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The International Comparative Legal Guide to:

International Arbitration 2007

A practical insight to cross-border International Arbitration work

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your country?

Arbitration agreements are subject to the same laws and rules as other contracts. To be enforceable, they must be in writing, agreed to by all parties, and must not be unconscionable. While courts generally determine the validity of an arbitration agreement by reference to the applicable substantive law, the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., as interpreted in decisional law, establishes a presumption in favor of the validity of arbitration agreements. The FAA supersedes any provisions of an otherwise applicable law that would impose special restrictions or requirements on agreements to arbitrate.

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

No. If, however, an individual person enters into a commercial transaction with a more sophisticated entity, courts may subject the terms of the contract, including its arbitration provisions, to closer scrutiny to confirm that they are conscionable.

1.3 What other elements ought to be incorporated in an arbitration agreement?

It is generally advisable to base an arbitration agreement on the language recommended by the institution the parties select to administer an arbitration, or, if the parties prefer an ad hoc arbitration, on model language associated with an established set of rules, such as the UNCITRAL Model Clause. The parties should supplement this language by specifying the place or seat of the arbitration, the language of the arbitration, and the number of arbitrators.

If the contract at issue is purely domestic - that is, it involves US parties and property and is to be performed within the US - it is prudent to include a clause providing that a judgment may be entered on the award in any court having jurisdiction. "US parties," for this purpose, would include US subsidiaries of foreign corporations.

It may be advisable to address the scope of available discovery, confidentiality, arbitrator qualifications, and the parties' ability to seek interim measures from a court in aid of arbitration. In addition, contracts among multiple parties and with sovereign states present issues requiring special consideration.

1.4 What has been the approach of the national courts to the enforcement of arbitration agreements?

US courts routinely require parties to abide by their election of an arbitral forum to the exclusion of a judicial one.

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

US courts generally enforce written mediation and other ADR agreements in the same way that they would enforce other contract provisions, although the policy underlying such enforcement is not as strong as the FAA's pro-arbitration policy. Agreements reached in ADR proceedings are also generally enforceable.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration agreements in your country?

The FAA governs the enforcement of arbitration agreements evidencing any nexus to interstate or international commerce or to admiralty. Chapter 1 of the FAA applies to domestic US arbitration agreements, while Chapter 2, implementing the New York Convention, and Chapter 3, implementing the Inter-American (or Panama) Convention, govern international arbitration agreements that fall within their terms.

State arbitration statutes typically also contain provisions governing the enforcement of arbitration agreements. Such provisions, however, may be preempted in the event they are inconsistent with the FAA's pro-enforcement policy. See question 1.1, above.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

Chapter 1 of the FAA governs domestic arbitrations; Chapters 2 and 3 govern international or "non-domestic" arbitrations. See question 2.1, above. Under Sections 208 and 301 of the FAA, however, Chapter 1's provisions apply to proceedings under Chapters 2 or 3 to the extent they do not conflict with the provisions of those chapters. In addition, some states have enacted their own arbitration laws, including laws expressly intended to govern international arbitration.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

The FAA is not based on the Model Law and is silent as to many issues that the Model Law addresses. These include, inter alia, interim relief in aid of arbitration, challenges to an arbitrator during arbitration proceedings, and the authority of an arbitral tribunal to modify or correct its award.

Some states have enacted international arbitration laws based in whole or in part on the Model Law.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your country? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The range of arbitrable subject matters under US law is very broad and includes matters of significant public policy concern, such as securities and antitrust claims, patent validity, infringement, and claim construction, and civil claims under the federal anti-racketeering statute. Subject matters that remain non-arbitrable include family law matters, cases involving seamen, railway workers, or other transportation workers involved in foreign or interstate commerce, and certain civil rights issues. Subject matters are generally arbitrable in the absence of statutory or decisional law specifically designating them as non-arbitrable.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Arbitrators are permitted to determine the scope of their own jurisdiction, but their rulings on this issue are subject to judicial review in a proceeding to enforce or vacate an award. Courts generally review such determinations de novo, unless they conclude that there is "clear and unmistakable evidence" that the parties intended to submit the issue of arbitrability to the arbitrators for determination. If so, the court will afford "considerable leeway" to the arbitrators' ruling on arbitrability. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995).

If an arbitration agreement adopts arbitration rules that empower the arbitrators to determine the scope of their own jurisdiction, such as the Rules of Arbitration of the International Chamber of Commerce, courts generally deem this to constitute "clear and unmistakable evidence" within the meaning of First Options. See Shaw Group Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 124-25 (2d Cir. 2003).

3.3 What is the approach of the national courts in your country towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Courts do not stay actions or compel arbitration sua sponte. A party seeking to enforce an agreement to arbitrate may petition a court to stay or dismiss pending proceedings and compel arbitration. If the matter is subject to an enforceable arbitration agreement, the court must grant the petition. See 9 U.S.C. §§ 3, 206, & 303. Similar provisions apply under state arbitration laws.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

If a party petitions a court for an order compelling arbitration, the court will determine, at least prima facie, the arbitrability of the dispute. Whether the court will make a conclusive ruling in this regard, or will refer the matter to a tribunal for determination in the first instance, depends on the nature of the challenge to the tribunal's jurisdiction, and whether the court concludes that there is "clear and unmistakable evidence" of intent to arbitrate arbitrability. See question 3.2, above. In addition, a court can set aside an award or refuse to recognise it if the court concludes that the dispute was outside the tribunal's jurisdiction, although the court may afford the tribunal's ruling on jurisdiction a degree of deference. See question 3.2, above, and question 9.1, below.

3.5 Under what, if any, circumstances does the national law of your country allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Arbitral tribunals may assume jurisdiction over non-parties under several theories, including incorporation by reference, agency, assumption, alter ego/veil-piercing, and estoppel. See, e.g., Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 777-80 (2d Cir. 1995).

4 Selection of Arbitral Tribunal

4.1 Are there any limits to the parties' autonomy to select arbitrators?

No, although the rules of an arbitral institution may impose restrictions on party autonomy, such as a prohibition on appointing non-neutral arbitrators.

4.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Parties may provide for a default procedure for arbitrator selection in their arbitration agreement. If such a default procedure is omitted or fails, a party may petition a court to appoint arbitrators under Section 5 of the FAA. The court will appoint the number of arbitrators provided for in the arbitration agreement, or, if the agreement does not specify the number of arbitrators, a single arbitrator.

Similar default procedures apply under many state arbitration laws.

4.3 Can a court intervene in the selection of arbitrators? If so, how?

Federal courts can intervene in arbitrator selection in the event of a failure to appoint an arbitrator. See question 4.2, above. Federal courts will generally consider objections to arbitrators' qualifications or impartiality only in a proceeding to enforce or vacate an arbitral award.

Some state arbitration laws - particularly those based on the Model Law - permit a party to challenge an arbitrator in the appropriate state court during arbitration proceedings.

4.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

A US court may vacate an arbitral award if an arbitrator lacked

independence or neutrality. Section 10 of the FAA provides that one of the grounds for vacatur is "evident partiality or corruption" of an arbitrator. Similar grounds for vacatur exist under state arbitration laws.

5 Procedural Rules

5.1 Are there laws or rules governing the procedure of arbitration in your country? If so, do those laws or rules apply to all arbitral proceedings sited in your country?

The FAA and the state arbitration law of the place of arbitration typically apply to all arbitrations sited in the US and supplement any rules the parties have selected to govern arbitral procedure.

5.2 In arbitration proceedings conducted in your country, are there any particular procedural steps that are required by law?

Although federal law does not require specific procedural steps in an arbitration, state law or any procedural law selected in the parties' arbitration agreement may require particular procedures. The FAA may preempt state law procedures, however, in the event that they are unduly burdensome or otherwise inconsistent with its pro-arbitration policy.

5.3 Are there any rules that govern the conduct of an arbitration hearing?

The FAA does not include provisions governing the conduct of an arbitration hearing. But see 9 U.S.C. § 7 (authorising an arbitrator to order the attendance of witnesses and production of documents at the hearing). Some state laws do include such provisions. These vary, but tend to address basic matters. See, e.g., Cal. Code Civ. Pro. § 1297.192 (empowering the tribunal to "conduct the arbitration in the manner it considers appropriate"); N.Y.C.P.L.R. § 7506(c)-(d) (affording the parties the right to be represented by counsel and to present evidence and cross-examine witnesses). The parties may otherwise specify or adopt rules to govern the conduct of the hearing.

5.4 What powers and duties does the national law of your country impose upon arbitrators?

The FAA authorises an arbitrator to issue subpoenas for testimony and production of documents, see 9 U.S.C. § 7, and, through its grounds for vacatur, implicitly imposes certain requirements on arbitrators. See question 9.1, below; see also 9 U.S.C. § 10.

State arbitration laws tend to be more direct and detailed. Such laws may require arbitrators to treat the parties with fairness and equality, to swear an oath before hearing testimony, and to give due notice before holding a hearing. They typically also confer a variety of powers on arbitrators, such as the power to decide the scope of their own jurisdiction, to hold hearings at a place of their choosing, and to appoint experts.

5.5 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The US courts' jurisdiction to intervene during an arbitration is limited and they will generally do so only in narrow circumstances. See, e.g., questions 4.2 & 4.3, above (intervention in arbitrator appointment) & question 7.3, below (enforcement of arbitrator subpoenas).

5.6 Are there any special considerations for conducting multiparty arbitrations in your country (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

Neither the FAA nor most state arbitration laws specifically address the appointment of arbitrators in multi-party arbitrations. Parties to a multilateral transaction are well advised to do so in their agreement.

Most federal courts hold that they may not consolidate arbitration proceedings in the absence of an agreement providing for consolidation. Some federal courts permit and some state arbitration laws provide for consolidation even without express party agreement. E.g., Lefkovitz v. Wagner, 395 F.3d 773, 780-81 (7th Cir. 2005); Cal. Civ. Proc. Code § 1281.3.

The FAA does not address third-party intervention. Institutional rules typically permit intervention only when the parties agree to it. Courts generally allow third parties to intervene in confirmation proceedings when an arbitral award may affect their rights.

5.7 What is the approach of the national courts in your country towards ex parte procedures in the context of international arbitration?

U.S. courts generally will not hear matters relating to arbitration ex parte. Some courts may, however, grant certain types of interim relief in aid of arbitration ex parte, if the party seeking the relief establishes that irreparable injury would likely result if the matter were heard on notice. Courts may condition the grant of any such relief on the posting of appropriate security.

6 Preliminary Relief and Interim Measures

6.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

The FAA does not address an arbitrator's power to order interim measures, but many state arbitration laws authorise arbitrators to order a wide range of such relief, without any court intervention, unless prohibited in the parties' arbitration agreement. The rules of most arbitration institutions empower arbitrators to order interim measures.

6.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The FAA does not address interim relief in aid of arbitration, and the federal courts have taken inconsistent positions on this issue. A majority of the Circuit Courts of Appeals - the federal intermediate appellate courts - has held that a district court - the federal court of first instance - may grant injunctive relief during an arbitration, provided that the general requirements for injunctive relief are satisfied and the relief is necessary to preserve the integrity or efficacy of the arbitration proceedings. A minority of the Circuit

Courts of Appeals has held that a district court may not order interim relief in aid of arbitration or may do so only if the arbitration agreement provides for it.

A party's request for interim relief from a court is not considered inconsistent with the right to arbitrate and will not affect the jurisdiction of the arbitral tribunal.

6.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

US courts are reluctant to provide interim relief in aid of arbitration. Most will do so only to preserve the status quo or protect the integrity of the final award. Some will not intervene even under those circumstances. See question 6.2, above.

6.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

The FAA does not address arbitrators' authority to order security for costs, although the arbitration laws of some states and the rules of many arbitration institutions grant such power to arbitrators.

7 Evidentiary Matters

7.1 What rules of evidence (if any) apply to arbitral proceedings in your country?

Arbitrators are not required to apply formal rules of evidence, absent an agreement to the contrary. Even so, by implication under the FAA and expressly under many states' arbitration laws, parties are entitled to a fundamentally fair hearing, including an opportunity to present relevant and material evidence. Most arbitral institutions' rules provide that arbitrators determine the relevance, materiality, and admissibility of proffered evidence. Arbitrators may consider, to the extent they deem appropriate, evidence submitted by declaration or affidavit.

7.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

The FAA explicitly empowers arbitrators to order parties and witnesses to produce documents at an arbitration hearing, without specifying any power to order pre-hearing discovery. It is nevertheless common for arbitrators to order party discovery in advance of the hearing, and somewhat less common for them to order such discovery from third parties. US courts have reached different conclusions regarding the extent to which arbitrator subpoenas for pre-hearing discovery may be judicially enforced. See question 7.3, below.

7.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

Courts do not intervene sua sponte in matters of disclosure and discovery in an arbitration. Under the FAA, a federal district court may, upon a petition, compel compliance with an arbitrator's subpoena.

Although Section 7 of the FAA only authorises arbitrators to compel parties and witnesses to produce documents at the arbitration hearing, courts generally enforce subpoenas for pre-hearing discovery if directed at parties. Many courts also allow arbitrators to compel third-party pre-hearing discovery, although some enforce such subpoenas only upon a showing of special need or hardship. Other courts refuse to do so under any circumstances.

It also bears noting that under Section 7, petitions to compel compliance with arbitrator subpoenas must be brought in the federal court in the district where the arbitrators are sitting. There are also territorial and other limitations on a district court's power to enforce such subpoenas. See Fed. R. Civ. Pro. 45. The arbitration laws of some states, however, grant broader judicial powers to compel compliance with arbitrator subpoenas.

7.4 What is the general practice for disclosure / discovery in international arbitration proceedings?

Discovery in US-sited international arbitrations typically includes exchanges of documents and may include a limited number of depositions, although arbitrators often are disinclined to order depositions in the absence of party agreement.

7.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

The FAA does not require that witnesses be sworn in, but the practice is common. Under the rules of the American Arbitration Association, arbitrators may require witnesses to testify under oath, and arbitrators must do so either if the law requires or a party requests it. Arbitrators routinely provide the opportunity for cross examination. Some state arbitration laws explicitly require an arbitrator to permit cross-examination.

7.6 Under what circumstances does the law of your Country treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

The FAA, most state arbitration laws, and most institutional rules do not specifically address the issue of privilege. Even when not required by law or rule, arbitrators in US-related proceedings routinely take account of applicable privilege law. All jurisdictions in the US recognise the attorney-client privilege and the privilege against self incrimination. Several other privileges or related protections are often recognised as well, such as the doctrine protecting attorney work-product. Generally, privilege is deemed waived if the privileged documents are disclosed to a person or entity outside the confidential relationship defined by the privilege.

8 Making an Award

8.1 What, if any, are the legal requirements of an arbitral award?

The FAA does not require arbitral awards to take any particular form. Some states require that the award be written and signed by the arbitrator. See, e.g., N.Y. CPLR § 7507; Cal. Code Civ. Proc. § 1297.311. Some states require further that the award set forth the reasons on which it is based, absent party agreement that no reasons be given. See, e.g., Cal. Code Civ. Proc. § 1297.312.

9 Appeal of an Award

9.1 On what bases, if any, are parties entitled to appeal an arbitral award?

A court in the US may vacate an award only on narrow grounds, which generally do not extend to the merits of the dispute. The precise grounds available for vacatur vary depending on whether the award is subject to the New York Convention and whether the proceeding to confirm or vacate the award has been filed in state or federal court.

Section 10 of the FAA provides that a federal district court may vacate an award if "the award was procured by corruption, fraud, or undue means;" there was "evident partiality or corruption in the arbitrators;" the arbitrators were guilty of misconduct or misbehavior prejudicing the rights of a party; or "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Certain federal courts have also inferred a non-statutory ground for vacatur, commonly referred to as "manifest disregard of the law." Some courts have held that these standards, including manifest disregard, may be applied in the review of any award rendered in the US - including "non-domestic" awards that are subject to the New York Convention. Only the grounds for non-recognition of an award set forth in Article V of the New York Convention, however, apply to proceedings to confirm an award rendered in a foreign country. See, e.g., Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997).

State arbitration laws often establish their own standards for vacatur, which may apply in state court proceedings. Courts in the US have reached differing conclusions regarding the extent, if any, to which federal law preempts these state standards in cases subject to the FAA.

9.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

The FAA does not address whether parties can agree to exclude any basis for appealing an arbitral award. Several federal circuits do not permit any contractual variations of judicial review, and courts are less likely to permit restrictions on judicial review than expansions. See, e.g., Hoeft v. MVL Group, Inc., 343 F.3d 57 (2d Cir. 2003).

9.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The FAA does not address whether parties can expand judicial review of arbitral awards by agreement, and judicial opinion on the issue is divided. Compare Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987 (9th Cir. 2003) with Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993 (5th Cir. 1995).

9.4 What is the procedure for appealing an arbitral award in your country?

Under the FAA, an application to vacate an arbitral award must be made to the federal district court in the district where the award was rendered within three months of the date of its issuance. See 9 U.S.C. §§ 10, 12. Applications for vacatur, like other proceedings with respect to arbitration agreements or arbitral awards, are treated as motions and heard on an expedited basis.

State arbitration laws vary, but generally have similar provisions regarding requests to vacate arbitral awards.

10 Enforcement of an Award

10.1 Has your country signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes. See questions 2.1 and 2.2, above. The US acceded to the New York Convention with the "reciprocity" and "commercial" reservations, meaning that it will apply the Convention only to awards rendered in countries that have ratified the Convention, and only to differences arising out of legal relationships, whether contractual or not, that are considered "commercial" under US law.

10.2 Has your country signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Yes. The US has entered into the Inter-American Convention on International Commercial Arbitration. See 9 U.S.C. § 301 et seq.

10.3 What is the approach of the national courts in your country towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

As a matter of policy, US courts strongly favour the recognition and enforcement of arbitral awards. Courts will refuse to recognise and enforce a foreign award only on the grounds enumerated in the New York Convention, and they construe those grounds narrowly. Parties seeking to enforce an award subject to the New York Convention must petition a court within three years of the award's issuance. 9 U.S.C. § 207. In contrast, the time-limit for seeking confirmation of a domestic award is one year. 9 U.S.C. § 9. A judgment enforcing an award is entitled to full faith and credit in any US court and may serve as the basis for the attachment of and realisation upon assets in any US jurisdiction.

10.4 What is the effect of an arbitration award in terms of res judicata in your country? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Res judicata applies to arbitration awards with the same force as to judicial judgments. Myer v. Americo Life, Inc., 469 F.3d 731, 733 (8th Cir. 2006); Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998); Restatement (Second) of Judgments § 84 (1982). The doctrine generally precludes parties from litigating claims that were or could have been raised, or issues that were decided, in the arbitration. Parties can modify the preclusive effect of an arbitral award by contract, and exceptions to res judicata apply to arbitration awards, as they would to judicial judgments. See generally Restatement (Second) of Judgments §§ 69-72, 84. Arbitral awards must be final - although not necessarily confirmed - for res judicata to apply.

11 Confidentiality

11.1 Are arbitral proceedings sited in your country confidential? What, if any, law governs confidentiality?

The FAA does not address confidentiality. US courts generally

enforce confidentiality provisions in an arbitration agreement or in the rules the parties select. Certain arbitral institutions will not disclose confidential information without the consent of the parties. In the absence of a confidentiality agreement, however, parties are free to disclose information obtained in or relating to an arbitration. It bears noting, moreover, that US courts do no treat confidentiality agreements as absolute and may order the production of materials related to an arbitration proceeding in limited circumstances.

11.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Unless its use is restricted through a confidentiality agreement, information disclosed in arbitral proceedings can be referred to and relied on in subsequent proceedings. See question 11.1, above.

11.3 In what circumstances, if any, are proceedings not protected by confidentiality?

See question 11.1, above.

12 Remedies / Interests / Costs

12.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The FAA does not address the availability of punitive or other types of damages. Parties may, either by direct agreement or through the selection of arbitral rules, permit or restrict the types of damages available in arbitration. See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

12.2 What, if any, interest is available?

Absent a contrary contractual provision, interest is generally determined by the substantive law under which a party's right to recover arises. Post-confirmation interest is generally determined by law of the place of confirmation.

12.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Under the "American Rule," a presumption firmly rooted in US decisional law, prevailing parties to a controversy, including a matter heard in arbitration, have no general entitlement to recover fees or costs. By express agreement or the selection of arbitral rules, parties may choose a different allocation of fees and costs, such as "loser pays," or give arbitrators the discretion to allocate fees and costs as they deem appropriate.

A right to recover attorneys' fees may also exist if the claims in the arbitration arise under a statute that confers such a right on the prevailing party.

12.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Arbitral awards are not subject to any special tax in the US, but, like judicial judgments, may be subject to income taxation. The timing of such taxation depends on the accounting method the taxpayer employs. E.g., Schlumberger Technology Corporation v. United States of America, 195 F.3d 216 (5th Cir. 1999) (for accrual taxpayer, taxation begins upon confirmation of an award).

13 Investor State Arbitrations

13.1 Has your country signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

Yes; the US ratified the Washington Convention in 1966.

13.2 Is your county party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')?

The US is currently a party to more than 40 BITs and a number of Multilateral Investment Treaties, including the North American Free Trade Act and the Central American-Dominican Republic Free Trade Agreement. The US has yet to sign the Energy Charter Treaty, but has "observer" status as to that treaty as a signatory to the original European Energy Charter.

Many of these treaties provide investors with recourse to ICSID arbitration as a means of resolving disputes, provided that the respondent country has also ratified the Washington Convention.

13.3 Does your country have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

The US has a model for its BITs, which was revised substantially in 2004. The US Model BIT includes the important substantive protections set forth in typical investment treaties, but has certain unusual features, including an exceptionally detailed definition of "investment;" elaborate transparency requirements; and provisions to discourage any weakening of environmental and labour laws.

13.4 In practice, have disputes involving your country been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in your country been to the enforcement of ICSID awards?

Investors have brought several cases against the US under the North American Free Trade Agreement ("NAFTA"). ICSID administered a number of these cases under the ICSID Additional Facility Rules, but the Washington Convention has not applied for jurisdictional or enforcement purposes because Canada and Mexico, the other parties to NAFTA, have not ratified the Washington Convention.

The US has prevailed in the cases concluded to date, and thus it has not yet been necessary for a US court to rule on the enforceability of an investment treaty award adverse to the US government. US courts have, however, upheld awards in favor of the US government, despite investor challenges to those awards. See, e.g., Loewen v. United States, No. 04-2151 (RWR), 2005 WL 3200885 (D.D.C. Oct. 31, 2005). In addition, US courts have upheld awards issued in investment treaty cases brought against other countries.

13.5 What is the approach of the national courts in your country towards the defence of state immunity regarding jurisdiction and execution?

US courts are bound to apply the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ l330, l332(a), l39l(f) and l60l et seq., under which foreign sovereigns and their agencies and instrumentalities presumptively enjoy immunity from jurisdiction and attachment in the US.

The FSIA specifies a number of exceptions to these immunities. For example, under 28 U.S.C. § 1605(a)(6)(B), immunity from jurisdiction does not apply in proceedings to confirm an arbitral award governed by an international treaty, such as the New York Convention. In addition, a sovereign's assets are not immune to attachment in the US if used for a commercial activity, and if the judgment providing the basis for attachment arose from an order confirming an arbitral award rendered against the sovereign. See 28 U.S.C. § 1610(a)(6).

14 General

14.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in your country? Are certain disputes commonly being referred to arbitration?

The use of arbitration continues to grow in the US, particularly as a means of resolving disputes with an international nexus. The arbitration of intellectual property disputes is particularly noteworthy in this regard. The US has become a favoured site for arbitration of such disputes because of its liberal policy with respect to the arbitrability of disputes involving the validity and infringement of IP rights. Moreover, US companies are increasingly choosing to arbitrate even domestic IP disputes, such as disagreements over patent claim construction. This seems due in part to a perception that arbitration leads more rapidly to a final and binding result. Whereas a district court's claim construction would be subject to de novo review by the Court of Appeals for the Federal Circuit, an arbitrator's ruling on this issue may be set aside only on the narrow grounds set forth in Section 10 of the FAA.

14.2 Are there any other noteworthy current issues affecting the use of arbitration in your country?

The US Supreme Court has not addressed arbitration in recent months, but the Circuit Courts of Appeals have continued the trend of promoting the enforceability of arbitral awards, and limiting the circumstances under which courts may substitute their judgment for that of arbitrators. For example, the Third Circuit held that a court confirming a foreign award under the New York Convention must adhere as closely as possible to the terms of the award in formulating its judgment - even if changed circumstances may require some modification of the details of execution - and must refer any post-award disputes to the tribunal. Admart AG v. Stephen & Mary Birch Found., 457 F.3d 302 (3d Cir. 2006). The Fifth Circuit, sitting en banc, reversed a prior decision by a panel of the same court, and upheld an arbitral award in the face of a challenge by one of the parties based on the arbitrator's failure to disclose a prior relationship with the firm representing the other party. Positive Software Solutions Inc. v. New Century Mortgage Corp., 476 F.3d 278 (5th Cir. 2007).

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