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International Arbitration

First Edition

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USA

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Introduction

Despite its size and complex dual federal and state legal system, the United States is a favourable forum for international arbitration. Its federal and state arbitration statutes and decisional law reflect a strong public policy in favour of arbitration, especially international arbitration. Nowhere is this pro-arbitration policy more clearly set forth than in the Federal Arbitration Act (the "FAA"), which governs international arbitration in the United States, and the jurisprudence interpreting the FAA. Enacted in 1925, the FAA is divided into three chapters. The first chapter governs cases involving interstate or foreign commerce. The second chapter implements the New York Convention, which the United States signed in 1958.[1] The third chapter implements the Panama Convention, which the United States signed in 1975.[2]

The FAA governs the scope of arbitration agreements and requires courts to enforce the agreements according to their terms.[3] Taking into account the dual nature of the U.S. legal system, the FAA overrides any state laws that conflict with the federal arbitration law or undermine its policies. The role of state law in the arbitral process is generally to govern substantive issues, such as the interpretation of an arbitration agreement and its terms. In this regard, U.S. courts will ordinarily honour the parties' contractual choice of law, whether that of a U.S. state or another country.

New York, Florida, and Texas are particularly popular venues for international arbitration. The American Arbitration Association ("AAA") and its international division, the International Center for Dispute Resolution ("ICDR"), are both sited in New York but operate nationally and administer all types of domestic and international commercial disputes. The International Chamber of Commerce ("ICC") has a New York office with counsel and staff that administer North American-based ICC arbitrations. A number of other organisations, including JAMS and CPR, also administer international arbitrations in the United States. Some states have created organisations to facilitate the administration of arbitration proceedings. For example, the New York International Arbitration Center was established in 2012 to provide access to information on arbitrating in New York and coordinate the availability of access to hearing locations. In Manhattan, the New York state court system has assigned a senior judge in its Commercial Division, the Hon. Charles E. Ramos, to hear international arbitration-related cases in order to ensure efficient and consistent adjudication.[4] In public remarks, Justice Ramos has emphasised his intent to apply the pro-arbitration policy set out in the FAA and federal case law.

Arbitration agreements

The FAA's primary focus is to legislate the way in which the U.S. courts interact with

arbitration proceedings.[5] Unlike arbitration laws in some other countries, the FAA does not contain extensive regulations on the necessary components and formalities of arbitration agreements. Instead, arbitration agreements in the United States are viewed in much the same way as other commercial contracts and courts look to generally applicable principles of contract law in interpreting and giving effect to arbitration agreements.[6]

Nevertheless, both U.S. federal and state courts have developed a body of jurisprudence regarding the scope of arbitration agreements and the division of authority between arbitrators and courts.

Arbitrability

In determining whether a particular dispute is arbitrable, U.S. courts analyse the language of the relevant arbitration provision. Often, arbitration clauses will provide for the arbitration of all disputes "aris[ing] out of" or "relat[ing] to" the contract.[7] Where an agreement contains this type of language, U.S. courts will construe the arbitration provision "as broadly as possible" to allow for arbitration.[8]

Although U.S. courts favour arbitration and seek to read arbitration provisions broadly, parties are free to narrow the scope of arbitrable matters through a carefully crafted arbitration agreement. For instance, in *World Rentals and Sales, LCC v. Volvo Const. Equip. Rents, Inc.*, the court found that disputes involving a company's affiliates were not arbitrable because the arbitration agreement expressly excluded affiliates from the agreement to arbitrate.[9] Additionally, the courts will honour narrow arbitration agreements where parties have sought to ensure that only certain types of issues are arbitrable, such as by enumerating or specifying the issues that are subject to arbitration under their agreement.[10]

One area of frequent debate is whether the question of arbitratiblity is to be decided by the courts or the arbitrators. More recently, the U.S. federal courts have held that arbitrability is for the arbitrators to decide if the parties' arbitration agreement is broad enough to grant the arbitrators this power.[11] Typically, this question is answered by the arbitration rules referred to in the arbitration clause, because such rules are deemed to be part of the parties' arbitration agreement. For example, both the ICC and the AAA's International Dispute Resolution Procedures ("ICDR Rules") grant the arbitrators jurisdiction to decide arbitrability. In such disputes, the courts are often called on to distinguish between the question of whether a party has agreed to arbitrate anything at all (typically a question for the courts) or whether a party has agreed to arbitrate the particular dispute involved (a question for the arbitrators, assuming the parties have granted the arbitrators this jurisdiction). This distinction can be blurred when a non-party to an arbitration agreement seeks to arbitrate with a party to an arbitration agreement. However, the Federal Court of Appeals for the Second Circuit has held that the arbitrators can be granted jurisdiction to decide this, because the question is whether the signatory has agreed to arbitrate with this particular non-party.

Joinder

U.S. courts typically decide whether an individual or entity which is not a party to an arbitration agreement may be compelled to participate in arbitration or whether a non-party to an arbitration agreement may compel a party to arbitrate with the non-party. The Supreme Court has held that "traditional principles of state law allow a contract to be enforced by or against non-parties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel."[12] Thus, general principles of joinder and the consolidation of third parties apply, and if a non-party to an arbitration agreement demonstrates through its conduct that it is "assuming the obligation to arbitrate", that non-party can be compelled to arbitrate.[13] Additionally, if a non-party to a

contract with an arbitration clause "knowingly seeks the benefits of the contract containing the arbitration clause", that party can also be estopped from avoiding arbitration.[14]

The same principles apply where a non-party seeks to compel arbitration with the party to the arbitration agreement. For example, in New York, a signatory to an arbitration agreement was bound to arbitrate with a non-party to that contract because of the "close relationship between the entities."[15] However, as noted above, the jurisdiction to decide whether a signatory must arbitrate with a non-signatory has more recently been found to lie with the arbitrators rather than the court, where the signatory agreed to arbitrate under arbitration rules that contain a broad grant of jurisdiction to the arbitrators.

Another instance in which the issue of the joinder of non-parties to an arbitration agreement arises is with respect to corporations that have subsidiary or affiliated entities. In these instances, courts have applied traditional concepts of corporate law and determined that where a company which has entered into an arbitration agreement exercises complete control over a subsidiary and uses that control to commit wrongdoing, the parent corporation may be compelled to arbitrate in a dispute related to its subsidiary.[16] Additionally, a corporation which is a non-signatory to an arbitration agreement may be able to compel arbitration where its subsidiary is a signatory to the agreement.[17]

Separability

Courts in the United States have developed a body of law concerning the separability (or severability) of arbitration clauses contained in contractual agreements. According to the doctrine of separability, U.S. courts will typically preserve the parties' agreement to arbitrate even where there is a challenge to the validity of the underlying contract containing the arbitration clause (for example, where a party claims to have been fraudulently induced to sign the contract or argues for other reasons that it was null and void from inception),[18] or where there is a clause or obligation within that contract that is not enforceable or invalid by operation of law.[19]

Arbitration procedure

The FAA does not contain extensive rules concerning arbitration procedure. Accordingly, in the United States, the contracting parties are free to choose the mechanisms and procedures in their arbitration agreement.[20]

Typically, contracting parties choose how to arbitrate by agreeing to arbitrate under a particular set of arbitration rules administered by a designated arbitration institution, e.g., ICC or AAA. Each arbitration institution has its own unique set of procedures for commencing and carrying out an arbitration.[21]

In the U.S., the American Arbitration Association administers arbitrations and has different sets of rules that govern various types of disputes, including its International Dispute Resolution Procedures for international cases.[22] Additionally, the AAA has rules governing preliminary hearings and scheduling, selection of arbitrators, evidence, designation of the locale where the arbitration will be held, filing deadlines for written submissions, and fees.

The International Chamber of Commerce also has an extensive set of procedural rules, which were most recently amended in January of 2012.[23] These rules govern the joinder of parties, interim relief, hearings, and other case management techniques, which give the arbitrator(s) broad authority over the timing and nature of submissions of written and oral evidence.

Significantly, some U.S. states have adopted default arbitration procedures. These procedures apply where the arbitration agreement is otherwise silent regarding procedures, rules or

administration. Arizona, California, and Texas are among the states that have adopted default arbitration rules.[24]

Arbitrators

In the U.S., the parties to an arbitration can determine the number of arbitrators that will decide their dispute and how they are selected. Typically the parties regulate this in their arbitration clause or by selecting a set of rules or an administrative body.[25] For example, the AAA's ICDR Rules provide for the appointment of one arbitrator where the parties have not specified the number of arbitrators in their agreement, unless the "administrator determines in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case".[26] Alternatively, the parties may elect for arbitrators to be selected by an arbitration institution or court.

Where the arbitration agreement does not contain provisions governing the selection of an arbitrator, FAA section 5 provides for the courts to "appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein […]". Further, even where an arbitration agreement contains an arbitrator-selection provision, courts have nevertheless stepped in to select an arbitrator where the arbitrator-selection provision itself is "fundamentally unfair".[27] Similarly, if an arbitrator exhibits bias during the arbitration proceedings, a party to the arbitration may challenge the award in a post-arbitration court proceeding.[28]

Interim relief

The FAA is silent on the issue of interim relief. However, parties which have agreed to an arbitration in the U.S. may seek an injunction from a U.S. state or federal court. Some U.S. states have statutes that specifically address interim relief in aid of arbitration. For example, New York state's procedural law permits parties to seek an injunction and other provisional relief in aid of an arbitration where "the award to which the applicant may be entitled may be rendered ineffectual" if interim relief is not granted.[29]

Texas and Florida have also adopted laws concerning interim relief in aid of arbitration, enabling parties to get an injunction in relation to arbitration proceedings.[30]

If the parties have opted to arbitrate under the rules of an arbitration institution, the institution's interim relief procedures govern. The ICDR Rules leave the parties free to seek interim relief from the courts in appropriate cases.[31] In the ICC, a special emergency arbitrator may be appointed to matters concerning urgent attention.[32] The arbitrator may order "any interim or conservatory measure it deems appropriate".[33] Under the ICC Rules Article 29(2), parties must abide by all orders issued by an emergency arbitrator. Similarly, the ICDR adopted emergency arbitral relief procedures pursuant to Article 37 of its International Dispute Resolution Procedures.[34] Article 37 provides for the appointment of an emergency arbitrator to rule on applications for interim relief. These interim relief measures are available for parties who entered into arbitration agreements on or after May 1, 2006. It should be noted that in the case of judicial injunctions, the courts have an array of mechanisms, including contempt of court, to compel enforcement. Questions exist as to how to enforce an arbitral injunction where a party refuses to comply.

Arbitration award

The FAA does not require an arbitration award to take a particular form. A number of states,

including New York, Texas, and Florida, require that the award must be in writing and signed by the arbitrators.[35] Florida and Texas require a reasoned decision, unless the parties agree otherwise.[36] This is similar to the requirements imposed on arbitrators by the ICC and ICDR Rules.[37] In general, however, parties can agree to the form any award must take. In New York, for example, the courts have vacated an award where the arbitrators failed to draft the award in the agreed-upon form.[38]

The FAA and state laws do not impose limitations or constraints on the types of relief the arbitrators are permitted to award. The parties themselves may, however, circumscribe the relief available in their agreement to arbitrate. For example, the parties can limit the types of damages the arbitrators can award. Limitations on the ability to award punitive or consequential damages are common and generally enforceable. Equally, the parties can agree that the arbitrators cannot award legal fees to the prevailing party. If the parties do not specifically agree on the types of relief available, an arbitrator can grant any form of relief that is rationally related to the purpose of the original agreement, taking into account the applicable laws.[39] Arbitrators may also award pre- and post-award interest, in accordance with the rules of the arbitration and the applicable state or federal laws.[40]

Unlike the rule that prevails in many other jurisdictions, in the U.S. legal system, parties to a lawsuit are generally required to bear their respective legal fees regardless of who wins.[41] This contrasts with the practice in international arbitration, where arbitrators are typically free to award attorneys' fees and arbitration costs to the winning party. The FAA is silent as to fee and cost allocation, but courts interpreting the FAA have held that it does not prohibit an award of fees and costs.[42] State arbitration laws in New York, Florida, and Texas do not explicitly preclude arbitrators from awarding fees and costs.[43] The courts in New York, Florida and Texas have been willing to allow arbitrators to award attorneys' fees and costs, particularly if the parties' agreement provides for such recovery or if the parties have otherwise demonstrated the intent to do so, such as when both parties request costs and fees in their pleadings[44] or if the arbitral rules chosen by the parties permit their recovery.[45]

Challenge of the arbitration award

Because of the strong federal policy favouring arbitration, a party that seeks to challenge an arbitration award in the United States faces a difficult burden. Public policy and judicial precedent impose severe limits on a court's ability to review arbitration awards and parties cannot agree to expand the scope of that review.[46]

To challenge an international arbitration award in a U.S. court, the challenging party must serve notice of a motion to vacate, modify or correct an award within three months after the award is filed or delivered.[47] The court must, however, have personal jurisdiction over the parties and subject matter jurisdiction. Personal jurisdiction is acquired easily if the responding party[48] is located in the state in which the court sits or if the responding party has agreed to arbitrate in that state.[49] If a responding party is located outside the state, the enforcing party must establish personal jurisdiction through the activities and contacts of the responding party. The guidelines for doing so will be found in the applicable state and federal laws on personal jurisdiction.[50]

Because the FAA does not confer original federal court subject matter jurisdiction for an action to vacate an award governed by the New York or Panama Conventions (as opposed to actions to enforce arbitration agreements or confirm awards), if the party that seeks to vacate an award wishes to do so in federal court, that party must establish an independent basis for federal court subject matter jurisdiction.[51] The two sources of federal subject matter

jurisdiction are 28 U.S.C. § 1331 and 28 U.S.C. § 1332, which respectively grant federal courts the power to hear cases "arising under" federal laws or involving complete diversity among the parties.[52] As a practical matter, such cases are generally heard in federal court because the typical response to an application to vacate is an application by the respondent to confirm the award. The federal courts do have original jurisdiction over an application to confirm, and hence over the related application to vacate.

The FAA provides separate criteria on which to vacate or modify an award.

Section 11 of the FAA governs the modification of awards. Under section 11, parties may apply for a modification of an award:

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

In practice, the FAA empowers courts to modify or correct an award to promote justice between the parties and effectuate the intent of the award.[53]

Parties that seek to vacate an award in its entirety face serious obstacles in that the U.S. section 10 of the FAA strictly limits the grounds upon which a party may seek *vacatur* to the following:[54]

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause show, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehaviour by which the rights of any party have been prejudiced; or
4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[55]

The first ground imposes a significant burden on the moving party. In general, to secure *vacatur* under section 10(a)(1) the party must "(1) establish the existence of the alleged fraud or undue means by clear and convincing evidence, (2) demonstrate due diligence in attempting to discover the fraud before entry of the award, and (3) demonstrate that the fraud was material to the arbitrators' decision".[56] At least one court has held that the party must provide evidence of intentional malfeasance on the part of a party to the arbitration to successfully vacate an award on the grounds of corruption, fraud, or undue means.[57]

Courts have vacated awards based on the second ground where a "reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration".[58] The party that seeks *vacatur* does not need to prove actual bias; rather, partiality can instead "be inferred from objective facts inconsistent with impartiality".[59] For example, an arbitrator's failure to disclose certain relationships or interests may suggest bias, but non-material or insubstantial relationships will not satisfy the evident partiality standard.[60]

An arbitration award can be vacated pursuant to the third ground where a court finds that an arbitrator was guilty of misconduct that compromises the "fundamental fairness" of the arbitral proceeding.[61] Examples of misconduct rising to this level include when an arbitrator has refused "to hear evidence pertinent and material to the controversy",[62] or held the proceeding during a time one party specified he was unavailable,[63] or refused to grant an adjournment to accommodate the schedule of a key witness.[64] *Vacatur* on this ground is

only permitted when "the arbitrator's exclusion of evidence prejudices one of the parties".[65]

Finally, a party may seek to vacate an award when the arbitrators "exceed their powers".[66] This is perhaps the most difficult of the four grounds available to the challenging party because courts have "consistently accorded the narrowest of readings" to the language of FAA section 10(a)(4).[67] The U.S. Supreme Court has held that an arbitrator exceeds their powers for the purposes of 10(a)(4) "only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice […]".[68] Thus, a court will not analyse the correctness of the arbitrator's decision on a particular issue; the court is limited to determining the scope of the arbitrator's powers.[69]

In addition to the FAA's four grounds, some U.S. courts have held that an arbitration award can be vacated if it is in "manifest disregard" of the law. In the 2008 case of *Hall St. Associates*, however, the U.S. Supreme Court held that FAA section 10(a) provides the exclusive grounds for vacating an arbitration award.[70] After *Hall St. Associates*, there is still some debate in the federal courts as to the continuing viability of the manifest disregard doctrine. Some courts have reasoned that manifest disregard constitutes exceeding the arbitrators' authority and thus remains a viable ground to set aside an award. Regardless, successful *vacatur* on this ground is, in practice, extraordinarily difficult to obtain. An appeals court recently described manifest disregard as a "last resort" doctrine.[71] A party seeking to vacate an arbitration award for manifest disregard must show: (1) that the law that was allegedly ignored was clear; (2) that the arbitrators did in fact err in their application of the law; and (3) that the arbitrators knew of the law's existence and its applicability to the issues before them.[72] Since the birth of the manifest disregard doctrine in 1960, no international arbitration awards have been vacated on this ground.[73]

Overall, the courts in the United States have demonstrated hostility to challenges to awards and may even sanction the challenging party in an appropriate case.[74]

Enforcement of the arbitration award

U.S. courts play an active role in enforcing international arbitration awards. The courts regularly and consistently issue judgments confirming such awards. Following the arbitrator's issuance of an award, a party can file a motion or petition to confirm the award in federal[75] or state court.[76] With regard to form, the petition to confirm the award must include the arbitration agreement and the award, though parties are also free to support the petition with any necessary affidavits, briefs, or other documents. A party must move to confirm an award within three years from the entry of the award.[77] Once a judgment confirming the award has been issued, the winning party can enforce that judgment using the various enforcement procedures available in every state. These procedures include freezing assets of the judgment debtor if a monetary award is involved.

To confirm the award, however, a court must have personal or quasi *in rem* jurisdiction over the parties.[78] In addition to jurisdiction over the parties, the court must also have subject matter jurisdiction to enforce an award. The U.S. federal courts have original subject matter jurisdiction over proceedings to confirm international arbitration awards pursuant to the FAA. This means a proceeding to confirm an international award can be brought in federal court or, if it is brought in state court, the respondent can remove the case to federal court.[79]

Provided the jurisdictional requirements are met, once a party properly submits a motion to confirm an award, the burden shifts to the adverse party who must prove a defence to enforcement.[80] Thus, confirmation of an award is generally a summary process unless the opposing party resists confirmation of an award and proves that one of the seven defences provided by the FAA applies:

1. the parties to the agreement […] were […] under some incapacity, or the said agreement is not valid under the law;
2. the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings;
3. the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitrate;
4. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
5. the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;
6. the subject matter of the difference is not capable of settlement by arbitration; or
7. the recognition or enforcement of the award would be contrary to the public police of the country in which enforcement or recognition is sought.[81]

A party that opposes the confirmation of an award rendered outside the United States is restricted to the seven grounds detailed above, and its burden is a heavy one.[82] Where an award is rendered inside the U.S., the domestic provisions of the FAA apply.[83] A party that opposes the confirmation of an award rendered inside the U.S. can thus seek to vacate or modify the award under FAA sections 10 and 11, as discussed above.

Because of the public policy favouring arbitration, particularly international arbitration,[84] courts in the United States regularly confirm and enforce arbitration awards. In fact, U.S. courts "must confirm an award unless it is vacated, modified, or corrected".[85]

Investment arbitration

As a signatory to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, the United States is a member of the International Centre for Settlement of Investment Disputes ("ICSID").[86] The United States is also a leading signatory of the North American Free Trade Agreement ("NAFTA") and is committed to "protect[ing] cross-border investors and facilitat[ing] the settlement of investment disputes".[87] The United States enjoys observer status to the Energy Charter Conference, but is not a signatory to the Energy Charter Treaty.[88]

Finally, the United States is a party to dozens of bilateral investment treaties ("BITs") and multi-party investment treaties ("MITs"). Each BIT is structured on the basis of a standard model, which is periodically updated by the Department of State and the Office of the United States Trade Representative ("USTR"). The current version was completed in 2012.[89] A full list of each BIT currently in effect is maintained by the Department of State.[90]

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* * *

Endnotes

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, 21

U.S.T. 2517, 330 U.N.T.S. 38, June 10, 1958.
2. Inter-American Convention on International Commercial Arbitration of 1975, OAS/SER. A20 (SEPEF), 14 I.L.M. 336 (1975), January 30, 1975.
3. *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010).
4. For statutory reasons explained below, most legal actions concerning international arbitration are heard in the federal, not state, courts.
5. 9 U.S.C. § 1.
6. *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010).
7. *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 75 (2d Cir. 1997); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 848 (2d Cir. 1987) (requiring arbitration where the arbitration clause contained "relating to" language); *Sedco v. Petroleos Mexicanos Mexican Nat'l Oil*, 767 F.2d 1140, 1145 (5th Cir.1985) (requiring arbitration where "arising out of" language was used).
8. *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 19 (2d Cir.1995).
9. *World Rentals and Sales, LLC v. Volvo Const. Equip. Rents, Inc.*, 517 F.3d 1240, 1246 (11th Cir. 2008).
10. *See, e.g.*, *Negrin v. Kalina*, 2010 WL 2816809, at *5-6 (S.D.N.Y. July 15, 2010) (finding that where an arbitration clause limited covered disputes to disputes over profit distributions or non-compliance with bylaws, claims for breach of fiduciary duty, unjust enrichment, tortious interference with contract, fraud, and conversion were not covered by the arbitration clause and thus could be litigated in court); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 3784938, at *3 (N.D. Cal. Jul. 18, 2013) (finding that where an arbitration clause limited covered disputes to disputes concerning "the terms of this Agreement," antitrust claims related to price determination were not covered by the Agreement's arbitration clause, even where the agreement stated that prices would be set forth in one party's pricing guidelines).
11. *See, e.g.*, *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (holding that where parties adopt rules that empower the arbitrators to decide arbitrability, "the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator").
12. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009).
13. *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995).
14. *Everett v. Paul Davis Restoration*, 771 F.3d 380, 383 (11th Cir. 2014) (internal quotations omitted).
15. *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995).
16. *See Variable Annuity Life Ins. Co. (VALIC) v. Dull*, 2009 WL 3064750, at *4 (S.D. Fla. [DATE] 2009).
17. *Barton Enterprises, Inc., v. Cardinal Health, Inc.*, 2010 WL 2132744, at *4 (E.D. Mo. May 27, 2010).
18. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (holding that "an arbitration provision is severable from the remainder of the contract").
19. *Beletsis v. Credit Suisse First Boston, Corp*., 2002 WL 2031610, at *6 (S.D.N.Y. Sept. 4, 2002).
20. Dept. of Commerce, *International Arbitration, Ad Hoc Arbitration* (Mar. 2005) (stating that parties engaging in *ad hoc* arbitration may choose the rules under which their arbitration will be carried out).
21. Except when using arbitration rules, such as the UNCITRAL Rules, that are not associated with an arbitral institution, parties should agree to use the rules of the organisation they designate to administer the case.
22. *See* American Arbitration Association, *ICDR, International Dispute Resolution Procedures* (Jun. 1, 2009) ("ICDR Rules").
23. ICC Rules of Arbitration (Jan. 1, 2012) ("ICC Rules").
24. *See, e.g.*, Ariz. Rev. Stat. §§ 12-1501-1518 (2015); Tex. Civ. Prac. & Rem §§ 171.041-171.055 (2014); Cal. Code. Civ. Proc. §§ 1280-1284.3 (2014).
25. The parties are well-advised not to stipulate to a particular arbitrator in their clause.

Doing so can create problems of enforceability if the arbitrator is unavailable or unwilling to hear the case when the dispute arises. The parties should also agree that the case will be decided by an uneven number of arbitrators so as to avoid deadlock.

26. ICDR Rules Art. 5.
27. *Nishimura v. Gentry Homes, Ltd.*, 338 P.3d 524, 534-35 (Haw. 2014) (finding an arbitration-selection provision fundamentally unfair where one party exercised exclusive control over the pool of potential arbitrators from which the arbitrator would be selected).
28. *Id.* at 532; *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d [MISSING], 981 (2d Cir. 1996) (finding that where the defendants challenged the selected arbitrator based on bias, the defendants would not be able to present credible evidence of bias where the case had not yet gone to arbitration).
29. NY CPLR § 7502(c).
30. Tex. Civ. Prac. & Rem. Code § 172.175 (2013); Fla. Stat. § 684.0028 (2014).
31. *See, e.g.*, ICDR Rules Art. 6 (6).
32. ICC Rules, Art. 29. ICC Rules Art. 29 and Appendix V, however, require that the parties "opt out" of their emergency procedures.
33. ICC Rules Art. 28.1.
34. ICDR Rules Art. 37.
35. NY CPLR § 7507; Fla. Stat. Ann. § 684.0042; Tex. Civ. Prac. & Rem. Code Ann. § 172.141.
36. Fla. Stat. Ann. § 684.0042; Tex. Civ. Prac. & Rem. Code Ann. § 172.141.
37. *See* ICC Rules Art. 31; *see also* ICDR Rules Art. 30.
38. *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 843 (11th Cir. 2011) ("An arbitrator may also exceed her authority by failing to provide an award in the form required by an arbitration agreement."); *Am. Centennial Ins. Co. v. Global Int'l Reinsurance Co., Ltd.*, 2012 WL 2821936 (S.D.N.Y. [DATE] 2012) (same).
39. *See Am. Laser Vision v. The Laser Vision Inst., L.L.C.*, 487 F.3d 255, 258–59 (5th Cir. 2007), *abrogated on other grounds by Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1320 (5th Cir. 1994); *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1219 (5th Cir. 1990) ("[A]rbitrators have traditionally enjoyed broad leeway to fashion remedies.").
40. Tex. Civ. Prac. & Redm. Code § 172.144 (permitting an award of interest); AAA Commercial Rules Art. R-43(d)(i) (permitting an award of interest).
41. The parties are free to agree to a different rule in their contract. Moreover, certain statutes provide for an award of legal fees to the prevailing party for claims based on the statute.
42. *Painewebber, Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996); *Turnberry Assocs. v. Serv. Station Aid, Inc.*, 651 So. 2d 1173, 1175 (Fla. 1995) ("Absent a clear directive from the legislature, we see no reason why the parties may not also voluntarily agree to allow the collateral issue of attorney's fees to be decided in the same forum as the main dispute."); *see also Stone & Webster, Inc. v. Triplefine Int'l Corp.*, 118 Fed. App'x 546, 550 (2d Cir. 2004); *IBK Enters., Inc. v. One Key, LLC*, 19 Misc.3d 1131(A), at *5 (Sup. Ct. N.Y. County 2008); *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 751 So. 2d 143, 145, 149 (Fla. 1st DCA 2000) (emphasis added).
43. *Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F.2d 228, 231 (2d Cir. 1982); Fla. Stat. Ann. § 682.11 ("Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' and umpire's expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award."); Tex. Civ. Prac. & Rem. Code Ann. § 172.145(b). In an unpublished decision the Fifth Circuit has held that this statute authorises an arbitrator to award costs and legal fees in an international arbitration seated in Texas. *Saipem America v. Wellington Underwriting Agencies Ltd.*, 2009 WL 1616122 (5th Cir. June 9, 2009).
44. *See, e.g*., *Synergy Gas Co. v. Sasso*, 853 F.2d 59, 64 (2d Cir. 1988).
45. *Shaw Grp., Inc. v. Triplefine Int'l Corp.*, 2003 WL 22077332, at [*PIN] (S.D.N.Y. Sept. 8, 2003), *aff'd* 322 F.3d 115 (2d. Cir. 2003) (confirming an arbitrator's award of

attorneys' fees because the contract provided for arbitration under the ICC Rules, which authorised award legal of fees to the prevailing party); *IBK Enters., Inc. v. One Key, LLC*, 19 Misc.3d 1131(A), at *5 (Sup. Ct. N.Y. County [DATE] 2008) (declining to vacate an award where the parties had incorporated the American Arbitration Association's Construction Arbitration Rules ("AAA Construction Rules") into their contract, and such rules expressly empowered the arbitrator to awarded attorneys' fees); *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 751 So. 2d 143, 145, 149 (Fla. 1st DCA 2000) (directing trial court to reinstate an arbitrator's award of attorneys' fees on the grounds that the arbitrator was authorised to award such fees by virtue of the parties' NASD submission agreement − which committed to arbitration "the present matter in controversy, as set forth in the attached statement of claim, answers *and all related counterclaims and/or third party claims which may be asserted*") (emphasis added).

46. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008); *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Ins. Co*., 668 F.3d 60, 71 (2d Cir. 2012) (internal quotations omitted).
47. FAA § 13.
48. The moving party cannot predicate jurisdiction on its own presence in the state.
49. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982) (noting that "lower federal courts have found such consent [to personal jurisdiction] implicit in agreements to arbitrate"); *Reed & Martin, Inc. v. Westinghouse Electric Corp.*, 439 F.2d 1268 (2d Cir.1971); *Harch Hyperbarics, Inc. v. Martinucci*, 2010 U.S. Dist. LEXIS 98159, at *13 (E.D. La. Aug. 20, 2010); *Bozo v. Bozo*, 2012 U.S. Dist. LEXIS 175412, at *2 (S.D. Fla. Nov. 21, 2012).
50. *See generally* 4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1069 [EDITION, DATE].
51. *Baltin v. Alaron Trading Corp*., 128 F.3d 1466, 1469 (11th Cir. 1997); *Smith v. Rush Retail Ctrs., Inc.*, 360 F.3d 504, 506 (5th Cir. 2004); Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 26 (2d Cir. 2000); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc*., 126 F.3d 15, [PINCITE] (2d Cir. 1997); *Int'l Ship. Co., S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 391 n.5 (2d Cir. 1989) (affirming the district court's holding that a motion to vacate a Convention award did not have subject matter jurisdiction).
52. 28 U.S.C. § 1331; 28 U.S.C. § 1332.
53. FAA § 11.
54. *Hall St. Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 578 (2008).
55. FAA § 10(a)(1)-(4).
56. *Houston Gen. Ins. Co. v. Certain Underwriters at Lloyd's London*, 2003 U.S. Dist. LEXIS 19516, at [*PIN] (S.D.N.Y. [DATE] 2003) (internal citation omitted).
57. *Natl. Cas. Co. v. First State Ins. Grp.*, 430 F.3d 492, 499 (1st Cir. 2005).
58. *Morelite Const. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 84 (2d Cir. 1984).
59. *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Ins. Co*., 668 F.3d 60, 72 (2d Cir. 2012).
60. *Id*.
61. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997); *Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985) (an arbitrator "must give each of the parties to the dispute an adequate opportunity to present its evidence and argument").
62. FAA § 10(a)(3); *Fairchild v. Alcoa, Inc.*, 510 F. Supp. 2d 280, [PIN] (S.D.N.Y. 2007) ("That provision applies to cases where an arbitrator, to the prejudice of one of the parties, rejects consideration of relevant evidence essential to the adjudication of a fundamental issue in dispute, and the party would otherwise be deprived of sufficient opportunity to present proof of a claim or defense.").
63. *Tube & Steel Corp. of Am. v. Chicago Carbon Steel Prods.*, 319 F. Supp. 1302, 1304 (S.D.N.Y. 1970).
64. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).

65. *Rai v. Barclays Capital, Inc.*, 739 F. Supp. 2d 364, 372 (S.D.N.Y. 2010).
66. FAA § 10(a)(4).
67. *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 220 (2d Cir. 2002) (citation omitted).
68. *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp*., 130 S. Ct. 1758, 1767 (2010).
69. *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 220 (2d Cir.2002) (citation omitted).
70. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).
71. *Sotheby's Int'l Realty Inc. v. Relocation Grp. LLC*, 588 Fed. Appx. 64, 65 (2d Cir. 2015) (internal citation omitted).
72. *Id.* at 65-66.
73. *See The "Manifest Disregard of Law" Doctrine and International Arbitration in New York,* Report by the Committee on International Commercial Disputes of the New York City Bar Association (August 2012) at 6.
74. *DigiTelCom, Ltd. v. Tele2 Sverige AB*, 2012 WL 3065345, at [*PIN] (S.D.N.Y. July 25, 2012) (issuing sanctions against law firm and requiring reinbursement of attorneys' fees for frivolous motion to vacate arbitral award); *Ingram v. Glast, Phillips & Murray*, 196 F. App'x 232, 233 (5th Cir. 2006) (upholding sanctions of attorneys' fees, costs, and expenses against attorneys for their bad-faith conduct, which included the pursuit of post-arbitration litigation "knowing that it was a 'complete sham'"); *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, [PIN] (11th Cir. 2006) (expressing future intention to issue sanctions for frivolous petitions to vacate arbitral award).
75. FAA § 6.
76. NY CPLR § 7510.
77. FAA § 207.
78. *See First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd*., 703 F.3d 742, [PIN] (5th Cir. 2012); *Frontera Resources Azerbaijan Corp. v. State Oil Company of the Azerbaijan Republic,* 582 F.3d 393, 397 (2d Cir. 2009*); S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1303–05 (11th Cir. 2000).
79. FAA § 207 (incorporated by FAA § 302 so as to apply to Panama Convention awards).
80. *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc*., 403 F.3d 85, 90 (2d Cir. 2005).
81. New York Convention Art. V; *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997).
82. *Gulf Petro Trading Co., Inc. v. Nigerian Nat. Petroleum Corp*., 512 F.3d 742, 747 (5th Cir. 2008).
83. *Commercial Risk Reinsurance Co. Ltd. v. Security Ins. Co. of Hartford*, 526 F. Supp. 2d 424, 427 (S.D.N.Y. 2007) ("However, because the arbitration occurred in the United States, the Award as to the Commercial Risk Bermuda company is also governed by the FAA provisions applicable to domestic arbitration awards.") (citing *Zeiler v. Deitsc*, 500 F.3d 157, 164 (2d Cir. 2007)).
84. *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, U.S., 9 F.3d 1060, 1063 (2d Cir. 1993) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 629-631 (1985)).
85. *Hall Street Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 577 (2008) (internal citations and quotations omitted).
86. *See* ICSID, *Database of ICSID Member States*, available at: https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx?tab=UtoZ&rdo=BOTH.
87. *See* U.S. Department of State, *NAFTA Investor-State Arbitrations*, available at: http://www.state.gov/s/l/c3439.htm.
88. *See* Energy Charter Conference, *Members and Observers*, available at: http://www.encharter.org/index.php?id=61.
89. Available at: http://www.state.gov/e/eb/ifd/bit/index.htm.
90. Available at: http://www.state.gov/e/eb/ifd/bit/117402.htm.

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