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UNITED STATES OF AMERICA (USA)

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CALIFORNIA CONTRIBUTION PREPARED BY

LEE M. CAPLAN, TIMOTHY J. FEIGHERY AND KAREN VAN ESSEN
OF ARENT FOX LLP

FLORIDA CONTRIBUTION PREPARED BY

NICOLAS SWERDLOFF, JEFFREY B. GOLDBERG AND MALIK HAVALIC
OF HUGHES HUBBARD & REED LLP

NEW YORK AND **WASHINGTON D.C.** CONTRIBUTION PREPARED BY

BEN LOVE AND JAMES M. BRENNAN
OF REED SMITH LLP

TEXAS CONTRIBUTION PREPARED BY

LOUISE WOODS AND PETER DANYSH
OF VINSON & ELKINS LLP

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TEXAS

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IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The United States is one of the most sought-after arbitration venues in the world. The United States is known for vigorous enforcement of arbitral awards, neutral dispute resolution, and judicial preferences in favor of arbitration. The United States also has a reputation for permitting more invasive discovery than other jurisdictions, even in streamlined arbitration proceedings.

Many arbitrations in the United States are governed by the Federal Arbitration Act ("FAA"), which applies to any arbitration affecting interstate commerce (generally defined as commercial trade, business, movement of goods or money, or transportation from one state to another, which is regulated by the federal government according to powers set out in Article I of the Constitution) or international commerce. Each state typically has its own arbitration statute as well. However, a state statute generally applies only where the FAA is silent or if the dispute is entirely local to a particular state. The FAA bears some similarity to the UNCITRAL Model Law on International Commercial Arbitration. However, there are important differences. For instance, unlike the Model Law, the FAA provides different grounds for vacating an award and also contains some default rules of procedure where the parties fail to agree to a governing set of rules.

When considering arbitration in the United States, corporate and in-house counsel should consider the following factors about this jurisdiction:

Key places of arbitration in the jurisdiction?	Popular venues include New York, Miami, San Francisco, Los Angeles, and Houston.
Civil law / Common law environment?	The U.S. is a common law country. Arbitrators are more likely to be persuaded by case law than in civil law countries.
Confidentiality of arbitrations?	U.S. arbitrations are not automatically confidential, but the parties may agree to keep the proceedings confidential.
Requirement to retain (local) counsel?	Each U.S. state separately governs the practice of law within its borders, and may prohibit foreign attorneys or attorneys from other U.S. states from participating in arbitrations located in that state.
Ability to present party employee witness testimony?	Arbitrators generally have broad discretion on evidentiary rulings, subject to any contrary agreement by the parties or applicable arbitration rules.
Ability to hold meetings and/or hearings outside of the seat?	Typically, there is an ability to hold meetings and/or hearings outside the seat.
Availability of interest as a remedy?	Parties in U.S. arbitrations may claim the full panoply of potential remedies, including pre- and post-judgment interest, costs, and potentially even punitive damages. However, the default "American Rule" in U.S. litigation is that each side pays its own attorney's fees.
Ability to claim for reasonable costs incurred for the arbitration?	Parties are generally required to bear their own costs and legal fees, barring statutory provisions or an agreement to the contrary.
Restrictions regarding contingency fee arrangements	Each U.S. state separately governs the terms and legality of funding arrangements. Each state has attorney ethical and

and/or third-party funding?	possibly other rules (*e.g.*, champerty) that should be consulted.
Party to the New York Convention?	The U.S. is a party to the New York Convention and U.S. courts are empowered to enforce arbitral awards, including through injunctions and judgments.
Other key points to note?	U.S. law strongly favors arbitration, with limited avenues for challenging an arbitral award through judicial intervention. In comparison to other jurisdictions, U.S. arbitrators are considered more likely to grant extensive discovery, including interrogatories and witness depositions, particularly in the case of domestic arbitration. However, the United States also offers robust protections for evidentiary and testimonial privileges.
WJP Civil Justice score (2019)	0.64

ARBITRATION PRACTITIONER SUMMARY

While the Federal Arbitration Act ("FAA") is the primary arbitration statue in the United States, each state typically has its own arbitration statute as well. The FAA generally applies broadly—applying to any arbitration agreement or award which touches on interstate commerce (generally defined as commercial trade, business, movement of goods or money, or transportation from one state to another, which is regulated by the federal government according to powers set out in Article I of the Constitution) or international commerce. Typically, the FAA, when applicable, will pre-empt any contrary state law provisions. However, if the FAA is silent with respect to a particular issue, the applicable state law will control. The state arbitration law will also apply to the extent an arbitration agreement or award does not implicate interstate or international commerce—for instance, a purely local dispute that does not involve federal law. Moreover, the FAA, when applicable, may be subject to differing interpretations by the different U.S. federal and state courts. These courts may reach differing interpretations in areas in which the U.S. Supreme Court has not ruled.

In this context, the following are key questions for legal practitioners to consider when engaged in arbitrations in the United States. As these questions are answered, the parameters of the arbitration will take shape, and practitioners will know what to expect as the arbitral proceedings move forward.

Date of arbitration law?	The FAA was enacted in 1925. Typically, each U.S. state also has its own arbitration law, and the enactment dates of those laws vary from state to state.
UNCITRAL Model Law? If so, any key changes thereto?	The FAA bears some similarity to the UNCITRAL Model Law on International Commercial Arbitration. However, there are important differences. For instance, unlike the Model Law, the FAA provides different grounds for vacating an award and also contains default rules of procedure where the parties fail to agree to a governing set of rules.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The availability of specialised courts or judges varies across the U.S. For example, New York has implemented specific procedures to help its courts develop arbitration expertise, including by designating a specialized judge to handle all the New York County Commercial Division's international arbitration cases.
Availability of *ex parte* pre-arbitration interim measures?	Most U.S. federal and state courts permit some form of pre-arbitration interim measures. Whether the procedure is *ex parte* or requires some form of notice to the parties varies.
Courts' attitude towards the competence-competence principle?	U.S. courts typically have a favourable view of the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The grounds for annulment of awards (referred to in the U.S. as vacatur) under the FAA are: (i) the award was procured through corruption, fraud, or undue means; (ii) the arbitrators exhibited bias or acted corruptly; (iii) the arbitrators engaged in misconduct in the course of proceedings, prejudicing the parties or otherwise raising due process concerns; and (iv) the arbitrators exceeded their power or imperfectly executed them

	that a mutual, final, and definite award upon the subject matter was not made. The grounds for vacating an award under the FAA are somewhat broader than under the New York Convention.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Foreign awards are readily confirmed and enforced in the U.S., consistent with the policy of the New York Convention. Depending on the circumstances, U.S. courts typically would not enforce an award that was annulled at the seat of the arbitration.
Other key points to note?	1. What type of court intervention, if any, can be expected during the arbitral proceedings? U.S. federal and state courts may intervene in select circumstances to facilitate arbitration of claims. This might include, for example, enjoining a party from proceeding with arbitration or compelling discovery or other disclosure in aid of arbitration. 2. In what format should the award be? Typically, awards under the FAA and state arbitration laws are written, but the FAA does not require that they be signed, dated, or reasoned. 3. What are the requirements for a valid and enforceable award? Typically, under the FAA and state arbitration laws, an award is valid and enforceable so long as it is written and the arbitral process in conducted in accordance with due process.

JURISDICTION DETAILED ANALYSIS

The Federal Arbitration Act ("FAA") is the primary arbitration statute in the United States. It was enacted by the U.S. in 1925 to set forth the national policy of encouraging arbitration as an alternative dispute resolution mechanism. The FAA thus applies broadly, reaching any arbitration agreement or award which touches on interstate commerce (generally defined as commercial trade, business, movement of goods or money, or transportation from one state to another, which is regulated by the federal government according to powers set out in Article I of the Constitution) or international commerce. While states also have their own arbitration statutes, most of which are modelled on the FAA or the UNCITRAL Model Law, the FAA will pre-empt any contradictory state law provisions. However, if the FAA is silent with respect to a particular issue, the applicable state law will apply. The state arbitration law will also apply to the extent an arbitration agreement or award does not implicate interstate or international commerce – for instance, a purely local dispute that does not involve federal law. Moreover, the FAA, when applicable, may be subject to differing interpretations by the different U.S. federal or state courts. These courts may reach differing conclusions in the absence of U.S. Supreme Court intervention.

The FAA is divided into three Chapters: Chapter 1 is the principal chapter, setting forth the basic operation of federal arbitration law; Chapter 2 incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), which requires signatory states to enforce and recognize arbitration agreements and awards issued by other contracting states; and Chapter 3 incorporates the Inter-American Convention on International Commercial Arbitration of 1975 ("Panama Convention"), which applies a very similar, but more specific regime amongst signatory states in North, Central, and South America. Significantly, the provisions of Chapter 1 are applied in all cases unless a more specific provision of Chapter 2 or 3 conflicts with Chapter 1. Chapter 3 also incorporates the majority of Chapter 2 into Chapter 3.

The key provisions of Chapter 1 (Sections 1-10) are as follows:

- Section 2 provides that arbitration agreements are valid and enforceable just as any other contract provision.
- Sections 3 and 4 provide courts with authorization to, respectively, (a) stay any judicial proceedings that are properly the subject of arbitration, and (b) compel parties to arbitrate pursuant to the terms of their agreement. In theory, courts are authorized to conduct an analysis as to whether a particular dispute, or a particular party, is properly subject to the arbitration agreement unless there is "*clear and unmistakable evidence*" that the parties agreed to let the arbitrators decide their own jurisdiction (*i.e.*, "*competence-competence*"). In practice, however, many arbitral institution rules provide the arbitrators with such authorization, so that an agreement referencing those rules will preclude U.S. courts from an exacting inquiry into the applicability of the arbitration agreement. The U.S. Supreme Court has agreed to decide whether an agreement's "carve-out" of types of claims which may be arbitrated (e.g., intellectual property or anti-trust claims) makes the incorporation of such institution rules less than "clear and unmistakable" evidence that the parties intended to have the arbitrator decide questions of arbitrability.
- Section 5 grants judges authority to appoint arbitrators, but only if the parties fail to do so notwithstanding a valid arbitration agreement. Section 5 does not specify any particular method for doing so.
- Section 7 permits courts to assist arbitrators with witnesses and evidence through the issuance of subpoenas, but, as discussed below, many other measures in aid of arbitration (*i.e.*, interim relief) are left to provisions of state law.

- Sections 9 and 10 respectively govern confirmation and vacatur (known in other jurisdictions as "set-aside" or "annulment") of any award rendered in the U.S., whether domestic or international. Section 10 enumerates four, limited grounds for vacatur or non-confirmation: (i) the award was procured through corruption, fraud, or undue means; (ii) the arbitrators exhibited bias or acted corruptly; (iii) the arbitrators engaged in misconduct in the course of proceedings, prejudicing the parties or otherwise raising due process concerns; and (iv) the arbitrators exceeded their power or "*so imperfectly execut[ed] them that a mutual, final, and definite award upon the subject matter was not made*." Some federal courts recognize an additional, judicially-created basis for vacatur when the arbitrators act in "*manifest disregard of the law*." While this latter ground has been the subject of significant debate and controversy, it is widely accepted that courts are not to review an arbitrator's findings on the merits, and that even clear errors in applying or interpreting the relevant substantive law of the dispute do not provide a basis for vacatur.
- Significantly, Chapter 1 does **not** confer subject matter jurisdiction on the federal courts, which require an independent basis for such jurisdiction over the case.

The key additional provisions of Chapters 2 (Sections 201-208) and 3 (Sections 301-307) are as follows:

- Sections 201 and 301 confirm the New York Convention and Panama Convention, respectively, as U.S. law. Accordingly, if a party seeks to enforce an award rendered in a New York or Panama Convention signatory state (outside of the United States), a U.S. court must confirm the award unless one of the bases for non-recognition set forth in those Conventions applies. The two Conventions contain nearly identical provisions for non-enforcement, broadly summarized as follows:
    - The agreement to arbitrate was invalid or void under the law to which the parties have subjected it, or the parties were under some incapacity.
    - The party against whom the award is being invoked did not have proper notice or was otherwise unable to present its case.
    - The award deals with subject matter outside of the scope of the parties' agreement.
    - The composition of the arbitral tribunal was not in accordance with the parties' agreement or, failing such agreement, with the procedural law governing the arbitration.
    - The award has been set aside by the "competent authority" (generally, the courts at the seat of arbitration).
    - The dispute deals with subject matter that is not arbitrable in the place where the award is to be confirmed.
    - Recognition or enforcement of the award would contravene public policy in the place where the award is to be confirmed.
- While (unlike the New York Convention) the Panama Convention does not on its face limit its applicability to agreements and awards rendered in other contracting states, Chapter 3 (Section 304) inserts this reciprocity requirement into the FAA.
- Chapters 2 and 3 provide for federal court subject matter jurisdiction in certain circumstances involving arbitration agreements and awards subject to the New York and Panama Conventions (*i.e.*, international arbitration agreements and awards).

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

No. The Federal Arbitration Act (the "FAA"),[1] was enacted in 1925 and largely predates the Model Law. However, eight U.S. states have adopted arbitration laws based on the UNCITRAL Model Law.[2]

District of Columbia Supplement: Washington, D.C. enacted the DC Revised Uniform Arbitration Act (DC RUAA)[3] which became fully effective in 2009. The DC RUAA is not based on the UNCITRAL Model Law, but is based on the Revised Uniform Arbitration Act (RUAA)[4] promulgated by the Uniform Law Commission in 2000. Federal court decisions construing the FAA are regarded as persuasive in construing the corresponding provisions in the DC RUAA as the two acts are "substantially similar."[5]

Florida Supplement: Florida has two arbitrations statutes: (1) an international statute, the Florida International Arbitration Act ("Florida FIAA"),[6] enacted in 2010 based on the Model Law; and (2) a domestic statute, the Revised Florida Arbitration Code ("Revised Code"),[7] based on the Revised Uniform Arbitration Act. The Florida FIAA adopts the Model Law's definition of international arbitration;[8] any arbitration seated in Florida that does not fall within that definition is governed by the Revised Code.

New York Supplement: New York's arbitration law is codified in Article 75 of its Civil Law Practice and Rules (CPLR), which became effective in 1963. Article 75 of the CPLR is not based on any model statute.

Texas Supplement: The Texas legislature passed the Texas Arbitration Act (the "TAA") in 1965, which is sometimes referred to as the Texas General Arbitration Act. It has now been codified as Chapter 171 of the Texas Civil Practice and Remedies Code. The TAA largely tracks the substantive provisions of the FAA, with a few exceptions. The Texas legislature enacted a separate international statute in 1989, referred to as the Texas International Arbitration Act (the "TIAA"). The TIAA drew from the UNCITRAL Model Law as in force at that time and was codified as Chapter 172 of the Texas Civil Practice and Remedies Code.

1.1.1 If yes, what key modifications have been made to it?

The FAA, if applicable, pre-empts any inconsistent state law provisions,[9] including any provisions based on the Model Law. States with laws based on the UNCITRAL Model Law have generally adopted its key provisions, sometimes with modifications appropriate to the local jurisdiction. For example, California (discussed in more detail in a separate section) adopted the first six chapters of the 1985 Model Law and added a provision on conciliation aimed at Pacific Rim businesses that prefer a less formal dispute resolution process.[10]

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1 9 U.S.C. §§ 1–16, 201–208, 301–307. When enacted in 1925, the law was titled the "United States Arbitration Act." 68th Cong., ch. 213, 143 Stat. 883 (1925). The unofficial name "Federal Arbitration Act" is more widely used today.

2 UN COMM'N ON INT'L TRADE LAW, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status. California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, and Texas have adopted legislation based on the UNCITRAL Model Law. Florida adopted the Model Law with its 2006 amendments, and the other seven states adopted the original 1985 version.

3 D.C. Code §§ 16–4401 to 16–4432.

4 REVISED UNIF. ARBITRATION ACT (UNIF. LAW COMM'N 2000).

5 Giron v. Dodds, 35 A.3d 433, 439 n.3 (D.C. 2012).

6 Fla. Stat. §§ 684.0001-684.0048.

7 Fla. Stat. §§ 682.01-682.25.

8 See Fla. Stat. § 684.002(3); Article 1(3) of the UNCITRAL Model Law.

9 Preston v. Ferrer, 552 U.S. 346, 353 (2008); *see also* RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION §§ 1.6–1.10 (AM. LAW. INST., Proposed Final Draft, 2019) [hereinafter RESTATEMENT].

10 Albert Golbert & Daniel Koley, *California's Adoption of a Code for International Commercial Arbitration and Conciliation*, 10 LOY. L.A. INT'L & COMP. L.J. 583, 583, 588 (1988).

Florida Supplement: As noted above, Florida adopted the Florida FIAA in 2010. The Florida FIAA is based upon, and nearly identical to, the Model Law, making only a few minor, procedural additions.

Texas Supplement: As mentioned, the TAA tracks many of the relevant substantive provisions of the FAA, with certain modifications. Texas courts have determined that certain provisions of the TAA are pre-empted by the FAA. For example, a Texas court has held that a TAA provision requiring additional signature of an arbitration agreement in personal injury cases is pre-empted by the FAA.[11]

As also mentioned, the TIAA was enacted in 1989 and generally tracked the UNCITRAL Model Law. Similar to the California international statute, the TIAA contains provisions on conciliation in Subchapter H, stating in Section 172.201 that it "*is the policy of this state to encourage parties to an international commercial agreement or transaction that qualifies for arbitration or conciliation under this chapter to resolve disputes arising from those agreements or transactions through conciliation*."

1.1.2 If no, what form does the arbitration law take?

International commercial arbitrations in the United States are governed by the FAA. FAA Chapter 1 applies to commercial arbitration generally, FAA Chapter 2 implements the New York Convention, and FAA Chapter 3 implements the Panama Convention. The FAA differs from the Model Law in the default selection rules for and number of arbitrators,[12] certain grounds for setting aside an award,[13] the authority of a court to modify and correct an award,[14] and the level of procedural detail provided.[15]

As noted above, under the U.S. federal system, federal arbitration law supersedes any inconsistent state law. In addition, U.S. federal courts often, but not always, have jurisdiction over international arbitration-related disputes. Consequently, state law will almost never provide the primary source of law for an international arbitration. However, the interpretation of the FAA on some questions has developed differently in different federal circuits, and between the federal courts and the courts of some of the states.[16]

Each state has its own arbitration laws, which may occasionally be used to fill gaps in the FAA.

District of Columbia Supplement: The DC RUAA is based on the RUAA promulgated by the Uniform Law Commission in 2000. While the RUAA does not contain specific provisions relating to international arbitration (and thus leaves less room for conflict with the FAA), the Uniform Law Commission "utilized provisions of the UNCITRAL Model Law, the New York Convention, and the 1996 English Arbitration Act as sources of statutory language for the RUAA."[17]

New York Supplement: New York's arbitration law, Article 75 of the CPLR, is not based on any model law. However, New York's arbitration law was influential in the drafting of the (unrevised) Uniform Arbitration Act.[18] Article 75 of the CPLR applies to both domestic and international arbitrations.[19] New York has also implemented specific procedures to help its courts develop arbitration expertise, including by designating a

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11 *In re* Nexion Health at Humble, Inc., 173 S.W.3d 67, 68 (Tex. 2005).

12 *Compare* 9 U.S.C. § 5 (stating that the default number of arbitrators is one and, if no method of arbitrator is provided in the parties' agreement, the court may appoint arbitrators) *with* UNCITRAL Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985), as amended in 2006 ("Model Law") art. 10(2), 11 (stating that the default number of arbitrators is three, and that arbitrators are chosen through a process involving party selection).

13 *Compare* 9 U.S.C. § 10 *with* Model Law art. 12 (setting out grounds for setting aside an award).

14 *Compare* 9 U.S.C. § 11 (permitting a court to modify or correct an award under limited circumstances) *with* Model Law art. 33 (allowing only the arbitral tribunal to modify or correct an award).

15 *Compare generally, e.g.*, 9 U.S.C. §§ 1-16 *with* Model Law ch. V, VI (laying out detailed procedural rules for the conduct of arbitral proceedings and the making of an award that are not covered by the FAA).

16 See, *e.g.*, n. 29–n. 31, *infra*, discussing circuit split on the requirement that an agreement to arbitrate be "in writing."

17 REVISED UNIF. ARBITRATION ACT, Prefatory Note at 4.

18 *See* Maynard E. Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act*, 10 VAND L. REV. 685, 690 (1957).

19 N.Y. C.P.L.R. §§ 7501–7514.

specialized judge to handle all of the New York County Commercial Division's international arbitration cases.[20]

1.2 When was the arbitration law last revised?

The FAA has not undergone an overall revision since it was first enacted in 1925.[21] Significant additions to the FAA were made in 1970 to implement the New York Convention,[22] and in 1990 to implement the Panama Convention.[23] Two separate enactments in 1988 made minor updates to the general provisions.[24] Many state laws, including in UNCITRAL Model Law states, have been revised more recently.[25]

District of Columbia Supplement: The DC RUAA has not been amended since it was enacted in 2008.

Florida Supplement: The Florida FIAA was last amended in 2013 to, *inter alia*, incorporate another statute providing that a party that initiates arbitration, or is party to an agreement to arbitrate, in Florida consents to *in personam* jurisdiction in Florida with respect to any action arising out of or in connection to the arbitration and any resulting order or award.[26]

New York Supplement: Article 75 of the CPLR was most recently amended in 2019 to expand the prohibition in CPLR 7515 on clauses which mandate arbitration of unlawful discriminatory sexual harassment to additionally prohibit mandatory arbitration of all forms of unlawful discrimination claims.[27] These prohibitions, however, are inconsistent with the FAA and thus unenforceable where the FAA applies.[28]

Texas Supplement: The TAA and the TIAA were both amended in 1997 and as mentioned above, are codified in the Texas Civil Practice and Remedies Code.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The FAA provides the procedural law for arbitrations seated in the United States,[29] with gaps filled by state law where applicable.

Principles of ordinary contract law, which may be the law of a U.S. or foreign jurisdiction, govern the validity, revocability, and enforceability of arbitration agreements.[30] State law that imposes more onerous requirements on arbitration agreements than on other types of agreements is pre-empted as inconsistent

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20 Administrative Order, Unified Court System, First Judicial District, Supreme Court, Civil Branch (A. Gail Prudenti, Chief Administrative Judge) (Oct. 3, 2013).

21 68th Cong., ch. 213, 43 Stat. 883 (1925) (original enactment of FAA); see, also 80th Cong., ch. 392, § 2, 61 Stat. 674 (1947) (reenacting FAA without substantive change as Title 9, United States Code).

22 Pub. L. 91–368, § 1, 84 Stat. 692 (1970).

23 Pub. L. 101–369, § 2, 104 Stat. 450 (1990).

24 Pub. L. 100–669, § 1, 102 Stat. 3969 (1988) (excluding application of the Act of State doctrine in proceedings to enforce arbitral agreements or awards); Pub. L. 100–702, title X, § 1019(a), 102 Stat. 4670 (1988) (allowing immediate appeal from orders refusing to enforce an arbitral agreement or award); see, also Pub. L. 101–650, title III, § 325(a)(2), 104 Stat. 5120 (1990) (correcting a technical numbering error in the 1988 amendments).

25 See, *e.g.*, UN Comm'n on Int'l Trade Law, *supra* note 2 (showing eight states' adoption of the UNCITRAL Model Law between 1988 and 2012).

26 2013 Fla. Sess. Law Serv. Ch. 2013-164 (C.S.S.B. 186) (WEST); see, also Fla. Stat. § 684.0049

27 N.Y. Laws of 2019, Ch.160, §§ 8, 16(b)

28 *See* Latif v. Morgan Stanley & Co. LLC, No. 18-cv-11528-DLC, 2019 WL 2610985, at *3 (S.D.N.Y. June 26, 2019).

29 Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (noting that the FAA governs both domestic and international arbitration proceedings).

30 9 U.S.C. § 2; *see* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987); RESTATEMENT, *supra* note 9, § 2.10, cmt. a.

with the FAA.[31] If the parties' underlying contract contains a choice of law provision, a court will generally apply the law selected by the parties to any questions concerning the arbitration agreement.[32] Where the contract does not contain a choice of law provision, a court will conduct a conflict of laws analysis, applying the conflict of laws rules of the state in which it sits to determine which law to apply.[33] These rules vary from state to state; the traditional approach was to apply the law of the place where the contract was made, but most states now weigh which jurisdiction has the most significant relationship to the transaction or the greatest interest in applying its own laws.[34]

District of Columbia Supplement: DC follows the newer "government interests" approach, applying, in the absence of any choice-of-law provision, the law of whichever jurisdiction whose policies "would be most advanced by having its law applied to the facts of the case."[35]

Florida Supplement: Florida follows the traditional approach, applying, in the absence of any choice-of-law provision contained in the arbitral agreement, the law of the place where the arbitration agreement was made to interpret questions about the agreement, including its validity.[36] At least one federal court in Florida has ruled that, because arbitration agreements are severable under federal law, arbitration agreements that do not themselves contain a choice-of-law clause are subject to the law in which they were made—even where the underlying agreement contains a separate choice-of-law clause selecting the laws of a different state.[37]

New York Supplement: New York follows the most significant relationship test in determining the law applicable to a contract that does not contain a choice of law provision.[38]

Texas Supplement: Texas courts generally follow the most significant relationship test in determining the law applicable to a contract that does not contain a choice of law provision.[39]

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes. An arbitration provision is severable from the contract in which it is included.[40] Thus, a challenge to the underlying contract as a whole does not prevent a court from enforcing a specific agreement to arbitrate.[41] Unless there is a challenge to the validity of the arbitration clause itself, the arbitrator resolves questions concerning the validity of the underlying contract in the first instance.[42] This federal rule of severability applies in state as well as federal courts and pre-empts inconsistent state law.[43]

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31 *Preston*, 552 U.S. at 353; *Perry*, 482 U.S. at 491; RESTATEMENT, *supra* note 9, § 1.6, cmt. a.

32 See, e.g., Telenor Mobile Comm'ns AS v. Storm LLC, 584 F.3d 396, 411 n.11 (2d Cir. 2009) ("[C]hoice of law clause [in the underlying contract] governs Storm's arbitrability challenge."); RESTATEMENT, *supra* note 9, § 2.2, reporters' note b.

33 *See, e.g.*, Progressive Casualty Insurance Co. C.A. v. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 45, 46 (2d Cir. 1993); St. Paul Fire & Marine Ins. Co. v. Employers Reinsurance Corp., 919 F. Supp. 133, 136 (S.D.N.Y. 1996) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)).

34 *See, e.g.,* Hammersmith v. TIG Insurance Co., 480 F.3d 220 (3d Cir. 2007); *Progressive Casualty*, 991 F.2d at 46 n.6.

35 Hercules & Co. v. Shama Restaurant Corp., 566 A.2d 31, 40–41 & n.18 (D.C. 1989).

36 State Farm Mut. Auto. Ins. Co. v. Roach, 845 So. 2d 1160 (Fla. 2006); Higgins v. West Bend Mut. Ins. Co., 85 So. 3d 1156, 1158 (Fla 5th DCA 2012). Questions about the contract's performance are governed by the law of the place of performance. *Higgins*, 85 So. 3d at 1158; *Prou v. Giarla*, 62 F. Supp. 3d 1365, 1383 (S.D. Fla. 2014).

37 Rimel v. Uber Technologies, Inc., 246 F. Supp. 3d 1317 (M.D. Fla. 2017).

38 *See* Cooney v. Osgood Mach., Inc., 612 N.E.2d 277, 280–81 (N.Y. 1993).

39 Sonat Exploration Co. v. Cudd Pressure Cont., Inc., 271 S.W.3d 228, 231 (Tex. 2008).

40 Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006); RESTATEMENT, *supra* note 9, § 2.7.

41 Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 70 (2010).

42 *See* Buckeye Check Cashing, 546 U.S. at 446; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).

43 *See Preston*, 552 U.S. at 353 (citing *Buckeye Check Cashing,* 546 U.S. at 447-48).

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

The FAA requires that the arbitration agreement be in writing.[44] Courts within the United States are divided on the specific requirements that must be met for an agreement to satisfy the "in writing" requirement.[45] For example, the United States Court of Appeals for the Second Circuit (which includes New York) has held that an arbitration clause in a contract signed by only one party did not satisfy the writing requirement,[46] while the United States Courts of Appeals for the Fifth Circuit (which includes Texas) and the Eleventh Circuit (which includes Florida) have held that an unsigned writing may be sufficient in some cases.[47] State laws may impose additional requirements only to the extent that such requirements are general contract regulations and not specific to arbitration agreements.[48]

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

As arbitration is fundamentally a matter of contract,[49] arbitration agreements are subject to ordinary principles of law that allow a contract to be enforced by or against non-parties in limited circumstances.[50] These principles include estoppel, incorporation by reference, assumption, waiver, agency, third-party beneficiary, and alter ego or veil piercing.[51] The U.S. Supreme Court recently confirmed the ability of a contractual non-signatory to rely on equitable estoppel doctrines (and thus presumably other principles of contractual interpretation) to enforce an arbitration agreement.[52]

2.5 Are there restrictions to arbitrability?

The FAA contains no restrictions to arbitrability as to a class of disputes or persons.[53] The central purpose of the FAA is to ensure that agreements to arbitrate are enforced in accordance with their terms and are treated no less favourably than other contracts.[54] The FAA pre-empts state law – statutory or common law – that prohibits arbitration of a particular type of claim.[55]

Accordingly, parties may agree to arbitrate claims based on statutory rights, including those that arise in connection with arbitrable contract issues, in the absence of a federal statute excluding the specific statutory claims from arbitration.[56] Congress has enacted such exclusions only in very limited circumstances.[57] In general, claims arising under securities laws, antitrust laws and other statutes enacted

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44 9 U.S.C. § 2; *see also* RESTATEMENT, *supra* note 9, § 2.4(a).

45 *See* S.I. Strong, *What Constitutes An "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT'L L. 47(2012) (discussing different definitions of "agreement in writing" under the FAA and the New York Convention and inconsistent treatment of a signature requirement by U.S. courts); RESTATEMENT, *supra* note 9, § 2.4, reporters' note b(i) (collecting cases).

46 Kahn Lucas Lancaster v. Lark International, 186 F.3d 210, 216–18 (2nd Cir 1999).

47 Todd v. SS Mut Underwriting Association (Bermuda), 601 F.3d 329, 335 n.11 (5th Cir 2010); Sphere Drake Insurance v. Marine Towing, 16 F.3d 666, 669 (5th Cir 1994); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1369 (11th Cir. 2005).

48 Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686–87 (1996).

49 *Rent-A-Ctr.*, 561 U.S. at 67.

50 *See* Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 (2009) (quoting 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 57:19 (4th ed. 2001)).

51 *See Arthur Andersen LLP,* 556 U.S. at 631; Merrill Lynch Inv. Managers v. Optibase, Ltd., 337 F.3d 125, 129 (2d Cir. 2003); Lawson v. Life of the South Ins. Co., 648 F.3d 1166, 1168 (11th Cir. 2011).

52 GE Energy Power Conversion France SAS Corp., FKA Converteam SAS v. Outokumpu Stainless USA, LLC., 140 S. Ct. 1637, 590 U.S. ___, ___ (2020); *see also* RESTATEMENT, *supra* note 9, § 2.3(b)(2)..

53 See *Mitsubishi Motors*, 473 U.S. at 627.

54 *Stolt-Nielsen*, 559 U.S. at 682.

55 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2001); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 533 (2012); *see also* RESTATEMENT, *supra* note 9, § 1.6(a).

56 *See* Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987).

57 Most notably, predispute arbitration agreements in motor vehicle dealer franchise contracts are not enforceable. See 15 U.S.C. § 1226. In addition, the Sarbanes-Oxley Act, which regulates public company accounting, excludes the applicability

to protect the public interest are fully arbitrable if they fall within the scope of a contractual arbitration clause. However, where the parties' agreement provides that certain claims are exempted from a general arbitration clause, the Fifth Circuit has held that such an agreement does not present "clear and unmistakable" evidence that the parties intended to arbitrate the question of arbitrability, so the question of whether the dispute is arbitrable is for a court to decided and not the arbitrator.[58] In contrast, the Ninth Circuit has held that a "carve-out" of arbitrable claims does not negate a delegation of the question of arbitrability to an arbitrator.[59] The U.S. Supreme Court has agreed to resolve the split and a decision is likely to be issued sometime in early 2021.[60]

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

No.

2.5.2 Do these restrictions relate to specific persons (*i.e.*, State entities, consumers etc.)?

No. Although some states have attempted to create rules limiting the ability of corporations to include agreements to arbitrate in consumer contracts, the U.S. Supreme Court has struck down such provisions as contrary to the FAA's principle of non-discrimination against arbitration agreements.[61]

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Yes. Upon application of a party, a U.S. court where litigation is pending is required to stay the litigation if the court is satisfied that the issue involved is referable to arbitration, unless the applicant for a stay has waived the right to arbitrate.[62]

When a case contains both claims that the parties have agreed to submit to arbitration and other claims, the court may, in its discretion, stay litigation of the entire matter or stay only the claims covered by the arbitration agreement.[63]

District of Columbia Supplement: The DC RUAA requires a court to compel arbitration and stay proceedings "[o]n motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement."[64]

Florida Supplement: The Florida FIAA is similar to the FAA in that it requires a court to refer to arbitration any matter that is subject to an arbitration agreement, provided a party so requests before submitting its first statement on the substance of the dispute.[65]

New York Supplement: CPLR 7503(a) requires a court to compel arbitration and stay a pending or subsequent action referable to arbitration where "there is no substantial question whether a valid agreement was made of complied with" and the underlying claim is not barred by the statute of

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of predispute arbitration provisions to suits under the act by whistleblowers. *See* 18 U.S.C. § 1514A(e)(2). However, courts have applied this exception narrowly, holding it does not apply to the similar whistleblower cause of action under the Dodd-Frank Act, 15 U.S.C.A. § 78u-6. *See, e.g.*, Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488, 493 (3d Cir. 2014).

58 Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274 (5th Cir. 2019), *cert. granted*, No. 19-963, 2020 WL 3146679 (U.S. June 15, 2020).

59 Oracle Am., Inc. v. Myriad Group, A.G., 724 F.3d 1069, 1075–76 (9th Cir. 2013).

60 No. 19-963, 2020 WL 3146679 (U.S. June 15, 2020)

61 *See*, *e.g.*, Kindred Nursing Centers, L.P. v. Clark, 137 S. Ct. 1421, 581 U.S. ___, ___ (2017); *Concepcion*, 563 U.S. at 339.

62 9 U.S.C. § 3.

63 Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 856 (2d Cir. 1987).

64 D.C. Code § 16-4407(a), (f); *see also* Giron v. Dodds, 35 A.3d 433, 437 (D.C. 2012)

65 Fla. Stat. § 684.0009.

limitations.[66] This statute of limitations defense is decided by a court, and not the arbitrators, where the FAA does not apply.[67]

Texas Supplement: The TAA provides that 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*."[68] The TAA further provides that a "*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*."[69] Section 172.174 of the TIAA provides that, "*On request of a party, a court in which a pending judicial proceeding is being brought by a party to an arbitration agreement to obtain relief with respect to a matter covered by the arbitration agreement shall (1) stay the judicial proceeding; and (2) refer the parties to arbitration*."[70]

3.1.1 If the place of the arbitration is inside of the jurisdiction?

Yes.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Yes. The FAA does not distinguish between a stay in favour of arbitration inside or outside of the jurisdiction.

A motion for a stay is often brought together with a motion to compel arbitration.[71] For agreements covered by the New York Convention or Panama Convention, the FAA permits courts to compel arbitration at any place provided for in the parties' agreement, whether "*within or without the United States*."[72] For agreements not covered by the New York Convention, there is disagreement as to whether courts may compel arbitration outside their own judicial district, even when the parties' agreement provides otherwise.[73] This distinction is seldom if ever important, because the courts must stay proceedings even if they do not directly order the parties to arbitrate. Virtually all modern arbitration rules recognize that arbitration may proceed in the absence of a party, and therefore a court order compelling a party to arbitrate is rarely necessary once a court has determined that a dispute is subject to arbitration and has stayed a court proceeding in favour of arbitration.

District of Columbia Supplement: The DC RUAA does not distinguish between a referral for arbitration inside or outside of the territory.[74]

Florida Supplement: Although arbitrations subject to the Florida FIAA typically take place in Florida, the law does not distinguish between a referral for arbitration inside or outside of the state.[75]

New York Supplement: New York courts under CPLR 7503(a) may order injunctive relief staying prosecution of proceedings outside of New York.[76]

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66 N.Y. C.P.L.R. 7503(a); *see also id.* 7502(b).

67 ROM Reinsurance Mgmt. Co. v. Cont'l Ins. Co., 982 N.Y.S.2d 73, 74 (N.Y. App. Div., 1st Dep't 2014)

68 Tex. Civ. Prac. & Rem. Code § 171.021.

69 Tex. Civ. Prac. & Rem. Code § 171.025.

70 Tex. Civ. Prac. & Rem. Code § 172.174.

71 9 U.S.C. § 4.

72 9 U.S.C. §§ 206, 303.

73 Seaman v. Private Placement Capital Notes II, LLC, No. 16-cv-00578-BAS-DHB, 2017 WL 1166336, at *6 (S.D. Cal. Mar. 29, 2017). Courts in other circuits have rejected this view. *See* Ansari v. Qwest Commc'ns Corp., 414 F.3d 1214, 1220 (10th Cir. 2005) (collecting cases).

74 D.C. Code § 16-4407.

75 Fla. Stat. §§ 684.0002(2), 684.0009.

76 *See, e.g.*, Curtis, Mallet-Prevost, Colt & Mosle, LLP v. Garza-Morales, 308 A.D.2d 261, 263–64 (N.Y. App. Div., 1st Dep't 2003) (collecting cases).

Texas Supplement: The TAA and the TIAA also do not distinguish between a referral for arbitration inside or outside the state, for the purposes of a stay.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

The FAA requires a U.S. court to stay litigation proceedings only when the court is satisfied that the issue is referable to arbitration under the parties' agreement.[77] Therefore, a party seeking to enforce an anti-suit injunction from an arbitrator would still need to convince the U.S. court independently that the parties intended to submit the issue to arbitration.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

U.S. courts may not intervene directly in an arbitration seated outside of the jurisdiction. However, a U.S. court may issue injunctions against a party in aid of arbitration seated anywhere in its jurisdiction and may also compel discovery for use in foreign or international arbitrations.

Injunctions: Before issuing an injunction, a U.S. court must first satisfy itself of its jurisdiction over the party to be enjoined. When the party to be enjoined is not a citizen or resident of the state where the court is located, and has not consented to the court's jurisdiction, there must be sufficient minimum contacts between that party and the forum state such that a U.S. court's exercise of personal jurisdiction over that party does not offend due process.[78]

Ordinarily, to obtain an injunction in aid of arbitration, a party must show that it will suffer irreparable harm in the absence of an injunction, that it is likely to succeed on the merits of its claims, and that the balance of hardships tips in its favour.[79] Courts may also consider the public interest and the interest of comity to foreign nations. Courts are frequently reluctant to issue injunctive relief in aid of arbitration if such relief can be timely obtained from the arbitration tribunal.[80] When, after a U.S. court grants an injunction, the arbitrator subsequently decides to modify or terminate the injunction, several U.S. courts have recognized the arbitrator's authority to do so and have declined to further intervene to enforce the injunction.[81]

A court's power to issue injunctions in aid of arbitration includes the power to issue an anti-suit injunction restraining a party subject to its jurisdiction from proceeding in a foreign lawsuit over a claim that the party has agreed to arbitrate.[82] Some courts have held that they have the authority to grant anti-arbitration injunctions as well, if they determine that a dispute is not subject to arbitration.[83] For an arbitration agreement governed by the New York Convention or the Panama Convention, a U.S. court may appoint arbitrators in accordance with the terms of the parties' agreement on application of a party, even for arbitration outside of the jurisdiction.[84]

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77 9 U.S.C. § 3. There does not appear to be case law on the enforceability of an anti-suit injunction issued by an arbitrator.

78 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

79 *See*, *e.g.*, Benihana, Inc. v. Benihana of Tokyo, LLC, 784 F.3d 887, 895 (2d Cir. 2015).

80 *See*, *e.g.,* Smart Techs. ULC v. Rapt Touch Ireland Ltd, 197 F. Supp. 3d 1204 (N.D. Cal. 2016); A & C Disc. Pharmacy, L.L.C. v. Caremark, L.L.C., No. 3:16-CV-0264-D, 2016 WL 3476970, at *6 (N.D. Tex. June 27, 2016).

81 *See*, *e.g.*, Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049 (2nd Cir. 1990); *In re* S.W. Ranching Inc., No. 01-23337, 2017 WL 4274309, at *3 (Bankr. S.D. Tex. Sept. 22, 2017).

82 Paramedics Electromedicina Comercial, Ltda. v. GE Medical Sys. Information Techs., Inc., 369 F.3d 645, 658 (2d Cir. 2004); see, also Canon Latin America, Inc. v. Lantech, 507 F.3d 597 (11th Cir. 2007); *see also* RESTATEMENT, *supra* note 9, § 2.29.

83 *See* Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1099, 1103 (11th Cir. 2004) (issuing an anti-arbitration injunction under the All Writs Act, 28 U.S.C. § 1651); Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co., 643 F.2d 863, 868 (1st Cir. 1981) (holding that the authority to grant an anti-arbitration injunction is "concomitant of the power to compel arbitration" under 9 U.S.C. § 3).

84 9 U.S.C. §§ 206, 303.

Discovery: By statute, U.S. courts may compel discovery for use in foreign or international tribunals.[85] The Second and Fifth Circuits have held that this does not include arbitral tribunals.[86] Relying on subsequent dicta from the U.S. Supreme Court,[87] however, the Fourth and Sixth Circuits, along with several district courts have held that they could order such discovery,[88] with some lower courts drawing a distinction between "private" commercial arbitrations and investor-State arbitrations.[89] The Supreme Court has so far declined to address the issue and uncertainty remains as to the availability and scope of such discovery in aid of arbitration.[90] Exacerbating the importance of this determination, the Second Circuit has held that the statute authorizing discovery in aid of foreign proceedings allows a party to seek documents held outside of the United States.[91]

District of Columbia Supplement: The DC RUAA contains no territorial limit in its sections authorizing courts to compel arbitration or to enter provisional remedies to safeguard the effectiveness of an arbitration.[92]

Florida Supplement: The Florida FIAA states that: "*It is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant such a measure*." Florida courts have not had occasion to interpret this provision, although it is expressly not limited to arbitral proceedings within Florida.[93]

New York Supplement: Article 75 CPLR contains a provision which allows a court to issue a preliminary injunction or attach assets in aid of an arbitration anywhere in the world.[94]

Texas Supplement: Section 171.086 of the TAA is titled Orders That May Be Rendered and provides for a number of measures that a court may take, before or during an arbitration. This includes an order to "*invoke the jurisdiction of the court over the adverse party*."[95] This provision is not expressly limited to arbitrations seated in Texas. Section 172.175 of the TIAA concerns Interim Orders, and contains a similar

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85 See 28 U.S.C. § 1782 (authorizing U.S. courts to order discovery (i) upon request of an "interested person," (ii) over a person or entity "found" in the United States, (iii) "for use" in a proceeding "in a foreign or international tribunal").

86 Hanwei Guo v. Deutsche Bank Sec., No. 19-781 2020 WL 3816098 (2d Cir. July 8, 2020); NBC v. Bear Stearns & Co., 165 F.3d 184, 190-91 (2d Cir. 1999); *In re* Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999).

87 Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 257 (2004) (citing with approval a statement that "[t]he term 'tribunal' . . . includes administrative and arbitral tribunals") (quoting Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1026–1027 & nn.71, 73 (1965)) (emphasis added).

88 *See,* Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 210 (4th Cir. 2020); *In re* Application to Obtain Discovery for Use in Foreign Proceedings, 939 F.3d 710 (6th Cir. 2019); *see also, e.g.*, *In re* Application of Chevron Corporation, Case N. 10-MC-00002 (S.D.N.Y. Nov. 5, 2010); *In re* the Republic of Ecuador, Case No. 10-80225 (N.D. Cal. Sept. 15, 2010) (both applying the multifactor test developed by the Supreme Court in *Intel* to grant requests for discovery to be used in investor-state arbitrations).

89 *See, e.g.*, *In re Ex Parte* Application of Kleimar N.V., No. 16-MC-355, 2016 WL 6906712 (S.D.N.Y. Nov. 16, 2016) (declining to follow prior Second Circuit case law prohibiting the taking of evidence for use in a foreign arbitration, noting that dicta from *Intel* "*suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782*" and that several other courts, following *Intel*, found private foreign arbitrations to be "tribunals" for the purposes of Section 1782); *see also* RESTATEMENT, *supra* note 9, § 3.5, cmt. b (describing split and endorsing view that discovery may be compelled for use in international private arbitrations).

90 See Chevron v. Berlinger, 629 F.3d 297 (2d Cir. 2011); Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), 747 F.3d 1262, 1270 n.4 (11th Cir. 2014); El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 Fed.Appx. 31, 34 (5th Cir. 2009).

91 *In re* del Valle Ruiz, 939 F.3d 520, 531–32 (2d Cir. 2019); *see also* Sergeeva v. Tripleton Int'l Ltd., 834 F.3d 1194 (11th Cir. 2016).

92 D.C. Code §§ 16-4407 to 16-4408.

93 Fla. Stat. §§ 684.00002(2), 684.001.

94 N.Y. C.P.L.R. 7502(c).

95 Tex. Civ. Prac. & Rem. Code § 171.086.

provision as applied in international proceedings.[96] It provides for several ways in which a court may intervene with an arbitration, either before or during the proceedings.

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

The FAA does not address the representation of parties.[97] Parties should consult the rules governing counsel in the state in which the arbitration is seated. Those rules generally provide that individuals may be represented by counsel or represent themselves on a *pro se* basis. However, many states, including New York and Florida, require corporations and business entities to be represented by counsel.[98] In addition, some states have other rules that may bear on the representation of parties by an out-of-state or foreign lawyer.

District of Columbia Supplement: D.C.'s rules governing the unauthorized practice of law explicitly except representation of a party in arbitration provided that the lawyer 1) is authorized to practice law by the highest court of a state or territory or by a foreign country, 2) provide services in no more than 5 alternative dispute resolution proceedings in D.C. per calendar year and 3) does not maintain an office for the practice of law in D.C. or otherwise hold out as practicing law in D.C.[99]

Florida Supplement: The Rules Governing the Florida Bar specifically permit a foreign attorney to represent a party to an arbitration, provided that either (1) such foreign attorney is associated with a lawyer admitted to the Florida Bar;[100] (2) such foreign attorney is representing a client that resides in or has an office in the attorney's home state; or (3) the arbitral proceeding is reasonably related to the foreign attorney's practice in a jurisdiction in which he or she is admitted.[101]

New York Supplement: Courts have permitted a foreign attorney to represent a party in an arbitration on the theory that such attorney is not engaging in the unauthorized practice of law due to the unique nature of arbitration.[102] The New York City Bar Association (NYCBA) has also issued reports affirming this practice, at least where the non-New York-licensed representative is an attorney in any jurisdiction.[103]

Texas Supplement: Neither the TAA, the TIAA nor the Texas Disciplinary Rules of Professional Conduct speak to whether a foreign attorney may represent a party to an arbitration. The Texas Disciplinary Rules of Professional Conduct contain provisions regarding the unauthorized practice of law. Texas has not adopted the provisions of the American Bar Association Model law regarding lawyers admitted in another United States jurisdiction or in a foreign jurisdiction. The Texas rules do allow Texas lawyers to "*employ[] the services of paraprofessionals and delegat[e] functions to them*," as long as the lawyer supervises the delegated work.[104]

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96 Tex. Civ. Prac. & Rem. Code § 172.175.

97 *See* RESTATEMENT, *supra* note 9, § 3.9, cmt. a.

98 *See, e.g.,* N.Y. C.P.L.R. 321 (requiring a corporation in a New York action to be represented by an attorney); Szteinbaum v. Kaes Inversiones y Valores, C.A., 476 So.2d 247, 248 (Fla.3d DCA 1985) (holding that common law requires corporations to be represented by an attorney).

99 D.C. App. Rule 49(c)(12).

100 4-5.5(c)(1), (d)(1) of the Rules Regulating the Florida Bar.

101 Rules 1-3.11(a) and 4-5.5(c), (d) of the Rules Regulating the Florida Bar.

102 *See* Williamson v. John D Quinn Construction Corp., 537 F.Supp. 613, 626 (S.D.N.Y. 1982).

103 NYCBA Committee on Arbitration, *Unauthorized Practice of Law and the Representation of Parties in Arbitrations in New York by Lawyers Not Licensed to Practice in New York*, 63 THE RECORD 700 (2008), http://www2.nycbar.org/Publications/record/Vol_63_No3.pdf; *see also* NYCBA, REPORT ON NON-LAWYERS REPRESENTING CUSTOMERS IN FINRA DISPUTE RESOLUTION ARBITRATIONS BY THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY 12–13 (2018), https://s3.amazonaws.com/documents.nycbar.org/files/2018444-NonLawyer_FINRA_FINAL_11.27.18.pdf.

104 Comment 4 to Rule 5.05 of the Texas Disciplinary Rules of Professional Conduct.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

The institution administering the arbitration is the platform for parties to initially challenge and vet arbitrators' independence and impartiality, through the appointment process and throughout the proceeding. While some courts maintain that they retain the inherent power to monitor issues of arbitrator impartiality, courts are generally reluctant to interfere with arbitration proceedings. The FAA instead provides for the vacatur of an arbitration award when an arbitrator has demonstrated "evident partiality."[105]

The Supreme Court established the "evident partiality" standard in *Commonwealth Coatings v. Continental Casualty Co*.[106] Writing for a plurality, Justice Black found that arbitrators not only needed to avoid actual bias, but must also "*avoid even the appearance of bias*."[107] Thus, a failure to disclose information that could create such an appearance could lead to vacatur, even in the absence of actual bias. In a concurring opinion, however, Justice White added that arbitrators need not be disqualified if they have business relationships with the litigants but disclose them in advance, or if they fail to disclose what is otherwise a "trivial" relationship. This plurality opinion has led to differing interpretations of the standard by the federal courts. For example, in the Second Circuit, which includes New York, "*[e]vident partiality may be found only where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration*" and a failure to disclose a relationship which would not meet the standard is not on its own a basis for vacatur.[108] The Eleventh Circuit, which includes Florida, in contrast, finds "'*evident partiality' of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists*."[109]

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

The FAA makes clear that courts are intended only as a last resort for the constitution of an arbitral tribunal, which should otherwise be handled by the parties' agreement or the administering institution. However, courts can appoint arbitrators under two scenarios: (1) where an agreement calls for appointment to be handled by an institution that either does not exist or has ceased to exist; and (2) where the parties' agreement does not provide for a method of appointment and the parties "*fail to avail [themselves] of such a method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators…*"[110] Under such circumstances, the FAA generally permits courts to appoint arbitrators, assign an arbitral institution to administer the proceedings, or develop an *ad hoc* method for appointment. However, where the arbitration agreement is subject to Chapter 3 of the FAA (*i.e.*, the Panama Convention), the FAA and the Panama Convention call for appointment pursuant to the rules of procedure of the Inter-American Commercial Arbitration Commission.[111]

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105 9 U.S.C. § 10(a)(2). Indeed, where a district court removed an arbitrator in a purportedly "extreme" case, the Ninth Circuit overturned that decision and further observed that "*[t]he majority of our sister circuits expressly preclude any mid-arbitration intervention*." In re Sussex, 781 F.3d 1065, 1073 (9th Cir. 2015).

106 Commonwealth Coatings v. Continental Casualty Co., 393 U.S. 145 (1968).

107 *Commonwealth Coatings*, 393 U.S. at 150.

108 Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire and Marine Ins. Co., 668 F.3d 60, 64, 77 (2d Cir. 2012) (internal citations omitted) ("The nondisclosure does not by itself constitute evident partiality. The question is whether the facts that were not disclosed suggest a material conflict of interest.").

109 Gianelli Money Purchase Plan and Tr. v. ADM Inv'r Services, Inc., 146 F.3d 1309, 1312 (11th Cir. 1998); *see also* RESTATEMENT, *supra* note 9, § 4.11, reporters' note f(i) (rejecting this absolutist position).

110 9 U.S.C. § 5; *see also* RESTATEMENT, *supra* note 9, § 3.2(a).

111 *See* 9 U.S.C. § 303; *see also* RESTATEMENT, *supra* note 9, § 3.2, cmt. c.

District of Columbia Supplement: The DC RUAA authorizes the court to appoint an arbitrator on motion of a party where "*the parties have not agreed on a method [for appointing an arbitrator], the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed*."[112]

Florida Supplement: The Florida FIAA authorizes the Florida courts to appoint an arbitrator where an arbitration agreement provides for one arbitrator and the parties are unable to agree on an appointee.[113] Additionally, the courts can intervene at the request of a party where (1) an arbitration agreement provides for three arbitrators and one of the parties fails to nominate one of the arbitrators or the two arbitrators nominated by the parties are unable to agree on a third arbitrator;[114] (2) the parties, their appointed arbitrators, or a third party fails to act or reach an agreement pursuant to the chosen appointment procedure;[115] (3) a party that has unsuccessfully challenged an arbitrator's appointment seeks the circuit court's review within 30 days of its initial, unsuccessful challenge;[116] or (4) an arbitrator becomes unable to perform his or her functions or for other reasons fails to act without undue delay and does not withdraw from the arbitration.[117]

New York Supplement: CPLR 7504 provides that "[*i*]*f 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.*"[118]

Texas Supplement: Section 171.041 of the TAA provides that a "*court, on application of a party stating the nature of the issues to be arbitrated and the qualifications of the proposed arbitrators, shall appoint one or more qualified arbitrators if: (1) the agreement to arbitrate does not specify a method of appointment; (2) the agreed method fails or cannot be followed; or (3) an appointed arbitrator fails or is unable to act and a successor has not been appointed*."[119]

Section 172.054 of the TIAA provides an appointment mechanism for a court under certain circumstances. Specifically, "*the district court of the county in which the place of arbitration is located shall appoint each arbitrator if: (1) an agreement is not made under Section 172.053(a) in an arbitration with a sole arbitrator and the parties fail to agree on the arbitrator; or (2) the appointment procedure in Section 172.053(b) applies and: (A) a party fails to appoint an arbitrator not later than the 30th day after the date of receipt of a request to do so from the other party; or (B) the two appointed arbitrators fail to agree on the third arbitrator not later than the 30th day after the date of their appointment*."[120] Section 172.055 provides the following factors, which the district court shall consider in appointing an arbitrator: (1) each qualification required of the arbitrator by the arbitration agreement; (2) any consideration making more likely the appointment of an independent and impartial arbitrator; and (3) in the case of a sole or third arbitrator, the advisability of appointing an arbitrator of a nationality other than that of any party.[121]

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112 D.C. Code § 16-4411.

113 Fla. Stat. § 684.0012(b).

114 Fla. Stat. § 684.0012(3)(a).

115 Fla. Stat. § 684.0012(4)

116 Fla. Stat. § 684.0014(3).

117 Fla Stat. 684.0015(1)

118 N.Y. C.P.L.R. 7504.

119 Tex. Civ. Prac. & Rem. Code § 171.041.

120 Tex. Civ. Prac. & Rem. Code § 172.054.

121 Tex. Civ. Prac. & Rem. Code § 172.055.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

While the FAA itself is silent on interim relief, most federal circuits permits injunctive relief pending arbitration under the usual test applicable to injunctions.[122] Although rarely exercised, federal courts generally have the power to grant such relief on an ex parte basis. Furthermore, state arbitration statutes often expressly provide for such measures.

District of Columbia Supplement: Before the appointment of an arbitrator, the DC RUAA grants courts the power to enter provisional remedies to protect the effectiveness of an arbitration proceeding under the same conditions as if the dispute where in civil court.[123] After an arbitration is appointed, a court may only enter a provisional remedy "if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy."[124]

Florida Supplement: The Florida FIAA grants Florida courts the same power as they have in court proceedings to issue interim relief in aid of an international arbitration anywhere in the world, provided they exercise that power in accordance with the applicable requirements and in consideration of the specific features of international arbitration.[125]

New York Supplement: Article 75 CPLR provides that a court may order an attachment or issue a preliminary injunction in aid of an arbitration anywhere in the world, so long as a party can show that any eventual award might be rendered ineffectual but for the interim relief.[126]

Texas Supplement: Section 171.086 of the TAA grants Texas courts the power to issue interim relief before or during an arbitration, as does Section 172.175 of the TIAA in the context of international commercial proceedings. These provisions do not expressly provide for an *ex parte* procedure. Although rare, Texas courts have issued temporary restraining orders in connection with arbitration proceedings on an *ex parte* basis.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

The FAA does not expressly address many of the specific issues raised in the questions set out in this section. U.S. courts, however, have developed case law interpreting the FAA to grant broad discretion to the parties and arbitrators.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

The FAA does not address confidentiality. Ordinarily, confidentiality is either left to party agreement or addressed in accordance with the rules of an arbitral institution.[127] In practice, arbitral proceedings are generally conducted in private facilities, making public access a non-issue even in the absence of express confidentiality. However, parties should be aware that court proceedings to compel arbitration, or confirm and enforce an award, will require parties to append their arbitration agreement or award to court pleadings. Such court pleadings are publicly accessible unless independent grounds exist to keep them sealed from the public (*e.g.*, they contain trade secrets, medical information, *etc*.).

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122 *See*, *e.g.*, Ortho Pharm. Corp. v. Amgen, Inc., 882 F.2d 806, 812 (3d Cir. 1989) (we hold that a district court has the authority to grant injunctive relief in an arbitrable dispute, provided that the traditional prerequisites for such relief are satisfied."); *see also* RESTATEMENT, *supra* note 9, § 3.3, cmts. b, c.

123 D.C. Code § 16-4408(a).

124 D.C. Code § 16-4408(b)(2).

125 Fla. Stat. § 684.0028

126 N.Y. C.P.L.R. 7502(c).

127 *See* RESTATEMENT, *supra* note 9, § 3.11.

4.5.2 Does it regulate the length of arbitration proceedings?

The FAA is silent on length of proceedings; this is left to the parties and arbitrators.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Section 4 of Chapter 1 of the FAA provides that federal courts may enforce an agreement to arbitrate by issuing a compulsory "*order directing that such arbitration proceed in the manner provided for in such agreement*" but also specifying that the "*hearing and proceedings, under such agreement, shall be within the [judicial] district in which the petition for an order directing such arbitration is filed*." Most courts have interpreted this provision to mean that the court-compelled arbitration can only take place in the judicial district in which the petition to compel arbitration was filed.[128] Some of these courts have applied this limitation even where the parties have selected a different arbitration seat in the agreement.[129] This restriction, however, only applies to domestic U.S. arbitrations. Chapters 2 and 3 of the FAA governing agreements falling under the New York and Panama Conventions, respectively, are broader and expressly provide that courts may direct arbitration to be held at the agreed upon place, "*whether that place is within or without the United States*."[130]

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

The FAA does not address the issuance of interim relief by arbitrators. Courts, however, take the view that arbitrators have the implied power to grant interim measures, absent the expression of a contrary intent in the arbitration agreement.[131] Furthermore, many arbitral institution rules specifically authorize arbitrators to issue interim relief.[132]

District of Columbia Supplement: The DC RUAA provides that an arbitrator "may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the

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128 Control Screening LLC v. Technological Application and Production Co. (Tecapro), HCMC-Vietnam, 687 F.3d 163 (3d Cir. 2012); Ansari v. Qwest Communications Corp., 414 F.3d 1214 (10th Cir. 2005); Inland Bulk Transfer Co.v. Cummins Engine Co., 332 F.3d 1007 (6th Cir. 2003); Jain v. Mere, 51 F.3d 686 (7th Cir. 1995). *But see* Sanchez v. Nitro-Lift Technologies, LLC, 762 F.3d 1139, 1152-53 (10th Cir. 2010) (§ 4 is a venue requirement that parties waive when they do not raise the issue before the district court).

129 Homestake Lead Co. of Missouri v. Doe Run Resources Corp., 282 F. Supp.2d 1131 (N.D. Cal. 2003); Indian Harbor Ins. Co. v, Global Tansport Sys., 197 F. Supp.2d 1, 3 (S.D.N.Y. 2002) (compelling arbitration in same district despite different seat specified in arbitration agreement).

130 9 U.S.C. §§ 206, 303. These sections apply when (1) the agreement is covered by the New York Convention or the Panama Convention and (2) the agreement specified an arbitral seat in the territory of a Convention signatory. *See* Jain v. Mere, 51 F.3d 686 (7th Cir. 1995); Bauhinia Corp v. China National Machinery & Equipment Import Corp., 819 F.2d 247 (9th Cir. 1987*);* Internaves de Mexico s.a. de C.V. v. Andromeda Steamship Corporation, 247 F. Supp.3d 1294, 1300 (S.D. Fla. 2017) (citing *Jain*, 51 F.3d at 691).

131 Toyo Tire Holdings of Am., Inc. v. Continental Tire N. Am., Inc., 609 F.3d 975 (9th Cir. 2010); Arrowhead Global Solutions, Inc. v. Datapath, Inc., 166 Fed. Appx. 39, 44 (4th Cir. 2006) ("arbitration panels must have the power to issue temporary equitable relief in the nature of a preliminary injunction"); Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255 (2d Cir. 2003); *see also* RESTATEMENT, *supra* note 9, § 1.1, cmt. t (defining interim measure).

132 AAA Commercial Rules, Rule 37 ("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."), available at https://www.adr.org/sites/default/files/commercial_rules.pdf; Delos Rules of Arbitration, Article 7(4)(c) ("The Tribunal's powers shall include, but are not limited to, the following: . . . to order interim or conservatory measures."), available at: https://delosdr.org/index.php/rules/; ICDR International Arbitration Rules , Article 24 ("At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property."), available at: https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased; JAMS Comprehensive Arbitration Rules, Rule 24(e) (The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods.), available at: https://www.jamsadr.com/rules-comprehensive-arbitration/; ICC Arbitration Rules, Article 28 ("Unless the parties have otherwise agreed […] the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate."), available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.

effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy."[133]

Florida Supplement: The Florida FIAA provides that an arbitrator overseeing an international arbitration has the power, which can be waived by an agreement between the parties, to issue interim relief to maintain or restore the "status quo" pending the determination of the dispute, to prevent imminent harm or prejudice to the arbitral process, to provide a means of preserving assets that might satisfy an award, and to preserve evidence that might be relevant to the dispute.[134]

New York Supplement: The CPLR does not regulate the ability of an arbitrator to issue interim relief or orders.[135]

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The FAA does not regulate an arbitrator's right to admit or exclude evidence. Arbitrators generally have broad discretion on evidentiary rulings, subject to any contrary agreement by the parties or applicable arbitration rules.[136]

Section 7 of the FAA does, however, grant arbitrators subpoena power to summon witnesses and evidence, and authorizes courts to compel attendance of those refusing to testify.[137] The courts' power is in turn constrained by the applicable rules of civil procedure, such as Federal Rule of Civil Procedure 45(b)(2), which limits a district court's subpoena power to a 100-mile territorial limit outside of its own jurisdiction. Indeed, some courts have held that this territorial limitation also applies to an arbitrator's subpoena power.[138]

There are other potential limits on an arbitrator's power to subpoena non-parties. In particular, federal courts have disagreed about whether Section 7 of the FAA applies to pre-hearing discovery or is limited to attendance at the hearing. For example, the Second and Third Circuits have held that the Section 7 is restricted to situations in which a non-party is asked to physically appear before the arbitrator(s) and hand over documents and testify.[139]

District of Columbia Supplement: Like the FAA, the DC RUAA grants arbitrators the power to issue subpoenas for the attendance of witnesses and production of documents.[140] The DC RUAA also explicitly allows an arbitrator to permit such discovery as the arbitrator deems appropriate.[141]

Florida Supplement: The Florida FIAA grants an arbitrator overseeing an international arbitration the power to determine the admissibility, relevance, materiality, and weight of evidence.[142]

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133 D.C. Code § 16-4408.

134 Fla. Stat. § 684.0018.

135 *Cf. e.g.*, American Int'l Specialty Lines Ins. Co. v. Allied Capital Corp., No. 23, 2020 WL 2066743 (N.Y. 2020) ("[F]or the court[s] to entertain review of intermediary arbitration decisions involving procedure or any other interlocutory matter, would disjoint and unduly delay the proceedings, thereby thwarting the very purpose of conservation" (quoting Mobil Oil Indonesia v. Asamera Oil (Indonesia), 372 N.E.2d 21, 23 (N.Y. 1977)); Pacnav S.A. v. Effie Bus. Corp., 29 Misc. 3d 1129 (N.Y. Sup. Ct., N.Y. Cty. 2010) (no judicial role with regard to arbitral order for security).

136 Compania Panemena Maritima San Gerassimo, SA v. J.E. Hurley Lumber Co., 244 F.2d 286, 288 (2d Cir. 1957) ("It should not be the function of the District Court, after having ordered an arbitration to proceed, to hold itself open as an appellate tribunal to rule upon any questions of evidence that may arise in the course of the arbitration"); Bailey Shipping Ltd. v. American Bureau of Shipping, No. 12-cv-05959-KPF, 2014 WL 3605606 (S.D.N.Y. 2014).

137 9 U.S.C. § 7.

138 See, *e.g.*, *In Re* Security Life Insurance Co. of America, 228 F.3d 865, 872 (8th Cir. 2000).

139 Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 215 (2d Cir. 2008); Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); *see also* RESTATEMENT, *supra* note 9, § 3.4, cmt. b(i) (describing split of authority but not endorsing position).

140 D.C. Code § 16-4417(a).

141 D.C. Code § 16-4417(c).

New York Supplement: Article 75 of the CPLR explicitly provides an arbtirator the ability to issue subpoenas and administer oaths.[143] There is no regulation of the right of the arbitrator to admit or exclude evidence.

Texas Supplement: Similar to the FAA, the TAA does not regulate an arbitrator's right to admit or exclude evidence. The TAA does grant certain powers to the arbitrator related to different types of evidence, including the power to authorize a deposition, and to issue a subpoena, either for the attendance of a witness or for production of books, records, documents or other evidence.[144] Section 172.104 of the TIAA states that the "*power of the arbitration tribunal under Section 172.103(b) includes the power to determine the admissibility, relevance, materiality, and weight of any evidence*."[145]

4.5.6 Does it make it mandatory to hold a hearing?

The FAA does not expressly require a hearing, and courts recognize the parties' freedom to design their own arbitral procedures.[146] However, an arbitral award is subject to vacatur under the FAA if it violates tenets of due process, including "*refusing to hear evidence pertinent and material to the controversy*."[147] Courts interpreting this standard have required arbitrations to satisfy certain basic requirements, including procedural fairness, notice, a hearing or other meaningful opportunity to be heard, or otherwise risk vacatur.[148] Grounds for vacatur have also been found when hearings were scheduled in a fundamentally unfair manner.[149]

4.5.7 Does it prescribe principles governing the awarding of interest?

The FAA does not provide for the award of interest – a matter left to the discretion of the arbitrator. However, upon confirmation of the award, the post-award interest rate set forth in the award will generally cease to accrue, and is replaced by the statutory interest rate of the relevant jurisdiction applicable to judgments.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

In United States court proceedings, parties to a litigation are generally required to bear their own costs and legal fees, barring statutory provisions to the contrary. By contrast, while the FAA itself is silent on the issue of party costs and attorney fees in arbitration, courts have upheld awards of costs and attorney fees provided that they are authorized by the parties' agreement.[150]

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142 Fla. Stat. § 684.003.

143 N.Y. C.P.L.R. 7505.

144 *See* Tex. Civ. Prac. & Rem. Code § 171.051.

145 *See* Tex. Civ. Prac. & Rem. Code § 171.104.

146 Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 325 (2d Cir. 2004) ("FAA requires 'arbitration proceed in the manner provided for in [the parties'] agreement'") (emphasis in original).

147 9 U.S.C. § 10(a)(3); *see also* RESTATEMENT, *supra* note 9, § 4.11.

148 China Nat'l Bldg. Material Inv. Co. v. BNK International, LLC., No. A-09-CA-488-SS, 2009 WL 4730578, at *6 (W.D. Tex. 2009) ("[T]he hearing should 'meet the minimal requirements of due process': adequate notice, a hearing on the evidence, and an impartial decision by the arbitor. . . The parties must have an opportunity to be heard 'at a meaningful time and in a meaningful manner'") (quoting Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Hegara, 364 F.3d 274, 298-99 (5th Cir. 2004)).

149 *See, e.g.*, Tempo Shain Corp. v. Bertek, 120 F.3d 16, 20 (2d Cir. 1997) (finding arbitrator misconduct justifying vacatur when the arbitrator refused to adjourn the hearing for a key witnesses whose wife fell gravely ill); Tube & Steel Corp. of Am. v. Chicago Carbon Steel Prods., 319 F. Supp. 1302, 1304 (S.D.N.Y. 1970) (vacating when an arbitrator set hearings at a time when a party specifically indicated they were unavailable).

150 Painewebber v. Bybyk, 81 F.3d 1193, 1201 (2d Cir. 1996).

5. Liability

5.1 Do arbitrators benefit from immunity to civil liability?

The FAA does not expressly address arbitrator immunity. However, courts generally grant arbitrators immunity from civil liability for actions undertaken within the scope of their capacity as arbitrators.[151]

District of Columbia Supplement: The DC RUAA provides arbitrators judicial immunity from civil liability "*to the same extent as a judge of a court of the District of Columbia acting in a judicial capacity*."[152]

Florida Supplement: Florida law grants arbitrators "judicial immunity,"[153] which grants arbitrators absolute immunity for actions taken while acting in their capacity as arbitrators, except those taken in the clear absence of jurisdiction.[154]

New York Supplement: New York courts have followed the prevailing rule that arbitrators are immune from liability for acts performed within their arbitral capacity.[155]

Texas Supplement: Texas courts have confirmed the doctrine of arbitral immunity, which "*is derived from judicial immunity, which establishes that judges are absolutely immune from personal liability for judicial acts that are not performed in clear absence of all jurisdiction, regardless of how erroneous the act, or how evil the motive*."[156]

5.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

No, to the best of our knowledge, there are no special concerns relating to criminal liability that arise out of participation in arbitration proceedings.

6. The Award

6.1 Can parties waive the requirement for an award to provide reasons?

Although the FAA presumes that awards will be written, it does not require that they will be signed, dated, or reasoned. Nor do courts interpreting the FAA require that arbitral awards be reasoned.[157] Rather, they generally deem unreasoned awards valid and enforceable, provided the relevant institutional rules or arbitration agreement do not require otherwise.[158]

District of Columbia Supplement: The DC RUAA requires only awards be signed or otherwise authenticated by the arbitrator.[159]

Florida Supplement: The Florida FIAA provides that the award must state reasons unless the parties agree that no reasons are to be given or the award is one on agreed terms.[160]

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151 Austern v. Chicago Bd. Options Exchange, Inc., 898 F.2d 882, 886 (2d Cir. 1990); *see also* RESTATEMENT, *supra* note 9, § 3.10.

152 D.C. Code § 16-4414.

153 Fla. Stat. § 684.0045.

154 *See* Sibley v. Lando, 473 F. 3d 1067, 1070 (11th Cir. 2005).

155 *See, e.g.*, Siskin v Cassar, 122 A.D.3d 714, 718 (N.Y. App. Div, 2d Dep't 2014).

156 Blue Cross Blue Shield v. Juneau, 114 S.W.3d 126, 131 (Tex.App.-Austin 2003, no pet.).

157 United Steelworkers of Am. v. Enter. Wheel Car Corp., 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award.").

158 Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 n.4 (1956); D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006).

159 D.C. Code § 16-4419; *see also* Schwartz v. Chow, 867 A.2d 230, 233 (D.C. 2005) ("Arbitrators, moreover, are not required to state the grounds for their decisions.").

160 Fla. Stat. 684.0042(2).

New York Supplement: Article 75 of the CPLR requires that awards be written and signed by the arbitrator.[161]

Texas Supplement: Section 171.053 of the TAA states that the arbitrator's award "*must be in writing and signed by each arbitrator joining in the award*."[162] However, it does not require that the award be reasoned, nor is a failure to state reasons listed as a ground for vacating an award. Section 172.141(b) states that the "*arbitration award must state the reasons on which it is based, unless the parties have agreed that no reasons are to be given, or the award is an award on agreed terms under Section 172.117*."[163]

6.2 Can parties waive the right to seek the annulment of the award?

6.2.1 If yes, under what conditions?

The federal courts are divided over whether parties can completely waive the statutory right to seek annulment (*i.e.*, vacatur) of arbitral awards, with most holding that they cannot do so.[164] Challenges for specific reasons, however, may be waived when the challenging party did not raise the challenge during the arbitration proceedings despite being aware of the relevant facts.[165]

District of Columbia Supplement: The D.C. Court of Appeals is in accord with most courts that parties may not alter or expand the grounds the statutory grounds for setting aside an award.[166] However, a party's participation in arbitration can constitute waiver of that party's right to raise a defense that the award is void for lack of an enforceable agreement.[167] A party may also waive its right to set aside an award by not filing its challenge within 90 days of receiving notice of the award pursuant to the DC RUAA.[168]

Florida Supplement: A party can waive its right to have an award "set aside" if it fails to comply with the technical conditions set out in Section 684.0046 of the Florida FIAA for seeking to annul an award.

New York Supplement: A party that participates in arbitration without timely objecting waives the right to have an award set aside backed on lack of an agreement.[169] A party may also waive its right to set aside an award by not filing its challenge within 90 days of receiving notice of the award pursuant to NY CPLR 7511(a).[170]

Texas Supplement: Texas courts have confirmed that a "*party may not sit idly by during an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrator when the result*

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161 N.Y. C.P.L.R. 7507; *see also, e.g.*, Penn Central Corp. v. Consolidated Rail Corp., 82 A.D.2d 208, 215 (N.Y. App. Div., 1st Dep't 1981) ("It is well settled that the arbitrators, in committing their final and unanimous award to writing, need neither recite their reasons nor set forth their calculations.").

162 *See* Tex. Civ. Prac. & Rem. Code § 171.053.

163 *See* Tex. Civ. Prac. & Rem. Code § 172.117

164 *See*, *e.g.*, *In re* Wal-Mart Wage & Hour Employment Practices Litig., 737 F.3d 1262, 1267-68 (9th Cir. 2013); Hoeft v. MVL Grp., Inc., 343 F.3d 57, 65 (2d Cir. 2003); *see also* RESTATEMENT, *supra* note 9, § 4.22 (adopting view that parties may not agree in advance to reduce grounds for post-award relief).

165 JCI Commc'ns, Inc. v. Int'l Bhd of Elec. Workers, Local 103, 324 F.3d 42, 51 (1st Cir. 2003) ("Absent exceptional circumstances, a court will not entertain a claim of personal bias where it could have been raised at at the arbitration proceedings but was not."); Lippert Tile Co., Inc. v. Int'l Union of Bricklayers & Allied Craftsmen, 724 F.3d 939, 945 (7th Cir. 2013) ("waiver rule applies equally to questions concerning arbitrability . . . we have repeatedly disapproved of the practice of remaining silent on an arbitrability issue during arbitration proceedings, only to play the arbitrability card in federal court after the party loses.").

166 *See* Wolf v. Sprenger + Lang, PLLC, 86 A.3d 1121, 1134 (D.C. 2013) (analyzing FAA and DC RUAA together).

167 Lopata v. Coyne, 734 A.2d 931, 937 (D.C. 1999).

168 *See* DC RUAA § 16-4423(c); Local Union 26, Int'l Bh'd of Elec. Workers v. CWS Elec., 669 F. Supp. 495, 497 (D.D.C. 1986) (applying the since-repealed DC Uniform Arbitration Act).

169 *See, e.g.*, Barclays Capital Inc. v. Leventhal, 93 N.Y.S.3d 624 (N.Y. Sup. Ct., N.Y. Cty. 2017) (collecting cases).

170 N.Y. C.P.L.R. 7511(a); *see also* 1000 Second Ave. v. Pauline Rose Trust, 171 A.D.2d 429, 429 (N.Y. App. Div., 1st Dep't 1991).

turns out to be adverse."[171] This has been applied in the context of arbitrator bias, when courts have stated that a party waives the right to complain after the fact if it "*knows or has reason to know of an arbitrator's bias, but remains silent pending the outcome of the arbitration*."[172] Courts have further confirmed that the "*90-day period in the Texas General Arbitration Act (TGAA) following delivery of an arbitration award during which a party can file an application to vacate is a limitations period, after which the party cannot ask a court to vacate the award*."[173]

6.2.2 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

As set forth above, the FAA does not impose any formal requirements, although state laws or institutional rules may do so.

6.3 Is it possible to appeal an award (as opposed to seeking its annulment)?

While some arbitral institutions can provide for appeal-like mechanisms under their rules, the FAA does not provide for an appeal from an award and only provides limited grounds for vacating, modifying, or correcting the award.

District of Columbia Supplement: The DC RUAA provides only for the modification, correction, or vacation of an award.[174] The drafters of the RUAA declined to include any provision sanctioning "opt-in" review of a challenged arbitration award by a court.[175]

Florida Supplement: Florida law does not provide for an appeal. It only provides for a limited application to set aside an award as the "*exclusive recourse against [an] arbitral award*".[176]

New York Supplement: Like the FAA, New York's CPLR provides only for the vacation or modification of awards.[177]

Texas Supplement: The TAA does not expressly provide for appeal and sets out very specific grounds for vacating an award in Section 171.088, which are similar to those of the FAA. The Texas Supreme Court has held that "*the FAA does not preempt enforcement of an agreement for expanded judicial review of an arbitration award enforceable under the TAA*."[178]

6.4 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

A party seeking to confirm an award under the FAA must file an application with the court within one year of the issuance of the award.[179] However, awards subject to the New York Convention or the Panama Convention may be confirmed within three years of the award.[180] In each case, parties seeking to enforce an award must attach to their filing both a copy of the award and a copy of the arbitration agreement.[181]In addition, in order to enforce an award against a party who is not a citizen or resident of the state where the court is located, and has not consented to the court's jurisdiction, there must be sufficient minimum

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171 Bossley v. Mariner Financial Group, 11 S.W.3d 349, 351-52 (Tex. App.–Houston [1st Dist.] 2000, pet. granted), *aff'd*, 79 S.W.3d 30 (Tex. 2002).

172 *Bossley*, 11 S.W.3d at 351-52.

173 New Med. Horizons II, Ltd. v. Jacobson, 317 S.W.3d 421, 428 (Tex. App.-Houston [1st Dist.] 2010, no pet.)

174 D.C. Code §§ 16-4420, 16-4423 to 16-4424

175 REVISED UNIF. ARBITRATION ACT, Prefatory Note at 4.

176 Fla. Stat. 684.0046.

177 N.Y. C.P.L.R. 7511.

178 Nafta Traders Inc. v. Quinn, 339 S.W.3d 84, 101-02 (Tex. 2011).

179 9 U.S.C. § 9; *see also* RESTATEMENT, *supra* note 9, § 4.30 cmt. a(i).

180 9 U.S.C. §§ 207, 302; *see also* RESTATEMENT, *supra* note 9, § 4.30 cmt. a(ii).

181 9 U.S.C. §§ 13, 208, 307; *see also* RESTATEMENT, *supra* note 9, § 4.4.

contacts between that party and the forum state such that a U.S. court's exercise of personal jurisdiction over that party does not offend due process.[182]

District of Columbia Supplement: The DC RUAA provides that a party to an arbitration to proceeding may make a motion to the court for an order confirming the award after the party receives notice of the award, and that the court shall issue a confirming order unless the award is modified or vacated.[183] The form of the motion is governed by Rule 70-I of the D.C. Superior Court Rules of Civil Procedure, which also requires service of the motion on an opposing party.[184] There are no time limits and no distinction made between local and foreign awards.

Florida Supplement: The Florida FIAA states that, upon application in writing to the court, an arbitral award "*irrespective of the country in which it was made, shall be recognized as bin*ding" and shall be enforced[185] except in the following circumstances:

> 1) A party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
>
> 2) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
>
> 3) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;
>
> 4) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> 5) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.[186]

A court may also refuse to recognize or enforce an award if it finds (1) the subject matter of the dispute is not capable of settlement by arbitration in Florida, or if (2) recognizing or enforcing the award would be contrary to Florida public policy.[187]

New York Supplement: The CPLR provides that New York courts "*shall confirm an award upon application of a party made within one year after its delivery*" unless the award is vacated or modified.[188] There is no distinction between domestic and foreign awards.

Texas Supplement: Section 171.087 of the TAA states that "*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*."[189]

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182 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

183 D.C. Code § 16-4422.

184 D.C. Super. Ct. Civ. R. 70-I.

185 Fla. Stat. 684.0047(1) (emphasis added).

186 Fla. Stat. 684.0048(1)(a).

187 Fla. Stat. 684.0048(1)(b).

188 N.Y. C.P.L.R. 7510.

189 *See* Tex. Civ. Prac. & Rem. Code § 171.087.

6.5 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

For an award to become enforceable, it must first be confirmed pursuant to the FAA, whereupon it becomes binding as if it were a judgment rendered by a U.S. court. A party seeking to vacate the award in the U.S. must therefore seek to do so before the award becomes confirmed. In practice, confirmation and vacatur determinations will tend to take place simultaneously in the same court proceeding.

However, when the award was rendered abroad, Chapter 2 of the FAA incorporates the New York Convention, Article IV of which provides courts with discretion to stay U.S. confirmation proceedings if an application for vacatur has been made at the seat of the competent authority. Even in such a scenario, however, the court still has discretion to deny the stay and may additionally require the party seeking it to post security.[190]

District of Columbia Supplement: The DC RUAA does not provide any enforcement exception for the initiation of annulment proceedings.

Florida Supplement: Section 48 of the Florida FIAA authorizes a party to request a stay of enforcement when the award has been set aside by the issuing court.[191] That decision is subject to the court's discretion, and the Florida FIAA does not contemplate suspending the right to enforce an award simply because there are proceedings to annul or set aside an award.

New York Supplement: The CPLR does not provide any enforcement exception for the initiation of annulment proceedings.

6.6 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Although the text of the New York Convention suggests that a court has discretion to confirm an award even if it has been vacated, a U.S. court will not enforce an international award that has been vacated at the seat of arbitration (*i.e.*, by the "competent authority") absent extraordinary circumstances.[192] In a notable exception, however, the Second Circuit in *Pemex* affirmed the confirmation of an award that had been vacated in Mexico – the seat of the arbitration – because the Mexican court retroactively applied the law, an act deemed contrary to "*fundamental notions of what is decent and just*" in the United States.[193]

District of Columbia Supplement: While it is theoretically possible for an annulled award to be enforced, federal courts in D.C. have described the standard as "high, and infrequently met" and requiring "extraordinary circumstances" that violate the "most basic notions of morality and justice."[194]

Florida Supplement: The Florida FIAA follows the New York Convention, theoretically granting courts discretion to confirm an award even if it has been annulled ("*recognition or enforcement [...] may be refused*"). As a practical matter, however, a Florida court is unlikely to enforce an award that has been annulled.[195]

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190 *See, e.g.*, Europcar Italia v Maiellano Tours, 156 F.3d 310, 316 (2d Cir. 1998).

191 Fla. Stat. 684.0048(1)(a)(5).

192 *See* RESTATEMENT, *supra* note 9, § 4.14(b).

193 Corporaciòn Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploraciòn y Producciòn, 832 F.3d 92, 97 (2d Cir. 2016).

194 Getma Int'l v. Republic of Guinea, 862 F.3d 45, 48–49 (D.C. Cir. 2017) (quoting TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928 (D.C. Cir. 2007)).

195 Fla. Stat. 684.0048(1)(a)(5) (emphasis added).

New York Supplement: While the Second Circuit, the federal appeals court embracing New York, confirmed an arbitral award that had been set aside at the seat of the arbitration in *Pemex*, subsequent cases have refused to confirm awards set aside at the seat.[196]

6.7 Are foreign awards readily enforceable in practice?

Yes. U.S. courts embrace a policy favoring the recognition and enforcement of arbitral awards.[197] As such, foreign awards are readily confirmed and enforced in the U.S., consistent with the policy of the New York Convention. Courts have even imposed sanctions on parties seeking to vacate or delay confirmation of an award without a substantial basis for doing so.[198]

7. Funding Arrangements

7.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

The terms and legality of funding arrangements are governed by U.S. state laws, whether or not an arbitration falls under the FAA. Each state has attorney ethical rules and possibly other rules (*e.g.*, champerty) that should be consulted.

District of Columbia Supplement: D.C.'s ethics rules impose certain restrictions on contingency or alternative fee arrangements. A lawyer is forbidden from charging or collecting an excessive fee, as determined by a reasonable lawyer standard.[199] Contingency fee arrangements must be in writing.[200]

In 2020, the D.C. Bar asked for comment on possible revisions to D.C.'s ethics rule which would loosen restrictions on fee-sharing with non-lawyers which in other jurisdictions has been interpreted to restrict lawyers from directly engaging in certain third-party funding arrangements.[201]

Florida Supplement: While the Florida FIAA and Florida law do not directly bar the use of contingency fees, alternative fee arrangements, or third-party funding for arbitrations, the ethical rules in Florida impose certain restrictions. For example, Rule 4-1.5 of the Florida Rules of Professional Conduct states that attorneys "*shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee*." This Rule also sets out factors for determining if fees are reasonable.[202] Moreover, attorneys are required to put contingent fee agreements in writing and provide details on the terms of any such agreement.[203]

In addition, the Florida Bar has stated that it "*discourages the use of non-recourse advance funding companies*."[204] Indeed, although the Florida Bar has advised that an attorney may provide a client with

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196 Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petroleum Corp., 397 F. Supp. 3d 323, 336 (S.D.N.Y. 2019), *appeal filed*, 19-3361 (2d Cir. Oct. 16, 2019); Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic, 864 F.3d 172, 186 (2d Cir. 2017).

197 Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013) ("Under the FAA, courts may vacate an arbitrator's decision only in very unusual circumstances") (internal citation omitted).

198 World Bus. Paradise, Inc. v. Suntrust Bank, 403 F. App'x 468, 470 (11th Cir. 2010); Prospect Capital Corp. v. Enmon, No. 08-cv-03721-LBS, 2010 WL 907956 (S.D.N.Y. Mar. 9, 2010).

199 D.C. Rules of Professional Conduct 1.5(a).

200 D.C. Rules of Professional Conduct 1.5(c).

201 *See* Press Release, D.C. Bar, D.C. Bar Global Legal Practice Committee Seeks Public Comment on Rule of Professional Conduct 5.4 (Feb. 27, 2020), https://www.dcbar.org/about-the-bar/news/DC-Bar-Global-Legal-Practice-Committee-Seeks-Public-Comment-on-Rule-of-Professional-Conduct-5-4.cfm.

202 Florida Rule of Professional Conduct 4-1.5.

203 Florida Rule of Professional Conduct 4-1.5(f).

204 Florida Bar Ethics Opinion 00-3 (March 15, 2002) (revised August 24, 2011), available at: https://www.floridabar.org/news/tfb-journal/?durl=%2Ftfb%2Ftfbetopin.nsf%2F840090c16eedaf0085256b61000928dc%2Ff40a54f76a7da5a585256b800057b541.

information about companies that offer non-recourse advance funding, the Bar concluded that *"[t]he attorney shall not recommend the client's matter to the funding company nor initiate contact with the funding company on a client's behalf."*[205]

New York Supplement: New York ethics rules impose certain restrictions on contingency or alternative fee arrangements. A lawyer is forbidden from charging or collecting an excessive fee, as determined by a reasonable lawyer standard.[206] Contingency fee arrangements must be in writing.[207] Any funding arrangement may not compromise a lawyer's professional judgment or allow a non-lawyer to direct or control the professional judgment of the lawyer.[208]

In 2018, the New York City Bar Association (NYCBA) issued a formal opinion which interpreted New York's Rules of Professional Conduct's fee-sharing prohibition as forbidding a lawyer from entering into arrangements with third-party litigation funders where the payments to the lawyer were contingent on the fees received.[209] This opinion was heavily criticized, and in 2020 the NYCBA's Working Group on Litigation Funding issued a report recognizing the benefit of litigation funding and proposing revisions to the applicable rules.[210] The report also addressed arbitration funding specifically, and recommended that changes be made to require the disclosure in arbitration of the fact of litigation funding and identity of litigation funders.[211]

7.2 Is there likely to be any significant reform of the arbitration law in the near future?

There have been several proposals to amend the FAA in recent years, primarily to curtail the arbitrability of certain types of disputes, such as consumer credit card cases, and labor and employment issues. However, few of these proposals have made any significant progress towards becoming law.[212] Furthermore, because the U.S. is a common law system, binding case law continues to develop and inform the application of the FAA. Most notably, the Supreme Court has shown an interest in addressing issues relating to class action arbitration, and is likely to continue opining on the FAA in the coming years.

District of Columbia Supplement: There are no expected revisions to the DC RUAA at this time.

Florida Supplement: There are no expected revisions to the Florida FIAA at this time.

New York Supplement: There are several pending legislative proposals to amend Article 75 of the CPLR, including one proposal to expressly authorize the vacating of an award for manifest disregard of the law.[213] However, none of these legislative proposals have made significant progress to becoming law.

Texas Supplement: There are no expected revisions to the TAA or TIAA at this time.

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205 Florida Bar Ethics Opinion 00-3 (March 15, 2002) (revised August 24, 2011), available at: https://www.floridabar.org/news/tfb-journal/?durl=%2Ftfb%2Ftfbetopin.nsf%2F840090c16eedaf0085256b61000928dc%2Ff40a54f76a7da5a585256b800057b541.

206 N.Y. Rules of Professional Conduct 1.5(a).

207 N.Y. Rules of Professional Conduct 1.5(c).

208 *See* N.Y. Rules of Professional Conduct 1.8(f), 5.4.

209 NYCBA Formal Op. 2018-15.

210 NYCBA WORKING GROUP ON LITIGATION FUNDING, REPORT TO THE PRESIDENT 22–23 (2020).

211 *Id.* at 69–72.

212 See Letter from R. Larson Frisby to ABA Section of Dispute Resolution, Aug. 3, 2016, https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/lsadr_august2016.authcheckdam.pdf

213 NYCBA, REPORT ON LEGISLATION BY THE ARBITRATION COMMITTEE, INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE, AND INSURANCE LAW COMMITTEE (2019), https://s3.amazonaws.com/documents.nycbar.org/files/2019534-ArbitrationRegulations.pdf.

DOMESTIC ARBITRATION IN CALIFORNIA

1. The legal framework

California's International Commercial Arbitration and Conciliation Act ("the Act") is based on the 1985 UNCITRAL Model Law.[214] However, California's domestic arbitration law—the California Arbitration Act ("CAA")—is a separate law, and it is not based on the UNCITRAL Model Law.[215]

The CAA is based on the Uniform Arbitration Act, which is a model law created by the Uniform Law Commission. Although the California Legislature regularly amends or updates small portions of the CAA, most provisions of the CAA have not been revised since it was first passed in 1961.

2. The Arbitration Agreement

As with all arbitrations, the arbitration agreement is the centerpiece of arbitration under the CAA. California courts will interpret an arbitration agreement to determine whether the parties intended to use the CAA rather than the FAA.[216] "*There is a 'strong default presumption that the Federal Arbitration Act, not state law, supplies the rules for arbitration*."[217] "*To overcome that presumption, parties to an arbitration agreement must evidence a 'clear intent' to incorporate state law rules for arbitration*."[218] Where an arbitration agreement provides that California law applies, the courts will presume the parties elected to apply California state law on *substantive* matters, but federal law for the arbitration procedures.[219]

Typically, an agreement's arbitration clause is considered separately from the rest of the contract. Courts evaluate the arbitration clause, as compared to the contract as a whole, to determine arbitrability. Challenges to the validity of the underlying contract (*i.e.*, ambiguous, unclear, lack of consideration, mutual mistake) are not considered.[220]

Under the CAA, there are no specific, unique requirements for an arbitration clause. In general, a written agreement to submit a dispute to arbitration "*is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract*."[221] The question of whether a valid agreement to arbitrate exists is determined by reference to the law applicable to contracts generally.[222] Arbitration agreements are subject to rescission on the same grounds as other contracts, and a petition to compel arbitration "*is not to be granted when there are grounds for rescinding the agreement*."[223]

Generally, because arbitration is based on a contract, only parties to the arbitration agreement can be compelled to arbitrate.[224] However, in certain instances, a third-party can be bound by the arbitration agreement where: (1) the nonsignatory is a third-party beneficiary of the contract containing the arbitration agreement; or (2) "*a preexisting relationship existed between the nonsignatory and one of the parties to the*

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214 See Cal. Civ. Proc. Code § 1297.11 *et seq*.

215 See Cal. Civ. Proc. Code § 1280 *et seq*.

216 *See* Fid. Fed. Bank, FSB v. Durga Ma Corp., 386 F.3d 1306, 1311-12 (9th Cir. 2004); Cronus Investments, Inc. v. Concierge Servs., 35 Cal. 4th 376, 387 (2005).

217 *Fid. Fed. Bank,* 386 F.3d at 1311.

218 *Fid. Fed. Bank,* 386 F.3d at 1311.

219 *Fid. Fed. Bank,* 386 F.3d at 1311.

220 See Phillips v. Sprint PCS, 209 Cal. App. 4th 758, 774 (2012) ("'An arbitration provision is severable from the remainder of the contract;' a challenge to the contract as a whole, without a focused challenge to the arbitration provision, does not preclude arbitration." (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–446 (2006))).

221 Cal. Civ. Proc. Code § 1281.

222 *See* Engalla v. Permanente Med. Grp., Inc., 15 Cal. 4th 951, 972 (1997), as modified (July 30, 1997).

223 *Engalla.*, 15 Cal. 4th at 972-73, as modified (July 30, 1997).

224 *See* Crowley Mar. Corp. v. Boston Old Colony Ins. Co., 158 Cal. App. 4th 1061, 1069 (2008).

arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim."[225]

With regard to whether claims are arbitrable, the U.S. Supreme Court has held that the FAA preempts state laws that prohibit the arbitration of particular types of claims.[226] Generally, under the CAA, if the arbitration clause is broadly worded, most contract and tort claims are arbitrable.[227] However, the court will determine whether an agreement to arbitrate has been entered into before compelling arbitration. For example, in *Long v. Provide Commerce*, the court declined to compel arbitration where the arbitration agreement was contained in a browserwrap agreement.[228] The court held that the website at issue failed to put a reasonably prudent user on inquiry notice of the terms of the supposed contract.

Additionally, for certain types of disputes, California has additional statutory requirements for enforceable arbitration agreements.[229]

Further, certain types of claims are not subject to arbitration as a matter of law, including, for example: residential leases that seek to waive a tenant's rights in litigation;[230] injury or death claims in real property purchase agreements;[231] construction subcontracts requiring arbitration outside of California;[232] and employment contracts requiring employees residing and working in California to litigate or arbitrate disputes outside of California.[233]

California law also requires that any waiver of the right to seek judicial redress must be knowing, voluntary and expressly not made as a condition of entering into a contract or as a condition of providing or receiving goods or services.[234]

3. Intervention of Domestic Courts

Generally, California courts will stay litigation if there is a valid arbitration agreement covering the dispute.[235] However, a court may deny a petition to compel arbitration where a party to an arbitration agreement is also (1) a party to a pending court action or special proceeding with a third party (2) arising out of the same transaction or series of related transactions and (3) there is the possibility of conflicting rulings on a common issue of law or fact.[236]

Additionally, a party seeking to stay court proceedings should seek a stay in California while an arbitration is pending in another jurisdiction. Under California law, after a petition to compel arbitration has been granted and a lawsuit stayed, "*the arbitrator takes over. It is the job of the arbitrator, not the court, to resolve all questions needed to determine the controversy*."[237]

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225 *Crowley Mar. Corp*.., 158 Cal. App. 4th at 1069-70.

226 AT&T Mobility v Concepcion, 563 U.S. 321 (2011).

227 *See* EFund Capital Partners v. Pless, 150 Cal. App. 4th 1311, 1322 (2007).

228 Long v. Provide Commerce, 245 Cal. App. 4th 855 (2016).

229 *See*, *e.g.*, Cal. Civ. Proc. Code, § 1295 (medical malpractice); § 1298 (disputes arising from real estate contracts).

230 Cal. Civ. Proc. Code § 1953(a)(4).

231 Cal. Civ. Proc. Code §§ 337.1, 337.5.

232 Cal. Civ. Proc. Code § 410.42.

233 Cal. Labor Code § 925(a), (b), (c), (f).

234 *See* Cal. Civ. Code §§ 51.7, 52, 52.1; see, also *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017) (holding that the arbitration agreement could not be enforced because it violated California's anti-waiver statute (Cal. Civ. Code § 3513) prohibiting contractual terms waiving a party's "public rights").

235 Cal. Civ. Proc. Code § 1281.4.

236 Cal. Civ. Proc. Code § 1281(c).

237 MKJA, Inc. v. 123 Fit Franchising, LLC, 191 Cal. App. 4th 643, 662 (2011) (reversing trial court lifting of stay for arbitration pending in Colorado); Cal. Civ. Proc. Code § 1281.4 (providing for stay when arbitration has been ordered).

Under California law, "*an arbitration provision does not oust the court of jurisdiction to hear the matter but merely means if one party chooses to arbitrate, a petition may be filed to stay the proceedings, order arbitration and then confirm the award*."[238] Even when a stay has been issued, the court retains limited jurisdiction over the dispute.[239] Additionally, California courts have the power to enjoin proceedings in another jurisdiction when there are exceptional circumstances that outweigh the threat to judicial restraint and where principles of comity warrant such a solution.[240]

4. The conduct of the proceedings

California has unique rules regarding the conduct of arbitral proceedings. For domestic arbitrations, California law limits the types of attorneys who may represent parties. California courts also enforce strict rules regarding the neutrality of arbitrators. Arbitrators may issue orders to support the arbitration, including interim orders and discovery orders. As a default, parties to California arbitrations pay for their own costs and fees.

4.1 Representation by Counsel

Parties have the right to be represented by an attorney at any arbitration proceeding, although parties are not required to retain counsel in every instance.[241] In domestic arbitrations seated in California, a party can be represented by (a) a California-licensed attorney; or (b) any other licensed attorney who registers with the California Bar to act as "*Out-of-State Attorney Arbitration Counsel.*"[242] Additionally, with regard to international arbitration, as of January 1, 2019, parties can be represented by: (a) a California-licensed attorney; or (b) any "*qualified attorney*." A "*qualified attorney*" is any individual who is all of the following:

- "*Admitted to practice law in a state or territory of the United States or the District of Columbia or a member of a recognized legal profession in a foreign jurisdiction, the members of which are admitted or otherwise authorized to practice as attorneys or counselors at law or the equivalent.*"
- "*Subject to effective regulation and discipline by a duly constituted professional body or public authority of that jurisdiction.*"
- "*In good standing in every jurisdiction in which he or she is admitted or otherwise authorized to practice.*"[243]

A "*qualified attorney*" may provide legal services in a proceeding if any of the following conditions is satisfied:

- "*The services are undertaken in association with an attorney who is admitted to practice in this state and who actively participates in the matter.*"
- "*The services arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice.*"
- "*The services are performed for a client who resides in or has an office in the jurisdiction in which the attorney is admitted or otherwise authorized to practice.*"

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238 Dial 800 v. Fesbinder, 118 Cal. App. 4th 32, 46 (2004), as modified (May 5, 2004).

239 *See* Titan/Value Equities Group, Inc. v. Superior Court, 29 Cal. App. 4th 482, 487 (1994) (explaining that after a stay is issued, court retains "vestigial" jurisdiction to appoint arbitrators if the method selected by the parties fails, to provide a provisional remedy, and to confirm, correct, or vacate the award).

240 *See* Advanced Bionics Corp. v. Medtronic, Inc., 29 Cal. 4th 697, 708 (2002), as modified (Mar. 5, 2003); TSMC N. Am. v. Semiconductor Mfg. Int'l Corp., 161 Cal. App. 4th 581, 589 (2008).

241 Cal. Civ. Proc. Code § 1282.4(a).

242 *See* Cal. Civ. Proc. Code § 1282.4(b); California Bar, Out-of-State Attorney Arbitration Counsel, http://www.calbar.ca.gov/Admissions/Special-Admissions/Out-of-State-Attorney-Arbitration-Counsel-OSAAC.

243 Cal. Civ. Proc. Code § 1297.185.

- "*The services arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted or otherwise authorized to practice.*"

- "*The services arise out of a dispute governed primarily by international law or the law of a foreign or out-of-state jurisdiction.*"[244]

In sum, as of January 1, 2019, parties to international arbitrations seated in California can, in practice, be represented by almost any attorney they choose.

4.2 Arbitrator Neutrality

With regard to arbitrators, California courts closely guard the impartiality of arbitrators. California law requires neutral arbitrators to disclose, within 10 days of being nominated, "*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*."[245] Unlike the UNCITRAL Model Law, the CAA includes a lengthy list of specific circumstances that must be disclosed.[246] These required disclosures are extensive; for example, a neutral arbitrator must disclose any professional or personal relationship with any lawyer or law firm retained by any party.[247] Neutral arbitrators must also disclose if they have previously served as an arbitrator in any matter that involved one of the parties' counsel.[248] Once appointed, arbitrators in California enjoy absolute immunity from civil liability for acts arising from the arbitral process.[249]

If an arbitrator fails to file the required disclosures within 10 days, the arbitrator "shall be disqualified."[250] Moreover, an arbitrator's failure to disclose facts which "*could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial*" warrants vacation of his or her award, even without any show of prejudice.[251]

California courts will assist the parties with the appointment of an arbitrator if necessary, as follows:

> If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. 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.[252]

4.3 Interim Measures

California courts may also order interim measures, "*but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief*."[253] And there is no limitation on *ex parte* requests. However, the CAA does not grant arbitrators independent powers to issue interim

244 Cal. Civ. Proc. Code § 1297.186.

245 Cal. Civ. Proc. Code §§ 170.1, 1281.9.

246 See Cal. Civ. Proc. Code §§ 170.1, 1281.9.

247 Cal. Civ. Proc. Code § 1281.9(a)(6).

248 Cal. Civ. Proc. Code § 1281.9(a)(4).

249 La Serena Properties v. Weisbach, 186 Cal. App. 4th 893, 897 (2010).

250 *La Serena Properties*, 186 Cal. App. 4th at 897 ; § 1281.91(a).

251 *See, e.g.*, Benjamin, Weill & Mazer v. Kors, 195 Cal. App. 4th 40, 46 (2011).

252 Cal. Civ. Proc. Code § 1281.6.

253 Cal. Civ. Proc. Code § 1281.8.

measures, but the parties' agreement or the agreed-upon arbitration rules may allow for some interim or provisional relief.[254]

4.4 Confidentiality

The CAA does not provide for the confidentiality of the arbitral proceedings. It also does not regulate the length of the arbitration, the location of proceedings, the arbitrators' ability to admit or exclude evidence, and it does not make a hearing mandatory.[255]

4.5 Powers of the Arbitrator

Regarding available procedures, either the parties or the arbitrator may issue subpoenas for witness testimony or may require the production of documents to facilitate the arbitration.[256] In some cases, the CAA requires the arbitral panel to permit depositions. In any arbitration relating to "*any injury to, or death of, a person caused by the wrongful act or neglect of another*," the arbitral panel must permit the parties to take depositions of witnesses.[257]

4.6 Costs of Arbitration

Regarding costs of arbitration, the CAA states: "*Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit*."[258] However, special protections apply in consumer arbitrations. California law prevents arbitrators from "*requiring that a consumer who is a party to the arbitration pay the fees and costs incurred by an opposing party if the consumer does not prevail in the arbitration, including, but not limited to, the fees and costs of the arbitrator, provider organization, attorney, or witnesses*."[259]

5. The Award

Under the CAA, the arbitral award must 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*."[260] Absent and agreement by the parties, "*[a]rbitrators are not required to explain their awards or provide reasons for their conclusions*."[261]

With regard to annulling or vacating the award, a party may waive the right to seek the annulment of the award if it does not comply with the requirements of California Code of Civil Procedure Section 1286.4, which outlines the conditions to vacation of an award:

> The court may not vacate an award unless:
>
> (a) A petition or response requesting that the award be vacated has been duly served and filed; or
>
> (b) A petition or response requesting that the award be corrected has been duly served and filed and:

254 Cal. Civ. Proc. Code § 1281.8.

255 Cal. Civ. Proc. Code § 1282.2.

256 Cal. Civ. Proc. Code § 1282.6.

257 Cal. Civ. Proc. Code §§ 1283.1, 1283.05.

258 Cal. Vic. Proc. Code § 1284.2.

259 Cal. Civ. Proc. Code § 1284.3.

260 Cal. Civ. Proc. Code § 1283.4.

261 Arco Alaska, Inc. v. Superior Court, 168 Cal. App. 3d 139, 148 (1985) (citing Sapp v. Barenfeld, 34 Cal. 2d 515, 523 (1949)).

> (1) All petitioners and respondents are before the court; or
>
> (2) All petitioners and respondents have been given reasonable notice that the court will be requested at the hearing to vacate the award or that the court on its own motion has determined to vacate the award and all petitioners and respondents have been given an opportunity to show why the award should not be vacated.[262]

Through its conduct, or failing to assert its rights, a party may otherwise waive its right to seek annulment of an award.[263]

With regard to appealing an award, generally, "*[a]bsent an express agreement to the contrary, a court has no authority to 'review the merits of the controversy, the validity of the arbitrator's reasoning or the sufficiency of the evidence supporting the arbitrator's award*.'"[264]

California Code of Civil Procedure Section 1286.2 sets forth exceptions to this general rule of non-reviewability. By enacting the exceptions, the Legislature sought to permit judicial review when the circumstances show "'*serious problems with the award itself, or with the fairness of the arbitration process*.'"[265]

Under California Code of Civil Procedure Section 1286.2, a court shall vacate an arbitration award if the court determines the following:

> (1) The award was procured by corruption, fraud or other undue means.
>
> (2) There was corruption in any of the arbitrators.
>
> (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
>
> (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.
>
> (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.
>
> (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.[266]

With regard to confirming an award, *"[a]ny party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to*

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262 Cal. Civ. Proc. Code § 1286.4.

263 *See, e.g.*, Int'l All. of Theatrical Stage Employees & Moving Picture Mach. Operators of U.S. & Canada, Local No. 16 v. Laughon, 118 Cal. App. 4th 1380, 1387 (discussing waiver with regard to arbitration).

264 Emerald Aero, LLC v. Kaplan, 9 Cal. App. 5th 1125, 1137–38 (2017), *as modified on denial of reh'g* (Mar. 21, 2017), *review denied* (June 14, 2017) (quoting Hoso Foods, Inc. v. Columbus Club, Inc., 190 Cal. App. 4th 881, 887 (2010) and citing Richey v. AutoNation, Inc., 60 Cal. 4th 909, 916 (2015); Cable Connection, Inc. v. DIRECTV, Inc., 44 Cal. 4th 1334, 1339 (2008)).

265 *Emerald Aero*, 9 Cal. App. 5th at 1137–38 (quoting Haworth v. Superior Court, 50 Cal. 4th 372, 380 (2010)).

266 Cal. Civ. Proc. Code § 1286.2.

the arbitration and may name as respondents any other persons bound by the arbitration award."[267] "*A petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner. A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner*."[268] And *"[n]o petition may be served and filed … until at least 10 days after service of the signed copy of the award upon the petitioner*."[269]

"*If an award is confirmed, judgment shall be entered in conformity therewith*."[270] The judgment has the same force and effect as a judgment in a civil action, and it may be enforced like any other court judgment.

6. Funding arrangements

Under the CAA, there are no specific restrictions on funding arrangements—whether contingency or alternative fee arrangements, nor third-party funding. However, attorneys must navigate their ethical obligations.[271]

267 Cal. Civ. Proc. Code § 1285.

268 Cal. Civ. Proc. Code § 1288.

269 Cal. Civ. Proc. Code § 1288.4.

270 Cal. Civ. Proc. Code § 1287.4.

271 *See* Lica Miller, *Perils of Third-Party Funding*, L.A. LAW., (Mar.2017), http://www.lacba.org/docs/default-source/lal-magazine/2017-test-articles/march2017testarticle.pdf