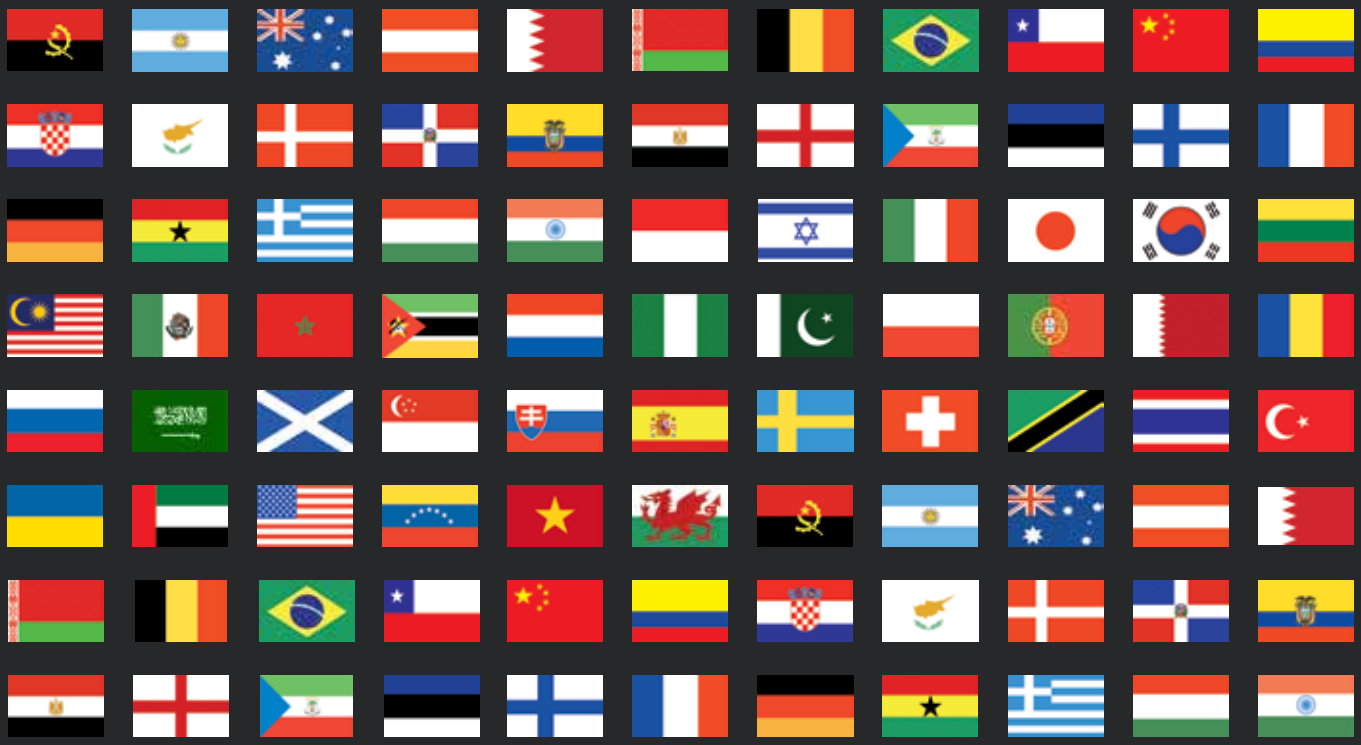
Arbitration

In 60 jurisdictions worldwide

Contributing editors
Gerhard Wegen and Stephan Wilske



2015

GETTING THE DEAL THROUGH

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Arbitration 2015

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Laws and institutions

1 Multilateral conventions relating to arbitration

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 are a contracting state to the following multilateral conventions:

- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), effective 29 December 1970. The New York Convention is codified in the Federal Arbitration Act (FAA) at 9 USC sections 201–208. The United States made declarations or other notifications pursuant to articles I(3) and X(1) as follows: (a) This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting state; and (b) This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.
- The Inter-American Convention on International Commercial Arbitration (Panama Convention), effective 27 October 1990, and codified in the FAA at 9 USC sections 301–307.
- The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), effective 14 October 1966, and codified in part at 22 USC section 1650a.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

The United States have entered into several bilateral investment treaties, a list of which can be found on the website of the United States Department of State at www.state.gov/s/l/treaty/tif/index.htm, which lists all 'treaties in force' with the United States.

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?

The primary domestic sources are found in both federal and state law, and in both statutes and judge-made case law. The FAA governs the validity and enforceability of arbitration agreements in maritime transactions and in contracts 'evidencing a transaction involving commerce'. Most states in the United States have also enacted arbitration statutes that are based on the Uniform Arbitration Act (UAA) or the Revised Uniform Arbitration Act (RUAA), with some variations. State statutes may complement and expand on federal arbitration law, to the extent that they do not conflict with the FAA. In the event of a conflict, the FAA pre-empts state statutes.

In the United States, there is a strong policy in favour of arbitration and the enforceability of arbitration agreements. Chapter 1 of the FAA governs domestic arbitration agreements and awards, and applies to international arbitration to the extent it does not conflict with the New York Convention. Chapters 2 and 3 of the FAA govern arbitrations under the New York Convention and the Panama Convention, respectively. FAA sections 202 and 302 define an international agreement as an agreement arising out of a legal relationship, whether contractual or not, which is considered as commercial and involving at least one non-US citizen, or if entirely between US citizens, one that involves property located abroad, envisages performance or enforcement abroad, or 'has 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?

Disputes involving interstate commerce are governed by the FAA, and the FAA is not based on the UNCITRAL Model Law on International Commercial Arbitration. The majority of state arbitration statutes are based on the UAA and the RUAA, with some state statutes also being based on the UNCITRAL Model Law. Under US law, the question of arbitrability may only be referred to the arbitral tribunal where there is clear and unmistakable evidence in the arbitration agreement that the question of arbitrability should be decided by the arbitral tribunal. A number of institutional arbitration rules are based on the UNCITRAL Model Law, or permit the parties to opt for the application of the UNCITRAL Rules in their arbitration.

5 Mandatory provisions

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

US courts have held repeatedly that 'arbitration is a creature of contract'. As a result, arbitral tribunals are bound by the parties' agreement. By reference in the arbitration agreement, the tribunal may also be bound by institutional rules concerning procedure. Under the FAA, courts can vacate arbitration awards only on very limited procedural grounds, including arbitrator misconduct or partiality, refusal to hear material evidence, and where the arbitrators have acted ultra vires.

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?

As a general rule, the parties' choice of substantive law is enforceable and binding, and arbitral tribunals must generally apply the substantive law chosen by the parties to govern their dispute. In some states in the United States, choice of law provisions are subject to the requirement that the chosen jurisdiction have a substantial relationship to the parties or the underlying transaction, or that the parties have a reasonable basis in their choice of law. If the arbitrators do not 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 acted ultra vires.

7 Arbitral institutions

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

The most prominent arbitral institutions in the United States are:

American Arbitration Association (AAA)
1622 Avenue of the Americas
New York, NY 10019
United States
www.adr.org

International Centre for Dispute Resolution (ICDR)
120 Broadway, 21st Floor
New York, NY 10271
United States
www.icdr.org

Judicial Arbitration and Mediation Services (JAMS)
620 Eighth Avenue, 34th Floor
New York, NY 10018
United States
www.jamsadr.com

International Institute for Conflict Prevention and Resolution (CPR)
575 Lexington Avenue, 21st Floor
New York, NY 10022
United States
www.cpradr.org

ICC International Court of Arbitration (SICANA)
1212 Avenue of the Americas, 9th Floor
New York, NY 10036
United States
www.iccwbo.org

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Any dispute of a civil/commercial nature between private persons or entities can be arbitrated.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Courts in the United States have confirmed repeatedly that arbitration is a 'creature of contract'. Arbitration agreements are, therefore, subject to the general requirements concerning the formation, validity and enforceability of contracts. Statutes governing the enforcement of arbitration agreements generally require that an arbitration agreement be in writing and valid under the laws of the state governing the arbitration agreement. The FAA pre-empts state laws restricting the formation or validity of arbitration agreements.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Under the FAA (section 2), arbitration agreements are valid, irrevocable and enforceable unless grounds 'exist at law or in equity for the revocation of any contract'. Thus, general principles of contract law apply for challenging an arbitration agreement, which include standard grounds such as duress, fraudulent inducement, fraud, illegality, lack of capacity, unconscionability and waiver.

11 Third parties – bound by arbitration agreement

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

Arbitration agreements generally bind only the contracting parties. In limited circumstances, third parties and non-signatories can be bound by arbitration agreements (or be able to enforce arbitration agreements) 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?

If non-signatories participate in an arbitration, they are generally subject to the same rules and procedures as signatories. Certain institutional rules provide for joinder of third parties, for example the AAA/ICDR International Arbitration Rules (article 7).

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?

The 'group of companies' doctrine is not generally recognised in the United States. While non-signatories typically are not bound by arbitration agreements, parent and subsidiary companies may be compelled to arbitrate in cases in which the claims against them are based on the same facts as, and are inherently inseparable from, the claims against the signatory company. Non-signatory parent and subsidiary companies may also be compelled 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?

For a multiparty arbitration agreement to be valid, it must comply with general contract law requirements; for example, it should be in writing and demonstrate the intent of the parties to be bound by the agreement. The consolidation of multiple arbitrations into a single arbitration will in most cases not be permitted unless expressly authorised by all the parties.

Class arbitration will be permitted only where there is a contractual basis for concluding that the parties agreed to authorise such a proceeding (*Stolt-Nielsen SA v AnimalFeeds Int'l Corp*, 559 US 662 (2010)).

But if the agreement is silent and the question of class arbitrability is deferred to the arbitral tribunal, a court must defer to the arbitrator's contractual interpretation, as long as the arbitrator 'arguably construed' the agreement (*Oxford Health Plans LLC v Sutter*, 133 S Ct 2064 (2013)). Courts must rigorously enforce arbitration agreements according to their terms, including those that contain class action waivers, even where the cost of pursuing an individual claim would be prohibitive (*American Express Co v Italian Colors Restaurants*, 133 S Ct 2304 (2013)).

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The parties to an arbitration agreement may restrict who may act as an arbitrator in a dispute, for example, by setting forth certain characteristics that arbitrators must have. In addition, codes of judicial conduct typically prohibit an active judge from acting as an arbitrator, and a party to an arbitration is also typically not permitted to serve as an arbitrator in that arbitration. The FAA does not address the appointment of arbitrators on the basis of nationality, religion or gender. In cases in which the parties are from different countries, the AAA Commercial Rules (R-15) provide that the AAA, on its own initiative or at the request of a party, may appoint as an arbitrator a national of a country other than that of any of the parties.

16 Default appointment of arbitrators

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

FAA section 5 provides for the appointment of arbitrators by courts if the parties have failed to provide a method for their selection or have failed to avail themselves of such a method. Several institutional rules also provide for the appointment of arbitrators in such cases.

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. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

In a US-seated arbitration, pursuant to the FAA (section 10), a party seeking to challenge an arbitrator in US courts can do so only after the final arbitration award has been issued, in the course of seeking to vacate an award based on arbitrator partiality. The FAA provides no basis for an arbitrator challenge as a form of interlocutory relief.

Institutional rules generally provide for the challenge and replacement of arbitrators on such grounds as partiality or bias, incapacity, failure to participate in the proceedings, failure to meet the qualifications agreed on by the parties, and death. A determination of arbitrator partiality or bias is a fact-specific inquiry and can include scenarios such as an arbitrator with a financial interest in the case or a party, undisclosed business or personal relationships with a party, and a refusal to admit evidence.

Institutional rules provide the specific procedures to be followed, including deadlines for raising a challenge and the procedure for installing a replacement arbitrator. Failure to follow the specific rules relating to an arbitrator challenge may result in waiver of that challenge.

Some arbitration institutions take the IBA Guidelines on Conflicts of Interest in International Arbitration into consideration when deciding arbitrator challenges; parties to an arbitration can also agree to follow the IBA Guidelines.

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 of arbitrators.

As noted above, arbitrators can be challenged and replaced based on partiality, and the FAA (section 10) allows for vacatur of an award where an arbitrator exhibited partiality. Institutional rules generally require arbitrator candidates to disclose facts that may suggest partiality or lack of independence from the parties.

Although parties may generally agree on the arbitrator appointment process, which may include party-appointed arbitrators, even party-appointed arbitrators must remain neutral. For example, both article 11.1 of the ICC Arbitration Rules and article 13 of the AAA/ICDR's International Arbitration Rules require that arbitrators be impartial and independent. The 2004 revision to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes makes clear that the neutrality requirement extends to all arbitrators, including party-appointed arbitrators, unless parties have agreed otherwise.

Compensation of arbitrators varies depending on the institutional rules. For example, under the AAA Commercial Arbitration Rules and the AAA/ICDR's International Arbitration Rules, an arbitrator's compensation is based on the arbitrator's stated rate of compensation. The ICC Arbitration Rules, on the other hand, provide for a fee schedule set by the ICC Court.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Article 38 of the AAA/ICDR International Arbitration Rules provides that arbitrators are immune from liability except where such limitation of liability is prohibited by applicable law. The AAA Commercial Arbitration Rules and ICC Arbitration Rules (article 40) contain similar language. The UNCITRAL Rules (revised in 2010), on the other hand, provide immunity from liability with an exception for deliberate wrongdoing.

In the US, state or federal law ultimately control arbitrator immunity from liability, and because arbitrators assume a quasi-judicial role, they are generally afforded immunity by US courts.

Jurisdiction and competence of arbitral tribunal

20 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 a suit brought in federal court will be stayed, upon application by a party, if the case is subject to a valid, written arbitration agreement between the parties.

If the parties dispute the existence of a valid, written arbitration agreement, section 4 of the FAA provides that a federal court may hold a hearing and, if the court finds that a valid, written arbitration agreement exists, it will order the parties to proceed with the arbitration. If the existence of the arbitration agreement is in issue, the court will conduct a trial. The FAA requires that a party seeking arbitration provide the other party with five days' notice of its intent to petition the court for an order directing arbitration.

21 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?

The *Kompetenz-Kompetenz* principle refers to the concept that a tribunal is competent to decide on its own competence to hear a dispute. International arbitral tribunals are generally presumed to have this power to decide on their own jurisdiction. Indeed, the major arbitral institutional rules include 'competence-competence' related provisions. Parties that have either agreed in the arbitration agreement to refer jurisdictional questions to the tribunal, or who have adopted institutional rules that include a 'competence-competence' provision within their arbitration agreements, are generally presumed to have agreed to confer on the tribunal the power to determine its own jurisdiction.

Although the FAA does not expressly address the *Kompetenz-Kompetenz* principle, US courts have acknowledged that arbitral tribunals have the power to determine their own jurisdiction (eg, *Howsam v Dean Witter Reynolds, Inc*, 537 US 79 (2002)).

The AAA/ICDR International Arbitration Rules (article 19) require that jurisdictional challenges be made no later than the time of submitting the answer (within 30 days after the arbitration is commenced); otherwise, jurisdictional challenges are waived.

Arbitral proceedings

22 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?

If the parties have not identified the place of arbitration in the arbitration agreement, and otherwise are unable to come to an agreement, most institutional arbitral rules provide that either the administrator or the tribunal will determine the place, or 'seat' of the arbitration, typically considering issues such as the nationality of the parties and arbitrators and the applicable law.

Under the FAA (section 4), US courts, when issuing orders compelling arbitration, have the power to specify the particular place the arbitration is to proceed. US courts have, in some cases, done so even where the parties agreed to institutional rules that provided for an alternate seat selection procedure (eg, *Tolaram Fibers, Inc v Deutsche Eng'g Der Voest-Alpine Industrieanlagenbau GmbH*, No. 2:91CV00025, 1991 WL 41772 (MDNC, 26 February 1991)).

If the parties have not agreed on the language of the arbitration, most institutional rules empower the tribunal to select the language of the arbitration, which will often look to the language of the underlying contract.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Arbitration agreements sometimes include requirements relating to commencing an arbitration, such as notice requirements or a requirement of negotiation or mediation before commencing arbitration. Institutional arbitral rules contain the specific requirements for a notice of arbitration (also called a request or demand for arbitration), including content requirements as well as fee requirements. In general, the notice of arbitration must be provided to the respondent.

24 Hearing

Is a hearing required and what rules apply?

Most institutional arbitral rules provide for a hearing, in keeping with the general proposition that the parties have the right to be heard and to present their case. Although the FAA does not expressly require a hearing, US courts have vacated awards under the New York Convention based on a failure to allow parties to be heard (eg, *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier* (RAKTA), 508 F 2d 969 (2d Cir 1974)).

25 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?

Institutional rules generally provide arbitral tribunals with broad discretion over the arbitral procedure, in particular relating to the admissibility and weight of evidence. Arbitral tribunals do not generally apply rules of evidence that are typical in US litigation, such as the Federal Rules of Evidence or the Federal Rules of Civil Procedure.

The exchange of documents (sometimes referred to as 'discovery' or 'disclosure') is available in arbitration, albeit in a much more limited scope than in US litigation. Tribunals often apply, or at minimum seek guidance from, the IBA Rules on the Taking of Evidence in International Arbitration.

Most institutional rules allow for both party-appointed and tribunal-appointed experts.

Most institutional rules require parties to submit written witness statements, or at minimum identify their witnesses and their anticipated testimony subject areas, in advance of the evidentiary hearing, so as to avoid 'surprise' testimony.

26 Court involvement

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

Section 7 of the FAA provides an arbitral tribunal with the power, in particular circumstances, to order testimony and document production, and, if the tribunal's orders are disregarded, the tribunal may seek judicial assistance to compel discovery. Section 7 also allows parties to an arbitration to make such a request for judicial assistance in taking evidence.

Some US state laws (for example, the New York Civil Practice Law and Rules, CPLR) also provide tribunals or parties with the power to issue subpoenas for documents or testimony in arbitrations, which would then be enforceable in court.

27 Confidentiality

Is confidentiality ensured?

The FAA does not provide for confidentiality of arbitral proceedings or of awards. Many institutional rules contain confidentiality provisions, with differing scopes. The IBA Rules on the Taking of Evidence also contain a limited confidentiality provision. To ensure confidentiality, parties should include confidentiality requirements within their arbitration agreements, select institutional rules that include satisfactory confidentiality provisions, or adopt a more specific, tailored confidentiality agreement at the start of the arbitration.

Interim measures and sanctioning powers

28 Interim measures by the courts

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

Although section 8 of the FAA gives courts the power to order interim measures only in a narrow category of admiralty or maritime disputes, US courts have found that they have the power to order interim measures (eg, *Teradyne, Inc v Mostek Corp*, 797 F 2d 43, 51 (1st Cir 1986)). Interim measures can include injunctions, temporary restraining orders or orders directing the taking of evidence or preservation of evidence or assets.

Some institutional rules also provide that courts may entertain requests for interim measures, although some rules suggest that such requests should be made before the tribunal is empanelled, and that any requests for provisional measures following the tribunal's formation should be handled by the tribunal. The parties can also agree that they will not seek interim measures from the courts.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The FAA does not provide for an emergency arbitrator. Some institutional rules, such as the AAA/ICDR International Arbitration Rules (article 6) and the ICC Arbitration Rules (Appendix V), do provide for an emergency arbitrator before the constitution of the arbitral tribunal.

30 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?

Many institutional rules provide the arbitral tribunal with the power to order interim measures, often with broad discretion. Interim measures can include injunctions, temporary restraining orders, or orders directing the taking of evidence or preservation of evidence or assets. Many institutional rules also provide for security for costs as an interim measure.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration?

The AAA Commercial Arbitration Rules (R-58) provide the tribunal with the power to sanction a party, upon a party's request, for failure to comply with its obligations under the rules or with an order of the tribunal.

Even where institutional rules do not provide express sanctions provisions, most arbitral institutional rules provide the tribunal with broad discretion to apportion the costs of the arbitration. Although these rules do not include sanctioning power per se, this broad discretion empowers the tribunal to take the parties' conduct into account in the course of apportioning costs. The 2012 ICC Rules include an update that empowers the tribunal to apportion costs based on 'the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner'.

Awards

32 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 state whether a majority or unanimity of the tribunal must render the award. Most institutional rules require a majority award and, in some cases, require that there be a written statement explaining why any arbitrator failed to sign the award. A dissenting opinion by an arbitrator does not form part of the award and has no impact on the enforceability of the award.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Unless the parties have otherwise agreed, a dissenting opinion should not affect the enforceability of an award.

34 Form and content requirements

What form and content requirements exist for an award?

A US court will enforce an award that is rendered in compliance with the parties' agreement, the applicable rules or the law of the state where it was awarded. The FAA (section 10(a)(4)) requires that arbitral awards be 'mutual, final, and definite', but does not expressly impose any formal requirements. Generally, US courts will require an award to be in writing and signed or otherwise authenticated. Institutional rules may impose further requirements, for example that the award include the date and place where the award was made.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The FAA does not set a time limit for rendering an award. Under the RUAA and UAA, the parties may agree to a deadline for the award, otherwise the court may order a time. The AAA Commercial Rules (R-45) instruct the arbitrator to issue the award 'promptly' and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing of the final hearing or of the AAA's transmittal of the final statements and proofs to the arbitrator, if oral hearings have been waived.

36 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?

The date of an award triggers time limits related to confirmation, modification, correction or vacatur of an award. Under the FAA, a party must apply to confirm a domestic arbitral award within one year and a foreign arbitral award within three years of the date of the award. The RUAA and UAA do not impose a time limit for confirming an award, but provide that a motion to 'change' or clarify an award must be made within 20 days of the date of the award, and a motion to modify or vacate must be made within 90 days. Likewise, under the AAA Commercial Rules (R-50), a party must file a motion to modify the award within 20 days of its transmittal.

37 Types of awards

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

Subject to the parties' agreement, arbitrators are generally free to issue any type of relief consistent with the law and circumstances of the case, including damages, injunctions, specific performance, punitive or exemplary damages, interest, costs and attorneys' fees. The RUAA and UAA allow an arbitrator to 'order any remedies the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding', regardless if such a remedy would be granted by an enforcing court. Similarly, the AAA Commercial Rules (R-47) permit tribunals to grant any relief deemed 'just and equitable' within the scope of the parties' agreement.

38 Termination of proceedings

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

An arbitration may terminate at the request of the parties or if the parties have reached a settlement. The AAA Commercial Rules (R-57(f)) also allow for suspension and termination of the proceedings if the parties fail to make full deposits. If a federal or state court finds that the agreement to arbitrate is not valid, it may order arbitration proceedings to be terminated. The AAA/ICDR International Arbitration Rules (article 32(3)) further provide that a tribunal may terminate proceedings if they become 'unnecessary or impossible'.

39 Cost allocation and recovery

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

The FAA is silent on the allocation of costs and fees. Under US practice, parties traditionally bear their own costs and fees. Institutional rules often allow a tribunal to award reasonable attorneys' fees and other reasonable expenses as appropriate or pursuant to agreement by the parties. The AAA Commercial Rules include detailed administrative fee schedules and allow the AAA to assess additional fees when necessary.

40 Interest

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

Whether interest is permitted in an award will vary, depending on state statutes, institutional rules and any agreement of the parties. The AAA/ICDR International Arbitration Rules (article 31) expressly allow the tribunal to award pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law. Likewise, the AAA Commercial Rules (R-47(d)(i)) permit the inclusion of interest in the award.

Proceedings subsequent to issuance of award

41 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?

In general, it is up to the parties to request modification, correction or interpretation of the award. The RUAA and UAA provide that a party may move to modify or correct an award within 20 days of receiving notice of the award. Under the AAA/ICDR International Arbitration Rules (article 6(5)), a tribunal may modify, correct or vacate an interim award issued by an emergency arbitrator, but any other request to modify or interpret an award must be made by one of the parties (article 33). The FAA (section 11) allows a federal court to modify or correct an award upon request.

42 Challenge of awards

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

A party may move to vacate a domestic award within three months of the filing or delivery of the award. The grounds on which an award may be set aside are, however, limited in deference to the arbitration process. Under the FAA and UAA, awards may be vacated in the event of fraud or corruption, 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 either the New York or Panama Conventions, or, in the case of an ICSID award, pursuant to the ICSID Convention.

43 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?

Generally, arbitration awards are final and not appealable, either to US courts or within the arbitration process itself. Some arbitral institutions have recently drafted rules allowing for limited appeals within the arbitration, for example the AAA Optional Appellate Arbitration Rules. Parties may appeal from US court orders relating to confirmation or vacatur of an award through normal litigation procedures; this process is generally lengthy and quite costly.

Update and trends

New ICDR International Arbitration Rules – a focus on efficiency and economy

The International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association, recently issued a revised set of International Dispute Resolution Procedures, which includes its International Arbitration Rules, effective from 1 June 2014. This marks the ICDR's first wholesale revision of the Rules since they were first issued in 1991. Notably, the Rules reflect a renewed emphasis on efficiency and economy, requiring both the tribunal and the parties to conduct the proceedings in an efficient manner.

For example, the Rules require that document exchange be managed and conducted in an efficient manner (article 21(1)), and now expressly provide that US-style discovery tools such as depositions, are 'not appropriate procedures in obtaining information in an arbitration under these Rules' (article 21(10)). In keeping with the theme of efficiency, the new Rules also provide that a tribunal must render its award within 60 days of the closing of the hearing, in contrast with the prior, vague, requirement of a 'prompt' award (article 30(1)).

The ICDR has also added a streamlined procedure for lower-value claims, the International Expedited Procedures, for claims under US$250,000. Notably, even parties with higher value claims may choose to use the Expedited Procedures, which may be appropriate if the issues are relatively straightforward and do not require either lengthy submissions or oral evidence, or any substantial exchange of information.

Finally, the new Rules provide that '[t]he conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject' (article 16) – a statement that suggests the ICDR may soon release its own guidelines on the topic of ethical conduct of counsel in international arbitration.

Third-party funding of arbitrations – risks of an emerging trend

As the practice of third party funding in arbitration continues to rise, the arbitration community is having to increasingly grapple with the ethical and practical concerns that come with it. Third-party funding generally involves a commercial company that agrees to pay some or all of the claimant's legal fees and expenses in exchange for payment of their direct costs and a share of the sum recovered by the claimant in the arbitration (typically between 15 per cent and 50 per cent). For claimants who might otherwise not have the resources to bring a claim, third-party funding has helped level the playing field. However, the introduction of a third party to arbitrations, typically private arbitrations that are strictly between the signatories of an arbitration agreement, is raising increasing concern.

The arbitration community has taken note. Earlier this year, the Columbia Law School's Center for International Commercial and Investment Arbitration (CICIA) held a conference to address the growing practice and some of the ethical concerns with third-party funding, including issues of disclosure, conflicts of interest, and attorney–client privilege. Panellists discussed the problem of introducing a third party whose motivation is solely profit, which can lead to distortion in the representation. Moreover, because a tribunal does not have jurisdiction over third-party funders, it has no power to compel the funder to advance or reimburse legal costs. Panellists at the CICIA conference agreed that, as third-party funding increases, a regulatory framework must emerge to deal with the ethical concerns.

44 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?

Either party may move to confirm an award according to the applicable procedures set forth in the court that has jurisdiction, usually by motion or petition. Under both federal and state law, confirmation is intended to be a summary proceeding, and the court is expected to convert the award into a judgment almost automatically. Although a party may object to confirmation, the court is limited in its ability to review an award and may not second-guess a tribunal. Under the FAA (section 9), an award must be confirmed unless it is vacated, modified or corrected.

45 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?

US courts may give deference to a foreign judgment annulling an award in the place of arbitration so long as that judgment does not violate US due process requirements. In general, US courts consider the court at the place of arbitration to have primary jurisdiction over the award.

46 Cost of enforcement

What costs are incurred in enforcing awards?

Under the 'American rule', each party must bear its own costs for post-award litigation, unless otherwise specified by contract.

Other

47 Judicial system influence

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

A dominant feature of US litigation is pretrial discovery, including voluminous document production and depositions. US arbitrators may favour extensive discovery and motion practice. Witnesses can be compelled to appear at an arbitration hearing (FAA section 7, which confers the same powers to compel a witness to appear upon a tribunal as US courts). Unless otherwise agreed, party officers may testify.

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48 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

All US lawyers are bound by the ethical rules of the state in which they practise; for example, New York lawyers must abide by the New York Rules of Professional Conduct. US counsel representing clients in international arbitration are naturally bound by these rules as well. These rules of professional conduct cover topics such as conflicts of interest, confidentiality, communication with represented and non-represented parties, and conduct before a tribunal. Although US rules of professional conduct tend to cover topics beyond those covered in the IBA Guidelines on Party Representation in International Arbitration, the principles set forth in the IBA Guidelines reflect the practices required by US rules of professional conduct. Ethical rules for counsel in international arbitration have become a topic of great interest, and certain institutional rules may soon cover the conduct of counsel, for example the ICDR/AAA International Arbitration Rules, as discussed further in 'Update and trends'.

49 Regulation of activities

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

Foreign practitioners participating in an arbitration in the US should be aware of differences relating to the attorney–client privilege, the work-product doctrine and conflict of interest rules. For instance, in the US, it is generally accepted that in-house counsel are covered by attorney–client privilege.

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