

ARBITRATION IN NEW YORK

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1. Introduction: New York and federal law

1.1.1 Arbitration in New York is governed by both federal and state law. Unlike many other jurisdictions, arbitration in New York is not based on the UNCITRAL Model Law. New York has developed a significant body of state law on arbitration, both through the common law and statutory modifications. However, due to the United States' federalist structure and the supremacy of federal law, the Federal Arbitration Act (**FAA**)¹ has been broadly applied to international arbitrations in New York. This has limited the number of arbitration agreements and disputes that are subject solely to New York state law.² As a result, this chapter primarily considers the reach and import of the FAA on international arbitration agreements and arbitral proceedings seated in New York. Where New York state law is of particular importance, either because it supplements the application of the FAA or because the rule it offers is of particular note, it is briefly discussed.

2. The Federal Arbitration Act

2.1 Background and structure

2.1.1 The FAA was initially introduced in 1925 in order to eliminate historic judicial hostility to arbitration agreements in the United States and to place arbitration agreements on the same footing as other contracts.³ In 1947 it was further amended, codified and restructured. More recently the FAA was updated to mandate the enforcement of the New York Convention⁴ and the Panama Convention, when these treaties were ratified. The FAA now consists of three chapters: (i) General Provisions (**Chapter 1**),⁵ (ii) Enforcement of the New York Convention (**Chapter 2**);⁶ and (iii) Enforcement of the Panama Convention (**Chapter 3**).⁷

2.1.2 The scope and application of the FAA depends on the type of agreement, transaction or award at issue, as discussed below.

¹ FAA, 9 U.S.C. §§ 1–307.

² The FAA has been interpreted by the Supreme Court of the United States (**Supreme Court**) to represent a strong federal policy favouring commercial arbitration. Up until 1984, the FAA was considered to be largely a matter of procedural law (and therefore applicable only in federal courts). Today, however, the FAA is considered to be substantive federal law. The provisions of the FAA (and the interpretation of the FAA by federal courts) therefore pre-empt contrary New York state law.

³ *American Express, Inc. v. McMahon*, 482 U.S. 220, 225–26 (1987), quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–511 (1974).

⁴ See CMS Guide to Arbitration, vol II, appendix 1.1.

⁵ FAA, 9 U.S.C. §§ 1–16.

⁶ *Ibid.*, §§ 201–208.

⁷ *Ibid.*, §§ 301–307.

2.2 Scope of application

- 2.2.1 The FAA applies to arbitral proceedings seated in the United States that relate to “foreign commerce”⁸ and “maritime transactions”⁹ (including general matters of admiralty jurisdiction and other common activities associated with maritime trade). Unlike the explicit and specified nature of the “maritime transactions”, the FAA defines “foreign commerce” broadly as “... commerce among the several states, other nations or the various territories...”.¹⁰ Any activity that may impact interstate commerce, even if that transaction is not commercial in nature, may be considered “commerce” under this definition.¹¹
- 2.2.2 In light of this broad definition, almost all commercial arbitration agreements that involve transactions or proceedings connected with the United States – whether by the domicile of the parties, the nature of the transaction or the enforcement of the award – will be subject to the FAA.¹² International arbitrations seated in New York and awards that parties seek to confirm or enforce in New York will be subject to the provisions of the FAA.¹³

Application of Chapter 2 of the FAA: Enforcement of the New York Convention

- 2.2.3 The United States ratified the New York Convention in 1970 and codified it as Chapter 2 of the FAA. The provisions for the enforcement of the New York Convention in the United States are set out in this chapter.¹⁴ Chapter 2 can only be applied to arbitration agreements and awards that relate to commercial relationships (as defined by federal law).
- 2.2.4 Chapter 2 of the FAA applies when one of the parties to an arbitration agreement is not considered a “citizen” of the United States and/or the dispute relates to property located outside the United States, envisages enforcement or performance outside the United States or has some other relation to a foreign state.¹⁵ In relation to arbitration agreements, the Second Circuit Court of Appeals (**Second Circuit**) – the relevant federal court of appeal for federal cases in New York – has

⁸ *Ibid*, § 1.

⁹ *Ibid*, § 1.

¹⁰ *Ibid*, § 1.

¹¹ See *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the growing of wheat in a singular state can be considered “interstate commerce” and regulated on the basis that growing wheat may impact the price of wheat among the several states); and *United States v. Lopez*, 514 U.S. 549, 460 (1995) (describing *Wickard* as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity”).

¹² FAA, 9 U.S.C. § 202.

¹³ As discussed below at paragraph 3.3.2, it is possible that parties may choose to have a different procedural law apply to arbitral hearings located in New York, although they would need to expressly agree to this.

¹⁴ FAA, 9 U.S.C. §§ 201–208.

¹⁵ *Ibid*, § 202.

determined that Chapter 2 (i.e. the New York Convention) applies if the arbitration agreement:

- (i) is in writing;
- (ii) provides that the arbitration will be seated in a territory of a signatory to the New York Convention;
- (iii) has a commercial subject matter; and
- (iv) is not entirely domestic.¹⁶

2.2.5 The final aspect of this test, “not entirely domestic”, has been held to correspond to the New York Convention’s application to arbitration agreements and awards “not considered as domestic”.¹⁷

2.2.6 In most circumstances where the arbitration agreement or award is “not entirely domestic”, both Chapter 1 and Chapter 2 of the FAA may apply.¹⁸ Where the rules prescribed by Chapters 1 and 2 are not in conflict, the parties have a choice as to how they might enforce an arbitration agreement or award.¹⁹ Where both Chapters apply, and there is a conflict between the FAA and the New York Convention, the provisions of the New York Convention prevail.²⁰ There are instances of clear conflict between the application of the FAA and the New York Convention and, where relevant, these are set out below.

Application of Chapter 3 of the FAA: Enforcement of the Panama Convention

2.2.7 The Panama Convention, which has been signed and ratified by numerous Central and South American countries,²¹ was ratified by the United States in 1990 and incorporated by reference into Chapter 3 of the FAA.²² The remainder of Chapter 3 serves to enforce the provisions of the Panama Convention and its relationship to the other provisions of the FAA.²³

¹⁶ See *Smith/Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration International, Inc.*, 198 F.3d 88, 92 (2d Cir. 1999).

¹⁷ See New York Convention, art 1.1 (CMS Guide to Arbitration, vol. II, appendix 1.1).

¹⁸ *Lander Co. Inc. v. MMP Investments, Inc.*, 107 F.3d 476, 481 (7th Cir. 1997). There can be circumstances where the “not entirely domestic” test does apply, but the provisions of the New York Convention do not apply because of the reciprocity requirement. These awards are technically non-domestic, but for the purposes of the applicable law should be considered “domestic”.

¹⁹ FAA, 9 U.S.C. § 208 (“Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States”); see also, *Spector v. Torenberg*, 852 F.Supp. 201, 205 (S.D.N.Y. 1994); *Oil Basins, Ltd. v. Broken Hill Proprietary Co. Ltd.*, 613 F.Supp. 483, 487 (S.D.N.Y. 1985).

²⁰ *Lander Co. Inc. v. MMP Investments, Inc.*, 107 F.3d 476, 481 (7th Cir. 1997).

²¹ The following countries have ratified the Panama Convention: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, United States, Uruguay and Venezuela.

²² FAA, 9 U.S.C. § 301.

²³ See in particular FAA, 9 U.S.C. §§ 302, 305 and 307.

- 2.2.8 When originally ratified, the Panama Convention served to allow the enforcement of arbitration agreements and awards rendered in the United States in several foreign states that had not yet ratified or acceded to the New York Convention.
- 2.2.9 The same standards in the FAA that govern the application of the New York Convention also apply to the Panama Convention, as Chapter 3 incorporates the relevant jurisdictional considerations of Chapter 2.²⁴ Accordingly, the Second Circuit's four-part test (set out above at paragraph 2.2.4) is used to determine whether a commercial arbitration agreement or award applies to arbitration agreements and awards under the Panama Convention.

Which Convention Governs: The New York Convention or the Panama Convention?

- 2.2.10 There are a number of jurisdictions that have acceded to or ratified both the New York Convention and the Panama Convention.²⁵ As a result, for the enforcement of arbitration agreements and awards rendered according to the laws of these foreign states, a conflict of laws analysis between the New York Convention and the Panama Convention may occur. In the United States, the enforcement of awards relating to these jurisdictions was anticipated and Chapter 3 resolves this issue by putting forward two clear possibilities:
- (i) if the majority of parties to the arbitration agreement are member states of the Organization of American States (**OAS**) and those member states have ratified or acceded to the Panama Convention, then the Panama Convention will apply; or
 - (ii) the New York Convention will apply.²⁶
- 2.2.11 There are differences between the New York Convention and the Panama Convention, so the determination as to which convention applies may have an impact in certain cases. Situations of particular note are set out in the discussion below. In any case, the conventions are largely enforced through the same mechanism of applications made by the parties through the federal district courts.²⁷ The law set out in Chapter 1 of the FAA serves to supplement both conventions in this regard.²⁸

²⁴ FAA, 9 U.S.C. §§ 202 and 302.

²⁵ In addition to the United States, these foreign states are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela.

²⁶ FAA, 9 U.S.C. § 305. Note that parties may waive the application of the Panama Convention through agreement. See Reservations to the Panama Convention [<http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp>] (accessed: 16 January 2012). Unlike in other jurisdictions, the FAA does not have a rule whereby the convention with the most favourable enforcement terms applies.

²⁷ See FAA, 9 U.S.C. §§ 202, 203, 204, 205, 207 and 302.

²⁸ *Ibid*, §§ 208 and 307.

2.3 General principles

- 2.3.1 While the FAA does not explicitly set out a purpose or guiding principle, the Supreme Court and the vast majority of commentators have agreed that the following fundamental principles guide the interpretation of arbitration law in the United States.
- **A policy favouring arbitration.** The FAA represents a federal public policy decision to favour arbitration and is now universally recognised to supervene contrary state policies (where the parties can be considered to have agreed to arbitration).²⁹
 - **A common intention to arbitrate.** The federal policy favouring arbitration is predicated on the agreement of the parties to submit their dispute to arbitration.³⁰ United States courts therefore place significant importance on contract validity and scope of the arbitration agreement and seek to ensure that parties compelled to arbitrate their claims actually agreed to arbitration.
 - **Freedom of contract.** Other than to show the existence of an agreement to arbitrate (e.g. a written agreement) there are few mandatory requirements for arbitration in the United States.³¹ Parties may waive the provisions of the FAA in favour of state law (by referring to the state law explicitly), agree to whatever procedure they may wish and freely limit or expand the scope of issues to be considered by arbitration.³²

3. The arbitration agreement

3.1 Formal requirements

- 3.1.1 Under the FAA there must be the existence of a valid, written agreement to arbitrate a dispute or claim. This agreement may be a separate agreement between the parties or a clause within a commercial contract (the terms “arbitration

²⁹ See, for example, *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (holding that the FAA declares “a national policy favouring arbitration and that 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”); and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (holding that a state law is pre-empted by the FAA because it stands as an obstacle to the accomplishment and execution of the of the FAA’s objectives). The FAA does not pre-empt state law in all cases. The Supreme Court has constrained the effect of the FAA in the few cases where the application of other law might further the federal policy in favour of arbitration. For instance, the FAA has also been interpreted to yield to state legislation that is considered more favourable to arbitration than the FAA itself (where the parties can be considered to have agreed to state law). *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (yielding to California law because, in part, it furthered the federal policy in favour of arbitration).

³⁰ See, for example, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

³¹ Such mandatory requirements include, for example, contracting to expand grounds for vacating an award. See *Hall Street Associates L.L.C. v. Mattel*, 128 S. Ct. 1396, 1408 (2008).

³² *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

agreement” and “arbitration clause” are used interchangeably in this chapter).³³ This is the only formal requirement under the FAA.

3.1.2 For international commercial arbitration agreements governed by the New York Convention, the Second Circuit interprets “written” to include “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”.³⁴ The Second Circuit has held that the New York Convention requires that an arbitration agreement (or clause) must either be signed by the parties or combined in a series of letters or telegrams in order to be effective.³⁵

3.1.3 Beyond these basic requirements, there may be larger questions concerning the validity of the arbitration agreement. For instance, disputes may arise concerning the existence or scope of the arbitration agreement. These two issues have been termed “gateway issues”³⁶ and how they are resolved is fundamental to understanding both the procedure and process of enforcing arbitration agreements in New York. The Supreme Court has sought to resolve some of these issues through its jurisprudence on the issue of severability.

3.2 Severability and defences to contract formation

3.2.1 Federal law supports the concept of severability (also referred to as “separability”). First established under the Supreme Court case *Prima Paint*, an arbitration clause should be considered separately from the underlying contract (**Container Agreement**).³⁷ Although there may be defences against the existence of the contract as a whole, e.g. fraudulent inducement (sometimes referred to in other jurisdictions as “deceit” and/or “fraudulent misrepresentation”), a court considering the objections of a party contesting the validity of the arbitration agreement may only consider defences that relate specifically to the formation of

³³ See FAA, 9 U.S.C. § 2.

³⁴ New York Convention, art 2.2 (see CMS Guide to Arbitration, vol II, appendix 1.1).

³⁵ *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210, 214–215 (2d Cir. 1999). Note that Article 1 of the Panama Convention contains a similar requirement. However, the Second Circuit’s holding in *Kahn Lucas* does not extend, at present, beyond application to the New York Convention. Pursuant to New York’s Electronic Signatures and Records Act, it is probable that email correspondence meets this requirement as well.

³⁶ *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79, 83 (2002).

³⁷ *Prima Paint Corp. v. Flood & Conklin Mtg. Co.*, 388 U.S. 395, 402–403 (1967) (finding that the doctrine of severability stems from the provisions of the FAA, 9 U.S.C. § 4). Unlike federal law, New York state law does not acknowledge the principle of severability. Defences against the formation of the Container Agreement are therefore considered valid defences against the formation of the intention to arbitrate for arbitrations where the law of New York is not pre-empted by federal law. For parties to international commercial arbitration agreements, this is of no concern because the FAA pre-empt this point. See *Southland v. Keating* 465 U.S. 1 (1984).

the arbitration clause.³⁸ All other defences concerning the Container Agreement (apart from issues concerning the validity of the arbitration agreement) are left to be considered by an arbitral tribunal.³⁹

- 3.2.2 The concept of severability is interconnected with the doctrine of arbitrability (addressed below at paragraph 5.1.1) and the authority of arbitrators to define their own jurisdiction.
- 3.2.3 However, the issue of whether an arbitral tribunal can consider defences to the formation of the arbitration clause (as opposed to the Container Agreement) is an open debate. There is varying case law on this point in United States circuit courts, particularly concerning the issue of fraudulent inducement, suggesting that this is still a developing area of the law.⁴⁰

3.3 Choice of law

- 3.3.1 The choice of New York as the seat for an international arbitration will, in almost all situations, mean that the provisions of the FAA apply. However, depending on the issue and the circumstances, the FAA may not be self-sufficient. Although the FAA constitutes federal substantive law,⁴¹ it sometimes requires the existence of supplemental law where there is no substantive law on point. For example, while the FAA requires that agreements to arbitrate be enforced, neither the FAA nor federal law defines what an “agreement” is (e.g. offer and acceptance, consideration, etc).⁴² As a result, the application of the FAA will depend on the applicable substantive law and, as demonstrated below, the applicable substantive law may be determined by the wording of the Container Agreement or arbitration clause, the stage in the proceedings and the issues considered.

Where there is a governing law clause

- 3.3.2 Where parties have explicitly included a valid governing law clause for the Container Agreement or a governing law clause specific to the arbitration clause, courts in New York will generally apply the law chosen by the parties to questions

³⁸ See *Mosely v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167, 170–171 (1963).

³⁹ See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (“a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator”).

⁴⁰ For example *cf.* *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 667 (2d Cir. 1997) (requiring a substantial relationship between the inducement of fraud and the arbitration clause to consider non-enforcement of an arbitration agreement); and *Rush v. Oppenheimer & Co. Inc.*, 681 F.Supp. 1045, 1053 (S.D.N.Y. 1988) (considering non-enforcement in the instance of fraud claims that pertained to the Container Agreement). Although only rulings of the Supreme Court and the Second Circuit have precedential value, where there is an open issue of law the reasoning of the circuit courts may be persuasive. For this reason, parties should take note of the varying approaches.

⁴¹ See *JSC Surgutneftegaz v. President and Fellows of Harvard College*, 2005 WL 1863676, at *2 (S.D.N.Y. August 3, 2005).

⁴² See, for example, *Chelsea Square Textiles, Inc. v. Bombay Dyeing and Mfg. Co., Ltd.*, 189 F.3d 289, 295 (2d Cir. 1999).

concerning the existence, formation and validity of the arbitration agreement.⁴³

However, there are two exceptions to this rule:

- when a party is seeking to apply an arbitration agreement against a non-signatory to the contract;⁴⁴ or
- when there is basis for asserting the authority of federal law and the law chosen by the parties is adverse to arbitration, at least as compared to the federal policy embodied by the FAA.⁴⁵

3.3.3 If the courts in New York refuse to enforce the governing law clause for the reasons set out above, they may choose to apply only those provisions of law that are “non-offensive” to arbitration.⁴⁶

3.3.4 The second situation set out in paragraph 3.3.2 occurs mainly when the parties choose state law as the governing law. As noted earlier, the FAA is significantly more “pro-arbitration” than New York state law.⁴⁷ When parties specify New York law in the Container Agreement’s governing law provision, courts in New York have applied substantive New York law to issues of general contractual interpretation while ignoring more restrictive statutes that are specific to arbitration.⁴⁸

3.3.5 If the parties have specified foreign law in the governing law clause (e.g. English law), they should be aware that certain mandatory statutory rights under United States law may still exist outside the scope of the arbitration agreement. Recent cases have suggested that where a forum selection clause and choice of law clause operate together as a prospective waiver of a United States citizen’s (both

⁴³ See, for example, *Telenor Mobile Communications AS v. Storm LLC*, 584 F.3d 396, 411 n.11 (2d Cir. 2009).

⁴⁴ See *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005) (holding that general federal law is the applicable law to determine whether a non-signatory was properly bound by an arbitration agreement, where a contract specified Egypt as the seat of the arbitration and specified Egyptian law in the governing law clause); but cf. *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004) (applying Swiss law to the issue of whether a non-signatory to a contract could compel a signatory to the agreement to arbitration because the governing law clause specified Swiss law). Recent case law suggests that the difference in approach may depend on the stage of the proceedings the court is making its inquiry. *Sarhank* relates to an issue of enforcement while *Motorola* relates to an issue of compelling the parties to arbitrate. See *FR 8 Singapore Pte v. Albacore Maritime Inc.*, 754 F.Supp.2d 628, 635 (S.D.N.Y. 2010).

⁴⁵ See the discussion on this point at paragraph 2.3.1 and footnote 29 above.

⁴⁶ See *Volt Information Sciences, Inc. v. Board of Trustees of Stanford Junior University*, 489 U.S. 469, 477–478 (1989).

⁴⁷ For instance, New York law restricts the ability of arbitral tribunals to award punitive damages and determine issues concerning the validity of the Container Agreement. Federal law permits arbitral tribunals to determine the scope of their authority on these issues when granted by the parties. See discussion at section 7.1 below.

⁴⁸ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (reading a governing law clause to include substantive New York law as regards general principles of contract formation and interpretation, but refusing to apply New York law to limitations on the power of the arbitrators). Parties may ensure that New York law – including its restrictions on the authority of the arbitral tribunal – is applicable to arbitration agreement by specifying that New York law should also govern “the enforcement” of the contract. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (where the Supreme Court offered such guidance in relation to California law).

individuals and corporations) statutory rights, then that arbitration clause may be deemed unenforceable with regard to those statutory claims.⁴⁹ Parties seeking to include the application of foreign law should be aware of this potential difficulty and add language to their choice of law clause that explicitly waives statutory rights under United States law.

Where the agreement does not provide for the governing law

- 3.3.6 In the rare instance that the parties have not specified a law governing the arbitration agreement, then the courts of New York will apply a conflict of laws analysis to determine the relevant substantive law that will be used to supplement, when necessary, the applicable provisions of the FAA.⁵⁰
- 3.3.7 The New York approach to determining the applicable substantive law is an “interest analysis”, which seeks to apply the law of the jurisdiction with the greatest interest in the outcome of the dispute.⁵¹ This analysis will consider the domicile of the parties, the place of execution and the place of performance of the contract among other factors.⁵²

Construction of the New York Convention and Panama Convention

- 3.3.8 A further issue to consider in an international arbitration is how the relevant conventions will be interpreted. This is an issue of statutory interpretation. As an initial starting point, all authorities agree that the provisions of the relevant convention will be applicable. However, when determining which law will be used to supplement and interpret the New York Convention’s provision to “refer parties to arbitration, unless [the court] finds that said agreement is null and void”,⁵³ various approaches have been used:
- (i) the courts have sometimes applied principles of treaty construction as employed by the courts of the United States (i.e. plain meaning based on rules of grammatical construction and supplemented by the applicable legislative history);⁵⁴

⁴⁹ See *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009) (preserving rights of an employee under the Seaman’s Wage Act where the parties specified Panamanian law for an arbitration to be seated in the Philippines); and *Central national-Gottesman v. MV “Gertrude Oldendorff”*, 204 F.Supp.2d 675 (S.D.N.Y. 2002) (preserving shipper’s right under Carriage of Goods by Sea Act where a mandatory forum selection clause required all disputes to be decided in England under English law).

⁵⁰ See, for example, *Progressive Casualty Insurance Co. C.A. v. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 45–46 (2d Cir. 1993) (applying New York law and New York conflicts of law analysis).

⁵¹ See *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 382 (1969).

⁵² See for example, *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 384 (1969).

⁵³ New York Convention, art II(3) (see CMS Guide to Arbitration, vol II, appendix 1.1).

⁵⁴ *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210, 215–216 (2d Cir. 1999) (applying a “treaty” construction approach and emphasising the plain meaning of the words).

- (ii) the courts have also found that they must apply neutral international standards when interpreting this provision; only finding agreements to be “null and void” in obvious circumstances such as fraud, mistake, duress and waiver;⁵⁵
- (iii) the courts have sometimes supplemented the provisions of the New York Convention with the provisions of forum law (e.g. the law of New York);⁵⁶ and
- (iv) additionally, the courts have also incorporated generally accepted principles of contract law; permitting parties access to contract defences available under federal common law.⁵⁷

3.3.9 Parties to non-domestic arbitration agreements can be assured that, at the very least, the provisions of the applicable convention will be enforced. However, there is not a uniform method as to how these provisions, and the “null and void” provision in particular, will be applied by New York courts.

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

4.1.1 The FAA does not provide a formal method for the constitution of the arbitral tribunal. Rather, the FAA relies on the parties’ agreement, either within the arbitration agreement or separately, as to how the arbitral tribunal is to be constituted. This is done through the incorporation of institutional rules or on an ad hoc basis where the parties agree on their own arbitral procedures, including the constitution of the arbitral tribunal.

4.1.2 Where the parties disagree on the appointment process, e.g. where the arbitration clause is unclear on the appointment mechanism and the parties cannot subsequently agree to an alternative method of appointment, the issue may come before the courts, whereby the court will seek to determine the intention of the parties. Courts may unilaterally appoint arbitrator(s)⁵⁸ or refer the parties to an appropriate arbitral institution in accordance with the intention of the parties.⁵⁹

⁵⁵ *Apple & Eve, L.L.C. v. Yantai North Andre Juice Co., Ltd.*, 499 F. Supp. 2d 245, 248 (E.D.N.Y. 2007).

⁵⁶ See *Meadows Indemnity Co. Ltd. v. Baccala & Shoop Insurance Services, Inc.*, 760 F. Supp. 1036, 1043 (E.D.N.Y. 1991) (incorporating into the “null and void” analysis both international law principles *and* the policy considerations of the forum state).

⁵⁷ See *Smith/Enron Cogeneration Ltd. v. Smith Cogeneration International, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) (citing compelling reasons to incorporate federal law).

⁵⁸ Pursuant to powers under the FAA. See FAA, 9 U.S.C. § 5.

⁵⁹ See *HZI Research Center, Inc. v. Sun Instruments Japan Co.*, 1995 WL 562181 (S.D.N.Y. September 20, 1995) (finding that the AAA was the appropriate arbitral institution).

In rare cases, the court may determine that the failure to incorporate proper institutional rules undermines the intention to arbitrate and refuse to enforce the arbitration agreement.⁶⁰

- 4.1.3 In certain circumstances, the arbitration clause may clearly indicate the parties' intention to arbitrate the dispute, but fail to specify any method for choosing arbitrators. In this case either party may apply to a federal district court to make an appointment.⁶¹ Courts in New York typically nominate sole-arbitrators where the agreement is completely silent as to the constitution of the arbitral tribunal.⁶² While the courts do receive occasional applications through this statute or by other means, they do not retain lists of arbitrator candidates and have no standing procedures for appointments.

4.2 Removal and substitution of arbitrators

- 4.2.1 The FAA does not provide explicitly for the removal of arbitrators during arbitral proceedings. New York courts have held that, except in very specific situations, courts will not entertain applications for the removal of arbitrators on the basis of alleged "inadequate qualifications or partiality". Courts will consider these concerns only when an award has been rendered.⁶³
- 4.2.2 A New York court will remove or order the substitution of an arbitrator when it considers that the intention of the parties to conduct an impartial arbitration has been frustrated. For example, when it concludes that one party has deceived the other concerning the nature of its relationship with the arbitrator.⁶⁴ The situations in which the courts will intervene are very narrow and depend on the applicant sufficiently demonstrating that failure to remove the arbitrator would frustrate the intent of the parties.⁶⁵

⁶⁰ *In re Saloman, Inc. Shareholders' Derivative Litigation*, 68 F.3d 554, 560–561 (2d Cir. 1995) (arbitration clause is null and void because the institution specified in the agreement was not available to the parties); and *Lea Tai Textile Co., Ltd. v. Manning Fabrics, Inc.*, 411 F.Supp 1404, 1407 (S.D.N.Y. 1975) (finding it impossible to determine the parties' intention).

⁶¹ FAA, 9 U.S.C. § 5. New York law specifies a similar provision for parties that seek to appoint arbitrators through the state courts. See NY CPLR § 7504.

⁶² See *CAE Industries, Ltd. v. Aerospace Holdings Co.*, 741 F.Supp. 388, 393 (S.D.N.Y. 1989); and *Ore & Chemical Corp. v. Stinnes Interoil, Inc.*, 611 F.Supp. 237, 240–41 (S.D.N.Y. 1985).

⁶³ *Aviall, Inc. v. Ryder System, Inc.*, 110 F.3d 892, 895 (2d Cir. 1997) (court "cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award").

⁶⁴ *Masthead Mac Drilling Corp. v. Fleck*, 549 F.Supp. 854, 856 (S.D.N.Y. 1982) (ordering the substitution of an arbitrator because one party had concealed the fact that the contractually-designated arbitrator was its business associate).

⁶⁵ See *Aviall, Inc. v. Ryder System, Inc.*, 110 F.3d 892 (2d Cir. 1997) (rejecting the application to remove an arbitrator on the basis of alleged partiality); and *Fleming Companies, Inc. v. FS Kids, L.L.C.*, 2003 WL 21382895, at *4-5 (W.D.N.Y. 2003) (rejecting the application to remove an arbitrator on insufficient qualifications).

4.2.3 Where a court does intervene, or in other instances where an arbitrator needs to be replaced (e.g. on the death of an arbitrator), the method of appointment is at the discretion of the court. In some cases, a court has simply ordered the relevant party or parties to appoint a new arbitrator.⁶⁶ A party may make an application under the FAA to request a court to appoint a replacement arbitrator, as discussed above at paragraph 4.1.3.⁶⁷

4.3 Arbitrator fees and expenses

4.3.1 The general rule in the United States is that each party pays its own costs (sometimes referred to as the “American Rule”) and parties are free to agree to split the arbitrator fees and expenses as they wish. The FAA does not require that parties split fees, and where the parties determine that fees should be borne unevenly, or even by one of the parties entirely, the courts will defer to the agreement of the parties.⁶⁸

4.3.2 Where the parties are silent as to how arbitrators’ fees and expenses should be split, the issue may be determined by the arbitral tribunal. The fact that the arbitration agreement is silent on this point does not render the arbitration agreement invalid.⁶⁹

4.3.3 The exception to the general rule that each party will pay its own costs is where the burden of fees makes it difficult for a party to arbitrate its statutory rights, such as employee-employer arbitration.⁷⁰ However, even in this narrow area, there is no uniform standard as to what constitutes a burden on the vindication of statutory rights.⁷¹

4.4 Arbitrator immunity

4.4.1 With regard to commercial disputes, the United States courts generally subscribe to the “jurisdictional theory” of judicial immunity whereby any party who undertakes a judicial function is entitled to absolute immunity.⁷² Within the Second

⁶⁶ See, for example, *Erving v. Virginia Squires Basketball Club Ltd.*, 349 F.Supp. 716, 719 (E.D.N.Y. 1972) (requiring a new party-appointed arbitrator).

⁶⁷ See FAA, 9 U.S.C. § 5 and the discussion above.

⁶⁸ *Reliastar Life Insurance Co. of New York v. EMC National Life Co.*, 564 F.3d 81, 86–88 (2d Cir. 2009) (administration of fees by an arbitral tribunal is an issue of the scope of the parties’ agreement).

⁶⁹ *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 911 (2000).

⁷⁰ See *Cole v. Burns International Security Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1997); but *cf.* *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 764 (5th Cir. 1999).

⁷¹ Various approaches on this exception have been taken by several circuit courts, but none in relation to international commercial arbitration. See M. Lamm, *Who Pays Arbitration Fees?: The Unanswered Question in Circuit City Stores, Inc. v. Adams*, 24 Campbell L. (2001) (summarising the expansive and varying case law on the issue of arbitral tribunals’ fees and employment arbitration).

⁷² *Forrester v. White*, 484 U.S. 219, 227 (1988).

Circuit, arbitrators in commercial arbitrations are considered the functional equivalent of judges and therefore are entitled to absolute immunity.⁷³ This immunity has also been held to apply to arbitral institutions that appoint arbitrators and supervise the arbitration.⁷⁴

- 4.4.2 An exception to absolute immunity arises where an arbitrator has clearly acted outside the scope of his or her jurisdiction.⁷⁵ However, this exception is limited, particularly given the typically broad authority generally granted to arbitrators in arbitration agreements (e.g. the authority to resolve “any and all” disputes).

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

- 5.1.1 On the issue of the power of an arbitral tribunal to decide upon its own jurisdiction (*competence-competence*), the Supreme Court has held that the courts shall determine the jurisdiction of the arbitral tribunal, absent the agreement of the parties.⁷⁶ Courts in New York will require clear and unmistakable evidence that the parties intended the arbitrators to determine their own jurisdiction.⁷⁷ Where the requisite intent is demonstrated, a court will order the arbitral proceedings to commence and the arbitral tribunal will have the authority to determine the issues that are arbitrable under the clause. Courts in New York show considerable deference to the determinations of the arbitrator on jurisdiction.⁷⁸

- 5.1.2 The “clear and unmistakable evidence” standard required to determine jurisdiction ensures that arbitration remains consent based.⁷⁹ The standard can, however, be easily satisfied. Where parties indicate that “any and all disputes” should be

⁷³ *Austern v. Chicago Board Options Exchange, Inc.*, 898 F.2d 882, 885–86 (2d Cir. 1990); and *Calzarano v. Liebowitz*, 550 F.Supp. 1389, 1391 (S.D.N.Y. 1982).

⁷⁴ As suggested by the Second Circuit, without extension to the relevant institution, immunity would be illusory. *Austern v. Chicago Board Options Exchange, Inc.*, 898 F.2d 882, 886 (2d Cir. 1990).

⁷⁵ *Mireles v. Waco*, 502 U.S. 9, 11 (1991).

⁷⁶ See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942–943 (1995) (holding that the courts have the primary authority to determine the jurisdiction of the arbitral tribunal, absent the agreement of the parties). This differs to arbitration law in other areas of the world, which generally prevents courts from determining the jurisdiction of arbitrators under the principle of *competence-competence*.

⁷⁷ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

⁷⁸ See *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (parties may agree to arbitrate arbitrability and where a decision is reached, review of the arbitrator’s decision will not differ from other matters arbitrated); and *FAA*, 9 U.S.C. § 10 (setting out standards for review by the courts).

⁷⁹ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (“given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the “who should decide arbitrability” point as giving arbitrators that power”).

resolved by arbitration, New York courts will enforce that intention to the fullest and arbitrators will determine their own jurisdiction.⁸⁰ Where the parties incorporate arbitral rules that confer the same authority or specifically grant arbitrators the power to determine their own jurisdiction, the courts will enforce those rules.⁸¹

5.1.3 Where the “clear and unmistakable evidence” standard is met, both substantive and procedural issues will be submitted to the arbitral tribunal.

5.1.4 If a court does not find clear and unmistakable evidence that the parties intended the arbitral tribunal to determine its own jurisdiction, the court should determine the issues that may be addressed by an arbitral tribunal and compel arbitration on these issues alone.⁸² Procedural defences will normally be submitted to the arbitral tribunal (barring language in the agreement suggesting otherwise). This includes procedural defences predicated on issues such as the statute of limitations, contractual time limitations, the doctrine of *laches*, etc.⁸³

5.2 Scope of jurisdiction

Merits-related issues

5.2.1 As noted above, the default federal rule is that, unless the parties “clearly and unmistakably” specify the arbitral tribunal’s authority to determine its own jurisdiction, the courts will decide the jurisdiction of the arbitral tribunal. However, regardless of who actually determines the arbitral tribunal’s jurisdiction, the default presumption is that any ambiguity concerning the scope of the arbitral tribunal’s jurisdiction should be resolved in favour of arbitration.⁸⁴ Where parties wish to

⁸⁰ See *Painewebber, Inc. v. Bybyk*, 81 F.3d 1193, 1199–1200 (2d Cir. 1996); and *Shearson, Inc. v. Sacharow*, 91 N.Y.2d 39, 45–46 (C.A.N.Y. 1997).

⁸¹ See *Shaw Group, Inc. v. Triplefine International Corp.*, 322 F.3d 115, 122 (2d Cir. 2003) (permitting arbitrators to determine their own jurisdiction where the parties adopted an ICC standard clause, see CMS Guide to Arbitration, vol. II, appendix 5.2 for this standard clause).

⁸² See, for example, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 385 (11th Cir. 1995) (remanding to a federal district court for compliance with these instructions).

⁸³ See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (holding that issue of contractual limitations was for an arbitrator to decide); and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 (1983) (defences of waiver and delay for an arbitrator to decide). Note that the New York rule is inapposite and procedural defences and preliminary issues are presumptively for the court to decide, see NY CPLR § 7502(b). Recall, however, that New York law will be displaced by provisions of the FAA unless the parties have specifically provided that New York law will govern the agreement and its enforcement. See matter of *Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 253 (C.A.N.Y. 2005).

⁸⁴ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–945 (1995) (in respect to whether merits-related disputes are arbitrable, the presumption is that any doubts should be resolved in favour of arbitration); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, n.13 (1985) (allowing arbitrators to consider the merits of a statutory rights claim under the Sherman Anti-Trust Act and instructing lower courts to compel arbitration).

limit the issues that an arbitral tribunal may consider, they must express that intention explicitly.⁸⁵

Formation-related issues

- 5.2.2 Issues concerning the jurisdiction of the arbitral tribunal and the formation of the Container Agreement and the arbitration clause have been a topic of recent consideration by the Supreme Court.⁸⁶ The Supreme Court has held that where the formation-related issue is concerned with the validity of the Container Agreement, it is an issue for the arbitral tribunal to consider.⁸⁷ However, where the formation-related issue concerns the validity of the arbitration clause specifically, it is an issue for a court to resolve.⁸⁸

5.3 Power to order interim measures

- 5.3.1 Where parties provide the arbitral tribunal with a broad mandate to fashion remedies (e.g. “to resolve any and all disputes”), the arbitral tribunal has comprehensive authority to resolve the dispute and ensure a meaningful resolution, including the ability to grant interim relief. Courts will not undermine the authority of the arbitral tribunal in this regard as long as they have not exceeded the powers granted to them by the arbitration agreement.⁸⁹ This power is expansive, even allowing arbitrators to fashion remedies (interim and otherwise) that courts in New York may not grant and that may include remedies of injunctive relief and specific performance.⁹⁰
- 5.3.2 Although an arbitral tribunal will typically have the power to grant these interim measures, such measures must be capable of being enforced. The process must abide by the due process requirements of United States courts.⁹¹ Additionally,

⁸⁵ *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582–583 (1960) (“[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute”).

⁸⁶ See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 424–450 (2006); and *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2775–2782 (2010).

⁸⁷ See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–446 (2006); and *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010) (court held that state law unconscionability issue did not address the arbitration clause specifically and that the arbitrator should determine the issue).

⁸⁸ The Supreme Court suggested in *Buckeye* that formation issues concerned with the capacity to contract or with the very existence of a purported Container Agreement (e.g. a fraudulent signature) may be considered under differing standards, leaving some outstanding questions. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

⁸⁹ *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003).

⁹⁰ *Sperry International Trade, Inc., v. Govt. of Israel*, 689 F.2d 301, 306 (2d Cir. 1982).

⁹¹ The key limitation is that the arbitral tribunal must ensure that minimum standards of “fundamental fairness” are met (e.g. each party has a right to present evidence and be heard). See *Yonir Technologies, Inc. v. Duration Systems, Ltd.*, 244 F. Supp.2d 195, 208 (S.D.N.Y. 2002).

interim measures should conform to the requirements of an “arbitral award” where the dispute is subject to the New York Convention or the Panama Convention.⁹² This is not to suggest that interim measures are, in and of themselves, “awards” in the sense of being permanent and lasting. Rather, it means that the order of an arbitral tribunal communicating such interim measures must be reasoned and unappealable.

- 5.3.3 As a general rule, courts in the Second Circuit are reluctant to vacate interim awards aimed at ensuring a meaningful resolution of the dispute.⁹³

6. Conduct of arbitral proceedings

6.1 General procedural principles

- 6.1.1 Arbitral tribunals are permitted to conduct arbitral proceedings as they see fit, so long as the proceedings are in accord with the intention of the parties, as expressed in the arbitration agreement. Where the arbitration agreement is silent as to how the arbitration will proceed, the arbitral proceedings will generally be administered by the subsequent agreement of the parties or the decision of the arbitral tribunal (usually through the means of a procedural hearing). An exception to this principle arises when an arbitration agreement is governed by the Panama Convention, which expressly incorporates the rules and procedure of the 1988 Inter-American Commercial Arbitration Commission (***Inter-American Commercial Arbitration Rules***).⁹⁴ In this situation, for arbitration agreements also subject to the FAA, the Inter-American Commercial Arbitration Rules will apply.⁹⁵
- 6.1.2 In addition to any agreement by the parties, the arbitral proceedings must meet minimum standards of fundamental fairness to avoid grounds for vacating the eventual award. This amounts, at the very least, to notice of the hearing and the opportunity for both parties to present evidence and be heard before an impartial arbitral tribunal.⁹⁶

⁹² Federal courts have required that “orders” be final and meet the substantive requirements of an award before being enforced. See *Publicis Communication v. True North Communication*, 206 F.3d 725, 729 (7th Cir. 2000). Both conventions require “reasoned” awards for arbitral tribunal orders to be enforced. See *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 260 (2d Cir. 2003). Note that in the instance of an arbitration agreement governed only by the FAA or New York law, these requirements do not apply.

⁹³ *Great Eastern Sec., Inc. v. Goldendale Investments Ltd.*, 2006 WL 3851159, at *2 (S.D.N.Y. Dec 20, 2006).

⁹⁴ Panama Convention, art 3.

⁹⁵ FAA, 9 U.S.C. § 306.

⁹⁶ See *Yonir Technologies, Inc. v. Duration Systems, Ltd.*, 244 F. Supp. 2d 195, 208 (S.D.N.Y. 2002).

6.2 Commencement of arbitration

- 6.2.1 Arbitration should be commenced in accordance with the terms of the arbitration agreement. Frequently, where the parties have incorporated private institutional rules, there will be institutional mechanisms and requirements that need to be fulfilled. If one of the parties refuses to participate in the process, they may be compelled by the courts to arbitrate (this is discussed below at section 8.3).
- 6.2.2 If the terms of the arbitration agreement are silent as to how the arbitration commences, but clearly indicate the parties' intention to arbitrate, then proceedings may be commenced through the courts to compel arbitration.⁹⁷

6.3 Multi-party issues

Consolidation

- 6.3.1 Where there are multiple arbitrations involving the same facts or claims, consolidation may be an option to aid the efficiency of the process. Courts in New York consider consolidation to be a "procedural issue" that is presumptively for the arbitral tribunal to decide. An arbitral tribunal's decision concerning consolidation will only be overturned by the courts if the arbitral tribunal has "exceeded its powers"⁹⁸ (and a court will only have jurisdiction to overturn such decision if one of the parties submits a motion to vacate the award, as discussed below at paragraphs 9.1.2 and following).⁹⁹
- 6.3.2 With regard to consolidation of arbitral proceedings by the courts, there are varying approaches among the several circuits. Consolidation is possible under the FAA, however, the Second Circuit considers that courts have no authority to consolidate arbitrations without party consent.¹⁰⁰

Joinder and intervention of additional parties

- 6.3.3 Joinder or intervention of third parties in international arbitration is limited. Participation in arbitration is a matter of consent: the parties must consent to the addition of another party to the arbitration (either in the arbitration agreement, through rules incorporated in the agreement or after the arbitration has commenced through subsequent agreement by the parties).

⁹⁷ FAA, 9 U.S.C. § 4.

⁹⁸ *Anwar v. Fairfield Greenwich Ltd.*, 728 F.Supp.2d 462, 478 (S.D.N.Y. 2010).

⁹⁹ *Safra National Bank of New York v. Penfold Investment Trading, Ltd.*, 2011 WL 1672467, at *6 (S.D.N.Y. April 20, 2011).

¹⁰⁰ See *United Kingdom v. Boeing Company*, 998 F.2d 68, 73–75 (2d Cir. 1993) (also holding that courts cannot consolidate arbitral proceedings without the consent of the parties); see also *in re Allstate Insurance Co. v. Global Reinsurance Corp.*, 2006 WL 2289999, at *1 (S.D.N.Y. August 8, 2006) (refusing to order consolidation absent party consent).

6.3.4 There may be instances where the parties have already agreed to participate in an arbitration and, on this basis, are subject to joinder. Frequently, in joinder cases, these parties are non-signatories to the arbitration agreement. As presented by the Second Circuit, the primary basis for joinder of parties in this situation falls along the basis of agency and interrelated agreements. Within the Second Circuit there are a number of established theories for arbitration with a non-signatory to the agreement:

- (i) **Incorporation by reference.** A party to an agreement that does not contain an arbitration clause explicitly incorporates an agreement that does. The signed contract need not specifically reference the arbitration clause.¹⁰¹
- (ii) **Assumption by conduct.** Where a party indicates that it is assuming the obligation to arbitrate, it may be bound to the agreement.¹⁰²
- (iii) **Principles of agency.** Where an agent signs on behalf of a non-signatory principal with either actual or apparent authority to do so.¹⁰³
- (iv) **Piercing the corporate veil.** Where one legal entity dominates the other to the extent that it assumes the latter's obligations; the test for piercing the corporate veil is borrowed from New York corporate law.¹⁰⁴
- (v) **Estoppel.** Courts have applied a theory of equitable estoppel whereby a party cannot purposefully take advantage of some of the benefits of a contract (e.g. the performance by the other party) without being subject to the obligations of the same contract (e.g. the arbitration clause).¹⁰⁵
- (vi) **Third-party beneficiaries.** An estoppel analysis might also apply when parties to the contract intend that a non-signatory third party may be able to rely or be bound by the terms of the agreement.¹⁰⁶

6.3.5 When a non-signatory seeks to compel a signatory to arbitration, courts will generally find that the intention of the parties is a matter for the arbitrator to decide. However, when a signatory seeks to compel a non-signatory to arbitrate, an issue of the very existence of the agreement to arbitrate arises (e.g. a question concerning the validity of the arbitration agreement itself). As such, courts frequently assert jurisdiction in determining whether or not a non-signatory can be compelled to participate in arbitration by other parties.¹⁰⁷

¹⁰¹ See *Progressive Casualty Insurance Co. v. CA Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993).

¹⁰² See *Thomson CSF, S.A. v. American Arbitration Association*, 64 F.3d 773, 777 (2d Cir. 1995).

¹⁰³ See *Bridas Corp. v. Government of Turkmenistan*, 345 F.3d 347, 356–359 (5th Cir. 2003); and *Thomson CSF, S.A. v. American Arbitration Association*, 64 F.3d 773, 777 (2d Cir. 1995).

¹⁰⁴ See *Thomson CSF, S.A. v. American Arbitration Association*, 64 F.3d 773, 777–778 (2d Cir. 1995).

¹⁰⁵ See *International Paper Co. v. Schwabedissen Maschinen and Anlagen GMBH*, 206 F.3d 411, 417–18 (4th Cir. 2000); and *American Bureau of Shipping v. Tencara Shipyard S.p.A.*, 170 F.3d 349, 353 (2d Cir. 1999).

¹⁰⁶ See *Spear, Leeds & Kellogg v. Central Life Assurance Co.*, 85 F.3d 21, 27 (2d Cir. 1996).

¹⁰⁷ *Cf. Merrill Lynch Investment Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2d Cir. 2003); and *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 661–662 (2d Cir. 2005).

6.4 Submissions and oral hearings

- 6.4.1 The expectation of “fundamental fairness” and considerations of due process require that the arbitral tribunal give the parties an opportunity to be heard and present evidence. Arbitral tribunals must allow the parties to present all evidence that “is pertinent and material to the controversy”, although an arbitral tribunal is afforded broad discretion regarding what is “pertinent and material”. The arbitral tribunal is not required to hear all of the evidence as long as each party has an adequate opportunity to present its case.¹⁰⁸
- 6.4.2 While the arbitral process may be informal, it commonly includes both written submissions and oral hearings; although, an arbitral tribunal has discretion in deciding whether to conduct an oral hearing.¹⁰⁹ The minimum requirements of the “fundamental fairness” test are illustrated by what the courts have required in actions to vacate an award on the basis of “denial of the opportunity to present one’s case”. These are set out below at paragraphs 9.2.2 and 10.2.4 (ii).

6.5 Default by one of the parties

- 6.5.1 The majority of institutional rules provide for the event where one party fails or refuses to take part in the arbitral proceedings. These rules typically permit the arbitral tribunal to render an award, notwithstanding the failure of one of the parties (often the respondent) to participate in the proceedings. As the rules are agreed to by the parties, a federal court will enforce any resulting award so long as it meets the requirements for enforcement under the FAA and the relevant convention (see below at section 10).¹¹⁰
- 6.5.2 If the incorporated rules do not specify a procedure for default by a party, a court may still confirm the award.¹¹¹ Case law is scarce on this issue, but courts will look to whether or not the “fundamental fairness” standard is achieved by the proceedings.¹¹² In difficult situations where the issue of default has not been considered by the arbitration agreement or where the arbitration agreement is to be enforced against a non-signatory, it may be preferable for the party seeking arbitration to seek the intervention of the courts and an order to compel the reluctant party to arbitration (see below at section 8.3).

¹⁰⁸ See FAA, 9 U.S.C. § 10(a)3.

¹⁰⁹ See *Yonir Technologies, Inc. v. Duration Systems Ltd.*, 244 F.Supp.2d 195, 209 (S.D.N.Y. 2002); and *Griffin Industries, Inc. v. Petrojam, Ltd.*, 58 F.Supp.2d 212, 219–220 (S.D.N.Y. 1999).

¹¹⁰ See *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140 (7th Cir. 1985); and *In re Transrol Navegacao S.A.*, 782 F.Supp. 848, 851–53 (S.D.N.Y. 1991).

¹¹¹ See *Euromarket Designs, Inc. v. McGovern & Co. L.L.C.*, 2009 WL 2868725, at *4 (S.D.N.Y. September 3, 2009) (holding that a party that did not participate in arbitral proceedings that met the standards of “fundamental fairness” did not have grounds to vacate the award).

¹¹² *Ibid.*

6.6 Evidence and discovery

- 6.6.1 Both the FAA and New York law recognise the right of the arbitral tribunal to compel witness testimony. The ability to compel witness testimony also applies to entities that are not party to the arbitral proceedings.¹¹³
- 6.6.2 In addition, the Second Circuit has interpreted this grant of authority to extend to documents and pre-hearing discovery.¹¹⁴ There has been some debate among the federal courts about the scope of this authority and whether or not an arbitral tribunal may order pre-hearing discovery against non-parties to the arbitral proceedings.¹¹⁵ The Second Circuit has found that the arbitral tribunal may only compel pre-hearing discovery from parties that are engaged in the arbitral proceedings.¹¹⁶ In addition, pre-hearing discovery may be further limited either by the agreement of the parties or the discretion of the arbitral tribunal (which may be impacted by other limits on its authority).¹¹⁷
- 6.6.3 In the words of the Supreme Court, when a party agrees to arbitrate it “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”.¹¹⁸ For this reason, unless agreed by the parties, the evidentiary rules of commercial litigation in the United States do not apply to international arbitrations in New York. As a result, discovery (and disclosure) is significantly more limited for arbitrations in New York, as compared to New York court-based proceedings.
- 6.6.4 However, where the parties have specified something contrary to this rule, for example, that the Federal Rules of Civil Procedure should apply, the courts will enforce this agreement. Where evidentiary rules of federal or state courts are explicitly incorporated into the agreement, the degree of discovery is likely to be broader than in other jurisdictions; incorporating depositions of witnesses, interrogatories and expansive requests for admissions.

¹¹³ See FAA, 9 U.S.C. § 7 (empowering the arbitral tribunal to issue a summons for any witness along with any material evidence). With regard to New York specific law, see *Radin v. Kleinman*, 299 A.D.2d 236 (App. Div. 2002) (stating that arbitrators have “inherent power to control the course of arbitral proceedings so as to permit a party to elicit the relevant information”).

¹¹⁴ *Arbitration Between Brazell v. American Color Graphics*, 2000 WL 364997, at *2-3 (S.D.N.Y. April 7, 2000) (stating that the FAA has been interpreted to permit the arbitral tribunal to subpoena documents of the parties where they are relevant to the proceedings, specifically as concerning pre-hearing discovery).

¹¹⁵ See discussion of the circuit split on this issue. *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 212 (2d Cir. 2008).

¹¹⁶ *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 217 (2d Cir. 2008).

¹¹⁷ While judicial assistance is available to enforce the determinations of arbitral tribunals, this assistance does have limits. See, for example, *National Broadcasting Co., Inc. v. Bear Stearns*, 165 F.3d 184, 191 (1999) (affirming the decision of the federal district court to limit document discovery available in arbitration on the grounds of statutory limitation).

¹¹⁸ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

6.6.5 In certain situations, the arbitral tribunal or the parties may seek to rely on the courts to obtain evidence that the arbitral tribunal does not have the authority to compel. The most notable of such measures is motion under 28 U.S.C. § 1782. The current view of the Second Circuit on this issue is discussed in more detail at paragraph 8.6.1 below.

6.7 Confidentiality

6.7.1 While international arbitration is generally characterised as private and confidential, under both federal and state case law there is no duty of confidentiality absent party agreement. If the arbitration agreement does not contain a confidentiality clause or obligations of confidentiality via institutional rules, either party may disclose the details of the arbitration to any third party.¹¹⁹

7. Making of the award and termination of proceedings

7.1 Remedies

7.1.1 The FAA does not provide guidance on the issue of remedies. Where the arbitration agreement is silent as to the issue of remedies, the arbitral tribunal has wide discretion on the range of remedies it may issue.¹²⁰ In fact, an arbitral tribunal may issue relief that a court may not have permission to grant had the parties chosen to litigate the dispute.¹²¹ However, arbitral tribunals typically apply the substantive law, either of the forum or the law chosen by the parties, to the calculation of damages. Although there are numerous theories of damages that may apply under New York law, there are several common categories of damages that may apply:

- **Actual Damages.** As held by the Second Circuit and New York courts, the key limitation to actual damages is causation. An injured party must show that the other party's conduct directly and proximately caused its loss.¹²² The amount of damages is limited to reasonable compensation for loss, although parties may be entitled to "lost profits" (subject to some limitations).¹²³

¹¹⁹ See *Contship Containerlines, Ltd. v. PPG Industries, Inc.* 2003 WL 1948807, at *2 (S.D.N.Y. April 23, 2003).

¹²⁰ An arbitral tribunal may be restricted by the agreement of the parties as to the remedies it may consider. For instance, the parties may specify the nature of specific performance that can be ordered, a sum of liquidated damages or a prohibition of consequential damages. Where an agreement specifies such limits, courts will ensure that the arbitral tribunal does not reach beyond the limits of the agreed on powers while enforcing the award (see below at paragraph 10.2.4 (iii)).

¹²¹ "A court may not vacate an award because the [arbitral tribunal] has exceeded the power the court would have, or would have had if the parties had chosen to litigate, rather than arbitrate the dispute." *Rochester City School District v. Rochester Teachers Association*, 41 N.Y.2d 578, 582 (N.Y. 1977).

¹²² See *National Market Share, Inc. v. Sterling National Bank*, 392 F.3d 520, 525 (2d Cir. 2004).

¹²³ See *Goodstein Construction Corp. v. City of New York*, 604 N.E.2d 1356, 1360–1361 (N.Y. 1992).

- **Special (or consequential) damages.** New York law defines “special damages” as those which do not flow directly from a breach of contract. They are recoverable only in very limited circumstances. When parties specifically disclaim or include the possibility of special damages, the terms of the agreement will determine the matter (unless the terms are found to be unconscionable).¹²⁴
- **Punitive damages.** Arbitrators are not permitted to award punitive damages in arbitrations governed solely by New York state law. However, the FAA pre-empts state law in this regard. If the FAA is applicable to the agreement, the arbitral tribunal has the discretion to award punitive damages in accordance with the intention of the parties.¹²⁵ For arbitration agreements that are subject to the FAA, parties may wish to specifically disclaim the application of punitive damages in the arbitration clause.
- **Specific performance.** The general rule in New York is that the use of specific performance as a remedy should be limited to situations where monetary damages are inadequate to redress the harm. This may occur if goods or services are especially unique and it is difficult to establish a market value for them.¹²⁶ Where applicable, an arbitral tribunal may prescribe these remedies, although ultimate enforcement of the remedy will likely fall upon the courts.

7.2 Interest

- 7.2.1 Under the FAA there is no limit to an arbitral tribunal’s discretion with regard to interest. New York law does not regard pre-judgment or post-judgment interest as a penalty, but rather as the cost of using another’s money for a specified period. New York law provides that pre-judgment interest be awarded at a rate of 9% for all breach of contract actions (subject to waiver or agreement by the parties).¹²⁷ Post-judgment interest at 9% is always applied by New York courts and will be enforced if awarded by the arbitral tribunal. Parties may vary the post-judgment rate up to the rate of usury (25%).¹²⁸

7.3 Form, content and effect of the award

- 7.3.1 The FAA does not provide explicit directions as to the form and content of the award. As interpreted by the federal courts, the FAA requires that an award be in

¹²⁴ See *Bi-Economy Market, Inc. v. Harleysville Insurance Company of NY*, 886 N.E.2d 127, 132 (N.Y. 2008) (the current leading case on special damages).

¹²⁵ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

¹²⁶ See New York Uniform Commercial Code at § 2-716(1)-(2).

¹²⁷ See NY CPLR § 5001(a). Note that for actions in equity, pre-judgment interest is discretionary.

¹²⁸ See NY CPLR § 5004 (specifying the post-judgment interest rule); and *Marine Management, Inc. v. Seco Management, Inc.*, 574 N.Y.S.2d 207, 208 (2d Dep’t 1991) (stating that parties may vary the post-judgment rate up to the usury rate).

writing and represent a “final and binding” determination of the issues.¹²⁹ The terminology ascribed to the award by the arbitral tribunal (i.e. terming it an “award”) will not be determinative; rather, courts look to the substantive effect of the award. If the written award resolves substantive issues before the arbitral tribunal in a final and binding manner, it can be considered enforceable by the courts.¹³⁰ If the resolution reached by the arbitral tribunal is predicated on the future resolution of other issues in other proceedings, then the award will not meet the “final and binding” criteria and will not be enforced.

- 7.3.2 There is no requirement under the FAA that an award be a “reasoned award” unless required by the terms of the arbitration agreement or institutional rules incorporated by the parties.¹³¹

7.4 Attorney’s fees

- 7.4.1 As discussed above at paragraph 4.3.1, the “American Rule” is that each party should bear its own costs in litigation. This is the standard set out by New York law. Absent an agreement of the parties otherwise, parties will bear their own costs in arbitration.

- 7.4.2 However, as construed by the Second Circuit, a broad arbitration clause may allow the arbitral tribunal to administer costs at its discretion.¹³² Parties may also specifically allow the arbitral tribunal to administer costs (either explicitly or through the incorporation of institutional rules). In such cases, arbitrators will have nearly unfettered discretion – including the discretion to determine whether or not the costs of ancillary litigation may be included.¹³³

8. Role of the courts

8.1 Jurisdiction of the courts

- 8.1.1 The appropriate court in which to challenge an arbitration agreement, the enforcement (or confirmation) of an award or to make any other motion relating

¹²⁹ See *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F.Supp.1 (S.D.N.Y 1973) (applying FAA, 9 U.S.C. § 10).

¹³⁰ See *Publicis Communication v. True North Communications*, 206 F.3d 725, 729 (7th Cir. 2000).

¹³¹ *Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 757 F.Supp. 283, 291 (S.D.N.Y.1991), *affirmed* 946 F.2d 883 (2d Cir.1991) (arbitrators are not required to give reasoned analysis for their decisions under the provision of the FAA alone); and *Michael M. Pfeifle v. Chemoil Corp.*, 73 Fed. Appx. 720, 722 (5th Cir. 2003).

¹³² See *Painewebber, Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996).

¹³³ *Shaw Group In. v. Triplefineline International Corp.*, 322 F.3d 115 (2d Cir. 2003).

to arbitral proceedings (collectively, **Arbitration-Related Motions**)¹³⁴ will depend on both the court that maintains the appropriate jurisdiction and, in some cases, the preference of the parties.

8.1.2 Arbitration-Related Motions may only be brought before a federal district court if that court has a basis of jurisdiction. There are three applicable bases of jurisdiction: (i) subject matter jurisdiction; (ii) diversity jurisdiction; or (iii) admiralty. For arbitration agreements and awards that fall under the New York Convention or the Panama Convention, the FAA grants the federal courts subject matter jurisdiction.¹³⁵ Arbitration-Related Motions in regard to an arbitration that addresses a controversy that “arises under” federal law can be brought before a federal district court.¹³⁶ Proper federal jurisdiction may also be established under Chapter 1 of the FAA through diversity jurisdiction; so long as no party on one side of the dispute shares a state of citizenship with a party on the other side of the dispute (so-called “complete diversity”) and the amount in dispute is greater than USD 75,000. All disputes concerning admiralty law may be heard by federal district courts.¹³⁷

8.1.3 The vast majority of arbitrations, and *all* international commercial arbitrations, will have a basis in one of these areas of jurisdiction, and therefore a party will be able to bring an Arbitration-Related Motion before a federal court.

8.1.4 In addition to the requirements discussed above, courts must have personal jurisdiction over the party the motion is made against. This is largely a federal due process consideration.¹³⁸ Personal jurisdiction may be obtained in a federal district court in one of three ways. First, if the party to the dispute consents to the jurisdiction (usually through a contract) then personal jurisdiction is established; the most common example is a forum selection clause.¹³⁹ Secondly, personal jurisdiction may be established through statutory authorisation and exercise of jurisdiction comporting with minimum standards of federal due process. This requires showing either: (i) that the dispute could be properly brought in a New York court; or (ii) that there is a long-arm statute authorising service of process and that the appropriate “minimum contacts” within a jurisdiction make such service

¹³⁴ The FAA specifically contemplates motions, rather than other pleadings. Motions, as identified by the Federal Rules of Civil Procedure, are less expansive than other pleadings and are limited to a few contested issues that seek judicial action on some issue (e.g. vacating an award, confirming an award, compelling performance, etc). Each federal district court will specify standards for motions submitted by the parties. These are usually available on the relevant district court website.

¹³⁵ See FAA, 9 U.S.C. §§ 203 and 302.

¹³⁶ See *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1265 (2009).

¹³⁷ See FAA, 9 U.S.C. § 4.

¹³⁸ *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393, 397–398 (2d Cir. 2009).

¹³⁹ See *Bank Julius Baer & Co. Ltd., v. Waxfield, Ltd.*, 424 F.3d 278, 284 (2d Cir. 2005).

valid.¹⁴⁰ Thirdly, personal jurisdiction may be obtained when property of the defendant exists in the jurisdiction, regardless of whether or not that property is the subject of the dispute.¹⁴¹

- 8.1.5 In all instances where the Arbitration-Related Motions relate to people, property or proceedings (held or to be held) in New York, the New York state supreme courts (so called because they are supreme in general jurisdiction) will have jurisdiction.¹⁴² As a result, for all disputes seated in New York or for motions that impact property held in New York (e.g. bank accounts), the New York state supreme courts will have a jurisdictional basis.¹⁴³ If proper service of process can be made, a New York state supreme court would then have proper jurisdiction over the Arbitration-Related Motion as well.

8.2 Proper venue for filing Arbitration-Related Motions

In federal court

- 8.2.1 The FAA provides that the appropriate venue for filing Arbitration-Related Motions is in any federal court, which, save for the arbitration agreement, is where the dispute could be brought.¹⁴⁴ There are therefore two appropriate venues for a party to bring Arbitration-Related Motions. The first is in the court where the dispute would have been brought had the arbitration agreement not existed.¹⁴⁵ The second is in the federal district where the seat of the arbitration is located.¹⁴⁶ If the arbitration is seated in New York City, this would be in the United States District Court for the Southern District of New York.
- 8.2.2 For motions to vacate an award, a separate venue provision applies. The FAA specifies that a motion to vacate an award should be made in the district where the award was made.¹⁴⁷ The Supreme Court has interpreted this as a permissive

¹⁴⁰ With regard to the test for either general jurisdiction or long-arm jurisdiction, see N.Y. CPLR 302(a) and *Sole Resort S.A. de C.V. v. Allure Resorts Management, LLC*, 450 F.3d 100, 103 (2d Cir. 2006). With regard to the “minimum contacts” necessary to satisfy federal due process, the inquiry concerns whether or not service would offend traditional notions of fair play and substantive justice. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

¹⁴¹ See *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393, 398 (2d Cir. 2009) (affirming the view of *Shaffer* that personal jurisdiction exists over parties with assets in the relevant state).

¹⁴² See NY CPLR § 302(a)1.

¹⁴³ However, the mere applicability of New York law to a dispute is not a sufficient basis for jurisdiction in New York; there must be more than a subject-matter basis for there to be proper jurisdiction.

¹⁴⁴ See FAA, 9 U.S.C. § 204.

¹⁴⁵ See FAA, 9 U.S.C. § 204 and 28 U.S.C. § 1391.

¹⁴⁶ See *American Construction Machinery and Equipment Co. v. Mechanised Construction of Pakistan, Ltd.*, 1986 WL 2973, at *4-5 (S.D.N.Y. Mar 5, 1986).

¹⁴⁷ See FAA, 9 U.S.C. § 10.

provision, so a motion to vacate can be made either where the award was made or before any other federal court that has proper jurisdiction.¹⁴⁸

- 8.2.3 If a party brings Arbitration-Related Motions in the wrong federal district court, the opposing party may make a motion under the Federal Rules of Civil Procedure to dismiss the motion.¹⁴⁹ Alternatively, a motion to transfer the proceedings to an appropriate venue may be made by either party under the Federal Rules of Civil Procedure.¹⁵⁰

In state court

- 8.2.4 As mentioned above, Arbitration-Related Motions relating to international commercial arbitrations are rarely, if ever, brought before New York state courts. In the case that they were, it would likely result in the application of the FAA through procedural motions dictated by New York state law. These include motions to commence arbitration and the application of a one-year statute of limitation on the confirmation of an award.¹⁵¹ In the instance that a party brings a matter in a New York state supreme court, the opposing party may make a motion to remove the matter to the appropriate federal district court.¹⁵²

8.3 Initial court proceedings

- 8.3.1 Application of the FAA prior to the arbitral hearing is centred around two motions: a motion to stay arbitral proceedings;¹⁵³ and a motion to compel arbitral proceedings.¹⁵⁴ Pursuant to a motion under either of these provisions, a court undertakes an analysis of: (i) the *prima facie* validity of the arbitration clause; (ii) a determination as to who decides issues of arbitrability (discussed above at paragraph 5.1.1) and, depending on the answer to “who decides”, the court may also consider (iii) the issues to be determined by an arbitral tribunal (discussed above at paragraph 5.1.4).

- 8.3.2 Applications under Section 3 and 4 of the FAA (primarily concerning stay of proceedings and orders to compel arbitration) are to be made as motions in accordance with the standards set out in FAA and the Federal Rules of Civil

¹⁴⁸ See *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193, 195 (2000).

¹⁴⁹ See 28 U.S.C. § 12(b)3.

¹⁵⁰ *Ibid*, § 1404(a). Note that such transfer can only be to an appropriate venue.

¹⁵¹ See NY CPLR §§ 7502, 7510 and 7511.

¹⁵² See FAA, 9 U.S.C. §§ 205 and 302.

¹⁵³ *Ibid*, § 3.

¹⁵⁴ *Ibid*, § 4.

Procedure.¹⁵⁵ In addition, individual federal district courts have discrete standards for the form and filing of motions and the majority of federal district courts now allow for the e-processing of applications and motions (though notice and service of process still must be made according to the rules of the relevant forum).

8.4 Preliminary rulings on points of jurisdiction and law

8.4.1 As a preliminary matter, courts may consider two questions:

- (i) **The existence of the arbitration agreement.** If the court finds the arbitration agreement to be *prima facie* valid – that is, there is no allegation of fraud with regard to the arbitration clause specifically – then the arbitral tribunal will consider the issues referred to arbitration.
- (ii) **The issues the arbitral tribunal may resolve.** Where the parties have “clearly and unmistakably” agreed to submit the scope of the arbitrator’s jurisdiction to the arbitral tribunal itself, the court will refer the issue of what the arbitral tribunal may consider to the arbitral tribunal. If, however, the parties have not indicated that the arbitral tribunal should resolve these issues, the court will determine the issues that the arbitrators may resolve.¹⁵⁶

8.5 Interim protective measures

8.5.1 Arbitral tribunals generally have broad authority to grant interim measures to protect the position of the parties. In some cases, the measures available to the arbitral tribunal may even exceed those available to courts in New York.

8.5.2 The effect of partial awards and interim measures is a matter of debate before United States courts. The Second Circuit has taken a favourable view of interim measures: allowing interim measures that reach a “final and binding” determination on issues to be enforceable as awards under the FAA and refusing to enforce or overrule interim measures that do not amount to a “final and binding” determination.¹⁵⁷ This is not to suggest that interim measures are “final” in a permanent sense; rather, it means that the interim measure is not subject to appeal.

8.5.3 In addition, federal courts remain available to consider injunctions and other interim measures that will help to ensure the efficacy of any award. Parties may

¹⁵⁵ *Ibid*, § 6. The specific rules of the relevant district court are generally available on the official webpage.

¹⁵⁶ See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

¹⁵⁷ See *Sperry International Trade, Inc. v. Government of Israel*, 532 F.Supp. 901 (S.D.N.Y.) *affirmed* 689 F.2d 301 (2d Cir 1982) (arbitral tribunal order establishing escrow account enforced); *Southern Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F.Supp. 692 (S.D.N.Y. 1985) (interim award requiring removal of claim of lien notice enforced); and *Compania Panamena Maritima v. J.E. Hurley Lumber Co.*, 244 F.2d 286, 289 (2d Cir. 1957) (court refuses to review interim ruling on arbitrability of claim).

seek a motion by applying either state law or federal law standards for injunctive relief under the Federal Rules of Civil Procedure.¹⁵⁸ The latter approach has been applied by federal courts in New York with more success,¹⁵⁹ as state courts appear unwilling to grant preliminary injunctions and attachments where international commercial arbitration agreements are governed by the New York Convention.¹⁶⁰

8.6 Obtaining evidence and other court assistance

Court assistance for arbitral proceedings outside the United States

- 8.6.1 Under the FAA, arbitral tribunals may summon witnesses, along with appropriate supporting documents. The Second Circuit has interpreted Section 7 of the FAA to also allow arbitral tribunals to compel the parties to disclose documents through discovery where determined as an interim measure by the arbitral tribunal.¹⁶¹ However, the Second Circuit has explicitly prevented the application of this provision to pre-hearing discovery as applied to third parties who will not be called as witnesses at a hearing.¹⁶²
- 8.6.2 In rare instances, a New York state supreme court may be willing to aid an arbitral tribunal in obtaining evidence, particularly in ordering discovery, but this will only happen in exceptional circumstances where it is a matter of “necessity”.¹⁶³
- 8.6.3 As a practical matter, arbitral tribunals rarely rely on the courts to help obtain evidence during an arbitration. Rather, parties typically comply because an arbitral tribunal may draw adverse conclusions from a party’s failure to comply with its order.¹⁶⁴

¹⁵⁸ See Federal Rules of Civil Procedure, 28 U.S.C. Rules 64 and 65.

¹⁵⁹ See, for example, *AIM International Trading, L.L.C., v. Valcucine S.p.A., L.L.C.*, 2002 WL 1285557, at *4-5 (S.D.N.Y. June 11, 2002) (granting a request for preliminary injunction on the basis of Rule 65 of the Federal Rules of Civil Procedure – 28 U.S.C.); and *Suchodolski Associates, Inc. v. Cardell Financial Corp.*, 2003 WL 22909149, at *3-4 (S.D.N.Y. Dec. 10 2003) (injunction granted pending arbitration on the basis of Rule 65 of the Federal Rules of Civil Procedure – 28 U.S.C.).

¹⁶⁰ See *Cooper v. Ateliers de la Motobecane S.A.*, 57 N.Y.2d 408 (C.A.N.Y. 1982). The refusal to grant such interim measures stems from old case law. New York has specifically passed new legislation to explicitly grant state courts this authority but this new provision has yet to be tested and, absent a ruling by the New York Court of Appeals or the Second Circuit, the old case law has not been formally abrogated.

¹⁶¹ See FAA, 9 U.S.C. § 7 (permitting arbitral tribunals to seek the assistance of federal courts in ensuring summoned witnesses actually appear); and *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216–217 (2d Cir 2008).

¹⁶² See *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 212 (2d Cir 2008) (“Section 7 of the FAA does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding.”).

¹⁶³ See NY CPLR § 3102(c); but see *Guilford Mills, Inc. v. Rice Pudding, Ltd.*, 455 N.Y.S.2d 88, 89 (App. Div.1982) (denying relief due to lack of extraordinary circumstances).

¹⁶⁴ See the IBA Rules (CMS Guide to Arbitration, Vol II, appendix 4.1) and ICDR Guidelines, which explicitly allow such negative inferences.

Court assistance for arbitral proceedings outside the United States

- 8.6.4 An ongoing issue of discussion within the arbitral community and federal courts are motions under 28 U.S.C. § 1782 (assistance to foreign and international tribunals and to litigants before such tribunals). In the Second Circuit, these motions have gained notoriety, in part, through the Lago Agrio litigation and Chevron's dispute with Ecuador.¹⁶⁵
- 8.6.5 A Section 1782 motion can only be made in relation to foreign proceedings, i.e. where the seat of the arbitration and place of the hearings is in a foreign country. Interested parties to these foreign proceedings may request the assistance of a federal court in procuring either testimony or the disclosure of documents from entities within that court's jurisdiction. In order to do so, parties must at least demonstrate the following:
- that the party seeking the information is an "interested person";
 - that the documents are being obtained "for use in a foreign or international tribunal";
 - that such adjudicative proceedings are within "reasonable contemplation"; and
 - that such materials are not privileged.¹⁶⁶
- 8.6.6 It should be noted that a court is not required to grant a Section 1782 motion. Federal district courts have *discretion* to grant such motions and compliance is not mandatory.¹⁶⁷ The Supreme Court has set out several factors that courts may consider in making such determinations:
- whether the individual from whom the information is sought is party to the proceedings or a third party;
 - the nature of the tribunal, the character of the proceedings and the receptivity of the relevant government, court or agency to such assistance;
 - whether the request seeks to circumvent proof-gathering limitations of the foreign country or the United States; and
 - whether the request is unduly intrusive or burdensome.¹⁶⁸

¹⁶⁵ See, for example, *Chevron Corp. v. Berlinge*, 629 F.3d 297 (2d Cir. 2011).

¹⁶⁶ See 28 U.S.C. § 1782 and *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (offering interpretation on each of these requirements).

¹⁶⁷ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004) *citing* *United Kingdom v. United States*, 238 F.3d 1312, 1319 (11th Cir. 2001).

¹⁶⁸ See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004).

- 8.6.7 The Second Circuit has since ruled on the application of these discretionary factors and has re-emphasised that the applying party does not need to show that the information would be discoverable in the foreign jurisdiction.¹⁶⁹

9. Challenging and appealing the award before the courts

9.1 Procedure

- 9.1.1 A party who opposes an award rendered by an arbitral tribunal may seek to have the award vacated when the award is rendered in the United States. Where a party seeks to vacate an award, a notice of a motion to vacate must be served on the opposing party within three months of the “date of the award” (as defined at paragraph 9.2.1 below).¹⁷⁰ The circuit courts have interpreted this provision strictly and have denied a motion to vacate an award where a party filed its motion within three months but failed to serve the notice to the opposing party within three months.¹⁷¹ A party seeking to vacate an award cannot simply wait to raise the application during the other party’s application to confirm the award, and doing so may forfeit the ability to challenge the award.
- 9.1.2 Applications to challenge an award are made through motions to the court.¹⁷² The procedure and format of the motion will vary depending on the federal district court judge. Parties may submit affidavits, legal briefs and documentary evidence in support of the motion. One of the key requirements for an action that seeks to confirm, modify or correct an award is that the party attach the written award.¹⁷³
- 9.1.3 If a party files a petition¹⁷⁴ before a New York state supreme court in accordance with state procedural law and the petition is removed to the appropriate federal district court, the pending petition will be treated by the federal district court as a motion. However, the procedural rules of the state court process will accompany

¹⁶⁹ See *Marubeni America Corp. v. LBA Y.K.*, 335 Fed.Appx. 95, 98 (2d Cir 2009).

¹⁷⁰ See FAA, 9 U.S.C. § 12; *Wallace v. Buttar*, 378 F.3d 182, 197 (2d Cir. 2004).

¹⁷¹ See *Webster v. A.T. Kearney, Inc.*, 507 F.3d 568, 571–572 (7th Cir. 2007).

¹⁷² See FAA, 9 U.S.C. § 6.

¹⁷³ *Ibid*, § 13. This is also a requirement of the New York Convention art IV(1)(a) (see CMS Guide to Arbitration, vol. II, appendix 1.1). Some courts have held that the failure to submit the written award is fatal to an enforcement action. The Second Circuit, however, has held that while this is not fatal, it does impact the merits of a motion for enforcement. See *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir. 2005).

¹⁷⁴ A petition is simply the state law equivalent of a motion and is used to commence a special proceeding in the New York state supreme courts. See NY CPLR § 304.

the removal to the federal district court; meaning any state law deadlines for filing a response will apply in this situation.¹⁷⁵

- 9.1.4 In the absence of the operation of state rules, the methods specified by the FAA for service of process of motions can be more complicated.¹⁷⁶ With regard to parties that reside in the district where the award was made, the rule is simple: apply the rules for the relevant federal district court. For parties located outside the federal district court where the award was made, the FAA references a method of service of process (service by the U.S. Marshal) that has long been abolished.¹⁷⁷ The present rule is that where the adverse party is not a resident of the district where the award was made then service of process should be made in accordance with Federal Rule of Civil Procedure 4, which sets out various options for service of process.¹⁷⁸ This is implicitly also the rule for service of process on parties located outside the United States.

9.2 Challenging (vacating) the award

- 9.2.1 The substantive grounds for challenging an award, in particular, seeking to vacate an award, depend crucially on where and when the award was “made”. Awards made outside the United States cannot be vacated. An award is made at the time it is “originally decided by the arbitrators”.¹⁷⁹ To avoid ambiguity on this point, some institutional rules require (and some parties set out that) the arbitral tribunal should specify the precise date and place where the arbitral tribunal made the award. If an award is made in a foreign country, the courts in New York do not have jurisdiction to vacate the award.¹⁸⁰
- 9.2.2 The provisions of the FAA specify the grounds on which an award made in the United States might be vacated.¹⁸¹ Courts have interpreted these grounds narrowly, consistent with the federal goal of enforcing agreements to arbitrate.¹⁸² Parties are limited to these grounds when moving to vacate an award and they cannot be

¹⁷⁵ D.H. Blair & Co. Inc., v. Gottdiener, 462 F.3d 95, 108 (2d Cir. 2006) (holding that the federal rules concerning removal do not apply to petitions to confirm or vacate awards).

¹⁷⁶ See FAA, 9 U.S.C. §§ 9 and 12.

¹⁷⁷ *Ibid.*

¹⁷⁸ See Hancor, Inc. v. R.R Engineering Products, Inc., 381 F.Supp.2d 12, 15–16 (D.P.R. 2005).

¹⁷⁹ See Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 989 F.2d 572, 581 (2d Cir. 1993).

¹⁸⁰ See Gulf Petro Trading v. Nigerian National Petroleum Corp., 512 F.3d 742, 753 (5th Cir. 2008).

¹⁸¹ See FAA, 9 U.S.C. § 10.

¹⁸² See Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003).

expanded on, even through the agreement of the parties.¹⁸³ Each of these grounds is set out below and the standards applied by the Second Circuit are explained:

- (i) **Where the award is procured by corruption, fraud or undue means.**¹⁸⁴ Courts in New York require that the party seeking to vacate the award demonstrate the existence of the alleged fraud or corruption, show due diligence in attempting to discover the fraud or corruption prior to the award and show that the fraud or corruption was material to the decision of the arbitral tribunal. The standard of proof for demonstrating these elements varies among the cases in the Second Circuit, but a common standard is “clear and convincing” evidence. Each basis for vacating the award, “corruption, fraud or undue means” requires intentional misconduct.¹⁸⁵
- (ii) **Where there was evident partiality or corruption in the arbitral tribunal.**¹⁸⁶ Courts are reluctant to remove arbitrators on the mere allegation of partiality or corruption. However, where a party can show that “a reasonable person would have concluded that an arbitrator was partial to one party”, the resulting award may be vacated. While a demonstration of actual bias is not required, there must be something more than the mere appearance of bias.¹⁸⁷ If a party has a relationship with an arbitrator, the other party has no reason to know of that relationship and that relationship is not disclosed, then the court may take non-disclosure as evidence of partiality and it may vacate the award.¹⁸⁸
- (iii) **Where the arbitral tribunal is guilty of misconduct that prejudiced the rights of a party.**¹⁸⁹ The misconduct that falls under this section may be characterised as the failure to postpone a hearing or a failure to entertain relevant and material evidence or other misbehaviour.¹⁹⁰ With regard to the nature of the hearing and general conduct of the arbitral tribunal, courts in New York apply the “fundamental fairness” test discussed above at paragraph 6.4.1.¹⁹¹ Particularly when considering whether or not a hearing was properly adjourned, courts will provide wide latitude or discretion to the

¹⁸³ Hall Street Associates, L.L.C. v. Mattel Inc., 128 S. Ct. 1396 (2008).

¹⁸⁴ See FAA, 9 U.S.C. § 10(a)i.

¹⁸⁵ See, for example, Hakala v. Deutsche Bank AG, 2004 WL 1057788, at *2-3 (S.D.N.Y. May 11, 2004).

¹⁸⁶ See FAA, 9 U.S.C. § 10(a)ii.

¹⁸⁷ Morelite Construction Corp. v. N.Y. City District Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).

¹⁸⁸ Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137–138 (2d Cir. 2007); and Lucent Technologies, Inc. v. Tatung Co., 379 F.3d 24, 28 (2d Cir. 2004).

¹⁸⁹ See FAA, 9 U.S.C. § 10(a)iii.

¹⁹⁰ *Ibid*, § 10(a)iii; see Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997).

¹⁹¹ See Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) (essentially requiring standards of due process).

arbitral tribunal, upholding the decisions of the arbitral tribunal where there is a reasonable basis for doing so.¹⁹²

- (iv) **Where the arbitral tribunal exceeded its powers or imperfectly executed them.**¹⁹³ Courts will vacate an award when the arbitral tribunal exceeds its authority. To determine this, a court will look to the validity of the arbitration agreement and consider who determines the arbitral tribunal's jurisdiction, as discussed above at section 5.1.

9.2.3 In addition to these provisions, there may also be the optional ground of "manifest disregard of the law". Although the Supreme Court has called into question the merits of this ground,¹⁹⁴ the Second Circuit continues to acknowledge its existence.¹⁹⁵

9.2.4 The application of "manifest disregard of the law" is severely limited. Mere factual error by the arbitral tribunal or misapplication of complex legal principles will not suffice. To successfully vacate an award under this standard, a party must show that the arbitral tribunal knew of the governing legal principle, that the governing legal principle was explicit, certain and clearly applicable to the instant facts, and that the arbitral tribunal refused to apply that governing principle.¹⁹⁶

9.2.5 A party seeking to vacate an award on these grounds must demonstrate these factors both subjectively and objectively. It must be shown that, subjectively, the arbitral tribunal actually knew the governing law and refused to apply it¹⁹⁷ and in doing so must rely on actual statements by the arbitral tribunal (either in the transcript of the arbitral proceedings or in the award) as a party cannot depose the arbitral tribunal to provide a foundation for its motion.¹⁹⁸ It also must be shown, objectively, that there is a clear, explicit and clearly applicable legal principle under the governing law.¹⁹⁹ The more complex the factual situation, the less likely that the second criterion can be demonstrated.

¹⁹² *Alexander Julian, Inc. v. Mimco, Inc.*, 2001 WL 477010, at *2 (S.D.N.Y. May 4, 2001), but cf. with *Ottawa Office Integration Inc. v. FTF Business Systems, Inc.*, 132 F.Supp.2d 215, 220, (S.D.N.Y. 2001) (requiring a "reasonable basis" for the arbitral tribunals decision to adjourn proceedings).

¹⁹³ See FAA, 9 U.S.C. § 10(a)iv.

¹⁹⁴ See *Wilko v. Swan*, 346 U.S. 427, 440 (1953) (implying "manifest disregard" as a ground for vacating awards), but see *Hall Street Associates, L.L.C. v. Mattel Inc.*, 128 S. Ct. 1396, 1404 (2008) (calling into question the validity of the ground while ruling that parties cannot contract to expand the scope of judicial review for awards).

¹⁹⁵ See *Stolt-Nielson S.A. v. AnimalFeeds International Corp.*, 548 F.3d 85, 94 (2d Cir. 2008).

¹⁹⁶ *Hoefv v. MVL Group, Inc.*, 343 F.3d 57, 69 (2d Cir. 2003).

¹⁹⁷ See *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 111 (2d Cir. 2006).

¹⁹⁸ See *Hoefv v. MVL Group, Inc.*, 343 F.3d 57, 68–69 (2d Cir. 2003).

¹⁹⁹ See *Duferco International Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003).

9.2.6 Courts in New York have very rarely vacated on “manifest disregard” grounds and will only do so in the most obvious cases.²⁰⁰

9.3 Correcting or modifying an award

9.3.1 The FAA expressly permits the correction and modification of awards by the courts in three circumstances: (i) where there is an evident miscalculation or mistaken reference; (ii) where the arbitral tribunal has produced a final and binding result on an issue that was not actually submitted to it (unless the resolution of this issue impacts the decision on the matter submitted); and (iii) when the award is imperfect as to its form in a way that does not effect the merits of the controversy (i.e. a date reference within the award is incorrect).²⁰¹

9.3.2 A party seeking a modification or a revision must submit a motion in the same way as it would a motion to vacate or confirm (as discussed in section 9.2 above). A party seeking such a correction should note that corrections and modifications are constrained by the actual intention of the arbitral tribunal and should indicate that this is the purpose of the motion.²⁰²

10. Confirmation and enforcement of awards

10.1 Domestic awards

10.1.1 Pursuant to the FAA, enforcement of a domestic award (i.e. awards that are not subject to the provisions of the New York Convention or the Panama Convention) is sought through “confirmation”. For commercial awards governed solely by Chapter 1 of the FAA (primarily domestic awards), a party must apply to confirm the award within one year.²⁰³

10.1.2 Under the FAA a court may confirm an award “if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration.”²⁰⁴ Courts in New York have held that they have no jurisdiction to enforce awards without an indication that the parties intended the

²⁰⁰ See, for example, *Porzig v. Dresdner, Kleinwort, Benson, North America L.L.C.*, 497 F.3d 133, 141–143 (2d Cir. 2007) (partially vacating an award on the grounds of “manifest disregard” where the arbitral tribunal failed to properly apply the rule concerning attorney’s fees that the federal district court had previously explained in a judicial order).

²⁰¹ See FAA, 9 U.S.C. § 11.

²⁰² See, for example, *Continental Group, Inc. v. NPS Communications, Inc.*, 873 F.2d 613, 617 (2d Cir. 1989) (where the pleading party submitted affidavits by the arbitrators suggesting their true intention).

²⁰³ See FAA, 9 U.S.C. § 9.

²⁰⁴ See FAA, 9 U.S.C. § 9.

award to be enforced by court judgment.²⁰⁵ The use of the words “final or finally” will be sufficient to communicate this intent.²⁰⁶ The vast majority of standard arbitration clauses meet this minimal requirement. Where doubts remain, other facts outside the arbitration agreement may be used to demonstrate that the parties intended the award to be enforced by court judgment.²⁰⁷

- 10.1.3 On a motion to confirm, the only barrier to confirmation by the courts is a counter-claim by an adverse party to vacate, correct or modify the award.²⁰⁸

10.2 International awards

- 10.2.1 Awards subject to the New York Convention or the Panama Convention (also referred to as international awards) are exempt from the requirement that the parties demonstrate an intention to have the award confirmed by court order. This includes awards made in the United States but subject to the provisions of either Chapter 2 or Chapter 3 of the FAA because of their international characteristics.²⁰⁹

- 10.2.2 The FAA creates an extended period of three years in which parties may make a motion for the confirmation of a non-domestic award (see discussion above at paragraph 10.1.1). In addition, the FAA specifies simplified procedures for non-domestic awards. A party need only make a motion to the relevant court for confirmation, supported by a “duly certified copy of the award” (or the original), a “duly certified copy of the arbitration agreement” (or the original) and a certified translation of these documents if they are in a language other than English.

- 10.2.3 As referenced at paragraph 9.2.2 above, the Second Circuit does not have jurisdiction to vacate an award made outside of the United States. However, courts in New York do possess the authority to not recognise awards made outside the United States. While this does not prevent the recognition of the award in other foreign countries, a ruling by a federal district court to this effect would assure the non-recognition of the award throughout the United States (barring the decision of the court being overturned on appeal).

²⁰⁵ *Varley v. Tarrytown Associates*, 477 F.2d 208, 210 (2d Cir. 1973).

²⁰⁶ See *I/S Starbory v. National Metal Converters, Inc.*, 500 F.2d 424, 425–27 (2d Cir. 1974). In addition, other similarly broad clauses may be effective. See *Ono Pharmaceutical Co., Ltd. v. Cortech, Inc.*, 2003 WL 22481379, at *3 (S.D.N.Y. November 03, 2003).

²⁰⁷ See *P&P Industries, Inc. v. Sutter Corp.*, 179 F.3d 861 (10th Cir. 1999) (incorporation of rates that explicitly provide consent to entry of judgment are sufficient).

²⁰⁸ See FAA, 9 U.S.C. § 12.

²⁰⁹ See *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d 433, 436 (2d Cir. 2004).

10.2.4 The New York Convention provides the grounds on which a jurisdiction may refuse to enforce an international award. The FAA and case law supplement the New York Convention to the extent they are not in conflict.²¹⁰ As a result, courts in New York have severely restricted the scope of review in accordance with the federal policy favouring the enforcement of arbitration agreements.²¹¹ There are seven express grounds for non-recognition under the New York Convention; these and the standards applied by courts in New York are set out below.

- (i) **Absence of a valid arbitration agreement.**²¹² Courts in New York will apply the FAA to determine whether or not the arbitration agreement is valid. As discussed above at section 3.2, the court will inquire as to whether or not the arbitration clause itself (as distinct from the Container Agreement) is valid. If the court finds that the arbitration clause is valid, then the court will inquire as to whether or not the arbitral tribunal had the jurisdiction to determine the validity of the Container Agreement. As discussed above at paragraph 5.1.2, the court will determine this on the basis of the “clear and unmistakable evidence” standard. If the parties intended for the arbitral tribunal to determine questions concerning the validity of the arbitration agreement then the court will defer to its decision.²¹³ Notably, courts in the United States will apply this line of analysis even when the arbitration agreement is made outside the United States.²¹⁴
- (ii) **Denial of an opportunity to present one’s case.**²¹⁵ Courts in New York have interpreted this ground to imply the forum state’s standards of due process.²¹⁶ As a result, courts in New York will ensure that the arbitral proceedings meet the “fundamental fairness” test set out above at paragraph 6.4.1.
- (iii) **Exceeding authority.**²¹⁷ The initial question courts in New York answer with regard to this ground is whether or not the parties intended for the arbitral tribunal to determine the issues to be arbitrated. Where this intention

²¹⁰ See *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir.1983).

²¹¹ See *Encyclopedia Universalis S.A. v. Encyclopedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005).

²¹² See New York Convention, art V(1)(a) (CMS Guide to Arbitration, vol II, appendix 1.1).

²¹³ See *Telenor Mobile Communications AS v. Storm L.L.C.*, 584 F.3d 396, 406 (2d Cir 2009) (holding that the presumption that the court determines arbitrability applies to cases governed by the New York Convention).

²¹⁴ See *Sarhank Group, Inc. v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005) (applying FAA analysis on this issue to an arbitration proceeding seated in Egypt).

²¹⁵ See New York Convention, art V(1)(b) (CMS Guide to Arbitration, vol II, appendix 1.1).

²¹⁶ *Parsons & Whittemore Overseas Co. v. Societe Generale*, 508 F.2d 969, 975–76 (2d Cir. 1974).

²¹⁷ See New York Convention, art V(1)(c) (CMS Guide to Arbitration, vol II, appendix 1.1).

is found, the court's review of this issue will end. Even if this issue is left to the court to decide, courts in New York have interpreted this ground of non-recognition narrowly. A party seeking non-recognition of the award must overcome a "powerful presumption" that the arbitral tribunal acted within its authority.²¹⁸

- (iv) **Violations of arbitral procedures or the law of the arbitral seat.**²¹⁹ Courts in New York have established that the New York Convention prioritises the procedural choices of the parties, supplemented by the procedural requirements of the forum. A party seeking non-recognition of an award on this ground must demonstrate that the arbitral tribunal either ignored specific procedural guidelines agreed by the parties,²²⁰ or ignored arbitral procedures required by the seat. In either case, the party seeking non-recognition of the award on these grounds must show a "substantial prejudice" due to the failure to follow procedure.²²¹
- (v) **Awards that are not binding or have been set aside.**²²² Once an award is set aside by courts in the seat of arbitration, courts in other jurisdictions may refuse to recognise the award. Citing concerns regarding reciprocity and comity, New York courts generally do not confirm awards that have been set aside by foreign courts.
- (vi) **Awards that address non-arbitrable issues.**²²³ A party seeking non-recognition on these grounds must demonstrate that the subject matter of the dispute is not an arbitrable issue in the United States. The Supreme Court has limited these exceptions to instances where Congress has explicitly recognised that an issue cannot be arbitrated.²²⁴ Courts in New York rarely find these grounds applicable.²²⁵

²¹⁸ See *Parsons & Whittemore Overseas Co. v. Societe Generale*, 508 F.2d 969, 976 (2d Cir. 1974).

²¹⁹ See New York Convention, art V(1)(d) (CMS Guide to Arbitration, vol II, appendix 1.1).

²²⁰ *Encyclopedia Universalis S.A. v. Encyclopedia Britannica, Inc.*, 403 F.3d 85, 90–91 (2d Cir. 2005) (finding that the premature appointment of a third arbitrator was grounds for non-recognition).

²²¹ See *P.T Reasuransi Umum Indonesia v Evanston Insurance Co.*, 1992 WL 400733, at *2 (S.D.N.Y. December 23, 1992) (an award should not be vacated based on a procedural irregularity because the complaining party was not "substantially prejudiced").

²²² See New York Convention, art V(1)(e) (CMS Guide to Arbitration, vol II, appendix 1.1).

²²³ See New York Convention, art V(2)(a) (CMS Guide to Arbitration, vol II, appendix 1.1).

²²⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (permitting arbitration of Sherman Act anti-trust claims in a foreign arbitral proceeding).

²²⁵ The majority of cases where a court considers an issue to be non-arbitrable is where a claim is specifically limited to litigation in the courts. See, for example, *Stephens v. American International Insurance Co.*, 66 F.3d 41, 45 (2d Cir. 1995).

- (vii) **Awards that violate public policy of the forum state.**²²⁶ Given the ambiguous language of this provision, this is probably the most widely asserted basis for the non-recognition of an award in the United States; it is also the most likely to be refused. Courts in New York interpret this provision in an extremely narrow way. A court will refuse to recognise an award only in the instance that it violates “the forum state’s most basic notions of morality and justice”.²²⁷ The instances where the claims of a party approaches this standard are exceptionally rare and generally only occur when there is clear partiality exhibited by an arbitrator,²²⁸ or where an award has been procured by obvious fraud and/or duress.²²⁹

10.2.5 Unless there are grounds for the deferral of recognition or enforcement as set out above, federal courts will enforce an award.²³⁰

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²²⁶ See New York Convention, art V(2)(b) (CMS Guide to Arbitration, vol II, appendix 1.1).

²²⁷ *Parsons & Whittemore Overseas Co. v. Societe Generale*, 508 F.2d 969, 974 (2d Cir. 1974).

²²⁸ See, for example, *York Hannover Holding A.G. v. American Arbitration Association*, 1993 WL 159961, at *3 n.4 (S.D.N.Y. May 11, 1993).

²²⁹ See, for example, *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co.*, 480 F.Supp. 352, 358 (S.D.N.Y. 1979).

²³⁰ *Karahua Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi*, 364 F.3d 274, 288 (5th Cir. 2004).