INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

"State Court Participation in Arbitration – Help or Hindrance?"

International Arbitration Commission & Litigation Commission

AIJA London 2015 Congress - Working Session 9

National Report of United States of America

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23 March 2015

1. Enforcement of the Arbitration Agreement and other issues related to Jurisdiction

1.1 In your jurisdiction, is there an obligation for state courts to enforce an arbitration agreement, i.e. to deny or otherwise refrain from exercising jurisdiction on that ground?

Yes. By federal law of long standing, specifically the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq.*, public policy in the United States strongly favors arbitration and enforcement of written arbitration agreements made either prior to or after a dispute arises. This follows from the strong policy in favor of freedom of contract and serves the policy objective of reducing the burden on the courts by providing an alternative forum for dispute resolution that is (potentially and in theory, at least), faster, appeal-free, less expensive, less burdensome for parties, possibly confidential, specialized, and jury-free. When an arbitration agreement applicable to the dispute binds the parties, federal and state courts that otherwise would have personal jurisdiction over the parties and subject-matter jurisdiction over the claim must dismiss it—essentially refraining from (further) exercising jurisdiction, though the dismissal is often loosely described as for lack of jurisdiction. "Congress designed the FAA to overrule the judiciary's longstanding reluctance to enforce agreements to arbitrate and its refusal to put such agreements on the same footing as other contracts, and in the FAA expressed a strong federal policy in favor of resolving disputes through arbitration." *Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 522 (3d Cir. 2009).

Arbitration agreements are governed by state contract law, *Tinder v. Pinkerton Sec.,* 305 F.3d 728, 733 (7th Cir.2002), except to the extent that state law is displaced by "federal substantive law regarding arbitration" under the FAA, *Preston v. Ferrer,* 552 U.S. 346, 349, 128 S. Ct. 978 (2008). The FAA creates a "body of federal substantive law of arbitrability" applicable to arbitration agreements affecting interstate commerce (interstate commerce being the constitutional basis of Congressional power to regulate in an area traditionally left to the states: contract law). *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 940-41 (1983). The FAA mandates enforcement of valid, written arbitration provisions. *See* 9 U.S.C. § 2; *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 111, 121 S. Ct. 1302 (2001). The FAA "provides two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U.S.C. § 3, and an affirmative order to engage in arbitration, 9 U.S.C. § 4." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 23, 103 S. Ct. at 940-41. A court called upon to act under either section must do so expeditiously on the basis of a summary proceeding involving a limited inquiry into factual and

legal issues related to the existence or applicability of a written arbitration agreement. *Id.*

"[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626, 105 S. Ct. 3346 (1985). This inquiry consists of two underlying issues: first, whether the parties entered into an agreement to arbitrate; and second, whether the dispute between the parties falls within the scope of the arbitration agreement. *See Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 130 S. Ct. 2847, 2856 (2010) ("To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce."); *see also Zurich Am. Ins. Co. v. Watts Indus., Inc.,* 466 F.3d 577, 580 (7th Cir. 2006). In determining whether an agreement requires arbitration, courts must recognize that the FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston,* 552 U.S. at 349, 128 S. Ct. 978.

"[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943, 115 S. Ct. 1920 (1995). Courts, not arbitrators, decide questions of arbitrability—whether an arbitration agreement exists and whether it applies to the dispute between the parties—unless the parties clearly and unmistakably vested arbitrators with the authority to decide arbitrability. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649, 106 S. Ct. 1415 (1986).

1.2 If so, how is the enforcement carried out? Please give a short overview of the procedure and the type of decision that the court would issue.

A party may initiate arbitration without first resorting to the courts, typically by filing a Demand for Arbitration or Request for Arbitration with the arbitral body specified in the arbitration agreement. If both sides recognize the arbitrability of the dispute and submit to the arbitral process, courts usually will not have occasion to become involved until called upon to confirm and enforce the arbitral award or enforce a subpoena for discovery ordered by the arbitral tribunal.

Parties that have agreed in advance to arbitration may waive that agreement and elect to file a claim in court. If the responding party also wishes to proceed in court, neither party will move to arbitrate, and the case will proceed like any other (unless and until the court realizes an arbitration agreement exists and inquires about referring the matter to arbitration).

The problem, of course, arises when one party wants to be in court (or arbitration) and the other does not. If one party files a claim in court and the opposing party wishes to enforce an arbitration agreement, the opposing party has two procedurally different but substantively similar options: a motion to dismiss for lack of jurisdiction or a motion (application) to compel arbitration. Upon determining that an arbitration agreement exists between the parties (or some of them), the court will typically order the parties bound by the agreement to arbitrate. Whether styled as an Order or Judgment Compelling Arbitration or a Preliminary or Permanent Injunction, the result is the same: the parties' arbitrable dispute is out of court, and the court will not exercise further jurisdiction over the dispute, the arbitrable claim or lawsuit usually being dismissed for lack of jurisdiction. If there is some chance that a party may abandon its claim instead of going forward with arbitration (such as if the cost of arbitrating is a bar to entry), it may be preferable to seek dismissal of the claim without an order affirmatively compelling arbitration, so as not to force the party's hand.

1.3 Is it required that the respondent(s) challenge or object to the court's jurisdiction or would the court enforce the arbitration agreement on its own motion, provided that it becomes aware of the fact that an arbitration agreement between the parties exists?

Generally, yes, one party of the other must object to proceeding in court on the basis of the arbitration agreement. Despite the strong federal policy favoring arbitration, courts have no authority to *sua sponte* enforce an arbitration agreement, which would be tantamount to forcing the parties to arbitrate and denying them the access to the courts they evidently desired by electing to waive the right to force arbitration. *See Amiron Devel. Corp. v. Sytner*, 2013 WL 1332725, at *3 (E.D.N.Y. 2013). "The FAA provides that, upon finding that the claims are arbitrable, a court shall compel arbitration *upon the petition of* a 'party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration.'" *Marzano v. Proficio Mort. Ventures, LLC*, 942 F. Supp. 2d 781, 798 (N.D. Ill. 2013) (quoting FAA, 9 U.S.C. § 4) (emphasis added). *See also Auto. Mechs. Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc.*, 502 F.3d 740, 746 (7th Cir. 2007); *Lopardo v. Lehman Bros.*, Inc., 548 fsupp2d 450, 457 (N.D. Ohio 2008); *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 2006 WL 3422198 (N.D. Cal. 2006); *In re Standard Tallow Corp., and Kil-Mgmt.*, 901 F. Supp. 147, 151 (S.D.N.Y. 1995).

That said, courts do sometimes refer parties to arbitration *sua sponte* or decline to rule on a matter presented by the parties on the grounds that the parties had agreed to arbitrate the matter. One of your National Reporters appeared in bankruptcy court to oppose a motion that the reorganized debtor wanted the bankruptcy court to decide in reference to a prior bankruptcy court proceeding, while the opposing party briefed the matter in bankruptcy court but really wanted issue resolved by a

state court outside the bankruptcy context. After arguing the motion, the bankruptcy judge refused to decide anything and instead *sua sponte* referred the parties to arbitration (without knowing that the parties were already in the middle of an arbitration over a related contract dispute). Both sides knew they were not going to get anywhere in the bankruptcy court, so the dispute went before the arbitral tribunal (to decide first whether it had jurisdiction to resolve issues relating to the bankruptcy and, after it did so decide, to consider the underlying corporate-control issues).

1.4 Does your jurisdiction allow a party to bring a declaratory action or any other kind of action to obtain an affirmative declaration by the court about an arbitration agreement (e.g. that an arbitration agreement exists between the parties, that it has a certain scope or that it covers a specific dispute between specific parties)?

Yes. Because the party contending that a given dispute is arbitrable typically advances that proposition by initiating an arbitration, declaratory-judgment actions concerning arbitrability most often involve a plaintiff seeking a declaration that no arbitration exists between the parties or that the arbitration agreement does not cover a specific dispute that has arisen. *See, e.g., Promega Corp. v. Life Technologies Corp.*, 674 F.3d 1253 (Fed. Cir. 2012) (Life Technologies demanded arbitration over royalties due under an agreement between Promega and a third-party; Promega then sued for declaratory judgment of non-arbitrability, contending that the rights under the agreement had not been validly assigned to Life Technologies; the third party then itself demanded arbitration and moved to compel arbitration, prompting Promega to argue that the third-party no longer existed so could not move to compel arbitration); *Peabody Holding Co. v. United Mine Workers of Am. Int'l Union*, 665 F.3d 96 (4th Cir. 2012) (union filed grievance with arbitrator regarding agreement with coal mine operator; operator's parent and affiliate sued for declaratory judgment that the dispute was not arbitrable; union counterclaimed for declaration that the dispute was arbitrable); *Rite-Aid of Pennsylvania, Inc. v. United Food & Commercial Workers Union, Local 1776*, 595 F.3d 128 (3d Cir. 2010) (union filed grievances for arbitration; employer sued for declaratory judgment that union, as opposed to employees, had no right to arbitrate grievances under collective-bargaining agreement); *Express Scripts, Inc. v. Aegon Direct Marketing Services, Inc.*, 516 F.3d 695 (8th Cir. 2008) (provider of pharmacy benefit management services sued for declaratory judgment that oral contract containing no arbitration agreement superseded written contract containing arbitration clause and sought injunction against client's arbitration demand); *Alliance Bernstein Investment Research & Mgmt., Inc. v. Schaffran*, 445 F.3d 121 (2d Cir. 2006) (after former employee initiated arbitration, former employer sued seeking declaratory judgment that it was not required to arbitrate claim for wrongful discharge); *Employers Ins. Co. of Wausau v. Century*

Indemnity Co., 443 F.3d 573 (2006) (reinsurer sued reinsured for declaratory judgment that it was not required to participate in consolidated arbitration with other reinsurers but rather was entitled to two separate arbitrations concerning two reinsurance agreements); *Multi-Financial Securities Corp. v. King*, 386 F.3d 1364 (11th Cir. 2004) (customer initiated arbitration against securities broker-dealer, which responded by suing for declaratory judgment that no arbitration agreement existed between broker-dealer and customer).

Though comparatively rare, instances of a party suing for declaratory judgment confirming the existence of an arbitration agreement do exist. *See, e.g., Household Bank v. The JFS Group*, 320 F.3d 1249 (11th Cir. 2003) (group of class members opted out of class-action settlement and stated intention to initiate new lawsuit against bank making "refund anticipation loans" (typically high-interest short-term loans secured by a taxpayer's anticipated tax refund); bank sued for declaratory judgment that arbitration agreement in loan documents was enforceable); *Gaming World Int'l Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003) (casino operator initiated arbitration against tribe of Native Americans after tribal council purported to terminate contract for management of casino; during the arbitral proceedings, the tribe sued the operator in tribal court seeking a declaration that the contract was void for lack of proper approval; the casino operator disputed the tribal court's jurisdiction then sued in federal court for a declaratory-judgment holding that the contract was enforceable and the dispute subject to arbitration).

1.5 If so, what are the procedural requirements, if any, for bringing such a declaratory action? Please focus on the requirements which are specific for this type of action.

There are no special requirements for bringing a declaratory-judgment action regarding the arbitrability or non-arbitrability of certain claims. A declaratory-judgment action of this sort proceeds just as any other declaratory-judgment action does, the only noteworthy procedural requirement being the presence of a live justiciable controversy between parties uncertain as to their rights and thus in need of a judicial determination to guide their future conduct. The filing of a demand for arbitration with an arbitral body, potentially requiring the respondent to participate in the arbitral proceedings or face consequences such as an adverse arbitral award, easily satisfies this requirement. So too would resort to a court (as in *Gaming World*).

The party seeking such a declaratory may do so after the other side has initiated arbitration or even before, as long as the threat of arbitration is sufficiently real and imminent to create a justiciable controversy over whether the dispute is arbitrable. A party facing an imminent threat that it will be sued in court over arbitrable claims need not wait for the lawsuit and respond by moving to compel arbitration but

rather may file a declaratory-judgment action to determine the enforceability of the arbitration agreement (as in *Household Bank*).

1.6 Are there any restrictions as to timing for asserting an objection to the state court's jurisdiction or to bring an action for an affirmative declaration about arbitral jurisdiction? E.g. would on-going challenge proceedings on the ground that the tribunal lacked jurisdiction prevent such an action from being brought?

There is no fixed deadline for filing a declaratory-judgment action regarding arbitral jurisdiction, although allowing an arbitral proceeding to progress toward conclusion runs the risk that the court may not act quickly enough to stop the arbitration (in which event the party contesting arbitral jurisdiction would be left to attack the award).

Similarly, there is no fixed deadline for a party involved in litigation over arbitrable claims to move to compel arbitration; courts consider a variety of factors in determining whether, by participating in the litigation, the party asserting arbitrability has effectively waived its right to arbitration. *See Sovak v. Chugai Pharma. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (litigant must show that party asserting right to arbitrate after participating in litigation had knowledge of existing right to compel arbitration and acted inconsistently with that right, while the delay in asserting arbitrability caused prejudice to the litigant); *Kelly v. Golden*, 352 F.3d 344 (8th Cir. 2003) (applying same standard and noting that a party acts inconsistently with its right if it "substantially invokes the litigation machinery before asserting its arbitration right", while prejudice may result from a party's use of discovery not available in arbitration or from litigating substantial issues on the merits); *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001) (applying essentially the same standard, and noting even in cases where the party seeking arbitration has invoked the litigation machinery to some degree, such as by filing lawsuits, delay itself and the filing of court pleadings will not suffice, by themselves, to establish waiver of arbitration); *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 130 (2d Cir. 1997) (a party waives its right to arbitration when it engages in protracted litigation that prejudices the opposing party; factors considered in determining whether waive occurred include the time elapsed from commencement of litigation to the request for arbitration, the amount of litigation (including substantive motions and discovery), and prejudice to the other party, meaning "the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue," though incurring legal expenses associated with litigation is not itself sufficient prejudice to warrant finding waiver).

1.7 When deciding on arbitral jurisdiction, do the courts in your jurisdiction apply the *doctrine of assertion* or any other doctrine according to which evidence is not required with respect to certain facts (so-called facts of double relevance) or the standard of proof is lowered compared to decisions on the merits in regular civil litigations? If so, does the doctrine apply equally in a declaratory action regarding arbitral jurisdiction and in a litigation case where an objection to the court's jurisdiction has been made with reference to an arbitration agreement? Please describe.

The United States does not apply the doctrine of assertion (the doctrine is unknown in U.S. law) or any other doctrine deeming evidence not necessary to prove certain facts germane to questions of arbitrability. When ruling on a motion to compel arbitration filed by a defendant in response to a plaintiff's filing of a complaint presenting the dispute to a court, a federal district court will apply either the standard governing motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) or motions for summary judgment under Federal Rule 56, the difference being whether the motion implicates any evidence outside the four corners of the pleadings. *Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764, 771-76 (3d Cir. 2103). "[W]hen it is apparent, based on the face of a complaint, and documents relied upon in the complaint, that certain of a party's claims are subject to an enforceable arbitration clause, a motion to compel arbitration should be considered under a Rule 12(b)(6) standard without discovery's delay." *Guidotti*, 716 F.3d at 776. In resolving a defendant's motion to compel arbitration, in that posture, the Court will accept "as true...factual allegations in the plaintiff's complaint that relate to the underlying dispute between the parties." *Schnabel v. Trilegiant Corp.,* 697 F.3d 110, 113 (2d Cir. 2012). But if the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue, then the parties should be entitled to discovery on the question of arbitrability before a court entertains further briefing on the question." *Guidotti*, 716 F.3d at 776. "If the party seeking arbitration has substantiated the entitlement by a showing of evidentiary facts, the party opposing may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried" (in much the same way litigants make and respond to motions for summary judgment). *Oppenheimer & Co., Inc. v. Neidhardt,* 56 F.3d 352, 358 (2d Cir. 1995). If the parties have gone outside the four corners of the pleadings by introducing evidence on whether an arbitration agreement exists, including perhaps evidence gathered through discovery, "the court applies a standard similar to that applicable for a motion for summary judgment[:] [if] there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary." *Bensadoun v. Jobe–Riat,* 316 F.3d 171, 175 (2d Cir. 2003). In extraordinary cases involving disputed factual issues, when it's not clear whether the

parties agreed to arbitrate or exactly what they agreed to arbitrate, the court proceeds to act as fact-finder following an evidentiary hearing—a "summary trial" under FAA Section 4, 9 U.S.C. § 4. *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977-78 (10th Cir. 2014).

If the question of arbitrability comes before the court in a declaratory-judgment action regarding the existence and applicability of an arbitration agreement, the case will proceed like any other declaratory-judgment action, including possibly a motion for judgment on the pleadings (if the material facts are admitted in response to the complaint), a motion for summary judgment (if the material facts stand undisputed after discovery), or a bench trial (if the material facts are disputed).

Generally, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 91, 121 S. Ct. 513 (2000).

1.8 When deciding on arbitral jurisdiction, how does your jurisdiction handle the situation where there are several alternative grounds for the claims, some covered by the arbitration agreement and some not (e.g. one ground based on contract, one on tort)? Will the courts split the case between different fora or if not, what forum will it refer the entire dispute to?

Arbitration agreements are typically written broadly to cover any dispute between the parties arising from any set of facts and based on any conceivable legal theory, contractual or otherwise. If an arbitration agreement applies to some but not all claims between the parties, the court will compel arbitration of the arbitrable claims but retain the non-arbitrable claims, effectively splitting the case between different fora. A case may also split if fewer than all the parties are bound by the arbitration agreement.

1.9 Does your jurisdiction allow for *anti-arbitration injunctions* or any other types of decisions attempting to prevent an arbitration from being initiated or from proceeding? Please describe.

Though the courts have not finally decided this issue, authority to issue anti-arbitration injunctions appears to be in doubt. One influential federal circuit court of appeals, the level just below the U.S. Supreme Court, has held seeking an anti-arbitration injunction "sanctionably frivolous," because the party seeking to prevent or stop the arbitration cannot show irreparable harm, in that the party will have a complete legal remedy through opposition to confirmation of any arbitration award ultimately rendered. *AT&T Broadband, LLC v. International Brotherhood of Elec. Workers*, 317 F.3d 758, 762 (7th Cir. 2003). This applies equally in the context of international arbitration, since the party contending no arbitration agreement exists may defend against any effort to confirm an award rendered by a foreign tribunal

on the grounds that the party had not agreed to arbitration. For this reason, U.S. courts typically refuse to grant anti-arbitration injunctions even when the court doubts the existence of an arbitration agreement. But some courts have held that, in principle, enjoining a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present, even though the FAA does not expressly authorize anti-arbitration injunctions. *See Societe General de Surveillance, S.A. v. Raytheon European Mgmt. Sys. Co.*, 643 F.2d 863, 868 (1st Cir. 1981). And the influential U.S. District Court for the Southern District of New York has held that the provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), as enabled by the FAA, directing courts to order arbitration where appropriate by implication authorizes courts to enjoin arbitration where arbitration is not appropriate. *Satcom Int'l Group PLC v. Orbcomm Int'l Partners, L.P.,* 49 F.Supp.2d 331, 342 (S.D.N.Y. 1999).

1.10 If so, who can such an injunction be directed at – a party, the arbitrator(s), an arbitral institute, etc.?

Ordinarily, it would be sufficient to enjoin the party seeking to arbitrate from initiating or pursuing the arbitration (or to order the party to dismiss the arbitration). While enjoining the arbitrators from acting would appear equally effective at stopping the proceedings, and enjoining the arbitral institute from administering the arbitration might also be effective (depending on the institute's usual role), some arbitral rules expressly provide that the arbitrators and arbitral institute are neither necessary nor proper parties to judicial proceedings relating to the arbitration. *See, e.g.,* American Arbitration Association Commercial Arbitration Rules R-52. And courts may prefer to direct their order to the parties instead of the arbitrator(s) or institute out of deference akin to comity.

1.11 What connection to your jurisdiction is required for the state courts to be competent to hear such a request?

The same two connections required for every case: subject-matter jurisdiction over the case and personal jurisdiction over the parties.

Except for matters within a specific grant of federal jurisdiction, such as over patents or bankruptcy, the subject-matter jurisdiction of federal courts is limited to complaints implicating federal questions (claims that involve rights arising under federal law) or lawsuits involving rights arising under state law between parties of complete diversity, meaning citizens of different states or a foreign country on either side of the case, provided at least $75,000 is in controversy. While federal courts have this limited subject-matter jurisdiction, states universally have at least

one court of general subject-matter jurisdiction, so the subject-matter jurisdiction requirement will be satisfied in state court if not federal court.

The requirement of personal jurisdiction essentially limits courts to exercising their power over only those persons who could fairly expect to be hauled into that court to answer a case. This is an important aspect of the U.S. federal system, and it applies not only to state courts but also to federal district courts, the jurisdiction of which is (in most cases) concomitant with that of a court of the state encompassing the federal district. Personal jurisdiction implicates issues of both federal and state constitutional law. *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 713-17 (7th Cir. 2002). For courts to exercise personal jurisdiction over a defendant who is not "generally present" within the state (or the state encompassing a federal district court), constitutional due process requires the existence of such "minimum contacts" between the defendant and the forum state as would make it fundamentally fair for the state's court to exercise power over that defendant. Before an out of state defendant may be required to defend a case in the forum state, it must have "minimum contacts" with the state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). There must be some act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

There are two different theories for personal jurisdiction in the United States, specific and general jurisdiction, both heavily dependent on the facts. Specific refers to personal jurisdiction over claims specific to the defendant's contacts with the forum state, while general refers to claims not connected with the defendant's contacts with the forum state, i.e. any claim under the sun. Specific jurisdiction depends on facts showing connections between the defendant's activities in the forum state and the dispute at issue in the lawsuit. Doing business, owning property, or committing torts in a state typically suffices to create personal jurisdiction in the state's courts for claims concerning that business, property, or tort. But random, incidental, or unintentional contacts with a state, or a few bare contacts (such as invoices sent or telephone calls placed) may not suffice to confer specific personal jurisdiction. As for general jurisdiction, a natural person who is physically present in a state is usually subject to personal jurisdiction there for all claims—certainly if that state is the person's domicile. Corporations or other legal enterprises are subject to general jurisdiction in at least two places: the state of organization and the state where the enterprise maintains its principal place of business. *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 131 S. Ct. 2846, 2853-54 (2011). Beyond that, general jurisdiction will lie only when a foreign corporation's "affiliations with the state are so 'continuous and systematic' as to render [it]

essentially at home in the forum state." *Id.* at 2851. Doing business in a state, even if on a continuous and systematic basis, usually will not suffice to subject a company to general jurisdiction in that state. *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 & nn. 18-19 (2014) (delivering large number of cars yearly to dealerships in California for sale would have been sufficient to support specific jurisdiction—i.e., for a suit involving one of those cars—but not general jurisdiction for a suit by survivors of Argentina's "dirty war" alleging that a Daimler affiliate in Argentina collaborated with state security forces to kidnap, detain, torture, and kill plaintiffs or their relatives).

Under these premises, a declaratory-judgment action to determine the arbitrability of certain claims could be filed in courts where the defendant is subject to general jurisdiction or in courts of a state having a connection to the relationship or the contract at issue, and perhaps in courts where the arbitration is or would be seated. A motion to compel arbitration filed by a defendant in response to a plaintiff's effort to bring the dispute before a court may always be addressed to the court where the plaintiff filed suit, because the filing of a complaint subjects the plaintiff to the jurisdiction of the court in which the plaintiff elected to file suit. If the defendant does not want to move to compel in that court for some reason (as the casino operator in *Gaming World* evidently decided about the tribal courts the Native American tribe decided to sue in), the defendant will be left with becoming a plaintiff in a new case in a different court that has personal jurisdiction over the other party.

1.12 Are you aware of any case in the past ten years where an anti-arbitration injunction or a similar type of decision has been issued by a state court in your jurisdiction? If so, please describe briefly the facts and what the effect of the injunction ultimately was.

Anti-arbitration injunctions are very rare in the United States, in part because courts usually do not view the conduct of arbitration (with or without the objecting party's participation) as inflicting irreparable harm, since the objecting party may always attack arbitrability when the opponent initiates proceedings to confirm the award. Nevertheless, one court granted an anti-arbitration injunction by analogizing to a court's power to enjoin parties appearing before it from proceeding with a parallel action in a foreign country in circumstances that are unjust—a test that discards the usual requirements for injunctions and looks instead for identity of the parties, whether one case is dispositive of the other, whether the foreign litigation would frustrate the policy of the forum, and whether the effect on comity would be tolerable. *See Oracle America, Inc. v. Myriad Group AG*, 2012 WL 146364, *3 (N.D. Cal. 2012) (noting that the injunction operates on the parties before the court, not the foreign tribunal). In that case, the parties and the claims were identical, and the

court had previously ruled that the intellectual-property claims going forward in the litigation fell outside the scope of the parties' arbitration agreement in a license agreement (and so should not be arbitrated). The court found that allowing the arbitration to go forward as one party desired would frustrate the policy of the forum state for avoiding inconsistent judgments (in particular on the threshold questions of who decides arbitrability and whether the IP claims belonged in court or arbitration), and against forum shopping and engaging in duplicative and vexatious litigation. The effect of the anti-arbitration injunction on international comity would be negligible, since the arbitration likely should have been seated in San Francisco (despite the pro-arbitration party's attempt to seat the arbitration in London) and arbitration does not involve another sovereign's courts anyway. On that basis, the court enjoined one party from proceeding further with arbitration of claims alleged in the lawsuit.

2. The Arbitral Tribunal

2.1 Does your jurisdiction offer assistance by the state courts in appointing arbitrators? If so, please describe briefly what options are available.

Yes. This happens exceedingly rarely, but it is possible. The FAA states that if an arbitration agreement provides for the method of appointing the arbitrator(s), that method should be followed. 9 U.S.C. § 5. But if no method is provided in the parties' agreement, or if a party fails to avail itself of such method (such as by failing to select an arbitrator), or if for any other reason there is a lapse in the naming of an arbitrator or in filling a vacancy, then, upon application of either party, the court shall designate or appoint an arbitrator. This would involve either filing a motion with the court before which any litigation is already pending (such as the case in which one party moved to compel arbitration), *see, e.g., Adam Technologies Int'l S.A. de C.V. v. Sutherland Global Svcs., Inc.*, 729 F.3d 443 (5th Cir. 2013), or filing a new lawsuit in a court of competent jurisdiction and moving the court to appoint the arbitrator.

2.2 What prerequisites, if any, must be satisfied for the court to deal with the appointment of an arbitrator (timing, failure by a party to act, etc.)?

Failure of a party to act when it has the right to act, failure of the arbitral institution to constitute the tribunal by appointing arbitrators in accordance with its rules (such as the ICC's rules for appointing the president of the tribunal), or any other conceivable failing that would result in the tribunal the parties agreed to not being fully constituted. But a duly appointed arbitrator's refusal to arbitrate the dispute will not constitute a "lapse in the naming of an arbitrator," since neither party failed to avail itself of the arbitration method set forth in the agreement. *See In re Salomon, Inc. Shareholders Deriv. Litig.*, 68 F.3d 554 (2d Cir. 1995). One court held that the

court should not intervene to determine the composition of the tribunal even when one party had refused to appoint an arbitrator, which under the agreement would have allowed the other party's arbitrator to proceed alone, but the refusal to appoint lasted only while the party was litigating an arbitrability question and, upon losing that issue, the party acted promptly to appoint its arbitrator. *See In re Utility Oil Corp.*, 10 F. Supp. 678 (S.D.N.Y. 1934).

If an arbitration agreement or institute rules provide time limits for a party to make an appointment, failure to do so within the time allotted may be sufficient for the court to act. For example, when a reinsurance agreement entitled an insurer to name an arbitrator on a reinsurer's behalf if the reinsurer failed to appoint an arbitrator within the 30 days allowed by the agreement, the court would enforce the insurer's right to make the reinsurer's appointment. *Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125 (7th Cir. 1993). And if the agreed method of appointing an arbitrator fails because a court rules the arbitration agreement substantively unconscionable (and hence unenforceable) on the very issue of appointing the arbitrator, the court may rely on the FAA to make the appointment on grounds of a lapse in the agreed naming procedure. *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 825 So.2d 779 (Ala. 2002) (arbitration clause in consumer contract giving business sole authority to appoint the arbitrator held unconscionable, so the court made the appointment); *but see Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582 (D.S.C. 1998) (supposed arbitration agreement deemed not bona fide and held unenforceable for substantive unconscionability when employer served as gatekeeper for pool of potential arbitrators; the court refused to make the appointment because it rule the entire arbitration agreement unenforceable, not just the part providing for the manner of appointing arbitrators). Unavailability of the appointed arbitrator(s) may constitute a "lapse" warranting appointment by the court. *See, e.g., Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787 (7th Cir. 2013); *Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012).

2.3 When deciding thereon, will the court consider whether there is arbitral jurisdiction? If so, what level of review will the court undertake in this respect?

No, not unless a party contends that it failed to act because no agreement to arbitrate the claims at issue had been reached (or the proceeding was initiated before an arbitral institute other than that agreed upon), in which event the court would proceed as usual on a motion to compel arbitration (see Part 1 above).

2.4 Please describe briefly the procedure for the appointment of arbitrators by the state courts, including any time-limits.

There is no set procedure for this. The party seeking the court's involvement in the appointment would be expected to set forth the facts showing the existence of the

arbitration agreement and the failure of the other party (or the arbitral institute) to proceed as necessary to make an appointment within its power. That should be done along with the motion seeking the court's involvement, typically by affidavit setting forth the evidentiary predicate for the court's involvement and the result the movant seeks. The opposing party would be given an opportunity to respond to the motion with a legal brief raising any relevant points and, if appropriate, a contravening affidavit. The court may hold an evidentiary hearing before issuing an Order effecting the appointment or, if the facts are undisputed, issue the Order based on the written submissions without a hearing. If the relief sought is a court appointment, the moving party may wish to propose one or more candidates for the court to choose among.

2.5 How does the court decide which arbitrator to appoint? Is there a list of arbitrators available to the court?

This point has not been decided in any reported opinions, but one would expect the appointment to be entrusted to the sound discretion of the court. At the same time, one would expect the court to be bound to follow, or at least be guided by, any specific requirements of the parties stated in the arbitration agreement (that an arbitrator must be an expert in a given field, or a lawyer or non-lawyer, or of a certain nationality, etc.) or in the rules of the agreed arbitral institute. If the lapse occurs because an arbitral institute fails to act, the court would likely follow any requirements or limitations imposed by the institute's rules (such as, in an ICC case if the ICC Court failed to act for some reason, not being of the same nationality of the parties and being on the national list of a neutral country).

2.6 Does the above apply irrespective of whether the arbitration is administered by an institute or not?

Apparently yes, but there is very little law in this area in the United States, so there is room for argument. In any event, if the agreed institute has its own procedure for appointing an arbitrator if a party fails to act (as the ICC does, for example), a court would likely defer to that procedure or—as long as the institute followed the procedure—hold that no lapse occurred because the institute's rules still resulted in an appointment.

2.7 Does your jurisdiction offer assistance by the state courts to remove or replace an arbitrator?

Replace, yes, but only if the appointment process for the replacement lapses to the extent that a vacancy would go unfilled (such as if the parties or the institute's rules did not provide for what happens in the event an arbitrator resigns or declines to

serve) , in which case a party may apply to a court under 9 U.S.C. § 5, as discussed above.

Remove, no, except in extreme cases. Under the FAA, court intervention prior to issuance of an arbitral award is extremely limited. Courts may decide whether an agreement to arbitrate exists and applies to the claims at issue. If it does, essentially the only result permitted by the FAA is an order compelling arbitration. The policy, embodied in the FAA, of enforcing arbitration agreements limits the remedies to those designed to return the parties to arbitration. *See Gulf Guaranty Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476, 487 (5th Cir. 2002). The FAA does not provide for court authority to remove an arbitrator, no matter what grounds for disqualification are advanced. *Id.* at 489-90. The remedy for defects in the arbitral process or partiality or corruption on the part of the arbitrators is through an application to vacate the award under 9 U.S.C. § 10.

Nevertheless, two fairly recent, very unusual cases stand as examples of courts departing from the usual rule of non-interference in ongoing arbitral proceedings. In *Sussex v. Turnberry/MGM Grand Towers, LLC*, No. 2:08-cv-00773 (D. Nev. Dec. 31, 2013), the court ordered disqualification of an arbitrator on grounds of evident partiality based on failure to disclose a business engagement (litigation financing) indicative of evident partiality (the standard for vacating an award); the court found the case "extreme" because it was exceptionally large with hundreds of claimants and multiple related state and federal court cases, some of which the arbitrator had been removed from separately, and was in the very early stages with years of proceedings ahead. In *Oakland-Macomb Interceptor Drain Drainage Dist. v. Ric-Man Constr., Inc.*, 850 N.W.2d 498 (Mich. Ct. App. 2014), the court ordered disqualification of an arbitrator on grounds that the arbitral institute had "repudiated" the parties' arbitration agreement by failing to appoint an arbitrator that had the specific, specialized qualifications enumerated in the parties' agreement; the court viewed the arbitral institute's refusal to follow the parties' agreement as effectively depriving the parties' of their agreement to arbitrate.

2.8 If so, please describe the procedure therefore briefly.

3. Interim Measures

3.1 In your jurisdiction, does an arbitral tribunal have the power to issue an interim injunction? If yes, what is the way to enforce such interim injunction?

Yes. An arbitral tribunal may issue interim injunctions and other relief so long as the tribunal does not exceed the scope of its authority granted by the parties' agreement to arbitrate. *See, e.g., Banco Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003). Thus, the extent to which a tribunal may award interim relief depends upon the parties' arbitration agreement and whether the chosen arbitral institution has procedures for such relief.

Presumably, parties that agreed to submit their dispute to arbitration and are proceeding before an arbitral panel would honor the panel's interim injunctive order without the need for court-assisted enforcement. To the extent that is the not the case, a party seeking to enforce an arbitral injunctive order would invoke the Federal Arbitration Act for domestic proceedings, or either the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") or the Inter-American Convention on International Commercial Arbitration (the "Panama Convention") for foreign awards, and apply for confirmation and enforcement of the award in a United States district court (trial-level court) or state trial-level court that has proper subject matter jurisdiction and personal jurisdiction over the parties (as outlined in response to Question 1.11 above).

Proceedings on the application to confirm the award are designedly summary, and are not tantamount to a new lawsuit but rather allow determination of only the limited statutory conditions for confirming or refusing to confirm an award. Under the federal rules of civil procedure, an ordinary lawsuit is called a "civil action," which is initiated when the plaintiff files a Complaint. A party seeking to confirm a foreign award should not file a Complaint but should instead style itself a petitioner and file with the appropriate court a Petition for Summary Proceedings to Confirm an Arbitral Award, or some such initiating paper. Upon the payment of a *de minimis* filing fee, likely equal to that for a civil action, the court's clerk will issue a summons to the respondent. The petitioner should have the respondent personally served (for a corporation, personal service is usually accomplished through a registered agent for service of process or a suitably high-ranking corporate officer). The respondent will then be required to file an answer to the petition and assert any available defenses to confirmation. Failure to timely file an answer may result in confirmation by default. If the respondent contests confirmation, the petitioner should proceed by motion to obtain a judgment. Although the proceedings are intended to be summary in fashion, the extent of motions practice, discovery, and other procedural maneuvering permitted to stand between the petitioner and the judgment of confirmation will rest within the discretion of the judge. The decision on confirmation will be made by the judge without a jury.

3.2 In your jurisdiction, what is the way, if any, to enforce an interim injunction issued by an arbitral tribunal having its seat outside your jurisdiction?

As discussed above, the process for enforcing an interim arbitral award in the United States that was issued outside of the territorial bounds of the United States is to invoke either the New York Convention or the Panama Convention and apply for confirmation and enforcement of the award in a court of competent jurisdiction.

3.3 If a specific interim measure as issued by a foreign arbitral tribunal is not available in your jurisdiction where it is sought to be enforced, what would be the way to proceed?

This question is difficult to answer in the abstract. U.S. law directs the courts to enforce arbitral awards unless certain narrow bases to vacate an award are present. And these bases do not expressly include the unavailability of the specific interim measure that was issued by a foreign arbitral tribunal. Rather, a party may raise one of the following grounds set forth in Article V of the New York Convention for refusal to recognize a foreign arbitral award: (1) no valid arbitration agreement exists between the parties; (2) the respondent did not have a fair opportunity to be heard; (3) the award exceeds the authority of the tribunal or the submission to arbitration; (4) the arbitral procedure is improper or the composition of the tribunal is improper; or (5) the award is not binding and final. Additionally, U.S. courts may refuse to confirm and enforce a foreign arbitral award if the award is contrary to the public policy in the United States.

With respect to the finality requirement, Courts in the United States will typically enforce an interim relief order issued by an arbitral panel where the "interim" measures "require specific action and do not serve as a preparation for further decisions for the arbitrators." *Zeiler v. Deitsch*, 500 F.3d 157, 168-69 (2d Cir. 2007); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984); *Ecopetroal S.A. v. Offshore Exploration & Prod., LLC*, 2014 WL 4449799, at *6-7 (S.D.N.Y. Sept. 10, 2014). Such interim orders are enforceable to the extent they "finally and conclusively" dispose of a "separate and independent" claim—which can simply be the claim for injunctive relief—notwithstanding the fact that they do not dispose of all the claims that were submitted for arbitration. *Zeiler*, 157 F.3d at 168-69. Similarly, courts will also generally enforce interim measures or arbitral security awards that ensure a meaningful arbitral proceeding and final award. *Banco Seguros del Estado*, 344 F.3d at 262. Thus, an interim measure will likely be enforced provided that the party opposing enforcement cannot establish any of these bases for non-recognition.

3.4 In your jurisdiction, are state courts competent to decide on a request for interim relief despite the fact that the parties entered into an arbitration agreement? May a party file for interim relief with a state court even before arbitration proceedings are initiated? If yes, what are the consequences with respect to the "main" claim that is sought to be secured by such interim injunction, i.e. is the party asking for interim relief obliged to commence arbitration within a certain period of time?

Yes. A party can apply to a court in the United States for interim relief, notwithstanding the existence of a binding agreement to arbitrate. But whether a court will grant such relief is a fact-specific inquiry that depends upon the nature of the interim relief sought, the terms of the parties' arbitration agreement, the nature and status of the arbitration proceeding and arbitral tribunal, and the contours of the underlying dispute. Because the FAA does not specifically address interim relief in aid of arbitration, the availability of such relief may vary from jurisdiction to jurisdiction. Nonetheless, the majority rule among courts in the U.S. is that interim relief is available to preserve the status quo and prevent the arbitration from becoming a hollow finality. *See, e.g., Toyo Tire Holdings of Americas, Inc. v. Cont'l Tire N.A., Inc.*, 609 F.3d 975, 981-82 (9th Cir. 2010) ("[W]e conclude that a district court may issue injunctive relief on arbitrable claims if interim relief is necessary to preserve the status quo and the meaningfulness of the arbitration process—provided, of course, that the requirements for granting injunctive relief are otherwise satisfied. This holding is consistent with . . . the holdings of a majority of our sister courts.") (collecting cases); *Puerto Rico Hosp. Supply, Inc. v. Boston Scientific Corp.*, 426 F.3d 503, 505 (1st Cir. 2005) (district courts have jurisdiction to issue injunctive relief to preserve the status quo pending arbitration); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1053-54 (2d Cir. 1990) (pro-arbitration public policy of the United States is furthered by a rule permitting district courts to preserve the meaningfulness of an arbitration through a preliminary injunction); *Sauer-Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 351-52 (7th Cir. 1983) (public interest is served by granting injunction pending arbitration). In fact, numerous court decisions recognize the obligation to ensure that parties to an arbitration agreement get what they bargained for—a meaningful arbitration—and that the issuance of injunctive relief to preserve the status quo pending arbitration fulfills a court's obligation to enforce a valid agreement to arbitrate. *See, e.g., Blumenthal,* 910 F.2d at 1053-54.

When interim relief is requested, federal courts generally act according to the powers granted them under Federal Rules of Civil Procedure 64 and 65—which provide for preliminary relief on an *ex parte* basis or with notice, respectively. To obtain relief under either rule, the moving party must show: (i) it will suffer irreparable harm if the injunction is not granted; and (ii) a likelihood of success on the merits. The moving party must also post security costs to obtain an injunction. Many states courts follow similar state procedural rules that are modeled after the Federal Rules of Civil Procedure.

Interim relief is generally available where the tribunal has not yet been constituted and where the arbitral institution has no emergency relief provisions. Because the Federal Arbitration Act does not address interim relief, there are no set deadlines within which a party must commence arbitration after obtaining interim relief. Rather, the issuing court will determine the duration of any injunctive relief and resolve other timing issues based on the specific facts and circumstances of each individual case. Where the arbitral tribunal is already seized, courts will generally defer to the tribunal instead of issuing an injunction at one party's request.

3.5 May parties file for interim relief with a state court even though an arbitration is already pending in the respective matter?

Yes, but a court is likely to grant a request for interim relief only under narrow circumstances if arbitration is already pending in the respective matter. For example, if the arbitral institution has no provisions to provide emergency relief or where such relief is necessary to preserve the status quo until the arbitral panel can act on the party's request for interim relief.

3.6 In your jurisdiction, does a state court have the power to order reimbursement of legal costs in proceedings for interim relief? If yes, what are the consequences if the claim that is sought to be secured by interim relief is subject to an arbitration agreement?

Under the "American Rule," each party generally bears its own litigation costs absent an applicable fee-shifting statute or contractual provision between the parties. Thus, whether a party can recover litigation costs related to a proceeding for interim relief will generally depend upon the terms of the parties' arbitration agreement.

4. Evidence

4.1 In your jurisdiction, do the state courts play a role in the gathering of evidence for use in arbitration?

Typically not, as the role of American courts in evidence gathering in aid of arbitration is designedly limited. In the United States, there is no right to discovery in arbitration. Indeed, broad discovery is seen as inconsistent with arbitration and is one of the procedural devices that parties to an arbitration agreement voluntarily sacrifice in exchange for the efficiency and cost-saving advantages associated with commercial arbitration. Thus, the extent to which formal discovery is available in a particular arbitral proceeding will depend upon the evidence gathering allowed in the parties' arbitration agreement, the applicable arbitration rules, and the discretion of the arbitration panel.

4.2 If your state courts play a role in the gathering of evidence for use in arbitration, how is the assistance or intervention of the state court requested (letters rogatory, petition, motion, filing of an action, etc.)?

As a threshold matter, it is important to distinguish between domestic arbitration (proceedings with a situs in the United States) and foreign arbitration (proceedings outside the territorial jurisdiction of the United States) when analyzing the mechanisms for court-assisted evidence gathering in aid of arbitration. Under U.S. law, Section 7 of the FAA (9 U.S.C. § 7) supplies the rule for discovery in connection with domestic arbitration and 28 U.S.C. § 1782 governs discovery in the U.S. in aid of a foreign proceeding or tribunal. These statutes, which implicate different public policy goals, are discussed below.

Discovery In Aid Of Domestic Arbitration Under The FAA:

To the limited extent that U.S. courts become involved with discovery in aid of domestic arbitration, such involvement is governed by Section 7 of the FAA (and similar arbitration statutes enacted in each of the fifty states). Section 7 is the only provision in the FAA to address discovery, and it grants U.S. district courts the authority to "compel" the attendance of witnesses and the production of documents for an arbitration hearing. 9 U.S.C. § 7.[1] This authority applies to parties and third party witnesses, as Section 7 "does not distinguish between parties and non-parties to the actual arbitration *proceeding* and the arbitrator's power over parties stems from the arbitration agreement, not Section 7." *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.2d 210, 217 (2d Cir. 2008). Accordingly, courts will exercise their Section 7 authority to require non-parties to the arbitration to appear and produce documents at a hearing before an arbitrator or arbitration panel. The requisite hearing need not be a hearing on the merits, and instead can be a hearing on preliminary matters or a hearing scheduled solely for the taking of evidence before the tribunal. *See Life Receivables*, 549 F.2d at 218 (Arbitrators have "the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings.")

[1] Specifically, Section 7 provides: "The arbitrator selected either as prescribed in this title or otherwise, or a majority of them, *may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper, which may be deemed material as evidence in the case*. The fees for such attendance shall be the same as the fees for witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrator, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the

However, there is a split of authority among the federal appellate courts whether Section 7 allows arbitrators to order third party discovery outside of the context of an actual arbitration hearing. The Courts of Appeals for both the Second and Third Circuits held that Section 7 does not allow an arbitrator (and by extension, a district court enforcing an arbitral subpoena) to compel pre-hearing discovery from a non-party witness. *Life Receivables Trust*, 549 F.3d at 216-217; *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004). As then-Judge—and now Supreme Court Justice—Alito wrote for the Third Circuit, Section 7 "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time." *Hay Group*, 360 F.3d at 407.

Similarly, the Fourth Circuit Court of Appeals contemplated that Section 7 *may* authorize arbitrators to compel the production of documents by non-parties outside of a hearing under "unusual circumstances" where there is a "special need or hardship" for the production. *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 274-76 (4th Cir. 1999). But the Fourth Circuit did not grant such relief or define the required showing other than suggesting it includes, at a minimum, that the information is otherwise unavailable. *Id.* In contrast, the Court of Appeals for the Eighth Circuit concluded that "implicit in an arbitration panel's power to subpoena documents is the power to order the production of relevant documents for review by a party prior to the hearing." *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000).

United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States." 9 U.S.C. § 7 (emphasis added.)

Among district courts sitting within federal circuits that have not expressed a view on the issue, the emerging majority rule is that arbitrators are not empowered to require non-parties to participate in pre-hearing discovery. *See, e.g., Chicago Bridge & Iron Co. v. TRC Acquisition, LLC,* 2014 WL 3796395, at *3 (E.D. La. July 29, 2014); *Empire Fin. Group, Inc. v. Penson Fin. Servs., Inc.*, 2010 WL 742579, at *3 (N.D. Tex. Mar. 3, 2010); *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078, 1080-83 (N.D. Ill. 2008); *see also* 4 Bus. & Com. Litig. Fed. Cts. § 47:51 (3d ed.) ("While there may be valid reasons for allowing arbitrators to assert subpoena power over third parties, the emerging view remains that because timeliness and efficiency are among the primary reasons to resolve disputes through arbitration, limiting arbitral discovery is sound."); Thomas H. Oemke, 3 Comm. Arb. § 88:4 (2012).

A party seeking to invoke court assistance under Section 7 of the FAA, must petition the U.S. district court for the district in which the arbitrator or a majority of the arbitrators are sitting. 9 U.S.C. § 7. The district court will then determine whether the requirements for enforcement of the subpoena under Section 7 and Federal Rule of Civil Procedure 45 (which governs the issuance of subpoenas in civil actions) are satisfied and weigh the relative burdens, costs and necessity of the requested disclosure.

Discovery In Aid Of Foreign Arbitration Under 28 U.S.C. § 1782:

Section 1782 provides, in relevant part, that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." 28 U.SC. 1782(a). The primary purpose of Section 1782 is to give federal-court judicial assistance in gathering evidence for use in a proceeding in a foreign or international tribunal. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004). Upon application to the proper district court with personal jurisdiction over the discovery target, the court may order a person or entity to produce discovery if three requirements are satisfied: (1) the application is made by a foreign or international tribunal or "any interested person"; (2) the discovery is for use in a proceeding in a foreign or international tribunal"; and (3) the person or entity from whom the discovery is sought is a resident of or found in the district in which the application is filed." *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 80 (2d Cir. 2012). Importantly, "a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so." *Intel*, 542 U.S. at 264.

With respect to the second requirement, the case law is unsettled whether Section 1782 applies to private commercial arbitrations. *See Consorcio Ecuatoriano de Telecommunicaiones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 (11th Cir. 2014) (noting, but declining to resolve, the uncertainty regarding the application of Section 1782 to private international arbitrations). The Second and Fifth Circuit Courts of Appeals have directly held that Section 1782 does not apply to purely private arbitrations. *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 190 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999). However, those decisions issued before the U.S. Supreme Court's 2004 *Intel* opinion. In *Intel*, the Court held that the Directorate General for Competition of the European Commission—the EU's "primary antitrust law enforcer"—was a tribunal within the meaning of § 1782. *Id.* at 257-58. In so doing, the Court focused on the function and procedures of the European Commission, concluding that its role as a first-instance decision-maker, its authority to determine liability and impose penalties, its ability to make a final disposition, and the judicial reviewability of its decisions brought it within the ambit of Section 1782. *Id.*, at 257-58; *see also id.* at 255 n.9. The Court also suggested in *Intel* that "[t]he term 'tribunal' . . . includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts." *Id* at 258 (emphasis added).

Since *Intel*, some district courts have focused on the Court's reference to "arbitral tribunals" to conclude that a private international arbitral body qualifies as a "foreign or international tribunal" for purposes of § 1782 discovery. *See In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 240 (D. Mass. 2008); *In re Hallmark Cap. Corp.*, 534 F. Supp. 2d 951, 952 (D. Minn. 2007); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1222 (N.D. Ga. 2006). Meanwhile, a number of other post-*Intel* decisions continue to reject the applicability of § 1782 to private commercial arbitrations and hold that *Intel* did not intend to expand the meaning of "foreign or international tribunal" to include private contractual arbitrations because *Intel* focused "quasi-judicial agencies" like the European commission. *See, e.g., El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed. Appx. 31, 34 (5th Cir. 2009) (affirming its prior holding in *Biedermann* and concluding that the application of § 1782 to private commercial arbitrations was not at issue or considered in *Intel*); *In re Dubey*, 949 F. Supp. 2d 990, 993-94 (C.D. Cal. 2013); *In re Arbitration in London, England*, 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009); *In re Operadora DB Mex., S.A. de C.V.*, 2009 WL 2423138, at *12 (M.D. Fla. Aug. 4, 2009).

4.3 Is there specific legislation or other legal authority governing the assistance that the state courts can provide?

As discussed above, the governing legal authority for federal courts in the United States is Section 7 of the FAA (and related laws at the state level) for domestic arbitrations and 28 U.S.C. § 1782 for foreign proceedings.

4.4 What requirements must the party requesting the evidence-gathering assistance satisfy in order to obtain the state court's assistance?

Please see the discussion above in response to Questions 4.1 and 4.2.

4.5 What kinds of evidence gathering can the state courts authorize or assist in (document production, sworn interrogation, depositions, in-court examination by the judge, inspections, etc.)?

As between the parties in an arbitration, American courts will not permit any discovery that exceeds the evidence gathering methods provided for in the parties' arbitration agreement. For non-parties to the proceeding, and as discussed above, the emerging majority rule is that arbitrators do not have the authority to compel pre-hearing document production from non-parties to a domestic arbitration. Although a minority of courts have adopted a contrary view with respect to document production, research did not reveal any decisions in which a court ordered a non-party to sit for a pre-hearing deposition. *See COMSAT Corp.*, 190 F.3d at 275 ("Nowhere does the FAA grant an arbitrator authority to order non-parties to appear at depositions. . . ."); *Matria Healthcare*, 584 F. Supp. 2d at 1080 and 1082 (same).

To the extent a requesting party can establish that a foreign private arbitration qualifies as a "foreign or international tribunal" under Section 1782 and is able to convince court of competent jurisdiction to exercise its discretion under the statute to permit discovery, the requesting party may be able to obtain document production and/or deposition testimony from the discovery target.

4.6 What rules govern the evidence gathering (rules of the state court, rules of the arbitral institute, others)?

Other than the limited enforcement authority under Section 7 of the FAA, evidence gathering in connection with a domestic arbitration will be governed by the parties' arbitration agreement and the rules of the relevant arbitral institute. To the extent a foreign arbitral proceeding qualifies as an international tribunal or proceeding for purposes of Section 1782, any discovery ordered by the district court will be governed by the applicable discovery rules for document production and deposition testimony under the Federal Rules of Civil Procedure.

4.7 Does the kind of arbitration (domestic vs. international, investor-state, commercial, etc.) impact what evidence can be gathered with the assistance of the state court?

As discussed above, Section 7 of the FAA applies to domestic arbitration and Section 1782 applies to foreign proceedings and tribunals. However, and as discussed above, it remains an open question under U.S. law whether evidence gathering capabilities under Section 1782 are available to parties in purely private commercial arbitrations.

4.8 Who can the courts order disclosure or discovery from? In other words, who do the state courts have jurisdiction over?

As a general matter, the authority that an American court has over an individual or entity is limited to such persons that are found within the court's specific territorial jurisdiction. A court has no power to compel compliance with an arbitral order or subpoena on an entity or individual who is outside of the court's geographic jurisdiction. Under Section 7 of the FAA, the only court that can enforce a discovery subpoena issued by a arbitral panel is the district court sitting in the district where the arbitrator or a majority of the arbitrators on a panel are sitting. Section 7 of the FAA incorporates Federal Rule of Civil Procedure 45, which governs subpoenas in civil actions and limits a court's enforcement authority to within 100 miles of the district court. Taken together, that means that a court's authority to compel third party compliance with an arbitral subpoena is limited to third parties who reside within the territorial scope of the district court located in the situs of the arbitration. *Dynegy Midstream Servs., LP v. Trammochem*, 451 F.3d 89, 96 (2d Cir. 2006); *Alliance Healthcare Servs., Inc. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 813 (N.D. Ill 2011). Similarly, a court exercising its authority under § 1782 can only compel discovery from a party that is found or resides within the court's territorial jurisdiction and is therefore subject to the court's personal jurisdiction.

4.9 Does the state court have the power to compel the discovery or disclosure target to give the evidence? When will the state court take that step?

Please see the discussion above in response to Questions 4.1, 4.2, 4.5, and 4.8.

4.10 What can the state court do if the discovery or disclosure target fails to comply?

The court can hold a non-compliant discovery respondent, over whom the court has personal jurisdiction, in contempt and/or issue monetary fines or sanctions. *See* 9 U.S.C. § 7; Fed. R. Civ. P. 26, 37, and 45.

4.11 Who can request assistance from the state court (parties to the arbitration, the tribunal, the arbitral institution, others)?

For domestic proceedings under Section 7 of the FAA, the party (or parties) seeking to compel the production of evidence initiate the court action to enforce the relevant subpoena after the arbitral panel has issued it. 9 U.S.C. § 7.

Under Section 1782, the request for discovery "may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person." 28 U.S.C. § 1782(a).

4.12 Can the disclosure or discovery target seek relief from state court or to otherwise modify or prevent the disclosure or discovery?

Yes.

4.13 What consideration will be given by the state court to concerns about the invasion of a privilege (attorney-client, etc.), confidentiality protections, or potential criminal liability in the event of disclosure? Whose laws and rules will the state court apply?

A court will not force a party to reveal information that is protected from disclosure by an applicable and legally recognized privilege or protection. Additionally, the Fifth Amendment to the U.S. Constitution provides that a witness may not be forced to give testimony that may tend to incriminate himself or herself. The Fifth Amendment right against self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar v. United States,* 406 U.S. 441, 445 (1972).

4.14 Do the state courts need to enquire into the view of the arbitral tribunal on the disclosure or discovery?

Once an arbitral tribunal has issued a subpoena (which implies that the panel found merit in the underlying request), the district court will not conduct its own analysis of the materiality of the evidence in connection with its assessment of an application under Section 7 of the FAA. *In re Sec. Life*, 228 F.3d at 871; *Bailey Shipping Ltd. v. Am. Bureau of Shipping*, No. 12 Civ. 5959, 2014 WL 3605606, at *3 (S.D.N.Y. July 18, 2014) ("The [arbitration] panel has concluded that the evidence subject to this subpoena may affect the outcome of its deliberation. For the Court to conclude otherwise now would require an independent conclusion on the same topic, and this the Court may not do."); *see also Compania Panemanena Maritima v. J.E. Hurley Lbr. 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 arbitration.").

Once the statutory requirements under § 1782 (discussed above) have been satisfied, a court is free to grant discovery in its discretion. *See, e.g., Intel,* 542 U.S. at 264-65; *Brandi-Dohrn*, 673 F.3d at 80. In exercising that discretion, among the factors the court can consider are the "nature of the foreign tribunal, the character of proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance." *Intel*, 542 U.S. at 264-65. And, the district court may also consider whether the request "conceals an attempt to circumvent foreign-proof-gathering restrictions or other policies of a foreign country or the United States," and the extent to which the discovery is sought in bad faith or for the purpose of harassment. *Id.* That said, the Supreme Court expressly rejected any foreign-discoverability requirement in connection with § 1782. *Id.* at 259-60; *see also Brandi-Dohrn*, 673 F.3d at 81-82.

4.15 Do the state courts need to enquire into the ultimate admissibility of the evidence in the arbitration?

No, such decisions are best left to the discretion of the arbitral panel. *See In re Sec. Life*, 228 F.3d at 871 (holding that district courts should not independently assess the requested evidence, as "it is antithetical to the well-recognized federal policy favoring arbitration, and compromises the panel's presumed expertise in the matter at hand."); *Brandi-Dohrn*, 673 F.3d at 81-82 ("[A]s a district court should not consider the *discoverability* of the evidence in the foreign proceeding, it should not consider the *admissibility* of evidence in ruling on a section 1782 application) (emphasis in original).

4.16 Do the state courts have the power to order reimbursement of attorneys' fees or expenses incurred by the disclosure or discovery target? If so, in what instances will they order that?

In the United States, parties and non-parties are generally responsible for bearing their own attorneys' fees and costs associated with responding to discovery. Under the Federal Rules of Civil Procedure, a non-party witness who appears for a deposition or hearing is entitled to receive a modest witness fee, typically $40.00 per day, as well as reimbursement of reasonable mileage costs for travel to/from the hearing or deposition. Absent unusual circumstances, hardship, or excessive burden and cost that will result from disclosure of the requested information, there are no witness fees or reimbursement for costs associated with document production. However, court may often make cost-shifting a condition of production if compliance with a discovery request is particularly burdensome or costly—especially where the respondent is a non-party to the pending action.

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