United States

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GENERAL

1. Please give a brief overview of the use of commercial arbitration in your jurisdiction, including any recent trends. What are the general advantages and disadvantages of arbitration compared to court litigation in your jurisdiction?

Arbitration is widely used for the resolution of both domestic and international commercial disputes in the US. It offers a number of important advantages, particularly in comparison to litigation proceedings in the US courts. These advantages include:

- Procedural flexibility, which the parties can use to tailor the proceedings to their particular dispute (for example, the parties can adopt procedures, such as limited discovery or expedited schedules, that allow for faster and less expensive dispute resolution where appropriate).
- Generally less broad and less burdensome discovery procedures.
- Neutrality.
- More readily enforceable awards.
- The ability to choose the panel of decision-makers.
- More finality through a much narrower scope of review.

Arbitration is also widely used in the US for the resolution of domestic consumer and employment disputes. Arbitration of these claims is more controversial, and there are lobbying and legislative efforts underway to revise the legal framework for arbitration of these claims, or even to remove them from the scope of arbitrable disputes under US law. In particular, the proposed Arbitration Fairness Act of 2009 would render unenforceable pre-dispute arbitration agreements in employment, consumer and franchise contracts. As drafted, certain provisions of the proposed Act are not limited to employment, consumer and franchise disputes, however, and could have far-reaching effects on commercial arbitration in the US.

In addition, considerable attention is currently being focused on class arbitrations, in which individual claimants assert claims against one or more respondents on behalf of a large class of similarly-situated, but largely unnamed and unidentified, persons. Class action litigation has been an important feature of US civil procedure for a number of years, and it is viewed as providing an important quasi-substantive right in connection with a number of statutory, contract, and tort claims. The class action procedure has been exported to the arbitration context, and a number of arbitrations in the US are proceeding on a class-wide basis. This trend is likely to continue.

2. Which arbitration organisations are commonly used to resolve large commercial disputes in your jurisdiction? Please give details of both arbitral institutions and professional/industry bodies, including the website address of each organisation.

The arbitration bodies most commonly used to resolve international disputes in the US are:

- The International Centre for Dispute Resolution of the American Arbitration Association (*www.adr.org/about_icdr*).
- International Chamber of Commerce (*www.iccwbo.org/court*).
- International Centre for the Settlement of Investment Disputes (*www.worldbank.org/icsid*).

(*see box, Main arbitration organisations*).

Other arbitration institutions used to resolve international disputes include:

- London Court of International Arbitration (*www.lcia.org*).
- Inter-American Commercial Arbitration Commission (*www.oas.org*).
- International Institute for Conflict Prevention and Resolution (*www.cpradr.org*).

The arbitration bodies most commonly used to resolve domestic disputes are:

- American Arbitration Association (*www.adr.org*).
- International Institute for Conflict Prevention and Resolution (*www.cpradr.org*).
- Financial Industry Regulatory Authority (*www.finra.org*).
- JAMS (*www.jamsadr.com*).

3. What legislation applies to arbitration in your jurisdiction? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?

Arbitration in the US is governed by federal and state arbitration statutes and case law.

At the federal level, the Federal Arbitration Act (FAA) underpins both domestic and international commercial arbitration in the US (*9 U.S.C. §1 et seq*). The FAA:

- Applies to any transaction involving interstate or foreign commerce (or maritime transactions).
- Was enacted in 1925 and is not based on the UNCITRAL Model Law.
- Governs domestic US arbitrations (*FAA, Chapter 1*).
- Governs international arbitration proceedings and implements:
  - the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) (*FAA, Chapter 2*);
  - the OAS Inter-American Convention on International Commercial Arbitration 1975 (Panama Convention) (*FAA, Chapter 3*).
- Both Chapters 2 and 3 are supplemented by the provisions in Chapter 1 (*§§208, 307, FAA*).

Although the FAA is the primary source of arbitration law in the US, particularly for international arbitrations, state law can apply where the FAA is silent, but only to the extent that the state law is not inconsistent with the FAA. State law also applies to cases that fall outside of the FAA. Each of the states has enacted a statute governing arbitration, and several states have enacted statutes governing international arbitration, some of which are based on the UNCITRAL Model Law.

Federal and state case law interpreting the statutory provisions are also important sources of law relating to arbitration in the US.

4. Are there any mandatory legislative provisions (for example, relating to removal of arbitrators, challenge of awards and arbitrability)? If yes, please summarise their effect.

There are mandatory legislative provisions that require the enforcement of arbitration agreements and arbitration awards subject only to limited exceptions (*see Question 22 and Question 25*).

There are no mandatory legislative provisions regarding arbitration procedures, arbitrability, or the form of the award (but certain violations of the parties' due process rights can result in the non-enforcement or annulment (*vacatur*) of the arbitral award (*see Question 22*)).

The FAA contains no provisions regarding interlocutory removal or replacement of arbitrators. Claims that arbitrators are biased or do not fulfill contractual qualifications must be reserved until an application to vacate (annul) a final award (*see Question 22*). The FAA does, however, give effect to institutional challenge procedures.

The range of arbitrable subjects under US law is very broad and includes most contract, tort, and statutory claims, including claims involving matters of significant public policy, such as antitrust, securities, and intellectual property claims, as well as consumer, employment and franchise claims. Subject matters that are not arbitrable under US law include family law matters, cases involving seamen, railroad and other transportation workers engaged in interstate or foreign commerce, and certain civil rights issues.

5. Are there any requirements relating to independence or impartiality?

Historically, in US domestic arbitration, the practice was that party-appointed arbitrators were partial. This has now generally been reversed, and the practice in both domestic and international arbitration is usually that all the arbitrators will be independent and impartial. (In domestic arbitration, the parties can still agree that the party-appointed arbitrators will be partial.)

Arbitrators are required to disclose to the parties any information that "might create an impression of possible bias" (*plurality decision of the US Supreme Court in Commonwealth Coatings Corp v. Continental Casualty Co., 393 U.S. 145 (1968)*). However, the lower courts have adopted different approaches in interpreting the holding in *Commonwealth Coatings*, and a number of them have held that failure to meet this standard is not necessarily grounds for vacating an award.

In response to the US courts' differing approaches to arbitrator disclosure, the American Bar Association (ABA) is currently drafting guidelines for arbitrator disclosure. The Disclosure Subcommittee of the Dispute Resolution Section of the ABA recently released a revised 25-page set of draft guidelines for arbitrator disclosure that would require broader disclosure than guidelines issued by other bodies, such as the International Bar Association. The revised draft guidelines provide that arbitrators should disclose any interest they have in the outcome of the arbitration, as well as any existing or past relationship with the parties to the proceeding, their counsel, their representatives, any witnesses, or any of the other arbitrators. The guidelines have generated substantial debate and may be subject to further revision.

6. Does the law of limitation apply to arbitration proceedings? If yes, briefly state the usual length of limitation period(s) and what triggers or interrupts it in the context of commercial arbitration.

The parties can generally specify a limitation period for their substantive claims in their agreement, provided that it is reasonable. In the absence of agreement by the parties, the applicable limitation period will be determined by the law of the place of arbitration (including state law) and/or the substantive law governing the contract or the parties' relationship.

The FAA establishes statutory limitations for the enforcement and annulment of arbitral awards (*see Question 25*).

ARBITRATION AGREEMENTS

7. For an arbitration agreement to be enforceable:

- **What substantive and/or formal requirements must be satisfied?**
- **Is a separate arbitration agreement required or is a clause in the main contract sufficient?**

The agreement to arbitrate must be in writing. A written provision in any maritime contract or transaction involving interstate or foreign commerce by which parties agree to refer either existing or future disputes to arbitration is "valid, irrevocable, and enforceable," subject only to the legal or equitable grounds for the revocation of contracts (*§2, FAA*). Arbitration agreements are therefore subject to general principles of contract law, including general contractual defences, such as duress, illegality, unconscionability, and waiver.

The FAA does not require that an arbitration agreement be contained in a single, integrated written contract, and courts have applied general principles of contract law to determine whether an arbitration agreement has been validly formed.

Consequently, the FAA has been interpreted not to specifically require that the parties execute or sign a written agreement containing the arbitration clause, as long as they have evidenced their intention to arbitrate in writing. For example, a written contract that incorporates by reference a second agreement including an arbitration clause is generally sufficient to satisfy the written provision requirement of the FAA. A written confirmation of a purchase order, in which the confirmation includes an arbitration provision, is also generally sufficient.

There is no requirement for a separate arbitration agreement, and most commercial arbitrations are conducted on the basis of arbitration clauses contained in commercial agreements.

8. Do statutory rules apply to the arbitration agreement? For example, are there restrictions on the number, qualifications/characteristics or selection of arbitrators?

There are no mandatory statutory provisions regarding arbitral procedures such as the number, selection, or qualifications of arbitrators. The parties' agreement, including any rules incorporated by the parties, will govern these issues. The parties' agreement is, in principle, subject to mandatory requirements of the FAA, paralleling the due process requirements of the US Constitution, but these requirements impose only very limited constraints on the parties' procedural autonomy.

9. In what circumstances can a third party be joined to an arbitration, or otherwise be bound by an arbitration award? Please give brief details.

The FAA does not contain any statutory provisions regarding the extension of arbitration agreements to non-signatories.

The courts have held that non-signatories can only be joined to an arbitration proceeding where they have somehow assumed the rights and obligations of the arbitration agreement. In this analysis, the courts generally apply principles of agency, succession or assumption of interest, third party beneficiary, alter ego/veil-piercing, estoppel or joint venture relations, to determine whether a non-signatory can be bound by the arbitration agreement.

The Supreme Court in *Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003)*, found that class action arbitrations are permitted under the FAA and that it is for the arbitrators to determine in the first instance whether a particular arbitration agreement allows for class arbitration. Since the *Green Tree* decision, courts have routinely permitted class arbitrations. The use of class arbitration in the US is likely to expand, particularly because a number of lower courts have found that provisions in consumer contracts seeking to exclude class arbitrations are unconscionable and therefore unenforceable.

The courts have also held that separate arbitrations proceeding under different arbitration agreements or involving different parties can only be consolidated with the consent of all of the parties.

While there is no provision in the FAA regarding the preclusive effects of an arbitral award, US courts have repeatedly recognised such effects. Once an arbitral award is recognised under the FAA it has the same force and effect as a court judgment, including preclusive effect under principles of *res judicata* (*see, for example, Second Restatement of Judgments, Section 84*).

In line with the preclusion rules applicable to court judgments, US courts are reluctant to extend the preclusive effects of arbitral awards to third parties. Arbitral awards generally have preclusive effect only with respect to the parties to the arbitration proceeding. In certain instances, a third party can raise the prior arbitration award to bind a party who participated in the original arbitration proceeding.

PROCEDURE

10. Does the applicable legislation provide default rules governing the appointment and removal of arbitrators, and the start of arbitral proceedings?

In domestic arbitrations, on application of either party the court will appoint an arbitrator if either (*§5, FAA*):

- The parties have not selected a method for appointing arbitrators or if their selected method has failed.
- For any other reason the tribunal has not been constituted.

Where the court appoints the arbitrator(s), the court will follow the parties' agreement as to the number of arbitrators, but if the parties have not specified a number, the court will appoint a sole arbitrator (*§5, FAA*).

In international arbitrations, the courts can appoint arbitrators in accordance with the provisions of the parties' arbitration agreement (*§206, FAA*).

There are no provisions in the FAA regarding challenges to or removal of arbitrators. The courts generally consider issues regarding arbitrator bias or impartiality in connection with their review of the arbitral award rather than during the constitution of the tribunal (*see Question 4 and Question 22*).

There are no provisions in the FAA regarding the commencement of arbitral proceedings, other than that a party can bring an action in a US court to request that the court compel the parties to arbitrate their dispute (*§§4 and 206, FAA*).

11. What procedural rules are arbitrators likely to follow? Can the parties determine the procedural rules that apply? Does the legislation provide any default rules governing procedure?

The arbitrators generally apply the procedural rules agreed by the parties, either directly in their arbitration agreement or by reference to a set of published arbitration rules (either institutional or *ad hoc*). The parties are given broad discretion to establish the arbitral procedures, and the arbitrators are given broad discretion to establish the procedures to the extent that they have not been agreed by the parties.

The FAA does not provide default rules governing the arbitral procedure. State statutes may provide additional procedural rules, but these statutes also generally grant the parties and the arbitrators discretion to establish the procedures.

12. What procedural powers does the arbitrator have? If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

The arbitrator generally has broad procedural powers, subject to any agreement by the parties that restrains the arbitrator's authority. Unless the parties have agreed to the contrary, the arbitrator can order either party to disclose documents or to secure the attendance of witnesses under that party's control. In addition, the arbitrator has the authority to *subpoena* third parties (within the US) to provide testimony or documents in connection with an arbitration (*§7, FAA*). If a third party refuses to comply with the *subpoena* issued by the arbitrators, the *subpoena* can be enforced by the courts.

EVIDENCE

13. What documents must the parties disclose to the other parties and/or the arbitrator(s)? Can the parties determine the rules on disclosure? How, in practice, does the scope of disclosure compare with disclosure in litigation?

The scope of discovery is subject to the agreement of the parties and the control of the tribunal. Federal and state rules of civil procedure and evidence, including the rules regarding discovery, are not applicable in arbitration proceedings. Arbitrators can order discovery from third parties in some circumstances and obtain judicial assistance in enforcing such orders (*§7, FAA*).

The scope of discovery therefore varies widely among commercial arbitrations. In some US arbitrations, there is no discovery of documents or witness testimony, while in others discovery is as wide-ranging as that allowed under the US Federal Rules of Civil Procedure.

The disclosure of documents is used in a substantial proportion of arbitrations in the US, while the use of pre-hearing deposition discovery of oral testimony is less common. In general, the scope of discovery is more restricted in arbitration proceedings than it is in US litigation. This is particularly true in international arbitration proceedings.

US courts have generally refused to vacate (annul) or deny enforcement of arbitral awards on the ground that disclosure in the proceedings was improperly narrow or broad.

CONFIDENTIALITY

14. Is arbitration confidential?

There is no express requirement in the FAA that arbitration be confidential. To date, US courts have been sceptical of claims that arbitral proceedings and submissions are impliedly confidential. However, if the parties have agreed that their arbitration should be confidential, that agreement is generally enforced. In addition, arbitrators can provide for the confidentiality of the proceedings through their procedural orders.

Although hearings are usually private, arbitral awards are sometimes published and parties are generally free to comment publicly about their arbitrations. It is important to note also that securities regulations and other rules governing the disclosure of information by public companies may require parties to disclose certain information about pending arbitration proceedings, even where the parties' contract generally provides for the confidentiality of the arbitral proceedings.

COURTS AND ARBITRATION

15. Will the local courts intervene to assist arbitration proceedings? For example, by granting an injunction or compelling witnesses to attend?

US courts will assist the arbitral process in a number of ways, including by appointing arbitrators, granting or enforcing interim measures of relief, and enforcing discovery orders and *subpoenas* issued by the arbitrators. Although some courts have interpreted Article II(3) of the New York Convention to preclude court-ordered provisional measures such as attachments in connection with international arbitration proceedings, the majority of courts reject that interpretation.

It is unsettled whether US courts can compel US citizens to produce documentary or oral evidence in arbitrations sited outside of the US. US courts are authorised to compel the production of evidence in the US for use in proceedings in foreign courts or before foreign tribunals (*28 U.S.C. §1782*). Before 2004, the courts uniformly interpreted this provision not to extend to private, foreign arbitral tribunals. In 2004, however, the US Supreme Court suggested that the section may extend to foreign arbitral proceedings (dicta *in Intel v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004)*). Since then, a number of US district courts have held that they have the authority to compel US citizens to produce evidence in aid of private arbitrations sited outside of the US under §1782 (but see *La Comision Ejecutiva Hidroelecctrica del Rio Lempa v. El Paso Corporation, 2008 WL 5070119 (S.D. Tex. Nov. 20, 2008)*, holding that *Intel* does not speak to this issue and applying pre-*Intel* precedent). No US appellate court has yet addressed the issue, and the application of §1782 to international arbitration proceedings still remains somewhat uncertain.

16. What is the risk of a local court intervening to frustrate the arbitration? Can a party delay proceedings by frequent court applications?

US courts have consistently refused to interfere in arbitration proceedings. For example, courts generally refuse to consider interlocutory appeals of orders made by the arbitrator. They also generally refuse to grant orders staying or otherwise delaying the arbitral proceedings.

17. What remedies are available where proceedings are started in the local court in breach of an arbitration agreement?

Valid arbitration agreements must be enforced according to their terms (*FAA*). If a party initiates litigation proceedings concerning an issue that is referable to arbitration under a valid arbitration agreement, the courts will generally stay the litigation proceedings at the request of the other party and direct the parties to arbitrate the particular claims that fall within the arbitration agreement. A continuing refusal to arbitrate in that circumstance would be not only a breach of the arbitration agreement, but also a direct violation of a court order, punishable by contempt of court.

18. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

Local courts can issue an anti-suit injunction where foreign proceedings have been initiated in breach of an arbitration clause.

An anti-suit injunction can be directed to the parties that have initiated foreign proceedings so long as the parties are subject to the personal jurisdiction of the US court. Among other factors in deciding whether to issue an anti-suit injunction, a US court will typically consider whether the parties and issues are the same in both matters, and whether resolution of the case before the other, enjoining court will dispose of the action.

The precise standards for issuing anti-suit injunctions vary from jurisdiction to jurisdiction. Some courts adhere to a restrictive standard, granting anti-suit injunctions only in rare circumstances; other courts are willing to entertain anti-suit injunctions based on a variety of equitable and other factors, including the delay, expense and inconvenience that result from parallel actions. Courts are often reluctant to interfere with foreign proceedings under the principle of international comity, however, and the availability of this type of injunctive relief varies.

19. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction accept the concepts of separability and/or kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

US law recognises the principle that an arbitration agreement is separable from the underlying contract in which it is contained. US law also recognises the implications of that principle, including that:

- The law governing the arbitration agreement is not necessarily the same as the law governing the underlying contract.
- The termination or invalidity of the underlying contract does not necessarily affect the validity of the separate arbitration agreement.
- In most cases, it is the job of the arbitrators and not the courts to decide whether the underlying contract is valid.

Arbitrators have the power to consider their own jurisdiction, but the courts generally have parallel competence to consider the arbitrators' jurisdiction. There is a presumption that the courts have the primary responsibility to determine the arbitrators'

jurisdiction, unless there is "clear and convincing evidence" that the parties intended for the arbitrator to have the primary role in determining jurisdiction (*US Supreme Court in First Options v. Kaplan, 514 U.S. 938 (1995)*).

The courts will therefore generally consider questions related to the validity or scope of an arbitration agreement at the outset of the arbitration or will review an arbitrator's jurisdictional decision (for example, in enforcement proceedings) under a *de novo* standard of review. The parties can agree, however, to assign the primarily responsibility for determining jurisdiction to the arbitrator, in which case the courts would review the arbitrator's determination on jurisdiction under the same limited scope of review applied to other arbitral awards.

REMEDIES

20. What interim remedies are available from the tribunal? Can the tribunal award:

- **Security for costs?**
- **Security or other interim measures?**

The tribunal generally has broad authority to award interim measures of relief, including security for costs and injunctive relief. In US arbitrations, it is relatively rare for a party to seek security for costs.

It is generally not considered a breach or waiver of an arbitration agreement for a party to seek interim measures of relief from a court. Parties sometimes select an exclusive forum for interim measures (either the tribunal or the courts) in their arbitration agreement, but in the absence of such agreement, the parties are generally free to seek interim measures of relief from either the courts or the arbitrators.

US courts have consistently held that they have jurisdiction under the FAA to issue provisional measures in domestic arbitrations (in the absence of contrary agreement by the parties) to protect parties and the arbitral process. US courts have not adopted a consistent approach to awarding interim measures of relief in international arbitration proceedings covered by the New York Convention. The majority of courts have held that interim measures of relief can be issued in an arbitration proceeding, but courts may be reluctant to award interim relief under certain circumstances, such as where the plea for court-ordered provisional relief is designed to bypass the arbitral process. Some courts have been reluctant to award interim relief in connection with a pending arbitration (under the *forum non conveniens* doctrine).

21. What final remedies are available from the tribunal? For example, can the tribunal award damages, injunctions, declarations, costs and interest?

The tribunal has the same authority as the courts to award damages and most other remedies. There are no general restrictions on the arbitrators' power to award monetary damages, declaratory relief, injunctive relief, costs, interest, or other remedies. The availability of remedies in a particular case will be governed by the applicable substantive law and can be affected by the parties' agreement.

MAIN ARBITRATION ORGANISATIONS

International Centre for Dispute Resolution of the American Arbitration Association (AAA)

Main activities. This is the international centre of the AAA, formed to deal with international arbitrations.

W *www.adr.org/about_icdr*

International Chamber of Commerce

Main activities. Among other things, issues policies on practical issues relating to international arbitration, settlement of international business disputes, and the legal and procedural aspects of arbitration.

W *www.iccwbo.org/court*

International Centre for the Settlement of Investment Disputes

Main activities. Provides forum for arbitrating disputes between foreign investors and states arising out of investments.

W *www.worldbank.org/icsid*

APPEALS

22. Can arbitration proceedings and awards be appealed or challenged in the local courts? If yes, please briefly outline the grounds and procedure. Can the parties effectively exclude any rights of appeal?

Parties can bring an action seeking to vacate (annul) domestic arbitration awards in the court in the judicial district where the award was made within three months after the award is delivered to the parties (*§12, FAA*). The courts can vacate an arbitral award for any of the statutory grounds provided (*§10, FAA*), which include where:

- The award was procured by corruption, fraud, or undue means.
- There was evident partiality or corruption in the arbitrators.
- The arbitrators were guilty of misconduct in refusing to postpone the hearing, on sufficient cause shown, or in refusing to hear evidence relevant and material to the dispute; or any other misbehaviour by which the rights of any party have been prejudiced.

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- The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award on the subject matter submitted was not made.

Courts have also vacated arbitral awards made in the US on the basis of an additional common law ground where the arbitrators acted in "manifest disregard of the law". The courts have adopted various formulations of what constitutes "manifest disregard", but they generally agree that arbitrators manifestly disregard the law where they know the proper legal standard, but consciously choose to disregard it.

In a recent case, however, the US Supreme Court called into question the continued viability of the common law "manifest disregard" doctrine as an independent ground for vacatur. In a decision holding that parties cannot contractually expand the scope of judicial review of arbitral awards made in the US, the Court stated that the FAA's provisions are the "exclusive" grounds for vacatur. The Supreme Court suggested without deciding that it was possible to interpret the phrase "manifest disregard" as a reference to the FAA's statutory grounds "collectively, rather than adding to them", or as shorthand for the subsections allowing vacatur when arbitrators were guilty of "misconduct" or "exceeded their powers" (*Hall Street Associates v. Mattel, 128 S.Ct. 1396, 1404 (2008)*).

Since *Hall Street* was decided, five Circuit Courts of Appeal have examined the decision's effect on the "manifest disregard" doctrine, producing varied results. The First Circuit concluded that the "manifest disregard" doctrine has been abolished; the Fifth Circuit held that "manifest disregard" no longer serves as an independent ground for vacatur; the Sixth Circuit continued to apply the doctrine; and both the Second and Ninth Circuits concluded that the doctrine survives as shorthand for arbitrators "exceed[ing] their powers" under the FAA, which the Ninth Circuit stated was consistent with its prior case law. See *Citigroup Global Markets, Inc. v. Bacon, -F.3d-, 2009 WL 542780 (5th Cir. 2009); Comedy Club Inc. v. Improv West Assocs., 553 F.3d 1277, 1289 (9th Cir. 2009); Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 n. 3 (1st Cir.2008); Coffee Beanery, Ltd. v. WW, L.L.C., 300 Fed.Appx. 415, 419 (6th Cir.2008); Stolt-Nielsen SA v. Animal Feeds Int'l Corp., 548 F.3d 85, 93-95 (2d Cir. 2008)*. Regardless of how the lower courts, and ultimately the Supreme Court, construe the "manifest disregard" doctrine, the US courts are in agreement that the scope of judicial review of an arbitral award remains extremely limited.

As noted, *Hall Street* held that parties cannot contractually expand the scope of judicial review of arbitral awards. The *Hall Street* decision interprets federal law only, however, and explicitly left open the possibility that state law may allow parties to contractually expand the scope of judicial review (*Hall Street Associates, 128 S.Ct. at 1406*). The California Supreme Court applying *Hall Street* recently held that California law does allow for such an expansion (*Cable Connection, Inc., v. Directv, Inc., 190 P.3d 586 (Ca. 2008)*). On a related issue, most lower courts that have considered the question have held that parties cannot contractually exclude the judicial review provided in the FAA. Following the reasoning in *Hall Street*, it is likely that the US Supreme Court would adopt this majority position if it were confronted with the question.

The courts have generally reviewed international arbitration awards made in the US under the same statutory (*§10, FAA*) and common law standards.

COSTS

23. What legal fee structures can be used? For example, hourly rates and task based billing? Are fees fixed by law?

There are no statutory provisions or other rules governing the fee structures that can be used to compensate arbitrators or that can be charged by the parties' counsel.

Various state laws and state organisations regulating attorneys (which are admitted to practice by the various state bars) do regulate attorney fee arrangements, but as long as the attorney's fees are disclosed and the client agrees to them, the regulations do not materially restrict lawyers' fee arrangements.

Lawyers are generally able to charge an hourly rate, a task-based fixed fee, or a contingency fee (which is based on a percentage of the recovery obtained). The hourly rate is the most common fee structure, particularly in commercial dispute resolution.

24. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider when awarding costs?

US federal and state civil procedure rules generally do not provide for fee shifting, and there is no rule in arbitrations sited in the US that requires the losing party to pay the costs of the proceedings and the legal fees of the winning party. Parties can agree to fee shifting in their arbitration agreement or rules (or subsequently during the proceedings). Conversely, parties can, and often do, agree to exclude fee shifting by providing that each party should bear its own legal costs. In the absence of any agreement by the parties, the power of the arbitrators to shift fees and costs may be affected by applicable state law.

ENFORCEMENT

25. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts? Please briefly outline the enforcement procedure.

Arbitral awards made in the US are fully enforceable in the US courts, subject only to certain narrow grounds for annulment (*vacatur*) or non-enforcement (*see Question 22*).

The time limits for applications to confirm or vacate (annul) an award are as follows:

- Within one year after issuance of a domestic arbitral award, any party can apply to the court for an order confirming

the award, and the court must confirm the award unless it has been vacated (*§9, FAA*). If the parties have agreed on a specific court in their arbitration agreement, they can apply to that court for an order confirming the award. Otherwise, the parties can apply to the district court in the district where the award was made (*§9, FAA*).

- A party must apply to vacate a domestic arbitration award (*§12, FAA*) within three months of the award.
- A party has three years to seek confirmation of an international arbitration award (*§207, FAA*).
- Some courts have also applied the three-month limitation period to applications to vacate international awards rendered in the US.

26. To what extent is an arbitration award made in your jurisdiction enforceable in other jurisdictions? Is your jurisdiction party to international treaties relating to this issue such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

The US is a party to the New York Convention and the Panama Convention. Arbitral awards made in the US are fully enforceable under those conventions in other signatory states.

In ratifying the New York Convention, the US took the reciprocity reservation and the commercial reservation, which means that the US will apply the New York Convention only to awards rendered in other signatory states and only to disputes that are considered as commercial under US law.

The US is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (Washington Convention), which provides a special enforcement mechanism for arbitration awards made under the auspices of the International Centre for Settlement of Investment Disputes (ICSID).

27. To what extent is a foreign arbitration award enforceable in your jurisdiction? Please briefly outline the enforcement procedure.

The US is a party to the New York Convention, the Panama Convention, and the Washington Convention, and it enforces foreign arbitration awards according to its obligations under those conventions.

28. How long do enforcement proceedings in the local court take? Is there any expedited procedure?

An application to confirm an arbitral award is treated as a motion rather than as the initiation of a lawsuit (*§6, FAA*). Consequently, it is generally faster than other proceedings in the courts. If the award is challenged, the process inevitably takes longer, but given the relatively limited scope of review of arbitral awards, the proceedings are generally still relatively expeditious.

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