

**INTERNATIONAL
COMMERCIAL
ARBITRATION IN
NEW YORK**

**EDITED BY
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&
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OXFORD
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Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

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Library of Congress Cataloging-in-Publication Data

International commercial arbitration in New York / edited by
James H. Carter, John Fellas.

p. cm.

Includes bibliographical references and index.
ISBN 978-0-19-537562-6 (hardback : alk. paper)

1. Arbitration and award, International. 2. Arbitration agreements, Commercial.
3. Arbitration and award—United States. 4. Arbitration and award—New York (State)—New York.

I. Carter, James H., 1943- II. Fellas, John., 1962-
K2400.I59243 2010

341.5'22—dc22

2009048254

1 2 3 4 5 6 7 8 9

Printed in the United States of America on acid-free paper.

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Chapter 3

Drafting Considerations for Clauses Designating New York as the Place of Arbitration

*Paul D. Friedland*¹

This chapter offers recommendations for drafting arbitration clauses that provide for international arbitration in New York.

Section A addresses preliminary issues that, irrespective of the chosen seat of arbitration, must be considered. The literature on this topic is extensive, and Section A is therefore only summary. The basic rule when drafting an arbitration clause is to start with a model clause.² This is so whether or not the clause provides for arbitration in New York.

Section B, which comprises the bulk of this chapter, discusses considerations that are specific to arbitration clauses designating New York as place of arbitration, and offers proposed wording.³

A. PRELIMINARY DRAFTING CONSIDERATIONS NOT PARTICULAR TO ARBITRATION IN NEW YORK

1. Essential Elements

Regardless of the seat of arbitration and the applicable arbitration law, there are three elements that are necessary to an effective arbitration clause: (1) an appropriately

¹ Damien Nyer of White & Case's International Arbitration Group (New York) substantially contributed to this chapter.

² *See generally* PAUL FRIEDLAND, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS*, 1–5 (2d ed. 2007).

³ The clauses presented in this chapter are largely based on the recommended clauses presented in Paul Friedland, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS* (2d ed. 2007).

Chapters 2 and 3 of the FAA respectively;¹³ and Article 75 of the New York Civil Practice Law and Rules (CPLR), which is the arbitration law of the State of New York.

The first place to look for the law pertaining to *international* arbitration agreements is the New York Convention¹⁴ and, where applicable, the Panama Convention.¹⁵ In addition, the general provisions found in Chapter 1 of the FAA are applicable to international arbitration agreements to the extent that they do not conflict with the provisions of the New York Convention and, where applicable, of the Panama Convention.¹⁶ In matters involving international arbitration agreements, the provisions of the CPLR will be applicable in only a limited set of circumstances and only to the extent that they are consistent with the FAA.¹⁷ Insofar as relevant to drafting, the differences between the CPLR and the FAA are pointed out in the remainder of this text.

Parties to an arbitration agreement are free to choose both the applicable substantive law and the applicable arbitration law.¹⁸ Where the parties wish to assure that the FAA will govern the arbitration agreement and any subsequent arbitration, the following language can be used:

“This arbitration agreement and any arbitration shall be governed by the United States Federal Arbitration Act to the exclusion of state law inconsistent therewith.”

Conversely, if the parties want New York arbitration law—Article 75 of the CPLR—to be the governing arbitration law, the following language can be used:

“This arbitration agreement and any arbitration shall be governed by New York’s Civil Practice Law and Rules.”

Generally, a clause providing that the laws of New York (or another jurisdiction) shall govern the contract will not be interpreted as requiring application of New York

¹³ 9 U.S.C. §§ 201–208 and 9 U.S.C. §§ 301–307.

¹⁴ Under § 202 of the FAA, the New York Convention is applicable to “an arbitration agreement or award arising out of a legal relationship, whether contractual or not, which is considered as commercial” except where the relationship is between U.S. citizens and does not involve property located abroad, does not envisage performance or enforcement abroad, and does not have some other reasonable relation with one or more foreign states.

¹⁵ Under Chapter 3 of the FAA, the Panama Convention is applicable where the New York Convention would be applicable under § 202 of the FAA and where “a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States [. . .].”

¹⁶ FAA, § 208 and § 307.

¹⁷ The CPLR will be applicable in the rare case where an action to enforce the arbitration agreement is brought in New York state courts and not removed to the federal courts pursuant to § 205 of the FAA. In this case, the CPLR will only be applicable to the extent that its provisions are consistent with and not preempted by federal law. *See Southland Corp. v. Keating*, 465 U.S. 1 (holding that the FAA creates a body of federal substantive law applicable in state and federal courts).

¹⁸ *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (“There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”).

(or another forum's) arbitration law. Rather, the clause will be read as referring solely to the substantive law.¹⁹ Where, however, a clause provides that "the laws of the state of New York govern the contract and *its enforcement*," the law is unsettled whether this makes New York arbitration law applicable. The New York Court of Appeals, the highest court in the state, has held that such language *did* call for application of the provisions of the CPLR.²⁰ In contrast, the U.S. Court of Appeals for the Second Circuit, which encompasses the State of New York, has held the opposite.²¹ To avoid uncertainty, the quoted language (providing for New York law to govern the "contract and its enforcement") should be avoided, and the choice of substantive law clause should be separate from the arbitration clause.

2. Jurisdictional Considerations

(a) *Kompetenz-Kompetenz* Under the principle of *Kompetenz-Kompetenz*, arbitrators are empowered to decide their own jurisdiction.²² This principle is reflected in the rules of the leading arbitral institutions²³ and is recognized by the laws of many countries.²⁴ The law in the United States is, however, partially at odds with international practice. Under the FAA, questions of arbitral jurisdiction²⁵ can be referred to arbitrators

¹⁹ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1219 (1995) (finding that a choice-of-law clause providing that a contract "shall be governed by the laws of the State of New York" encompassed only "substantive principles that New York courts would apply, but not [. . .] special rules limiting the authority of arbitrators.").

²⁰ *Matter of Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 253 (C.A.N.Y. 2005) ("A choice of law provision, which states that New York law shall govern both 'the agreement and its *enforcement*,' adopts as binding New York's rule that threshold Statute of Limitations questions are for the courts."); *Merrill Lynch, Pierce, Fenner, & Smith v. Adler*, 234 A.D.2d 139 (S.C.N.Y., App. Div. 1996) (similar); *see also Smith Barney, Harris Upham & Co., Inc. v. Luckie*, 85 N.Y.2d 193 (C.A.N.Y. 1995).

²¹ *Painewebber Incorporated v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996) (rejecting the argument that because the agreement provided that it and its enforcement "shall be governed by the laws of the State of New York," the CPLR's rule regarding the nonallocation of attorneys' fees was applicable). This decision was most recently followed by the Southern District of New York in *Goldman, Sachs & Co. v. Griffin*, 2007 WL 147430 (S.D.N.Y. 2007).

²² For a detailed discussion of this doctrine, *see* Chapter 5.D and Chapter 8.B.3(a) of this book.

²³ *See, e.g.*, ICC Rules of Arbitration, Art. 6(2).

²⁴ For a comparative account of national laws, *see* JEAN-FRANÇOIS POUURET AND SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION*, 384 *et seq.* (2007).

²⁵ The terminology used by courts in the United States is liable to confuse foreign practitioners. In the United States, courts use the term "arbitrability" to refer to any one or all of the following: (1) the existence of an arbitration agreement, (2) the competence of the arbitral tribunal, or (3) the subject matters that can properly be settled by arbitration. *See* William Park, *Kompetenz-Kompetenz: The Arbitrability Dicta in First Options* in *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES*, 88 (2006). Outside the United States, only the third topic would be referred to as "arbitrability." *See* EMMANUEL GAILLARD AND JOHN SAVAGE, *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION*, 312 *et seq.* (1998).

only if there is “clear and unmistakable” evidence that the parties intended that arbitrators decide these questions.²⁶ New York arbitration law follows the same rule.²⁷

Federal and state courts in New York have been liberal in finding “clear and unmistakable” evidence of the parties’ intent to submit jurisdictional issues to the arbitrators. There is authority that an agreement to submit “all and any disputes” to arbitration sufficiently evidences the parties’ intent to have arbitrators decide jurisdictional questions.²⁸ There is also case law holding that reference in the arbitration agreement to arbitration rules that empower arbitrators to decide questions of arbitral jurisdiction (as for example Article 6.2 of the ICC Rules of Arbitration or Article 15 of the ICDR International Arbitration Rules) will suffice.²⁹

As the case law is scant, if parties wish to empower the arbitrators to decide questions of arbitral jurisdiction and have not incorporated arbitration rules that provide so or wish to leave no doubt, the following language can be used:

“The arbitral tribunal shall have the power to rule upon any challenge to its jurisdiction.”

Conversely, if the parties wish to assure that courts will decide questions of arbitral jurisdiction, the following language can be used:

“Any challenge of arbitral jurisdiction is to be submitted to the federal courts in the Southern District of New York.”

(b) *Arbitral jurisdiction to resolve preliminary issues* The question of whether courts or arbitrators are to decide threshold issues such as the timeliness of claims

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- 26 First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) (“Courts should not assume that the parties agreed to arbitrate arbitrability unless there is “clea[r] and unmistakabl[e]” evidence that they did so.”); *see also* Sarhank Group v. Oracle Corporation, 404 F.3d 657 (2d Cir. 2005) (when there is no clear and unmistakable evidence of intent to permit the arbitrator to decide issues of arbitral jurisdiction, the district court is not bound by the arbitrator’s decision). The significance of the distinction between U.S. and international practice can be overstated. Internationally, like in the United States, courts have the final say on arbitral jurisdiction. The difference is one of timing: internationally, arbitrators are generally empowered to rule first on their own jurisdiction, with courts reviewing disputes about jurisdiction only after an arbitration is completed; in the United States, parties can go to courts at the outset of an arbitration.
- 27 Smith Barney Shearson Inc. v. Sacharow, 91 N.Y.2d 39 (C.A.N.Y. 1997) (the courts will recognize and enforce an agreement to arbitrate even questions of arbitrability when the parties have clearly and unmistakably so provided).
- 28 Painewebber Incorporated v. Bybyk, 81 F.3d 1193, 1199–1200 (2d Cir. 1996) (holding that the language “[a]ny and all controversies” was sufficiently broad to evidence an intent to arbitrate issues of arbitrability); *see also* Shaw Group Inc. v. Triplefine Intern. Corp., 322 F.3d 115, 121–22 (2d Cir. 2003) (suggesting that the reference to “all disputes” in the arbitration clause is sufficient to evidence the parties’ intent to arbitrate arbitrability); Smith Barney Shearson Inc. v. Sacharow, 91 N.Y.2d 39 (C.A.N.Y. 1997) (language providing for “[a]ny and all controversy” between the parties to be settled by arbitration is sufficiently “plain and sweeping” to indicate an intent to arbitrate arbitrability).
- 29 Shaw Group Inc. v. Triplefine Intern. Corp., 322 F.3d 115 (2d Cir. 2003) (parties’ intent to arbitrate arbitrability is further evidenced by their agreement to refer all disputes to the ICC).

(e.g., compliance with statutes of limitations or contractual time limitations, laches) has generated case law in the United States. Under the FAA, these threshold issues are for the arbitrators to decide.³⁰ By contrast, under New York arbitration law, issues of compliance with statutory time limitations (as opposed to contractual ones) are for the courts to decide.³¹ The New York rule has, however, been held inapplicable to arbitrations governed by the FAA located in New York.³²

Appropriate language can be added to the arbitration clause if, given this state of the law, parties want to clarify the respective roles of the arbitrators and courts regarding threshold issues. If their wish is for arbitrators to decide these issues, the following language can be used:

“The arbitrators shall have the discretion to hear and determine in a preliminary phase of the arbitration, in accordance with such procedure as the arbitrators may deem appropriate, any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or part, including any defense that any claim or counterclaim is not timely by reason of statute of limitations, contractual limitations period, or laches, and the arbitrators may render an award on such issue.”

Conversely, if parties want the courts to decide a designated category of threshold issues (here, timeliness issues), the following language can be used:

“Determination of whether a claim or counterclaim is timely under this Agreement or the applicable law is an issue that shall be determined by a court of competent jurisdiction, and not by the arbitrators.”

A related issue that has been the subject of case law in the United States is who decides the preclusive effect of a prior related award (*res judicata*). Under the FAA, this question is for the arbitrators to decide.³³ New York state courts are divided on this issue, some holding that the *res judicata* effect of prior awards is a question for the

30 *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (interpretation of NASD rule imposing six-year time limit for arbitration was a matter presumptively for the arbitrator, not for the court); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (allegations of waiver, delay, or a like defense to arbitrability are for the arbitrators to decide).

31 CPLR § 7502(b); *see, e.g.*, *Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 202 (C.A.N.Y. 1995) (“Clearly, under New York law, *statutory* time limitations questions [. . .]—as opposed to *contractual* time limitations agreed upon by the parties—are for the courts, not the arbitrators.”).

32 *Matter of Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 253 (C.A.N.Y. 2005) (suggesting that the New York rule would be applicable only where the parties have agreed that “the laws of the State of New York shall govern their agreement and *its enforcement*.”).

33 *Consol. Coal Co. v. United Mine Workers of Am.*, 213 F.3d 404, 408–09 (7th Cir. 2000) (“The *res judicata* effect of a judicial decision merely confirming an arbitral award is extremely limited. All it amounts to is a determination that there is no basis for upending *that* award; the effect on subsequent awards must be left to the arbitrators who make them.”).

courts.³⁴ If the parties have concerns about this subject, the provisions presented above can be adapted to clarify the applicable rule.

(c) *Jurisdiction over nonsignatories* Courts in the United States have extended the effect of arbitration agreements to nonsignatories under a variety of now well-established contractual and legal theories.³⁵ Federal and state courts in New York have applied these norms, and the situation in New York is not distinct.³⁶

If parties wish to ensure that affiliates and related parties will not be bound, the following language could be used: “This arbitration agreement binds only the signatories hereto.”

3. Powers and Duties of the Arbitral Tribunal

(a) *Impartiality of arbitrators* A distinguishing feature of U.S. arbitration practice, as compared to international practice, is that, traditionally, party-appointed arbitrators in the United States need not be impartial or neutral. Federal and state courts in New York have relied upon this distinction to deny actions to disqualify arbitrators or to reject actions to vacate awards on the basis of bias.³⁷

International arbitration rules generally require neutrality or impartiality by all arbitrators, including party-appointed ones.³⁸ Where the parties choose not to adopt arbitration rules that require impartiality on the part of all arbitrators and this aspect of U.S. arbitration practice is a concern, the following language can be used: “All arbitrators shall be impartial.”

³⁴ *In re Pinnacle Env't Sys, Inc.*, 760 N.Y.S.2d 253 (3d Dep. 2003) (holding that a court, not an arbitrator, should decide the preclusive effect of a prior award), *but see* *Town of Newburgh v. Civil Serv. Employees Ass'n, Inc.*, 707 N.Y.S.2d 225 (2d Dep. 2000) (holding the opposite).

³⁵ Larry Edmonson, ed., *DOMKE ON COMMERCIAL ARBITRATION*, §§ 13.1 *et seq.* (3d ed. 2007).

³⁶ *American Bureau of Shipping v. Tencara Shipyard S.p.A.*, 170 F.3d 349, 352 (2d Cir. 1999) (explaining that nonsignatories may be bound under five different theories: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel); *see also* *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995) (similar). For a discussion of the circumstances in which nonsignatories may be bound by, or rely upon, arbitration agreements, *see* Chapter 7.B.4.(b) of this book.

³⁷ *Instituto de Resseguros do Brasil v. First State Ins. Co.*, 178 A.D.2d 313 (S.C.N.Y. 1991) (holding that a party designated member of a tripartite arbitration tribunal is not expected to be neutral in the same sense as a judge or arbitral umpire); *Cia De Navegacion Omsil, S.A. v. Hugo Neu Corporation*, 359 F.Supp. 898, 899 (S.D.N.Y. 1973) (“As everyone knows, the party’s named arbitrator in this type of tribunal is an amalgam of judge and advocate.”); *Astoria Medical Group v. Health Insurance Plan*, 11 N.Y.2d 128, 134 (C.A.N.Y. 1962) (“Arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be “neutral”, at least in the sense that the third arbitrator or a judge is.”).

³⁸ *See, e.g.*, ICDR International Arbitration Rules, Art. 7, which provides that “[a]rbitrators acting under these rules shall be impartial and independent.”

(b) *Allocation of costs and fees* In most countries, costs (administrative expenses and other expenses such as stenographic costs) and attorneys' fees incurred in litigation or arbitration are allocated at the end of the proceedings, with the losing party typically obliged to pay part or all of the prevailing party's expenses. The United States stands apart. Under the *American Rule*, each party generally bears its own costs and attorneys' fees regardless of the outcome of the proceedings.³⁹

The FAA is silent on the issue of costs. By contrast, New York arbitration law explicitly disallows the allocation of attorneys' fees absent specific language to this effect in the arbitration agreement.⁴⁰ The New York rule has, however, been held inapplicable to international arbitrations or other arbitrations subject to the FAA located in New York.⁴¹ Arbitrators are thus free to award costs in international arbitrations located in New York.

While the American Rule does not govern international arbitral proceedings in New York, the U.S. practice may inhibit arbitrators sitting in New York from allocating fees and expenses. This may be so even where the parties select arbitral rules (such as the ICC Rules of Arbitration or the ICDR International Arbitration Rules) that empower arbitrators to allocate costs and fees.⁴²

Accordingly, if parties choosing New York as seat of arbitration want the arbitrators to have the discretion to allocate costs and fees, they should so provide in their arbitration clause. The following language can be used:

“The arbitrators are authorized to include in their award an allocation to any party of such costs and expenses, including attorneys' fees, as the arbitrators shall deem reasonable.”

Conversely, as the FAA contains no prohibition on allocating costs and attorneys' fees, if the parties wish to ensure that arbitration costs will be shared equally and that each party will bear its own attorneys' fees and costs (and thereby to override the grant of authority, e.g., in the ICDR International Arbitration Rules), the following language should be added to the arbitration clause:

“All costs and expenses of the arbitrators [and the arbitral institution] shall be borne by the parties equally; each party shall bear the costs and expenses, including attorneys' fees, of its own counsel, experts, witnesses and preparation and presentation of its case.”⁴³

³⁹ See discussion in Chapter 2.H of this book.

⁴⁰ CPLR, § 7513.

⁴¹ *Painewebber Incorporated v. Bybyk*, 81 F.3d 1193. (2d Cir. 1996) (New York rule not applicable to FAA arbitration in New York, and this despite the New York choice of law provision in the contract).

⁴² ICC, Rules of Arbitration, Art. 31(1); ICDR, International Arbitration Rules, Art. 31.

⁴³ In *ReliaStar Life Insurance Company of New York v. EMC National Life Company*, 2009 WL 941173 (2d Cir. 2009), the Court of Appeals for the Second Circuit held that such a clause did not prevent the arbitrators from awarding costs as a sanction against a party that the arbitrators determined had failed to arbitrate in good faith.

(c) *Punitive damages* A well-known distinction of U.S. litigation is the availability of punitive damages in commercial cases. Under the FAA, arbitrators are empowered to award punitive damages.⁴⁴ By contrast, arbitrators have no such authority under New York arbitration law, and this is so even if the parties seek to confer such authority on the arbitrators.⁴⁵ The New York prohibition is, however, not applicable to international arbitrations located in New York (even where the contract is governed by New York law).⁴⁶

The availability of punitive damages is a cause of concern for some foreign parties choosing New York as seat of arbitration. Taking this concern into consideration, the AAA amended its International Arbitration Rules to prohibit awards of punitive damages absent party agreement.⁴⁷ The rules of other institutions do not include similar prohibitions. Where the subject of punitive damages is not addressed in the chosen arbitral rules, the matter can be addressed in the arbitration clause. To disable the arbitrators from awarding punitive damages, the following sentence can be added to the arbitration clause:

“The arbitrators are not empowered to award punitive damages, and each party hereby waives any right to seek or recover punitive damages with respect to any dispute resolved by arbitration.”

Conversely, parties to an arbitration agreement who wish to confirm the arbitrators' power to grant punitive damages could use the following language: “The arbitrators shall be empowered to award punitive damages in appropriate cases.”

In practice, the author is aware of no international arbitral awards providing for punitive damages.

4. Arbitral Process

(a) *Discovery* Extensive discovery—wide-ranging document disclosure and pretrial depositions and interrogatories of parties and nonparties—is the hallmark of U.S.

44 *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 (1995) (FAA preempts New York rule prohibiting arbitrators from awarding punitive damages).

45 *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 356 (C.A.N.Y. 1976) (“An arbitrator has no power to award punitive damages, even if agreed upon by the parties.”).

46 *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 (1995) (New York choice-of-law provision is not “an unequivocal exclusion of punitive damages claims.”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Adler*, 234 A.D.2d 139 (App. Div. 1996) (following *Mastrobuono*); *but see Dean Witter Reynolds v. Trimble*, 166 Misc.2d 40 (S.C.N.Y. 1995) (holding that the New York prohibition on punitive damages would be applicable where the contract requires arbitration in New York).

47 Article 28.5 of the International Arbitration Rules reads in relevant part: “Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner.”

litigation.⁴⁸ This practice is of concern to many parties considering New York as place of arbitration.

This concern is misguided because international arbitrators sitting in New York need not, and generally do not, follow U.S. litigation standards regarding discovery.⁴⁹ As a matter of law, the arbitrators' power to compel prehearing discovery in arbitrations located in New York is limited.⁵⁰ Courts in New York have recognized the arbitrators' power to order document disclosure from parties,⁵¹ but not from nonparties.⁵² Although doubts remain as to whether arbitrators have the authority to compel prehearing depositions of parties,⁵³ there is significant authority for the proposition that arbitrators cannot require depositions of *nonparties*.⁵⁴

48 For a discussion of how discovery operates in the U.S. system of civil litigation, see Chapter 2.E of this book.

49 For a discussion of discovery procedures in an international arbitration seated in New York, see Chapter 9 of this book.

50 Section 7 of the FAA provides that "[t]he arbitrators [. . .] 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." For the way this provision has been interpreted, see generally Paul Friedland and Lucy Martinez, *Arbitral Subpoenas under U.S. Law and Practice*, 14 AM. REV. INT'L ARB. 197 (2003). Under § 7505 of the CPLR, arbitrators are granted power to issue subpoenas. This provision has, however, been limited to the procuring of evidence at the hearing, i.e., to compel attendance at the hearing, see *De Shapiro v. Kohlmeyer*, 35 N.Y.2d 402, 406 (C.A.N.Y. 1974) ("Under the CPLR, arbiters do not have the power to direct the parties to engage in disclosure proceedings.").

51 See, e.g., *Integrity Ins. Co., In Liq. v. American Centennial Ins. Co.*, 885 F. Supp. 69, 72 (S.D.N.Y. 1995) (although § 7 "speaks only to the arbitrators' power to summon a witness to 'attend before them,' i.e. at the hearing, the courts have permitted arbitrators to order prehearing discovery of parties.") (Emphasis in original); see also *Arbitration Between Douglas Brazell v. American Color Graphics, Inc.*, 2000 WL 364997 at *2 (S.D.N.Y. 2000) ("Section 7 has been interpreted by courts in this district to include pre-hearing discovery among parties.").

52 *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 2008 WL 4978550 (2d Cir. 2008) (finding that § 7 of the FAA does not enable arbitrators to issue prehearing document subpoenas to entities not parties to the arbitration proceeding). This interpretation of the FAA has been adopted in several other federal circuits, see *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999) and *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004); but see *In re Sec. Life Ins. Co.*, 228 F.3d 865, 871 (8th Cir. 2000) (the power to compel document disclosure from third parties is "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing [. . .]").

53 In *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.* 165 F.3d 184, 187 (2d Cir. 1999), the Second Circuit noted that "open questions remain as to whether § 7 [of the FAA] may be invoked as authority for compelling pre-hearing depositions [. . .]." The Court, however, eschewed deciding the question.

54 *Amtel Corp. v. LM Ericsson Telefon, AB*, 371 F. Supp. 2d 402, 403 (S.D.N.Y. 2005) ("The weight of judicial authority favors the view that the Federal Arbitration Act [. . .] does not authorize arbitrators to issue subpoenas for discovery depositions against third parties."); *Integrity Ins. Co., In Liq. v. American Centennial Ins. Co.*, 885 F. Supp. 69 (S.D.N.Y. 1995) ("[A]n arbitrator does not have the authority [under the FAA] to compel nonparty witness to appear for pre-arbitration depositions.").

The *courts'* authority to compel discovery in aid of arbitration proceedings is also extremely limited. As a general rule, federal and state courts in New York will not intervene in arbitration proceedings to order disclosure of documents or other forms of discovery absent "extraordinary circumstances."⁵⁵ There is some authority in New York for the proposition that parties could, by agreement, waive this requirement and agree, for example, to discovery of third parties.⁵⁶

If discovery remains a concern, parties choosing New York as seat of arbitration may specify the rules applicable to discovery in their arbitration clause. Under the FAA, they are free to specify both the discovery that is permissible between them and the powers of the arbitrator respecting such discovery.⁵⁷ Parties seeking to limit the scope of discovery to the disclosure of documents between them could use the following language:

"The parties shall be entitled to reasonable production of relevant, non-privileged documents, carried out expeditiously. If the parties are unable to agree upon same, the arbitral tribunal shall have the power, upon application of any party, to make all appropriate orders for production of documents by any party. There shall be no other form of discovery, including discovery depositions."

Where the parties wish to provide for U.S. litigation-style discovery, the following provision could be used:

"The parties shall allow and participate in discovery in accordance with the United States Federal Rules of Civil Procedure. Unresolved discovery disputes shall be submitted to the arbitrator(s)."

⁵⁵ See, e.g., *Oriental Commercial & Shipping Co., Ltd. v. Rosseel, N.V.*, 125 F.R.D. 398, 400 (S.D.N.Y. 1989) ("As a general rule, the discovery provisions of the Federal Rules of Civil Procedure are not available as an incident to an arbitration proceeding. [. . .] However, discovery 'in aid of arbitration' is permitted by the courts where a movant can demonstrate 'extraordinary circumstances.'"); *International Components Corp. v. Klaiber*, 54 A.D.2d 550, 551 (App. Div. 1976) ("The court's power to direct disclosure should not be granted in arbitration proceedings except under extraordinary circumstances."). There is some uncertainty as to whether parties to an international arbitration located in New York could seek the assistance of courts under 28 U.S.C. § 1782, a federal statute that permits a party to "a proceeding in a foreign or international tribunal" to apply to a U.S. court to take evidence located in the United States for use in such proceedings. The Second Circuit has, so far, held that the reference to "foreign or international tribunal" in § 1782 did not encompass arbitral tribunals located abroad. See *NBC v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999). This interpretation by the Second Circuit has recently come under challenge in other circuits. See *In re Roz Trading Ltd.*, 469 F. Supp. 2d (N.D. Ga 2006) (holding that assistance to private arbitration proceedings located in Israel was permissible under § 1782). To this date, however, no court has accepted to extend § 1782 to international arbitrations conducted *in* the United States.

⁵⁶ *In re ACE Am. Ins. Co.*, 6 Misc.3d 1005(A) (S.C.N.Y. 2004) (special circumstances need not be present to obtain deposition of third party where both parties to the arbitration stipulated to the discovery); *Textron, Inc. v. Unisys Corp.*, 138 Misc.2d 124 (S.C.N.Y. 1987) (same).

⁵⁷ *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999) ("[A]s a creature of contract, both the substance and procedure for arbitration can be agreed upon in advance. The parties may pre-arrange discovery mechanisms directly or by selecting an established forum or body of governing principles in which the conventions of discovery are settled.").

It remains uncertain whether this language would be sufficient to allow broad discovery of third parties. Contracting parties cannot by agreement expand the power of the *arbitrators* to compel nonparties to participate in the prehearing discovery process, notably to participate in prehearing depositions.⁵⁸ There is, however, some authority in New York supporting the view that parties to an arbitration agreement could agree to turn to the *courts* to obtain prehearing depositions of third parties.⁵⁹

(b) *Consolidation of proceedings* Absent party consent, consolidation of related arbitral proceedings can give rise to insuperable difficulties. This is a disadvantage of arbitration as compared to litigation in projects involving multiple contracts and parties.

Although court-ordered consolidation is possible under the FAA, parties choosing New York as the seat of arbitration should be aware that judicial assistance will not necessarily be available. The Second Circuit, as a majority of the other federal circuits, considers that courts have no authority under the FAA to consolidate related arbitral proceedings absent party consent.⁶⁰ The case law is scant, but suggests that this is so even though consolidation can be ordered absent party consent under New York arbitration law.⁶¹

As a result, parties who anticipate the need for consolidation are left with two options. First, they can explicitly consent in their arbitration agreement to judicial consolidation of related proceedings. The drawback of this approach, however, is that

58 *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 187 (2d Cir. 1999) (“If discovery were to be obtained from [. . .] third parties [. . .] the authority to compel their participation would have to be found in a source other than the parties’ arbitration agreement”); *Integrity Ins. Co., In Liq. v. American Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995) (“Because the parties to a contract cannot bind non-parties, they certainly cannot grant such authority to an arbitrator. Thus, an arbitrator’s power *over non-parties* derives solely from the FAA.”).

59 *In re ACE Am. Ins. Co.*, 6 Misc.3d 1005(A) (S.C.N.Y. 2004) (special circumstances need not be present to obtain deposition of third party where both parties to the arbitration stipulated to the discovery); *Textron, Inc. v. Unisys Corp.*, 138 Misc.2d 124 (S.C.N.Y. 1987) (same).

60 *United Kingdom v. Boeing Company*, 998 F.2d 68, 74 (2d Cir. 1993) (“[T]he district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties’ agreement to allow such consolidation.”); *see also Allstate Insurance Company v. Global Reinsurance Corporation U.S.*, 2006 WL 2289999 (S.D.N.Y. 2006) (applying *Boeing* and refusing to order consolidation absent party consent, but referring the parties to an arbitration panel to determine whether consolidation would be appropriate).

61 *Sullivan County v. Edward L. Nezelek Inc.*, 42 N.Y.2d 123 (C.A.N.Y. 1977) (“parties signing an agreement to arbitrate must be held to do so in contemplation of the announced authority of the courts in proper cases to direct consolidation”). Prior to the Second District’s decision in *Boeing*, the New York Supreme Court had found this rule applicable to proceedings governed by the FAA. *See Bock v. Drexel Burnham Lambert*, 143 Misc.2d 542 (S.C.N.Y. 1989). After *Boeing*, this approach would, however, appear to be no longer applicable. *See Home Insurance Company v. New England Re. Corp.*, 1999 WL 681388 (S.D.N.Y. 1999) (“[A]ny New York arbitration law that permits consolidation without the consent of all parties would conflict federal law as pronounced by the Second Circuit and be preempted”).

it frustrates the purpose of choosing to arbitrate in the first place, i.e., to avoid being drawn into court proceedings.

The second option is to spell out a mechanism for parties or arbitrators to consolidate related proceedings. This option will require a significant drafting effort, as multiple scenarios and technicalities must be taken into account. Readers should refer to specialized works on the issue.⁶² The best way is to do so in a stand-alone arbitration protocol signed by all parties to all related agreements. Where that is done, there should be no need for consolidation orders by arbitrators or judges. Absent a single arbitration agreement, the arbitration clauses of the several related agreement must include complementary and cross-referenced consolidation provisions. The drafting considerations are not particular to New York arbitration.

(c) *Confidentiality* Confidentiality of arbitral proceedings and awards is one of the enduring myths surrounding international arbitration.⁶³ In the United States, the few cases that have addressed the issue have held that no duty of confidentiality exists absent party agreement.⁶⁴ Parties choosing New York as seat of arbitration should not expect the proceedings and award to be confidential unless they expressly provide so.

If confidentiality is an issue, either because a party wishes to keep the subject matter of the contract confidential (e.g., because it involves trade secrets) or because it is anticipated that disclosure of the arbitration proceedings would be prejudicial to its business interests, this should be addressed at the drafting stage. This can be done in one of two ways. First, the parties can agree to arbitration in New York under the rules of an institution that provides for confidentiality, e.g., the Arbitration Rules of the LCIA.⁶⁵ Second, the parties can include a confidentiality clause in their arbitration agreement. The following language, adapted from the LCIA rules, could be used:

“The parties and the arbitrators shall keep confidential all awards in the arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party or arbitrator by legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a court or other judicial authority.”

62 See, e.g., PAUL FRIEDLAND, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS*, 135 *et seq.* (2d ed. 2007).

63 Confidentiality should be distinguished from privacy. Arbitration ensures privacy in the sense that arbitral proceedings, unlike court proceedings, are and remain private. Confidentiality refers to restrictions on the disclosure that the parties or counsel can make regarding the arbitration. Arbitration's privacy permits, but does not mandate, confidentiality.

64 *United States v. Panhandle E. Corp.*, 118 F.R.D. 346 (D.Del. 1998) (arbitration proceedings not confidential where there was no evidence that the parties had, in fact, agreed to hold the proceedings in confidence); *Contship Containerlines, Ltd. v. PPG Industries, Inc.*, 2003 WL 1948807 (S.D.N.Y. 2003) (ordering production of documents relating to foreign arbitral proceedings despite allegation that such proceedings were covered by an implied duty of confidentiality).

65 LCIA Arbitration Rules, Art. 30.

5. Considerations Relating to Judicial Powers

(a) *Provisional measures* Whether courts in New York have the authority to grant provisional measures (e.g., preliminary injunctions or attachments) in aid of international arbitral proceedings remains a vexed topic.⁶⁶ In its 1982 decision in *Cooper v. Ateliers de la Motobécane S.A.*, the New York Court of Appeals interpreted the New York Convention as barring courts from granting such relief in international cases.⁶⁷ The *Cooper* decision was followed by state and, to an extent, federal courts in New York.⁶⁸

In 2005, the New York legislature amended the CPLR and explicitly authorized New York courts to order attachments and preliminary injunctions in aid of arbitral proceedings subject to the New York Convention.⁶⁹ Doubts, however, remain as to whether the New York legislature effectively overruled *Cooper*.⁷⁰ Absent a decision of the New York Court of Appeals or of the Supreme Court of the United States, the interpretation of the New York Convention in *Cooper* may still be controlling.

If the availability of provisional measures is a concern, parties can try to assuage judicial concerns that a court order of provisional relief would be inconsistent with the arbitration agreement. The following language can be added to the arbitration agreement:

“Nothing in this Agreement shall prevent either party from seeking provisional measures from any court of competent jurisdiction, and any such request shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.”

⁶⁶ See generally Chapter 8 of this book.

⁶⁷ *Cooper v. Ateliers de la Motobécane S.A.*, 57 N.Y.2d 408 (C.A.N.Y. 1982). See discussion in Chapter 8.C.3 of this book.

⁶⁸ Federal courts in New York were bound by *Cooper* when asked to order provisional remedies under the CPLR, *ContiChem LPG v. Parsons Shipping Co., Ltd.*, 229 F.3d 426 (2d Cir. 2000) (refusing to order attachment under CPLR 7502 in aid of arbitral proceedings in London). Federal courts in New York, however, have interpreted the New York Convention as not limiting their equitable power to grant preliminary injunctions in aid of arbitral proceedings. See *Borden Inc. v. Meiji Mills Products Co.*, 919 F.2d 822 (2d Cir. 1990) (confirming a preliminary injunction granted pending arbitration of a trademark dispute between a U.S. licensor and a Japanese licensee subject to the New York Convention).

⁶⁹ Section 7502(c) of the CPLR reads as follows: “The Supreme Court [. . .] may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. [. . .]”

⁷⁰ By amending § 7502(c) of the CPLR, the New York legislature, arguably, purported to interpret federal law (Chapter 2 of the FAA implementing the New York Convention), an exercise that it was incompetent to perform. At most, the New York legislature’s action is an invitation to the New York Court of Appeals to reconsider *Cooper*. See Robert P. Knapp III, *New CPLR 7502(c): Can Legislature Interpret Federal Law for N.Y.?* N.Y.L.J. 4 (July 25, 2006). See discussion in Chapter 8.C.3 of this book.

There is some authority in New York that similar language would be effective and not inconsistent with *Cooper*.⁷¹

(b) *Modifying the scope of judicial review* Section 10(a) of the FAA sets forth the grounds upon which courts may vacate arbitral awards. Courts have also recognized “implied” grounds of vacatur, most notably “manifest disregard of the law” by the arbitrators.⁷² A question that has received considerable attention in the United States is whether parties may by contract modify the scope of judicial review of arbitral award.

In its recent decision in *Hall Street Associates v. Mattel, Inc.*, the Supreme Court of the United States held that the grounds for vacatur set forth in the FAA are exclusive and that it is not open to parties to stipulate additional grounds.⁷³ In this decision, the Supreme Court resolved a split among U.S. federal circuit courts.⁷⁴

A related issue is whether grounds for vacating awards can be excluded by contract. This question was not addressed by the Supreme Court in its recent decision, but the import of *Hall Street* is that parties would lack such power. There is authority in the Second Circuit for the proposition that parties cannot limit the grounds for vacatur.⁷⁵

71 *Canwest Global Communications Corp. v. Mirkaei Tikshoret Ltd.*, 9 Misc. 3d 845, 866 (S.C.N.Y. 2005) (“The injunctive relief carve-out, contractually agreed upon by the parties herein, does not frustrate the purpose of the UN Convention, but supports the goal of ‘minimiz[ing] the uncertainty of enforcing arbitration agreements and to avoid the vagaries of foreign law for international traders’ [announced in *Cooper*].”).

72 *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953) (“[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.”); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (“‘Manifest disregard of the law’ by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court in *Wilko v. Swan*.”). The availability of these additional grounds has, however, been called into serious question as a result of the 2008 decision by the U.S. Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008), in which the Supreme Court stated that §§ 10 and 11 of the FAA provide the “exclusive grounds” for vacatur and modification of awards. In *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85 (2d Cir. 2008), the Court of Appeals for the Second Circuit concluded, however, that the “manifest disregard of the law” standard had survived *Hall Street*. For a detailed discussion of the doctrine of “manifest disregard,” and its continued viability, see Chapter 13.C.2.(c) of this book.

73 *Hall Street Associates v. Mattel, Inc.*, 128 S.Ct. 1396 (2008). See Chapter 13.C.2.(c) of this book.

74 *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001); *Schoch v. Infousa, Inc.*, 341 F.3d 785, 789 n.3 (8th Cir. 2003) (expressing skepticism as to whether parties can heighten the standard of review); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504–05 (7th Cir. 1991) (stating in dicta that “[p]arties cannot contract for *judicial* review of [an] award; federal jurisdiction cannot be created by contract.”); but see *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21 (1st Cir. 2005); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001); *Syncor Int’l Corp. v. McLeland*, 1997 WL 452245 (4th Cir. 1997); *Gateway Techs, Inc. v. MCI*, 64 F.3d 993 (5th Cir. 1995).

75 *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003) (“Since federal courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards for compliance with §10(a) [of the FAA].”). It has, however, been held that

(c) *Enforcement of awards* Section 9 of the FAA provides that a court may confirm an award “if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration.” Interpreting this language, courts in New York have held that they have no jurisdiction to enforce arbitral awards absent an indication of the parties’ intent to have a court enter judgment upon the award.⁷⁶

It is doubtful that the FAA requirement applies to international arbitration. The U.S. Court of Appeals for the Second Circuit has held that the FAA requirement of consent to entry of judgment does not apply to awards enforced under the New York Convention,⁷⁷ including international arbitration awards made in the United States.⁷⁸

There is, moreover, authority for the proposition that an arbitration clause stating that awards shall be “*final*” or that disputes shall be “*finally*” settled by arbitration is sufficient to satisfy the FAA requirement.⁷⁹ The case law also suggests that arbitration agreements calling for arbitration under the AAA Commercial Arbitration Rules, which explicitly provide for consent to entry of judgment,⁸⁰ would be sufficient to satisfy the FAA requirement.⁸¹

parties can limit appellate review of the district court’s review of an award, *see* MACTEC, Inc. v. Gorelick, 427 F.3d 821, 829 (10th Cir. 2005).

76 *See* Phoenix Aktiengesellschaft v. Ecoplas, Inc., 391 F.3d 433, 436 (2d Cir. 2004) (9 U.S.C. § 9 “requires prior consent to confirmation by both parties.”); Varley v. Tarrytown Associates, 477 F.2d 208 (2d Cir. 1973) (no jurisdiction to confirm arbitration award and enter judgment on the award where contract does not explicitly provide that judgment could be entered upon an arbitration award). New York arbitration law, by contrast, does not require consent to entry of judgment. Section 7501 of the CPLR provides that an arbitration agreement “confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.”

77 Phoenix Aktiengesellschaft v. Ecoplas, Inc., 391 F.3d 433, 436 (2d Cir. 2004) (9 U.S.C. § 9 not applicable to New York Convention awards).

78 Stone & Webster, Inc. v. Triplefine Intern. Corp., 118 Fed.Appx. 546 (2d Cir. 2004) (9 U.S.C. § 9 not applicable to enforcement of an award rendered in New York in a dispute opposing U.S. and Taiwanese corporations concerning a contract to be performed in Taiwan) referring to *Bergersen v. Joseph Muller Corporation* (2d Cir. 1983) (award rendered in New York City between two foreign entities is a “nondomestic award” for the purposes of the New York Convention).

79 *I/S Stravborg* (O. H. Meling, Manager) v. National Metal Converters, Inc., 500 F.2d 424, 425–27 (2d Cir. 1974) (holding that the FAA requirement was satisfied in light of the provision that the decisions of the arbitrators “shall be final”); Phoenix Aktiengesellschaft v. Ecoplas, Inc., 391 F.3d 433, 437 (2d Cir. 2004) (suggesting obiter that the “final” language could be sufficient); Daihitsu Motor Co. v. Terrain Vehicles, Inc., 13 F.3d 196, 207 (7th Cir. 1993) (FAA requirement is satisfied where the agreement provides that “any given dispute . . . would be ‘finally settled’ by arbitration”).

80 Rule 48(c) of the AAA Commercial Arbitration Rules reads: “Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.” It should be noted that the AAA International Arbitration Rules do not contain any similar language.

81 *See, e.g.,* P & P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 866–67 (10th Cir. 1999); Washington Mut. Bank v. Crest Mortgage Co., 418 F. Supp. 2d 860 (N.D. Tex. 2006).

To avoid any uncertainty as to the ultimate enforceability of the award, where New York is the place of arbitration, it remains advisable to add specific language to the arbitration agreement empowering the courts to enter judgment upon the award (a so-called “entry-of-judgment” provision). The following language can be used: “Judgment upon any award(s) rendered by the arbitrators may be entered in any court having jurisdiction thereof.”