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Foley Hoag LLP Foley Hoag's International Litigation and Arbitration Department has expertise in international commercial arbitration, international investment arbitration, international litigation in international courts and tribunals and before the US courts on matters of public international law. This composition makes Foley Hoag unique among law firms.

Foley Hoag represents major companies and State-owned entities in international arbitration and litigation matters. Foley Hoag also represents entities in arbitrations governed by common law and civil law, including the laws of France, New York, California, Cyprus, Liechtenstein, the Netherlands, India, England & Wales, Switzerland, Sweden and Mauritius among others. The firm has extensive experience in all major arbitral fora, including the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA), the Arbitration Institute of the

Stockholm Chamber of Commerce (SCC) and tribunals constituted under the UNCITRAL Arbitration Rules and under the national arbitration laws of numerous countries in Europe, Latin America, the Caribbean and Africa.

Our international arbitration team consists of multilingual and diverse attorneys, admitted to practice in Argentina, Belgium, Canada, Ecuador, England & Wales, France, Greece, India, Nicaragua, Russia, Ukraine, the United States and Uruguay. Foley Hoag represents clients in international commercial arbitrations in which the official language of the proceedings is in English, Spanish or French.

Together with Foley's recently established United Nations Practice Group, which provides legal advice and representation to nation states before the UN, the International Litigation and Arbitration Department also provides a one-stop shop for state sovereigns. Many of Foley's attorneys also serve as arbitrators in international commercial arbitration and international investment arbitration matters.

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1. General

1.1 Prevalence of Arbitration

International arbitration is widely used by parties in the United States. US law, in particular the Federal Arbitration Act (FAA), provides predictability for those parties aiming to resolve international arbitration disputes seated in the US. It is for this reason that the US continues to be a popular place of arbitration and that US law, in particular New York law, continues to be a popular choice of law in international agreements.

The International Chamber of Commerce's (ICC's) International Court of Arbitration has indicated that more than half of its arbitrations seated in the US in 2018 were seated in New York. New York was the place of arbitration for 38 out of 75 US seats in 2018. In 2018, New York also was for the first time one of the three most frequently selected seats of arbitration at the ICC, on par with Geneva. In 2018, the International Center for Dispute Resolution (ICDR) had a caseload of 993 cases. Of these, New York was by far the most frequently selected seat, followed by Miami.

1.2 Trends

Recent trends show an increase in the use of emergency arbitration proceedings. By July 2019, various parties had initiated 101 emergency arbitrator proceedings in total at the ICDR. At the ICC, parties have similarly initiated more than 100 emergency arbitrator proceedings, expanding from 2 in 2012 to 24 in 2018. In 2018, 5 of these ICC emergency arbitrator proceedings were administered out of New York. On average, emergency arbitrators issue their decisions in two to three weeks.

In light of the efforts of the major arbitration organisations to increase efficiency and reduce costs, there has also been an increased focus on arbitral awards resolving cases on summary disposition. The arbitration rules of the major arbitration organisations, such as the ICDR, the ICC, the American Arbitration Association (AAA), the International Institute for Conflict Prevention and Resolution (CPR) and JAMS either expressly or implicitly allow dispositive motions in arbitration. US courts generally confirm awards granted following summary disposition, finding that 'a party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high'. *Oracle Corp. v Wilson*, 276 F. Supp. 3d 22, 29 (S.D.N.Y. 2017). Awards granted on the basis of dispositive motions can only

be vacated on the same limited grounds for vacatur available under FAA § 10, including that: (i) the award was procured by corruption, fraud or undue means; (ii) there was evident partiality or corruption in one or more arbitrators; (iii) the arbitrators were guilty of misconduct in refusing to postpone the hearing, refusing to hear evidence or taking other actions prejudicial to the rights of one of the parties; or (iv) 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. *Id.* at 29. See also *Bezek v NBC Universal*, No. 3:17-CV-1087 (JCH), 2018 US Dist. LEXIS 86421, *14 (May 23, 2018) (discussing the same four factors). For a fuller discussion of the grounds upon which an award can be vacated, see Section 11.1 **Grounds for Appeal**, *infra*.

Arbitral institutions have also instituted expedited procedures to resolve certain cases efficiently and promptly. For instance, as of 1 March 2017, the ICC established expedited procedures to streamline international arbitrations in which the value of the claims and counterclaims was below USD2 million. These types of cases are expected to be resolved within six months of the initial Case Management Conference. At the ICC, the amount in dispute in expedited arbitrations is on average USD850,000, although parties have also opted to resort to the expedited procedures in connection with larger disputes, including a case in which the amount in dispute was USD116 million.

The ICDR has similarly adopted International Expedited Procedures. In 2018, various parties had initiated 104 proceedings in total under these procedures. They typically involve a single arbitrator, limited disclosure of documents, and the prompt issuance of an arbitral award.

As in prior years, third party funding continues to play an increasing role in arbitration disputes. In March 2019, a litigation and arbitration funding firm announced that it had committed over USD2.5 billion to fund cases and portfolios of cases. Litigation funding has become a significant financial market with the potential risk of transforming arbitrations into investment products. While such financing may make it possible for meritorious claims to be brought in certain circumstances, it also raises issues of the quality of the due diligence performed by the funders, the potential waiver of the attorney-client privilege, the potential undisclosed conflicts of interests and the ability of the prevailing party in arbitration to seek recourse from hedge funds or other firms that funded its adversary. Third-party funding is discussed in greater detail in section 13.3 **Third-party Funding** below.

1.3 Key Industries

Across the board, all major industries continue to resort to international arbitration for the resolution of their cross-border disputes. The main areas are construction, engineer-

ing and energy, but a growing number of international arbitrations involve finance, life sciences and technology.

1.4 Arbitral Institutions

There are a diverse range of institutions in the US. Parties tend to adopt the arbitration rules of the ICC, AAA, ICDR and the United Nations Commission on International Trade Law (UNCITRAL). Additionally, parties also adopt the rules of JAMS and CPR. Certain disputes involving securities are also arbitrated by the Financial Industry Regulatory Authority (FINRA).

2. Governing Legislation

2.1 Governing Law

International arbitration in the United States is governed principally by the FAA, codified at 9 U.S.C. §§ 1 et seq. The FAA is the United States' general arbitration statute. Enacted in 1925, it predates the UNCITRAL Model Law by 60 years and has not been radically amended since its entry into force. Compared to the UNCITRAL Model Law, the FAA is relatively succinct and does not address some of the issues covered in the Model Law.

Among other things, the FAA: (i) addresses the validity of agreements to arbitrate and provides for US courts to give effect to such agreements (9 U.S.C. §§ 2, 4); (ii) requires US courts to confirm awards (ie convert them into a judgment) when certain circumstances are satisfied (9 U.S.C. § 9); (iii) defines those situations under which a court may decline to confirm an award (9 U.S.C. § 10–11); and (iv) implements the New York Convention (9 U.S.C. §§ 201–208) and the Panama Convention (9 U.S.C. §§ 301–307).

Chapter 1 of the FAA (§§ 1 et seq.) applies to both domestic and international arbitration. It provides for, *inter alia*, enforcement of agreements to arbitrate, the appearance of witnesses in arbitral proceedings, enforcement of arbitral awards and the grounds for setting aside arbitral awards.

The FAA is part of federal law, which applies nationwide. Individual US states have also enacted separate legislation governing international arbitration which applies in their respective territories. However, such state-level legislation only supplements the FAA. To the extent there are conflicts between the FAA and state law, the FAA prevails.

Most recently, the state assembly of California – the world's fifth largest economy – passed legislation to amend the state's code of civil procedure, part of the California International Arbitration and Conciliation Act, to promote California as a seat of arbitration. This included clarifying the prior ambiguity in the law as to whether it prohibited out-of-state attorneys from appearing in arbitrations seated in California. This amendment to California's code of civil procedure may

further encourage the use of arbitration by parties engaged in business with technology companies in the Silicon Valley.

Moreover, because the United States – including its constituent states – is a common law jurisdiction, legislation is not the only source of law relevant to international arbitration. The decisions of US courts – which have binding, precedential effect – are another source of law and supplement the FAA in two ways. They interpret the express provisions of the FAA and fill in lacunae in the FAA, addressing issues not provided for in the statute.

2.2 Changes to National Law

No changes have been made to the FAA in the past year, nor is there any legislation pending to amend the FAA.

However, there are currently a number of bills pending before the New York State Legislature that would affect arbitration proceedings in New York. These bills aim, inter alia, to ban or limit arbitration clauses in employment and consumer cases. See A.2301 (Dinowitz) / S.3208 (Comrie) (NYS 2019). This pending legislation also imposes disclosure requirements on arbitrators with respect to matters that could affect their impartiality and requires that all arbitrators be neutral. A.3337 (Dinowitz)/S.5669 (Sepulveda) (NY 2019); A3265 (Dinowitz)/S.3684 (Hoylman) (NYS 2019). A more detailed discussion of this pending legislation is included in Section 4.1 **Limits on Selection**, *infra*.

Recent years have also seen efforts to enact new legislation addressing the validity of arbitration agreements in consumer contracts. In a series of recent cases: eg *AT&T Mobility LLC v Concepcion*, 563 U.S. 333 (2011); *Am. Express Co. v Italian Colors Rest.*, 570 U.S. 228 (2013), the Supreme Court has firmly upheld the validity of such clauses, overturning the lower courts' holdings that an arbitration clause contained in a contract of adhesion was unconscionable (and thus unenforceable) insofar as it waives access to judicial class action procedures for small value claims. Proposed legislation has been introduced in Congress in an effort to reverse some of the effects of those decisions and give courts the freedom not to enforce arbitration agreements contained in consumer contracts. However, none of the legislation thus far introduced in Congress has obtained near enough support to be enacted, a situation that is likely to continue in the near future.

Further, the Supreme Court recently decided in *Henry Schein, Inc. v Archer & White Sales, Inc.* that 'when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless.' *Henry Schein, Inc. v Archer & White Sales, Inc.*, 139 S. Ct. 524, 526 (2019). The court held that this exception, recognised by the Fifth Circuit as well as other courts of appeals, which allow the courts to decide arbitrability questions if the argu-

ment that the arbitration agreement applies to in the dispute is 'wholly groundless' and inconsistent with the FAA, as the FAA contains no such exception and the courts 'must interpret the Act as written.'

Particularly relevant, and underscoring the importance of the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as the 'Singapore Convention', which is open for signature in August 2019, is a recent Ninth Circuit decision on the treatment of settlement agreements as consent awards. In its November 2018 decision, the court clarified the circumstances in which settlement agreements can be enforced as arbitral awards. It held that a settlement agreement reached by parties, who then constituted a tribunal for the purposes of converting the settlement agreement into an arbitral award, did not 'transform' the agreement into an arbitral award that could be enforced under the New York Convention. *Castro v Tri Marine Fish Co. LLC*, 921 F.3d 766, 772–776 (9th Cir. 2019).

The Ninth Circuit found that a consent award reached in such circumstances did not constitute an arbitral award because no 'dispute' existed. That is, the parties had already resolved their dispute before the tribunal was constituted, thus, there was nothing left to arbitrate, *Id.* at 775. In addition, the consent award could not constitute an arbitral award because the arbitrator did not follow the arbitral procedures outlined in the parties' arbitration agreement and did not act pursuant to the arbitration law of the arbitral seat, the Philippines, *Id.* The Ninth Circuit was careful to distinguish this case from cases in which parties seek to enforce settlements reached after an arbitral tribunal has already been constituted. *Id.* at 776. This temporal distinction was significant in deciding whether the converted settlement agreement could be enforced as an award under the New York Convention.

Further, the Fifth Circuit Court recently held in *Stemcor USA Inc. v Cia Siderurgica do Para Cosipar*, No. 16-30984, 2019 U.S. App. LEXIS 18940 (5th Cir. June 25, 2019) that Louisiana law allows for pre-award attachment of property of the respondent in aid of arbitration if the same requirements under Louisiana law permitting a pre-judgment attachment in aid of litigation are met. The Fifth Circuit's holding was based on the Louisiana Supreme Court's ruling upon referral that Louisiana's attachment statute, La. Code Civ Proc. Art. 3542, permitted attachment in aid of arbitration "if the origin of the underlying arbitration claim is one pursuing money damages and the arbitral party has satisfied the statutory requirements necessary to obtain a writ of attachment". *Id.* at *10. Because the claimant had made clear from the beginning that it would be pursuing money damages, the court found that the action underlying the arbitration qualified as an "action for money judgment". *Id.* at *11.

3. The Arbitration Agreement

3.1 Enforceability

Reflecting the policy in favour of arbitration, US law is relatively permissive regarding the requirements for an arbitration agreement to be enforceable. An agreement to arbitrate must be in writing, arise out of a commercial relationship and not be subject to a contract defence. These criteria are reflected in two parts of the FAA.

Section 2 of the FAA provides that a written arbitration agreement in a commercial contract 'is valid, irrevocable, and enforceable, except upon such grounds as exist at law or equity for the revocation of any contract'. Such grounds, which are not listed in the FAA but exist within general contract law, include typical contract defences such as fraud and incapacity.

The New York Convention, incorporated into the FAA, does not significantly alter the standard set out in Section 2. Article II(1) requires that the contracting states recognise agreements to arbitrate made in writing. Article II(2) further clarifies that an 'agreement in writing' includes arbitration clauses contained in an exchange of letters, in addition to clauses in integrated contracts. Article II is, on its face, broader than Section 2 in that it does not require the arbitration agreement to be part of a commercial relationship, as Section 2 does. However, the United States ratified the New York Convention subject to a reservation that it will apply the convention only to differences arising out of legal relationships considered to be commercial under US law.

3.2 Arbitrability

Under the FAA, there is a general presumption in favour of respecting the parties' agreement to arbitrate, including their decision as to which claims may be submitted.

Nearly all claims arising under federal statutes may be referred to arbitration. In a line of cases, beginning with *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (confirming the arbitrability of anti-trust claims), the Supreme Court has upheld the arbitrability of claims arising under a range of statutes, including consumer, employment, antitrust and civil rights claims. In *Shearson/American Express, Inc. v McMahon*, 482 U.S. 220, 227 (1987), the court set out the guiding standard; statutory claims may be submitted to arbitration unless the statute indicates an intent by Congress to preclude arbitration.

3.3 National Courts' Approach

The FAA was enacted to reverse the courts' then-existing hostility to the enforcement of arbitration agreements. The statute thus embodies a policy in favour of arbitration. See *Gilmer v Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24–25 (1991).

Since the enactment of the FAA, US courts have relied on the policy in favour of arbitration. They routinely cite the congressional policy of favouring arbitration and construing arbitration agreements liberally in order to give them effect.

3.4 Validity

US law considers arbitration clauses to be severable from the contract containing them. As a result, they may be enforced even if the underlying contract is invalid. See *Buckeye Check Cashing, Inc. v Cardegna*, 546 U.S. 440, 445 (2006).

Accordingly, when a party challenges the validity of a contract as a whole, the US courts will give effect to the arbitration agreement contained therein and permit the arbitrator to determine the validity of the contract in the first instance.

Only when a party challenges the validity of the arbitration clause itself will the court decide on the challenge before allowing the arbitration to proceed. An exception to this is when the parties have agreed that challenges to the validity of an arbitration clause will be submitted to arbitration, in which case the court will respect the parties' agreement and permit the tribunal to hear the challenge. This is not an uncommon circumstance. The arbitration rules of the ICC, ICDR, AAA (Commercial Arbitration Rules), CPR (Rules for Administered Arbitration in International Disputes) and JAMS provide that the arbitral tribunal shall have the power to hear and determine challenges to its jurisdiction.

4. The Arbitral Tribunal

4.1 Limits on Selection

The FAA does not impose any limitations on the parties' ability to select arbitrators, nor on the qualifications of the arbitrators.

However, there are currently a number of bills pending before the New York State Legislature that would require arbitrators to disclose in advance of their appointment facts that might affect their impartiality, including whether they have a financial or personal interest in the outcome of the arbitration or whether they have an existing or past relationship with any of the parties, their counsel or representatives, a witness or another arbitrator. A.3337 (Dinowitz)/S.5669 (Sepulveda) (NY 2019); A3265 (Dinowitz)/S.3684 (Hoylman) (NYS 2019).

To the extent that an arbitrator discloses such facts, and a party challenges the arbitrator's appointment or continued service on that basis, then that objection could be the basis for vacatur of an award, regardless of the outcome of that challenge. *Id.* See also N.Y. City Bar, Recommendations Concerning Pending Legislation to Ensure New York Continues to Support Long-Established Practices of Business-to-Business Arbitration Proceedings, Report on Legislation

by the Arbitration Committee, International Commercial Dispute Committee and Insurance Committee, p. 2 (May 2019) (NYC Bar Report).

The legislation would also require that all arbitrators serve as neutral, third-party arbitrators. A.3337(Dinowitz)/S.5669 (Sepulveda) (NY 2019); A3265 (Dinowitz)/S.3684 (Hoylman) (NYS 2019). Even though arbitrators are already under an obligation to maintain neutrality, this requirement could interfere with the practice in a few industries of having disputes decided by two 'non-neutral' party-appointed arbitrators, who together select a third, neutral arbitrator. NYC Bar Report, at pp. 5–6.

For example, maritime and reinsurance arbitrations are typically conducted by two party-appointed arbitrators and a third neutral chair. *Id.* at p. 6. See also AIDA Reinsurance and Insurance Arbitration Society (ARIAS)-US Rules 2 and 6.1 (requiring that all the arbitrators in reinsurance arbitrations be disinterested, but only requiring that the 'third arbitrator [who] shall serve as the umpire ... be neutral', which is defined as being disinterested, unbiased and impartial). Further, the American Arbitration Association (AAA) and American Bar Association's (ABA) Code of Ethics for Arbitrators in Commercial Disputes also recognises that 'parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral', and sets forth a special set of ethical considerations for such arbitrators, exempting them from certain expectations of neutrality based on the parties' agreement. See Canon X, Code of Ethics for Arbitrators in Commercial Disputes (2014) (allowing 'Canon X arbitrators [to] be predisposed toward the party who appointed them ...').

4.2 Default Procedures

When the parties' arbitration agreement establishes a procedure for selecting arbitrators, US courts and arbitration organisations will defer to that procedure. The arbitration organisations also have default mechanisms in place in the event that the parties fail to nominate an arbitrator or fail to agree on the selection of a chairperson. These mechanisms may include, among other things, the administrative appointment of an arbitrator or the circulation of lists of potential chairpersons to the parties with a request that the candidates be ranked.

Where a party refuses to appoint an arbitrator in accordance with the parties' agreement, under FAA § 206 the other party may also move to compel the appointment of an arbitrator in accordance with the provisions of the arbitration agreement. Section 5 provides that, upon application by either party, a court shall appoint an arbitrator or arbitrators who will act under the arbitration agreement with the same force and effect as if they had been appointed by the parties. Section 303 makes a similar provision for disputes falling under the Panama Convention.

A court may exercise this authority in three circumstances: when the arbitration agreement does not establish a procedure for selecting the arbitrator(s); when one or more parties does not follow the established procedure; and 'if for any other reason there shall be a lapse in the naming of an arbitrator'. See 9 U.S.C. § 5.

4.3 Court Intervention

The only circumstances under which US law provides for courts to intervene in the selection of arbitrators are those described in section 4.2 **Default Procedures** above.

4.4 Challenge and Removal of Arbitrators

The FAA does not contain any provisions addressing the challenge or removal of arbitrators. As a result, US federal courts have consistently found that they lack authority to remove arbitrators during an arbitration. They will, instead, entertain challenges based on arbitrator bias or misconduct as challenges to the award after it is rendered, as addressed in Section 11. **Review of an Award**, below.

The removal of arbitrators is governed by the applicable rules of the arbitral institutions. They rule on challenges at the earliest possible opportunity, most frequently at the outset of an arbitration proceeding. The AAA has publicised its standards for removing arbitrators and established the Administrative Review Council (ARC), an executive-level, administrative decision-making authority created to resolve issues such as objections to arbitrators. From 2013 through 2016, the ARC reviewed 743 issues, including 517 arbitrator challenges. The ICDR similarly created an ARC in the Spring of 2018.

4.5 Arbitrator Requirements

The FAA does not directly set out any requirements for arbitrator independence, impartiality or the disclosure of potential conflicts of interest. However, § 10 sets an implicit standard by providing that an award may be set aside on the ground of 'evident partiality or corruption in the arbitrators'. Under that standard, US courts have generally held that a mere failure to disclose a potential conflict of interest is not a sufficient basis to annul an award. Instead, the challenging party must demonstrate that the partiality is 'direct, definite, and capable of demonstration rather than remote, uncertain or speculative'. See *Republic of Arg. v AWG Grp. Ltd.*, 211 F.Supp.3d 335 (D.C.C. 2016); *Kolel Beth Yechiel Mechil of Tartikov, Inc. v YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d. Cir. 2013).

In a recent decision, the D.C. Circuit Court of Appeals addressed the extent of disclosure obligations imposed by FAA § 10. It clarified that the 'evident partiality' standard requires arbitrators to disclose interests in one of the parties only when those interests are 'substantial' rather than 'trivial'. The court held that an arbitrator's position on the board of directors of a company with a passive shareholding in two of

the parties was tenuous, leading it to reject the challenge to the enforcement of the award. See *AWG Grp.*, supra.

In arbitrations seated in the US, many arbitration organisations and tribunals follow the IBA Guidelines on Conflicts of Interest in International Arbitration.

The rules of the major arbitration institutions expressly address the requirements for independence, impartiality and disclosure. For example, the ICC, ICDR, AAA, CPR and JAMS require both the arbitrators and the parties to disclose any circumstances that may give rise to justifiable doubts regarding the arbitrator's impartiality or independence, and permit parties to challenge an arbitrator whenever such circumstances become known. The duty to disclose is ongoing. The requirement to disclose, for example the number of previous and concurrent appointments by a party or law firm, can help foster the confidence of the parties in the fairness of the arbitration process.

Additionally, some state-level international arbitration acts also impose similar requirements.

Further, as discussed in Section 4.1 **Limits on Selection** above, there are currently a number of bills pending before the New York State Legislature that would require arbitrators to disclose in advance of their appointment facts that might affect their impartiality.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

US law embodies a policy favouring the enforcement of agreements to arbitrate according to their terms. Thus, when the parties to an agreement have agreed to arbitrate a claim, the US courts will generally permit it to be arbitrated. See Section 3.2 **Arbitrability** above for additional discussion.

However, there are a few limited areas where legislators have aimed to protect consumers in class actions and individuals in certain employment claims. See, for example, *Cullinane v Uber Technologies, Inc.*, No. 16-2023 (1st Cir. 2018) (finding the class action dispute not arbitrable because Uber's arbitration terms were not readily accessible to its users).

5.2 Challenges to Jurisdiction

Under US law, there is a presumption that the courts shall hear any objections as to whether the parties agreed to be bound by an arbitration clause and whether a dispute is within the scope of an arbitration clause.

This presumption may be overcome by clear and unmistakable evidence that the parties intended for the arbitral tribunal to determine these issues. It should be noted that the FAA does not expressly address this principle of compe-

tence-competence – the power of an arbitral tribunal to rule on objections to its own jurisdiction – but US courts have consistently recognised such a power when the parties have granted it to the tribunal.

US courts have consistently found that an arbitration agreement's incorporation of arbitration rules that grant the tribunal authority to rule on its own jurisdiction, that is, that contain a competence-competence clause, is sufficient evidence of such an intent. Faced with that situation, US courts will review questions of arbitrability under a highly deferential standard.

When a tribunal has ruled on its own jurisdiction, US courts will give deference to the tribunal's decision and will only disregard it in exceptional circumstances. See Section 5.5 **Standard of Judicial Review for Jurisdiction/Admissibility** below for further discussion.

5.3 Circumstances for Court Intervention

It is possible for US courts to address the jurisdiction of an arbitral tribunal either at the outset of the arbitration or when reviewing the arbitral award.

A ruling on the tribunal's jurisdiction made at the outset of the arbitration will typically occur as part of a motion to compel arbitration or a motion to stay judicial proceedings pending arbitration. In this context, a court may be asked to rule on the existence or validity of the arbitration agreement or whether it applies to the parties' particular dispute. However, insofar as the parties' have agreed to submit such questions to an arbitral tribunal, either in the arbitration agreement itself or in the arbitration rules incorporated into the agreement, a court will permit the tribunal to resolve the jurisdictional issue in the first instance. See Sections 3.2 **Arbitrability** and 5.2 **Challenges to Jurisdiction** above.

Once an award has been rendered, FAA § 10(a)(4) permits the court to vacate it if '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'. While this provision permits courts to set aside awards rendered if the arbitrators exceeded their powers, awards are not frequently vacated. As discussed in Section 5.5 **Standard of Judicial Review for Jurisdiction/Admissibility** below, US courts will almost always grant substantial deference to the arbitrators' rulings on jurisdiction when applying § 10(a)(4).

5.4 Timing of Challenge

The answer is provided in Section 5.3 **Circumstances for Court Intervention** above.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

There is a general policy in favour of arbitration and limited court intervention or interference with the arbitration

process. In theory, US courts may review certain issues of admissibility and jurisdiction *de novo*. In practice, however, such a *de novo* review will occur in only the rarest cases.

US courts typically review challenges to arbitral awards under a highly deferential standard. The Supreme Court has, however, recognised an exception for questions of arbitrability, which are presumptively reviewed under a *de novo* standard. In this context, the term ‘arbitrability’ refers to a specific category of jurisdiction objection that deals with whether the parties have consented to submit a particular dispute to arbitration, such as whether the parties are bound by a given arbitration clause, or whether an arbitration clause in a concededly binding contract applies to a particular type of controversy. *BG Grp. PLC v Republic of Arg.*, 134 S. Ct. 1198, 1206 (2014), rehearing denied, No. 11-7021, 2014 U.S. App. LEXIS 9519 (D.C. Cir. May. 21, 2014), cert denied, No. 14-211, 2014 U.S. LEXIS 7310 (U.S. Nov 3, 2014).

Not all objections to jurisdiction or admissibility present questions of arbitrability. For example, in *BG Group* the petitioner sought a *de novo* review of an investment arbitral tribunal’s ruling that it had jurisdiction over the dispute, notwithstanding the claimant’s failure to comply with a requirement to exhaust domestic remedies prior to initiating an arbitration under the relevant bilateral investment treaty. The Supreme Court reversed the lower court’s decision to grant *de novo* review, holding that the domestic litigation requirement did not present an issue of ‘whether there was a duty to arbitrate’, but was merely a ‘procedural condition precedent to arbitration’ and thus did not present an issue of arbitrability. *BG Group*, *supra*, at 1207.

5.6 Breach of Arbitration Agreement

The FAA makes express provision for a situation in which a party resorts to the US courts where a dispute is subject to a valid arbitration clause. FAA § 3 requires that the court in which such a lawsuit is brought stay proceedings ‘until such arbitration has been had in accordance with the terms of the agreement’, once it is satisfied that the dispute is properly referable to arbitration.

Similarly, if a party refuses to comply with an arbitration agreement, but does not file a suit in court, FAA § 4 permits any other party to the agreement to initiate an action seeking to compel arbitration before the court that would have jurisdiction over the dispute but for the arbitration agreement.

5.7 Third Parties

Typically, an arbitral tribunal only has jurisdiction over the parties to the arbitration agreement, that is, the parties that consented to arbitration.

However, third parties may be considered to be bound by the arbitration agreement under principles of contract law by which one entity can be deemed to be bound by the com-

mitments of another. This includes theories of agency, veil-piercing, third-party beneficiary, estoppel and assignment of rights to the contract containing the arbitration agreement. See Section 17, *infra*, for a fuller discussion of this issue.

6. Preliminary and Interim Relief

6.1 Types of Relief

The FAA does not expressly address whether arbitral tribunals seated in the United States may order interim measures. However, in keeping with the general rule of giving effect to the parties’ agreement to arbitrate according to its terms, the courts widely accept that tribunals may order interim relief when such an authority is granted by the arbitration agreement or the applicable arbitration rules. Among other things, this is provided for in the arbitration rules of the ICC, ICDR, AAA and CPR. Preliminary or interim relief typically takes the form of an injunction; for example, ordering the parties to preserve the status quo or an attachment.

Emergency arbitrations also have the authority to order such relief. See *Yahoo!, Inc. v Microsoft Corp.*, 983 F. Supp. 2d 310, 319 (S.D.N.Y. 2013) (confirming the injunction issued by the emergency arbitrator). The U.S. District Court for the Southern District of New York held that ‘if an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made.’ *Id.* (citation omitted).

As discussed in Section 6.2 **Role of Courts** below, US courts will frequently issue orders to enforce interim measures ordered by a tribunal.

6.2 Role of Courts

The FAA does not address whether US courts have authority to order provisional relief in support of arbitration. Nevertheless, US courts have frequently ruled that they do possess such authority.

The rules of the major arbitration organisations also provide that seeking provisional or interim relief from a court is compatible with these rules and does not constitute a waiver of the right to arbitrate. The authority to order preliminary or interim relief is not limited to the courts of the arbitral seat; the courts of a jurisdiction where significant assets are located may, for example, have the authority to attach those assets.

The courts have issued preliminary or interim relief to preserve the status quo prior to the constitution of the arbitral tribunal; for instance, injunctions prohibiting the termination of long-term contracts. The courts have also issued such relief in aid of arbitration during the course of arbitration proceedings. The courts typically apply the same standard to a request for provisional relief in support of arbitration as they would apply to a request for provisional relief in any

other case. The precise standard will vary depending on the nature of the relief sought and the jurisdiction.

The courts will also typically consider whether it is possible for the tribunal to order the provisional relief sought, ie whether the tribunal has been constituted and whether the applicable rules permit it to order relief. If the relief sought can be granted by the tribunal, a court may defer to the tribunal. Similarly, it is not uncommon for courts to grant provisional relief that lasts only until the arbitral tribunal is able to consider the issue.

US courts may also enforce interim measures ordered by an arbitral tribunal, even if the arbitration is not seated in the United States. Although the New York and Panama Conventions provide only for the recognition and enforcement of final decisions, US courts have held awards of interim measures to be ‘final’ and thus subject to judicial enforcement in certain circumstances.

6.3 Security for Costs

As with many aspects of arbitral procedure, the FAA contains no provisions addressing security for costs and thus does not prohibit tribunals from ordering it. Instead, the specific arbitral rules will determine the possibility of awarding security for costs.

7. Procedure

7.1 Governing Rules

The FAA does not address most issues of arbitration management and does not set out rules for the conduct of arbitrations. Arbitral tribunals and parties are generally free to determine the procedure to be followed, typically subject to the applicable arbitration rules.

7.2 Procedural Steps

Just as US law does not set out any particular rules for the conduct of an arbitration, it does not provide that any particular procedural steps must be followed. The only real procedural constraint imposed as a matter of law is that whatever procedure is followed, it should not give rise to a circumstance that would result in vacatur of the award under FAA § 10. For example, a procedure that did not permit each of the parties to be heard could lead to vacatur under § 10(a)(3).

7.3 Powers and Duties of Arbitrators

The powers vested in arbitrators under US law are essentially the powers granted to them by the parties to the arbitration agreement and the applicable arbitration rules. US courts will give effect to the parties’ intention within the limits discussed in this chapter.

The FAA does not directly impose any duties on arbitrators, but it does indirectly constrain their behaviour by providing

that certain behaviour or decisions can lead to vacatur of any award they render. See FAA § 10. The American Bar Association and the International Bar Association have both published codes of ethics for arbitrators that, while not legally binding, serve as a useful reference.

7.4 Legal Representatives

The FAA does not demand that legal representatives appearing in arbitrations in the United States hold any particular qualifications or meet any other specific requirements. However, each state and the District of Columbia has its own rules of professional conduct that govern the behaviour of individuals engaged in the practice of law within that jurisdiction. See the discussion above regarding California law.

8. Evidence

8.1 Collection and Submission of Evidence

The FAA does not provide particular rules for the disclosure and use of evidence in international arbitration. Arbitral tribunals enjoy wide discretion in compelling the disclosure of information and in determining the scope of applicable privileges. As a practical matter, an arbitration seated in a common law jurisdiction such as the US often involves some disclosure of information and documents. To the extent that the arbitration clause imposes guidance or limitations on the scope of disclosure of information, arbitrators will typically abide by them.

In addition, US law has created mechanisms to obtain disclosure of information from third parties in certain foreign proceedings. Some courts have held that 28 U.S.C. 1782 enables parties to obtain discovery from third parties in the US in aid of a foreign arbitration proceeding, though doing so might be challenging as the decision as to whether to grant the application rests within the discretion of the district court.

In *Kiobel v Cravath, Swaine & Moore LLP*, 895 F.3d 238 (2nd Cir. 2018), *cert. denied*, No. 18-706.2019 U.S. LEXIS 112 (Jan. 7, 2019), the Second Circuit Court of Appeals addressed such an application. In that case, Kiobel filed an application under 28 U.S.C. 1782 seeking documents belonging to Royal Dutch Shell from its counsel, Cravath, Swaine & Moore, who was in possession of the documents from a prior litigation. The Court of Appeals found the district court’s decision granting the petition constituted an abuse of discretion and, therefore, reversed the decision on the grounds that producing the documents would jeopardise the policy promoting open communication between counsel and clients.

A more detailed discussion of 28 U.S.C. 1782 is below in Section 8.3 **Powers of Compulsion**, *infra*.

8.2 Rules of Evidence

US law does not require the use of any particular rules of evidence in arbitration. Parties are free to elect the procedure they desire. Courts reviewing arbitration awards grant deference to the evidentiary rulings of arbitrators and do not require that the arbitrators follow the strict evidentiary rules that would apply in a court of law. Arbitrators and parties often refer to the IBA Rules on Taking Evidence in International Arbitration in the terms of reference or procedural orders in the arbitration.

8.3 Powers of Compulsion

Although arbitrators generally do not have authority over non-parties to the arbitration, FAA § 7 grants arbitrators the authority to summon 'any person' to appear in the arbitration as a witness or to produce documents. If the recipient of the summons refuses to comply, § 7 permits the arbitrators to request judicial assistance to enforce the summons in the same manner it would enforce a subpoena for the witness to appear or produce documents before the court itself, including through contempt sanctions. This mechanism may make it possible to obtain testimony and documents from third parties in aid of an arbitration seated in the US.

Disclosure can also be sought in some instances from third parties in connection with arbitrations seated outside of the US under 28 U.S.C. 1782, as discussed in Section 8.1, *supra*. Although the statute was originally used in aid of foreign proceedings in domestic courts, the definition of 'tribunal' was later interpreted by some district courts to include international arbitration based on a statement made by the Supreme Court in dicta in *Intel Corp. v AMD, Inc.*, 542 U.S. 241, 258 (2004), that even though Section 1782 had previously referred to 'judicial proceeding[s]', Congress had amended Section 1782, expanding its reach to cover 'proceeding[s] in a foreign or international tribunal'. Subsequently, in *In re Application of the Republic of Kazakhstan*, the Southern District of New York held that a sovereign state constituted an 'interested party' that could seek discovery under Section 1782, Case No. 15-Misc.-0081 (S.D.N.Y. 2015). Some district courts have continued to hold, however, that § 1782 does not apply to private international arbitrations. *See, eg In re Servotronics, Inc.*, No. 2:18-mc-00364-DCN, 2018 U.S. Dist. LEXIS 189423, *5-6 (D.S.C. Nov 6, 2018) (holding that other than its passing mention when defining the word 'tribunal', the Intel Court did not specifically discuss arbitral tribunals, much less private arbitral tribunals. As such, the Intel decision did nothing to alter [the] holdings [in prior cases] that § 1782 does not apply to private international arbitrations.)

9. Confidentiality

9.1 Extent of Confidentiality

US law does not address the confidentiality of arbitral proceedings or their constituent parts. The parties are free to,

and often do, draft confidentiality agreements to govern proceedings.

In light of the public policy of access to documents filed in open court, arbitral awards may become public upon the filing of a motion to confirm or vacate an arbitral award. To the extent that confidentiality is a significant issue, the arbitration clause or confidentiality agreement should address this topic to maximise the likelihood that filings in court will be made under seal.

10. The Award

10.1 Legal Requirements

US law does not impose any specific requirements regarding the form of arbitral awards. However, many of the applicable arbitration rules set out certain requirements.

10.2 Types of Remedies

The FAA does not limit the types of remedies that an arbitral tribunal may award. Instead, the courts will look to whether the parties' arbitration agreement contains such a limit. If a tribunal awards a remedy not permitted by the arbitration agreement, it is subject to being set aside by the reviewing court.

Limitations on the remedies available may also exist within the governing law. For example, certain statutory claims may not permit punitive damages.

10.3 Recovering Interest and Legal Costs

Although the FAA does not address awards of interest by an arbitral tribunal, courts widely recognise that tribunals may award both pre- and post-award interest, unless the arbitration agreement provides otherwise. Awards of interest are common.

The FAA, likewise, does not prohibit a tribunal from shifting costs. In international arbitration proceedings seated in the US, arbitrators frequently exercise their discretion to apply the principle that 'costs follow the event', which means that the parties bear the costs of the proceeding in shares corresponding to their measure of success. The parties can also address fee shifting in their contract and their choices in this respect will typically be respected by arbitral tribunals and courts.

In June 2017, the International Commercial Disputes Committee of the New York Bar Association published a report entitled *Awards of Interest in International Commercial Arbitration: New York Law and Practice*. It expressed the view that international arbitral tribunals have the discretion to award a rate of prejudgment interest different from New York's nine percent statutory rate. As described in that report, 'New York courts acknowledge that, in the absence

of express party agreement on the interest rate to be applied, arbitrators have discretion to determine interest based on a broad range of considerations.’

11. Review of an Award

11.1 Grounds for Appeal

Under US law, arbitral awards are final and binding. They are not appealable, as that term implies the possibility of a court reviewing and issuing its own ruling as to the merits of the arbitration.

Instead, US law permits the parties to apply for vacatur (that is, set aside or annulment) of an award based on a limited set of grounds that do not involve the court reviewing the merits of the award, but rather the integrity of the arbitral process. The grounds for vacating an arbitral award are set out in FAA § 10. A court may vacate an award when:

- the award was procured by corruption, fraud or undue means;
- there was evident partiality or corruption by one or more arbitrators;
- the arbitrators were guilty of misconduct in refusing to postpone the hearing, refusing to hear evidence or taking other actions prejudicial to the rights of one of the parties; or
- 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.

In light of the Supreme Court’s decision that the FAA provides exclusive grounds for vacating an arbitral award, discussed in the following section, the non-statutory doctrine of manifest disregard of law now exists only as a ‘gloss’ on the FAA’s grounds, if it remains a viable doctrine at all (an issue many courts have yet to decide). Arguments based on manifest disregard of law have had virtually no success whatsoever in the US courts.

Well-established jurisprudence supports the position that the manifest disregard of the law doctrine may only be applied, if at all, in the extremely rare instance where an arbitral panel intentionally ignored a governing and well-defined explicit legal principle. It cannot be invoked where a party disagrees with the interpretation of a law. A unanimous panel of the First Appellate Department of the New York Supreme Court highlighted this point in *Matter of Dae-sang Corp. v NutraSweet Co.*, 167 A.D.3d 1, 19 (N.Y. App. Div 2018) by reversing a partial vacatur of an arbitration award by the New York Supreme Court, Commercial Division on the grounds that ‘manifest disregard of the law’ is a high standard that ‘requires more than a simple error in law or a failure by the arbitrators to understand or apply it’.

A court may also modify or correct an award on the limited grounds set out in FAA § 11:

- there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property;
- 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; or
- the award is imperfect in matter or form not affecting the merits of the dispute.

A party seeking vacatur, modification or the correction of an arbitral award must do so by filing a motion in the U.S. district court of the district in which the award was made. The decision whether to seek such a remedy must be made quickly; FAA § 12 requires that the party serve notice of its motion on the opposing party within three months of the date of the award.

Most recently, the Second Circuit Court of Appeals clarified the process for converting arbitral awards into US court judgments in *CBF Industria*, discussed *infra*, finding that a party may have an award confirmed and enforce it against the opposing party’s assets in the same action.

11.2 Excluding/Expanding the Scope of Appeal

US law does not permit the parties to expand the grounds for judicial review of arbitral awards by agreement. The Supreme Court has held that the grounds set out in the FAA, discussed in Section 11.1 **Grounds for Appeal** above, are exclusive. See *Hall Street Assocs., L.L.C. v Mattel, Inc.*, 552 U.S. 576, 581 (2008).

The courts are split, however, on whether the parties may agree to limit the grounds for judicial review of awards, or even waive access to judicial review entirely. Some courts have permitted parties to restrict judicial review, citing the parties’ freedom to contract for the arbitration procedure they desire. Other courts have rejected parties’ attempts to limit the judicial review of awards, citing the need to protect the integrity of arbitration generally.

11.3 Standard of Judicial Review

US courts will not review the merits of an arbitral award. Instead, they will review the award only to determine whether one of the grounds for vacatur or modification, discussed in Section 11.1 **Grounds for Appeal** above, are present. That review is almost always carried out under a highly deferential standard, as addressed in Section 5.5 **Standard of Judicial Review for Jurisdiction/Admissibility** above.

12. Enforcement of an Award

12.1 New York Convention

The United States acceded to the New York Convention in 1970. It did so subject to two reservations: (i) that it will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting state; and (ii) that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under US law.

The United States ratified the Panama Convention in 1986, subject to several reservations:

- when the criteria for application of both the Panama Convention and New York Convention are met, the Panama Convention will apply only if the majority of the parties are states or citizens of states that have ratified the Panama Convention and are members of the Organization of American States, in the absence of an agreement to the contrary;
- the United States will apply the rules of the Inter-American Commercial Arbitration Commission in force on the date it deposited its instruments of ratification, in the absence of a later official determination to the contrary; and
- the United States will apply the Convention only to awards made in the territory of another contracting state.

12.2 Enforcement Procedure

To initiate an action to recognise and enforce a foreign or non-domestic award under the New York or Panama Conventions, the party requesting enforcement must file a petition to confirm the award in a US court within three years of the date of the award. See FAA §§ 207, 302. A copy of the award and the agreement to arbitrate should be attached to the petition.

The recognition and enforcement of an arbitral award in the United States is a summary procedure. It is common for courts to decide petitions to confirm an award on the basis of written pleadings alone, without an evidentiary hearing or oral argument. The FAA requires courts to confirm a valid award, unless one of the grounds for refusing recognition and enforcement set out in the applicable Convention is present. See FAA §§ 207, 302.

More specifically, the award creditor presents its request to the court as a petition to confirm the award. ‘Confirmation’ is the terminology used in US courts under the FAA, in contrast to the New York Convention which uses the terminology ‘recognition and enforcement’. As found in *CBF Industria de Gusa v AMCI Holdings, Inc.*, 850 F.3d 58, 72 (2d Cir. 2017), when dealing with a Convention award in the US, confirmation is equivalent to recognition and enforcement.

Once the petition to confirm has been filed, the opposing party will have 60 days from the date of service to present either a response to the petition (the equivalent of an answer) or a motion to dismiss the petition. See 28 U.S.C. § 1608(d). In practice, defences under Article V of the Convention are presented in both of those formats.

Another option for resisting enforcement and recognition of an award is to seek its annulment in the primary jurisdiction. The judgment debtor does not need to wait for the creditor to seek recognition and enforcement, setting aside an award is a stand-alone remedy that is not merely a defence to recognition and enforcement.

12.3 Approach of the Courts

Reflecting the United States’ policy in favour of arbitration, US courts rarely refuse to recognise and enforce awards. The burden is on the party opposing recognition and enforcement to establish that one of the grounds set out in the New York or Panama Conventions is satisfied. Moreover, US courts apply those grounds under a highly deferential standard and will not review the merits of the award. See, for example, *BG Group PLC v Republic of Arg.*, 134 S. Ct. 1198, 1210 (2014) (courts ordinarily review arbitral awards with ‘considerable deference’); *Leeward Constr. Co. v Am. Univ of Antigua – College of Med.*, 826 F.3d 634 (2d Cir. 2016) ‘Arbitration panel determinations are generally accorded great deference... as a general matter, a court is required to enforce the arbitration award as long as there is a barely colourable justification for the outcome reached.’ (Quotation marks and citations omitted).

Under the FAA, the grounds for refusal to recognise or enforce awards are:

- § 10(a)(1): ‘the award was procured by corruption, fraud, or undue means’;
- § 10(a)(2): ‘there was evident partiality or corruption in the arbitrators, or either of them’;
- § 10(a)(3): ‘the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehaviour by which the rights of any party have been prejudiced’;
- § 10(a)(4): ‘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’.

The approach is typified by the US courts’ application of the New York and Panama Convention’s provision permitting refusal of recognition and enforcement on public policy grounds. Courts construe the provision narrowly and will not apply it unless enforcement of the award would conflict with a public policy of fundamental importance – as one oft-repeated standard puts it, when recognition and enforce-

ment would violate the United States' most basic notions of morality and justice.

Although it is extremely rare, US courts have recognised and enforced awards that were set aside in the primary jurisdiction. See for example, *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996); *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V v Pemex-Exploración y Producción*, 832 F.3d 92 (2d Cir. 2016).

The most notable is the Second Circuit's 2016 decision in the *Pemex* case, affirming the district court's confirmation of an award that had been set aside by a Mexican appellate court. The Second Circuit nominally reaffirmed the standard that it and the D.C. Circuit had both applied to that point: that US courts will not recognise and enforce an award set aside in the primary jurisdiction unless the decision of the foreign court is 'repugnant to fundamental notions of what is decent and just' in the United States. *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V v Pemex-Exploración y Producción*, 832 F.3d 92, 106 (2d Cir. 2016). However, it held that the Mexican appellate court's decision did just that by retroactively applying legislation. The legal community's reaction to that decision was that, notwithstanding its reaffirmation of the high bar for recognising and enforcing a set aside award, the Second Circuit displayed a surprising willingness to review the merits of the foreign court's judgment.

Since *Pemex*, both the Second Circuit (in *Thai-Lao Lignite*) and the D.C. Circuit (in *Getma*) have affirmed the district courts' refusals to recognise and enforce awards set aside in their primary jurisdiction, which has been taken as evidence that results like *Pemex* will continue to be extremely rare. *Thai-Lao Lignite (Thail.) Co. v Gov't of the Lao People's Democratic Republic*, 864 F.3d 172 (2d Cir. 2017); *Getma Int'l v Republic of Guinea*, 862 F.3d 45 (D.C. Cir. 2017). In *Novenergia II – Energy & Environment (SCA), v Kingdom of Spain*, No. 1:18-cv-1148 (D.D.C.), a case currently pending before the U.S. District Court for the District of Washington D.C., Spain has argued that the court should refuse enforcement of an arbitral award because Sweden, the primary jurisdiction, had ordered a suspension of the award on the grounds that a decision by the European Court of Justice found the arbitration clause the arbitration was brought under to be invalid under EU law. It will be important to see how the district court decides this issue in light of the fact that the award has been suspended, but not yet set aside, and whether this distinction will make a difference.

13. Miscellaneous

13.1 Class-action or Group Arbitration

The U.S. Supreme Court recently ruled on the arbitrability of class actions in *Lamps Plus, Inc. v Varela*, 139 S. Ct. 1407, 1416 (2019), in which it held that 'courts may not infer con-

sent to participate in class arbitration in the absence of an affirmative contractual basis for concluding that the party *agreed* to do so.' (Citations omitted.) The court emphasised that under the FAA, courts are required to 'enforce arbitration agreements according to their terms,' and while 'ordinarily [courts can] accomplish that end by relying on state contract principles, ... state law is preempted to the extent it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA.' Id. at 1415. Because '[c]onsent is essential under the FAA' and class arbitration 'lacks those benefits' that usually come with individualised arbitration, including efficiency, speed of the proceedings and lower costs of adjudication, ambiguity is not sufficient to conclude that the parties agreed to sacrifice the benefits of individualised arbitration in favour of class arbitration. Id. at 1416–17.

Thus, even though class wide arbitration remains available under *Lamps Plus*, the parties must demonstrate that the arbitration agreement at issue clearly provides for class arbitration. The Supreme Court's holding is consistent with its prior holding in *Stolt-Nielsen S.A. v Animal Feeds Int'l Corp.*, 559 U. S. 662 (2010), where it similarly held that a court may not compel class wide arbitration when an agreement is silent on the availability of such arbitration.

13.2 Ethical Codes

There are a number of sources that provide rules governing the conduct of arbitrators and counsel in the United States.

First, the *Code of Ethics for Arbitrators in Commercial Disputes*, jointly developed by the ABA and the AAA, 'sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes.' Preamble, *The Code of Ethics for Arbitrators in Commercial Disputes* (Approved, Feb 9, 2004). Even though the Code does not have any legal force and thus is subject to rules agreed upon by the parties, it has been referred to for guidance by many courts in various judicial opinions. See *Applied Indus. Materials Corp. v Ovalar Makine Ticaret Ve Sanayi, A.S.*, No. 05 CV 10540 2006 U.S. Dist. LEXIS 44789, *28 (S.D.N.Y. June 28, 2006) (citing the standards for arbitrators set forth in the Code of Ethics for Arbitrators in Commercial Disputes, as well as the IBA Guidelines on Conflicts of Interest in International Arbitration in holding that arbitrator's non-disclosure of relationship between arbitrator's company and one of the parties required vacatur of an arbitral award). Further, the Code does not apply to arbitrations arising out of labour disputes. A separate set of rules apply to those arbitrations, as set forth in the '*Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*'.

Some states have adopted their own rules of professional conduct pertaining to arbitrators. Most notably, California has adopted the *Ethics Standards for Neutral Arbitrators in Contractual Arbitration*. These rules mandate, inter alia, that

an arbitrator shall ‘decline appointment if he or she is not able to be impartial’, unless there is ‘any contrary request, consent or waiver by the parties.’ Standard 6, *California Ethics Standards for Neutral Arbitrators in Contractual Arbitration*. An arbitrator is also required to ‘disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be impartial.’ Cal Code Civ Proc § 1281.9(a). Florida has also adopted standards for the professional conduct of arbitrators, though the application of these rules is limited to court-ordered arbitration.

Further, in international arbitrations that have their arbitral seat in the United States, arbitrators and parties often apply the *IBA Rules on Conflict of Interest* with respect to decisions about prospective appointments and disclosures and in assessing the impartiality of arbitrators. The IBA Rules contain guidelines on, inter alia, impartiality and the types of conflicts of interests that should cause an arbitrator to decline an appointment.

With respect to rules governing the conduct of counsel, the ABA Model Rules of Professional Conduct serve as the model for the ethics rules adopted in most states. These rules contain guidelines for, inter alia, lawyers that have previously or are currently serving as third-party neutrals. See Rules 1.12 and 2.4, *ABA Model Rules of Professional Conduct*.

13.3 Third-party Funding

The doctrine of champerty, an ancient common law doctrine, has historically prohibited third parties from providing funding for disputes to which they are not a party in several US jurisdictions. In recent years, ‘[t]he consistent trend across the [United States has been] toward limiting, not expanding, champerty’s reach’, *Del Webb Cmtys., Inc. v Partington*, 652 F.3d 1145, 1156 (9th Cir. 2011). That said, some states, including New York, Delaware and Pennsylvania continue to recognise the doctrine, but courts in those jurisdictions have recently held that there are situations in which third-party funding might run afoul of champerty.

For example, in *Justinian Capital SPC v WestLB AG, N.Y. Branch*, 28 N.Y.3d 160, 163 (2016), the New York Court of Appeals found that an arrangement whereby a German bank assigned its investment in certain notes to a third party for USD1 million in order to enable the third party to sue the defendant in connection with the notes, violated New York’s champerty statute which ‘prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit.’ The court emphasised that while just ‘intending to bring a lawsuit on a purchased security is not champerty’ under the New York statute, the purchase of a security for the exclusive purpose of bringing a lawsuit is. *Id.* at 166. Because the German bank had assigned the notes to the third party solely because it wanted to bring a lawsuit against defendant without having

to be named in the case, the acquisition of the notes was deemed champertous. The court also noted that the transaction did not fall under New York’s champerty safe harbour provision for transactions with an aggregate purchase price of USD500,000, because the USD1 million purchase price ‘was not a binding and bona fide obligation’ as it was contingent upon a successful recovery in the lawsuit. *Id.* at 170.

Similarly, in *WFIC, LLC v LaBarre*, 148 A.3d 812, 814 (Pa. Sup. Ct. 2016), one of Pennsylvania’s intermediate appellate courts invalidated a litigation funding agreement because it was champertous. In that case, a company had entered into an agreement with its attorney, pursuant to which third-party investors would fund an appeal and in turn be paid from the attorney’s increased contingency fee. The court found that the agreement met the three requirements for establishing a prima facie case of champerty under Pennsylvania law: (i) the third-party investors were ‘completely unrelated parties who had no legitimate interest’ in the underlying dispute; (ii) they had expended their own money ‘to aid in the cost of the litigation’; and (iii) had been promised to be paid out of the proceeds from the suit. *Id.* at 818–19.

Further, even where a specific third-party funding agreement is not deemed invalid, the parties might, nonetheless, be required to disclose such agreements going forward. In 2018, Wisconsin became the first US state to pass legislation that required parties to disclose third-party funding agreements, regardless of whether the agreement is sought in discovery or not. Further, the Texas legislature has recently also introduced two bills that would mandate the disclosure of third-party funding arrangements.

13.4 Consolidation

A number of U.S. Courts of Appeals have held that, under the FAA, whether or not separate disputes can be consolidated into a single proceeding is a procedural question for the arbitrator to decide. *Shaw’s Supermarkets, Inc. v United Food & Commercial Workers Union, Local 791*, 321 F.3d 251, 254 (1st Cir. 2003) (‘Leaving the decision whether to consolidate ... proceedings in the hands of the arbitrator comports with long-standing precedent resolving ambiguities regarding the scope of arbitration in favour of arbitrability.’); *Certain Underwriters at Lloyd’s London v Westchester Fire Ins. Co.*, 489 F.3d 580, 582 (3rd Cir. 2007) (affirming lower court decision that ‘the issue of consolidation should be decided by an arbitrator’); *Employers Ins. Co. of Wausau v Century Indem. Co.*, 443 F.3d 573, 581 (7th Cir. 2006) (‘The Supreme Court [has] made clear ... that procedural issues are presumptively for the arbitrator to decide. Consolidation is a procedural issue.’)

Nonetheless, some states have adopted their own mechanisms to allow courts to order consolidation of separate arbitration proceedings. For example, pursuant to the California Arbitration Act, [a] party to an arbitration agreement may

petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when the following three conditions are met:

- separate arbitration agreements or proceedings exist between the same parties, or one party is a party to a separate arbitration agreement or proceeding with a third party;
- the disputes arise from the same transactions or series of related transactions; and
- there is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

California Code of Civil Procedure 1281.3.

13.5 Third Parties

Even though the general rule is that under the FAA ‘a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit’, *United Steelworkers of America v Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), US courts have nonetheless recognised a number of theories under which non-signatories can be bound by an arbitration agreement under ‘general principles of contract and agency law’. *Ouadani v TF Final Mile LLC*, 876 F.3d 31, 37 (1st. Cir. 2017). See also *Sapic v Gov’t of Turkm.*, 345 F.3d 347, 356-363 (5th Cir. 2003); *CBF Indústria de Gusa S/A v AMCI Holdings, Inc.*, 846 F.3d 35, 54 (2nd. Cir. 2017); *Invista S.à.r.l. v Rhodia, SA*, 625 F.3d 75, 84 (3rd. Cir. 2010); *Mundi v Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th. Cir. 2009).

First, courts have found that third parties can be bound under a theory of ‘incorporation by reference’, which covers situations in which the non-signatory has entered into a separate contract that incorporates the existing arbitration clause. See *Import Export Steel Corp. v Mississippi Valley Barge Line Co.*, 351 F.2d 503, 505-506 (2d Cir. 1965) (separate agreement with non-signatory expressly ‘assum[ing] all the obligations and privileges of [signatory] under the... subcharter’ constitutes grounds for enforcement of arbitration clause by the non-signatory).

Second, non-signatories may be bound where they assume the obligation to arbitrate by way of their conduct. Compare *Thomson-CSF, S.A. v American Arbitration Ass’n*, 64 F.3d 773, 777 (2nd. Cir. (1995) (finding that theory did not apply where the non-signatory ‘explicitly disavowed any obligations arising out of the ... Agreement and filed [an] action seeking a declaration of non-liability under the Agreement’ with *Gvozdencovic v United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991) (flight attendants manifested a clear intention to arbitrate by sending a representative to act on their behalf in the arbitration process, and where they did not object to the arbitration before or during the process and made no attempt to seek judicial relief), cert.

denied, 502 U.S. 910, 116 L. Ed. 2d 248, 112 S. Ct. 305 (1991).

Third, non-signatories can also be bound where they act as the agent of the signatory. Courts have found that this requirement is only satisfied where ‘an arrangement exists[s] between the [non-signatory and signatory] so that [the non-signatory] acts on behalf of the [signatory] ... within usual agency principles, [and] the arrangement [is] relevant to the plaintiff’s claim of wrongdoing’. *Phoenix Canada Oil Co. v Texaco, Inc.*, 842 F.2d 1466, 1477 (3rd. Cir. 1988). In other words, the signatory and non-signatory must have entered into an ‘agency relationship for [the] specific transaction’ at issue in the lawsuit. *Id.* at 1487. Thus, for example, in *Ouadani v TF Final Mile LLC*, 876 F.3d 31, 37 (1st. Cir. 2017), the First Circuit found that a company could not require one of its former delivery drivers to arbitrate his wage and hour claims against the company because the driver had not signed an arbitration agreement with the company. Further, even though the driver was associated with a vendor with whom the company did have an arbitration agreement, the company could not bind the driver as an agent of this vendor, because the driver had not brought his wage and hour claims as an ‘agent acting on behalf of’ the vendor, but, instead, had initiated the lawsuit ‘on his own behalf and purportedly on behalf of other similarly situated drivers’. *Id.*

Fourth, in some cases, pursuant to a veil-piercing/alter ego theory, the relationship between a non-signatory and a signatory might be sufficiently close to warrant piercing the corporate veil and holding the non-signatory responsible for the conduct of the signatory. Courts are cautious to pierce the corporate veil and have held that ‘[c]ommon ownership and common management, without more, are insufficient to override corporate separateness and pave the way for alter ego liability’. *InterGen N.V v Grina*, 344 F.3d 134, 149 (1st. Cir. 2003). The corporate veil may be pierced to hold an alter ego liable for the commitments of its instrumentality only if: (i) the owner exercised complete control over the corporation with respect to the transaction at issue and (ii) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil. *Sapic v Gov’t of Turkm.*, 345 F.3d 347, 359 (2nd. Cir. 2003). See also *Non-signatories and International Contracts: An Arbitrator’s Dilemma*, in *Multiple Parties in International Arbitration 3* (Permanent Court of Arbitration, 2009), adapted from *Non-Signatories and International Arbitration*, in *Leading Arbitrators’ Guide to International Arbitration 707* (L. Newman and R. Hill, 3d ed. 2014); *2 Dispute Res. Int’l 84* (2008); *Extending the Arbitration Agreement to Non-Signatories*, ch. 4 *Int’l Commercial Arb. Practice: 21st Century Perspectives* (H. Grigera Naón and P. Mason eds. 2010, 2d Ed. 2013) (discussing disregard of corporate personality as one basis pursuant to which non-signatories may be bound by an arbitration agreement, especially in cases where the corporate form has been exploited for fraudulent purposes).

Fifth, under a third-party beneficiary theory, a non-signatory has been deemed to be bound by the arbitration clause because the non-signatory is a third-party beneficiary of the agreement containing the clause. Under this theory, which is similar to estoppel, courts look 'to the intentions of the parties at the time the contract was executed' and assess whether the intent to make the non-signatory a third-party beneficiary is 'clearly written or evidenced in the contract.' *Sapic v Gov't of Turkm.*, 345 F.3d 347, 362 (5th. Cir. 2003) (refusing to find a third-party beneficiary relationship where the arbitration agreement specified that its terms applied only to the parties) (citations omitted).

Sixth, non-signatories can also be deemed to be bound by an arbitration agreement under two separate theories of estoppel. The first theory covers the more typical case in which a signatory is seeking to bind a non-signatory. In those cases, courts have found that the non-signatory may be bound by the agreement if the non-signatory embraced the agreement during the life of the agreement, 'despite their non-signatory status, but then during litigation attempt[ed] to repudiate the arbitration clause in the contract.' *Ouadani v TF Final Mile LLC*, 876 F.3d 31, 38 (1st. Cir. 2017). See for example, *American Bureau of Shipping v Tencara Shipyard S.P.A.* 170 F.3d 349, 353 (2d. Cir. 1999) (binding non-signatory to a contract under which it received direct benefits of lower insurance and the ability to sail under the French flag). The second theory covers instances in which a non-signatory seeks to bind a signatory. In those cases, courts have estopped a 'signatory from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.' *Smith/Enron Cogeneration Ltd. P'ship v Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 98 (2nd. Cir. 1999) (citations omitted). Thus, in *Sourcing Unlimited, Inc. v Asimco Int'l, Inc.*, 526 F.3d 38, 47 (1st. Cir. 2008), the First Circuit held that a non-signatory could require a manufacturer to arbitrate its claims against it because most of the manufacturer's claims either directly or indirectly related to an agreement the manufacturer had entered into with the non-signatory's parent company. By way of explanation, the manufacturer's complaint alleged that the non-signatory had

intentionally interfered with the manufacturer's agreement with the parent company. The complaint also alleged that the non-signatory's chairman had made certain misrepresentations to the manufacturer in negotiating the agreement on behalf of the parent company. Because '[a]ll of [the manufacturer's] claims against [the non-signatory] ultimately derive[d] from benefits [the manufacturer] allege[d] [were] due [to] it under the ... Agreement', the manufacturer was required to arbitrate its claims against the non-signatory. *Id.* at 48.

With respect to this second theory of estoppel, the Supreme Court has recently granted a writ of certiorari and agreed to hear in its next term the international arbitration case of *GE Energy Power Conversion France SAS v Outokumpu Stainless USA LLC*, No. 18-1048, to address whether a foreign non-signatory can compel arbitration under the doctrine of equitable estoppel under the New York Convention. The case is on appeal from the Eleventh Circuit, which held that, even though non-signatories can compel arbitration under a theory of estoppel under Chapter 1 of the FAA, which governs domestic arbitration agreements, this is only because Chapter 1 'does not expressly restrict arbitration to the specific parties to an agreement', while the New York Convention requires that there be an agreement in writing. Specifically, the Eleventh Circuit focused on the language contained in paragraph 2 of Article II of the New York Convention, which it interpreted as requiring that there be an 'agreement in writing' which must be 'signed by the parties or contained in an exchange of letters or telegrams.' *Outokumpu Stainless USA, LLC v Converteam SAS*, 902 F.3d 1316, 1326-27 (11th. Cir. 2018). The Eleventh Circuit also held that the New York Convention trumps Chapter 1 of the FAA where the two are in conflict, citing 9 U.S.C. § 208 which provides that 'Chapter 1 [of the FAA] applies to actions and proceedings ... to the extent that chapter is not in conflict with ... the [New York] Convention as ratified by the United States.' *Id.* at 1326. Thus, because there was no signed arbitration agreement between the parties, the Eleventh Circuit held that a non-signatory could not compel the signatory to litigate its claims against it in arbitration.

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