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A Q&A guide to arbitration in the United States.

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General

1. Please give a brief overview of the use of commercial arbitration in your jurisdiction, including any recent trends. What are the general advantages and disadvantages of arbitration compared to court litigation in your jurisdiction?

In the United States (US), there is a federal policy in favour of arbitration as an alternative method of dispute resolution. This policy requires courts to enforce privately made agreements to arbitrate as they would other contracts. This policy does not require parties to arbitrate in the absence of their agreement, but if parties have agreed to arbitrate, they are bound by that agreement. Any doubts relating to the scope of arbitrable issues must be resolved in favour of arbitration, whether the issue concerns a construction of the language of the agreement itself, or a defence to arbitrability. The federal policy is even stronger in international business transactions (*Scherk v. Alberto-Culver Co.*).

There are many differences between commercial arbitration and litigation, for example:

- Arbitration is private, litigation is public. For example, court filings are typically a matter of public record.
- Arbitration proceedings are likely to have more limited discovery than litigation in the US.
- Because of the New York Convention, to which the US is party, international arbitration awards rendered in the US are easier to enforce abroad than court judgments rendered in the US (the US is not a party to any multilateral or bilateral treaties relating to the enforcement of its judgments abroad).
- The grounds to challenge arbitration awards are significantly more limited than grounds to challenge court judgments.
- Most civil cases are heard by a jury. By contrast, arbitrations are conducted by one or three arbitrators specialised in the particular matter.

2. Which arbitration organisations are commonly used to resolve large commercial disputes in your jurisdiction? Please give details of both arbitral institutions and professional/industry bodies, including the website address of each organisation.

The following organisations are commonly used to resolve large commercial disputes:

- American Arbitration Association (AAA) (*www.adr.org*).

- International Centre for Dispute Resolution (ICDR) (*www.adr.org*). ICDR is the international branch of the AAA.
- JAMS (*www.jamsadr.com*). It is the largest private ADR provider in the world.
- The New York office of the ICC International Court of Arbitration (*www.iccwbo.org/policy/arbitration/id2882/index.html*).

All organisations above also provide mediation services.

3. What legislation applies to arbitration in your jurisdiction? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?

The Federal Arbitration Act (FAA) applies to all international arbitrations seated in the US (*section 1 et seq, FAA*). State law (determined by the location of pending arbitration) also applies to the extent it does not conflict with the FAA.
The US has not adopted the UNCITRAL Model Law.

4. Are there any mandatory legislative provisions (for example, relating to removal of arbitrators, challenge of awards and arbitrability)? If yes, please summarise their effect.

The FAA does not specify which provisions are mandatory and which are not. However, the courts' interpretation indicates that certain FAA provisions cannot be waived or altered by the parties' agreement. For example, the Supreme Court has held (*Hall Street Assoc. v. Mattel, 552 U.S. 576 (2008)*) that certain grounds for vacating and modifying an arbitral award (*sections 10-11, FAA*) cannot be expanded by the parties' agreement. Courts have also held that these grounds cannot be waived by the parties' agreement (therefore, they are mandatory).

5. Are there any requirements relating to independence or impartiality?

An arbitral award can be vacated if there was evident partiality or corruption in any or all of the arbitrators (*section 10(a)(2), FAA*). Evident partiality is found if a reasonable person would conclude that the arbitrator was partial to one party or the other. The standard is objective. An actual subjective bias of the arbitrator need not be shown. However, there must be more than a mere appearance of bias. An arbitrator's failure to disclose material conflicts or relationships with a party, witness or a fellow arbitrator can satisfy the evident partiality standard and be a grounds for vacating an award.
In addition, arbitrators must ensure the parties are not misled into believing that no non-trivial conflict exists. The arbitrator has an affirmative duty to investigate potential conflicts once notified of these conflicts. Once the arbitrator accepts an appointment to serve on the tribunal, he must not enter into other engagements which would present a conflict. Mere disclosure of the conflicting engagement is not sufficient to avoid evident partiality.

6. Does the law of limitation apply to arbitration proceedings? If yes, briefly state the usual length of limitation period(s) and what triggers or interrupts it in the context of

commercial arbitration.

Statutes of limitation apply to arbitration proceedings to the same extent as to court litigation. For example, under New York law, arbitration claims based on a breach of a written contract must generally be asserted within six years from the date of breach (*section 213(2), N.Y.C.P.L.R.*). The statute of limitation applicable to claims in a particular arbitration depends on the substantive state law regulating the parties' claims. In New York, for example, if a respondent seeks a judicial stay of arbitration on the grounds that the party is not obligated to submit a claim to arbitration, the limitation period is interrupted from the time the demand for arbitration is filed until a court finally determines that the dispute is not subject to arbitration (*section 204(b), N.Y.C.P.L.R.*).

Arbitration agreements

7. For an arbitration agreement to be enforceable:

- **What substantive and/or formal requirements must be satisfied?**

- **Is a separate arbitration agreement required or is a clause in the main contract sufficient?**

An arbitration agreement is in force and recognised, provided a "written provision" demonstrates an intent to submit a dispute to arbitration, subject to statutory exemptions or equity relating to contract revocation (*section 2, FAA*). US courts have interpreted the writing requirement broadly to include unsigned contracts, exchanges of writings (including e-mails and faxes), and tacit acceptance of correspondence containing an arbitration provision. An arbitration agreement can also be contained in a separate document, which is incorporated into the main contract.
A separate arbitration contract is not required and a clause in the main contract is sufficient.
The scope of arbitrable disputes depends on the arbitration clause. Arbitration of commercial, tort, labour, employment discrimination, consumer, securities and statutory disputes arising out of interstate or foreign estate are permitted under the FAA.

8. Do statutory rules apply to the arbitration agreement? For example, are there restrictions on the number, qualifications/characteristics or selection of arbitrators?

No statutory rules apply to the arbitration agreement, except the requirement that the agreement be in writing (*see Question 7*).

9. In what circumstances can a third party be joined to an arbitration, or otherwise be bound by an arbitration award? Please give brief details.

The distinction must be drawn between two categories of cases relating to non-signatory third parties:

- A non-signatory seeks to enforce an arbitration agreement against a signatory, by, for example, requesting the court to compel the signatory to arbitrate or to stay a lawsuit commenced by that signatory.

- A signatory seeks to enforce an arbitration agreement against a non-signatory.

Cases involving attempts by a non-signatory to enforce an arbitration clause against a signatory are considered less problematic, as it is undisputed that the resisting signatory agreed to arbitrate (even if not with the person seeking to enforce the arbitration agreement). Courts are normally willing to resolve these cases by determining, as a matter of law, whether there is clear and unmistakable evidence that the arbitration agreement grants the arbitral tribunal the authority to determine its own jurisdiction. If the tribunal is deemed to have such jurisdiction, courts will refer the case to the tribunal to determine whether or not the signatory needs to arbitrate with the non-signatory.

To compel non-signatories to arbitrate, courts have identified six main valid methods:

- Incorporation by reference.
- Assumption by conduct.
- Agency.
- Piercing of the corporate veil.
- Estoppel.
- Third party beneficiary.

In addition, the Supreme Court has recently permitted cases to go forward as class arbitrations (*Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003)*). However, at the moment class arbitrations are being revisited by the US Supreme Court in the *Stolt-Nielsen S.A., et al. v. Animal Feeds International Corp. (08-1198)*.

Procedure

10. Does the applicable legislation provide default rules governing the appointment and removal of arbitrators, and the start of arbitral proceedings?

There are no default rules under the FAA that specifically regulate the appointment and removal of arbitrators, or the start of arbitral proceedings.

The federal court has the authority to appoint an arbitrator under specific circumstances (for example, if an arbitration agreement does not specify a method or if the specified method is not followed, or to fill a vacancy) (*section 5, FAA*). There are no standing procedures to guide the courts, and instead the parties must rely on an individual judge's discretion in making the appointment.

Courts generally enforce agreements that require parties to negotiate or mediate before commencing an arbitration, although courts usually consider these agreements to be within the arbitrator's jurisdiction, rather than the courts'.

11. What procedural rules are arbitrators likely to follow? Can the parties determine the procedural rules that apply? Does the legislation provide any default rules governing procedure?

Parties to an arbitration agreement have a broad discretion over the applicable procedural rules, as courts

enforce arbitration agreements according to the written terms and there are no mandatory procedural rules in the FAA. If an agreement refers generally to institutional arbitration rules, the procedural framework of those rules apply.

12. What procedural powers does the arbitrator have? If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

The arbitrator's powers are determined in the first instance by the procedural rules expressly agreed by the parties. In the absence of agreement, the arbitrator generally has broad discretion in relation to the arbitral procedure.

An arbitrator can order attendance of witnesses and disclosure of documents, with certain specific limitations. Arbitrators can summon in writing any person to attend before them or any of them as a witness and, when warranted by the circumstances, to bring with him any book, record or document, or paper which may be deemed material as evidence in the case (*section 7, FAA*). An arbitrator-issued summons is enforceable by US district courts, and failure to obey the arbitrator summons may result in a court punishment.

US courts are divided as to whether section 7 also covers pre-hearing discovery. On a literal interpretation, the section addresses the appearance of witnesses at the arbitral hearing and allows arbitrators to require a witness to also produce documents as part of the obligation to appear at the hearing. Some courts, therefore, conclude that pre-hearing discovery does not fall within the scope of section 7, as traditional discovery procedurally occurs before a hearing on the merits (*Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008); Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004)*). However, other courts interpret section 7 more broadly to include discovery as part of the arbitration process (*In re Sec. Life Ins. Co. of Am., 228 F.3d 865, 870-71 (8th Cir. 2000); COMSTAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 271 (4th Cir. 1999)*).

US courts have the power to enforce arbitral summons, subject to two limitations:

- The summons must issue from a majority of the arbitrators.
- Federal courts will not enforce a summons that requires the witness to travel more than 100 miles (*Dynegy Midstream Servs. L.P. v. Trammochem, 451 F.3d 89, 90, 96 (2d. Cir. 2006)*).

Evidence

13. What documents must the parties disclose to the other parties and/or the arbitrator(s)? Can the parties determine the rules on disclosure? How, in practice, does the scope of disclosure compare with disclosure in litigation?

There are no legal requirements for the disclosure of specific types of documents as part of the arbitration process. This is a matter left to the parties' agreement and rules they choose to regulate the proceedings. In international arbitrations, parties and arbitrators often look for guidance in the IBA Rules on the Taking of Evidence in International Commercial Arbitration. Arbitrators can typically order parties to exchange documents and arbitrators can decide to draw an adverse inference from the failure to produce documents.

One of the significant distinctions between judicial and arbitral proceedings in the US is the scope of discovery. When parties enter into litigation, federal and state civil practice rules may result in relatively

onerous, costly and time-intensive discovery and disclosure obligations. By contrast, arbitration does not typically involve pre-hearing depositions or burdensome discovery requirements.

Confidentiality

14. Is arbitration confidential?

The FAA does not address the confidentiality of arbitral proceedings and there is no implied duty of confidentiality. However, courts generally enforce party agreements relating to the confidentiality of international arbitration, including adoption by the parties of the rules they agree to apply to their dispute (*United States v. Panhandle E. Corp., 118 F.R.D. 346 (D.Del. 1998) (proceedings not confidential where there was no evidence the parties had agreed to hold them in confidence); Contship Containerlines, Ltd. V. PPG Industries, Inc., 2003 WL 1948807 (S.D.N.Y. 2003) (no implied duty of confidentiality)*).
Therefore, arbitration is private but not confidential. The privacy of arbitration means that only the parties to the arbitration agreement can attend hearings and otherwise participate in the arbitral proceedings. Both the ICDR (*Rule 20.4*) and JAMS Rules (*Rule 23.4*) provide that hearings are private, unless the parties agree otherwise. These rules also give the tribunal authority to require that any witness retire during the testimony of other witnesses. The ICC Rules give arbitrators full control of the hearings and provide that only those persons involved in the proceedings must be admitted, subject to the parties' agreement (*Rules 21.3*).
Arbitration is not confidential, as there is little to stop a party from providing information to others about the proceedings, in the absence of party agreement. In addition, most arbitral rules only require confidentiality from the arbitrators and do not prevent parties from disclosing information about the proceeding. The ICC Rules simply provide that the arbitral tribunal can take measures for protecting trade secrets and confidential information (*Rule 20*). Similarly, the ICDR Rules simply provide that confidential information disclosed during the proceedings must not be divulged by an arbitrator or by the administrator and do not specify what information (if any) the parties must keep confidential (*Rule 34*).

Courts and arbitration

15. Will the local courts intervene to assist arbitration proceedings? For example, by granting an injunction or compelling witnesses to attend?

Local courts can intervene to assist arbitration proceedings by:

- Granting preliminary relief in aid of arbitration under both federal and state law (*see Question 20*).
- Staying or dismissing litigation proceedings brought in breach of an agreement to arbitrate (*section 3, FAA*) (*see Question 17*).
- Considering parties' petitions to the court for a motion to compel arbitration (*section 4, FAA*) (*see Question 17*).
- Appointing an arbitrator in the limited circumstances when the parties have not agreed on a set of rules for the appointment of arbitrators, or when there is a lapse in the arbitrator selection process (*section 5, FAA*) (*see Question 10*).

- Enforcing the arbitrators' orders for witness testimony and document production (*section 7, FAA*) (*see Question 12*).

- Granting an anti-suit injunction stopping a person subject to their jurisdiction from pursuing a foreign lawsuit (*see Question 18*).

16. What is the risk of a local court intervening to frustrate the arbitration? Can a party delay proceedings by frequent court applications?

Considering the federal policy in favour of arbitration, the risk of a local court intervening to frustrate arbitration is minimal. While the FAA does not expressly provide for judicial non-interference, courts cannot intervene in ongoing arbitral proceedings to correct procedural errors or evidentiary rulings (*see, for example, Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F.Supp. 1241, 1242 (S.D.Fla.1988)*).

17. What remedies are available where a party starts court proceedings in breach of an arbitration agreement, or initiates arbitration in breach of a valid jurisdiction clause?

If a party commences arbitration in breach of a valid jurisdiction clause, the party opposing arbitration can ask the court to stay the arbitration (*Satcom Int'l Group PLC v. Orbcomm Int'l Partners, L.P., 49 F. Supp. 2d 331, 337 (S.D.N.Y. 1999), aff'd 205 F.3d 1324, 1324 (2d Cir. 1999)*). Since arbitration agreements are enforceable as written, courts will only stay arbitration in limited circumstances, for example if:

- There is no written agreement to arbitrate.

- The claims at issue are non-arbitrable, subject to the tribunal's authority to determine its own jurisdiction (*see Question 19*).

- Other limited defences apply to the arbitration agreement itself (rather than the contract as a whole), such as unconscionability, duress, fraud or waiver. This is subject to the doctrine of separability (*see Question 19*).

If a party starts litigation in the US in violation of an arbitration clause, the party seeking to arbitrate can:

- File a motion with the court to compel arbitration. The court must (*section 4, FAA*):
  - hear the parties, and
  - on being satisfied that the making of the arbitration agreement or the failure to comply with it is not an issue, make an order directing the parties to proceed to arbitration under the terms of the arbitration agreement.

  The role of courts is limited to determining two issues (*PaineWebber Inc. v. Bybyk, 81 F.3d at 1198*):
  - whether a valid agreement or obligation to arbitrate exists. Courts compel arbitration if there is a written arbitration agreement between the parties that covers the disputes at issue. Courts decide the issue of arbitrability themselves, unless the parties clearly intended for the tribunal to determine its own jurisdiction (*see Question 19*);

- whether one party to the agreement has failed, neglected or refused to arbitrate.

- Request the court to stay or dismiss the litigation on the grounds that the subject matter of the litigation is "referable to arbitration" (*section 3, FAA*). While the FAA refers specifically to stay of litigation, courts have held that section 3 also authorises them to dismiss a lawsuit brought in breach of an arbitration agreement.

- Seek damages against a party that starts litigation in breach of an arbitration clause. The measure of damages is based on the attorneys' fees incurred in resisting the litigation (*Shaw Group Inc. v. Triplefine Int'l Corp., 322 F.3d 115 (2d Cir. 2003)*). The damages are sought from the arbitrator.

18. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

US courts have the authority to grant an anti-suit injunction to stop a person subject to their jurisdiction from prosecuting a foreign lawsuit. Failure to comply with an anti-suit injunction is punishable as contempt of court (*Paramedics Electromedicina Comercial, Ltda. V. GE Medical Sys. Information Techs., Inc., 369 F.3d 645, 658 (2nd Cir. 2004)*).
Two requirements must be met before an anti-suit injunction can be granted (*China Trade and Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987)*):

- The parties must be the same in both matters.

- The resolution of the case before the enjoining court must be dispositive of the action to be enjoined.

Because an anti-suit injunction interferes with a foreign court's proceedings, considerations of international comity often arise. Depending on the circuit, courts give varying weight to these considerations. Therefore, whether a court grants or denies an anti-suit injunction depends heavily on an individual case. For example, the Second Circuit places weight on comity, while also considering whether the foreign suit would (*Ibeto v. Petrochem. Indus. Ltd. v. M/T "Beffen", 475 F.3d 56, 64-65 (2d Cir. 2007)*):

- Contravene public policy in the enjoining forum.

- Be vexatious.

- Threaten the issuing court's jurisdiction.

- Result in prejudice to other equitable considerations.

- Result in delay, inconvenience, expense, inconsistency or a rush to judgment.

Considering the strong federal policy favouring arbitration, courts generally are less likely to support a litigation deemed "an attempt to sidestep arbitration" (*Storm, LLC v. Telenor Mobile Comm. AS, 2006 WL 3735657 (S.D.N.Y. Dec. 15, 2006)*).

19. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concepts of separability and/or kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

The FAA does not expressly address the concepts of kompetenz-kompetenz or separability. Normally, a court decides whether a dispute is arbitrable (that is, within the tribunal's jurisdiction), unless there is clear and unmistakeable evidence that the parties intended to have this issue decided by an arbitrator (*First Options of Chicago v. Kaplan, 514 U.S. 938, 944, 985 (1995)*). The parties' intent to refer the question of arbitral jurisdiction to the tribunal can be expressed through either:

- The contractual language.
- The choice of applicable law or arbitral procedures.

For example, if an arbitration agreement incorporates the ICC Rules of Arbitration, which recognise kompetenz-kompetenz (*Rule 6(2)*), the tribunal, and not the court, should determine arbitrability (*Shaw Group Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 122 (2d Cir.2003); Global Gold Mining v. Robinson,* 533 F.Supp.2d 442 *(S.D.N.Y. 2008)*).
The doctrine of separability, under which the clause is separable from the underlying contract, is recognised by courts (*Prima Paint Corp v. Conklin Mfg. Co., 388 U.S. 395 (1967)*). Therefore, most challenges to the validity of a contract (for example, through claiming fraud, duress or illegality) do not affect the tribunal's jurisdiction to resolve a dispute under the arbitration clause in the underlying contract.

Remedies

20. What interim remedies are available from the tribunal? Can the tribunal award:

- **Security for costs?**
- **Security or other interim measures?**

The tribunal can grant interim remedies if authorised by the parties or by the procedural rules regulating the arbitration. In addition, parties can apply to courts for interim relief in aid of an arbitration. The FAA does not address the availability of interim relief in arbitration, but some states have laws specifically providing for interim relief in arbitration (for example, *section 7502(c), N.Y.C.P.L.R.*). In the absence of state law, parties seeking interim relief can rely on the court's inherent power to grant preliminary injunctive relief.
Interim remedies before a confirmed arbitral award are available only if a party claims an equitable interest in the matter (*Contichem v. Parsons Shipping Co., Ltd., 229 F.3d 426 (2d Cir. 2000); Traffix, Inc. v. Talk.com Holding Corp., 2001 WL 123724, at *1 (S.D.N.Y. Feb. 13, 2001)*).

21. What final remedies are available from the tribunal? For example, can the tribunal award damages, injunctions, declarations, costs and interest?

The tribunal can award any relief authorised (*see below*) (*Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995)*), including:

- Damages (compensatory and punitive).
- Injunctive relief.
- Declarations.
- Costs and interest.

The scope of permitted relief can be determined by:

- The parties' contract.
- The law that applies to the specific claims.
- The rules governing the arbitration.

Appeals and challenges

22. Can arbitration proceedings and awards be appealed or challenged in the local courts? If yes, please briefly outline the grounds and procedure. Can the parties effectively exclude any rights of appeal or challenge?

Vacation of awards

Both US federal and New York state law provide limited grounds for challenging arbitration awards. An award can be vacated (*vacatur*) under the FAA only in the court with the jurisdiction over the place where the award was made, and only if one of the following is proved (*section 10(a), FAA*):

- The award was procured by fraud, corruption or undue means.
- There was evident partiality or corruption on the part of one or more arbitrators.
- The arbitrators were guilty of:
  - misconduct in refusing to postpone the hearing, on sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or
  - any other misbehavior by which the rights of any party have been prejudiced.
- The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award on the subject matter submitted was not made.

The US Supreme Court recently held that the statutory grounds listed in the FAA are exclusive and that the parties cannot expand on these grounds (for example, by permitting review of an award for legal or factual

error) (*Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 585 (2008)*). However, parties may rely on state court grounds for review in certain circumstances (*Id.*). Based on the Supreme Court's ruling, the parties probably cannot remove or eliminate these grounds either.

In addition, US courts have applied a fifth, non-statutory ground for vacating an award, known as manifest disregard of the law. Manifest disregard is interpreted narrowly and the party must prove that the arbitrator was aware of a clearly applicable governing legal principle that he intentionally disregarded, leading to an erroneous result (*Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 548 F.3d 85, 93 (2d Cir. 2008)*).

Modification or correction of awards

In addition, a party can seek modification or correction of an award if (*section 11, FAA*):

- 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.
- The arbitrators have awarded on a matter not submitted to them, unless it is a matter not affecting the merits of the decision on the matter submitted.
- The award is imperfect in matter of form not affecting the merits of the controversy.

Procedure

Applications to vacate, modify or correct an award under the FAA or New York state law must be brought within three months after the award is delivered (*section 12, FAA and section 7511(a), N.Y.C.P.L.R.*).

Costs

23. What legal fee structures can be used? For example, hourly rates and task- based billing? Are fees fixed by law?

The FAA does not fix fees and the parties can use any legal fee structure in commercial cases. Hourly rates are typically used, but task-based and contingency fee arrangements are also possible.

24. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

The general rule is that parties bear their own legal fees. While the FAA is silent on the recoverability of attorney's fees, courts have held that the FAA does not preclude an award of attorney's fees, provided the arbitral tribunal otherwise has the authority to award these fees (*Painewebber, Inc. v. Bybyk*, *81 F.3d 1193, 1202 (2d Cir. 1996)*). However, this principle only applies if the parties have agreed, explicitly or implicitly, that the successful party will recover its legal fees (*Dunhill Franchisees Trust v. Dunhill Staffing Sys., Inc., 513 F. Supp. 2d 23 (S.D.N.Y. 2007)*).

An implicit agreement between the parties that the successful party will recover its legal fees exists if:

- The institutional arbitral rules chosen by the parties permit the recovery of attorney's fees (*Shaw Group, Inc. v. Triplefine International Corporation, 2003 WL 22077332 (S.D.N.Y. Sept. 8, 2003), aff'd 322 F.3d 115 (2d. Cir. 2003)*).

- The parties' conduct during the course of arbitration proceedings evidences an agreement that the successful party can recover its legal fees (*Synergy Gas Co. v. Sasso, 853 F.2d 59, 64 (2d Cir. 1988)*).

- The case is regulated by a statute that grants the successful party the right to recover legal fees or the claim is regulated by foreign law that permits the successful party to recover legal fees (*RLS Associates v. United Bank of Kuwait, 464 F. Supp. 2d 206, 218 (S.D.N.Y. 2006)*).

Enforcement

25. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts? Please briefly outline the enforcement procedure.

A party seeking to enforce an award regulated by the FAA, including the awards falling under the New York Convention, must petition the court for a confirmation order. The court must confirm the award, unless one of the statutory grounds for refusing enforcement applies (*see sections 9-10, FAA and Question 22*).
In addition, awards that fall within the New York Convention or Inter-American Convention on International Commercial Arbitration 1975 (Panama Convention) must be enforced, unless one of the grounds set out in the Conventions applies (*section 207, FAA*).
Confirmation of domestic awards under Chapter 1 of the FAA, or of awards regulated by New York state law, must be sought within one year from the date the award was made (*section 9, FAA and section 7510, N.Y. C.P.L.R.*). Confirmation of awards regulated by the New York and Panama Conventions must be sought within three years (*sections 207 and 307, FAA*). The procedure for a petition to confirm an arbitration award under the FAA is the same as the procedure for making and hearing motions (*section 6, FAA*). In practice, these petitions can generally be made and decided fairly easily and quickly. Once an award is confirmed, it is enforceable to the same extent as a judgment of the court that confirmed it (*section 13, FAA*).
State law may also provide different mechanisms for enforcement of arbitral awards (for example, *sections 7502(a), 7510, 7511, 7514, N.Y. C.P.L.R*).

26. To what extent is an arbitration award made in your jurisdiction enforceable in other jurisdictions? Is your jurisdiction party to international treaties relating to this issue such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

The US is a party to the New York Convention (*section 201 et seq, FAA*) and the 1975 Panama Convention (*section 301 et seq, FAA*). Therefore, an arbitration award rendered in the US should be enforceable in signatories to these Conventions under the terms of the Conventions. In addition, foreign countries that are not party to either of these Conventions may have legislation permitting enforcement of foreign arbitral awards.
In addition, the US is a party to 51 bilateral investment treaties, most of which provide for arbitration of disputes between investors and states. However, the US is not party to any reciprocal agreements relating to commercial arbitral awards, other than the New York and Panama Conventions.

27. To what extent is a foreign arbitration award enforceable in your jurisdiction? Please briefly outline the enforcement procedure.

Foreign arbitration awards are enforceable to the same extent, and through the same procedure, as domestic arbitration awards. Confirmation of awards regulated by the New York and Panama Conventions can only be refused based on the grounds listed in Article V of the New York Convention and Article 5 of the Panama Convention (*see Question 25*).

28. How long do enforcement proceedings in the local court take? Is there any expedited procedure?

The duration of the enforcement of an arbitral award depends on whether, and to what extent, the respondent resists the confirmation of the award. An unopposed petition to confirm an award should ordinarily be obtainable in three months or less. Challenges based on the court's lack of personal jurisdiction over the respondent or a lack of subject matter jurisdiction over the application, or on one of the grounds for refusing enforcement can substantially delay confirmation. In addition, cross-petitions to vacate or modify the award in the court where confirmation is sought and parallel proceedings in other jurisdictions can result in delays. Vigorously contested confirmation petitions can take up to a year or more.

Neither federal nor New York law provide a specific expedited procedure to confirm an arbitral award. The general procedures applicable to confirmation proceedings are intended to streamline the process as compared to other actions. Both federal and New York state courts can grant provisional remedies to assist arbitration in appropriate circumstances (for example, *Faiveley Transport Malom AB v. Wabtec Corp., 559 F.3d 110, 116 (2d Cir. 2009); section 7502(c), N.Y. C.P.L.R.*).

Main arbitration organisations

American Arbitration Association (AAA)

Main activities. The AAA facilitates resolution of large commercial disputes through arbitration. Mediation is also available.

W *www.adr.org*

International Centre for Dispute Resolution (ICDR)

Main activities. ICDR is the international branch of the AAA. It resolves through arbitration large commercial disputes. It also offers mediation services.

W *www.adr.org*

JAMS

Main activities. JAMS is the largest private ADR provider in the world. It provides arbitration and meditation services.

W *www.jamsadr.com*

Resource information

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Products: Arbitration 2010/11, PLC Arbitration - England and Wales, PLC Arbitration - International, PLC Cross-border, PLC Dispute Resolution, PLC Law Department, PLC US Law Department

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