

UNITED STATES OF AMERICA (USA)

DELOS GUIDE TO ARBITRATION PLACES (GAP)

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WASHINGTON D.C.



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IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The United States is one of the most sought-after arbitration venues in the world. The United States is known for vigorous enforcement of arbitral awards, neutral dispute resolution, and judicial preferences in favor of arbitration. The United States also has a reputation for permitting more invasive discovery than other jurisdictions, even in streamlined arbitration proceedings.

Many arbitrations in the United States are governed by the Federal Arbitration Act (“FAA”), which applies to any arbitration affecting interstate commerce (*i.e.*, commerce between one of the U.S. states) or international commerce. Each state typically has its own arbitration statute as well. However, a state statute generally applies only where the FAA is silent or if the dispute is entirely local to a particular state. The FAA bears some similarity to the UNCITRAL Model Law on International Commercial Arbitration. However, there are important differences. Unlike the Model Law, the FAA provides different grounds for vacating an award and few default rules of procedure where the parties fail to agree to a governing set of rules.

When considering arbitration in the United States, corporate and in-house counsel should consider the following factors about this jurisdiction:

Key places of arbitration in the jurisdiction	Popular venues include New York, Miami, San Francisco, Los Angeles, and Houston.
Civil law / Common law environment?	The U.S. is a common law country. Arbitrators are more likely to be persuaded by case law than in civil law countries.
Confidentiality of arbitrations?	U.S. arbitrations are not automatically confidential, but the parties may agree to keep the proceedings confidential.
Requirement to retain (local) counsel?	Each U.S. state separately governs the practice of law within its borders, and may prohibit foreign attorneys or attorneys from other U.S. states from participating in arbitrations located in that state.
Ability to present party employee witness testimony?	Arbitrators generally have broad discretion on evidentiary rulings, subject to any contrary agreement by the parties or applicable arbitration rules.
Ability to hold meetings and/or hearings outside of the seat?	Typically, there is an ability to hold meetings and/or hearings outside the seat.
Availability of interest as a remedy?	Parties in U.S. arbitrations may claim the full panoply of potential remedies, including pre- and post-judgment interest, costs, and potentially even punitive damages. However, the default “American Rule” is that each side pays its own attorney’s fees.
Ability to claim for reasonable costs incurred for the arbitration?	Parties are generally required to bear their own costs and legal fees, barring statutory provisions or an agreement to the contrary.
Restrictions regarding contingency fee arrangements and/or third-party funding?	The terms and legality of funding arrangements are governed by U.S. state laws. Each state has attorney ethical and possibly other rules (<i>e.g.</i> , champerty) that should be consulted.

Party to the New York Convention?	The U.S. is a party to the New York Convention and U.S. courts are empowered to enforce arbitral awards, including through injunctions and judgments.
Other key points to note	<p>U.S. law strongly favors arbitration, with limited avenues for challenging an arbitral award through judicial intervention</p> <p>U.S. arbitrators are considered more likely to grant extensive discovery, including potentially interrogatories and witness depositions, particularly in the case of domestic arbitration. However, the United States also offers robust protections for evidentiary and testimonial privileges.</p>
WJP Civil Justice score (2017-2018)	0.73

ARBITRATION PRACTITIONER SUMMARY

While the Federal Arbitration Act (“FAA”) is the primary arbitration statute in the United States, each state typically has its own arbitration statute as well. The FAA generally applies broadly—reaching any arbitration agreement or award which touches on interstate commerce (*i.e.*, commerce between one of the U.S. states) or international commerce. Typically, the FAA, when applicable, will pre-empt any contrary state law provisions. However, if the FAA is silent with respect to a particular issue, the applicable state law will control. The state arbitration law will also apply to the extent an arbitration agreement or award does not implicate interstate or international commerce—for instance, a purely local dispute that does not involve federal law. Moreover, the FAA itself is subject to interpretation by the courts, which may reach differing interpretations in areas in which the U.S. Supreme Court has not ruled.

In this context, the following are key questions for legal practitioners to consider when engaged in arbitrations in the United States. As these questions are answered, the parameters of the arbitration will take shape, and practitioners will know what to expect as the arbitral proceedings move forward.

Date of arbitration law?	The FAA was enacted in 1925. Typically, each U.S. state also has its own arbitration law, and the enactment dates vary from state to state.
UNCITRAL Model Law? If so, any key changes thereto?	The FAA bears some similarity to the UNCITRAL Model Law on International Commercial Arbitration. However, there are important differences. Unlike the Model Law, the FAA provides different grounds for vacating an award and few default rules of procedure where the parties fail to agree to a governing set of rules.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	The availability of specialised courts or judges varies across the U.S. For example, New York has implemented specific procedures to help its courts develop arbitration expertise, including by designating a specialized judge to handle all of the New York County Commercial Division’s international arbitration cases.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Most U.S. Federal and state courts permit some form of pre-arbitration interim measures. Whether the procedure is purely <i>ex parte</i> or requires some notice to the parties varies.
Courts’ attitude towards the competence-competence principle?	U.S. courts typically have a favourable view of the competence-competence principle.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The typical grounds for annulment of awards in the U.S. are: (i) the award was procured through corruption, fraud, or undue means; (ii) the arbitrators exhibited bias or acted corruptly; (iii) the arbitrators engaged in misconduct in the course of proceedings, prejudicing the parties or otherwise raising due process concerns; and (iv) the arbitrators exceeded their power or imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.
Courts’ attitude towards the recognition and enforcement of	Foreign awards are readily confirmed and enforced in the U.S., consistent with the policy of the New York Convention.

foreign awards annulled at the seat of the arbitration?	Depending on the circumstances, U.S. courts typically would not enforce an award that was annulled at the seat of the arbitration.
Other key points to note?	<ol style="list-style-type: none"> 1. <u>What type of court intervention, if any, can be expected during the arbitral proceedings?</u> U.S. federal and state courts may intervene in select circumstances to facilitate arbitration of claims. 2. <u>In what format should the award be?</u> Typically, awards under the FAA and state arbitration laws are written, but the FAA does not require that they be signed, dated, or reasoned. 3. <u>What are the requirements for a valid and enforceable award?</u> Typically, under the FAA and state arbitration laws, an award is valid and enforceable so long as it is written and the arbitral process is conducted in accordance with due process.

JURISDICTION DETAILED ANALYSIS

The Federal Arbitration Act (“FAA”) is the primary arbitration statute in the United States. It was enacted by the U.S. in 1925 to set forth the national policy of encouraging arbitration as an alternative dispute resolution mechanism. The FAA thus applies broadly, reaching any arbitration agreement or award which touches on interstate commerce (*i.e.*, commerce between one of the U.S. states) or international commerce. While states also have their own arbitration statutes, most of which are modelled on the FAA or the UNCITRAL Model Law, the FAA will pre-empt any contradictory state law provisions. However, if the FAA is silent with respect to a particular issue, the applicable state law will apply. The state arbitration law will also apply to the extent an arbitration agreement or award does not implicate interstate or international commerce – for instance, a purely local dispute that does not involve federal law. Moreover, the FAA itself is subject to interpretation by the courts, which may reach differing conclusions in the absence of U.S. Supreme Court intervention.

The FAA is divided into three Chapters: Chapter 1 is the principal chapter, setting forth the basic operation of federal arbitration law; Chapter 2 incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), which requires signatory states to enforce and recognize arbitration agreements and awards issued by other contracting states; and Chapter 3 incorporates the Inter-American Convention on International Commercial Arbitration of 1975 (“Panama Convention”), which applies a very similar, but more specific regime amongst signatory states in North, Central, and South America. Significantly, the provisions of Chapter 1 are applied in all cases unless a more specific provision of Chapter 2 or 3 conflicts with Chapter 1. Chapter 3 also incorporates the majority of Chapter 2 into Chapter 3.

The key provisions of Chapter 1 (Sections 1-10) are as follows:

- Section 2 provides that arbitration agreements are valid and enforceable just as any other contract provision.
- Sections 3 and 4 provide courts with authorization to, respectively, (a) stay any judicial proceedings that are properly the subject of arbitration, and (b) compel parties to arbitrate pursuant to the terms of their agreement. In theory, courts are authorized to conduct an analysis as to whether a particular dispute, or a particular party, is properly subject to the arbitration agreement unless there is “*clear and unmistakable evidence*” that the parties agreed to let the arbitrators decide their own jurisdiction (*i.e.*, “*competence-competence*”). In practice, however, many arbitral institution rules provide the arbitrators with such authorization, so that an agreement referencing those rules will preclude U.S. courts from an exacting inquiry into the applicability of the arbitration agreement.
- Section 5 grants judges authority to appoint arbitrators, but only in the event that the parties fail to do so notwithstanding a valid arbitration agreement, and without specifying any particular method for doing so.
- Section 7 permits courts to assist arbitrators with witnesses and evidence through the issuance of subpoenas, but, as discussed below, many other measures in aid of arbitration (*i.e.*, interim relief) are left to provisions of state law.
- Sections 9 and 10 respectively govern confirmation and vacatur (known in other jurisdictions as “set-aside” or “annulment”) of any award rendered in the U.S., whether domestic or international. Section 10 enumerates four, limited grounds for vacatur or non-confirmation: (i) the award was procured through corruption, fraud, or undue means; (ii) the arbitrators exhibited bias or acted corruptly; (iii) the arbitrators engaged in misconduct in the course of proceedings, prejudicing the parties or otherwise raising due process concerns; and (iv) the arbitrators exceeded their power or “*so imperfectly execut[ed] them that a mutual, final, and definite award upon the subject matter was not made.*” Some federal courts recognize an additional, judicially-created basis for vacatur when the arbitrators

act in “*manifest disregard of the law.*” While this latter ground has been the subject of significant debate and controversy, it is widely accepted that courts are not to review an arbitrator’s findings on the merits, and that even clear errors in applying or interpreting the relevant substantive law of the dispute do not provide a basis for vacatur.

- Significantly, Chapter 1 does **not** confer subject matter jurisdiction on the federal courts, which require an independent basis for such jurisdiction over the case.

The key additional provisions of Chapters 2 (Sections 201-208) and 3 (Sections 301-307) are as follows:

- Sections 201 and 301 confirm the New York Convention and Panama Convention, respectively, as U.S. law. Accordingly, if a party seeks to enforce an award rendered in a New York or Panama Convention signatory state (outside of the United States), a U.S. court must confirm the award unless one of the bases for non-recognition set forth in those Conventions applies. The two Conventions contain nearly identical provisions for non-enforcement, broadly summarized as follows:
 - The agreement to arbitrate was invalid or void under the law to which the parties have subjected it, or the parties were under some incapacity;
 - The party against whom the award is being invoked did not have proper notice or was otherwise unable to present its case;
 - The award deals with subject matter outside of the scope of the parties’ agreement;
 - The composition of the arbitral tribunal was not in accordance with the parties’ agreement or, failing such agreement, with the procedural law governing the arbitration;
 - The award has been set aside by the “competent authority” (generally, the courts at the seat of arbitration).
 - The dispute deals with subject matter that is not arbitrable in the place where the award is to be confirmed.
 - Recognition or enforcement of the award would contravene public policy in the place where the award is to be confirmed.
- While (unlike the New York Convention) the Panama Convention does not on its face limit its applicability to agreements and awards rendered in other contracting states, Chapter 3 (Section 304) inserts this reciprocity requirement into the FAA.
- Chapters 2 and 3 provide for federal court subject matter jurisdiction in certain circumstances involving arbitration agreements and awards subject to the New York and Panama Conventions (*i.e.*, international arbitration agreements and awards).

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

No. The Federal Arbitration Act (the “FAA”),¹ was enacted in 1925 and largely predates the Model Law. However, eight U.S. states have adopted arbitration laws based on the UNCITRAL Model Law.²

¹ 9 U.S.C. §§ 1–16, 201–208, 301–307. When enacted in 1925, the law was titled the “United States Arbitration Act.” 68th Cong., ch. 213, 143 Stat. 883 (1925). The unofficial name “Federal Arbitration Act” is more widely used today.

² UN Comm’n on Int’l Trade Law, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, and Texas have adopted legislation based on the UNCITRAL Model Law. Florida adopted the Model Law with its 2006 amendments, and the other seven states adopted the original 1985 version.

Florida Supplement: Florida has two arbitrations statutes: (1) an international statute, the Florida International Arbitration Act (“Florida FIAA”),³ enacted in 2010 based on the Model Law; and (2) a domestic statute, the Revised Florida Arbitration Code (“Revised Code”),⁴ based on the Revised Uniform Arbitration Act. The Florida FIAA adopts the Model Law’s definition of international arbitration;⁵ any arbitration seated in Florida that does not fall within that definition is governed by the Revised Code.

1.1.1 If yes, what key modifications have been made to it?

The FAA pre-empts any inconsistent state law provisions,⁶ including any provisions based on the Model Law. States with laws based on the UNCITRAL Model Law have generally adopted its key provisions, sometimes with modifications appropriate to the local jurisdiction. For example, California (discussed in more detail in a separate section) adopted the first six chapters of the 1985 Model Law and added a provision on conciliation aimed at Pacific Rim businesses that prefer a less formal dispute resolution process.⁷

Florida Supplement: As noted above, Florida adopted the Florida FIAA in 2010. The Florida FIAA is based upon, and nearly identical to, the Model Law, making only a few minor, procedural additions.

1.1.2 If no, what form does the arbitration law take?

International commercial arbitrations in the United States are governed by the FAA. FAA Chapter 1 applies to commercial arbitration generally, FAA Chapter 2 implements the New York Convention, and FAA Chapter 3 implements the Panama Convention. The FAA differs from the Model Law in the default selection rules for and number of arbitrators,⁸ certain grounds for setting aside an award,⁹ the authority of a court to modify and correct an award,¹⁰ and the level of procedural detail provided.¹¹

As noted above, under the U.S. federal system, federal arbitration law supersedes any inconsistent state law. In addition, U.S. federal courts often, but not always, have jurisdiction over international arbitration-related disputes. Consequently, state law will almost never provide the primary source of law for an international arbitration. However, the interpretation of the FAA on some questions has developed differently in different federal circuits, and between the federal courts and the courts of some of the states.¹²

Each state has its own arbitration laws, which may occasionally be used to fill gaps in the FAA.¹³ For example, New York’s arbitration law, codified at Article 75 of the New York Civil Procedure Practice and Rules, applies to both domestic and international arbitrations.¹⁴ New York has also implemented specific procedures to

³ Fla. Stat. §§ 684.0001-684.0048.

⁴ Fla. Stat. §§ 682.01-682.25.

⁵ See Fla. Stat. § 684.002(3); Article 1(3) of the UNCITRAL Model Law.

⁶ *Preston v. Ferrer*, 552 U.S. 346, 353 (2008).

⁷ Albert Golbert & Daniel Koley, “California’s Adoption of a Code for International Commercial Arbitration and Conciliation”, 10 *LOY. L.A. INT’L & COMP. L.J.* 583, 583, 588 (1988).

⁸ Compare 9 U.S.C. § 5 (stating that the default number of arbitrators is one and, if no method of arbitrator is provided in the parties’ agreement, the court may appoint arbitrators) with UNCITRAL Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985), as amended in 2006 (“Model Law”) art. 10(2), 11 (stating that the default number of arbitrators is three, and that arbitrators are chosen through a process involving party selection).

⁹ Compare 9 U.S.C. § 10 with Model Law art. 12 (setting out grounds for setting aside an award).

¹⁰ Compare 9 U.S.C. § 11 (permitting a court to modify or correct an award under limited circumstances) with Model Law art. 33 (allowing only the arbitral tribunal to modify or correct an award).

¹¹ Compare generally, e.g., 9 U.S.C. §§ 1-16 with Model Law ch. V, VI (laying out detailed procedural rules for the conduct of arbitral proceedings and the making of an award that are not covered by the FAA).

¹² See, e.g., n. 29–n. 31, *infra*, discussing circuit split on the requirement that an agreement to arbitrate be “in writing.”

¹³ Washington D.C., however, does not have a local arbitration law that applies in international arbitration. See D.C. Code §§ 16-4401–16-4432 (outlining rules for domestic arbitration only). Accordingly, international arbitration in Washington, D.C. is governed only by the FAA.

¹⁴ N.Y. C.P.L.R. §§ 7501–7514.

help its courts develop arbitration expertise, including by designating a specialized judge to handle all of the New York County Commercial Division's international arbitration cases.¹⁵

1.2 When was the arbitration law last revised?

The FAA has not undergone an overall revision since it was first enacted in 1925.¹⁶ Significant additions to the FAA were made in 1970 to implement the New York Convention¹⁷ and in 1990 to implement the Panama Convention.¹⁸ Two separate enactments in 1988 made minor updates to the general provisions.¹⁹ Many state laws, including in UNCITRAL Model Law states, have been revised more recently.²⁰

Florida Supplement: The Florida FIAA was last amended in 2013 to, *inter alia*, incorporate another statute providing that a party that initiates arbitration, or is party to an agreement to arbitrate, in Florida consents to *in personam* jurisdiction in Florida with respect to any action arising out of or in connection to the arbitration and any resulting order or award.²¹

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The FAA provides the procedural law for arbitrations seated in the United States,²² with gaps filled by state law where applicable.

Principles of ordinary contract law, which may be the law of a U.S. or foreign jurisdiction, govern the validity, revocability, and enforceability of arbitration agreements.²³ State law that imposes more onerous requirements on arbitration agreements than on other agreements is pre-empted as inconsistent with the FAA.²⁴ If the parties' underlying contract contains a choice of law provision, a court will generally apply the law selected by the parties to any questions concerning the arbitration agreement.²⁵ Where the contract does not contain a choice of law provision, a court will conduct a conflict of laws analysis, applying the conflict of laws rules of the state in which it sits to determine which law to apply.²⁶ These rules vary from state to state; the traditional approach was to apply the law of the place where the contract was made, but most states now weigh which jurisdiction has the most significant relationship to the transaction or the greatest interest in applying its own laws.²⁷

¹⁵ Administrative Order, Unified Court System, First Judicial District, Supreme Court, Civil Branch (A. Gail Prudenti, Chief Administrative Judge) (Oct. 3, 2013).

¹⁶ 68th Cong., ch. 213, 43 Stat. 883 (1925) (original enactment of FAA); see, also 80th Cong., ch. 392, § 2, 61 Stat. 674 (1947) (reenacting FAA without substantive change as Title 9, United States Code).

¹⁷ Pub. L. 91-368, § 1, 84 Stat. 692 (1970).

¹⁸ Pub. L. 101-369, § 2, 104 Stat. 450 (1990).

¹⁹ Pub. L. 100-669, § 1, 102 Stat. 3969 (1988) (excluding application of the Act of State doctrine in proceedings to enforce arbitral agreements or awards); Pub. L. 100-702, title X, § 1019(a), 102 Stat. 4670 (1988) (allowing immediate appeal from orders refusing to enforce an arbitral agreement or award); see, also Pub. L. 101-650, title III, § 325(a)(2), 104 Stat. 5120 (1990) (correcting a technical numbering error in the 1988 amendments).

²⁰ See, e.g., UN Comm'n on Int'l Trade Law, *supra* note 2 (showing eight states' adoption of the UNCITRAL Model Law between 1988 and 2012).

²¹ 2013 Fla. Sess. Law Serv. Ch. 2013-164 (C.S.S.B. 186) (WEST); see, also Fla. Stat. § 684.0049.

²² *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (noting that the FAA governs both domestic and international arbitration proceedings).

²³ 9 U.S.C. § 2; See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

²⁴ *Preston*, 552 U.S. at 353 (2008); *Perry*, 482 U.S. at 491.

²⁵ See, e.g., *Telenor Mobile Comm'ns AS v. Storm LLC*, 584 F.3d 396, 411 n.11 (2d Cir. 2009) ("[C]hoice of law clause [in the underlying contract] governs Storm's arbitrability challenge.").

²⁶ See, e.g., *Progressive Casualty Insurance Co. C.A. v. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 45, 46 (2d Cir. 1993); *St. Paul Fire & Marine Ins. Co. v. Employers Reinsurance Corp.*, 919 F. Supp. 133, 136 (S.D.N.Y. 1996) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)).

²⁷ See, e.g., *Hammersmith v. TIG Insurance Co.*, 480 F.3d 220 (3d Cir. 2007); *Progressive Casualty*, 991 F.2d at 46 n.6.

Florida Supplement: Florida follows the traditional approach, applying, in the absence of any choice-of-law provision contained in the arbitration agreement, the law of the place where the arbitration agreement was reached to interpret questions about the agreement's nature, interpretation, and validity.²⁸ At least one federal court in Florida has ruled that, because arbitration agreements are severable under federal law, arbitration agreements that do not themselves contain a choice-of-law clause are subject to the law in which they were formed—even where the underlying agreement contains a separate choice-of-law clause selecting the laws of a different state.²⁹

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes. An arbitration provision is severable from the contract in which it is included.³⁰ Thus, a challenge to the underlying contract as a whole does not prevent a court from enforcing a specific agreement to arbitrate.³¹ Unless there is a challenge to the validity of the arbitration clause itself, the arbitrator resolves questions concerning the validity of the underlying contract in the first instance.³² This federal rule of severability applies in state as well as federal courts and pre-empts inconsistent state law.³³

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

The FAA requires that the arbitration agreement be in writing.³⁴ Courts within the United States are divided on the specific requirements that must be met for an agreement to satisfy the “in writing” requirement.³⁵ For example, the United States Court of Appeals for the Second Circuit (which includes New York) has held that an arbitration clause in a contract signed by only one party did not satisfy the writing requirement,³⁶ while the United States Courts of Appeals for the Fifth Circuit (which includes Texas) and the Eleventh Circuit (which includes Florida) have held that an unsigned writing may be sufficient in some cases.³⁷

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

As arbitration is fundamentally a matter of contract,³⁸ arbitration agreements are subject to ordinary principles of law that allow a contract to be enforced by or against non-parties in limited circumstances.³⁹ These principles include estoppel, incorporation by reference, assumption, waiver, agency, third-party beneficiary, and alter ego or veil piercing.⁴⁰

²⁸ *State Farm Mut. Auto. Ins. Co. v. Roach*, 845 So. 2d 1160 (Fla. 2006); *Higgins v. West Bend Mut. Ins. Co.*, 85 So. 3d 1156, 1158 (Fla 5th DCA 2012). Questions about the contract's performance are governed by the law of the place of performance. *Higgins*, 85 So. 3d at 1158; *Prou v. Giarla*, 62 F. Supp. 3d 1365, 1383 (S.D. Fla. 2014).

²⁹ *Rimel v. Uber Technologies, Inc.* 246 F. Supp. 3d 1317 (M.D. Fla. 2017).

³⁰ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006).

³¹ *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010).

³² See *Buckeye Check Cashing*, 546 U.S. at 446; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

³³ See *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (citing *Buckeye Check Cashing*, 546 U.S. at 447-48).

³⁴ 9 U.S.C. § 2.

³⁵ See S.I. Strong, “What Constitutes An “Agreement in Writing” in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act”, 48 *STAN. J. INT'L L.* 47(2012) (discussing different definitions of “agreement in writing” under the FAA and the New York Convention and inconsistent treatment of a signature requirement by U.S. courts).

³⁶ *Kahn Lucas Lancaster v. Lark International*, 186 F.3d 210, 216-18 (2nd Cir 1999).

³⁷ *Todd v. SS Mut Underwriting Association* (Bermuda), 601 F.3d 329, 335 n.11 (5th Cir 2010); *Sphere Drake Insurance v. Marine Towing*, 16 F.3d 666, 669 (5th Cir 1994); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1369 (11th Cir. 2005).

³⁸ *Rent-A-Ctr.*, 561 U.S. at 67.

³⁹ See *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009) (quoting 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 57:19 (4th ed. 2001)).

⁴⁰ See *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009) at 631; *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 129 (2d Cir. 2003); *Lawson v. Life of the South Ins. Co.*, 648 F.3d 1166, 1168 (11th Cir. 2011).

2.5 Are there restrictions to arbitrability?

There are no restrictions to arbitrability as to a class of disputes or persons in the FAA itself.⁴¹ The central purpose of the FAA is to ensure that agreements to arbitrate are enforced in accordance with their terms and are treated no less favourably than other contracts.⁴² The FAA pre-empts state law – statutory or common – that prohibits arbitration of a particular type of claim.⁴³

Accordingly, parties may agree to arbitrate claims based on statutory rights, including those that arise in connection with arbitrable contract issues in the absence of a federal statute excluding the specific statutory claims from arbitration.⁴⁴ Congress has enacted such exclusions only in very limited circumstances.⁴⁵ In general, claims arising under securities laws, antitrust laws and other statutes enacted to protect the public interest are fully arbitrable if they fall within the scope of a contractual arbitration clause.

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

No.

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

No. Although some states have attempted to create rules limiting the ability of corporations to include agreements to arbitrate in consumer contracts, the U.S. Supreme Court has struck down such provisions as contrary to the FAA's principle of non-discrimination against arbitration agreements.⁴⁶

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Yes. Upon application of a party, a U.S. court where litigation is pending is required to stay the litigation if the court is satisfied that the issue involved is referable to arbitration, unless the applicant for a stay has waived the right to arbitrate.⁴⁷

When a case contains claims that the parties have agreed to submit to arbitration and other claims, the court may, in its discretion, stay litigation of the entire matter or stay only the claims covered by the arbitration agreement.⁴⁸

Florida Supplement: The Florida FIAA is similar to the FAA in that it allows a court to refer to arbitration any matter that is subject to an arbitration agreement, provided a party so requests before submitting its first statement on the substance of the dispute.⁴⁹

3.1.1 If the place of the arbitration is inside of the jurisdiction?

Yes.

⁴¹ See *Mitsubishi Motors*, 473 U.S. at 627.

⁴² *Stolt-Nielsen*, 559 U.S. at 682.

⁴³ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2001); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012).

⁴⁴ See *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

⁴⁵ Most notably, predispute arbitration agreements in motor vehicle dealer franchise contracts are not enforceable. See 15 U.S.C. § 1226. In addition, the Sarbanes-Oxley Act, which regulates public company accounting, excludes the applicability of predispute arbitration provisions to suits under the act by whistleblowers. See 18 U.S.C. § 1514A(e)(2). However, courts have applied this exception narrowly, holding it does not apply to the similar whistleblower cause of action under the Dodd-Frank Act, 15 U.S.C.A. § 78u-6. See, e.g., *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 493 (3d Cir. 2014).

⁴⁶ See, e.g., *Kindred Nursing Centers, L.P. v. Clark*, 581 U.S. ___ (2017); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2001).

⁴⁷ 9 U.S.C. § 3.

⁴⁸ *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 856 (2d Cir. 1987).

⁴⁹ Fla. Stat. § 684.0009.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Yes. The FAA does not distinguish between a stay in favour of arbitration inside or outside of the jurisdiction.

A motion for a stay is often brought together with a motion to compel arbitration.⁵⁰ For agreements covered by the New York Convention or Panama Convention, the FAA permits courts to compel arbitration at any place provided for in the parties' agreement, whether "*within or without the United States.*"⁵¹ For agreements not covered by the New York Convention, there is disagreement as to whether courts may compel arbitration outside their own judicial district, even when the parties' agreement provides otherwise.⁵² This distinction is seldom if ever important, because the courts still must stay proceedings even if they do not directly order the parties to arbitrate. Virtually all modern arbitration rules recognize that arbitration may proceed in the absence of a party, and therefore a court order compelling a party to arbitrate is rarely necessary once a court has determined that a dispute is subject to arbitration and has stayed a court proceeding in favour of arbitration.

Florida Supplement: Although arbitrations subject to the Florida FIAA typically take place in Florida, the law does not distinguish between a referral for arbitration inside or outside of the state.⁵³

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

The FAA requires a U.S. court to stay litigation proceedings only when the court is satisfied that the issue is referable to arbitration under the parties' agreement.⁵⁴ Therefore, a party seeking to enforce an anti-suit injunction from an arbitrator would still need to convince the U.S. court independently that the parties intended to submit the issue to arbitration.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

U.S. courts may not intervene directly in an arbitration seated outside of the jurisdiction. However, a U.S. court may issue injunctions in aid of arbitration seated anywhere against a party in its jurisdiction.

Before issuing an injunction, a U.S. court must first satisfy itself of its jurisdiction over the party to be enjoined. When the party to be enjoined is not a citizen or resident of the state where the court is located, and has not consented to the court's jurisdiction, there must be sufficient minimum contacts between that party and the forum state such that a U.S. court's exercise of personal jurisdiction over that party does not offend due process.⁵⁵

Ordinarily, to obtain an injunction in aid of arbitration, a party must show that it will suffer irreparable harm in the absence of an injunction, that it is likely to succeed on the merits of its claims, and that the balance of hardships tips in its favour.⁵⁶ Courts may also consider the public interest and the interest of comity to foreign nations. Courts are frequently reluctant to issue injunctive relief in aid of arbitration if such relief can be timely obtained from the arbitration tribunal.⁵⁷ When, after a U.S. court grants an injunction, the arbitrator

⁵⁰ 9 U.S.C. § 4.

⁵¹ 9 U.S.C. §§ 206, 303.

⁵² *Seaman v. Private Placement Capital Notes II, LLC*, 2017 WL 1166336, at *6 (S.D. Cal. Mar. 29, 2017). Courts in other circuits have rejected this view. See *Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1220 (10th Cir. 2005) (collecting cases).

⁵³ Fla. Stat. §§ 684.0002(2), 684.0009.

⁵⁴ 9 U.S.C. § 3. There does not appear to be case law on the enforceability of an anti-suit injunction issued by an arbitrator.

⁵⁵ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁵⁶ See, e.g., *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015).

⁵⁷ See, e.g., *Smart Techs. ULC v. Rapt Touch Ireland Ltd*, 2016 WL 3871179 (N.D. Cal. July 15, 2016); *A & C Disc. Pharmacy, L.L.C. v. Caremark, L.L.C.*, 2016 WL 3476970, at *6 (N.D. Tex. June 27, 2016).

subsequently decides to modify or terminate the injunction, several U.S. courts have recognized the arbitrator's authority to do so and have declined to further intervene to enforce the injunction.⁵⁸

A court's power to issue injunctions in aid of arbitration includes the power to issue an anti-suit injunction restraining a party subject to its jurisdiction from proceeding in a foreign lawsuit over a claim that the party has agreed to arbitrate.⁵⁹ Some courts have held that they have the authority to grant anti-arbitration injunctions as well, if they determine that a dispute is not subject to arbitration.⁶⁰ For an arbitration agreement governed by the New York Convention or the Panama Convention, a U.S. court may appoint arbitrators in accordance with the terms of the parties' agreement on application of a party, even for arbitration outside of the jurisdiction.⁶¹

By statute, U.S. courts may compel discovery for use in foreign or international tribunals.⁶² The Second and Fifth Circuits have held that this does not include arbitral tribunals.⁶³ Relying on subsequent dicta from the U.S. Supreme Court,⁶⁴ however, several district courts have held that they could order such discovery,⁶⁵ with some courts drawing a distinction between "private" commercial arbitrations and investor-State arbitrations.⁶⁶ Circuit courts have so far declined to address the issue and uncertainty remains as to the availability and scope of such discovery in aid of arbitration.⁶⁷

Florida Supplement: The Florida FIAA states that: "*It is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant such a measure.*" Florida courts have not had occasion to interpret this provision, although it is expressly not limited to arbitral proceedings within Florida.⁶⁸

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

The FAA does not address the representation of parties. Parties should consult the rules governing counsel in the state in which the arbitration is seated. Those rules generally provide that individuals may be represented by counsel or represent themselves on a *pro se* basis. However, many states, including New York

⁵⁸ See, e.g., *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2d Cir. 1990); *In re S.W. Ranching Inc.*, 2017 WL 4274309, at *3 (S.D. Tex. Sept. 22, 2017).

⁵⁹ *Paramedics Electromedicina Comercial, Ltda. v. GE Medical Sys. Information Techs., Inc.*, 369 F.3d 645, 658 (2d Cir. 2004); see also *Canon Latin America, Inc. v. Lantech*, 507 F.3d 597 (11th Cir. 2007).

⁶⁰ See *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099, 1103 (11th Cir. 2004) (issuing an anti-arbitration injunction under the All Writs Act, 28 U.S.C. § 1651); *Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.*, 643 F.2d 863, 868 (1st Cir. 1981) (holding that the authority to grant an anti-arbitration injunction is "concomitant of the power to compel arbitration" under 9 U.S.C. § 3).

⁶¹ 9 U.S.C. §§ 206, 303.

⁶² See 28 U.S.C. § 1782 (authorizing U.S. courts to order discovery (i) upon request of an "interested person," (ii) over a person or entity "found" in the United States, (iii) "for use" in a proceeding "in a foreign or international tribunal").

⁶³ *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190-91 (2d Cir. 1999); *In re Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).

⁶⁴ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 257 (2004) (citing with approval a statement that "[t]he term 'tribunal' . . . includes administrative and arbitral tribunals") (quoting Smit, *International Litigation under the United States Code*, 65 Colum. L.Rev. 1015, 1026-1027 & nn.71, 73 (1965)) (emphasis added).

⁶⁵ See, e.g., *In re Application of Chevron Corporation*, Case N. 10-MC-00002 (S.D.N.Y. Nov. 5, 2010); *In re the Republic of Ecuador*, Case No. 10-80225 (N.D. Cal. Sept. 15, 2010) (both applying the multifactor test developed by the Supreme Court in *Intel* to grant requests for discovery to be used in investor-state arbitrations).

⁶⁶ See, e.g., *In re Ex Parte Application of Kleimar N.V.*, No. 16-MC-355, 2016 WL 6906712 (S.D.N.Y. Nov. 16, 2016) (declining to follow prior Second Circuit case law prohibiting the taking of evidence for use in a foreign arbitration, noting that dicta from *Intel* "suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782" and that several other courts, following *Intel*, found private foreign arbitrations to be "tribunals" for the purposes of Section 1782).

⁶⁷ See *Chevron v. Berlinger*, 629 F.3d 297 (2d Cir. 2011); *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA)*, 747 F.3d 1262, 1270 n.4 (11th Cir. 2014); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed.Appx. 31, 34 (5th Cir. 2009).

⁶⁸ Fla. Stat. §§ 684.00002(2), 684.001.

and Florida, require corporations and business entities to be represented by counsel.⁶⁹ In addition, some states have other rules that may bear on the representation of parties by an out-of-state or foreign lawyer. In New York, for instance, courts have permitted a foreign attorney to represent a party in an arbitration on the theory that such attorney is not engaging in the unauthorized practice of law due to the unique nature of arbitration.⁷⁰

Florida Supplement: The Rules Governing the Florida Bar specifically permit a foreign attorney to represent a party to an arbitration, provided that either (1) such foreign attorney is associated with a lawyer admitted to the Florida Bar;⁷¹ (2) such foreign attorney is representing a client that resides in or has an office in the attorney's home state; or (3) the arbitral proceeding is reasonably related to the foreign attorney's practice in a jurisdiction in which he or she is admitted.⁷²

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

The institution administering the arbitration is the platform for parties to initially challenge and vet arbitrators' independence and impartiality, through the appointment process and throughout the proceeding. While some courts maintain that they retain the inherent power to monitor issues of arbitrator impartiality, courts are generally reluctant to interfere with arbitration proceedings. The FAA instead provides for the vacatur of an arbitration award when an arbitrator has demonstrated "evident partiality."⁷³

The Supreme Court established the "evident partiality" standard in *Commonwealth Coatings v. Continental Casualty Co.*⁷⁴ Writing for a plurality, Justice Black found that arbitrators not only needed to avoid actual bias, but must also "avoid even the appearance of bias."⁷⁵ Thus, a failure to disclose information that could create such an appearance could lead to vacatur, even in the absence of actual bias. In a concurring opinion, however, Justice White added that arbitrators need not be disqualified if they have business relationships with the litigants but disclose them in advance, or if they fail to disclose what is otherwise a "trivial" relationship. This plurality opinion has led to differing interpretations of the standard by the federal courts. For example, in the Second Circuit, which includes New York, "[e]vident partiality may be found only where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration" and a failure to disclose a relationship which would not meet the standard is not on its own a basis for vacatur.⁷⁶ The Eleventh Circuit, which includes Florida, in contrast, finds "'evident partiality' of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists."⁷⁷

⁶⁹ See, e.g., CPLR § 321, requiring a corporation in a New York action to be represented by an attorney. *Szteinbaum v. Kaes Inversiones y Valores, C.A.*, 476 So.2d 247, 248 (Fla.3d DCA 1985) (holding that common law requires corporations to be represented by an attorney).

⁷⁰ See *Williamson v. John D Quinn Construction Corp.*, 537 F.Supp. 613, 626 (S.D.N.Y. 1982).

⁷¹ 4-5.5(c)(1), (d)(1) of the Rules Regulating the Florida Bar.

⁷² Rules 1-3.11(a) and 4-5.5(c), (d) of the Rules Regulating the Florida Bar.

⁷³ 9 U.S.C. § 10(a)(2). Indeed, where a district court removed an arbitrator in a purportedly "extreme" case, the Ninth Circuit overturned that decision and further observed that "[t]he majority of our sister circuits expressly preclude any mid-arbitration intervention." *In re Sussex*, 781 F.3d 1065, 1073 (9th Cir. 2015).

⁷⁴ *Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145 (1968).

⁷⁵ *Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968).

⁷⁶ *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 64, 77 (2d Cir. 2012) (internal citations omitted) ("The nondisclosure does not by itself constitute evident partiality. The question is whether the facts that were not disclosed suggest a material conflict of interest.").

⁷⁷ *Gianelli Money Purchase Plan and Tr. v. ADM Inv'r Services, Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998).

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?

The FAA makes clear that courts are intended only as a last resort for the constitution of an arbitral tribunal, which should otherwise be handled by the parties' agreement or the administering institution. However, courts can appoint arbitrators under two scenarios: (1) where an agreement calls for appointment to be handled by an institution that either does not exist, or has ceased to exist; and (2) where the parties' agreement does not provide for a method of appointment and the parties "*fail to avail [themselves] of such a method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators...*"⁷⁸ Under such circumstances, the FAA generally permits courts to appoint arbitrators, assign an arbitral institution to administer the proceedings, or develop an *ad hoc* method for appointment. However, where the arbitration agreement is subject to Chapter 3 of the FAA (*i.e.*, the Panama Convention), the FAA and the Panama Convention call for appointment pursuant to the rules of procedure of the Inter-American Commercial Arbitration Commission.⁷⁹

Florida Supplement: The Florida FIAA authorizes the Florida courts to appoint an arbitrator where an arbitration agreement provides for one arbitrator and the parties are unable to agree on an appointee.⁸⁰ Additionally, the courts can intervene at the request of a party where (1) an arbitration agreement provides for three arbitrators and one of the parties fails to nominate one of the arbitrators or the two arbitrators nominated by the parties are unable to agree on a third arbitrator;⁸¹ (2) the parties, their appointed arbitrators, or a third party fails to act or reach an agreement pursuant to the chosen appointment procedure;⁸² (3) a party that has unsuccessfully challenged an arbitrator's appointment seeks the circuit court's review within 30 days of its initial, unsuccessful challenge;⁸³ or (4) an arbitrator becomes unable to perform his or her functions or for other reasons fails to act without undue delay and does not withdraw from the arbitration.⁸⁴

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

4.4.1 If so, are they willing to consider *ex parte* requests?

While the FAA itself is silent on interim relief, most federal circuits permits injunctive relief pending arbitration under the usual test applicable to injunctions.⁸⁵ Furthermore, state arbitration statutes often expressly provide for such measures. For example, New York law contains a specific statute dealing with attachments or preliminary injunctions in aid of an arbitration anywhere in the world, so long as a party can show that any eventual award might be rendered ineffectual but for the interim relief.

Florida Supplement: The Florida FIAA grants Florida courts the same power as they have in court proceedings to issue interim relief in aid of an international arbitration anywhere in the world, provided they exercise that power in accordance with the applicable requirements and in consideration of the specific features of international arbitration.⁸⁶

⁷⁸ 9 U.S.C. § 5.

⁷⁹ See 9 U.S.C. § 303.

⁸⁰ Fla. Stat. § 684.0012(b).

⁸¹ Fla. Stat. § 684.0012(3)(a).

⁸² Fla. Stat. § 684.0012(4).

⁸³ Fla. Stat. § 684.0014(3).

⁸⁴ Fla Stat. 684.0015(1)

⁸⁵ See, *e.g.*, *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989) (we hold that a district court has the authority to grant injunctive relief in an arbitrable dispute, provided that the traditional prerequisites for such relief are satisfied.").

⁸⁶ Fla. Stat. § 684.0028

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

The FAA does not expressly address many of the specific issues raised in the questions set out in this section. U.S. courts, however, have developed case law interpreting the FAA to grant broad discretion to the parties and arbitrators.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

The FAA does not address confidentiality. Ordinarily, confidentiality is either left to party agreement or addressed in accordance with the rules of an arbitral institution. In practice, arbitral proceedings are generally conducted in private facilities, making public access a non-issue even in the absence of express confidentiality. However, parties should be aware that court proceedings to compel arbitration, or confirm and enforce an award, will require parties to append their arbitration agreement or award to court pleadings. Such court pleadings are publically accessible unless independent grounds exist to keep them sealed from the public (e.g., they contain trade secrets, medical information, etc.).

4.5.2 Does it regulate the length of arbitration proceedings?

The FAA is silent on length of proceedings; this is left to the parties and arbitrators.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Section 4 of Chapter 1 of the FAA provides that federal courts may enforce an agreement to arbitrate by issuing a compulsory "*order directing that such arbitration proceed in the manner provided for in such agreement*" but also specifying that the "*hearing and proceedings, under such agreement, shall be within the [judicial] district in which the petition for an order directing such arbitration is filed.*" Most courts have interpreted this provision to mean that the court-compelled arbitration can only take place in the judicial district in which the petition to compel arbitration was filed.⁸⁷ Some of these courts have applied this limitation even where the parties have selected a different arbitration seat in the agreement.⁸⁸ This restriction, however, only applies to domestic U.S. arbitrations. Chapters 2 and 3 of the FAA governing agreements falling under the New York and Panama Conventions, respectively, are broader and expressly provide that courts may direct arbitration to be held at the agreed upon place, "*whether that place is within or without the United States.*"⁸⁹

4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?

The FAA does not address the issuance of interim relief by arbitrators. Courts, however, take the view that arbitrators have the implied power to grant interim measures, absent the expression of a contrary intent in

⁸⁷ *Control Screening LLC v. Technological Application and Production Co. (Tecapro), HCMC-Vietnam*, 687 F.3d 163 (3d Cir. 2012); *Ansari v. Qwest Communications Corp.*, 414 F.3d 1214 (10th Cir. 2005); *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007 (6th Cir. 2003); *Jain v. Mere*, 51 F.3d 686 (7th Cir. 1995). But see *Sanchez v. Nitro-Lift Technologies, LLC*, 762 F.3d 1139, 1152-53 (10th Cir. 2010) (§ 4 is a venue requirement that parties waive when they do not raise the issue before the district court).

⁸⁸ *Homestake Lead Co. of Missouri v. Doe Run Resources Corp.*, 282 F. Supp.2d 1131 (N.D. Cal. 2003); *Indian Harbor Ins. Co. v. Global Transport Sys.*, 197 F. Supp.2d 1, 3 (S.D.N.Y. 2002) (compelling arbitration in same district despite different seat specified in arbitration agreement).

⁸⁹ 9 U.S.C. §§ 206, 303. These sections apply when (1) the agreement is covered by the New York Convention or the Panama Convention and (2) the agreement specified an arbitral seat in the territory of a Convention signatory. See *Jain v. Mere*, 51 F.3d 686 (7th Cir. 1995); *Bauhinia Corp v. China National Machinery & Equipment Import Corp.*, 819 F.2d 247 (9th Cir. 1987); *Internaves de Mexico s.a. de C.V. v. Andromeda Steamship Corporation*, 247 F. Supp.3d 1294, 1300 (S.D. Fla. 2017) (citing *Jain*, 51 F.3d at 691).

the arbitration agreement.⁹⁰ Furthermore, many arbitral institution rules specifically authorize arbitrators to issue interim relief.⁹¹

Florida Supplement: The Florida FIAA provides that an arbitrator overseeing an international arbitration has the power, which can be waived by an agreement between the parties, to issue interim relief to maintain or restore the “status quo” pending the determination of the dispute, to prevent imminent harm or prejudice to the arbitral process, to provide a means of preserving assets that might satisfy an award, and to preserve evidence that might be relevant to the dispute.⁹²

4.5.5 Does it regulate the arbitrators’ right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The FAA does not regulate an arbitrator’s right to admit or exclude evidence. Arbitrators generally have broad discretion on evidentiary rulings, subject to any contrary agreement by the parties or applicable arbitration rules.⁹³

Section 7 of the FAA does, however, grant arbitrators subpoena power to summon witnesses and evidence, and authorizes courts to compel attendance of those refusing to testify.⁹⁴ The courts’ power is in turn constrained by the applicable rules of civil procedure, such as Federal Rule of Civil Procedure 45(b)(2), which limits a district court’s subpoena power to a 100-mile territorial limit outside of its own jurisdiction. Indeed, some courts have held that this territorial limitation also applies to an arbitrator’s subpoena power.⁹⁵

There are other potential limits on an arbitrator’s power to subpoena non-parties. In particular, federal courts have disagreed about whether Section 7 of the FAA applies to pre-hearing discovery or is limited to attendance at the hearing. For example, the Second and Third Circuits have held that the Section 7 is restricted to situations in which a non-party is asked to physically appear before the arbitrator(s) and hand over documents and testify.⁹⁶

Florida Supplement: The Florida FIAA grants an arbitrator overseeing an international arbitration the power to determine the admissibility, relevance, materiality, and weight of evidence.⁹⁷

⁹⁰ *Toyo Tire Holdings of Am., Inc. v. Continental Tire N. Am., Inc.*, 609 F.3d 975 (9th Cir. 2010); *Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, 166 Fed. Appx. 39, 44 (4th Cir. 2006) (“arbitration panels must have the power to issue temporary equitable relief in the nature of a preliminary injunction”); *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003).

⁹¹ AAA Commercial Rules, Rule 37 (“The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.”), available at https://www.adr.org/sites/default/files/commercial_rules.pdf; Delos Rules of Arbitration, Article 7(4)(c) (“The Tribunal’s powers shall include, but are not limited to, the following: . . . to order interim or conservatory measures.”), available at: <https://delosdr.org/index.php/rules/>; ICDR International Arbitration Rules, Article 24 (“At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.”), available at: <https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased>; JAMS Comprehensive Arbitration Rules, Rule 24(e) (The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods.), available at: <https://www.jamsadr.com/rules-comprehensive-arbitration/>; ICC Arbitration Rules, Article 28 (“Unless the parties have otherwise agreed [...] the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate.”), available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>.

⁹² Fla. Stat. § 684.0018.

⁹³ *Compania Panemena Maritima San Gerassimo, SA v. J.E. Hurley Lumber Co.*, 244 F.2d 286, 288 (2d Cir. 1957) (“It should not be the function of the District Court, after having ordered an arbitration to proceed, to hold itself open as an appellate tribunal to rule upon any questions of evidence that may arise in the course of the arbitration”); *Bailey Shipping Ltd. v. American Bureau of Shipping*, 2014 WL 3605606 (S.D.N.Y. 2014).

⁹⁴ 9 U.S.C. § 7.

⁹⁵ See, e.g., *Re Security Life Insurance Co. of America*, 228 F.3d 865, 872 (8th Cir. 2000).

⁹⁶ *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 215 (2d Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004).

⁹⁷ Fla. Stat. § 684.003.

4.5.6 Does it make it mandatory to hold a hearing?

The FAA does not expressly require a hearing, and courts recognize the parties' freedom to design their own arbitral procedures.⁹⁸ However, an arbitral award is subject to vacatur under the FAA if it violates tenets of due process, including "*refusing to hear evidence pertinent and material to the controversy.*"⁹⁹ Courts interpreting this standard have required arbitrations to satisfy certain basic requirements, including procedural fairness, notice, a hearing or other meaningful opportunity to be heard, or otherwise risk vacatur.¹⁰⁰ Grounds for vacatur have also been found when hearings were scheduled in a fundamentally unfair manner.¹⁰¹

4.5.7 Does it prescribe principles governing the awarding of interest?

The FAA does not provide for the award of interest – a matter left to the discretion of the arbitrator. However, upon confirmation of the award, the post-award interest rate set forth in the award will generally cease to accrue, and is replaced by the statutory interest rate of the relevant jurisdiction applicable to judgments.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

In the United States, parties to a litigation are generally required to bear their own costs and legal fees, barring statutory provisions to the contrary. While the FAA itself is silent on the issue of party costs and attorney fees, courts have upheld awards of costs and attorney fees provided that they are authorized by the parties' agreement.¹⁰²

5. Liability

5.1 Do arbitrators benefit from immunity to civil liability?

The FAA does not expressly address arbitrator immunity. However, courts generally grant arbitrators immunity from civil liability for actions undertaken within the scope of their capacity as arbitrators.¹⁰³

Florida Supplement: Florida law grants arbitrators "judicial immunity,"¹⁰⁴ which grants arbitrators absolute immunity for actions taken while acting in their capacity as arbitrators except those taken in the clear absence of jurisdiction.¹⁰⁵

5.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

No, to the best of our knowledge, there are no special concerns relating to criminal liability that arise out of participation in arbitration proceedings.

⁹⁸ *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 325 (2d Cir. 2004) ("FAA requires 'arbitration proceed in the manner provided for in [the parties'] agreement'") (emphasis in original).

⁹⁹ 9 U.S.C. § 10(a)(3).

¹⁰⁰ *China Nat'l Bldg. Material Inv. Co. v. BNK International, LLC.*, 2009 WL 4730578, at *6 (W.D. Tex. 2009) ("the hearing should 'meet the minimal requirements of due process: adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator. . . The parties must have an opportunity to be heard 'at a meaningful time and in a meaningful manner'" (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Hegara*, 364 F.3d 274, 298-99 (5th Cir. 2004)).

¹⁰¹ See, e.g., *Tempo Shain Corp. v. Bertek*, 120 F.3d 16, 20 (2d Cir. 1997) (finding arbitrator misconduct justifying vacatur when the arbitrator refused to adjourn the hearing for a key witnesses whose wife fell gravely ill); *Tube & Steel Corp. of America v. Chicago Carbon Steel Products*, 319 F. Supp. 1302, 1304 (SDNY 1970) (vacating when an arbitrator set hearings at a time when a party specifically indicated they were unavailable).

¹⁰² *Painewebber v. Bybyk*, 81 F.3d 1193, 1201 (2d Cir. 1996).

¹⁰³ *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 886 (2d Cir. 1990).

¹⁰⁴ Fla. Stat. § 684.0045.

¹⁰⁵ See *Sibley v. Lando*, 473 F.3d 1067, 1070 (11th Cir. 2005).

6. The Award

6.1 Can parties waive the requirement for an award to provide reasons?

Although the FAA presumes that awards will be written, it does not require that they will be signed, dated, or reasoned. Nor do courts interpreting the FAA require that arbitral awards be reasoned.¹⁰⁶ Rather, they generally deem unreasoned awards valid and enforceable, provided the relevant institutional rules or arbitration agreement do not require otherwise.¹⁰⁷

Florida Supplement: The Florida FIAA provides that the award must state reasons unless the parties agree that no reasons are to be given or the award is one on agreed terms.¹⁰⁸

6.2 Can parties waive the right to seek the annulment of the award?

6.2.1 If yes, under what conditions?

The federal courts are divided over whether parties can completely waive the statutory right to seek annulment (*i.e.*, vacatur) of arbitral awards, with most holding that they cannot do so.¹⁰⁹ Challenges for specific reasons, however, may be waived when the challenging party did not raise the challenge during the arbitration proceedings despite being aware of the relevant facts.¹¹⁰

Florida Supplement: A party can waive its right to have an award “set aside” if it fails to comply with the technical conditions set out in Section 684.0046 of the Florida FIAA for seeking to annul an award.

6.2.2 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction

As set forth above, the FAA does not impose any form requirements, although state laws or institutional rules may do so.

6.3 Is it possible to appeal an award (as opposed to seeking its annulment)?

6.3.1 If yes, what are the grounds for appeal?

While some arbitral institutions can provide for appeal-like mechanisms under their rules, the FAA does not provide for an appeal from an award and only provides limited grounds for vacating, modifying, or correcting the award.

Florida Supplement: Florida law does not provide for an appeal. It only provides for a limited application to set aside an award as the “*exclusive recourse against [an] arbitral award*”.¹¹¹

¹⁰⁶ *United Steelworkers of Am. v. Enter. Wheel Car Corp.*, 363 U.S. 593, 598 (1960) (“Arbitrators have no obligation to the court to give their reasons for an award.”).

¹⁰⁷ *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 n.4 (1956); *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006).

¹⁰⁸ Fla. Stat. 684.0042(2).

¹⁰⁹ See, e.g., *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 737 F.3d 1262, 1267-68 (9th Cir. 2013); *Hoelt v. MVL Grp., Inc.*, 343 F.3d 57, 65 (2d Cir. 2003).

¹¹⁰ *JCI Commc'ns, Inc. v. Int'l Bhd of Elec. Workers, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003) (“Absent exceptional circumstances, a court will not entertain a claim of personal bias where it could have been raised at the arbitration proceedings but was not.”); *Lippert Tile Co., Inc. v. Int'l Union of Bricklayers & Allied Craftsmen*, 724 F.3d 939, 945 (7th Cir. 2013) (“waiver rule applies equally to questions concerning arbitrability . . . we have repeatedly disapproved of the practice of remaining silent on an arbitrability issue during arbitration proceedings, only to play the arbitrability card in federal court after the party loses.”).

¹¹¹ Fla. Stat. 684.0046.

6.4 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

A party seeking to confirm an award under the FAA must file an application with the court within one year of the issuance of the award.¹¹² However, awards subject to the New York Convention or the Panama Convention may be confirmed within three years of the award.¹¹³ In each case, parties seeking to enforce an award must attach to their filing both a copy of the award and a copy of the arbitration agreement.¹¹⁴

Florida Supplement: The Florida FIAA states that, upon application in writing to the court, an arbitral award *"irrespective of the country in which it was made, shall be recognized as binding"* and shall be enforced¹¹⁵ except in the following circumstances:

A party to the arbitration agreement was under some incapacity or the 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; 2) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; 3) the award deals with a dispute 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; 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; 4) the composition of the arbitral tribunal 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; or 5) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.¹¹⁶

A court may also refuse to recognize or enforce an award if it finds (1) the subject matter of the dispute is not capable of settlement by arbitration in Florida, or if (2) recognizing or enforcing the award would be contrary to Florida public policy.¹¹⁷

6.5 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

For an award to become enforceable, it must first be confirmed pursuant to the FAA, whereupon it becomes binding as if it were a judgment rendered by a U.S. court. A party seeking to vacate the award in the U.S. must therefore seek to do so before the award becomes confirmed. In practice, therefore, confirmation and vacatur determinations will tend to take place simultaneously in the same court proceeding.

However, when the award was rendered abroad, Chapter 2 of the FAA incorporates the New York Convention, Article IV of which provides courts with discretion to stay U.S. confirmation proceedings if an application for vacatur has been made at the seat of the competent authority. Even in such a scenario, however, the court still has discretion to deny the stay and may additionally require the party seeking it to post security.

Florida Supplement: Section 48 of the Florida FIAA authorizes a party to request a stay of enforcement when the award has been set aside by the issuing court.¹¹⁸ That decision is subject to the court's discretion, and

¹¹² 9 U.S.C. § 9.

¹¹³ 9 U.S.C. §§ 207, 302.

¹¹⁴ 9 U.S.C. §§ 13, 208, 307.

¹¹⁵ Fla. Stat. 684.0047(1) (emphasis added).

¹¹⁶ Fla. Stat. 684.0048(1)(a).

¹¹⁷ Fla. Stat. 684.0048(1)(b).

¹¹⁸ Fla. Stat. 684.0048(1)(a)(5).

the Florida FIAA does not contemplate suspending the right to enforce an award simply because there are proceedings to annul or set aside an award.

6.6 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Although the text of the New York Convention suggests that a court has discretion to confirm an award even if it has been vacated, a U.S. court will not enforce an international award that has been vacated at the seat of arbitration (*i.e.*, by the “competent authority”) absent extraordinary circumstances. In a notable exception, however, the Second Circuit affirmed the confirmation of an award that had been vacated in Mexico – the seat of the arbitration – because the Mexican court retroactively applied the law, an act deemed contrary to “*fundamental notions of what is decent and just*” in the United States.¹¹⁹

Florida Supplement: The Florida FIAA follows the New York Convention, theoretically granting courts discretion to confirm an award even if it has been annulled (“*recognition or enforcement [...] may be refused*”). As a practical matter, however, a Florida court is unlikely to enforce an award that has been annulled.¹²⁰

6.7 Are foreign awards readily enforceable in practice?

Yes. U.S. courts embrace a policy favoring the recognition and enforcement of arbitral awards.¹²¹ As such, foreign awards are readily confirmed and enforced in the U.S., consistent with the policy of the New York Convention. Courts have even imposed sanctions on parties seeking to vacate or delay confirmation of an award without a substantial basis for doing so.¹²²

7. Funding Arrangements

7.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

The terms and legality of funding arrangements are governed by U.S. state laws, whether or not an arbitration falls under the FAA. Each state has attorney ethical and possibly other rules (*e.g.*, champerty) that should be consulted.

Florida Supplement: While the Florida FIAA and Florida law do not directly bar the use of contingency fees, alternative fee arrangements, or third-party funding for arbitrations, the ethical rules in Florida impose certain restrictions. For example, Rule 4-1.5 of the Florida Rules of Professional Conduct states that attorneys “*shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee.*” This Rule also sets out factors for determining if fees are reasonable.¹²³ Moreover, attorneys are required to put contingent fee agreements in writing and provide details on the terms of any such agreement.¹²⁴

In addition, the Florida Bar has stated that it “*discourages the use of non-recourse advance funding companies.*”¹²⁵ Indeed, although the Florida Bar has advised that an attorney may provide a client with information about companies that offer non-recourse advance funding, the Bar concluded that “[t]he attorney

¹¹⁹ *Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic*, 864 F.3d 172, 186 (2d Cir. 2017).

¹²⁰ Fla. Stat. 684.0048(1)(a)(5) (emphasis added).

¹²¹ *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (“*Under the FAA, courts may vacate an arbitrator's decision only in very unusual circumstances*”) (internal citation omitted).

¹²² *World Bus. Paradise, Inc. v. Suntrust Bank*, 403 Fed. Appx. 468, 470 (11th Cir. 2010); *Prospect Capital Corp. v. Enmon*, 2010 WL 907956 (S.D.N.Y. 2010).

¹²³ Florida Rule of Professional Conduct 4-1.5.

¹²⁴ Florida Rule of Professional Conduct 4-1.5(f).

¹²⁵ Florida Bar Ethics Opinion 00-3 (March 15, 2002) (revised August 24, 2011), available at: <https://www.floridabar.org/news/tfb-journal/?durl=%2Ftfb%2Ftfbetopin.nsf%2F840090c16eedaf0085256b61000928dc%2Ff40a54f76a7da5a585256b800057b541>.

*shall not recommend the client's matter to the funding company nor initiate contact with the funding company on a client's behalf."*¹²⁶

7.2 Is there likely to be any significant reform of the arbitration law in the near future?

There have been several proposals to amend the FAA in recent years, primarily to curtail the arbitrability of certain types of disputes, such as consumer credit card cases, and labor and employment issues. However, few of these proposals have made any significant progress towards becoming law.¹²⁷ Furthermore, because the U.S. is a common law system, binding case law continues to develop and inform the application of the FAA. Most notably, the Supreme Court has shown an interest in addressing issues relating to class action arbitration, and is likely to continue opining on the FAA in the coming years.

Florida Supplement: There are no expected revisions to the Florida FIAA at this time.

¹²⁶ Florida Bar Ethics Opinion 00-3 (March 15, 2002) (revised August 24, 2011), available at: <https://www.floridabar.org/news/tfb-journal/?durl=%2Ftfb%2Ftfbetopin.nsf%2F840090c16eedaf0085256b61000928dc%2Ff40a54f76a7da5a585256b800057b541>.

¹²⁷ See https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/lsadr_august2016.authcheckdam.pdf

DOMESTIC ARBITRATION IN CALIFORNIA

1. The legal framework

California's International Commercial Arbitration and Conciliation Act ("the Act") is based on the 1985 UNCITRAL Model Law.¹²⁸ However, California's domestic arbitration law—the California Arbitration Act ("CAA")—is a separate law, and it is not based on the UNCITRAL Model Law.¹²⁹

The CAA is based on the Uniform Arbitration Act, which is a model law that the Uniform Law Commission created. Although the California Legislature regularly amends or updates small portions of the CAA, most provisions of the CAA have not been revised since it was first passed in its entirety in 1961.

2. The Arbitration Agreement

As with all arbitrations, the arbitration agreement is the centerpiece of arbitration under the CAA. California courts will interpret an arbitration agreement to determine whether the parties intended to use the CAA rather than the FAA.¹³⁰ *"There is a 'strong default presumption that the Federal Arbitration Act, not state law, supplies the rules for arbitration.'"*¹³¹ *"To overcome that presumption, parties to an arbitration agreement must evidence a 'clear intent' to incorporate state law rules for arbitration."*¹³² Where an arbitration agreement provides that California law applies, the courts will presume the parties elected to apply California state law on *substantive* matters, but federal law for the arbitration procedures.¹³³

Typically, an agreement's arbitration clause is considered separately. Courts evaluate the arbitration clause, as compared to the contract as a whole, to determine arbitrability. Challenges to the validity of the underlying contract (i.e., ambiguous, unclear, lack of consideration, mutual mistake) are not considered.¹³⁴

Under the CAA, there are no specific, unique requirements for an arbitration clause. In general, a written agreement to submit a controversy to arbitration *"is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."*¹³⁵ The question of whether a valid agreement to arbitrate exists is determined by reference to the law applicable to contracts generally.¹³⁶ Arbitration agreements are subject to rescission on the same grounds as other contracts, and a petition to compel arbitration *"is not to be granted when there are grounds for rescinding the agreement."*¹³⁷

Generally, because arbitration is based on a contract, only parties to the arbitration agreement can be compelled to arbitrate.¹³⁸ However, in certain instances, a third-party can be bound by the arbitration agreement where: (1) the nonsignatory is a third-party beneficiary of the contract containing the arbitration agreement; or (2) *"a preexisting relationship existed between the nonsignatory and one of the parties to the*

¹²⁸ See Cal. Civ. Proc. Code § 1297.11 *et seq.*

¹²⁹ See Cal. Civ. Proc. Code § 1280 *et seq.*

¹³⁰ See *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1311-12 (9th Cir. 2004); *Cronus Investments, Inc. v. Concierge Servs.*, 35 Cal. 4th 376, 387 (2005).

¹³¹ *Fid. Fed. Bank, FSB*, 386 F.3d at 1311.

¹³² *Fid. Fed. Bank, FSB*, 386 F.3d at 1311.

¹³³ *Fid. Fed. Bank, FSB*, 386 F.3d at 1311.

¹³⁴ See *Phillips v. Sprint PCS*, 209 Cal. App. 4th 758, 774 (2012) (*"An arbitration provision is severable from the remainder of the contract; a challenge to the contract as a whole, without a focused challenge to the arbitration provision, does not preclude arbitration."* (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-446 (2006))).

¹³⁵ Cal. Civ. Proc. Code § 1281.

¹³⁶ See *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 972 (1997), as modified (July 30, 1997).

¹³⁷ *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 972 (1997), as modified (July 30, 1997), at 973.

¹³⁸ See *Crowley Mar. Corp. v. Boston Old Colony Ins. Co.*, 158 Cal. App. 4th 1061, 1069 (2008).

arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim."¹³⁹

With regard to whether claims are arbitrable, the U.S. Supreme Court has held that the FAA preempts state laws that prohibit outright the arbitration of a particular types of claims.¹⁴⁰ Generally, under the CAA, if the arbitration clause is broadly worded, most contract and tort claims are arbitrable.¹⁴¹ However, the court will determine whether an agreement to arbitrate has been entered into before compelling arbitration. For example, in *Long v. Provide Commerce*, the court declined to compel arbitration where the arbitration agreement was contained in a browserwrap agreement.¹⁴² The court held that the website at issue failed to put a reasonably prudent user on inquiry notice of the terms of the supposed contract.

Additionally, for some domains, California has additional statutory requirements for enforceable arbitration agreements.¹⁴³

Further, certain types of claims are not subject to arbitration as a matter of law, including, for example: residential leases that seek to waive a tenant's rights in litigation;¹⁴⁴ injury or death claims in real property purchase agreements;¹⁴⁵ construction subcontracts requiring arbitration outside of California¹⁴⁶; and employment contracts requiring employees residing and working in California to litigate or arbitrate disputes outside of California.¹⁴⁷

California law also requires that any waiver of the right to seek judicial redress must be knowing, voluntary and expressly not made as a condition of entering into a contract or as a condition of providing or receiving goods or services.¹⁴⁸

3. Intervention of Domestic Courts

Generally, California courts will stay litigation if there is a valid arbitration agreement covering the dispute.¹⁴⁹ However, a court may deny a petition to compel arbitration where a party to an arbitration agreement is also (1) a party to a pending court action or special proceeding with a third party (2) arising out of the same transaction or series of related transactions and (3) there is the possibility of conflicting rulings on a common issue of law or fact.¹⁵⁰

Additionally, a party seeking to stay court proceedings should seek a stay in California while an arbitration is pending in another jurisdiction. Under California law, after a petition to compel arbitration has been granted and a lawsuit stayed, "*the arbitrator takes over. It is the job of the arbitrator, not the court, to resolve all questions needed to determine the controversy.*"¹⁵¹

¹³⁹ *Crowley Mar. Corp. v. Boston Old Colony Ins. Co.*, 158 Cal. App. 4th 1061, 1069 (2008), at 1069-70.

¹⁴⁰ *AT&T Mobility v Conception*, 563 U.S. 321 (2011).

¹⁴¹ See *EFund Capital Partners v. Pless*, 150 Cal. App. 4th 1311, 1322 (2007).

¹⁴² *Long v. Provide Commerce*, 245 Cal. App. 4th 855 (2016).

¹⁴³ See, e.g., Cal. Civ. Proc. Code, § 1295 (medical malpractice); § 1298 (disputes arising from real estate contracts).

¹⁴⁴ Cal. Civ. Proc. Code § 1953(a)(4).

¹⁴⁵ Cal. Civ. Proc. Code §§ 337.1, 337.5.

¹⁴⁶ Cal. Civ. Proc. Code § 410.42.

¹⁴⁷ Cal. Labor Code § 925(a), (b), (c), (f).

¹⁴⁸ See Cal. Civ. Code §§ 51.7, 52, 52.1; see, also *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017) (holding that the arbitration agreement could not be enforced because it violated California's anti-waiver statute (Cal. Civ. Code § 3513) prohibiting contractual terms waiving a party's "public rights").

¹⁴⁹ Cal. Civ. Proc. Code § 1281.4.

¹⁵⁰ Cal. Civ. Proc. Code § 1281(c).

¹⁵¹ *MKJA, Inc. v. 123 Fit Franchising, LLC*, 191 Cal. App. 4th 643, 662 (2011) (reversing trial court lifting of stay for arbitration pending in Colorado); Cal. Civ. Proc. Code § 1281.4 (providing for stay when arbitration has been ordered).

Under California law, “an arbitration provision does not oust the court of jurisdiction to hear the matter but merely means if one party chooses to arbitrate, a petition may be filed to stay the proceedings, order arbitration and then confirm the award.”¹⁵² Even when a stay has been issued, the court retains limited jurisdiction over the dispute.¹⁵³ Additionally, California courts have the power to enjoin proceedings in another jurisdiction when there are exceptional circumstances that outweigh the threat to judicial restraint and where principles of comity warrant such a solution.¹⁵⁴

4. The conduct of the proceedings

Parties have the right to be represented by an attorney at any arbitration proceeding, although parties are not required to retain counsel in every instance.¹⁵⁵ However, California law strictly limits the ability of parties to retain foreign and out-of-state attorneys in connection with California-based arbitration.¹⁵⁶ In domestic arbitrations seated in California, a party may only be represented by (a) a California-licensed attorney; or (b) an attorney licensed in another U.S. state. If the attorney is licensed in a different U.S. state, the attorney must receive the arbitrators’ explicit approval to participate in the proceeding and must file a *pro hac vice* “certificate” with the arbitrators, the State Bar, and all parties. Foreign attorneys—i.e. attorneys licensed in another country but not licensed in a U.S. state—may not represent clients in either domestic or international arbitration based in California.¹⁵⁷ The unlawful practice of law in California is a criminal misdemeanor.¹⁵⁸ In April 2017, a specially-formed Working Group of the California Supreme Court issued a strong recommendation in favor of lifting these restrictions, thus the rules may be changed in the near future.

In international arbitrations seated in California, a party may only be represented by a California-licensed attorney.¹⁵⁹ California law prohibits attorneys who not licensed in California from practicing law in California.¹⁶⁰ And although out-of-state attorneys may apply for a *pro hac vice* exception in domestic arbitrations held in California, there is no equivalent exception for *international* arbitrations.¹⁶¹ Accordingly, even U.S.-licensed attorneys from other states may not represent a party in an international commercial arbitration in California.

With regard to arbitrators, California courts closely guard the impartiality of arbitrators. California law requires neutral arbitrators to disclose, within 10 days of being nominated, “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.”¹⁶² Unlike the UNCITRAL Model Law, the CAA includes a lengthy list of specific circumstances that must be disclosed.¹⁶³ These required disclosures are extensive; for example, a neutral arbitrator must disclose any professional or personal relationship with any lawyer or law firm retained by any party.¹⁶⁴

¹⁵² *Dial 800 v. Fesbinder*, 118 Cal. App. 4th 32, 46 (2004), as modified (May 5, 2004) (citation omitted).

¹⁵³ See *Titan/Value Equities Group, Inc. v. Superior Court*, 29 Cal. App. 4th 482, 487 (1994) (explaining that after a stay is issued, court retains “vestigial” jurisdiction to appoint arbitrators if the method selected by the parties fails, to provide a provisional remedy, and to confirm, correct, or vacate the award).

¹⁵⁴ See *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697, 708 (2002), as modified (Mar. 5, 2003); *TSMC N. Am. v. Semiconductor Mfg. Int’l Corp.*, 161 Cal. App. 4th 581, 589 (2008).

¹⁵⁵ Cal. Civ. Proc. Code § 1282.4(a).

¹⁵⁶ See Cal. Bus. & Prof. Code § 6125.

¹⁵⁷ Cal. Civ. Proc. Code § 1282.4; Cal. Rules of Court, Rule 9.43; see also California Bar, Out-of-State Attorney Arbitration Counsel, <http://www.calbar.ca.gov/Admissions/Special-Admissions/Out-of-State-Attorney-Arbitration-Counsel-OSAAC>.

¹⁵⁸ See Cal. Bus. & Prof. Code § 6126.

¹⁵⁹ See California Supreme Court International Commercial Arbitration Working Group, Report and Recommendations (Apr. 25, 2017), p. 7.

¹⁶⁰ Cal. Bus. & Prof. Code § 6125.

¹⁶¹ See Cal. Civ. Proc. Code § 1282.4 (*pro hac vice* exception for domestic arbitrations); Cal. Civ. Proc. Code § 1297.17 (explicitly superseding §1282.4 without replacement).

¹⁶² Cal. Civ. Proc. Code §§ 170.1, 1281.9.

¹⁶³ See Cal. Civ. Proc. Code §§ 170.1, 1281.9.

¹⁶⁴ Cal. Civ. Proc. Code § 1281.9(a)(6).

Neutral arbitrators must also disclose if they have previously served as an arbitrator in any matter that involved one of the parties' counsel.¹⁶⁵ Once appointed, arbitrators in California enjoy absolute immunity from civil liability for acts arising from the arbitral process.¹⁶⁶

If an arbitrator fails to file the required disclosures within 10 days, the arbitrator "shall be disqualified."¹⁶⁷ Moreover, an arbitrator's failure to disclose facts which "*could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial*" warrants vacation of his or her award, even without any show of prejudice.¹⁶⁸

California courts will assist the parties with the appointment of an arbitrator if necessary, as follows:

If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator.¹⁶⁹

California courts may also order interim measures, "*but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief.*"¹⁷⁰ And there is no limitation on *ex parte* requests. However, the CAA does not grant arbitrators independent powers to issue interim measures, but the parties' agreement or the agreed-upon arbitration rules may allow for some interim or provisional relief.¹⁷¹

The CAA does not provide for the confidentiality of the arbitral proceedings. It also does not regulate the length of the arbitration, the location of proceedings, the arbitrators' ability to admit or exclude evidence, and it does not make a hearing mandatory.¹⁷²

Regarding available procedures, either the parties or the arbitrator may issue subpoenas for witness testimony or may require the production of documents to facilitate the arbitration.¹⁷³ In some cases, the CAA requires the arbitral panel to permit depositions. Any arbitration relating to "*any injury to, or death of, a person caused by the wrongful act or neglect of another,*" the arbitral panel must permit the parties to take depositions of witnesses.¹⁷⁴

Regarding costs of arbitration, the CAA states: "*Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit.*"¹⁷⁵ However, special protections apply in consumer arbitrations. California law prevents arbitrators from "*requiring that a consumer who is a party to the arbitration pay the fees and costs incurred by an opposing*

¹⁶⁵ Cal. Civ. Proc. Code § 1281.9(a)(4).

¹⁶⁶ *La Serena Properties v. Weisbach*, 186 Cal. App. 4th 893, 897 (2010).

¹⁶⁷ *La Serena Properties v. Weisbach*, 186 Cal. App. 4th 893, 897 (2010) § 1281.91(a).

¹⁶⁸ See, e.g., *Benjamin, Weill & Mazer v. Kors*, 195 Cal. App. 4th 40, 46 (2011).

¹⁶⁹ Cal. Civ. Proc. Code § 1281.6.

¹⁷⁰ Cal. Civ. Proc. Code, § 1281.8.

¹⁷¹ Cal. Civ. Proc. Code § 1281.8.

¹⁷² Cal. Civ. Proc. Code § 1282.2.

¹⁷³ Cal. Civ. Proc. Code § 1282.6.

¹⁷⁴ Cal. Civ. Proc. Code §§ 1283.1, 1283.05.

¹⁷⁵ Cal. Vic. Proc. Code § 1284.2.

party if the consumer does not prevail in the arbitration, including, but not limited to, the fees and costs of the arbitrator, provider organization, attorney, or witnesses.”¹⁷⁶

5. The Award

Under the CAA, the arbitral award must be in writing and signed by the arbitrators concurring therein. “It shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy.”¹⁷⁷ Absent and agreement by the parties, “[a]rbitrators are not required to explain their awards or provide reasons for their conclusions.”¹⁷⁸

With regard to annulling or vacating the award, a party may waive the right to seek the annulment of the award if it does not comply with the requirements of California Code of Civil Procedure Section 1286.4, which outlines the conditions to vacation of an award:

The court may not vacate an award unless:

(a) A petition or response requesting that the award be vacated has been duly served and filed; or

(b) A petition or response requesting that the award be corrected has been duly served and filed and:

(1) All petitioners and respondents are before the court; or

(2) All petitioners and respondents have been given reasonable notice that the court will be requested at the hearing to vacate the award or that the court on its own motion has determined to vacate the award and all petitioners and respondents have been given an opportunity to show why the award should not be vacated.¹⁷⁹

Through its conduct, or failing to assert its rights, a party may otherwise waive its right to seek annulment of an award.¹⁸⁰

With regard to appealing an award, generally, “[a]bsent an express agreement to the contrary, a court has no authority to ‘review the merits of the controversy, the validity of the arbitrator’s reasoning or the sufficiency of the evidence supporting the arbitrator’s award.’”¹⁸¹

California Code of Civil Procedure Section 1286.2 sets forth exceptions to this general rule of non-reviewability. By enacting the exceptions, the Legislature sought to permit judicial review when the circumstances show “serious problems with the award itself, or with the fairness of the arbitration process.”¹⁸²

Under California Code of Civil Procedure Section 1286.2, a court shall vacate an arbitration award if the court determines the following:

(1) The award was procured by corruption, fraud or other undue means.

¹⁷⁶ Cal. Civ. Proc. Code § 1284.3.

¹⁷⁷ Cal. Civ. Proc. Code § 1283.4.

¹⁷⁸ *Arco Alaska, Inc. v. Superior Court*, 168 Cal. App. 3d 139, 148 (1985) (citing *Sapp v. Barenfeld*, 34 Cal. 2d 515, 523 (1949)).

¹⁷⁹ Cal. Civ. Proc. Code § 1286.4.

¹⁸⁰ See, e.g., *Int’l All. of Theatrical Stage Employees & Moving Picture Mach. Operators of U.S. & Canada, Local No. 16 v. Laughon*, 118 Cal. App. 4th 1380, 1387 (discussing waiver with regard to arbitration).

¹⁸¹ *Emerald Aero, LLC v. Kaplan*, 9 Cal. App. 5th 1125, 1137–38 (2017), as modified on denial of reh’g (Mar. 21, 2017), review denied (June 14, 2017) (quoting *Hoso Foods, Inc. v. Columbus Club, Inc.*, 190 Cal. App. 4th 881, 887 (2010) and citing *Richey v. AutoNation, Inc.*, 60 Cal. 4th 909, 916 (2015); *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1339 (2008)).

¹⁸² *Emerald Aero, LLC v. Kaplan*, 9 Cal. App. 5th 1125, 1137–38 (2017), as modified on denial of reh’g (Mar. 21, 2017), review denied (June 14, 2017) (quoting *Haworth v. Superior Court*, 50 Cal. 4th 372, 380 (2010)).

- (2) There was corruption in any of the arbitrators.
- (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
- (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.
- (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.
- (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.¹⁸³

With regard to confirming an award, “[a]ny party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award.”¹⁸⁴ “A petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner. A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner.”¹⁸⁵ And “[n]o petition may be served and filed ... until at least 10 days after service of the signed copy of the award upon the petitioner.”¹⁸⁶

“If an award is confirmed, judgment shall be entered in conformity therewith.”¹⁸⁷ The judgment has the same force and effect as a judgment in a civil action, and it may be enforced like any other court judgment.

6. Funding arrangements

Under the CAA, there are no specific restrictions on funding arrangements—whether contingency or alternative fee arrangements, nor third-party funding. However, attorneys must navigate their ethical obligations.¹⁸⁸

¹⁸³ Cal. Civ. Proc. Code § 1286.2.

¹⁸⁴ Cal. Civ. Proc. Code § 1285.

¹⁸⁵ Cal. Civ. Proc. Code § 1288.

¹⁸⁶ Cal. Civ. Proc. Code § 1288.4.

¹⁸⁷ Cal. Civ. Proc. Code § 1287.4.

¹⁸⁸ See Lica Miller, “Perils of Third-Party Funding”, *Los Angeles Lawyer*, March 2017, <http://www.lacba.org/docs/default-source/lal-magazine/2017-test-articles/march2017testarticle.pdf>