CPR Rules), Rule 15.6; and Judicial Arbitration and Mediation Services (JAMS) Comprehensive Arbitration Rules and Procedures, article 38.1). The ICDR and CPR Rules further grant arbitrators a short period in which to make an additional award on claims presented in the arbitration but not disposed of in the initial award.

Section 11 of the Federal Arbitration Act (FAA) vests district courts with the power to modify or correct the award where it contained a material miscalculation or mistake, where it ruled on a matter outside the tribunal's jurisdiction or where it 'is imperfect in matter of form not affecting the merits of the controversy'. Nonetheless, courts may refuse to do so on the basis that the arbitrators already considered, and declined, such a request (eg, ***Daebo Int'l Shipping Co v Americas Bulk Transport (BVI) Ltd***, 2013 WL 2149591 (SDNY 2013)).

Law stated - 15 January 2025

Challenge of awards

How and on what grounds can awards be challenged and set aside?

Section 10 of the FAA sets forth the standard and procedure for setting aside arbitral awards made in the United States. A majority of US circuit courts have held that the section 10 standards for vacatur also apply to international or foreign awards seated in the United States (see, eg, ***Yusuf Ahmed Alghanim & Sons v Toys 'R' Us, Inc***, 126 F3d 15, 23 (Second Circuit, 1997); ***Ario v Underwriting Members at Lloyds***, 618 F3d 277, 292 (Third Circuit, 2010); ***Gulf Petro Trading Co Inc v Nigerian National Petroleum Corp***, 512 F3d 742 (Fifth Circuit, 2008)); and ***Jacada (Europe), Ltd v Int'l Mktg Strategies***, 401 F3d 701, 709 (Sixth Circuit, 2005); but see ***Inversiones y Procesadora Tropical INPROTSA, SA v Del Monte Int'l GmbH***, 921 F3d 1291 (Eleventh Circuit, 2019), holding that FAA grounds for vacatur are inapplicable to an international arbitration award governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)).

Under section 10, awards may be vacated where:

- the award was procured by corruption, fraud or undue means;
- there was evident partiality of the arbitrators;
- 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 misbehaviour by which the rights of any party have been prejudiced; or
- the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award on the subject matter submitted was not made.

Some courts have interpreted the arbitrators' 'excess of powers' to permit vacatur on the basis that the tribunal acted in 'manifest disregard of the law' (eg, ***Warfield v ICON Advisors, Inc***, 2020 US Dist LEXIS 105321 (WDNC 16 June 2020, No. 3:20CV195-GCM)), but these decisions are outliers. The Fifth, Eighth and Eleventh Circuits have rejected the manifest disregard doctrine. In circuits where the doctrine has not been expressly rejected, it has been considerably limited, and it is rare for awards to be vacated on this basis (see, eg, ***Daesang Corporation v NutraSweet Company***, 85 NYS 3d 6 (2018) (reversing the trial court's vacatur of a foreign arbitral award on the grounds of manifest disregard of the law)). The Federal Court of Appeals for the Second Circuit explained that 'awards are vacated on grounds of manifest disregard only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent' (see ***Seneca Nation of Indians v New York***, 988 F3d 618, 626 (Second Circuit, 2021)).

The issue of what constitutes a reasoned award is not litigated frequently in US courts but was examined by the Second Circuit in ***Smarter Tools v Chongqing Senci Import & Export Trade Inc*** (2019 US Dist LEXIS 50633 (SDNY 26 Mar 2019, No. 18-cv-2714 (AJN))), where the Court concluded that the parties agreed that any award be reasoned, and that an award that contained no rationale for rejecting plaintiff's claims did not meet the standard for a reasoned award.

Finally, the courts may impose sanctions for challenges to arbitral awards that lack any real legal basis (see ***INPROTSA***, 921 F3d).

Courts may enjoin parties resisting enforcement of an award from seeking injunctions in foreign courts that would interfere with the US courts exercise of its jurisdiction under the

New York or ICSID conventions (***Nextera Energy Glob. Holdings BV v Kingdom of Spain***, 112 F.4th 1088 (D.C. Cir. 2024)).

Law stated - 15 January 2025

Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Normally, arbitral awards themselves are not subject to appeal on the merits by courts or arbitral institutions. Nevertheless, parties to American Arbitration Association, CPR or JAMS arbitrations may opt in to those institutions' appeal procedures.

However, court orders with respect to confirmation, vacatur or recognition and enforcement of awards are subject to the normal appeal procedures of US litigation. Parties wishing to challenge a final federal district court order can appeal to the federal circuit court of appeals in which the district court sits. In general, the circuit courts of appeals have the final word on the matters before them; in rare cases, the Supreme Court may grant a request to review a circuit court decision.

Law stated - 15 January 2025

Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Courts generally uphold arbitration awards in line with the United States' strong public policy in favour of arbitration. Awards made by US-seated tribunals may be recognised and enforced (ie, confirmed) by any court agreed on by the parties or, in the absence of such agreement, by a court sitting in the district in which the arbitration agreement was made, provided no ground for vacatur or modification exists under sections 10 or 11 of the FAA.

For foreign-seated arbitrations, the FAA incorporates the grounds for denial of recognition and enforcement of awards set forth in the New York and Panama Conventions (FAA, sections 207 and 301). In limited circumstances, the United States may also permit denial of recognition or enforcement of a foreign award on the basis of certain procedural defences, such as the court's lack of personal jurisdiction over the award debtor, or the doctrine of *forum non conveniens*.

Law stated - 15 January 2025

Time limits for enforcement of arbitral awards

Is there a limitation period for the enforcement of arbitral awards?

A petition to confirm a domestic arbitral award may be filed within one year of the date of the award (9 United States Code (USC), section 9). Whether this limitation is mandatory depends on the court in which it is brought (see ***FIA Card Servs, NA v Gachiengu***, 571 F Supp 2d 799, 803-804 (SD Tex 2008)). For foreign awards, a petition to confirm must be filed within three years (9 USC sections 207 and 302). The FAA provides a three-month limit for motions to vacate, modify or correct an award (9 USC, section 12).

Law stated - 15 January 2025

Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Citing concerns for international comity, US courts usually do not enforce foreign awards set aside by the courts at the place of arbitration (eg, ***Getma Int'l v Republic of Guinea***, 862 F3d 45 (DCC 2017); and ***Thai-Lao Lignite (Thailand) Co v Gov't of Lao People's Democratic Republic***, 864 F3d 172 (Second Circuit, 2017)).

However, several courts have held that they may enforce an award despite vacatur by the courts of the seat in 'extraordinary circumstances'. For instance, a 2016 decision upheld the enforcement of an award that had been vacated by Mexican courts on the basis of newly enacted legislation that applied retroactively, stating that to hold otherwise would be 'repugnant to fundamental notions of what is decent and just in this country' (***Commisa v Pemex***, 832 F3d 92 (Second Circuit, 2016)). Similarly, the Second Circuit has found that a court can enforce an award set aside at the seat if the judgment setting aside the award is contrary to US public policy 'because it offends notions of justice from the point of view of the United States' (see ***Esso Exploration & Prod Nig v Nigerian Natl Petroleum Corp***, 397 F Supp 3d 323 (SDNY 2019); see also ***Compañía De Inversiones v Grupo Cementos de Chihuahua***, SAB de CV, Civil Action No. 1:15-cv-02120-JLK (D Colo 30 Apr 2021)). The Second Circuit articulated four factors relevant for exercising discretion under article V(1)(e) of the New York Convention:

> (1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectation; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation.

Law stated - 15 January 2025

Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The enforceability of awards issued by emergency arbitrators is somewhat uncertain. Although courts have enforced emergency awards on a number of occasions, some courts

have refused to enforce them on the basis that they are not final and therefore not reviewable under the FAA (compare ***Yahoo! Inc v Microsoft Corp***, 983 F Supp 2d 310, 319 (SDNY 2013) (enforcing an emergency award) with ***Chinmax Medical Sys, Inc v Alere San Diego, Inc***, 2011 WL 2135350 (SD Cal 2011) (refusing to enforce an emergency award)).

Law stated - 15 January 2025

Cost of enforcement

What costs are incurred in enforcing awards?

In general, each party bears its own costs and fees in connection with post-award litigation pursuant to the 'American Rule'. US court fees are quite minimal: the bulk of a party's costs for enforcement will be attorneys' fees, which will generally be borne by the enforcing party absent agreement to the contrary. However, the position may be different if the parties contractually agree to fee-shifting in post-award proceedings, or if a party opposes confirmation or enforcement on a ground deemed to be frivolous (in which case fees may be awarded as a sanction).

Law stated - 15 January 2025

OTHER

Influence of legal traditions on arbitrators

What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

The scope of mandatory disclosure or discovery is an important difference between judicial and arbitral proceedings in the United States. In US litigation, the Federal Rules of Civil Procedure and corresponding state practice rules allow parties to obtain wide-ranging discovery of documents or information that may be relevant to any claim or defence in the litigation. Disclosure in international arbitration is generally much less burdensome than discovery in US litigation, and it is relatively unusual for an international tribunal to permit multiple depositions or the type of broad-ranging document discovery contemplated by the Federal Rules.

Law stated - 15 January 2025

Professional or ethical rules

Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Attorneys practising in the United States, including in international arbitrations, are bound by the rules of professional conduct of the state bars to which they are admitted. American Bar Association (ABA) Model Rule 5.5, which has been implemented in many US jurisdictions

(including New York), permits lawyers admitted in one US state to represent clients in arbitration proceedings seated in another US state; however, it is silent on the ability of lawyers admitted abroad to represent clients in US-seated arbitrations.

The conduct of arbitrators in international arbitration is regulated by ethics guidelines promulgated by the various arbitral institutions, such as the Code of Ethics for Arbitrators in Commercial Disputes (revised in 2004), recommended and approved by the American Arbitration Association and the ABA, and the Arbitrators Ethics Guidelines by the Judicial Arbitration and Mediation Services. These guidelines do not have the force of law.

Law stated - 15 January 2025

Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding of arbitrations has become increasingly common in the United States, including in arbitration. Laws governing third-party funding, if any, generally exist at the state level. Parties exploring third-party funding options should, therefore, be attuned to relevant state laws, such as laws directly regulating funders, the common law doctrines of maintenance, champerty, barratry and attorney ethics rules.

Law stated - 15 January 2025

Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign parties, non-US counsel or arbitrators involved in an international arbitration seated in the United States should consult with local counsel well in advance of the arbitration to ensure compliance with federal visa requirements.

Law stated - 15 January 2025

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending

> investment arbitration cases in which the country you are reporting about is a party?

End of an era for section 1782 discovery

The year 2024 saw the closing of the door on US court discovery assistance to international arbitration under section 1782. For decades, section 1782 provided parties to international arbitrations seated outside the United States with access to US court-ordered discovery. But, in 2023, the US Supreme Court found that arbitrations of purely commercial disputes did not qualify for section 1782 assistance. Then, in 2024, the Second Circuit Court of Appeals found that even tribunals organised under the ICSID Convention did not meet the criteria for assistance (***Webuild SPA v WSP USA Inc***, 108 F.4th 138 (2d Cir. 2024)).

Effect of the new Trump administration on investor-state arbitration

President Trump has promised to renegotiate the US–Mexico–Canada Agreement (USMCA) of 2018. The USMCA narrowed the scope of investor-state arbitration under its predecessor, the North American Free Trade Agreement (NAFTA). Commentators suggest that any renegotiation may further reduce the scope of investor-state arbitration.

On 20 January 2021, President Biden issued Executive Order 13990, revoking the March 2019 Permit for the Keystone XL Pipeline, a planned oil pipeline from Canada to the United States. In 2023, a Canadian pipeline investor sued the United States under the sunset provisions of NAFTA (see ***Alberta Petroleum Marketing Commission v United States of America*** (ICSID Case No. UNCT/23/4)). Commentators expect President Trump to rescind Biden's executive order and allow the pipeline to proceed. If so, then the sole remaining claim brought against the United States under NAFTAs Chapter 11 arbitration provision may be resolved.

Law stated - 15 January 2025