GETTING THE DEAL THROUGH

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in 55 jurisdictions worldwide

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United States

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Laws and institutions

1 Multilateral conventions

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The United States is a party to the New York Convention, which went into force on 29 December 1970. The primary federal statute governing arbitration in the US is the Federal Arbitration Act (FAA), 9 USC sections 201-208. The FAA codified the New York Convention at 9 USC sections 201-208.

The US is also a party to the Inter-American Convention on International Commercial Arbitration (commonly referred to as the Panama Convention), which entered into force on 27 October 1990, and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), which entered into force on 14 October 1966.

2 Bilateral treaties

Do bilateral investment treaties exist with other countries?

The US is party to multiple bilateral and multilateral treaties, including bilateral investment treaties requiring arbitration and regulating the recognition and enforcement of arbitral awards. The US Department of State's 'Treaties in Force' database includes a list of US bilateral and multilateral treaties on record as being in force as of 1 January of each year. (See http://www.state.gov/documents/organization/143863.pdf)

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Arbitration and the enforcement of arbitral awards are governed by both federal and state statutory and common law. The FAA provides for the enforceability of arbitration agreements in contracts concerning maritime transactions and contracts 'evidencing a transaction involving commerce'. Most states have also enacted arbitration statutes, which are generally based on some variation of the Uniform Arbitration Act (UAA). A Revised Uniform Arbitration Act (RUAA) was approved for enactment by the states in 2000. Federal courts recognise that state statutes may compliment and expand upon federal arbitration law, to the extent that they do no conflict with the FAA. In the event of a conflict, the FAA pre-empts state statutes.

The US Supreme Court has recognised that FAA provides a strong policy favouring the enforceability of arbitration agreements. Chapter 1 of the FAA governs domestic arbitrations and awards, and applies to international arbitration to the extent it is not in conflict with the New York Convention. Chapters 2 and 3 of the FAA govern arbitrations within the New York and Panama Conventions, respectively. FAA, section 202 defines an international arbitration as one arising out of a commercial relationship and involving at least one non-US citizen, or, if entirely between US citizens, one involving property located abroad, performance or enforcement abroad, or 'some other reasonable relation with one or more foreign states'.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

US domestic arbitration law is not based on the UNCITRAL Model Law on International Commercial Arbitration. Disputes involving interstate commerce are governed by the FAA, and the majority of state arbitration statutes are based on the UAA or RUAA. Under US law, in contrast to the Model Law, the issue of arbitrability may only be referred to the arbitral tribunal where there is clear and unmistakeable evidence from the arbitration agreement that the question of arbitrability is to be decided by the arbitral tribunal. Several institutional arbitration rules, however, are modelled after the UNCITRAL Rules, or permit the parties to opt for the application of the UNCITRAL Rules in their arbitrations.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

US courts have held that 'arbitration is a creature of contract'. Accordingly, arbitral tribunals are bound by the parties' agreement. The tribunal may also be bound by reference in the arbitration agreement to institutional rules concerning procedure. The FAA permits a court to vacate an arbitral award on limited procedural grounds, including arbitrator misconduct or partiality, refusal to hear material evidence, and where the arbitrators exceed the scope of their powers.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Arbitral tribunals in the US are generally required to enforce the parties' choices concerning the substantive law governing their dispute. Judicial enforcement of state choice-of-law provisions is subject in some jurisdictions to a requirement that the chosen state have a substantial relationship to the parties or the transaction, or that the parties have a reasonable basis in their choice of law. As a general

rule, however, the parties' choice of substantive law is enforceable and binding. If the tribunal fails to apply the substantive law selected by the parties in the arbitration agreement, the arbitral award may be vacated on the grounds that the arbitrators manifestly disregarded the law or that they exceeded the scope of their powers.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

American Arbitration Association (AAA)
1633 Broadway
New York, NY 10019
United States
www.adr.org

The AAA is a major US arbitral institution. Parties frequently resolve domestic disputes pursuant to the AAA Commercial Arbitration Rules, and international disputes pursuant to the International Arbitration Rules. The AAA provides a roster of arbitrators with expertise in numerous areas of law and industry. Filing and case service fees are based on the amount in dispute between the parties. Arbitrators' fees are determined by the AAA case manager in cooperation with the parties, based on the arbitrators' stated rate of compensation and the size and complexity of the case. The AAA has regional case management centres throughout the US, where parties from the appropriate geographic region may file their case.

JAMS
1920 Main Street
Suite 300
Irvine, California 92614
United States
www.jamsadr.com

Judicial Arbitration and Mediation Services, Inc (JAMS) is one of the largest private alternative dispute resolution institutions in the world, providing both domestic and international arbitration services. JAMS provides several sets of specialised institutional arbitration rules, including Comprehensive, Streamlined, Employment, and Global Engineering and Construction Rules and Procedures. JAMS also provides Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases to facilitate efficient, cost-effective discovery. JAMS maintains a roster of over 250 full-time neutral arbitrators with expertise in numerous fields, including engineering and construction, intellectual property, antitrust, mass torts, securities and many others. JAMS handles an average of 10,000 cases per year.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The FAA provides for the arbitrability of any dispute concerning a contract 'evidencing a transaction involving commerce'. This broad description provides for the arbitrability of most commercial disputes. The FAA may pre-empt any state laws that impose restrictions on the arbitrability of particular disputes, where the dispute involves interstate commerce.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

US courts have recognised that arbitration is a 'creature of contract'. Accordingly, arbitration agreements are subject to the requirements concerning the enforceability of general contracts. Statutes governing the enforcement of arbitration agreements almost universally require that an arbitration agreement be in writing and valid under the laws of the state governing the arbitration agreement. State statutes may require that an arbitration agreement be signed by the parties. Courts have held, however, that the FAA pre-empts state laws restricting the formation or validity of arbitration agreements. Further, formal requirements concerning the arbitration agreement may, under appropriate circumstances be deemed waived by the parties, and minor deficiencies in complying with formal requirements frequently are insufficient to vacate an award.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The FAA provides that arbitration agreements are valid, irrevocable, and enforceable unless grounds 'exist at law or equity for the revocation of any contract'. Thus, general principles of contract law apply for challenging an arbitration agreement. These include standard grounds such as duress, fraudulent inducement, fraud, illegality, lack of capacity, unconscionability and waiver.

The enforceability of an arbitration agreement may also be challenged on the basis that the subject matter of the dispute is not arbitrable. The issue of arbitrability, however, is often treated as separate from the validity of the underlying contract. Federal law generally governs the issue of arbitrability, and this issue is typically resolved by the courts. State law controls the formation of a contract and the substantive claims of the dispute, and challenges to the validity of the contract as a whole, or to specific provisions therein, must be considered by the arbitrator.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Arbitration agreements are generally enforceable only against contracting parties. Third parties and non-signatories may sometimes be bound by, or enforce arbitration agreements, in limited circumstances, through traditional principles of state contract law, such as assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary, waiver and estoppel.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

In circumstances where non-signatories may be bound by or enforce an arbitration agreement, non-signatories generally are subject to the same rules and procedures as signatories. Where a signatory seeks to enforce an arbitration agreement against a non-signatory, the signatory may seek an order compelling arbitration from the court with applicable jurisdiction. A non-signatory similarly may seek an order compelling arbitration against a signatory, where the law allows. As noted in question 11, traditional principles of contract law govern whether a non-signatory may be bound by or enforce an arbitration agreement.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

US courts generally do not recognise the group of companies doctrine. Although non-signatory third parties typically are not bound

by arbitration agreements, parent and subsidiary companies may be compelled to arbitrate where the claims against them are based on the same facts as, and are inherently inseparable from, the claims against the signatory company. Courts may also compel non-signatory parent and subsidiary companies to arbitrate based on state law theories of alter ego, veil-piercing and agency.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

A valid multiparty arbitration agreement must comport with general contract law requirements. It should be in writing and demonstrate the intent of the parties to be bound to the agreement. Most federal and state courts will not permit consolidation of multiple arbitrations into a single arbitration unless specifically authorised by all the parties. The standard for determining whether consolidation of multiple cases is proper, is whether the individual claims have a significant factual and legal relationship to each other. Where class arbitration is not clearly precluded by a contract's arbitration clause, the question of whether class arbitration is permissible is decided by the arbitrators (Green Tree Fin Corp v Bazzle, 539 US 444 (2003)).

Constitution of arbitral tribunal

15 Appointment of arbitrators

Are there any restrictions as to who may act as an arbitrator?

It is a fundamental principle of US law that arbitrators must be selected in accordance with the agreement between the parties. Neither the FAA nor the RUAA provides specific requirements on arbitrator qualifications. Where the parties' arbitration agreement sets forth specific selection procedures or institutional arbitration rules, such as the AAA's Commercial Rules, the parties may be bound to abide by the arbitrator selection requirements of that institution. Many arbitral organisations maintain a roster of arbitrators with expertise applicable to particular disputes. US codes of judicial conduct typically prohibit a sitting judge from acting as an arbitrator. A party to an arbitration also may not serve as an arbitrator, and an arbitration agreement that provides for a party to serve as an arbitrator may be deemed unenforceable.

16 Appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Section 5 of the FAA and section 11 of the RUAA provide for the appointment of arbitrators by courts where the parties fail to provide a method for their selection or if the method agreed to by the parties fails. Courts have held that where one party fails to appoint an arbitrator pursuant to the requirements of an arbitration agreement, it cannot later contest the appointment of an arbitrator by the court.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement and the procedure, including challenge in court.

Arbitration statutes generally do not provide for pre-award disqualification of an arbitrator. Some courts have held, however, that under their general equity powers, the court may order the pre-award disqualification and replacement of an arbitrator on the basis of 'evident partiality'. Pre-award disqualification, however, is considered extraordinary relief and is not typically available.

An arbitrator may be challenged on numerous grounds, including having a financial interest in the subject matter or a party; undisclosed business, social, or professional dealings with a party; the refusal to admit relevant evidence; and a prejudiced or hostile attitude towards a party. Institutional rules typically provide for the challenge and replacement of arbitrators on grounds of partiality, inability to perform his or her function, incapacity or death.

A party may waive its right to challenge the qualifications of an arbitrator under the 'clean hands' doctrine, where the moving party has also appointed a biased arbitrator, or where the party fails to object to the arbitrator after having become aware of the grounds for questioning the arbitrator's impartiality or qualifications. Where the parties have agreed to a specific arbitrator, courts will generally not entertain a pre-award challenge.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses and liability of arbitrators.

The FAA states at section 10(a)(2) that an award may be vacated where there is evident partiality in an arbitrator, such as where the arbitrator has an interest in the outcome of the arbitration, or where the arbitrator has a close relationship with one of the parties. RUAA, section 11(b), bars an individual with a material interest in the outcome of the proceedings from serving as a neutral arbitrator.

US courts generally require an arbitrator to disclose any facts that might suggest bias to a reasonable person. Institutional rules typically require that arbitrators disclose any facts that may call the arbitrator's impartiality into question. It is common, however, for three-arbitrator panels to be composed of two non-neutral, party-appointed arbitrators and a neutral chairperson. The AAA Rules provide that an arbitrator's compensation shall be based on his or her stated rate of compensation.

Jurisdiction

19 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Section 3 of the FAA provides that any suit brought in federal court may be stayed upon petition by one of the parties, where the dispute is referable to arbitration pursuant to a valid, written arbitration agreement between the parties. The party seeking a stay has the burden of proving the existence and enforceability of the arbitration agreement, and that the moving party is not in default in proceeding with arbitration. A party may be in default by having participated in the challenged litigation.

Where the existence of an arbitration agreement is disputed by the parties, the FAA provides that a federal court may hold a trial to resolve the issue. Where both arbitrable and non-arbitrable issues are in dispute, federal courts have discretion to stay both the arbitrable and non-arbitrable claims. Many state arbitration statutes also permit parties to seek a stay of court proceedings pending the resolution of arbitrable claims.

20 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Under federal law, arbitrability is an issue to be determined by the court and may not be determined by the arbitral tribunal unless there is 'clear and unmistakable evidence' that the parties intended to refer the issue of arbitrability to the tribunal. Accordingly, if the parties wish to grant the arbitrators the authority to determine the issue of

arbitrability, parties should specifically confer such authority in their arbitration agreement.

Certain US courts have held that reference to particular arbitral rules in the arbitration agreement, which allow arbitrators to decide the issue of arbitrability, constitute clear and unmistakable evidence allowing the arbitrators to determine their own jurisdiction. Generally, US courts do not entertain interlocutory challenges to a tribunal's jurisdiction and will review the issue on a motion to vacate an arbitral award upon the conclusion of arbitral proceedings. The AAA Commercial and International Rules require parties to object to jurisdiction or arbitrability prior to filing a statement of deference to the relevant claim.

Arbitral proceedings

21 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

In the absence of an agreement between the parties, federal courts may compel arbitration within their own jurisdiction. State arbitration statutes and institutional rules usually permit arbitral tribunals to determine the site of arbitral proceedings. In the absence of an express provision, the language of the arbitration is generally that of the document containing the arbitration agreement. Consideration may also be given to the language of any relevant evidence and of potential witnesses.

22 Commencement of arbitration

How are arbitral proceedings initiated?

Arbitration agreements often specify the procedure for initiating arbitral proceedings. These provisions may contain notice requirements and may require the parties to consult each other in an effort to resolve the dispute prior to commencing arbitration. Institutional arbitral rules also provide procedures for initiating an arbitration, which may include payment of a fee and delivery of a demand for arbitration. Before a party may commence arbitration, it must have exhausted all contractual remedies available.

23 Hearing

Is a hearing required and what rules apply?

Under the FAA, there is no requirement that a hearing be held. The parties may provide for hearings or for arbitration based solely on written submissions, in the terms of their arbitration agreement. Under state and federal law, awards may be vacated for arbitral misconduct where the tribunal refuses to hold a hearing in violation of the parties' agreement or institutional rules referred to therein. An award may also be vacated where the tribunal refuses to postpone a hearing or hear material evidence, or otherwise prejudices a party's rights. The AAA Commercial Rules specifically contemplate a hearing, but permit the parties to waive oral hearings and proceed with arbitration based solely on written submissions if they choose.

24 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Federal law recognises that the essence of arbitration is its freedom from the requirements of formal judicial procedure. Accordingly, in the absence of an agreement between the parties, arbitrators are not required to observe formal rules of procedure or evidence. Tribunals are granted wide discretion in determining arbitral procedures and are required only to provide a fundamentally fair hearing. Tribunals may accept hearsay evidence that normally would be inadmissible in formal litigation.

Discovery is available in arbitration, subject to agreement between the parties, although it is typically much more limited in arbitral proceedings than in commercial litigation. Parties often seek guidance from, and tribunals will often apply, the IBA Rules on the Taking of Evidence or the ICDR Guidelines for Arbitrators Concerning Exchanges of Information. Further, section 7 of the FAA provides that a tribunal may issue subpoenas for the attendance of witnesses and for the production of evidence.

25 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Pursuant to section 7 of the FAA, arbitral tribunals may summon witnesses and compel the production of evidence. A party may compel witness attendance or the production of evidence by petitioning the district court with applicable jurisdiction. The majority of state arbitration statutes also provide for the enforcement of a tribunal's discovery orders by petitioning state courts.

26 Confidentiality

Is confidentiality ensured?

The FAA does not provide for confidentiality of proceedings or awards. Parties often include confidentiality requirements as in their arbitration agreements or by reference to institutional rules. The AAA Commercial Rules, for example, provide for the privacy of hearings, and the AAA International Rules set forth confidentiality requirements on tribunals and the AAA. In the absence of an agreement between the parties however, parties are free to disclose information concerning their arbitration. Furthermore, confidentiality is not provided for, and typically cannot be maintained, when parties initiate court proceedings to confirm and enforce an arbitral award.

Interim measures

27 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The FAA does not address the issue of interim relief, and courts historically have been reluctant to grant such relief. In recent years, however, there has been a shift in favour of granting interim relief in order to prevent irreparable harm to the parties. The RUAA, section 8, and states that have codified its terms, allow for judicial assistance in aid of arbitration both before and after the appointment of an arbitrator. The type of interim relief courts may grant, includes temporary restraining orders, preliminary injunctions, writs of attachment, mechanic's liens, discharge of attachment, and the recordation of a notice of lis pendens.

28 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

US courts typically accept arbitral tribunals' power to order interim relief, including security for costs, although some courts have required the parties' express agreement for such powers. RUAA section 8 expressly allows tribunals to order interim measures to protect the effectiveness of the arbitration. Institutional rules also permit arbitral tribunals to order interim measures. Some institutional rules provide for expedited or emergency measures before the constitution of the tribunal.

Awards

29 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

The FAA does not address whether a majority or unanimity is required for an arbitral award. Most state arbitration statutes permit majority awards where the panel is composed of more than one arbitrator. Under the RUAA, the tribunal's powers must be exercised by a majority and the award must be signed by any arbitrator who concurs. Institutional rules typically provide for majority awards, although some require an arbitrator who fails to sign an award to provide reasons for abstaining. Under the AAA Commercial Rules, the tribunal's decision must be by majority unless the parties' arbitration agreement expressly requires unanimity. A dissenting arbitrator's refusal to sign an award typically does not prevent the award from being enforced.

30 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Where a statute, institutional rules or the agreement between the parties provides for a majority award, a dissenting opinion does not affect the enforceability of the tribunal's award.

31 Form and content requirements

What form and content requirements exist for an award?

An arbitral award must be in writing and state the date and place where it was made. Under federal law, awards must be 'final and definite' regarding the issues covered, but need not be signed, nor provide reasons for the award. An award that does not fully resolve the dispute presented by the parties, leaving no avenue for further litigation, is generally unenforceable.

State laws often require awards to be signed by the arbitrators and a copy delivered to each party. Institutional rules also typically require a signed award. It is common for institutional rules to require the tribunal to provide reasons for the award.

32 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law?

The FAA does not set a time limit for rendering an award. According to the RUAA, the award must be made within the time specified by the parties, or if none is specified, within the time specified by the court.

33 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Under the FAA, parties apply to confirm New York Convention awards within three years, or any award under the FAA, section 9, within one year after the tribunal renders its decision. While some courts have held that section 9 of the FAA imposes a one-year statute of limitations, other courts have interpreted the one year requirement as permissive only. The FAA further provides that a party must move to vacate, modify, or correct an award within three months of the date on which the award is filed or delivered. The RUAA provides that such a motion must be made within 90 days after the movant receives notice of the award.

34 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Arbitrators are generally empowered to fashion remedies and forms of relief that are consistent with the facts of the case. For example, the AAA Commercial Rules permit tribunals to grant any relief deemed 'just and equitable' within the scope of the parties' agreement. Tribunals may award damages, declarations, injunctions, specific performance, punitive or exemplary damages, interest, costs and attorneys' fees. Institutional rules confer broad discretion in awarding relief.

35 Termination of proceedings

By what other means than an award can proceedings be terminated?

The tribunal may terminate proceedings if arbitration becomes unnecessary or impossible. Parties may also request the stay or termination of proceedings upon reaching a settlement to their dispute.

36 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Arbitrators are generally not required to allocate costs between the parties, and under traditional US practice, parties normally bear their own costs and attorneys' fees, unless otherwise agreed. Institutional rules may allow a tribunal to apportion expenses associated with an arbitration as it deems appropriate. It may also be possible for a prevailing party to petition the tribunal for attorneys' fees and costs, based on the laws of the state that governs the arbitration agreement. In international arbitrations, institutional rules generally allow tribunals to award the prevailing party reasonable costs associated with its representation.

37 Interest

May interest be awarded for principal claims and for costs and at what rate?

In the absence of an agreement between the parties, state statutes typically govern the availability and rate of interest in arbitration. Pre-award interest is usually determined at the sole discretion of the arbitrator. Post-award interest, prior to filing a petition to confirm an arbitral award, may generally be determined by either the arbitrator or the court. Post-filing, pre-judgment interest may be ordered by the arbitrator, or at the discretion of the court. Post-judgment interest is typically determined by the court at the applicable rate set by state or federal law.

Proceedings subsequent to issuance of award

38 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The FAA does not provide for tribunals to modify or correct an award on their own initiative. Some courts have indicated that awards may be corrected by the tribunal, and institutional rules typically allow tribunals to interpret or correct an award upon request by a party. Certain state laws also allow tribunals to modify awards. The FAA permits federal courts to modify or correct awards, upon petition by a party, within three months of the award, or to modify or correct awards in the event of evident material miscalculations or descriptions, decisions by the tribunal on matters not submitted to arbitration, and imperfections of form not affecting the dispute's merits.

Update and trends

Arbitration of overseas investment disputes is one of the fastest growing areas of international dispute resolution. One critical issue in the field of international investment arbitration is Argentina's decision not to honour adverse decisions from the International Centre for Settlement of Investment Disputes (ICSID), including those brought by US investors. Notably, following the Argentine financial crisis in 2001, dozens of claims were filed by foreign investors, including US corporations, against Argentina. Thereafter, following numerous adverse awards, Argentina started annulment proceedings under section 52 of the Washington Convention for Settlement of Investment Disputes (the ICSID Convention), and requested a stay of enforcement in virtually all of the cases filed against it. Most recently, in June and July 2010, two ICSID annulment committees annulled arbitration awards against Argentina in Sempra Energy International v The Argentine Republic (ICSID Case No ARB/02/16) and Enron Creditors Recovery Corporation and Ponderosa Assets, LP v Argentine Republic (ICSID Case No. ARB/01/3). These decisions have not only created new uncertainty regarding the scope of review in annulment proceedings under the ICSID Convention, but also place into question the protection afforded to investors under numerous bilateral investment treaties to which the US is a party.

Another recent development is the use of 28 USC section 1782(a) in the field of international investment arbitration. 28 USC section 1782(a) authorises federal district courts in the United States to order testimony or the production of documents for use in a foreign or international tribunal. Recently, in Chevron Corporation's international arbitration proceeding against Ecuador in the Permanent Court of Arbitration in the Hague, both Chevron Corporation and the Republic of Ecuador filed competing requests for discovery under 28 USC section 1782(a). Notably, in granting the Republic of Ecuador's application, In re Republic of Ecuador, No. C-10-80225 MISC CRB, 2010 WL 4973492 (ND Cal Dec 1, 2010), the district court held that the Republic of Ecuador was an 'interested person' for purposes of the statute.

39. Challenge of awards

How and on what grounds can awards be challenged and set aside?

The scope of judicial review of an arbitral award is generally very limited. Both federal and state law express a presumption that awards will be confirmed. Awards may be set aside under federal and state law in the event of fraud or evident partiality by the arbitrators, arbitrator misconduct or refusal to hear material evidence, due process concerns, or where the arbitrators exceeded the scope of their powers or failed to make a mutual, final and definite award. International arbitration awards may be set aside on the grounds contained in both the New York and Panama Conventions.

40 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

At both the state and federal level, parties are typically entitled to one appeal as of right, and any further appeals are accepted at the discretion of the second-level appellate court. The appellate process can take months or years, and can entail significant legal fees and costs. Unless otherwise specified in the agreement between the parties, each party must bear the costs of its representation.

41 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Arbitral awards are not self-executing. Therefore, an arbitral award must be given force and effect by being converted into a judicial order confirming the award. After the court has entered an order confirming an award, it may issue a judgment on that order. Once a judgment has been entered, the court can enforce the judgment. Federal and state laws strongly favour the confirmation and enforcement of arbitral awards, barring limited and compelling reasons for vacating the award.

42 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Generally US courts do not have to provide any deference to a foreign court's order vacating an award if that court is not one with primary jurisdiction.

43 Cost of enforcement

What costs are incurred in enforcing awards?

Unless otherwise specified by contract, a party seeking enforcement must pay costs associated with its action to confirm the award,

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including court filing fees and attorneys' fees, as well as any subsequent costs associated with the enforcement as a judgment in US jurisdictions other than the confirming jurisdiction.

Other

44 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

US features that may influence arbitrators include the availability of extensive discovery and witness examination.

45 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

US attorneys are bound by the rules of ethics of the state within which they are licensed to practice. Some courts permit attorneys from foreign jurisdictions to practise within a state on a temporary basis, for the purpose of prosecuting or defending a particular case. Foreign attorneys are expected to abide by the ethical standards of the state in which the proceedings are conducted.

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