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GUIDE TO NEW YORK ARBITRATION LAW

NEW YORK | VIENNA | LONDON | MEXICO CITY | CHICAGO | HOUSTON | SYDNEY

1. INTRODUCTION

This guide encompasses eight relevant arbitration topics with the aim of offering a comprehensive overview of arbitration in New York. First, it deals with sources of arbitration law in New York, whereby it analyzes potential issues and offers practical solutions for overcoming them. Second, it covers arbitration agreements with an emphasis on the issues of personal and substantive scope. Third, it analyses a complex question of arbitrability which has a much wider meaning in the United States as compared with other countries. Fourth, it covers the relationship between courts and arbitral tribunals in the U.S., whereby it identifies the proper motions that are to be filed with courts depending on the circumstances and discusses the doctrines of competence-competence and separability. Fifth, it deals with the issues of constituting arbitral tribunals and challenging arbitrators. Sixth, it covers matters related to arbitral proceedings, namely, applicable law, interim measures, evidence and oral hearings. Seventh, it outlines important federal and state rules regarding the content and form of an arbitral award. Finally, it sets out relevant provisions on the enforcement and challenging of arbitral awards, including matters of jurisdiction, procedure and material grounds for setting aside and non-recognition.

Each chapter analyses relevant federal and state rules as well as any relevant decisions from the U.S. Supreme Court. Furthermore, bearing in mind that New York belongs to the Second Circuit of a federal court system, decisions from the U.S. Court of Appeals for the Second Circuit¹ are binding precedence for district courts and other lower courts in New York. Thus, this guide also analyses relevant rulings handed down by this Court. Finally, decisions from courts belonging to other circuits are also considered when dealing with relevant issues

¹ United States Court of Appeals for the Second Circuit (headquartered in Manhattan) has jurisdiction over the United States District Courts of Connecticut, New York, and Vermont.

since they may serve as persuasive authority in New York (both for the U.S. Court of Appeals for the Second Circuit and for the lower courts).

2. SOURCES OF LAW AND POTENTIAL ISSUES

Arbitrations seated in New York are governed by federal as well as state law. This chapter provides an overview of relevant federal and state arbitration law. Due to the parallel existence of federal and state legal systems, two important questions arise. First, how should potential inconsistencies between federal and state law be resolved? Second, which court, federal or state, will have jurisdiction in an action or proceedings related to arbitration in New York? The purpose of this chapter is to provide answers to both of these questions.

2.1 Federal Law:

At the federal level, arbitration in the U.S. is governed by the Federal Arbitration Act of 1925 (FAA).²

The FAA was enacted by Congress based on the Commerce Clause of Article I Section 8 of the U.S. Constitution. Under this clause, Congress has the jurisdiction to regulate commerce with foreign nations, commerce among the several states as well as commerce with Indian tribes.

On the one hand, the Commerce Clause gives a very important power to the Federal Government while imposing an important limitation on states on the other. The word “commerce” has been interpreted in U.S. Supreme Court practice as not only covering the movement of persons and things across state lines, but also as encompassing every kind of communication or transmission of intelligence whether for commercial purposes or otherwise³, every kind of commercial negotiation which involves an act of transportation of persons or

² 9 U.S.C.

³ *United States v. Simpson*, 252 U.S. 465 (1920); *Caminetti v. United States*, 242 U.S. 470 (1917).

things at some point in time or the flow of services or power across state lines.⁴ Thus, the meaning of the word “commerce” has been interpreted in rather a broad manner. This is an important point to bear in mind when interpreting the FAA.

The FAA is divided into three chapters. Chapter 1 of the FAA contains sixteen sections.

Section 1 defines “maritime transactions” and “commerce”. It excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from the FAA’s coverage.⁵

The U.S. Supreme Court interpreted this provision in *Circuit City Stores, Inc. v. Adams*. In this case, there was a provision in the respondent’s application for work at the petitioner, an electronics retailer, which required all employment disputes to be settled by arbitration. After he was hired, the respondent filed a state-law employment discrimination action against the petitioner, who then sued in a federal court to enjoin a state-court action and to compel arbitration pursuant to the FAA. The District Court entered the requested order but the Ninth Circuit reversed it, interpreting Section 1 of the FAA **as exempting all employment contracts** from the FAA’s coverage. However, the U.S. Supreme Court disagreed. The Court found that the purpose of the FAA is to overcome judicial hostility towards arbitration, which is why exclusion under Section 1 should be interpreted narrowly. Thus, the clause should not be read as excluding all employment contracts from the FAA’s coverage but **only employment contracts for transportation workers**.⁶

⁴ *United States v. South- Eastern Underwriters Assn.*, 322 U.S. 533, 549 -550 (1944).

⁵ 9 U.S.C., Chapter 1, §1.

⁶ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). See *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349 (S.D.N.Y. 1999).

Section 2 of the FAA, which deals with the validity, the irrevocability and the enforcement of agreements to arbitrate, stipulates the following:

*"A written provision in any maritime transaction or a contract evidencing a transaction **involving commerce** to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, **shall be valid, irrevocable, and enforceable**, save upon such grounds as exist at law or in equity for the revocation of any contract."* (Emphasis added.)

In *Allied-Bruce Terminix Cos. v. Dobson*, the U.S. Supreme Court held that Congress intended to exercise its power to regulate interstate commerce as broadly as possible. The Court found that the phrase "*involving commerce*" from Chapter 1 Section 2 of the FAA shows the intent of Congress "*to exercise its commerce power to the full*".⁷

Section 3 of Chapter 1 of the FAA contains an obligation for U.S. courts to stay proceedings where the issue can be referred to arbitration.

Section 4 deals with the situation in which one party alleges that the other party has failed, neglected or refused to arbitrate under a written arbitration agreement. This provision contains rules regulating petitions to U.S. courts with the jurisdiction to compel arbitration, rules dealing with the notice and service thereof and provisions on hearings and determination.

Section 5 of Chapter 1 of the FAA deals with the appointment of arbitrators. According to this provision, the method of naming or appointing arbitrators provided in parties' agreements should be followed. A court will designate and

⁷ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. at 277 (1995).

appoint arbitrators in three situations: 1) No method of appointment has been provided in the parties' agreement; 2) a party fails to comply with the appointment method provided in the agreement; 3) there is a delay in the naming of arbitrator(s) or in filling a vacancy for some other reason. Unless otherwise stipulated in the agreement, the court will appoint a single arbitrator.

Section 6 stipulates that any application to the court under the FAA shall be made and heard in the manner stipulated by law for the making and hearing of motions, except where otherwise expressly provided for in the FAA.

Section 7 deals with the issue of witnesses before arbitrators, their fees and compelling them to attend. It states that arbitrators may summon in writing any person to appear before them or any one of them as a witness and, in a proper case, to bring with him/her or them any book, record, document, or paper which may be deemed material as evidence in the case. If any person summoned to testify in this manner refuses or neglects to obey such summons, the court (the U.S. district court for the district in which the arbitrators are sitting) may compel the attendance of such a person before the arbitrators or punish such a person.

Section 8 deals with proceedings initiated by libel in admiralty and seizure of vessels or property.

Section 9 stipulates that if the parties have agreed that a judgment from the court is to be entered on the arbitration award, any party to the arbitration may apply to the court for an order confirming the award, whereupon the court must grant such an order (unless the award is vacated, modified, or corrected). This provision also sets out the rules for establishing court jurisdiction and procedures in such cases.

Section 10 sets out the grounds for vacating the arbitral award upon the application of any party to the arbitration. An award may be vacated if procured by corruption, fraud, or undue means; if there is evident partiality or corruption on the part of the arbitrator(s); and if arbitrators were guilty of any misconduct or misbehavior which has prejudiced the rights of any party. Finally, an award

may be vacated if the arbitrators have exceeded their powers or have executed them so imperfectly that a mutual, final, and definite award on the subject matter submitted was not made.

Section 11 stipulates that a competent court may grant an order modifying or correcting an award on the application of any party to the arbitration. Grounds for such correction are: 1) Evident miscalculation; 2) award for a matter which was not submitted for the arbitrators to decide on; 3) the imperfection of the award.

Section 12 sets out procedural rules dealing with notices of motion to vacate, modify, or correct an award. It also provides the rules for the service of such motions and the stay of court proceedings.

Section 13 lists all of the papers which are to be filed by a party moving for an order to confirm, modify or correct an award. It also stipulates that judgments so entered shall have the same force and effect as a judgment in an action in all respects and that they may be enforced as such.

Section 14 states that the FAA is not applicable to contracts made prior to January 1, 1926.

Section 15 stipulates that the Act of State doctrine is not applicable to the enforcement of arbitral agreements, confirmation of arbitral awards and execution of judgments based on orders confirming such awards.

Section 16 allows appeals against certain orders, interlocutory orders and final decision. However, it denies appeals against certain specified interlocutory orders.

Chapter 2 of the FAA incorporates the New York Convention of 1958 (NYC) into federal law while Chapter 3 incorporates the Inter-American Convention on International Commercial Arbitration of 1975 (IAICA), which largely resembles the NYC. The IAICA takes precedence where the majority of the parties to the

arbitration agreement are from countries that have ratified or acceded to the IAICA and which are also members of the Organization of American States.

2.2 State Law

Together with the FAA, New York state arbitration law is a relevant source of law in arbitrations seated in New York State.

The New York State arbitration law was enacted in 1920 as the first of its kind nationwide. Since then, the law has been amended substantially and is now codified in Article 75 of New York's Civil Practice Law & Rules (CPLR).

Article 75 of New York's CPLR is divided into fifteen sections.

Section 7501 deals with the effect of an arbitration agreement, providing that *"a written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award"*.

Section 7502 is divided into three paragraphs. Paragraph (a) provides for a *"special proceeding"* which *"shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action"*. It sets out several procedural rules to be followed in such proceedings.

Paragraph (b) deals with time limitations. Under this provision, the courts in New York may stay an arbitration at the very early stages and decide as a threshold issue whether the claim brought forward for arbitration would be barred by the applicable statute of limitations.

Paragraph (c) deals with provisional remedies. It stipulates that a competent court may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside of the state of New York (regardless of whether or not it is subject to the NY Convention) only on the grounds that the

award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.

Section 7503 also consists of three paragraphs. Paragraph (a) deals with applications to compel arbitration. It gives the right to a party aggrieved by the failure of another to arbitrate to apply for an order compelling arbitration. The court shall direct parties to arbitrate where there is no substantial question as to whether a valid agreement was made or complied with and the claim brought forward for arbitration is not barred by limitation under subdivision (b) of Section 7502. However, if any such question is raised, this Section stipulates that it shall be tried immediately in the aforementioned court.

Paragraph (b) deals with applications to stay arbitrations. It gives the right to a party who has not participated in an arbitration and who has not made or been served with an application to compel arbitration to apply for the arbitration to be stayed on the grounds that a valid agreement was not made or has not been complied with or that the claim brought forward for arbitration is barred by limitation under subdivision (b) of Section 7502.

Paragraph (c) deals with notices of intention to arbitrate. It explains the content of such notices and the way in which it should be served. Under this provision, a party served with a demand to arbitrate has twenty days thereafter to seek a stay to the arbitration or will otherwise be precluded from later denying the validity of or compliance with the arbitration agreement or asserting in court that the claim is time-barred.

Section 7504 provides for the appointment of an arbitrator by a court if the arbitration agreement does not provide such a method of appointment or if the agreed method fails or is not followed for any reason or if an arbitrator fails to act and his/her successor has not been appointed.

Section 7505 grants arbitrators and any attorneys of record in the arbitration proceedings the power to issue subpoenas and to administer oaths.

Section 7506 regulates hearings. It deals with arbitrators' oaths, the time and place of the hearing, evidence and representation by attorney. It also stipulates that the determination of any question and rendering of an award may be done by majority, whereas hearings are to be conducted by all arbitrators.

Section 7507 deals with the form of an arbitral award, the time for rendering it and the way in which it is delivered to the parties. It stipulates that an award should be in writing, signed and affirmed by the arbitrator granting it.

Section 7508 provides for award by confession, which may be granted for money which is due or which will become due at any time before an award is granted otherwise. It also sets out the necessary elements of such an award.

Section 7509 regulates the modification of an award by an arbitrator. It provides that a party must apply for such modification within twenty days after delivery of the award to the applicant. Grounds for modification are to be found in subdivision (c) of section 7511. Section 7509 deals with the procedure for such modification.

Section 7510 deals with the confirmation of an award. It provides that the court shall confirm an award on application by a party unless the award is vacated or modified. Application for confirmation is to be made within one year after its delivery to the applicant.

Section 7511 defines grounds for vacating or modifying an award. It provides that an application to vacate or modify an award may be made by a party within ninety days after its service on such party. The number of grounds for vacating awards differs depending on who the applicant is.

If the applicant is a party who participated in the arbitration or was served with a notice of intention to arbitrate, the award shall be vacated if the court finds that the rights of that party were prejudiced by: corruption, fraud or misconduct in procuring the award; the partiality of an arbitrator appointed as neutral, except where the award was by confession; an arbitrator, agency or person granting the award exceeded his/her power or so imperfectly executed it that a

final and definite award on the subject matter submitted was not made; failure to follow the procedure of Article 75 unless the party applying to vacate the award continued with the arbitration after having received notice of the defect and without having objected.

If the applicant is a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate, there are three additional grounds for vacation: a valid agreement to arbitrate was not made; the agreement to arbitrate was not complied with; the arbitrated claim was barred by limitation under subdivision (b) of Section 7502.

As previously stated, Section 7511 also provides grounds for modification of an award. The court should modify the award in cases of miscalculated figures, mistakes in the description of persons, things and property, where the arbitrators have granted an award on a matter which was not submitted to them and the award may be corrected without affecting the merits of the decision on those issues which have been submitted to the arbitrators; or the award is imperfect with respect to its form in a way that does not affect the merits of the controversy.

Section 7512 regulates the consequences of the death or incompetency of a party after making a written agreement to submit a controversy to arbitration.

Section 7513 deals with fees and expenses. If the arbitration agreement does not stipulate otherwise, the award should stipulate the way in which such fees and expenses (attorney's fees excluded) are to be allocated. On application, the court may reduce or disallow any fee or expense it finds excessive or allocate it as justice requires.

Section 7514 provides that a judgment shall be entered on the confirmation of an award.

Section 7515 deals with mandatory arbitration clauses and prohibited clauses.

Subdivision (a) paragraph 2 defines a “prohibited clause” as a clause in a contract which requires mandatory arbitration as a condition for the enforcement of the contract or for obtaining remedies under the contract to resolve any allegation or claim of discrimination in violation of laws prohibiting discrimination.

Subdivision (a) paragraph 3 defines “mandatory arbitration clause” as a provision contained in a written contract which requires the parties to such a contract to submit any matter arising under such a contract to arbitration prior to the commencement of any legal action for the enforcement of the provisions of such a contract. The clause must provide language to the effect that the facts found or determination made by the arbitrator(s) in his/her or their response to a party alleging discrimination in violation of laws prohibiting discrimination (including but not limited to article fifteen of the executive law) shall be final and not subject to an independent court review.

Subdivision (b) provides that written contracts shall not contain such “prohibited clauses” and that mandatory arbitration clauses shall be null and void, except where inconsistent with federal law.

2.3 Issues arising from the parallel existence of state and federal law

As a general matter, if federal law and state law regulate the same subject matter, it may be the case that federal and state law provisions contradict each other. The U.S. Constitution has a resolution for this problem called the doctrine of preemption.⁸

The doctrine of preemption is based on Article IV, Section 2 of the U.S. Constitution, otherwise known as the “Supremacy Clause”. It states that federal law is the “supreme law of the land”.

⁸ U. S. Const. Art. IV, § 2.

Preemption can be either express or implied. Express preemption means that there is express language in a federal statute which indicates that state law is preempted, whereas implied preemption requires courts to look beyond the express language of federal statutes. More precisely, the court would have to determine whether Congress has “occupied the field” of regulation, whether a state law directly conflicts with federal law or whether the federal purpose will be frustrated by enforcement of the state law.⁹

According to the U.S. Supreme Court in *Volt Info. Sciences*, the FAA “contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration”.¹⁰

This means that the FAA does not automatically preempt all state arbitration laws. The next step is to investigate the purpose of the FAA and the federal policy behind it and to see whether such a purpose would be frustrated by the enforcement of state law.

The U.S. Supreme Court has adopted a very favorable approach towards arbitration. The Court found that “Congress declared a national policy favoring arbitration” by adopting the FAA.¹¹ It has also found that the FAA pre-empts any legal rules “hinging on the primary characteristic of an arbitration agreement”.¹²

The U.S. Supreme Court also found that “courts must place arbitration agreements on an equal footing with other contracts”.¹³ This means that the FAA “requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in

⁹ See: *Pennsylvania v. Nelson*, 350 U.S. 497 (1956)

¹⁰ *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 477 (1989).

¹¹ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1985).

¹² *Kindred Nursing Centers, L. P. v. Clark*, 581 U.S. ___, 137 S. Ct. 1421 (2017).

¹³ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1745; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *DIRECTV, Inc. v. Imburgia*, 577 U.S. ___, 136 S. Ct. 463 (2015).

accordance with their terms."¹⁴ If state law interferes with the enforceability of arbitration agreements by imposing additional requirements for the validity of arbitration agreements, such law would be preempted by the FAA.¹⁵

As an example, in *Volt Info. Sciences Inc.*, the U.S. Supreme Court found that the FAA preempts state laws which require a judicial forum for the resolution of claims which the contracting parties have agreed to resolve by arbitration.¹⁶

Similarly, in *AT&T Mobility LLC v Concepcion*, the U.S. Supreme Court relied on the supremacy of the FAA in rejecting state case law on contract invalidity for being unconscionable. The Court considered whether a clause in an arbitration agreement waiving a customer's right to bring a class action rendered the arbitration agreement invalid under Californian case law. Californian case law made such class action waivers unconscionable in certain consumer contracts. The U.S. Supreme Court held that this Californian law was invalid because states cannot pass laws inconsistent with the FAA's mandate to broadly enforce agreements to arbitrate, even if such laws are "*desirable for unrelated reasons*".¹⁷

Therefore, bearing in mind the very strong federal policy in favor of arbitration, provisions of New York state law which are inconsistent with the FAA will be preempted by the FAA. In other words, if state law contradicts federal law, state law is preempted, but state law will apply if there is no conflicting federal law.

For example, under Section 7502 (b) of the New York CPLR mentioned earlier (see chapter 2.2.), courts in New York may stay an arbitration at the very early stages and decide as a threshold issue whether the claim brought forward for arbitration would be barred by the applicable statute of limitations. The Court of Appeals of the State of New York held that this state rule was "*not inimical to the*

¹⁴ *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989).

¹⁵ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995)

¹⁶ *Volt Inf. Sciences v. Stanford Univ.*, 489 U.S. 468 (1989)

¹⁷ *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

policies of the FAA" and was therefore not preempted by it.¹⁸ However, a federal court held, contrary to the New York Court of Appeals' decision, that the CPLR rule should be preempted by the FAA.¹⁹

Under the aforementioned Section 7503 (c) of the New York CPLR (see chapter 2.2.), a party served with a request to arbitrate has twenty days thereafter to seek a stay to the arbitration or will otherwise be precluded from later denying the validity of or compliance with the arbitration agreement or asserting in court that the claim is time-barred. Some federal trial courts held that this provision is inapplicable under the FAA since the FAA does not provide for a comparable time limitation,²⁰ while other federal courts have applied this provision.²¹ Hence, the courts are divided on the issue as to whether this state law rule is preempted by the FAA or not. In such circumstances, a prudent party should request that a court stay an arbitration within twenty days of being served with an arbitration request.

Another example of federal law preempting state law is the New York state law which prohibits the inclusion of mandatory arbitration agreements in contracts for the sale or purchase of consumer goods requiring consumers to submit future disputes to arbitration.²² The New York Supreme Court found that if the transaction affects interstate or foreign commerce, the FAA preempts such state law.²³

Hence, any state law that is inconsistent with the FAA or the federal policy behind it will be preempted by the FAA and, consequently, will not be applied.

¹⁸ *Smith Barney, Harris Upham, & Co. v. Luckie*, 85 N.Y.2d 193, 206 (1995).

¹⁹ *Goldman Sachs & Co. v. Griffin*, No. 07 Civ. 1313 (LMM), 2007 WL 1467430 (S.D.N.Y. May 16, 2007).

²⁰ *PMC Inc. v. Atomergic Chemetals Corp.*, 844 F. Supp. 177, 182 (S.D.N.Y. 1994).

²¹ *In re Herman Miller, Inc.*, No. 97 Civ. 7878 (SAS), 1998 WL 192213 at *3 (S.D.N.Y. Apr. 21, 1998).

²² CLS Gen Bus Law § 399-c.

²³ *Baronoff v. Kean Development Company*, 818 N.Y.S.2d 421, 425 (Sup. Ct. 2006)

On the other hand, if consistent with the FAA, state arbitration law applies and may thus may serve as a “gap filler”. For example, the FAA does not deal with the issue of court-ordered interim reliefs, whereas the CPLR enables the courts to grant interim emergency relief such as preliminary injunctions and orders of attachment in aid of arbitrations. Bearing in mind that this provision does not seem to conflict with either the FAA or the federal policy behind it, there is no reason why the respective provisions of the CPLR should not apply.

In conclusion, the FAA is the principal law of arbitration at the national level and it governs both domestic arbitrations which involve interstate commerce and international arbitrations. If the arbitration is seated in New York, the arbitration law of New York State also comes into play. State arbitration law will be applied if consistent with the FAA, while conflicting provisions will be preempted by the FAA.

If the dispute does not involve interstate commerce, it will only be governed by state arbitration law and not the FAA. However, such situations are quite rare (e.g. professional malpractice disputes or New York-based real estate disputes). The vast majority of arbitration disputes in New York will be governed by the FAA and state law will only apply if consistent with the FAA and the federal policy behind it.

2.4 Court Jurisdiction

The parallel existence of federal and state legal systems in the U.S. raises one more important question, namely, which court, federal or state, has jurisdiction in an action or proceedings related to an arbitration in New York.

As a general matter, state courts have power to hear any claim arising under federal or state law, except those falling under the exclusive jurisdiction of the federal courts. As for federal courts, there are two primary sources of their subject-matter jurisdiction: diversity jurisdiction and federal question jurisdiction. Diversity jurisdiction permits individuals to bring claims to a federal court where the claim exceeds \$75,000 and the parties are citizens of different

states. Federal question jurisdiction is for claims arising under federal law (including the U.S. Constitution).

In addition, Section 203 of the FAA sets forth the subject matter that falls under the jurisdiction of federal courts by stating:

*“An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of Title 28) **shall have original jurisdiction** over such an action or proceeding, regardless of the amount in controversy.”* (Emphasis added.)

This provision clearly grants jurisdiction to the federal courts over matters arising from the New York and Inter-American Convention. The next question is how we determine whether the matter falls under the Conventions.

Section 202 of the FAA gives an answer to this question. It defines agreements or awards that fall under the Convention as follows:

*“An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is **entirely between citizens of the United States** shall be deemed **not to fall under the Convention unless** that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.”* (Emphasis added.)

It follows from the provision above that it is enough for an arbitral agreement or award to have some reasonable relation with a foreign state in order to be covered by the Conventions. Thus, a broad category of cases will fall under the Conventions.

Conversely, the FAA does not grant federal courts jurisdiction over actions that do not fall within the coverage of the Conventions. For example, a domestic arbitration with no connection at all to a foreign state would not be covered by the Conventions.

Thus, if a party wants to initiate proceedings before a federal court in a matter not covered by the Conventions, he/she must satisfy jurisdictional requirements regarding the contested amount and diversity of citizenship. Alternatively, he/she must demonstrate the existence of some other independent basis for the jurisdiction of a federal court over the subject-matter like e.g. federal question jurisdiction.

Finally, it is possible that a party initiates proceedings in a state court over a matter which falls under the Conventions. In such cases, the opposing party may remove the action or proceedings to the appropriate federal court.

Section 205 of the FAA provides for the removal of cases from state courts:

“Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall

be deemed to have been brought in the district court to which it is removed.”

Thus, with respect to matters related to an arbitration agreement or award falling under the Conventions or if federal jurisdiction can be established otherwise (diversity jurisdiction, federal question jurisdiction), the FAA provides a basis for the jurisdiction of a federal court over the original subject matter as well as the ability to remove a case from a state court to a federal court.

If, however, a claim does not involve arbitral agreements or awards falling under the Conventions and there is no other legal basis for establishing the jurisdiction of the federal courts, the state court will hear such claim.

3 THE ARBITRATION AGREEMENT

3.1 Definition and Scope

The arbitration agreement is the basis of the arbitral proceedings which gives power to the arbitral tribunal to decide on the dispute submitted to it. Conversely, a valid arbitration agreement prevents a court from establishing jurisdiction over the matters covered by such agreement.

Every arbitration agreement has a personal and substantive scope. The personal scope makes clear who is bound by the arbitration agreement while the substantive scope makes clear what is covered by the agreement. The U.S courts have developed significant practice on the matter of the scope of arbitration agreements.

3.1.1. PERSONAL SCOPE

The general rule is that only the signatories to an arbitration agreement are bound to arbitrate.

However, there are certain exceptions to this general rule which have developed in court practice. In *Thomson-CSF, S.A.*, the U.S. Court of Appeals for the Second Circuit acknowledged that:

*"this Court has recognized a number of theories under which non-signatories may be bound to the arbitration agreements of others. Those theories arise out of common law principles of contract and agency law. Accordingly, we have recognized five theories for binding non-signatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel."*²⁴

Thus, non-signatories can be bound by an arbitration agreement based on five given theories.

A. Incorporation by reference

U.S. courts have regularly found that a signatory to a contract which does not contain an arbitration clause but which incorporates a contract containing such a clause by reference may be required to arbitrate despite his/her not having signed the latter contract.²⁵

The U.S. Court of Appeals for the Second Circuit confirmed that the contract does not have to contain an explicit arbitration clause if it validly incorporates an arbitration clause in another document by reference.²⁶ However, the signed document must contain an explicit reference to another document that contains the arbitration clause.²⁷ Referring to the federal policy in favor of arbitration, the Court held that the term incorporating the arbitration clause in a contract need

²⁴ *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995)

²⁵ See: *Coffey v. Dean Witter Reynolds, Inc.*, 891 F.2d 261 (10th Cir. 1989); *R.J. O'Brien & Assoc., Inc. v. Pipkin*, 64 F.3d 257 (7th Cir. 1995).

²⁶ *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional*, 991 F.2d 42, 48 (2d Cir. 1993); New York district court also held that parties can incorporate an arbitration agreement into their contract by reference. See: *Upstate Shredding, LLC v. Carloss Well Supply Co.*, 84 F.Supp. 2d 357, 366 (N.D.N.Y. 2000).

²⁷ *R.J. O'Brien Assoc., Inc. v. Pipkin*, 64 F.3d 257 (7th Cir. 1995)

not mention the arbitration agreement specifically.²⁸ Thus, a reference to a document containing an arbitration clause must be explicit, but it does not have to mention such a clause specifically.

Decisions of the U.S. Court of Appeals for the Second Circuit are mandatory for district courts and other lower courts within the Second Circuit (which New York belongs to). Thus, the controlling authority for the Second Circuit is established by the Court of Appeals for the Second Circuit. However, decisions of other Courts of Appeal are of importance because they can be used as persuasive authority in the Second Circuit.

In one case, the Fifth Circuit relied on two well-settled propositions in order to reach the conclusion that a non-signatory of an arbitration agreement is bound to arbitrate based on incorporation by reference. The first such proposition is that arbitration provisions in a contract "*evidencing a transaction involving commerce*" are "*valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract*". This is in line with the strong federal policy favoring arbitration before litigation. The second proposition is that, as a matter of contract law, "*incorporation by reference is generally effective*" if "*the provision to which reference is made has a reasonably clear and ascertainable meaning*".²⁹

Thus, if there is a valid arbitration agreement covering the dispute and if such an agreement is clearly incorporated by reference, the non-signatory will be compelled to arbitrate. However, where the non-signatory's agreement is not clearly incorporated by reference, the non-signatory cannot be compelled to arbitrate.

For example, in one case, the Seventh Circuit found that because a guarantee appeared immediately beneath the signature line of an underlying agreement

²⁸ Progressive Casualty Ins. Co. v. CA Reaseguradora Nacional de Venezuela, 991 F.2d 42 (2d Cir. 1993).

²⁹ J. S. & H. Construction Company v. Richmond County Hospital Authority, 473 F.2d 212 (5th Cir. 1973)

containing an arbitration clause, it was not possible to establish that the guarantee was part of the underlying agreement for the purpose of determining whether the guarantor intended to be bound to arbitrate in the event of disputes arising from the guarantee.³⁰

Similarly, in another case, the Eighth Circuit found that even though some emails between parties included attachments that referenced an agreement to arbitrate, it was not incorporated by reference where the emails did not alert the party to the fact that the attachment contained additional contract terms.³¹

Finally, in a relatively recent case, the Supreme Court of Oklahoma was asked to provide an opinion on a question as to whether a written consumer contract for the sale of goods incorporated a separate document entitled “Terms of Sale” available on the seller’s website by reference when the contract states that it is “subject to” the seller’s “Terms of Sale” but does not specifically reference the website. In response, this Court held that *“a contract must make clear reference to the extrinsic document to be incorporated, describe it in such terms that its identity and location may be ascertained beyond doubt, and the parties to the agreement had knowledge of and assented to the incorporated provisions”*. Therefore, there was no valid incorporation by reference in this case.³²

In conclusion, if the parties want to incorporate an arbitration clause from another document in their contract, they must determine such a document in a clear and specific manner but they do not have to mention the arbitration clause as such. If the parties are insufficiently clear in describing the document incorporated by reference, the courts will be reluctant to find that a non-signatory is bound to arbitrate based on the arbitration clause contained in such a document.

³⁰ *Grundstad v. Ritt*, 106 F.3d 201 (7th Cir. 1997)

³¹ *Dakota Foundry, Inc. v. Tromley Indus. Holdings, Inc.*, 737 F.3d 492 (8th Cir. 2013)

³² *Walker v. Builddirect.com Technologies, Inc.*, WL 3429364 (10th Cir. 2015).

B. Assumption

Where a non-signatory assumes a contract containing an arbitration clause or receives the assignment of such a contract, U.S. courts typically compel the non-signatory assignee to arbitrate.³³

As a general matter, under the assignment and assumption agreement, the assignor transfers his/her rights and obligations under the agreement to the assignee, who assumes all the rights and obligations of assignor under the agreement by accepting the assignment.

In one case, the U.S. Court of Appeals for the Second Circuit found that a separate agreement with a non-signatory expressly assuming all the obligations and privileges of a signatory party under the sub-charter (which included an arbitration clause) constituted grounds for the enforcement of an arbitration clause by the non-signatory.³⁴

It should be noted, however, that assumption in U.S. court practice could also refer to “assumption by conduct” - a party’s subsequent conduct which indicates that it is assuming the obligation to arbitrate.

For example, the U.S. Court of Appeals for the Second Circuit found that “*in the absence of a signature, a party may be bound by an arbitration clause if its **subsequent conduct** indicates that it is **assuming** the obligation to arbitrate*”.³⁵ (Emphasis added.) The Court referred to an earlier case in which it found that “*flight attendants manifested a clear intention to arbitrate by sending a representative to act on their behalf in arbitration process*”.³⁶

³³ See: Niedermaier, International Arbitration in the U.S, in INTERNATIONAL COMMERCIAL ARBITRATION 763, 774 (Stephan Balthasar ed., 2016)

³⁴ Import Export Steel v. Miss. Val. Barge Line, 351 F.2d 503 (2d Cir. 1965)

³⁵ Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773 (2d Cir. 1995)

³⁶ See: *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir.)

Thus, a non-signatory can be bound to arbitrate if he/she assumes a signatory party's obligation (for example, by assuming all of the rights and obligations under the agreement including the arbitration clause). Additionally, a non-signatory can be bound to arbitrate if his/her conduct indicates the assumption of the obligation to arbitrate.

C. Agency

If an arbitration agreement is signed by an agent on behalf of a principal, it will only bind the principal.³⁷

As a general matter, an agent may have actual, implied and apparent authority to act on a principal's behalf.

An agent acts with actual authority when the *"agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act"*.³⁸

Regarding the scope of such authority, an agent may take action *"designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives"*.³⁹

Finally, an agency relationship can also be established through apparent authority. Such authority exists when *"a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations"*.⁴⁰

³⁷ Restatement (Third) of Agency, § 1(1) (1958).

³⁸ Restatement (Third) Agency § 2.01 (2006)

³⁹ Restatement (Third) Agency § 2.02 (2006)

⁴⁰ Restatement (Third) Agency § 2.03 (2006)

Apparent authority comes into play where the agent is lacking actual authority yet acted within the scope of such apparent authority. In this case, his acts would bind the principal as though the agent had had actual authority.

In determining the apparent authority of an agent, the courts will usually rely on the notion of estoppel. For example, in one case, the court found that:

*“Apparent authority is based on the doctrine of estoppel, and one seeking to charge the principal through apparent authority of an agent must establish **conduct by the principal** that would lead a reasonably prudent person to believe that the agent has the authority that he purports to exercise”.⁴¹(Emphasis added.)*

Thus, the principal can be bound by an arbitration agreement concluded by an agent even if the agent is lacking actual (or implied) authority to enter into such an agreement, if, based on the principal’s conduct, the other party reasonably concluded that an agent had authority to enter into such an agreement on behalf of the principal.

D. Piercing the corporate veil

Under the ‘piercing the corporate veil’ doctrine or ‘alter ego’ doctrine, the non-signatory may be bound to arbitrate if he/she is the “alter ego” of the signatory to the arbitration agreement.

In *Thomson-CSF, S.A. v. American Arbitration Ass’n*, the U.S. Court of Appeals for the Second Circuit found that a corporation may be bound by an arbitration

⁴¹ *Biggs v. U.S. Fire Ins. Co.*, 611 S.W.2d 624, 629 (Tex. 1981)

agreement entered into by its subsidiary if its "conduct demonstrates a virtual abandonment of separateness".⁴²

There are numerous factors that a court should investigate when deciding on the application of this doctrine. In one case, the U.S. Court of Appeals for the Second Circuit enlisted the following facts as relevant for piercing the corporate veil: inadequate capitalization; putting and taking funds in or out of a corporation for personal purposes; overlap in ownership, officers, directors, and personnel; common office space, addresses, telephone numbers; corporations are treated as independent profit centers, etc.⁴³

E. Equitable estoppel

The doctrine of equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens imposed by such contract.⁴⁴

In the context of binding a non-signatory to arbitrate, the doctrine of equitable estoppel means that a non-signatory cannot rely on a contract (containing an arbitration clause) when it works to his/her advantage and avoid it when it works to his/her disadvantage.

⁴² *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995). Other courts relied on this reasoning, see for example: *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 358–359 (5th Cir. 2003). Additionally, it should be noted that this doctrine is strongly influenced by equity. As one court found, the separate status of corporations "should be disregarded only where necessary to do equity" - *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 536 (5th Cir. 1992).

⁴³ *Passalacqua Builders, Inc., and Safeco Insurance Company of America and General Insurance Company of America, Cross-Appellees v. Resnick Developers South, Inc., Jack Resnick, Burton Resnick, 90079, Inc., Jack Resnick & Sons, Inc., Sunrise Builders, Inc., Jack Resnick & Sons of Florida, Inc., Resnick of Boca, Inc., Jfam Investments, Inc., Resnick Development Corporation, Pearl Resnick, Judith Resnick, Ira Resnick, Marilyn Katz, Stanley Katz, Susan Abrams, John Doe, John Does, Inc., Cross-Appellants*, 933 F.2d 131 (2d Cir. 1991).

⁴⁴ *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006)

The U.S. Court of Appeals for the Second Circuit explained that “*a party is estopped from denying its obligation to arbitrate when it receives a ‘direct benefit’ from a contract containing an arbitration clause*”.⁴⁵

There was a disagreement between circuits as to whether the New York Convention permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel.⁴⁶ This matter was resolved by the U.S. Supreme Court in June 2020.

The Court found that the New York Convention does not address the issue of whether non-signatories may enforce arbitration agreements under equitable estoppel. It also found that Article II (3) of the NY Convention “*does not state that arbitration agreements shall be enforced only in the identified circumstances*”. Moreover, “*Article II contemplates using domestic doctrines to fill gaps in the Convention*”. Finally, the Court concluded that the New York Convention does not conflict with the domestic equitable estoppel doctrine that permits the enforcement of arbitration agreements by non-signatories.⁴⁷

Thus, in an arbitration seated in New York, a non-signatory of the arbitration agreement can be bound to arbitrate based on the equitable estoppel doctrine.

⁴⁵ *American Bureau, Shipping v. Tencara Shipyard*, 170 F.3d 349, 353 (2d Cir. 1999). As one court found, a party is equitably estopped from avoiding arbitration where its claims were grounded in the alleged breach of obligations arising out of the agreement containing an arbitration clause - *Hughes Masonry v. Greater Clark Cty. Sch. Bldg*, 659 F.2d 836 (7th Cir. 1981).

⁴⁶ In favor of applying equitable estoppel to arbitration agreements under the NYC: *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38 (1st Cir. 2008); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355 (4th Cir. 2012); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000). Against the doctrine's application to arbitration agreements under the NYC: *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017); *Outokumpu Stainless USA, LLC v. Convertteam SAS*, No. 17-10944 (11th Cir. 2018).

⁴⁷ *GE Energy Power Conversion France SAS, Corp. v. OUTOKUMPU STAINLESS USA, LLC*, 139 U.S. 2776 (2019)

3.1.2. SUBSTANTIVE SCOPE

In accordance with the principle of party autonomy, parties are free to determine the substantive scope of their arbitration agreement. If there is uncertainty as to whether a dispute falls within the scope of an arbitration agreement, such an agreement must of course be interpreted. The main issue here is whether the dispute about the scope of an arbitration clause should be resolved by an arbitrator or a court.

The U.S. Court of Appeals for the Second Circuit found that the question as to whether disputed claims fall under agreements containing a broad arbitration clause was "*a question of scope*" which had been delegated to an arbitrator.⁴⁸ Thus, broad language contained in an arbitration clause is evidence of the parties' intention to have an arbitrator decide on the question of scope.

In line with this position and in order to determine whether a dispute falls within the scope of an arbitration agreement, the Second Circuit developed the following two-step analysis.

First, a court must decide whether an arbitration clause is narrow or broad. If the clause is broad, there is a presumption of arbitrability.⁴⁹ However, if the clause is narrow, the second question would be whether the dispute "*concerns matter collateral to the contract calling for arbitration*" or the claims "*touch matters covered by the parties' agreement*". In the first scenario, the presumption of arbitrability should be tested and the court should look into allegations underlying the dispute and see if the alleged claim "*implicates issues of contract construction*". In the second scenario, claims must be referred to arbitration "*whatever the legal labels attached to them*".⁵⁰

⁴⁸ *Bell v. Cendant Corp.*, 293 F.3d 563 (2d Cir. 2002).

⁴⁹ See: *Bell v. Cendant Corp.*, 293 F.3d 563 (2d Cir. 2002).

⁵⁰ See: *Worldcrisis Corporation v. Armstrong*, 129 F.3d 71 (2d Cir. 1997) and cases quoted therein.

Finally, if a party to an arbitration agreement raises claims founded on statutory rights and the arbitration clause in question does not mention these statutes or statutes in general, the clause can still serve as a basis for arbitrating such statutory claims.⁵¹ This conclusion stems from the federal policy favoring arbitration.

3.2 Form

Both the FAA (Section 2) and the New York Convention (Article II) provide that arbitration agreements must be made in writing.⁵²

Several U.S. Circuit Courts held that the FAA does not require arbitral agreements to be signed although they must be in writing.⁵³ This is in line with the theories described above, under which non-signatories may be bound to the arbitration agreements of others (see chapter 3.1.1.).

Moreover, an arbitration agreement can be made by way of email or other electronic communication.⁵⁴ The E-Sign Act provides that "*a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.*"⁵⁵ This means in turn that an email agreement to arbitrate would be enforceable and in compliance with the FAA's requirements.

Finally, in accordance with the preemption doctrine analyzed above (see chapter 2.3.), state law shall not impose requirements of form for arbitral agreements that are stricter than those provided in federal law. The U.S. Supreme Court explained this in *Doctors Associates*.

⁵¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

⁵² 9 U.S.C. § 2; NYC, Art II.

⁵³ *Valero Refining, Inc. v. M/T Lauberhorn*, 813 F.2d 60, 64 (5th Cir. 1987); *Tinder v. Pinkerton Security*, 305 F.3d 728, 736 (7th Cir. 2002).

⁵⁴ See: *Campbell v. Gen. Dynamics Govt. Sys. Corp.*, 407 F.3d 546, 559 (1st Cir. 2005)

⁵⁵ 15 U.S.C. § 7001(a).

In this case, the Montana Supreme Court held that the arbitration clause was unenforceable because it did not meet the state-law requirement that "*notice that a contract is subject to arbitration*" be "*typed in underlined capital letters on the first page of the contract.*" The U.S. Supreme Court, however, held that "*Montana's first-page notice requirement, which governs not 'any contract,' but specifically and solely contracts 'subject to arbitration,' conflicts with the FAA and is therefore displaced by the federal measure*".⁵⁶

This decision was made in reliance on a previous U.S. Supreme Court ruling in *Perry v. Thomas*, where the Court found that:

*"State law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of **contracts generally**. A state-law principle that takes its meaning precisely from the fact that a **contract to arbitrate** is at issue does not comport with this requirement of § 2."*⁵⁷ (Emphasis added.)

As a general matter, the formation and validity of a contract (adhesion, unconscionability, other requirements imposed on contracts that limit their validity) are governed by state law.⁵⁸ Thus, validity requirements which state law imposes on all contracts are permissible. However, if the state law imposes special formal requirements for arbitral agreements to be valid and enforceable, such requirements shall not be applied.

4 ARBITRABILITY

Arbitrability in international arbitration typically refers to the question as to which matters may or may not be submitted to arbitration as a matter of law. In

⁵⁶ *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996)

⁵⁷ *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520 (1987)

⁵⁸ Thomas E. Carbonneau, *The Law and Practice of United States Arbitration*, 16 (2018)

other words, national laws may exempt some disputes (i.e. criminal or family law matters) from arbitration proceedings, meaning that such disputes may be resolved exclusively by national courts. Consequently, Article V(2)(a) of the New York Convention provides that recognition and enforcement of an arbitral award may be refused if the court where such recognition and enforcement is sought finds that "[t]he subject matter of the difference is **not capable of settlement by arbitration** under the law of that country." (Emphasis added.).

This is how arbitrability is generally understood in international arbitration. However, the term "arbitrability" has a different and wider meaning in the U.S.⁵⁹ The U.S. Supreme Court used the term "arbitrability" to refer to a variety of threshold issues dealing with the existence, enforceability, and scope of an arbitration clause.

As one author put it, in U.S. practice "*in*arbitrability can arise as a result of the **subject matter of the dispute** or because of **contractual flaws** in the arbitration agreement".⁶⁰ (Emphasis added.)

Subject matter inarbitrability means that a dispute cannot be submitted to arbitration as a matter of law because of its relation to matters of public interest.⁶¹ This is how arbitrability is understood in international arbitration in general.

On the other hand, there is also inarbitrability based on contract in the U.S. Such inarbitrability does not involve the public interest. The focus here is on

⁵⁹ One author enumerates the following issues under "common arbitrability challenges": (1) disputes concerning challenges to the contract; (2) disputes involving non-signatories; (3) disputes involving the scope of the arbitration clause; and (4) disputes about whether the party seeking to arbitrate has waived its right to do so. John Fellas, *Enforcing International Arbitration Agreements*, in *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK*, 201, 215 (eds. John Fellas, James Carter).

⁶⁰ Thomas E. Carbonneau, *The Law and Practice of United States Arbitration*, 13 (2018)

⁶¹ *Ibid.*, 13.

challenges to the arbitration agreement – the existence, making and scope of the agreement.⁶²

4.1 Subject-matter Arbitrability

Subject-matter arbitrability is not mentioned in the FAA. Although this matter should be addressed by Congress, since only the legislative branch should decide whether certain statutory disputes are arbitrable or not, courts have the final word on this in practice through the interpretation of statutes.⁶³

In U.S. court practice, certain types of claims (claims arising under the federal securities law, RICO claims and antitrust claims) were traditionally treated as non-arbitrable. However, this position has changed drastically over the years.

In *Scherk v. Alberto-Culver Co.*, the U.S. Supreme Court held that claims under federal securities laws were arbitrable if they arose from an international commercial transaction. The Court held that invalidation of an agreement to arbitrate would reflect a “*parochial concept that all disputes must be resolved under our laws and in our courts*”. The Court explained:

“We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”⁶⁴

In *Mitsubishi Motors Corp. v. Soter Chrysler-Plymouth, Inc.* the U.S. Supreme Court held that claims under federal antitrust laws are arbitrable in international cases. The Court rejected the respondent’s position that the clause could not be properly read as contemplating arbitration of these statutory claims because the arbitration clause at issue did not mention relevant statutes (or statutes in general). It also held that there was no reason to depart from the federal policy

⁶² *Ibid.*, 15.

⁶³ *Ibid.*, 14

⁶⁴ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974)

favoring arbitration and that “antitrust claims are arbitrable pursuant to the Arbitration Act”. The Court held that the arbitration clause should be enforced in this international context “even assuming that a contrary result would be forthcoming in a domestic context”⁶⁵

In *Shearson/Am. Express, Inc. v. McMahon*, the U.S. Supreme Court held that claims under federal securities law and the RICO statute are arbitrable. The Court found that:

*“The Arbitration Act establishes a federal policy favoring arbitration, requiring that the courts rigorously enforce arbitration agreements. This duty is not diminished when a party bound by an agreement raises a claim founded on statutory rights. The Act’s mandate may be overridden by a contrary congressional command, but the burden is on the party opposing arbitration to show that **Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue**. Such intent may be discernible from the statute’s text, history, or purposes.”*⁶⁶ (Emphasis added.)

With respect to bankruptcy related claims, the U.S. Court of Appeals for the Second Circuit held that Congressional intent to override the Arbitration Act’s mandate can be induced from “an inherent conflict between arbitration and the statute’s underlying purposes”.⁶⁷ The Court acknowledged that “bankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters”, which implicate “more pressing bankruptcy concerns”. However, the Court held that even in such “core proceedings”, the bankruptcy court cannot override an arbitration agreement “unless it finds that the proceedings are based on provisions of the Bankruptcy Code that ‘inherently conflict’ with the Arbitration Act

⁶⁵ *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 615 (1985)

⁶⁶ *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987)

⁶⁷ *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006)

*or that arbitration of the claim would 'necessarily jeopardize' the objectives of the Bankruptcy Code".*⁶⁸

In conclusion, many types of claims which were traditionally deemed non-arbitrable in the U.S., have become arbitrable over the years thanks to the federal policy in favor of arbitration and a broad interpretation of such policy by the U.S Supreme Court.

However, it should be noted that some U.S. states, including New York, have recently adopted legislation which nullifies agreements to arbitrate claims related to sexual harassment or discrimination. In 2018 New York adopted legislation that prohibits the mandatory arbitration of sexual harassment claims. The District Court for the Southern District of New York dealt with the validity of this legislation in *Latif v. Morgan Stanley & Co. LLC*.

In this case, the employee argued that the arbitration agreement between him and his employer was unenforceable with respect to his claim of sexual harassment. He argued that New York CPLR 7515 (see chapter 2.2. above) invalidated the agreement to arbitrate his sexual harassment claim. The Court rejected this argument, holding that the employee's sexual harassment claims were subject to mandatory arbitration. The Court referred to a provision in CPLR 7515(b)(iii) which states that agreements to arbitrate sexual harassment claims are null and void "*except where inconsistent with federal law*". The Court found that invalidating parties' agreements to arbitrate such claims would be inconsistent with the FAA, which sets forth a strong presumption in favor of the enforceability of arbitration agreements.⁶⁹

The Court also advised that state law grounds (in law or equity) providing exceptions to arbitration must be generally applicable to any contract and should not prohibit outright the arbitration of a certain type of claim. Bearing in

⁶⁸ *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006)

⁶⁹ *Latif v. Morgan Stanley & Co. LLC*, Case No. 18 cv 11528 (U.S. Dist. S. D. NY June 26, 2019)

mind that Section 7515 is not a “generally applicable contract defense”, it “cannot overcome the FAA’s command that the parties’ Arbitration Agreement be enforced”.⁷⁰

Thus, based on this ruling, sexual harassment claims are arbitrable in New York.⁷¹ In conclusion, federal pro-arbitration policy has been a strong incentive for courts to significantly reduce the number of non-arbitrable claims.

4.2 Lack of arbitrability due to non-existence, formation or scope of the arbitration agreement

As previously explained, the term “arbitrability” in the U.S. is often understood as the question as to whether parties have agreed to submit a dispute to arbitration or not. Arguing that a certain dispute is not arbitrable would mean challenging the existence, formation or scope of the arbitration agreement.

An important preliminary question discussed in case law is whether arbitrators or the courts should decide on the issue of arbitrability.

The U.S. Supreme Court elaborated on this issue extensively in *AT&T Technologies, Inc. v. CWA*.⁷² In this landmark case, a dispute arose between an employer and a union who were both parties to a collective bargaining agreement. The agreement contained an arbitration clause which provided for the arbitration of differences arising over the interpretation of the agreement. Another provision in the agreement, however, stated that the employer was free to exercise certain managerial functions, including the hiring, placement, and termination of employees **not subject to the arbitration clause**. After the employer had laid off some employees, the union sought to compel arbitration

⁷⁰ *Latif v. Morgan Stanley & Co. LLC*, Case No. 18 cv 11528 (U.S. Dist. S. D. NY June 26, 2019)

⁷¹ Although this is only a district court ruling, it should be noted that the Second Circuit dismissed the appeal on January 15, 2020, for lack of jurisdiction because the district court had stayed the federal action pending arbitration.

⁷² *AT&T Technologies, Inc. v. CWA*, 475 U.S. 643 (1986)

but the employer refused arguing that layoffs were not arbitrable. The U.S. Supreme Court held that:

*“the issue whether, because of express exclusion or other evidence, the dispute was subject to the arbitration clause should have been decided by the District Court and should not have been referred to the arbitrator”.*⁷³

The Court also held that it was the District Court which was supposed to interpret the collective bargaining agreement and to determine *“whether the parties intended to arbitrate grievances concerning layoffs”*. In the next step, if the court found that the agreement provided for this, *“then it would be for the arbitrator to determine the relative merits of the parties’ substantive interpretations of the agreement”*.⁷⁴

The U.S. Supreme Court emphasized two well-settled principles which were necessary to decide this case. The first is that *“arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit”*. The second principle is that *“the question of arbitrability - whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance - is undeniably an issue for judicial determination”*. The Court found:

“unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator”.⁷⁵ (Emphasis added.)

Thus, the question whether a dispute is subject to arbitration (the question of arbitrability) is for the courts to decide unless the parties’ agreement stipulates

⁷³ AT&T Technologies, Inc. v. CWA, 475 U.S. 643 (1986)

⁷⁴ AT&T Technologies, Inc. v. CWA, 475 U.S. 643 (1986)

⁷⁵ AT&T Technologies, Inc. v. CWA, 475 U.S. 643 (1986)

in a clear and unmistakable manner that the question of arbitrability is for arbitrators to decide.

Bearing in mind that the scope of the arbitration agreement was the only issue in *AT&T Technologies*, one might think that the “clear and unmistakable” standard only applies to the question of the scope of the arbitration agreement. However, this standard was also used by the U.S. Supreme Court in *First Options of Chicago, Inc. v. Kaplan*, where the Court had to decide on the existence of the arbitration agreement between the parties. The Court held that “courts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did”.⁷⁶

This holding of the U.S. Supreme Court has been applied in numerous subsequent cases. For example, in *Paine Webber, Inc. v. Bybyk*, the U.S. Court of Appeals for the Second Circuit explained:

*“Where the arbitration agreement is ambiguous, the Federal Arbitration Act’s policy favoring arbitration requires that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. However, where the arbitration agreement contains an **ambiguity as to who determines eligibility**, the Act’s presumption favoring arbitration is reversed so that **the court will ordinarily decide the question**. Thus, under *First Options* and *ATT Technologies*, the **arbitrability of a given issue is a question for the court unless there is ‘clear and unmistakable’ evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator.**”⁷⁷ (Emphasis added.)*

⁷⁶ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942-943 (1995)

⁷⁷ *Paine Webber, Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996)

Thus, the presumption is that the issue of arbitrability is for the courts to decide. In order to rebut this presumption, the arbitration agreement must clearly and unmistakably provide that arbitrability is for arbitrators to decide.

However, it is important to note that according to the governing case law, the clear and unmistakable standard is met when the parties agree that the arbitration will be governed by institutional rules which provide that questions of arbitrability are for arbitral tribunals to decide. For example, in one case, the U.S. Court of Appeals for the Second Circuit found that:

“Because the arbitration agreement at issue in this case provides for all disputes between the parties to be referred to the International Chamber of Commerce (“ICC”), and because the rules of that organization expressly provide for the International Court of Arbitration (“ICA”) to resolve in the first instance any disputes about its own jurisdiction, we conclude that the arbitrability of Triplefine’s contract claim for attorneys’ fees and costs was a question for the arbitrator rather than the court.”⁷⁸

Another important point to be noted is that courts differentiate between “substantive” and “procedural” arbitrability. The courts found that real “arbitrability issues” should only encompass gateway matters where contracting parties would have expected a court to decide and they should not encompass simple “procedural” issues.

In *Howsam v. Dean Witter Reynolds, Inc.* the U.S. Supreme Court explained that:

*“The phrase ‘question of arbitrability’ has a **limited scope**, applicable in the kind of **narrow circumstance** where contracting parties would likely have expected a court to have decided the gateway matter. But the phrase is not applicable in other kinds of general circumstance*

⁷⁸ Shaw Group Inc. v. Triplefine Intern. Corp., 322 F.3d 115 (2d Cir. 2003)

where parties would likely expect that an arbitrator would decide the question."⁷⁹ (Emphasis added.)

Moreover, the Court offered some examples of arbitrability questions: "*disputes about whether the parties are bound by a given arbitration clause*" and "*disagreements about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy*". By contrast, it also offered examples of "procedural" issues which should not be treated as questions of arbitrability: "*disputes regarding whether prerequisites or conditions precedent to arbitration had been satisfied*", as well as "*allegations of waiver, delay, or a like defense to arbitrability*". Such issues should be decided by arbitrators, not courts.⁸⁰

To sum up, there is a general presumption in favor of a court's jurisdiction to decide on the issue of arbitrability. This can be rebutted if the parties' agreement stipulates in a clear and unmistakable manner that arbitrability is for arbitrators to decide. The "clear and unmistakable" standard will be met if the parties' agreement incorporates arbitration rules which expressly provide for an arbitral tribunal to resolve the question of arbitrability. Furthermore, the arbitrability should only encompass crucial questions such as whether an agreement to arbitrate binds the parties in question or whether the subject matter of the dispute is covered by the agreement. In this way, the court's jurisdiction is limited in favor of arbitration.

Finally, in a recent case (*Henry Schein, Inc. v. Archer & White Sales, Inc.*), the U.S. Supreme Court further limited the role of the courts when dealing with arbitrability issues.

In this case, there was a contract between the parties providing for arbitration of any dispute arising under or related to the agreement except for, among other things, actions seeking injunctive relief. Schein filed a motion to compel

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

⁸⁰ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)

arbitration and asked the District Court to refer the matter to arbitration while Archer & White argued that the dispute was not subject to arbitration because its complaint sought injunctive relief, at least in part. Schein referred to rules governing the contract based on which arbitrators have the power to resolve arbitrability questions. Archer & White countered that Schein's claim for arbitration was **wholly groundless**, meaning the District Court could resolve the threshold arbitrability question. The matter was finally resolved by the U.S. Supreme Court, which held as follows:

*"The 'wholly groundless' exception to arbitrability is inconsistent with the Federal Arbitration Act and this Court's precedent. Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. The parties to such a contract may agree to have an arbitrator decide not only the merits of a particular dispute, but also 'gateway' questions of 'arbitrability.' Therefore, **when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless.**"⁸¹ (Emphasis added.)*

Thus, the U.S. Supreme Court resolved the narrow issue here. It held that courts must enforce contractual provisions delegating the threshold question of arbitrability to an arbitral tribunal and that courts may not consider whether the claims are "wholly groundless".

The more complicated question which the U.S. Supreme Court did not deal with here is whether the contract in question delegated the arbitrability question to an arbitrator. Thus, parties should be careful when drafting their arbitration clause in order to make sure that the issue of arbitrability is indeed delegated to an arbitral tribunal if they want to avoid a court speculating on this issue.

⁸¹ Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. ___, 139 S. Ct. 524 (2019),

5 RELATIONSHIP BETWEEN ARBITRAL TRIBUNALS AND COURTS

In order to enforce an arbitration agreement in New York, a party might need court assistance. Depending on the circumstances, a party may file a motion to compel arbitration, a motion to stay a litigation and/or an anti-suit injunction.

Furthermore, courts might have to decide on certain “gateway matters” before referring the dispute to arbitration. The doctrine of competence-competence and separability play an important role in this respect.

5.1 Court Intervention

5.1.1. MOTION TO COMPEL ARBITRATION

Filing a petition (motion) to compel a party to arbitrate is an appropriate remedy if a party needs a court’s assistance in compelling the opposing side to arbitrate and if there is no lawsuit already pending.⁸²

Section 4 of the FAA stipulates that:

*“A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration **may petition any United States district court** which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, **for an order directing that such arbitration proceed in the manner provided for in such agreement.**” (Emphasis added.)*

⁸²John Fellas, Enforcing International Arbitration Agreements in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, 201, 228 (eds. John Fellas, James Carter).

Section 206 of the FAA incorporating the NYC and Section 303 of the FAA incorporating the IAICA also provide for an order to compel arbitration. There is one difference, however, between Section 4 on the one hand and Sections 206 and 303 on the other, namely, that Section 4 only authorizes a court to order arbitration in the United States (precisely in “*the district in which the petition for an order directing such arbitration is filed*”), whereas Sections 206 and 303 authorize a court to “*direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States*”.⁸³

5.1.2.MOTION TO STAY PROCEEDINGS

A motion to stay or dismiss litigation is an appropriate remedy for a party seeking to enforce the agreement to arbitrate if another party has already commenced litigation in the U.S. notwithstanding the arbitration agreement. The only purpose of this motion is to stop litigation. The purpose is not, however, to compel arbitration. Therefore, if a party also wants to compel arbitration it should simultaneously file a motion to compel.⁸⁴

Section 3 of the FAA stipulates that:

*“If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties **stay the trial of the action until such arbitration has been had** in accordance with the terms of the*

⁸³ *Ibid.*, 229

⁸⁴ See: *Ibid.*, 233. It should be noted that staying litigation has different consequences from dismissing litigation. Order to stay is only an interlocutory order against which no appeal can be filed, whereas against decision to dismiss litigation, a party may file the appeal, which might cause further delays.

agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.” (Emphasis added.)

A motion to stay litigation is an appropriate remedy only if litigation has been initiated in the U.S. courts. If such litigation has been initiated in a foreign court, an appropriate remedy may be to file an anti-suit injunction with a U.S. court.

5.1.3.ANTI-SUIT INJUNCTION

A party seeking to enforce an arbitration agreement in New York against a party which has commenced litigation before the courts of another country could apply to a New York court for an anti-suit injunction.

The U.S. courts have the power to issue such anti-suit injunctions in order to prevent persons subject to their jurisdiction from prosecuting foreign lawsuits.⁸⁵ Thus, this is a general remedy which is not exclusively related to international arbitration.

In *Paramedics Electromedicina*, the U.S. Court of Appeals for the Second Circuit affirmed the granting of an anti-suit injunction in an arbitration-related case. In this case, GE Medical commenced proceedings before the Brazilian courts. Paramedics filed for an anti-suit injunction which was granted by a district court and was then subject to review by the Second Circuit.

The Court considered two factors in making its decision. First, whether “*the parties are the same in both matters*” and second, whether “*the resolution of the case before the enjoining court is dispositive of the action to be enjoined*”.⁸⁶

The Court found that the identity of the parties although the respondent in the U.S. was not a party to the lawsuit filed in Brazil. The Court gave weight to the fact that the two entities were part of the same group of companies and that one

⁸⁵ *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624,626 (5th Cir. 1996).

⁸⁶ *Paramedics Electromedicina Comercial Ltda. v. GE Medical Systems Information Technologies, Inc.*, 369 F.3d 645 (2d Cir. 2004).

held 70% of the other's capital. Thus, it affirmed the District Court's finding that the parties to the two actions were sufficiently similar to satisfy the requirement of party identity.⁸⁷

The Court also agreed with the district court that the second requirement was met because "*the case before the enjoining court here concerns the arbitrability of the parties' claims; therefore the question ... is whether the ruling on arbitrability is dispositive of the Porto Alegre litigation, even though the underlying disputes are confided to the arbitral panel and will not be decided by the enjoining court.*"⁸⁸ Thus, the Court did not consider the merits of the case.

The Court also considered other factors such as whether the foreign proceedings threatened a strong public policy before concluding that an anti-suit injunction should be granted against GE Medical.

Since its decision in *Paramedics*, the U.S. Court of Appeals for the Second Circuit has affirmed the granting of an antisuit injunction in two other arbitration cases.⁸⁹ Additionally, there are many decisions by New York federal district courts granting antisuit injunctions in the context of enforcing agreements to arbitrate⁹⁰

⁸⁷ *Paramedics Electromedicina Comercial Ltda. v. GE Medical Systems Information Technologies, Inc.*, 369 F.3d 645 (2d Cir. 2004).

⁸⁸ *Paramedics Electromedicina Comercial Ltda. v. GE Medical Systems Information Technologies, Inc.*, 369 F.3d 645 (2d Cir. 2004).

⁸⁹ *Ibeto Petrochemical Industries Ltd. v. M/T Beffen*, 475 F.3d 56 (2d Cir. 2007); *Kahara Bodas Co. v. Pentsahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2d Cir. 2007).

⁹⁰ *Storm, LLC v. Telenor Mobile Comms. AS*, No. 06-CV-13157 (GEL), 2006 WL 3735657 (S.D.N.Y. Dec. 15, 2006) (enjoining parties to arbitration agreement in shareholder dispute from litigating in Ukraine; finding sufficient similarity between nonidentical parties in parallel proceedings based on alter ego theory); *Suchodalski Assocs., Inc. v. Cardell Fin. Corp.*, Nos. 03-Cv-4148 (WHP), 04-Cv-5732 (WHP), 2006 WL 3327625 (S.D.N.Y. Nov. 16, 2006) (enjoining party to arbitration agreement from proceeding with litigation in Brazil; noting that to the extent Brazilian action asserted non-arbitrable claims only those claims could proceed through litigation); *SG Avipro Fin. Ltd. v. Cameroon Airlines*, 2005 WL 1353955, No. 05-CV655 (LTS) (DFE), (S.D.N.Y. June 8, 2005) (enjoining party to arbitration agreement from proceeding with litigation in Cameroon).

5.2 Competence – competence or deciding on “gateway matters”

The competence-competence doctrine enables an arbitral tribunal to rule on its own jurisdiction. In the United States, matters related to the question of the jurisdiction of an arbitral tribunal are also referred to as “gateway matters”. Moreover, the terms “competence-competence” and “jurisdiction to decide on arbitrability” are often used interchangeably in U.S. case law. (see chapter 4 above).

As already explained, there is a general presumption in favor of a court’s jurisdiction to decide on the issue of arbitrability. However, if a parties’ agreement stipulates in a clear and unmistakable manner that the matter is for arbitrators to decide, then the courts will refer this question to arbitrators. In such cases, even if the court finds that the arbitrability claim is “wholly groundless”, it must refrain from deciding on this matter.

Finally, there is one more “gateway matter” for courts to decide on before referring a dispute to arbitration following the U.S. Supreme Court’s ruling in *New Prime Inc. v. Oliveira*,

In this case, New Prime (an interstate trucking company) filed a motion with a court to compel arbitration against Oliveira (one of its drivers) based on the arbitration clause contained in the parties’ agreement. Oliveira argued that the court lacked the authority to compel arbitration because of Section 1 of the FAA which excludes “*contracts of employment of . . . workers engaged in foreign or interstate commerce*” from the Act’s coverage. In response, New Prime argued that any question regarding the applicability of Section 1 was for the arbitrator to answer. Both the district court and the Court of Appeals for the First Circuit agreed with Oliveira and the U.S Supreme Court confirmed this.

The U.S. Supreme Court held that it was for the court to decide whether a Section 1 exclusion applies before ordering arbitration. The FAA gives power to a court to stay litigation and compel arbitration based on Sections 3 and 4, but first it

must determine whether the parties' agreement is excluded from the FAA's coverage. New Prime argued that the parties' contract contained a delegation clause which gave the arbitrator authority to decide on threshold questions of arbitrability. However, the Court held that such a delegation clause is only enforceable under Sections 3 and 4 if it appears in a contract consistent with Section 2 that does not trigger exceptions under Section 1 of the FAA.⁹¹

The Court held:

*"While a **court's authority** under the Arbitration Act **to compel arbitration** may be considerable, it **isn't unconditional**. If two parties agree to arbitrate future disputes between them and one side later seeks to evade the deal, §§3 and 4 of the Act often require a court to stay litigation and compel arbitration 'accord[ing to] the terms' of the parties' agreement. But this authority **doesn't extend to all private contracts**, no matter how emphatically they may express a preference for arbitration."⁹² (Emphasis added.)*

Because Oliveira's agreement with New Prime fell within the exception from Section 1 of the FAA, the FAA was not applicable.

In conclusion, the threshold issue as to whether the FAA is applicable at all is for the courts to decide. That question is outside of the scope of party autonomy and their agreement is not relevant here no matter how "clear and unmistakable" the arbitration clause is in terms of referring the issue of arbitrability to arbitrators.

To summarize, there are several preliminary questions which a U.S. court might be asked to deal with before referring the dispute to arbitration.

⁹¹ *New Prime Inc. v. Oliveira*, 586 U. S. ____ (2019) at p. 7-14

⁹² *New Prime Inc. v. Oliveira*, 586 U. S. ____ (2019) at p. 7-14

The first question is whether the FAA applies at all or the case falls within the exceptions defined in Section 1 of the FAA. Based on *New Prime Inc. v. Oliviera* this question is for the courts and not arbitrators to decide.

If the court finds that the dispute is covered by the FAA (in accordance with Sections 1 and 2), the second question is who decides on the matter of arbitrability. Based on *First Options*, the court should investigate the parties' agreement in order to answer this question.

Under *AT&T Technologies*, unless the parties have agreed in a "clear and unmistakable manner" that the question of arbitrability should be decided by arbitrators, this question is also for the courts to decide.

Finally, under *Henry Schein, Inc.*, when a parties' agreement delegates the arbitrability question to an arbitrator, a court must refer the matter even if it thinks that the arbitrability claim is wholly groundless.

5.3 Separability doctrine

Separability provides that the arbitration agreement is independent of the main contract, meaning that allegations of contractual invalidity made against the main contract do not necessarily affect the arbitration clause.⁹³

The U.S. Supreme Court elaborated on this doctrine in *Prima Paint Corp.* The Court held that "except where the parties otherwise intend ... arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded." The Court held that when deciding on an application for a stay of arbitration under Section 3 of the FAA, the federal court "may consider only the issues relating to the making and performance of the agreement to arbitrate", but may not consider issues relating to the contract generally.⁹⁴

⁹³ Thomas E. Carbonneau, *The Law and Practice of United States Arbitration*, 19 (2018)

⁹⁴ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)

Similarly, in *Buckeye Check Cashing, Inc.* the U.S Supreme Court held that “regardless of whether it is brought in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court”. The Court emphasized two important principles:

*“First, as a matter of substantive federal arbitration law, an **arbitration provision is severable from the remainder of the contract.** Second, unless the challenge is to the arbitration clause itself, the issue of the **contract’s validity is considered by the arbitrator in the first instance.**”⁹⁵ (Emphasis added.)*

Finally, the principle of separability was confirmed and further elaborated in *Rent-A-Center, West, Inc. v. Jackson*.⁹⁶

In this case, Rent-A-Center filed a motion under Sections 3 and 4 of the FAA to dismiss or stay the proceedings and to compel arbitration based on the arbitration agreement. Jackson opposed the motion on the grounds that the agreement was unenforceable since it was unconscionable under relevant state law.

The parties’ arbitration agreement stipulated that the arbitrator had the “exclusive authority to resolve any dispute relating to the [Agreement’s] enforceability ... including ... any claim that all or any part of this Agreement is void or voidable.” Thus, Rent-A-Center argued that this provision delegated the “gateway” question of enforceability to the arbitrator.⁹⁷

The Court found that there are two types of validity challenges under Section 2: one “challenges specifically the validity of the agreement to arbitrate,” and “[t]he other challenges the contract as a whole”. The Court held that “only the first type of

⁹⁵ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)

⁹⁶ *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010)

⁹⁷ *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010)

challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable". The Court explained:

"That is because §2 states that a "written provision" "to settle by arbitration a controversy" is "valid, irrevocable, and enforceable" without mention of the validity of the contract in which it is contained. Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate."⁹⁸

The Court advised that an arbitration provision is severable from the remainder of a contract based on Section 2 of the FAA. It held that the federal court must consider the party's challenge to the validity "of the precise agreement to arbitrate at issue" under Section 2. The Court explained:

"In some cases, the claimed basis of invalidity for the contract as a whole will be much easier to establish than the same basis as applied only to the severable agreement to arbitrate. Thus, in an employment contract many elements of alleged unconscionability applicable to the entire contract (outrageously low wages, for example) would not affect the agreement to arbitrate alone. But even where that is not the case—as in Prima Paint itself, where the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract—we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene."

In conclusion, the issue of contract validity as a whole is for arbitrators to decide, whereas the challenging of the arbitration agreement itself will be considered by a court before referring the parties to arbitration.

⁹⁸ Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010)

6 THE TRIBUNAL

6.1 Constitution of the Tribunal

The arbitration agreement will normally stipulate a procedure for the appointment of arbitrators either explicitly or implicitly by referring to arbitration rules.

Section 5 of the FAA deals with the appointment of arbitrators or an umpire by stating:

*"If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy **the court shall designate and appoint an arbitrator or arbitrators or umpire**, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator."* (Emphasis added.)

Section 206 of the FAA is similar, It deals with orders to compel arbitration and the issue of the appointment of arbitrators:

*"A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. **Such court may also appoint arbitrators** in accordance with the provisions of the agreement."* (Emphasis added.)

Article II of the New York Convention requires that Contracting States refer parties to arbitration in accordance with their arbitration agreement. The fact that the composition of the tribunal was not in accordance with the agreement is grounds for denying the enforcement of an arbitral award under Article V (1) (d) of the NYC. The Panama Convention also provides that “*arbitrators shall be appointed in the manner agreed by the parties*”. Both Conventions are incorporated into the FAA, as explained earlier (see chapter 2).

Thus, arbitral tribunals have to be constituted in accordance with the parties’ agreement. A party may seek court assistance in accordance with Section 5 of the FAA if: 1) The parties failed to provide a method for such appointment; 2) a party fails to comply with the designated procedure; 3) there is a delay in naming an arbitrator or filling a vacancy for some other reason.

An important question which requires consideration here is what happens if the designated arbitration forum becomes unavailable. There is disagreement between circuits on this issue. While some circuits have accepted the appointment of substitute arbitrators, others have not. The Second Circuit sides with the latter group. Thus, in New York, if the designated authority refuses to arbitrate, the court will not substitute arbitrators and the matter will go to court. There is a well-known ruling from the Court of Appeals for the Second Circuit in *Salomon*, in which the Court refused to appoint substitute arbitrators after having found that the unavailable forum was “central” to the parties’ agreement to arbitrate.⁹⁹

In this case, there was an agreement between the company and its officials providing for the arbitration of any disputes arising from their employment. Officials filed a motion to compel arbitration under Section 1 of the FAA and the court referred the parties to the New York Stock Exchange (“NYSE”), the arbitral forum which had been designated in the arbitration agreements. However, the NYSE refused to arbitrate the dispute and the officials went back to the district

⁹⁹ In re Salomon Inc. Shareholders’ Derivative Litig., 68 F.3d 554 (2d Cir. 1995)

court seeking the appointment of substitute arbitrators under Section 5 of the FAA. They argued that because the district court judge had referred the matter to the NYSE in the first place, he had no choice but to name substitute arbitrators under Section 5 of the FAA when the NYSE proved unwilling or unable to arbitrate. The district court denied this motion and the Court of Appeals for the Second Circuit confirmed this, holding that the district court judge had acted properly in declining to appoint substitute arbitrators and compel arbitration in another forum because the parties had contractually agreed that only the NYSE could arbitrate any disputes between them.¹⁰⁰

Thus, following this ruling, New York courts are reluctant to substitute arbitrators if the designated arbitral institution becomes unavailable for any reason.

6.2 Challenges

As a general matter, challenging arbitrators owing to an alleged lack of impartiality or independence (or other grounds) should be brought before arbitral institutions administering the arbitration or before the appointing authority.¹⁰¹

The FAA only deals with the issue of an arbitrator's impartiality and other grounds for challenges in the context of the setting aside of an arbitral award.

¹⁰⁰ *In re Salomon Inc. Shareholders' Derivative Litigation*, 68 F.3d 554 (2d Cir 1995)

¹⁰¹ See for example Article 14 of the ICC Rules, which deals with challenging arbitrators providing that: "(1) A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based. (2) For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification. (3) The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators."

Under Section 10(a)(2) of the FAA, an award may be challenged “*where there was **evident partiality** [...] in the arbitrators, or either of them.*” (Emphasis added.)

The term “evident partiality” was interpreted by the U.S. Supreme Court. The Court held in one of its early rulings that arbitrators are required to “*disclose to the parties any **dealings that might create an impression of possible bias***” and that an arbitrator’s failure to disclose a close business relationship with a party to the arbitration shows evident partiality.¹⁰² (Emphasis added.)

The U.S. Court of Appeals for the Second Circuit found that evident partiality exists “*where a **reasonable person** would have to conclude that an arbitrator was partial to one party to the arbitration*”.¹⁰³ Thus, this is a controlling standard in the Second Circuit for evident partiality.

The rulings of other circuit courts may also be considered as persuasive authority in New York. In a similar manner to the Second Circuit, the Ninth Circuit held that where the arbitrator fails to disclose a relationship with a party, “*showing a **reasonable impression** of partiality is sufficient*” to establish evident partiality.¹⁰⁴

More specifically, as nicely summarized by the Ninth Circuit, “evident partiality” is present where there are “***direct financial connections** between a party and an arbitrator or its law firm, or a concrete possibility of such connections*”. On the other hand, “***long past, attenuated, or insubstantial connections** between a party and an arbitrator*” would not create a reasonable impression of partiality.¹⁰⁵ (Emphasis added.)

For example, an arbitrator’s concurrent service in another, arguably similar arbitration “*does not, in itself, suggest that they were predisposed to rule in any*

¹⁰² *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968).

¹⁰³ *Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F. 3d 60 (2d Cir. 2012).

¹⁰⁴ *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994)

¹⁰⁵ *In re Sussex*, 781 F.3d 1065 (9th Cir. 2015);

particular way” and so their failure to disclose such concurrent service does not indicate “evident partiality”.¹⁰⁶ Similarly, the fact that an arbitrator spent two months of service as counsel for a party in an unrelated arbitration four years ago, “*would not have implied ‘evident partiality’*”.¹⁰⁷ However, an arbitrator’s non-disclosure of his high-ranking position in a company which has a business relationship with one party would constitute grounds for setting-aside an arbitral award.¹⁰⁸

In addition, it should be noted that the “evident partiality” standard has been interpreted less strictly than the “appearance of partiality”, which would be enough to disqualify a judge in the U.S.

As noted in one Seventh Circuit case: “*the scope of disqualification under § 10(a)(2) is considerably more confined than the rule applicable to judges*”. The Court further explained that “evident partiality” is just a “*subset of the conditions that disqualify a federal judge*”. For example, “*a judge can’t hold even a single share of a party’s stock, but this would not imply ‘evident partiality’ for purposes of § 10(a)(2)*”.¹⁰⁹ As the Court clearly put it:

“Arbitration differs from adjudication, among many other ways, because the “appearance of partiality” ground of disqualification for judges does not apply to arbitrators; only evident partiality, not appearances or risks, spoils an award.”¹¹⁰

Finally, although any dealings an arbitrator has with one party which may raise doubts as to his partiality usually exist before the arbitration proceedings commence, an arbitrator may engage in such dealings during the arbitration proceedings themselves. In such cases, the fact that previous dealings were

¹⁰⁶ Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60 (2d Cir. 2012).

¹⁰⁷ Sphere Drake Ins. Ltd v. ALL AMERICAN LIFE INSURANCE COMPANY, 307 F.3d 617 (7th Cir. 2002).

¹⁰⁸ Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 159 (8th Cir. 1995).

¹⁰⁹ Sphere Drake Ins. Ltd v. ALL AMERICAN LIFE INSURANCE COMPANY, 307 F.3d 617 (7th Cir. 2002).

¹¹⁰ Sphere Drake Ins. Ltd v. ALL AMERICAN LIFE INSURANCE COMPANY, 307 F.3d 617 (7th Cir. 2002).

honestly disclosed before the arbitration proceedings were initiated is wholly irrelevant since the new dealings are what raise doubts as to his/her impartiality and could be a reason for setting aside a resulting award.¹¹¹

In conclusion, the evident partiality of an arbitrator is grounds for setting aside an arbitral award before a U.S. court. Setting aside or vacation of an arbitral award is the only context in which the challenging of arbitrators is addressed by the FAA. In other words, the FAA does not explicitly provide for the pre-award removal of an arbitrator.¹¹²

In line with this, the United States District Court for the Western District of New York ruled, based on existing case law, that *"it is well established that a district 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."*¹¹³

However, the Court of Appeals for the Second Circuit accepted that a court has the power to remove an arbitrator based on Section 2 of the FAA "in certain limited circumstances".¹¹⁴ The Court held that an agreement to arbitrate may not be disturbed **unless** the agreement is subject to attack under general contract principles "as exist at law or in equity".¹¹⁵ For example, pre-award removal of an arbitrator is justified:

"when the court concludes that one party has deceived the other, that unforeseen intervening events have frustrated the intent of the

¹¹¹ Thomas Kinkade Co. v. White LLC, 711 F.3d 719, 720 (6th Cir. 2013): "when the neutral arbitrator engages in or attempts to engage in mid-arbitration business relationships with non-neutral participants, it jeopardizes what is supposed to be a party-structured dispute resolution process".

¹¹² *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997).

¹¹³ *Fleming Companies, Inc. v. FS Kids, L.L.C.*, 02-CV-0059E(F) (W.D.N.Y. May. 14, 2003)

¹¹⁴ *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997).

¹¹⁵ *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997).

*parties, or that the unmistakable partiality of the arbitrator will render the arbitration a mere prelude to subsequent litigation."*¹¹⁶

Thus, under case law, the court removal of an arbitrator during arbitration proceedings is only possible in exceptional circumstances. Otherwise, the partiality of an arbitrator would be grounds for setting aside an arbitral award under Section 10 (a) (2) of the FAA.

However, if an arbitrator has already been challenged during the arbitration proceedings, the court will take this into account in a setting aside proceeding. *Reeves Bros., Inc. v. Capital-Mercury Shirt Corp*, which was decided by the District Court for the Southern District of New York, serves as a good illustration of this.¹¹⁷

In this case, the Court denied a motion to vacate the award based on a challenge already reviewed by an arbitral tribunal. After Reeves sought the confirmation of an arbitration award in its favor against Capital, the latter cross-moved to vacate the award because of an inadequately disclosed relationship between two of the arbitrators and Reeves. The court granted the motion to confirm the award and denied the cross-motion to vacate.

The Court noted that Capital had already challenged the respective arbitrators in the course of the arbitration proceedings. The established procedures under the governing arbitration rules were followed and it was determined that the challenged arbitrators should not be disqualified. The Court also noted that after this determination, Capital fully participated in the arbitration without seeking a stay on the grounds of the arbitrators' qualifications. The Court concluded that:

¹¹⁶ *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997).

¹¹⁷ *Reeves Bros., Inc. v. Capital-Mercury Shirt Corp.*, 962 F. Supp. 408 (S.D.N.Y. 1997)

*“there are no sound policy reasons why a party should be permitted to profit from a strategic decision to defer seeking a ruling on an arbitrator's authority until after he renders his award, especially since it is clear that had the award been favorable, [defendant] would not now be challenging the authority of the arbitrator”.*¹¹⁸

Thus, a party who wishes to challenge an arbitrator due to his partiality should first do so in the course of the arbitration proceedings before the relevant arbitral institution or appointing authority. If the proceedings continue without removal, a party should seek judicial relief prior to receipt of any award. Finally, the party may move to vacate such an award based on arbitrator's evident partiality.

7 THE ARBITRAL PROCEEDINGS

7.1 Applicable Law

Under current practice, parties may empower arbitrators to rule according to law, equity, amicable composition, or according to their technical knowledge and expertise.¹¹⁹

As a general matter, parties are free to choose the law which will govern the merits of a case and they can do so either explicitly or implicitly by referring to arbitration rules that include conflict of law provisions. In the absence of such a choice, the tribunal is free to determine the law applicable to the merits of a case. A tribunal seated in the U.S. may use Restatement of Conflict of Laws as guidance.¹²⁰

¹¹⁸ Reeves Bros., Inc. v. Capital-Mercury Shirt Corp., 962 F. Supp. 408 (S.D.N.Y. 1997)

¹¹⁹ Thomas E. Carbonneau, *The Law and Practice of United States Arbitration*, 22 (2018)

¹²⁰ Niedermaier, *International Arbitration in the U.S.*, in *INTERNATIONAL COMMERCIAL ARBITRATION* 763, 787 (Stephan Balthasar ed., 2016)

7.2 Interim Measures

The FAA does not contain any specific provisions on provisional measures, apart from Section 8 which is only applicable in the context of maritime disputes. It stipulates that a party may begin proceedings by seizing a vessel or other property belonging to the other party. The NYC and IAICA also fail to address provisional measures. However, U.S. courts generally recognize a tribunal's authority to grant preliminary measures based on an arbitration agreement, applicable rules or applicable law.¹²¹

As was found by the U.S. Court of Appeals for the Second Circuit:

*"Where an arbitration clause is broad (...) arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself."*¹²²

Furthermore, under the Second Circuit ruling, arbitrators are free to order relief they find appropriate regardless of whether such relief would be available in a federal court. The Court affirmed interim awards requiring funds to be placed in escrow despite the fact that such relief would not have been available in a federal court, finding that:

"a court may not vacate an award because the arbitrator has exceeded the power the court would have or would have had if the parties had chosen to litigate, rather than to arbitrate the dispute. Those who have chosen arbitration as their forum should recognize

¹²¹ Lucas Bento & Michael Peng, Interim Measures: Arbitral Tribunals and Courts, in INTERNATIONAL ARBITRATION IN THE UNITED STATES 239, 242 (Laurence Shore, Tai-Heng Cheng *et al.* eds., 2018)

¹²² Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003)

that arbitration procedures and awards often differ from what may be expected in courts of law.”¹²³

Bearing in mind that arbitral tribunals generally lack enforcement powers, the question arises as to whether an interim measure order from an arbitral tribunal may be enforced by a court. In New York, as in many other states, the answer depends on whether an order or award granting such interim relief is considered final.¹²⁴

As was found in one case before the U. S. District Court for the Southern District of New York:

“Such an award is not ‘interim’ in the sense of being an ‘intermediate’ step toward a further end. Rather, it is an end in itself, for its very purpose is to clarify the parties’ rights in the ‘interim’ period pending a final decision on the merits. The only meaningful point at which such an award may be enforced is when it is made, rather than after the arbitrators have completely concluded consideration of all the parties’ claims.”¹²⁵

Thus, assuming such finality of an arbitral interim measure, an award or order should be enforceable in U.S. courts in the framework of recognition and enforcement of awards under the FAA and NYC.¹²⁶

Another important question regarding interim measures is whether a party may request that a court order a provisional measure in aid of arbitration.

¹²³ Sperry Intern. Trade v. Government of Israel, 689 F.2d 301, 306 (2d Cir. 1982)

¹²⁴ Lucas Bento & Michael Peng, Interim Measures: Arbitral Tribunals and Courts, in INTERNATIONAL ARBITRATION IN THE UNITED STATES 239, 250 (Laurence Shore, Tai-Heng Cheng *et al.* eds., 2018)

¹²⁵ Southern Seas Navigation v. Petroleos Mexicanos, 606 F. Supp. 692, 694 (S.D.N.Y. 1985)

¹²⁶ Lucas Bento & Michael Peng, Interim Measures: Arbitral Tribunals and Courts, in INTERNATIONAL ARBITRATION IN THE UNITED STATES 239, 252 (Laurence Shore, Tai-Heng Cheng *et al.* eds., 2018)

Section 7502 of the New York CPLR enables New York courts to grant provisional remedies, *“but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief”*. This provision does not seem to conflict with the FAA, meaning that it is not preempted by federal law (see chapter 2.3).

The U.S. Court of Appeals for the Second Circuit held that a court’s jurisdiction over preliminary injunction in aid of a covered arbitration was proper. The Court found:

“In the instant case, far from trying to bypass arbitration, [the party] sought to have the court compel arbitration. New York law specifically provides for provisional remedies in connection with an arbitrable controversy (...) and the equitable powers of federal courts include the authority to grant it. Entertaining an application for such a remedy, moreover, is not precluded by the Convention but rather is consistent with its provisions and its spirit.”¹²⁷

In conclusion, provisional measures can be granted by an arbitral tribunal based on an arbitration agreement, applicable arbitration rules or the applicable law. Provided that such measures are final, which is usually the case, New York courts will enforce orders for provisional relief under the same procedure for the enforcement of arbitral awards. Finally, in accordance with Section 7502 of the CPLR, a party may request that a competent court in New York order provisional measure in aid of arbitration.

7.3 Evidence

In accordance with the principle of party autonomy in international arbitration, parties are free to agree in their arbitration agreement (expressly or by

¹²⁷ Borden, Inc. v. Meiji Milk Products Co., 919 F.2d 822 (2d Cir. 1990)

incorporating arbitral rules) on the procedure for obtaining and submitting evidence.

Section 7 of the FAA deals with witnesses in arbitration. It stipulates that:

*“The **arbitrators** selected either as prescribed in this title or otherwise, or a majority of them, **may summon in writing any person** to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.” (Emphasis added.)*

The U.S. District Court for the Southern District of New York confirmed that Section 7 of the FAA “authorizes arbitrators to subpoena individuals and documents”.¹²⁸

Thus, according to the FAA, the arbitrator can order the production of evidence by an arbitrating party or a third party. This is different from the majority of

¹²⁸ In Matter of Complaint of Koala Shipping Trading, 587 F. Supp. 140, 142 (S.D.N.Y. 1984)

national arbitration laws, which limit a tribunal's authority over parties to the arbitration proceedings. Furthermore, if a tribunal's subpoena or disclosure order is not complied with, a U.S. district court at the tribunal's seat may compel compliance.¹²⁹

Thus, both document disclosure and summoning witnesses seems to be uncontroversial under the FAA. However, a couple of issues might be controversial.

The first issue is the position of third parties in the pre-hearing document disclosure or pre-hearing depositions.

The Court of Appeals for the Second Circuit found that pre-hearing document disclosure of third parties is not allowed under Section 7 of the FAA:

*"If Congress wants to expand arbitral subpoena authority, it is fully capable of doing so. There may be valid reasons to empower arbitrators to subpoena documents from third parties, but we must interpret a statute as it is, not as it might be, since 'courts must presume that a legislature says in a statute what it means and means in a statute what it says. . . .' A statute's clear language does not morph into something more just because courts think it makes sense for it to do so. Thus, we join the Third Circuit in holding that section 7 of the FAA **does not authorize** arbitrators to compel **pre-hearing document discovery** from **entities not party** to the arbitration proceedings".¹³⁰ (Emphasis added.)*

¹²⁹ See: Claudia T. Salomon & Sandra Friedrich, Witnesses, Subpoenas, Documents and the Relationship Between the FAA and the State Law, in INTERNATIONAL ARBITRATION IN THE UNITED STATES 317, 325 (Laurence Shore, Tai-Heng Cheng *et al.* eds., 2018)

¹³⁰ *Life Recei. Trust v. Syndicate* 102, 549 F.3d 210, 216-17 (2d Cir. 2008)

Furthermore, according to the U.S. District Court for the Southern District of New York, a tribunal also lacks the power to order pre-hearing depositions for non-parties under Section 7 of the FAA. The Court found:

*“Documents are only produced once, whether it is at the arbitration or prior to it. Common sense encourages the production of documents prior to the hearing so that the parties can familiarize themselves with the content of the documents. Depositions, however, are quite different. The nonparty may be required to appear twice — once for deposition and again at the hearing. That a nonparty might suffer this burden in a litigation is irrelevant; arbitration is not litigation, and the nonparty never consented to be a part of it. “Thus, an arbitrator **may not compel attendance of a nonparty at a pre-hearing deposition**. The subpoenas issued by the arbitrators are modified accordingly.”¹³¹ (Emphasis added.)*

Thus, neither pre-hearing document disclosure of non-parties nor pre-hearing depositions of such parties is allowed under Section 7 of the FAA.

The second potential source of controversies is the enforcement of a tribunal’s orders against individuals not residing in New York.

Section 7 of the FAA provides two important procedural limitations for a tribunal’s disclosure order. First, subpoenas issued by an arbitrator must be served in the same manner as subpoenas to appear and testify before a court. Second, only the federal district court for the district in which the arbitrator (or majority of arbitrators) is sitting may assist with enforcement.¹³²

¹³¹ Integrity Ins. v. American Centennial Ins., 885 F. Supp. 69, 73 (S.D.N.Y. 1995)

¹³² Claudia T. Salomon & Sandra Friedrich, Witnesses, Subpoenas, Documents and the Relationship Between the FAA and the State Law, in INTERNATIONAL ARBITRATION IN THE UNITED STATES 317, 353 (Laurence Shore, Tai-Heng Cheng *et al.* eds., 2018)

Under rule 45 (b) (2) of the Federal Rule of Civil Procedure “a subpoena may be served at any place (a) within the district of the court by which it is issued, or (b) at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in subpoena”.¹³³ Practically, this would mean that if the tribunal is sitting in New York and it issues a subpoena to a non-party witness residing in California, such a subpoena may not be served validly because of geographical limitations. Furthermore, even if such a party is properly served, the federal district court in New York would not have personal jurisdiction over the third-party witness residing in California to be able to enforce such an order.¹³⁴

Thus, the enforcement of a tribunal’s disclosure orders might be problematic where the witness does not reside in New York.

The third controversial issue is whether Section 7 of the FAA also enables parties to seek judicial assistance in taking evidence without prior involvement of a tribunal. On the Second Circuit, such a disclosure order by a court would have to be justified by “*extraordinary circumstances*”.¹³⁵

Finally, New York state law also contains provisions which are potentially applicable to the gathering of evidence. Section 7505 of the New York CPLR states that an arbitrator and any attorney of record has the power to issue subpoenas.

However, as a general matter, state law provisions allowing tribunals to order extensive U.S. style discovery beyond the scope of Section 7 of the FAA may be preempted in the absence of agreement between parties on the application of

¹³³ Fed. R. Civ. P. 45 (b) (2)

¹³⁴ Claudia T. Salomon & Sandra Friedrich, Witnesses, Subpoenas, Documents and the Relationship Between the FAA and the State Law, in INTERNATIONAL ARBITRATION IN THE UNITED STATES 317, 354 (Laurence Shore, Tai-Heng Cheng *et al.* eds., 2018)

¹³⁵ “Ordinarily, disclosure will not be ordered to aid in arbitration under CPLR 3102 (subd [c]) unless there are extraordinary circumstances present” - Guilford Mills, Inc. v. Rice Pudding, Ltd., 90 A.D.2d 468, (N.Y. App. Div. 1982)

state law.¹³⁶ In order to have New York arbitration law applied to this matter instead of Section 7 of the FAA, a generic choice of law clause might not be enough.¹³⁷

7.4 Oral Hearing

The FAA contains no provisions as to how the hearing before an arbitral tribunal should be conducted. However, Section 7506 of the New York CPLR contains several provisions in this respect.

First, it is stipulated that an arbitrator must be sworn in by a proper officer to "*hear and decide controversy faithfully and fairly*". Second, the arbitrator is to decide on the place and time for such a hearing and is to notify the parties at least eight days in advance. Third, parties have the right to be heard, to present their case and to cross-examine witnesses. Fourth, a party has the right to be represented by an attorney and this right may not be waived. Finally, the hearing must be held before all arbitrators, although a majority is sufficient for both the determination of any questions and for rendering an award.¹³⁸

8 THE AWARD

As a general matter, arbitral tribunals may issue partial, final and interim awards. Interim awards aim to sustain the rendering and/or protect the enforcement of the final award, whereas partial and final awards dispose of all issues (in case of

¹³⁶ Claudia T. Salomon & Sandra Friedrich, Witnesses, Subpoenas, Documents and the Relationship Between the FAA and the State Law, in INTERNATIONAL ARBITRATION IN THE UNITED STATES 317, 331 (Laurence Shore, Tai-Heng Cheng *et al.* eds., 2018)

¹³⁷ *Imclone Systems Incorporated v. Waksal*, 22 A.D.3d 387, (N.Y. App. Div. 2005): "The generic choice of law clause in the subject agreement, which did not provide for the application of New York law to its "enforcement," did not displace the subject provision of the Federal Arbitration Act ([FAA] 9 USC § 7)"

¹³⁸ N.Y. C.P.L.R. § 7506

final award) or some issues (partial award).¹³⁹ The FAA does not specifically mention interim awards, but it seems that it recognizes the difference between partial and final awards.¹⁴⁰

As explained by the Court of Appeals for the Second Circuit, "*In order to be 'final', an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them.*"¹⁴¹ Judicial review is only available for rulings from arbitrators that purport to resolve issues finally.¹⁴²

In accordance with the doctrine of *functus officio*, once arbitrators have fully exercised their authority to adjudicate the issues submitted to them, their authority over those questions is ended and the arbitrators have no further authority to decide on those issues anew in the absence of agreement between the parties.¹⁴³ As explained by District Court for the Southern District of New York:

*"The traditional rationale underlying this rule is that it is necessary to prevent re-examination of an issue by a nonjudicial officer potentially subject to outside communication and unilateral influence."*¹⁴⁴

However, the U.S. Court of Appeals for the Second Circuit recently granted a petition to affirm an issued award after the arbitral panel had clarified the original award. In this case, the party argued that the doctrine of *functus officio* limited the power of the arbitrators to alter an award once the arbitrators had decided on the issue. Thus, according to this party, the tribunal was barred from clarifying how the parties were to calculate the amount of the award. The Court,

¹³⁹ Niedermaier, International Arbitration in the U.S, in INTERNATIONAL COMMERCIAL ARBITRATION 763, 784 (Stephan Balthasar ed., 2016)

¹⁴⁰ 9 U.S.C. §16.

¹⁴¹ *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 413 (2d Cir. 1980)

¹⁴² *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980)

¹⁴³ *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329 (2d Cir. 2010)

¹⁴⁴ *LLT Intern., Inc. v. MCI Telecommunications Corp.*, 69 F. Supp. 2d 510 (S.D.N.Y. 1999)

however, recognized an exception to *functus officio*, finding that a tribunal retains the authority to clarify an ambiguous award.¹⁴⁵

Thus, the issuance of a final arbitral award represents a complete determination of all claims submitted to the arbitrators. As of that moment, the authority of arbitrators ceases to exist (except when it comes to clarifying an award) and judicial review becomes available.

As for formal requirements, the FAA contains no specific provisions but New York state rules do.

Section 7505 of the CPLR provides that “*the award shall be in writing, signed and affirmed by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders*”. The time for rendering the award may be extended by an agreement between the parties placed in writing. If the party wants to object that an award was not made within the fixed time, it must object in writing prior to the delivery of an award to him/her or it will be deemed that the party waived his/her right to object. A copy of the award must be delivered to each party as stipulated by the agreement (if nothing is provided then either in person or by certified/registered mail).¹⁴⁶

Finally, Section 7508 of the CPLR deals with award by confession, which may be granted for money which is due or which will become due at any time before an award is granted otherwise.

¹⁴⁵ Gen. RE Life Corp. v. Lincoln Nat'l Life Ins. Co., 909 F.3d 544, 546 (2d Cir. 2018)

¹⁴⁶ See N.Y. C.P.L.R. § 7505.

9 ENFORCEMENT OF AND CHALLENGES TO ARBITRAL AWARDS

9.1 The issue of jurisdiction

Before discussing substantive grounds for setting aside an arbitral award and refusing the enforcement, it is necessary to answer one fundamental procedural question – which court (federal or state) has jurisdiction to decide on the question of the setting aside or enforcement of an arbitral award?

As a preliminary matter, parties in actions to challenge or enforce international arbitral awards in New York usually choose federal courts.¹⁴⁷ However, given the complexity of the relationship between federal and state courts in New York, this question requires additional clarification.

At the outset, it should be noted that court jurisdiction over enforcement proceedings on the one hand and jurisdiction for setting aside an arbitral award on the other must be analyzed separately.

9.1.1. SUBJECT-MATTER JURISDICTION OVER ACTIONS TO ENFORCE ARBITRAL AWARDS

The FAA provides federal district courts with federal-question jurisdiction (subject-matter jurisdiction) over any action or proceeding which falls under the New York and Inter-American Convention (Chapters 2 and 3 of the FAA) without regard to the amount in controversy.¹⁴⁸

A commercial arbitral award “falls under” the New York and Inter-American Conventions when the legal relationship between the parties **is not “entirely**

¹⁴⁷John V. H. Pierce & David N. Cinotti, Challenging and Enforcing International Arbitral Awards in New York Courts in *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK*, 357, 362 (eds. John Fellas, James Carter).

¹⁴⁸9 U.S.C. § 203.

domestic in scope”.¹⁴⁹ For example, even if a dispute resolved by an award is entirely between U.S. citizens, the award could still fall under the Conventions if it involves property located abroad or envisages performance or enforcement abroad.¹⁵⁰ It is enough to have any reasonable relationship with a foreign state.¹⁵¹

Thus, the enforcement of an international arbitral award would unquestionably fall under Chapter 2 or 3 of the FAA, meaning that federal courts would, in turn, have subject-matter jurisdiction.

However, parties seeking to enforce entirely domestic awards in a federal court must identify another source of subject-matter jurisdiction (such as diversity of citizenship or maritime jurisdiction) because Chapter 1 of the FAA does not automatically grant jurisdiction to federal courts.¹⁵²

9.1.2. SUBJECT-MATTER JURISDICTION OVER ACTIONS TO VACATE ARBITRAL AWARDS

As previously mentioned, the FAA grants federal district courts with federal-question jurisdiction (subject-matter jurisdiction) over any action or proceeding which falls under the New York and Inter-American Convention (Chapters 2 and 3 of the FAA) without regard to the amount in controversy.¹⁵³

However, neither of the two Conventions provides a basis for the vacation of an arbitral award (different from refusing enforcement), which means that it is not

¹⁴⁹ Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Jnc., 198 F.3d 88, 92 (2d Cir. 1999).

¹⁵⁰ 9 U.S.C. § 202

¹⁵¹ 9 U.S.C. § 202

¹⁵² John V.H. Pierce & David N. Cinotti, Challenging and Enforcing International Arbitral Awards in New York Courts in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, 357, 367 (eds. John Fellas, James Carter).

¹⁵³ 9 U.S.C. § 203.

certain whether a federal court has original jurisdiction (based on Sections 203 and 302) over an action to vacate.¹⁵⁴

However, even if the federal courts do not have original jurisdiction, Section 205 of the FAA provides for the removal of cases from state courts if such a case “relates to an arbitration agreement or award falling under the Convention” (see chapter 2.4.). Therefore, even if federal courts do not have original subject matter jurisdiction and the action to vacate an award is filed in a state court, it would be subject to removal to a federal court.¹⁵⁵

Such a removal can be requested “at any time before trial”. This is much more flexible than the general removal statute, which requires removal within thirty days after the initial plea or other paper from which it can be ascertained that the case is removable has been served.

In conclusion, even if an action for the setting aside of an arbitral award has been initiated before a state court, the case can easily be removed to a federal court at any time.

9.1.3. PERSONAL JURISDICTION

The Court of Appeals for the Second Circuit confirmed that personal jurisdiction must be established over an award-debtor as a prerequisite for an action to be able to confirm an award.¹⁵⁶ Such personal jurisdiction may be established in different ways (jurisdiction by consent, jurisdiction through minimum contacts, *quasi in rem* jurisdiction).¹⁵⁷

¹⁵⁴ John V H. Pierce & David N. Cinotti, Challenging and Enforcing International Arbitral Awards in New York Courts in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, 357, 369 (eds. John Fellas, James Carter).

¹⁵⁵ *Ibid.*, 370.

¹⁵⁶ *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393, 397-98 (2d Cir. 2009).

¹⁵⁷ John V H. Pierce & David N. Cinotti, Challenging and Enforcing International Arbitral Awards in New York Courts in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, 357, 370-376 (eds. John Fellas, James Carter).

9.2 Procedural remarks

Section 13 of the FAA states that:

“the party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed also file the following papers (...): (a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award; (b) The award; (c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.”

These requirements are in line with Article IV of the New York Convention.

Furthermore, the FAA stipulates that *“any application [under the FAA] shall be made and heard in the manner provided by law for the making or hearing of motions”*.¹⁵⁸ Thus, a party should not file a complaint but a motion or petition to confirm or vacate an award.¹⁵⁹

As for deadlines, an action to confirm (enforce) an award under the New York Convention or Inter-American Convention must be brought **within three years** after the award is “made” (originally decided by the arbitrators).¹⁶⁰ On the other hand, notice of a motion to vacate (set aside) must be served to the adverse party or his/her attorney *“within **three months** after the award is filed or delivered”*.¹⁶¹

¹⁵⁸ 9 U.S.C. § 6.

¹⁵⁹ John V H. Pierce & David N. Cinotti, Challenging and Enforcing International Arbitral Awards in New York Courts in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, 357, 363 (eds. John Fellas, James Carter).

¹⁶⁰ See 9 U.S.C. §§ 207, 302.

¹⁶¹ See 9 U.S.C. § 12.

9.3 Grounds for setting aside an arbitral award

Under Section 10 of the FAA, the court in and for the district in which the award was made may, on application of any party to the arbitration, grant an order setting aside (vacating) the award on limited grounds:

"(1) Where the award was procured by corruption, fraud, or undue means;

(2) Where there was evident partiality or corruption in the arbitrators, or either of them;

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

The U.S. Supreme Court held that parties cannot contractually expand the grounds of vacatur. In *Hall Street Associates*, the Court held that the enumerated grounds for judicial review of an arbitral award set out in the FAA are "exclusive," and that contracting parties cannot expand the scope of judicial review of an arbitral award under the FAA.¹⁶²

This was confirmed by the U.S. Court of Appeals for the Second Circuit, which found that the "argument that the parties contracted for a heightened standard of

¹⁶² *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

review is squarely foreclosed by the Supreme Court's recent decision in *Hall Street Assocs*".¹⁶³

Moreover, it also seems that parties cannot contractually limit the grounds for vacatur. As was found by the Ninth Circuit:

*"the FAA compels the conclusion that the grounds for vacatur of an arbitration award may not be supplemented, it also compels the conclusion that these grounds are not waivable, or subject to elimination by contract".*¹⁶⁴

However, it is unclear from U.S. court practice whether there are any non-codified common law grounds for vacatur in addition to statutory grounds. Some U.S. courts have vacated arbitral awards on the basis that the arbitral award was "arbitrary and capricious or irrational", in violation of "public policy" or because it reflected a "manifest disregard of the law".¹⁶⁵

9.4 Grounds for refusing enforcement

Under Articles III and V of the New York Convention, the court "*shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon*" unless, as provided in Article V:

(1) the party against whom the award is invoked provides "proof" that one of five grounds for non-recognition exists (Article V (1) NYC grounds), or

¹⁶³ *Eso Exploration & Production Chad, Inc. v. Taylors International Services, Ltd.*, 293 F. App'x 34 (2d Cir. 2008)

¹⁶⁴ *Burton v. Class Counsel & Party to Arbitration (In re Wal-Mart Wage & Hour Emp't Practices Litig.)*, 737 F.3d 1262 (9th Cir. 2013)

¹⁶⁵ See: Niedermaier, *International Arbitration in the U.S.*, in *INTERNATIONAL COMMERCIAL ARBITRATION* 763, 794 (Stephan Balthasar ed., 2016)

(2) the court decides that (a) the subject matter of the award is not capable of settlement by arbitration under the laws of the United States, or (b) the recognition or enforcement of the award would be contrary to the public policy of the United States (Article V (2) NYC grounds).

9.4.1.ARTICLE V (1) NYC GROUNDS

This Article sets out non-enforcement grounds that must be raised by the party for them to be considered by the court. There are five such grounds.

A. Lack of a valid arbitration agreement

Article V (1) (a) of the New York Convention provides that recognition and enforcement of the award may be refused in the following situation:

"The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

Clearly, the enforcement of an award may be denied in the absence of a valid arbitration agreement. This guide has already dealt with the issue of jurisdiction in order to answer the question as to whether have agreed to arbitrate certain disputes (see chapter 4.2, as well as chapters 5.2 and 5.3).

However, irrespective of this question, an arbitral award may be subjected to a court review based on Article V(l)(a) of the NYC. As explained by the Third Circuit in *China Minmetals Material*:

*"Under the rule of First Options, a party that opposes enforcement of a foreign arbitration award under the Convention on the grounds that the alleged agreement containing the arbitration clause on which the arbitral panel rested its jurisdiction was void ab initio **is entitled to present evidence of such invalidity to the district court, which***

must make an **independent determination of the agreement's validity** and therefore of the arbitrability of the dispute.”¹⁶⁶
(Emphasis added.)

B. A party was unable to present his/her case

Article V (1) (a) of the New York Convention states that recognition may be refused if “*the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case*”.

The District Court for the Southern District of New York interpreted this non-enforcement ground in the following way:

“ [I]n order to invoke the Article V(l)(b) defense, [the party] must establish that it was denied the opportunity to be heard at a **meaningful time or in a meaningful manner**.”¹⁶⁷ (Emphasis added.)

C. The Award deals with matters outside of scope of the Arbitral Agreement

Based on Article V (1) (a) (c) recognition and enforcement may be denied if

“*the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced*”.

¹⁶⁶ China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 288 (3d Cir. 2003).

¹⁶⁷ *Ukrvneshprom State Foreign Econ. Enter. v. Tradeway, Inc.*, No. 95 Civ. 10278 (RPP), 1996 WL 107285, at *5 (S.D.N.Y. Mar. 12, 1996)

In order to successfully resist recognition of an international arbitral award under this provision in New York, a petitioner would have to “*overcome a powerful presumption that the arbitral body acted within its powers*”, as held by the Court of Appeals for the Second Circuit.¹⁶⁸

D. Violation of arbitral procedure

Article V (1) (d) stipulates that the fact that “*the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*” constitutes grounds for denying enforcement.

In order to comply with “*the law of the country where the arbitration took place*”, an arbitral tribunal must only comply with the arbitration law of the arbitral seat and not with all the rules of civil procedure.¹⁶⁹

Bearing in mind that the FAA and the NY CPLR are quite flexible when dealing with arbitral procedure, it would not be easy to resist enforcement on these grounds, especially in a pro-enforcement jurisdiction such as New York.¹⁷⁰

E. The Award has not become binding or has been set aside

Article V (1) (e) of the New York Convention stipulates that enforcement may be denied if “*the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*”

¹⁶⁸ Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 976 (2d Cir. 1974)

¹⁶⁹ John V H. Pierce & David N. Cinotti, Challenging and Enforcing International Arbitral Awards in New York Courts in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, 357, 392 (eds. John Fellas, James Carter).

¹⁷⁰ See for example: *P.T. Reasuransi Umum Indonesia v. Evanston Ins. Co.*, No. 92 Civ. 4623 (MGC), 1992 WL 400733 (S.D. N.Y. Dec. 23, 1992) (rejecting claims of procedural irregularities at hearing).

However, it should be noted that once the proceedings have ended and there are no further steps to be taken by the arbitral tribunal, the award becomes binding. Thus, party seeking to enforce an arbitral award does not need to have previously confirmed the arbitral award in the arbitral situs.¹⁷¹

9.4.2.ARTICLE V (2) NYC GROUNDS

Article V (2) of the NYC contains grounds for rejecting the recognition of an arbitral award, which may be raised by the party resisting recognition or by the court itself.

A. Non-arbitrability of the subject matter

Article V (2) (a) permits non-recognition where the court finds that the “*subject matter of the dispute is not capable of settlement by arbitration under the law of that country*”.

In the United States in general, exceptions to arbitrability are very limited (see chapter 4.1). As was found by the U.S. Supreme Court:

“we decline to subvert the spirit of the United States’ accession to the Convention by recognizing subject matter exceptions [to arbitrability] where Congress has not expressly directed the courts to do so.”¹⁷²

Thus, recognition of an arbitral award would be denied based on non-arbitrability of the subject matter only in very limited circumstances and only when Congress has designated the matter in question as non-arbitrable.

¹⁷¹ John V H. Pierce & David N. Cinotti, Challenging and Enforcing International Arbitral Awards in New York Courts in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK, 357, 392, 393 (eds. John Fellas, James Carter).

¹⁷² Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985)

B. Public policy

Article V (2) (b) of the NYC stipulates that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that *"the recognition or enforcement of the award would be contrary to the public policy of that country"*.

As was held by the Court of Appeals for the Second Circuit:

*"the Convention's public policy defense should be construed **narrowly**. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's **most basic notions of morality and justice**."*¹⁷³ (Emphasis added.)

Thus, in New York, the courts will only deny enforcement of an arbitral award based on these grounds if the "most basic notions of morality and justice" were violated by such enforcement.

¹⁷³ *Parsons & Whittemore Overseas Co. v. Societe Generale d L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (1974)



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