



The Legal 500 & The In-House Lawyer  
Comparative Legal Guide  
United States: Arbitration

This country-specific Q&A provides an overview of the legal framework and key issues surrounding arbitration law in **United States** including arbitration agreements, tribunals, proceedings as well as costs, awards and the hot topics concerning this country at present.

This Q&A is part of the global guide to Arbitration.

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### **1. What legislation applies to arbitration? Are there any mandatory laws?**

Because the United States is a federal system, arbitration legislation exists at both the federal and state level. The primary federal statute governing arbitration is the Federal Arbitration Act (the "FAA"). The U.S. Supreme Court has held that section 2 of the FAA (9 U.S.C. § 2), which provides for the validity, irrevocability, and enforceability of arbitration agreements, is substantive federal law that applies in state courts and supplants inconsistent state laws with respect to all transactions affecting interstate commerce. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). In addition to the FAA,

other federal statutes contain arbitration provisions, including for example the Patent Act and the Foreign Sovereign Immunities Act.

At the state level, each state has enacted arbitration legislation (e.g., the California Arbitration Act in California), which applies to arbitrations seated in that state (to the extent not preempted by section 2 of the FAA). Practitioners should be mindful of mandatory rules imposed by these state statutes. The majority of state arbitration acts are based on a version of the Uniform Arbitration Act and thus are broadly similar to each other.

Because the United States is a common-law system, arbitration law derives not only from these various statutes but also from court decisions interpreting them.

**2. Is the country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?**

The United States has been party to the New York Convention since its entry into force on 29 December 1970. (9 U.S.C. §§ 201-08). The United States has made two declarations to the New York Convention which limit its application to (i) awards made in the territory of another State Party to the Convention and (ii) differences arising from a legal relationship which is commercial in nature.

**3. What other arbitration-related treaties and conventions is the country a party to?**

The United States is party to the Inter-American Convention on International Commercial Arbitration (Panama Convention) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). In addition, the United States is party to 20 free trade agreements, including the North American Free Trade Agreement (NAFTA), and the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), and numerous bilateral investment treaties. These trade and investment agreements provide a limited right for investors from one contracting State to arbitrate claims against the State in which they invested.

**4. Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?**

The FAA pre-dates and is not based on the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”). The FAA differs from the Model Law with respect to the procedures for appointment of arbitrators, the power of arbitrators to rule on their own jurisdiction, the power of the courts to modify or correct an award, and the grounds for setting aside an award, among other issues. In general, the Model Law provides more detailed and numerous procedures for arbitration, such as the availability of provisional relief and the procedures to be followed in an event of a party default, whereas the FAA leaves much of this to be filled in by the parties’ arbitration agreement and selected arbitration rules. Despite these differences, U.S. courts have interpreted the FAA’s provisions in a manner that by and large is consistent with the Model Law. In addition, many state-level arbitration statutes, such as the Texas Arbitration Act, are based on the Model Law.

**5. Are there any impending plans to reform the arbitration laws?**

No. Consumer advocacy interests concerned about access to justice have led several legislative and regulatory efforts to restrict the use of pre-dispute arbitration agreements in form consumer and employment contracts and in connection with claims for violations of statutory law (e.g., civil rights or antitrust claims), but to date these efforts have been unsuccessful.

**6. What arbitral institutions (if any) exist? Have there been any amendments to their rules or are there any being considered?**

The main arbitral institutions that are headquartered in the United States are (i) the American Arbitration Association (AAA, [www.adr.org](http://www.adr.org)) and its International Centre for Dispute Resolution (ICDR, [www.icdr.org](http://www.icdr.org)) (‘AAA/ICDR’); (ii) JAMS ([www.jamsadr.com](http://www.jamsadr.com)); (iii) the International Institute for Conflict Prevention and Resolution (CPR, [www.cpradr.org](http://www.cpradr.org)); and (iv) the Inter-American Commercial Arbitration Commission (IACAC, [www.sice.oas.org](http://www.sice.oas.org)). In addition, the International Chamber of Commerce (headquartered in France), and the World Intellectual Property Association (headquartered in Switzerland), maintain branch offices in New York. None of these institutions have

amended their rules in the most recent three-year period.

**7. What are the validity requirements for an arbitration agreement?**

Under the FAA, an arbitration agreement must be in writing. To be valid, however, a written agreement need not necessarily be signed or incorporated in a signed contract. For example, the Delaware Chancery Court recently recognized the validity of an arbitration agreement reflected in an exchange of emails between counsel for the contracting parties. *Gomes v. Karnell*, No. 11814-VCMR (Del. Ch. Nov. 30, 2016). Beyond the writing requirement, the only permissible validity requirements are those imposed upon all contracts by the state law that governs the arbitration agreement (typically the governing law of the main contract or, in the absence of an express choice of law by the parties, the law of the state in which the arbitration is seated).

**8. Are arbitration clauses considered separable from the main contract?**

Yes. A valid agreement to arbitrate remains enforceable notwithstanding a successful challenge to the validity of the contract in which it appears. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

**9. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?**

The FAA is silent concerning multi-party or multi-contract arbitration. Most arbitral institutions, however, including AAA/ICDR and JAMS, provide a mechanism for joining additional parties or consolidating arbitrations between the same parties under more than one contract. The ICDR provides for the appointment of a special consolidation arbitrator at the request of a party. In addition, some states provide specific procedures permitting courts to order consolidation of cases where the claims arise in substantial part from the same transaction or series of transactions or common issues of law or fact exist. See, e.g., Cal. Code. Civ. Pro., § 1281.3. However, a party may not be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. *Stolt Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010). In such cases, the arbitrator will decide whether class arbitration is permissible.

**10. How is the law applicable to the substance determined?**

The FAA and its state law counterparts generally do not address the issue of choice of substantive law. Arbitral tribunals apply the law or laws chosen by the parties. Where the parties' agreement is silent, U.S. courts have held that an arbitrator has broad authority to determine the appropriate choice of law rules. In practice, the tribunal often will apply the choice-of-law rules of the law of the seat of arbitration.

**11. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?**

Very few categories of disputes are considered non-arbitrable in the United States (e.g., criminal law disputes). Virtually any dispute of a civil or commercial nature can be arbitrated. For example, intellectual property, antitrust, labor and employment, franchise, and civil rights claims all are arbitrable in the United States.

**12. Are there any restrictions in the appointment of arbitrators?**

No. The FAA does not restrict the appointment of arbitrators and state law provisions generally defer to the parties' selection.

**13. Are there any default requirements as to the selection of a tribunal?**

Where the parties fail to specify a method for appointing arbitrators, the institutional rules governing the arbitration typically provide for default appointments of one to three arbitrators depending on the complexity of the case. If the parties have not selected institutional rules, or if the process selected by the parties otherwise fails to result in appointment of an arbitrator, the FAA and most state arbitration laws permit the court to appoint an arbitrator. These laws, however, do not specify requirements for who may or may not be selected for a default appointment.

**14. Can the local courts intervene in the selection of arbitrators? If so, how?**

Neither the FAA nor state arbitration laws allow for court intervention in the selection of

arbitrators except in circumstances where a default appointment is necessary. See responses to questions 12 and 13, above.

**15. Can the appointment of an arbitrator be challenged? What is the procedure for such challenge? Has there been an increase in number of challenges in your jurisdiction?**

The FAA does not provide a procedure for challenging appointment of an arbitrator. The institutional rules of most arbitration institutions, including for example the AAA/ICDR, JAMS, and CPR, provide mechanisms for arbitrator challenges, typically based on alleged conflicts of interest. Some state arbitration statutes establish additional procedures for such challenges. For example, the California Arbitration Act requires arbitrators to make disclosures, and imposes a 15-day deadline for arbitrator challenges following those disclosures.

Following an arbitration, the FAA permits a party to challenge enforcement of an arbitration award on the ground that there was ‘evident partiality or corruption in the arbitrators.’ 9 U.S.C. §10.2. The U.S. circuit courts are split on how to interpret this ‘evident partiality’ standard, with some circuits finding evident partiality where undisclosed facts create a ‘reasonable impression’ of bias, and others finding ‘the burden on a claimant for vacation of an arbitration award due to ‘evident partiality’ is heavy, and the claimant must establish specific facts that indicate improper motives on the part of an arbitrator.’ *Republic of Argentina v. AWG Grp. Ltd.*, 211 F. Supp. 3d 335, 351 (D.D.C. 2016) (quoting *Al-Harbi v. Citibank*, 85 F.3d 680, 683 (D.C. Cir. 1996)).

**16. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?**

The FAA is silent regarding the authority of truncated tribunals. U.S. decisions under the FAA have held that truncated tribunals lack authority to decide disputes unless the parties’ agreement states otherwise (for example by reference to institutional rules that address this situation). The majority of institutional rules, including those of the AAA/ICDR and CPR, permit a truncated tribunal to proceed to a decision. Where the parties have failed to incorporate rules with this feature or to otherwise agree to a truncated tribunal, the arbitral process must be repeated. See, e.g., *Marine Prods. Exp. Corp. v M.T. Globe Galaxy*, 977 F.2d 66, 68 (2d Cir. 1992).

## 17. **Are arbitrators immune from liability?**

The FAA does not address immunity for arbitrators, but U.S. courts have held that an arbitrator is immune from civil liability for actions in the execution of the arbitrator's decision-making function. See e.g., *Sacks v. Dietrich*, 663 F.3d 1065, 1069-70 (9th Cir. 2011).

## 18. **Is the principle of competence-competence recognised? What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?**

The principle of competence-competence (i.e., the principle that the arbitral tribunal has authority to rule on its own jurisdiction, including to decide objections with respect to the existence or validity of the arbitration agreement) is recognized in the United States, but its scope and application are not codified or settled.

When presented with a challenge to its jurisdiction to decide particular claims, an arbitral tribunal seated in the United States may decide such challenge without need of referring it to a court for resolution. Whether a court would defer to such determination, however, would depend on the nature of the challenge at issue and, frequently, on the language of the parties' arbitration agreement.

When a question of arbitral jurisdiction is presented to a court for decision (such as where one party institutes an action to stay an arbitration commenced by the other party), the court will decide the issue itself (without deference to the arbitrator(s)) unless there is 'clear and unmistakable evidence' that the parties intended to submit that particular question to the arbitrator(s). See *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995). In practice, courts often find that where the parties have incorporated arbitration rules that empower the arbitral tribunal to determine its own jurisdiction, or broad language submitting 'any and all disputes' to arbitration, this constitutes 'clear and unmistakable evidence' that the parties intended the arbitrator(s) to determine their jurisdiction. On the other hand, courts also have held that certain jurisdictional challenges, such as challenges to the formation of the main contract containing the arbitration clause (e.g., an allegation that the contract was a forgery and thus never came into existence), cannot logically have been delegated to the arbitrator and therefore must be decided by the court irrespective of the language of the alleged

arbitration agreement. See, e.g., *Sphere Drake Ins. v. All American Ins.*, 256 F.3d 587 (7th Cir. 2001).

19. **How are arbitral proceedings commenced? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?**

The FAA does not contain default rules regulating the commencement of arbitral proceedings. Instead, this issue will be decided by reference to the dispute resolution procedures to which the parties have agreed or, in the absence of such agreement, by the law of the state of the seat of arbitration. For example, if parties have included a mandatory and precise period prior to the arbitration during which they agree to attempt negotiation or mediation, courts typically enforce such ‘tiered’ agreements.

There is no statute of limitation on the right to commence an arbitration. Instead, any limitations on a party’s claims arise from the law governing the substance of each claim.

20. **What happens when a respondent fails to participate in the arbitration? Can the local courts compel parties to arbitrate? Can they order third parties to participate in arbitration proceedings?**

Where a respondent fails to participate in the arbitration commenced under a valid arbitration agreement, the FAA empowers federal courts to compel the respondent to participate in the arbitration. 9 U.S.C. § 4. Most state arbitration acts confer similar authority on state courts. If a party nevertheless does not participate in the proceedings, the arbitral rules of most arbitration institutions empower arbitrators to enter a default award, but require that the non-defaulting party provide evidence in support of its claims. Such default awards are enforceable in the United States. For information on compelling arbitration by non-signatories, see question 22 below.

21. **In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of**

## **arbitration proceedings?**

Under the Foreign Sovereign Immunities Act, a sovereign state is immune from judicial process (including court proceedings under the FAA) unless one or more enumerated exceptions to state immunity apply. One such exception is where the state has waived its immunity by contract and entered into an agreement to arbitrate, subject to additional restrictions. See 28 U.S.C. 1605(a)(6); *Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion*, 832 F.3d 92, 107 (2d Cir. 2016), pet. for cert. dismissed, 137 S. Ct. 1622, 197 L. Ed. 2d 746 (2017). However, a waiver of immunity from suit does not constitute a waiver of immunity from attachment of assets. See question 32 for more on sovereign immunity and enforcement.

### **22. In what instances can third parties or non-signatories be bound by an arbitration agreement or award?**

Arbitration agreements generally bind only the parties. Nonetheless, applying ordinary principles of contract law, courts in the United States have held that third-party non-signatories may be bound by arbitration agreements on theories of estoppel, agency relationships with a party, assumption of the contract containing the arbitration agreement, third-party beneficiary status under the contract, or piercing the corporate veil. *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 518 (5th Cir. 2006). With respect to joinder, please see response to question 9 above.

Arbitration awards bind only the parties to the arbitration. Enforcing an arbitral award against a non-party to the arbitration (e.g., by piercing the corporate veil ) requires a separate lawsuit against the third party.

### **23. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?**

Most arbitral institutional rules empower a tribunal to issue interim measures. These include injunctions, preservation of evidence or assets, security for costs and temporary restraining orders. These rules, however, require the arbitrators to provide both parties an opportunity to be heard and do not permit the type of ex parte restraining orders granted by U.S. courts. Increasingly, institutions have amended their rules to provide for

emergency arbitrator procedures, which enable an interim arbitrator to grant such relief before the tribunal is constituted.

Federal and state courts have authority to issue interim measures – and, where appropriate, do issue such measures – pending constitution of the arbitral tribunal. (Although less common, courts sometime issue such measures even after constitution of the tribunal, provided that doing so does not undermine the arbitral process.) As a general matter, a party may seek interim relief from a court without waiving its right to insist that its claims be arbitrated. U.S. courts are empowered to issue preliminary injunctions and attachments of property as well as ex parte temporary restraining orders. Despite this broad authority, in practice, U.S. courts typically will deny applications for preliminary relief which could have been submitted to the arbitrator(s).

**24. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence?**

There are no particular rules of law governing evidentiary matters in arbitration. In general, '[a]rbitrators are accorded great deference in their evidentiary determinations, and need not follow all the niceties observed by the federal courts.' *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99 (2d Cir. 2013). Institutional rules often include provisions regarding evidentiary matters, which typically are subject to any contrary provision of the parties' agreement.

With respect to obtaining evidence, section 7 of the FAA empowers arbitrators to summon a witness to appear and testify at an arbitration hearing (and to produce documents at such hearing), and provides further that the US district court for the district in which the arbitration is seated may enforce such summonses. (There presently is a split of authority regarding (a) whether the FAA empowers an arbitrator to compel pre-hearing discovery, and (b) whether the territorial limits that apply generally to a federal court's ability to subpoena witnesses apply to subpoenas issued under the FAA.) Some state statutes also provide for judicial enforcement of arbitrator subpoenas, typically limited to the territory of the state in which the arbitration is seated, but law on this issue is unsettled.. In practice, parties to an arbitration may have difficulty enforcing arbitration subpoenas against out-of-state non-party witnesses.

**25. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings?**

Counsel in the United States are bound by the ethics rules of the states in which they practice, which largely are based on the Model Rules of the American Bar Association ('ABA'). These rules typically cover conflicts of interest, financial arrangements, conduct before a tribunal, and confidentiality. ABA Model Rule 5.5. addresses the multijurisdictional practice of law and has been amended to address practice by U.S. lawyers in foreign jurisdictions and by foreign lawyers in U.S. jurisdictions. Many states have promulgated further ethical rules to address international arbitration. Other states, like Texas, have not adopted Model Rule 5.5 and have no ethics rule specifically addressing lawyers engaged in international arbitrations.

Arbitrators in the United States are generally required to observe standards of impartiality and neutrality. Particular states may impose further requirements, such as California's Ethics Standards for Neutral Arbitrators in Contractual Arbitrations. In addition, arbitral institutions offer training and, in some cases, non-binding guidance, such as the JAMS Ethical Guidelines for Arbitrators or the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes.

**26. How are the costs of arbitration proceedings estimated and allocated?**

The FAA is silent on the award of costs and fees. State laws vary by jurisdiction. Where the law provides no guidance, the parties' agreement and the applicable arbitral rules will govern any costs and fees award. The AAA (Rule 47(b)), CPR (Rule 19), and JAMS (Rule 24(a)) all empower arbitrators to allocate costs and expenses between the parties, subject to any express provision in the parties' agreement.

**27. Can pre- and post-award interest be included on the principal claim and costs incurred?**

The FAA is silent on this issue, but U.S. courts have recognized the authority of the arbitral tribunal to award both pre- and post-award interest.

**28. What legal requirements are there for the recognition of an award?**

Under the FAA, an application to recognize (or 'confirm') an award issued in the United States (except for 'non-domestic' awards, as discussed below) must be filed within one year of issuance of the award. For awards deemed to be 'non-domestic' or 'foreign' within the meaning of the FAA and the New York Convention, the time limit for seeking recognition is three years from issuance of the award.

The party moving for recognition of a New York Convention award must file (1) a duly certified copy of the arbitration agreement and (2) a duly certified copy of the arbitration award. If these documents are not in English, the party moving for recognition must also submit a certified translation. A party moving for recognition of a domestic award must file (1) the arbitration agreement; (2) the selection or appointment of the arbitrators; (3) any written extension of time to make the award; (3) the award; and (4) any notices, affidavits or other papers 'used upon an application to confirm, modify, or correct the award,' together with each court order on the application. Unless the award is challenged under the grounds set forth in the FAA (for domestic awards) or the New York Convention (for non-domestic and foreign awards), the court is required to recognize the award.

**29. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts?**

The FAA does not impose limits on remedies. Consistent with the strong federal policy favoring arbitration, federal courts generally 'have . . . been hesitant to find that the arbitrator exceeded his authority where the arbitration agreement fails to affirmatively or otherwise clearly limit the arbitrator's authority.' *Rhone-Poulenc, Inc. v. Gould Electronics, Inc.*, 1998 WL 704420, \*3 (N.D. Cal. 1998). Certain states impose limits on arbitral remedies, but such rules do not apply to arbitrations governed by the FAA (essentially, arbitrations involving interstate or international commerce). For example, New York law prohibits arbitrators from awarding punitive damages, but this restriction does not apply to New York-seated arbitrations governed by the FAA.

**30. Can arbitration proceedings and awards be appealed or**

## **challenged in local courts? What are the grounds and procedure?**

The FAA and state arbitration statutes include specified grounds and procedures for challenging (referred to as 'vacating' or 'setting aside') an arbitration award. The FAA grounds and procedures apply in federal court set-aside proceedings only (an award may be challenged in federal court only if federal subject matter jurisdiction exists, which is the case for example with respect to international awards and awards between parties from different US states).

Under the FAA, an award may be set aside if (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption by the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing for sufficient cause, in refusing to hear pertinent and material evidence, or any other misbehavior which prejudiced any party's rights; or (4) the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award was not made. 9 U.S.C. § 10(a). These are the exclusive grounds for setting aside an award under the FAA, and the parties may not expand them by agreement. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

Although many state arbitration statutes mirror the FAA's set-aside grounds, some state courts have held that such statutory grounds (unlike the FAA's grounds) are not exclusive. For example, courts in a number of states have held that an award may be set aside for public policy reasons, in addition to the statutory grounds. In another departure from federal law, several states, including for example California, Texas, and New Jersey, allow the parties to expand the scope of judicial review of an arbitration award in state court by stipulating in their arbitration agreement that (a) their agreement is governed by state arbitration law, and (b) the arbitral tribunal has no power or authority to reach a decision based on 'reversible' errors of law or fact. Because excess of authority is a recognized set-aside ground, such an agreement, where permitted, effectively results in converting a set-aside proceeding into an appeal. (In *Hall Street*, the US Supreme Court specifically held that such an expansion of the scope of judicial review is impermissible under the FAA.)

### **31. Can the parties waive any rights of appeal or challenge to an**

## **award by agreement before the dispute arises (such as in the arbitration clause)?**

Under the FAA, ‘the grounds for vacatur of an arbitration award . . . are not waivable, or subject to elimination by contract.’ *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 737 F.3d 1262, 1267 (9th Cir. 2013). Most state courts that have addressed this issue have reached the same conclusion under state law. However, California will enforce waiver of the right to challenge a judgement confirming an arbitration award where the waiver is “clear and explicit.” *Emerald Aero, LLC v. Kaplan*, 1144, 215 Cal. Rptr. 3d 5, 21 (Ct. App. 2017), as modified on denial of reh'g (Mar. 21, 2017), review denied (June 14, 2017).

## **32. To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?**

The Foreign Sovereign Immunities Act, which prohibits courts from exercising personal jurisdiction over a foreign state, contains an exception for actions seeking to confirm and enforce arbitration awards governed by an international agreement in force in the United States — such as the New York Convention and the Washington Convention — where the plaintiff has effected proper service on the State. In general, to attach sovereign assets, the assets must be located in the United States and used for commercial activity in the United States. At its most basic level, the inquiry for determining whether an asset is used for ‘commercial activity’ asks whether a private person could have engaged in the same type of activity.

## **33. To what extent might a third party challenge the recognition of an award?**

U.S. courts have interpreted the FAA to allow only parties to an arbitration to challenge or intervene in a challenge to the recognition of an award. See *Acuff v. United Papermakers & Paperworkers*, 404 F.2d 169, 171 n. 2 (5th Cir. 1968). For example, where a collective bargaining agreement provides for arbitration between a union and an employer, the individual employee does not have standing to challenge the arbitration award even though the outcome of the arbitration may affect him or her. See *Melander v. Hughes Aircraft Co.*, 194 Cal. App. 3d 542, 547, 239 Cal. Rptr. 592, 595 (Ct. App.

1987). At least one state court has extended this rule to awards rendered under the Uniform Arbitration Act. *Eisen v. State Dep't of Pub. Welfare*, 352 N.W.2d 731, 736 (Minn. 1984).

34. **Have there been any significant developments with regard to third party funding recently?**

No. There have not been any significant recent developments.

35. **Is emergency arbitrator relief available? Is this frequently used?**

Yes. All major U.S. arbitration institutions, AAA/ICDR, CPR, and JAMS, provide for emergency arbitrator proceedings, and these procedures are being actively used. While there are not many decisions on the enforceability of measures issued by emergency arbitrators, likely due to a high rate of voluntary compliance, at least one U.S. court denied a motion to vacate an emergency arbitrator's order, finding that 'the interim order was not a final order and is not subject to review.' See *Chinmax Medical Sys. Inc. v. Alere San Diego, Inc.*, 2011 WL 2135350 No. 10-CV-2467-WQH(NLS), at \*5 (S.D. Cal. May 27, 2011). More recently, in *Yahoo! Inc. v. Microsoft Corp.*, a federal district court confirmed an order issued by an emergency arbitrator under the AAA rules, holding that the parties had 'a clear interest in enforcing the equitable award made by the Arbitrator as soon as possible.' 983 F.Supp.2d 310, 319 (S.D.N.Y. 2013).

36. **Are there arbitral laws or arbitration institutional rules providing for simplified or expedited procedures for claims under a certain value? Are they often used?**

The AAA/ICDR, JAMS, and CPR all provide for expedited arbitration under certain circumstances. These procedures, which place limits on discovery, simplify hearing procedures, encourage the use of a sole arbitrator, and set a deadline for the arbitrator(s) to render an award, are used often. The parties can modify the expedited procedures by agreement.

In 2017, the ICC introduced a similar set of expedited procedures. Where it applies, however, the ICC expedited rule requiring a sole arbitrator is mandatory and overrides the agreement of the parties to have three arbitrators.

**37. Have measures been taken by arbitral institutions to promote transparency in arbitration?**

All major commercial arbitration institutions in the United States provide for confidentiality of an arbitration award, and often of the arbitration process itself. In an effort to provide some transparency, several organizations, including the AAA and the ICC, publish anonymized award summaries that do not disclose the parties' identities or confidential commercial information. By contrast, ICSID frequently publishes awards, decisions, and submissions if the parties consent, and the United States Department of State maintains a public web page with links to its submissions in investor-State disputes.

**38. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted? If so, how?**

Yes. The AAA has formed a dedicated Diversity Committee to 'promote the inclusion of individuals who historically have been excluded from meaningful and active participation in alternative dispute resolution.' Similarly, CPR maintains a Diversity in ADR Task Force. In addition, a number of young professionals groups, notably the ICC-Young Arbitrators Forum, emphasize the need to promote diversity in selecting speakers and representatives, and the ICC, CPR and ICDR have pledged support for equal representation of women in arbitration.

**39. Have there been any developments regarding mediation?**

Yes. The UNCITRAL Working Group II continues work started in 2014 on the development of an international instrument for enforcement of settlements resulting from international commercial conciliation and mediation. The United States government has been active in these negotiations. In addition to government delegations, many arbitral institutions, including the AAA/ICDR have observer status at the working group and have actively participated in negotiations.

**40. Have there been any recent court decisions considering the setting aside of an award that has been enforced in another**

## **jurisdiction or vice versa?**

Yes. Several courts have addressed the question of whether (and if so, under what circumstances) an award that has been annulled at the seat of arbitration may be recognized and enforced in the United States. Most notably, two recent cases have clarified the position of the Second Circuit Court of Appeals on these issues. In *Pemex* (2016) and *Thai-Lao Lignite* (2017), the Second Circuit held that (a) US courts have discretion under the Panama Convention and the New York Convention to enforce an award that has been annulled at the seat of arbitration; (b) courts nevertheless should be very reluctant to enforce an award that has been annulled by the courts of the seat, which have primary jurisdiction over the arbitration, because enforcing such an award necessarily would imply a refusal to recognize the judgment of annulment, in breach of international comity; and (c) courts should only refuse to recognize the annulment judgment if enforcement would be repugnant to fundamental notions of what is decent and just in the United States (a very high standard that was satisfied in *Pemex* but not in *Thai-Lao*). *Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion y Produccion*, 832 F.3d 92, 107 (2d Cir. 2016), cert. dismissed, 137 S. Ct. 1622, 197 L. Ed. 2d 746 (2017); *Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, 864 F.3d 172, 184 (2d Cir. 2017).