

Selecting a party-appointed arbitrator in the US

by David McLean

Produced by Latham & Watkins LLP for [LexisPSL Arbitration](#).

11/03/2014

Arbitration analysis: Selecting an arbitrator is one of the most important strategic considerations in an arbitration. While an arbitrator's neutrality and impartiality is widely assumed to be the norm (especially internationally), tribunals in the United States have historically allowed commercial arbitrators to exhibit differing degrees of partiality. Here, David J. McLean of Latham & Watkins' New York office discusses the background to party-appointments in the US and discusses the practice in modern international arbitration.

Questions about the permitted partiality of party-appointed arbitrators in the United States have been much debated and the answers have evolved over the years. Having a partisan arbitrator may seem like an advantage, but as the norm has moved towards favouring neutral arbitrators, parties need to strategise carefully when selecting partisan arbitrators so as not to overplay their position.

To provide an understanding of the current status of this important issue in domestic arbitration and to examine considerations surrounding the selection of party-appointed arbitrators in the United States, this analysis discusses the historical context and the subsequent development of the modern role of party-appointed arbitrators in domestic arbitration. Also discussed are the factors that practitioners should consider when selecting a party-appointed arbitrator and how those factors vary depending on whether the party-appointed arbitrator is to be neutral or partisan.

Understanding the historical context

To understand how the partisan nature of party-appointed arbitrators in the United States developed, one should remember that many of the rules and customs attendant to American-style arbitration grew out of the American labour movement of the early 1900's. Going back to the 1930s, a typical labour contract provided for arbitration as the only form of dispute resolution. Not until the civil rights legislation of the 1960s could workers resort to the courts for redress of employment claims and even then, contractual claims were not typically resolved through court proceedings.

To this day, collective bargain agreements in the United States provide for an arbitration process in which management appoints one arbitrator, the union appoints another and the two select the third. Not surprisingly, the union-appointed arbitrator is sympathetic to the worker's claims while the management-appointed arbitrator can be expected to favour the company. As commercial arbitration in the United States became more widespread, the prevailing approach to arbitrator selection resulted in party-appointed arbitrators who were expected to advocate for the party that appointed them (see *Tate v Saratoga Savings & Loan Association* 216 Cal. App. 3d 843 (1989) (not available in Lexis@Library)).

In effect, party-appointed arbitrators were partisan representatives of the appointing sides and each was expected to compete for the vote of the third, neutral arbitrator (see *Sunkist Soft Drinks v Sunkist Growers* 10 F.3d 753 (11th Cir. 1993), cert. denied, 513 U.S. 869 (1994) (not available in Lexis@Library)). Far from acting as neutrals, the party-appointed arbitrators advocated for their respective side and such advocacy influenced the tribunal's deliberations. The boundaries of acceptable partisan conduct were ill-defined and without clear rules or customs, uncertainty arose as to whether both partisans were playing the same game. Even with consensus among the parties about the boundaries of permitted conduct in a particular situation, the concept of partisan arbitrators allowed for a considerable range of conduct. In some instances, party-appointed arbitrators were expected to aid counsel for 'their side' in formulating strategy, considering arguments to advance, witnesses to call and other tactical considerations. Essentially, these partisan arbitrators acted like an extension of the appointing party's counsel. Sometimes, the lines of communication between counsel and its chosen arbitrator would remain open until the tribunal's deliberations began. In other instances, albeit rarer, such communications continued even as the tribunal deliberated (although this later conduct is now proscribed by the Canons of Arbitrator Ethics). In this world, the lines between advocate and party-appointed arbitrator often blurred.

Over time, many began to question the fairness and propriety of this approach. As criticism mounted, both from within the United States and abroad, the norm for United States commercial arbitration shifted to a presumption of arbitrator neutrality. The commercial rules of many arbitral institutions were revised in the last decade or so to pro-

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vide that, absent a specific agreement between the parties, all three arbitrators comprising the panel must be neutral. For example, the American Arbitration Association (AAA) amended their own rule to this effect for domestic arbitration in 2003. The rules of the AAA's international arm, the International Center for Dispute Resolution (ICDR), also require all arbitrators to be neutral, as do the domestic and international rules of the International Institute for Conflict Prevention and Resolution.

Now, typically, when three arbitrators are to be selected, the parties have some input in the selection process. For example, under the AAA default rule, the parties receive a list of candidates and are asked to strike and rank the candidates. Under other regimes, each party appoints one arbitrator and the two will pick the third, subject to certain deadlock breaking provisions set forth in the rules of the various arbitral institutions or the agreement of the parties. Although two of the arbitrators may be selected directly or with input from the disputing parties, in the United States today, all arbitrators are presumed neutral, unless the parties have agreed otherwise.

Despite the modern presumption of neutrality in the United States, parties can still select the partisan approach, with each side picking an arbitrator beholden to the appointing party (if the applicable arbitral rules or the parties' agreement so provides). This approach stands in stark contrast to international arbitration where, even in the United States, all arbitrators must be independent and impartial. Such partisan arbitrators are sometimes referred to as 'Canon X' arbitrators, because Canon X of the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes (2003) specifically exempts such party-appointed arbitrators from certain expectations of neutrality where the parties so agree.

Considerations for selecting a partisan party-appointed arbitrator

Considerations for selecting a party-appointed arbitrator depend on whether he or she is to be partisan or neutral. We begin with the less common instance where the parties have agreed to appoint partisan arbitrators.

The selection of a partisan party-appointed arbitrator in the domestic arbitration setting in the United States will have implications throughout the dispute resolution process. The influence of the partisan arbitrator is not limited to advocacy during final deliberations. Disputes about discovery, such as the number of depositions allowed, the length of a deposition, the scope of discoverable evidence and whether or not to grant a protective order will likely be influenced by the views of the partisan arbitrators. Similarly, decisions affecting the proceedings, such as whether to grant interim relief, motions to dismiss or motions for summary adjudication and other procedural matters are likely to be influenced by a partisan arbitrator who argues effectively in favour of one party's interests. While typically not outcome-determinative, these procedural decisions can affect the overall direction of the dispute.

In these circumstances, a party must consider the degree of partisanship that is permissible and most favourable. Although an effective partisan arbitrator is expected to advance the cause of the party who appointed him or her, a party-appointed arbitrator who is patently biased may be less effective in influencing the vote of the third arbitrator. Sometimes, the chair will react by deeply discounting a vocal advocate on the panel, especially if the other side has appointed a less obviously partisan arbitrator. For this reason, maintaining some appearance of neutrality may actually increase the effectiveness of the party-appointed arbitrator on the chair whose vote, practically speaking, will decide the case. Balancing these factors can be difficult, making partisan arbitration selection challenging, even under the best circumstances.

Although there has been no shortage of criticism of 'partisan' party-appointed or Canon X arbitrators and the rules of most arbitral institutions in the United States now require all arbitrators be neutral unless the parties agree otherwise, some argue that the partisan approach is not inherently unfair or ill-advised. Commercial arbitration is a creation of contract, and so, the argument goes, parties should be allowed to fashion their agreement as they see fit (within certain limits, perhaps).

The biggest risk associated with appointing partisans arises when parties do not have a clear and shared understanding of the parameters that apply to the conduct of the party-appointed arbitrator. One party may limit its own or its arbitrator's conduct in certain ways to which the other side does not adhere. For example, one party may constrain the extent of communication with its appointed arbitrator, while the other party continues to discuss strategy, or even the merits, with its appointed arbitrator, thus gaining undue influence on, or at least valuable insight into, the tribunal's assessment of important issues. This risk of an uneven playing field creates the potential for unfairness and underlies much of the criticism associated with the use of partisan arbitrators over the years.

For these reasons, and others, the modern presumption in favour of neutrality for party-appointed arbitrators in domestic arbitrations has gained solid ground in the United States, much as it has always had in the realm of international arbitration.

Considerations for selecting a neutral party-appointed arbitrator

Even in the context of rules that require selection of 'impartial' and 'independent' arbitrators, parties will often attempt to appoint an arbitrator who is predisposed in their favour. Impartiality refers to one who is not biased nor prejudiced in relation to the parties, but that is not the same as requiring a total absence of pre-existing philosophies influenced by one's life experiences.

Arbitrator independence tends to focus on the financial, professional or personal relationships of the arbitrator and the parties or their counsel and ought to be easy to achieve. When appointing a neutral, party-appointed arbitrator, parties often attempt to maximize their chance of winning while remaining cognizant of the arbitrator's neutrality. As one commentator expressed, in selecting a party-appointed arbitrator, the candidate with the 'maximum predisposition towards' the client, but 'with the minimum appearance of bias' is often favored (M Hunter, *Ethics of the International Arbitrator*, 53 Arb 219 at [223] (1987)).

Even when an arbitrator must be neutral and impartial, parties nevertheless seek candidates who are predisposed towards their position, whether based on philosophy, prior rulings or predilection. Without a doubt, all else being equal, to select an arbitrator likely to view one's case favourably should increase the chances of a favourable award. For example, depending on the case, one may seek to appoint 'pro-business' or 'pro-consumer' arbitrators. Similar dichotomies include 'pro-employee' and 'pro-employer' jurists in an employment dispute or 'strict constructionist' and 'liberal constructionist' in a contract dispute. Likewise, potential arbitrators, like judges, sometimes can be distinguished by the degree to which they are likely to focus on equitable considerations as opposed to implementing the business deal as written on the four corners of the contract. Parties might find clues into such predispositions in previous academic writings or prior decisions. Even though the modern arbitrator is neutral and not an advocate for the appointing party, the neutral's legal perspective, political views and other such factors could colour his or her decision. Under somewhat analogous circumstances, litigants often speak of being assigned to a judge whom they believe will look favourably on their side, such as when a judge has previously expressed views on relevant legal theories consistent with one's position in litigation. These considerations are often germane as one approaches arbitrator selection.

Most arbitral rules in the United States, like their international counterparts, now require the neutrality of the arbitrators (although under some regimes, the parties can agree to appoint partisan arbitrators, as discussed). Correspondingly, there are rules that impose a duty on arbitrators to investigate possible conflicts of interest and disclose facts likely to affect an arbitrator's judgment. Upon receiving such disclosures, parties can object to the appointment of an arbitrator who appears biased, at which point the arbitral institution typically determines whether the arbitrator should be disqualified (see Rule R-18, AAA Commercial Arbitration Rules and Mediation Procedures (2013)). Rules also limit the extent of ex parte communication between the arbitrators and the parties (see Rule R-19, AAA Commercial Arbitration Rules and Mediation Procedures (2013)). Additionally, some rules require the arbitrator to sign a statement of independence.

Choosing the right arbitrator

Because an arbitrator's approach to procedural and substantive issues likely will impact significantly the outcome of the dispute, appointing the right arbitrator is an essential step towards representing a party in arbitration.

Although the presumption is now in favour of arbitrator neutrality even in the United States, parties in domestic arbitration in the United States are generally free to agree to appoint Canon X or partisan arbitrators. Especially because partisan arbitrators are an anathema in the international context, such that many parties may be unfamiliar with the concept or the role party-appointed arbitrators can play in the domestic context, practitioners should be mindful of the differences in these two approaches.

Practitioners should know the parameters and limitations of selecting (and communicating with) a party-appointed partisan arbitrator. Similarly, where all three arbitrators are to be neutral, the selection process remains just as important. Practitioners should take into consideration the varying dispositions of potential arbitrators in making their selection. Failure to account for these dynamics could significantly disadvantage one's position in the dispute resolution process.

This article was originally published on [Lexis®PSL Arbitration](#) on 11/03/14.

US arbitral institutions and their rules

by David McLean

Produced by Latham & Watkins LLP for [LexisPSL Arbitration](#).

When arbitrating in the United States, disputants can choose from a number of institutions. This Practice Note is intended to familiarise practitioners with the most commonly used arbitral institutions in the United States: the American Arbitration Association (AAA); the International Institution for Conflict Prevention and Resolution (CPR); and JAMS. This Practice Note outlines the key differences between the institutions in terms of panel selection, applicable rules and arbitration fees.

In this Practice Note, the following definitions will be used:

- o AAA Commercial Arbitration Rules and Mediation Procedures (2013) ([AAA Rules](#))
- o CPR Rules for Non-administered Arbitration of Business Disputes (2007) ([CPR Rules](#))
- o JAMS Comprehensive Arbitration Rules & Procedures (2010) ([JAMS Rules](#))

AAA, CDR and JAMS--profiles

AAA

AAA, the oldest provider of ADR worldwide, was formed following the enactment of the Federal Arbitration Act 1926 (FAA). AAA provides administrative services for dispute resolution throughout the United States, see Practice Note: [AAA arbitration--overview](#), and internationally through its International Centre for Dispute Resolution (ICDR) see Practice Note: [ICDR arbitration--overview](#).

CPR

CPR was founded in 1979 as an effort to bring together corporate counsel and their law firms to find a way to lower the cost of litigation. CPR provides both administered and non-administered arbitration services.

Unlike AAA or JAMS, CPR does not receive a portion of the fees paid to its arbitrators. CPR is funded largely through annual dues, third party grants (no government money), program fees (generally associated with annual programs) and gifts. The arbitrators also pay a nominal amount to be on the panel.

CPR does not charge a filing fee and as such it is arguably a cheaper option than using other institutions, but since the bulk of the expense in any case is the arbitrators' fees themselves, this is unlikely to be a major consideration for choosing this institution.

With a focus on expanding the use of alternative dispute resolutions, the CPR has promoted the 'CPR pledge' in which parties commit to considering ADR mechanisms before filing suit. To date, more than 4,000 operating companies and 1,500 law firms in the US have signed on to this pledge.

JAMS

Also founded in 1979, JAMS is amongst the largest private ADR providers in the world. Founded by the Hon Warren Knight, JAMS offers nearly 300 full-time neutrals to resolve disputes in most legal fields. In 2011, JAMS partnered with the ADR Centre in Italy and formed JAMS International to provide mediation and arbitration of cross-border disputes.

Other arbitral institutions

The degree of consistency which AAA, CPR and JAMS provide to parties has contributed to their international reputation. Administering thousands of cases per year, these institutions offer parties confidence that the dispute resolution process will be administered reliably. Unlike arbitration awards by the ICC, however, these three institutions do not review the final award before it is issued.

Beyond these three institutions, a number of other highly qualified institutions provide ADR services, often focusing more specifically upon a particular sector, which may provide added benefit for certain disputes, ie FINRA (the Financial Industry Regulatory Authority) offers the largest dispute resolution forum in the securities industry field, ARIAS (the AIDA Reinsurance and Insurance Arbitration Society) leads in the reinsurance field and the ICC (International Chamber of Commerce) enjoys a strong worldwide reputation, frequently administering arbitration cases in the United States, see Practice Note: [ICC arbitration--overview](#).

Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), 149 nations have agreed to enforce international arbitration awards in their territory. While the Convention serves as the primary mechanism in which arbitration awards are enforced across borders today, [New York Convention](#), art V, s (d) provides that recognition and enforcement may be refused if the:

'arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.'

An arbitral institution's prominence and international name recognition may therefore contribute to the deference afforded to it regarding the validity of its procedures, the legitimacy of the tribunal and the authority of its award.

AAA, CPR and JAMS--rules and procedures

Tribunal composition plays a key role in the arbitration process. Arbitrators' quality and expertise, as well as the selection process should factor highly in determining which institution to use. As AAA, CPR and JAMS provide the framework in which this process takes place, parties should ensure that they understand the differences between these institutions with regard to:

- o tribunal selection process
- o the extent to which neutral lists of potential arbitrators are available to prospective parties
- o the degree to which parties may choose (and refuse) individual arbitrators, and
- o the level of qualifications required

Tribunal selection and lists of arbitrators

As to the availability of a list of potential arbitrators prior to the commencement of arbitration proceedings:

- o JAMS publishes its list of arbitrators on its website for all interested parties to examine
- o AAA treats its list as proprietary and it is therefore not publicly available. Accordingly, prior to selecting AAA as the dispute resolution institution, the parties will have no idea of the arbitrators available to them should a dispute arise
- o CPR takes a blended approach, allowing only individuals or companies who are CPR members to access the CPR list

These three institutions also differ in the manner in which the tribunal is selected once a dispute arises:

- o AAA does not provide a complete list of arbitrators to the parties once a dispute arises. The parties must first inform AAA of the nature of their dispute and AAA will then provide a list of ten recommended arbitrators from which the parties may choose. Parties strike out the individuals whom they disavour, rank the remaining names and ask AAA to select the tribunal from these individuals based upon their availability. If the AAA list proves insufficient, parties may request another list of ten arbitrators. This process can be repeated as many times as necessary until the tribunal has been constituted
- o CPR and JAMS provide their complete list to the disputing parties and the parties can then choose their preferred arbitrators from these lists
- o a unique feature of CPR's tribunal selection process is that of 'screened' selection. Under this optional approach, the tribunal would not know which party has selected them, enhancing their neutrality

Requirements

While all three institutions monitor the quality of their arbitrators as a source of pride, they differ in their approach to selecting the arbitrators serving on their lists.

- o JAMS, founded by a judge, developed a list dominated by retired judges in the institution's early years, a preference still obvious in its current list of arbitrators
- o JAMS and AAA typically require exclusivity from their arbitrators, although this limitation does not apply to serving on the CPR panel
- o arbitrators for JAMS and CPR must hold a law degree, but AAA neutrals can include industry experts who are not lawyers

In addition to offering arbitrators with broad expertise, AAA, JAMS and CPR each also have arbitrators who focus on particular industries, ie financial services, construction and technology.

Moreover, all three institutions vigilantly maintain their reputations by regularly reviewing arbitrators' performance and character. Those who fail to meet the institutions' high standards are removed from the respective list.

Applicable rules

[AAA](#), [CPR](#), and [JAMS](#) have all established their own sets of arbitral rules. An arbitral forum with an established set of rules increases predictability and streamlines the dispute resolution process. Unlike the lists of arbitrators, these rules are readily available to be examined by interested parties.

Developed over time, each set of rules is comprehensive, addressing most of the common issues that can arise in the course of a dispute and all three institutions routinely update their rules to reflect the latest trends and developments. Hence, if a particular rule of one institution gains wide traction, it is likely the other institutions will also adopt it. This constant competition has led to the convergence of rules and a common adoption of best practices.

Note that while these institutional rules are available, all three institutions give primacy to the express will of the disputing parties. The institutional rules are thus subordinated to the language in a given agreement and may be freely adjusted to suit parties' particular needs.

Federal and state or common law

Parties should be mindful that the arbitral rules of each institution do not operate in a vacuum and may be subject to limitations based on the FAA or on applicable state or common law.

For example, CPR allows the arbitration tribunal 'to require and facilitate such discovery as it shall determine appropriate' (CPR, r11). However, should the arbitral tribunal demand a pre-hearing third-party subpoena (ie documents or information from a third party), the third party may challenge that order in state or federal court. Section 7 of the FAA provides that:

'the arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case,'
(Federal Arbitration Act (FAA), 9 USC § 7)

There arises, then, a question as to whether the power of the arbitral tribunal extends to pre-hearing third-party subpoenas under CPR rules. This issue has led to a split in the court circuits, with the second (*Life Receivables Trust v Syndicate 102 at Lloyd's of London* 549 F.3d 210 (2d Cir. 2008) not available in Lexis@Library) and third (*Hay Group, Inc v EBS Acquisition Corp* 360 F.3d 404 (3d Cir. 2004) not available in Lexis@Library). Circuits taking a restrictive approach, the sixth (*American Federation of Television and Radio Artists, AFL-CIO v WJBK-TV (New World Communications of Detroit, Inc)* 164 F.3d 1004 (6th Cir. 1999) not available in Lexis@Library) and eight (*Re Security Life Insurance Co of America* 228 F.3d 865 (8th Cir. 2000) not available in Lexis@Library). Circuits holding this power implicit under FAA, s 7 and the fourth (*COMSAT Corp v National Science Foundation* 190 F.3d 269 (4th Cir. 1999) not available in Lexis@Library) circuits staking out a middle ground.

Discovery

In regards to discovery:

- o the [AAA](#) rules provide that there should be no discovery unless ordered by the arbitrator or based upon party agreement (AAA, r R-22)
- o [CPR](#) allows the tribunal to determine the extent of discovery (CPR, r 11)
- o [JAMS](#) requires the parties to co-operate in good faith in the voluntary and informal exchange of all non-privileged documents and other information and each party may presumptively take one deposition of the opposing party, unless the arbitrator determines that more is warranted (JAMS, r 17)

All three institutions also provide expedited procedures that parties can choose upon mutual agreement.

Number of arbitrators

The three institutions also differ in the number of arbitrators required to serve on the panel:

- o in the absence of an express agreement between the parties, AAA uses one arbitrator, unless the AAA, in its discretion, determines that more arbitrators are necessary due to a case's size, complexity or other circumstances (AAA, r R-16).
- o JAMS requires one arbitrator to conduct the arbitration unless the parties agree otherwise (JAMS, r 7)
- o CPR requires three arbitrators to serve on the panel unless the parties agree otherwise (CPR, r 5)

Awards issued on default

AAA, CPR, and JAMS also differ in their approach to the absence of parties and the issuance of award on default:

- o AAA does not allow an award solely based upon default and requires the present party to submit evidence supporting the award (AAA, r R-31)
- o JAMS takes a similar approach to AAA, but also allows the arbitrator to arrange for a telephone hearing or to receive necessary evidence to render an award by affidavit (JAMS, r 22)
- o CPR does allow the tribunal to issue an award on default, providing that the non-defaulting party produces appropriate evidence and legal arguments in support of its contentions (CPR, r 16)

Costs of arbitration

Approaches to costs vary between the three institutions.

With respect to filing fees, AAA uses a sliding scale based upon the amount in dispute, while CPR's non-administered arbitration is initiated without any filing fee.

These three providers also differ in their approach to administrative and case management fees, just as the range of arbitrator compensation varies depending on the neutrals selected. Administrative and filing fees can fluctuate widely between institutions, just as arbitrators' hourly rates can vary significantly, even within the same institution.

Choosing the right institution

Choosing an appropriate arbitral institution can serve as the first step towards successfully resolving a dispute. While many times the panellists' expertise alone could lead parties to elect one arbitral institution versus another, parties seeking to limit or expand aspects of the process (ie discovery) may focus on the institutional rules as the determining selection factor.

Parties should keep in mind that other respectable institutions could equally be the best option in certain disputes.

Choosing an arbitral seat in the United States

by *Claudia Salomon and Irina Sivachenko*

Produced by Latham & Watkins LLP for [LexisPSL Arbitration](#).

Why the venue (or seat) is important

Venue is the seat, or the legal place, of the arbitration. Frequently overlooked by the parties at the time of contracting, the selection of the seat is one of the most important choices to make during contract negotiations. Indeed, the seat of the arbitration usually determines the applicable procedural law, *lex arbitri*, with important practical and legal implications, including the role of local courts in relation to the arbitration (see Practice Notes: [Arbitration seat](#) and [Choosing the seat of arbitration](#)).

Because the laws determining the authority of local courts and the extent to which they can intervene in the arbitral process vary substantially across jurisdictions, failing to consider the appropriate seat for an arbitration may slow down the proceedings and leave the parties unprepared to address the peculiarities of local law. Parties should thoughtfully select the seat and fully understand its legal and practical implications during the contract drafting stage to ensure they are in the best possible position should a dispute arise.

The role of local courts

Although arbitration is largely an extra-judicial process, the courts where the arbitration is seated can impact substantially the arbitral proceedings at every stage of the process, for example:

- o before the arbitration has been initiated, the courts may assist parties in commencing the arbitration and consider petitions for provisional relief. A party may request that a local court enforce the agreement to arbitrate when another party is resisting arbitration
- o during the arbitration, local courts may be able to assist with the production of evidence, supplementing the limited power of the arbitral tribunal to gather facts from third parties
- o after the tribunal has issued its award, parties must bring any applications to vacate or set aside the award before the court of the selected venue, and that court considers the application under its local laws and procedures

Practical considerations

As the seat frequently (although not always, as hearings can take place in another location, but the legal 'seat' will remain unchanged) serves as the actual location where the arbitral proceedings take place, parties should consider the practical implications of their choice of seat, such as convenience and ease of physical access, the pool of available and experienced arbitrators, and the official language of the seat as well as its cultural practices.

Important considerations in selecting arbitral seats in the United States

Despite the proliferation of places around the world promoting themselves as favourable arbitral seats, the United States remains one of the most popular seats of arbitration. Federal policy favouring arbitration, independent courts, a well-developed body of contract and commercial law, as well as the courts' authority to compel arbitration have all fuelled the popularity of the United States as a place for an international arbitration. Within the United States, New York, Miami and Houston have emerged as the most popular arbitral seats. While all three cities offer great infrastructure, qualified arbitrators and neutral, experienced judges, their local procedural and substantive laws vary.

State law matters

The dual legal system of state and federal laws in the United States results in two sources of relevant laws governing arbitral proceedings: the Federal Arbitration Act ([FAA](#)) and the laws of the state of the seat. When choosing a seat

in the United States, parties should consider how the FAA as well as state laws impact both applicable procedural rules and substantive matters.

Substantive law

The parties frequently select governing substantive law during negotiations. This substantive law, however, usually governs parties' rights and obligations under the contract but does not always apply to disputes about the validity and formation of the contract, disagreements about arbitrability of a particular issue, or challenges to the arbitral award. The courts frequently apply the law of the seat to resolve these questions. See Practice Note: [Applicable laws in international arbitration](#); for questions of applicable law in England and Wales, see Practice Notes: [Arbitration--substantive law of the dispute \(England and Wales\)](#), [Law of the arbitration agreement \(England and Wales\)](#) and [Law of the proceedings--curial law of lex arbitri \(England & Wales\)](#).

Under the Supremacy clause of the [US Constitution](#), federal law trumps conflicting state law. Although the FAA contains no express pre-emptive provision, the Supreme Court has held that the FAA overrides state laws that are unfavourable to arbitration. See for example, *AT&T Mobility v Concepcion* 131 S Ct 1740, 1753 (US 2011), holding that the FAA pre-empted California state law because the state law 'stands as an obstacle' to the FAA policy favouring arbitrations; and *Moses H Cone Memorial Hospital v Mercury Construction* 460 US 1, 24 (US 1983), describing the FAA as 'a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary'.

The FAA, however, was not intended to 'occupy the entire field of arbitration' (*Volt Information Scientists v Board of Trustees* 489 US 468, 477 (US 1989)), and without a direct conflict between federal and state law, the courts may apply both. Indeed, the interplay between the two can be very subtle--for example, while it is generally accepted that state law determines the validity of the arbitration agreement, federal law defines the scope of the agreement. Where the FAA is silent on the issue, state law will be applied to supplement the FAA and fill in the gap. For example, although the FAA requires courts to enforce a valid agreement to arbitrate, it provides no definition of what constitutes an agreement. As a result, state law will be used to determine whether the contract has been formed and whether the parties have indeed agreed to arbitrate their dispute. Generally state law also governs the interpretation and review of the contract's validity and thus might be decided differently across the seats.

Procedural law

The FAA favours party autonomy in arbitral proceedings and contains little guidance on the conduct of the arbitration procedure itself. Therefore, parties should understand the state law of the selected seat, as many states have enacted their own statutes governing arbitral proceedings; for example, Texas and Florida have adopted the UNCITRAL Model Law (see Practice note: [UNCITRAL Model Law on international commercial arbitration \(the 'Model Law'\)](#)), while New York has developed its own provisions. The FAA does not cover provisional relief, thus the availability and scope of interim measures will depend on the state law of the selected venue. Some states, such as New York, Texas and Florida, have adopted statutes specifically addressing the issue of the interim relief and the circumstances under which the application for such relief should be granted.

The state law of the selected seat can also impact the parties' ability to engage foreign lawyers as their counsel or as arbitrators. The unauthorised practice of law is a serious violation in the United States, and every state has its own procedures authorising lawyers to practice law in front of its courts. The states, however, disagree as to whether the representation in a private arbitral proceeding qualifies as practice of law and thus falls within the same lawyer registration requirements. For example, New York courts have held that foreign lawyers can appear before arbitral tribunals seated in the state because such representation does not constitute the practice of law (*Prudential Equity Group v Ajamie* 538 F Supp 2d 605, 607 (SDNY 2008); and *Williamson PA v John D Quinn Construction*, 537 F Supp 613, 616 (SDNY 1982)).

Similarly, Texas and Florida statutes generally allow foreign counsel to represent parties in the proceedings seated within their borders (see Handbook of Texas Lawyer and Judicial Ethics, Vol 48-48B (Texas Practice Series, 2013) §10:5, and Florida Disciplinary Rule of Conduct 4-5.5 (FLA BAR REG. R. 4-5.5 (2006))). In contrast, California does not allow foreign lawyers to appear before arbitral tribunals, and even requires that US out-of-state lawyers obtain special pre-approval from the tribunal and notify the California Bar in advance of their appearance (see [Out of State Attorney Arbitration Counsel on the State Bar of California](#)). California's strict restriction on the use of foreign counsel has impacted negatively on the popularity of California as an arbitral venue.

Circuit splits--varying approaches across jurisdictions

Just as state statutory law varies, federal district courts also vary in their interpretation of the federal substantive law that may impact an arbitration. For example, although the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) mandates that an agreement to arbitrate must be made in writing, the courts have interpreted this requirement differently. The Fifth Circuit, which includes Texas, has ruled that under certain circumstances even an unsigned contract can satisfy the writing requirement of the New York Convention (*Todd v SS Mut Underwriting Association (Bermuda)* 601 F.3d 329, 335 n11 (5th Cir 2010); and *Sphere Drake Insurance v Marine Towing* 16 F.3d 666, 669 (5th Cir 1994), noting that if an arbitral clause was included in the contract, a signature is not required). In contrast, the Second Circuit, which includes New York, held that an arbitration clause included in a form purchase order that was signed only by one party is not enforceable and does not satisfy the necessary writing requirement (*Kahn Lucas Lancaster v Lark International* 186 F.3d 210, 216-18 (2nd Cir 1999)).

Similarly, the courts are split on the availability of pre-hearing discovery (the US equivalent of disclosure). Although the FAA contains a provision granting a tribunal general authority to compel necessary witness testimony (FAA, 9 USC § 7), federal courts have disagreed on the scope of such authority. The circuits are currently split on whether the courts' authority to compel evidence extends to pre-hearing discovery against the third parties. The Second and Third Circuits, for example, do not allow pre-hearing discovery from non-parties, whereas the Sixth and Eighth Circuits allow such pre-hearing document requests (*Life Receivables Trust v Syndicate 102 at Lloyd's of London* 549 F.3d 210 (2d Cir 2008); *Hay Group Inc v EBS Acquisition Corp.*, 360 F.3d 404 (3rd Cir 2004); *American Federation of Television and Radio Artists, AFL-CIO v WJBK-TV*, 164 F.3d 1004 (6th Cir 1999); *Re Security Life Insurance Company of America*, 228 F.3d 865 (8th Cir 2000)). Depending on the venue of arbitration, the parties may not be able to obtain much-needed documentary evidence from non-parties before the commencement of the arbitral proceedings.

The circuits are also split on the available grounds on which a party may seek to vacate an arbitral award. The Supreme Court ruled that the FAA provides an exclusive list of the available grounds to vacate an award (*Hall Street Associates v Mattel* 552 US 576, 578 (2008)), but the courts have disagreed on whether 'manifest disregard of the law', not among the FAA's enumerated grounds, can nevertheless be applied. The Second, Fourth and Ninth Circuits have held that manifest disregard of the law remains a valid ground to vacate arbitral awards (*Stolt-Nielsen SA v AnimalFeeds International* 548 F.3d 85, 93-94 (2d Cir 2008), revised on other grounds by *Stolt-Nielsen SA v AnimalFeeds International*, 130 S Ct 1758 (2010); *Wachovia Securities v Brand*, 671 F.3d 472, 480 (4th Cir 2012), confirming validity of manifest disregard of law doctrine; and *Comedy Club v Improv West Associates*, 553 F.3d 1277, 1290 (9th Cir 2009), confirming validity of manifest disregard of law doctrine). In contrast, the First, Fifth, and Eleventh Circuits have ruled that manifest disregard of the law is no longer a viable basis to vacate an arbitral award (*Ramos-Santiago v United Parcel Services*, 524 F.3d 120, 124 n3 (1st Cir 2008), noting that 'manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act'; *Citigroup Global Markets v Bacon*, 562 F.3d 349, 350 (5th Cir 2009), abandoning manifest disregard of the law doctrine as an independent ground to challenge arbitral awards; and *Frazier v CitiFinancial*, 604 F.3d 1313, 1324 (11th Cir 2010), holding that manifest disregard doctrine can no longer be used).

Popular seats in the United States

While New York, Miami and Houston are all popular venues in the United States, each offers particular advantages for specific kinds of disputes.

New York

Given New York's well-developed, stable and respected body of commercial law, many parties select New York as the substantive law governing their contract, and likewise select New York as the venue of the arbitration (although the selection of the substantive governing law need not be the same as the law of the seat). New York also offers the benefit of neutral courts that strongly favour arbitration (eg *David L Threlkeld v Metallgesellschaft (London)*, 923 F.2d 245, 248 (2d Cir 1991)), and in September 2013, New York became the third city in the world, and the first in the United States, to establish a specialised arbitration court with a dedicated arbitration judge.

New York is also the home of several respected arbitration centres, including the International Centre for Dispute Resolution and the International Institute for Conflict Prevention and Resolution. In 2013, the International Chamber of Commerce Court of Arbitration also opened an office in New York to administer cases. The recent opening

of the New York International Arbitration Center, which offers state-of-the-art facilities for arbitral hearings, further strengthens New York's popularity.

As a global centre of international commerce, New York is also a practical choice because of the ease of physical access and the pool of available lawyers experienced in international commercial arbitration.

Miami

As home to the US headquarters of many Latin American business, and host of the 2014 International Council for Commercial Arbitration Congress, Miami is building a solid reputation for arbitral proceedings involving Latin American parties. In addition, Miami recently followed New York's example, and in December 2013 announced the creation of an International Commercial Arbitration Court, staffed with specialist judges and dedicated exclusively to hearing international commercial arbitration matters.

Houston

Houston is developing as a popular choice for arbitration of disputes in the energy and construction fields. The city promotes itself as a venue on the crossroads between America and the Middle East.

The United States Federal Arbitration Act: a powerful tool for enforcing arbitration agreements and arbitral awards

by *Claudia Salomon and Samuel de Villiers*

Produced by Latham & Watkins LLP for [LexisPSL Arbitration](#).

17/04/2014

Arbitration analysis: The Federal Arbitration Act (FAA) provides the legislative framework for the enforcement of arbitration agreements and arbitral awards in the United States. Supreme Court decisions over the last several decades ensure that the FAA's 'pro-arbitration mandate' must be broadly interpreted and universally applied by both state and federal courts. Parties seeking to enforce an arbitration agreement or arbitral award in the United States need not be concerned that 'the old [judicial] hostility toward arbitration' or 'the failure of state arbitration statutes to mandate enforcement of arbitration agreements' will thwart their ability to do so. Parties involved in arbitration subject to the New York or Panama Convention should also consider the potential advantages these Conventions provide. Claudia T. Salomon and Samuel B.C. de Villiers of Latham & Watkins' New York Office discuss the history, development and shortcomings of the FAA.

While arbitration provides parties with an efficient alternative to the courts when disputes arise, such an alternative is only useful to the extent it can be effectively enforced. From its origin in 1925 and through significantly evolving case law, the United States Federal Arbitration Act (FAA) has become a powerful tool for parties seeking to enforce both agreements to arbitrate and the arbitral awards issuing from arbitrations in the US. When drafting and entering into arbitration agreements in commercial contracts with US-based parties or where assets are likely to be based in the US, parties should understand why and how the FAA works, how the Supreme Court has interpreted the FAA's scope, and how to leverage the New York and Panama Conventions to compensate for the FAA's limitations.

Scope of the Federal Arbitration Act

The FAA sets out the legislative framework for the enforcement of arbitration agreements and arbitral awards in the United States. Passed in 1925, the FAA was intended to ensure agreements to arbitrate in maritime transactions and commerce were 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract' (9 U.S.C.S. § 2).

The FAA's implementing provisions provide that if a party to a contract containing an arbitration clause initiates contract-related litigation, either of the parties may ask the court to stay the litigation (9 U.S.C.S. § 3) and compel the other party to resolve the dispute through arbitration (9 U.S.C.S. § 4). The FAA provides that the court should determine if the dispute is 'referable to arbitration' before staying litigation or compelling arbitration:

- o a court should only stay judicial proceedings 'upon being satisfied that the issue involved in such suit or proceeding is preferable to arbitration under such an agreement' (9 U.S.C.S. § 3)
- o 'The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof' (9 U.S.C.S. § 4)

However, the Supreme Court has clarified that many questions as to the validity and scope of an arbitration agreement should be decided by the arbitrators, rather than the court.

The FAA also empowers arbitrators to call third-party witnesses, compel them to appear (and provide any documents they have that are material to the case), and hold such witnesses in contempt if they fail to comply (9 U.S.C.S. § 7). However, because arbitrators do not possess the authority to enforce compliance with their orders, parties must apply to the federal court where the arbitration is seated to obtain any necessary enforcement measures.

The FAA provides the procedures by which the prevailing party may seek to enforce an arbitral award (9 U.S.C.S. § 9) and the procedures by which the non-prevailing party may seek to vacate the award (9 U.S.C.S. § 10(a)(1)-(4)). In addition, the FAA prescribes limited grounds under which a court may modify an arbitral award (9 U.S.C.S. § 11(a)-(c)). Importantly, the FAA also makes international arbitral awards arising from arbitral proceedings in other countries enforceable in United States courts (9 U.S.C.S. § 15).

The Future of Law. Since 1818.

The Supreme Court evolves from arbitration skeptic to supporter

The Supreme Court has not always embraced arbitration, and early Supreme Court decisions were highly skeptical that arbitration proceedings could adequately enforce a party's legal rights. (See, eg, *Bernhardt v Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) ('Arbitration carries no right to trial by jury... [a]rbitrators do not have the benefit of judicial instruction on the law [and] need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial!'); see also *Wilko v Swan*, 346 U.S. 427, 435-36 (1953).)

However, the Supreme Court began to reconsider the value of arbitration as an efficient alternative to litigation, and in 1976 Chief Justice Warren Burger called for 'a reappraisal of the values of the arbitration process.' (Warren E. Burger, Keynote Address, *Agenda for 2000 A.D.--A Need for Systematic Anticipation*, 70 F.R.D. 79, 94 (1976) (addressing the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (The Pound Conference)).) Noting that '[t]here is nothing incompatible between efficiency and justice,' (*Id.* at 92) he recommended greater use of 'the well-developed forms of arbitration' to settle disputes (*Id.* at 94).

In 1984, the Supreme Court declared that Congress's essential purpose in enacting the FAA was to overcome the 'old [judicial] hostility toward arbitration.' (*Southland Corp. v Keating*, 465 U.S. 1, 14 (1984)). The Court has since issued multiple decisions implementing a broad 'national policy favoring arbitration' (*Southland*, 465 U.S. at 10) under the FAA that requires courts in the United States to strictly enforce agreements to arbitrate and arbitral awards, while limiting judicial interference with the arbitral process.

Supreme Court case law clarifies a national policy favouring arbitration under the FAA

The FAA is applicable to both state and federal courts

Before the 1980s there was some disagreement among the US courts as to whether the FAA applied to state courts. In the 1983 case *Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp.*, the Supreme Court summarily resolved this issue in favour of the FAA's broad-reaching power. The Court declared that the FAA is a 'congressional declaration of a liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary,' and that 'as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.' (*Id.* at 24-25 (emphasis added).) The Court added (in dicta) that the FAA 'create[s] a body of federal substantive law of arbitrability' equally applicable in both state and federal courts (*Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp.*, 460 U.S. 1, 24-27 (1983)). A year later, in *Southland Corp. v Keating*, the Court converted this dicta into controlling law in a case reviewing the actions of a state court (*Southland*, 465 U.S. 1). Again emphasising that the FAA represents a broad 'national policy favoring arbitration' (*Id.* at 10), the Court declared that the FAA must have been intended to control both state and federal courts, or the FAA would be inadequate to fulfill its two central purposes: overcoming 'the old [judicial] hostility toward arbitration' and addressing 'the failure of state arbitration statutes to mandate enforcement of arbitration agreements' (*Id.* at 14). The Court therefore held that the FAA not only controls state courts, it also preempts state law that would bar the enforcement of an arbitration agreement:

- o 'The Arbitration Act creates a body of federal substantive law... applicable in state and federal court' (*Id.* at 12) (internal quotation marks omitted)
- o 'In enacting [the FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration' (*Id.* at 10)
- o 'In holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that [state courts are bound by the act's procedural rules]' (*Id.* at 16) (emphasis added)

State cannot pass laws inconsistent with the FAA mandate to broadly enforce agreements to arbitrate

The fact that an arbitration agreement survives a challenge to the formation of the agreement itself is well established in the United States. In the years since *Southland*, the Supreme Court has reviewed an unusually large number of cases involving general contract challenges to the enforcement of arbitration agreements and, as reflected in the cases that follow, has consistently limited the application of these challenges under the FAA.

As early as the 1967 case *Prima Paint*, the Supreme Court held that courts may only consider a party's specific

challenge that the *agreement to arbitrate* was procured by fraud; a general challenge that the entire contract was procured by fraud must be decided by the arbitral tribunal (*Prima Paint Corp. v Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). Because a party is far less likely to have been wrongfully induced into agreeing to arbitrate disputes arising out of a contract, as compared to entering into the contract, this 'severability' doctrine, severing the analysis of an individual arbitration clause from the analysis of the rest of the contract, greatly curtails a court's involvement in deciding contract challenges such as fraud and duress where a contract contains an agreement to arbitrate (*Id.* at 402-03). The concept of 'severability' is sometimes also referred to as 'separability'. See, eg, *id.* at 421 (Black, J, dissenting).

In *Buckeye Check Cashing v Cardegna*, in 2006, the Supreme Court furthered this line of reasoning. The Court considered whether the severability doctrine adopted in *Prima Paint* regarding a contract that might not be binding on the parties (due to fraud in the inducement) should also apply to a contract that might be intrinsically invalid (due to illegality) (*Buckeye Check Cashing, Inc. v Cardegna*, 546 U.S. 440, 442 (2006)). Examples of illegal contracts would include a contract to commit murder or rob a bank; in the case of *Buckeye Checking*, the challenged loan contract was alleged to be illegal from the outset because it provided for 'usurious interest rates' that rendered it 'criminal on its face' under Florida lending and consumer-protection laws. The Court held that the 'distinction between void and voidable contracts' was 'irrelevant' (*Id.* at 446). If two parties agree in writing to the arbitration of contract-related disputes, that agreement is always severable from the rest of the contract, and is the only part of the agreement that a court may consider (*Id.*). An agreement to arbitrate disputes is not itself illegal, and if that agreement, considered alone, was fairly entered into, then any challenge to the underlying contract must be sent to the arbitrator to decide (*Id.* at 448-49). The court explained:

'[i]t is true, as respondents assert, that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum - and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.'

In *Rent-A-Center, West v Jackson*, in 2010, the Supreme Court continued to uphold an arbitrator's power to resolve contract challenges raised by parties seeking judicial review of such challenges. The Court used the severability doctrine to enforce a sub-clause of a challenged arbitration agreement stating that the arbitrator, rather than the courts, would decide all questions of arbitrability, including any gateway challenge to the validity of the arbitration agreement itself (*Rent-A-Center, West v Jackson*, 130 S. Ct. 2772, 2779 (2010)).

While *Prima Paint* and *Buckeye* had held an 'agreement to arbitrate' to be severable from a global challenge to the validity of a contract that set forth other substantive contractual obligations between the parties, the contract in *Rent-A-Center* consisted only of the agreement to arbitrate itself (*Id.*). In *Rent-A-Center*, the Court further underlined the breadth of the severability doctrine by holding that the arbitration agreement's sub-clause to 'arbitrate arbitrability' was severable from the greater 'agreement to arbitrate', and since Jackson's challenges were not specifically directed at this sub-clause, the threshold issue of arbitrability must be decided by an arbitrator (*Id.*).

State laws inconsistent with the FAA

In *AT&T Mobility LLC v Concepcion*, in 2012, the Supreme Court underlined the supremacy of the FAA in rejecting an unconscionability challenge from a state court. The Court considered whether a clause in a form arbitration agreement waiving a customer's right to bring a class action rendered the arbitration agreement invalid under California case law making such class action waivers unconscionable in certain consumer contracts (*AT&T Mobility LLC v Concepcion*, 131 S. Ct. 1740 (2011)). Holding that individualised proceedings are an inherent and necessary element of arbitration that do not permit blanket rules banning class action waivers (*Id.* at 1750-52), the Supreme Court held the California unconscionability law invalid, despite the fact that unconscionability is a ground that 'exist[s] at law or in equity for the revocation of any contract' (*Id.* at 1746 (internal quotation marks omitted)). The Court further held that states *cannot* pass laws inconsistent with the FAA mandate to broadly enforce agreements to arbitrate, even if such laws are 'desirable for unrelated reasons' (*Id.* at 1753). The California courts that developed the unconscionability rule at issue in *Concepcion*, for example, believed such a rule was necessary to prevent corporations from forcing their customers into contracts of adhesion. This clarification underlined the Court's previous holding that 'public policy' exceptions to the FAA's pro-arbitration mandate are similarly impermissible (see *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth*, 473 U.S. 614, 626-27 (1985) (reversing a First Circuit holding that some public policy issues are so critical that they must be left in the hands of the courts; ordering that the dispute under review be sent to arbitration; and noting that 'we are well past the time when judicial suspicion of the desira-

bility of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution')).

Courts have limited grounds to vacate or modify arbitration awards

The Supreme Court has reinforced the FAA's 'liberal policy favoring arbitration' when considering a court's power to vacate an arbitral award (*Hall St. Assocs., LLC v Mattel* 552 U.S. 576, 588 (2008) (noting that the 'national policy favoring arbitration' requires 'just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway'). Because an arbitration party seeking to have an arbitral award vacated must apply to the courts of the country where the award was issued to seek such vacatur, courts in the United States may only vacate arbitral awards issued in the United States in most circumstances (see, eg, *Karaha Bodas v Perusahaan Per-tambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007)). In 2008, the Supreme Court confirmed that the four very limited grounds listed in the FAA for vacating an arbitral award are the exclusive grounds for overturning an award issued from an arbitration seated in the United States and therefore subject to vacatur under the FAA (*Id.* at 578).

In summary, the non-prevailing party may move the appropriate court to vacate an arbitral award based on:

- o fraud by the opposing party in securing the award (9 U.S.C.S. § 10(a)(1));
- o the tribunal's corruption or evident partiality to one of the parties (9 U.S.C.S. § 10(a)(2));
- o other misconduct by the tribunal in granting the award (9 U.S.C.S. § 10(a)(3)); or
- o the tribunal grossly 'exceed[ing] its powers' in issuing the award (9 U.S.C.S. § 10(a)(4)). (For example, a tribunal might exceed its powers if it addresses an issue that was not within the scope of the agreement to arbitrate (see, eg, *Westerbeke v Daihatsu Motor*, 304 F.3d 200, 220 (2d Cir. 2002)) (providing an analysis of whether an arbitral tribunal exceeded its powers turns on 'whether the arbitrators had the power based on the parties' submissions or the arbitration agreement, to reach a certain issue').)

There is dispute among the Circuits over whether courts may employ a fifth ground for vacatur (the arbitrators' 'manifest disregard for the law') despite the Supreme Court's holding that the four grounds for vacatur enumerated by the FAA are 'exclusive'. Some Circuit courts have held that the 'manifest disregard' standard is merely 'a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA' (see, eg, *Stolt-Nielsen SA v Animal-Feeds Int'l*, 548 F.3d 85, 94 (2d Cir. 2008), reversed and remanded on other grounds by *Stolt-Nielsen SA v Animal-Feeds Int'l*, 559 U.S. 662 (2010) (agreeing with the Seventh Circuit that an arbitral award may be vacated for manifest disregard of the law where 'the arbitrator knew of the relevant legal principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it' (*Id.* at 95) (internal brackets, quotation marks and citation omitted))).

Other Circuit courts have ruled that the Supreme Court's 'unequivocal holding that the statutory grounds listed in section 10 are the exclusive means for vacatur' means that 'manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA' (*Frazier v Citifinancial, LLC*, 604 F.3d 1313, 1323 (11th Cir. 2010), quoting *Citigroup Global Mkts. v Bacon*, 562 F.3d 349, 350 (5th Cir. 2009) (brackets omitted)).

In practice, vacating an arbitral award on the ground that an arbitral tribunal exceeded its powers is very difficult. For example, an analysis of whether a tribunal exceeded its powers does not turn on 'whether the arbitrators *correctly decided* [a certain] issue' (*Stolt-Nielsen*, 559 U.S. at 694 (emphasis added) (internal quotation marks and citation omitted)). Rather, in the context of exceeding an arbitrator's powers, '[i]t is only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice that his decision may be unenforceable' (*Id.* at 671-72 (internal quotation marks and citation omitted)). The FAA also prescribes the limited grounds under which a court asked to enforce or vacate an award may modify that arbitral award (9 U.S.C.S. § 11(a)-(c) (permitting modification where 'there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award,' where 'the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted,' or where 'the award is imperfect in matter of form not affecting the merits of the controversy')).

The New York and Panama Conventions

Two international conventions overlay the FAA, providing additional advantages to a party seeking to enforce an arbitration agreement or arbitral award in an action subject to one of the conventions. While the provisions of the FAA that do not conflict with the conventions remain applicable in such proceedings, some provisions that do not conform to the conventions provide benefits that are not available under the FAA alone.

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) requires signatory states, including the United States, to recognise and enforce arbitration agreements entered into in fellow signatory states, and to recognise and enforce arbitral awards issued in such states. The New York Convention has been incorporated into Chapter 2 of the FAA, governing how US courts should enforce arbitration agreements or arbitral awards in disputes between a US citizen and a non-US citizen of another country signatory to the Convention (9 U.S.C.S. § 202). (Section 202 also makes the New York Convention applicable to arbitrations between two US citizens where the disputed contract 'involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.' *Id.* A corporation is deemed to be a US citizen 'if it is incorporated or has its principal place of business in the United States.' *Id.*)

The 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention) (Inter-American Convention on International Commercial Arbitration, 30 January 1975, 14 I.L.M. 336) was similarly incorporated into Chapter 3 of the FAA and governs how US courts (and other courts in the Americas) should enforce arbitration agreements or arbitral awards in disputes between a US citizen and a non-US citizen from one of the (exclusively) South, Central, and North America countries signatory to the Convention (9 U.S.C.S. § 302). If both the New York and Panama Conventions apply to an application for judicial assistance in enforcing an arbitration agreement or arbitral award, the Panama Convention will govern if the majority of parties to the arbitration agreement are citizens of Panama Convention signatories. (9 U.S.C.S. § 305).

Notably, the New York and Panama Conventions only address the *enforcement* of arbitration agreements and arbitral awards, and neither Convention contains rules for *vacating* an award. The Conventions are silent on vacating awards because only the courts of the country where an arbitration is seated have the power to vacate the resulting arbitral award, and that country's law will govern a motion to vacate the award. (See, eg, *Karaha Bodas*, 500 F.3d at 115 n.1). Thus, a US court can only vacate an arbitral award if it was rendered in the United States. Because any US enforcement of an award rendered in the United States will not be subject to either the New York or Panama Conventions, which only apply to the enforcement of foreign awards, such an award may only be vacated on one of the four limited grounds for vacatur provided by Chapter 1 of the FAA.

Chapters 2 and 3 of the FAA provide that the rules set out in Chapter 1 also apply to actions and proceedings brought under the New York and Panama Conventions, to the extent that Chapter 1 is not in conflict with any provision of the relevant Convention (9 U.S.C.S. §§ 208, 307). Thus, Chapter 1 of the FAA remains important when considering any action where one of the Conventions would apply. For example, if an action is subject to the New York Convention based on the parties' respective nationalities, and one party requires the aid of a US court to compel arbitration in another country, that party will bring an action pursuant to both Chapter 1 (guiding a court's actions in compelling an arbitration proceeding) and Chapter 2 (reinforcing the necessity that the court compel the arbitration proceeding in accord with the New York Convention). (See, eg, *Mitsubishi*, 473 U.S. at 618 ('Mitsubishi brought an action against Soler in [] United States District Court... under the Federal Arbitration Act and the [New York] Convention. Mitsubishi sought an order, pursuant to 9 U. S. C. §§ 4 and 201, to compel arbitration in accord with [the parties' contractual agreement to arbitrate disputes]' (emphases added)).)

Navigating the intersections of the FAA and the Conventions

A party seeking to enforce an arbitration agreement in an action subject to one of the Conventions enjoys some advantages compared to a party enforcing an arbitration agreement under Chapter 1 of the FAA alone. For example, under Chapter 1 of the FAA, a US district court only has the power to compel arbitration in its own district (9 U.S.C.S. § 4). In contrast, under the New York and Panama Conventions, a court is empowered to 'direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States' (9 U.S.C.S. §§ 206, 303). Notably, if an arbitration agreement subject to one or both of the conventions does not specify a seat, the court's authority to direct the seat of the arbitration will be derived from Chapter 1 of the FAA, limiting the court's power to compel arbitration to its own district. (9 U.S.C.S. § 4). Similarly, a party seeking to confirm a Convention award has more time to seek such confirmation from the courts compared to a party seeking to confirm an arbitral award under Chapter 1 of the FAA alone. While Chapter 1 of the FAA provides that such confirmation must be sought within one year of the issuance of the award (9 U.S.C.S. § 9), the Con-

ventions allow for confirmation within three years (See 9 U.S.C.S. §§ 207, 302).

Further, to seek the enforcement of an arbitration agreement or arbitral award in a federal district court, the court must have jurisdiction over the 'subject matter' of the case. Because federal courts generally have jurisdiction to address any matter related to the 'subject' of federal law, they usually have subject matter jurisdiction over cases involving substantive federal statutes such as the FAA (see, eg, *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 26 n.32 (observing that 'a body of federal substantive law' would usually create 'independent federal-question jurisdiction under 28 U. S. C. § 1331')). However, in 1983, when the Supreme Court declared that the FAA is indeed a body of substantive federal law, the Court took the unusual step of excepting the statute from the general rule conferring subject matter jurisdiction. (*Id.* (Noting that because it does not create federal-question jurisdiction, the FAA is 'something of an anomaly in the field of federal-court jurisdiction').) Parties to an arbitration agreement subject to the New York or Panama Convention need not concern themselves with this anomaly, because subject matter jurisdiction is automatically conveyed on district courts under the Conventions (9 U.S.C.S. §§ 207, 302 (section 302 incorporates § 207 of the New York Convention into the Panama Convention)). Where neither Convention applies, however, a party seeking to enlist the assistance of a federal court in enforcing arbitration rights must assert an independent basis for the court's subject matter jurisdiction. (For example, federal law provides subject matter jurisdiction to district courts in any action between US citizens of different states or between a US citizen and a foreign citizen, provided that the damages alleged are over \$75,000. See 28 USC § 1332. A district court would also acquire subject matter jurisdiction in an action implicating both Section 1 of the FAA and another federal law that does supply 'federal question' jurisdiction.)

Summary

The FAA provides the legislative framework for the enforcement of arbitration agreements and arbitral awards in the United States. Supreme Court decisions over the last several decades ensure that the FAA's 'pro-arbitration mandate' must be broadly interpreted and universally applied by both state and federal courts. Parties seeking to enforce an arbitration agreement or arbitral award in the United States need not be concerned that 'the old [judicial] hostility toward arbitration' or 'the failure of state arbitration statutes to mandate enforcement of arbitration agreements' will thwart their ability to do so. Parties involved in arbitration subject to the New York or Panama Convention should also consider the potential advantages these Conventions provide.

This article was originally published on [Lexis®PSL Arbitration](#) on 17/04/14.