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CPLR Article 75 or the Federal Arbitration Act: Which One Applies to Arbitrations in New York and Why It Matters

BOAZ S. MORAG AND KATIE GONZALEZ*

I. Introduction

For nearly a century, New York has been a center for arbitration, both domestic and international, owing in large part to its long-standing history of judicial support for arbitration through New York's arbitration law, Article 75 of New York's Civil Practice Law and Rules (Article 75).[1] Indeed, Article 75 predates the 1925 Federal Arbitration Act (FAA)[2] and was the model for the FAA. Given this historical encouragement of arbitration, New York remains a favored seat for international arbitrations. In a recent survey of practitioners for the seat most often chosen for international arbitrations, New York was the only United States forum that made the top seven fora chosen as a seat for international arbitrations.[3] New York's role in commerce likewise makes it a natural situs for non-international arbitrations.[4]

As practitioners know, the situs of an arbitration is critical because it is the arbitration law of the situs that, absent an explicit agreement to the contrary, provides the *lex arbitri*—the law that determines among other issues under what circumstances a court will compel arbitration, supervise the arbitration proceedings, and vacate an award issued in that seat.[5] Where an arbitration

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1. N.Y. C.P.L.R. §§ 7501–7515 (McKinney 2018).

2. Federal Arbitration Act, 9 U.S.C. §§ 1–16, 201–208, 301–307 (1947).

3. *2018 International Arbitration Survey: The Evolution of International Arbitration*, WHITE & CASE 1, 9 (last visited Feb. 5, 2019), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey—-The-Evolution-of-International-Arbitration.pdf.

4. Press Release, Rekha Rangachari, N.Y. Int'l Arbitration Ctr., N.Y.C. Maintains Lead As The Favored U.S. Arbitral Seat, (May 18, 2018), https://gallery.mailchimp.com/95f3ab83655de165578b57965/files/d792ca4d-19c9-448c-b490-1076a246cb5f/2018.05.18_NYIAC_Press_Release_New_York_City_Maintains_Lead_As_The_Favored_U.S._Arbitral_Seat.02.pdf.

5. Gonzalo Vial, Influence of the Arbitral Seat in the Outcome of an International Commercial Arbitration, 50 INT'L LAW. 329, 334 (2017).

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is sited in the United States—more specifically in New York—the United States' federal system results in both federal and New York state law playing a role in an arbitration conducted here.[6] Indeed, for an entirely local dispute that does not involve interstate commerce, New York's Article 75 is the sole source of arbitration law to govern such a proceeding.[7]

But New York arbitration law also can play a role—and its terms are, therefore, relevant for practitioners and parties alike—when arbitration in New York is agreed to in order to resolve disputes over transactions involving interstate commerce between entirely domestic parties, and when there is an international component to the transaction that subjects the agreement to arbitrate and the resulting award to the terms of the New York Convention or the Panama Convention.[8] In both domestic and international circumstances, the United States Supreme Court has construed the FAA and the architecture of the New York and Panama Conventions potentially to make New York law applicable, rather than preempted.[9] For one, New York arbitration law plays a "gap filler" role on procedural issues not addressed by the FAA.[10] But even more importantly, depending on how the parties draft their contracts, courts have found parties to have agreed to arbitrate under New York's arbitration law (rather than under the FAA's provisions),[11] an option that the United States Supreme Court has held is consistent with the FAA, not preempted by it.[12]

As this article explains beginning with Part I, New York courts have found an intention to arbitrate under New York State's arbitration law based on the language of the parties' arbitration clause as well as the wording of the choice-of-law clause that identifies the law that governs the interpretation of

6. Jeremy Wilson & William Lowery, Arbitration in New York, in 1 CMS GUIDE TO ARBITRATION 519, 521 (2012), https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_NEW%20YORK.pdf.

7. Stephen L. Brodsky, *Navigating Federal and State Law in a NY Arbitration*, N.Y. L. J. (Aug. 2, 2018), https://www.law.com/newyorklawjournal/2018/08/02/navigating-federal-and-state-law-in-a-ny-arbitration/?printer-friendly/.

8. The "New York Convention" refers to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature*, June 10, 1958, 21 U.S.T. 2517, *reprinted in* Federal Arbitration Act, 9 U.S.C. § 201 (1947) (historical and statutory notes) to which the United States and over 145 countries are signatories. The "Panama Convention" refers to the Inter-American Convention on International Commercial Arbitration of January 30, 1975, 101 Stat. 448, 1438 U.N.T.S. 245, to which the United States and 18 Latin American countries are signatories. The New York Convention and Panama Convention apply to international disputes including when the arbitration is held in the United States. Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983).

9. *See* Brodsky, *supra* note 7.

10. *Id.*

11. *See* Wilson & Lowery, *supra* note 6, at 527–28.

12. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (holding that the California Arbitration Act is not preempted by the FAA where parties were found to have agreed that their arbitration agreement would be governed by California arbitration law).

the contract, even where such clause makes no reference to arbitration.[13] Accordingly, it is important for anyone contemplating entering into an agreement to arbitrate in New York to understand how Article 75 operates and the ways in which a party may be found to have manifested the intention to adopt New York arbitration law. Because parties can find themselves bound by Article 75 without subjectively intending that result, this article offers drafting tips to avoid the unintended consequence of adopting Article 75 to apply to an arbitration that the lawyers and parties might have believed was, and intended to be, governed by the FAA alone in a domestic case, or solely by the FAA and New York or Panama Conventions in an international arbitration.

In Part II, we provide background on the historical similarities and divergences between the FAA and Article 75, dating back to their enactment nearly a century ago, as well as recent attempts to amend Article 75 with the potential to create an even greater variance between New York state and federal law. Part III, then, summarizes the current differences between the FAA and the provisions of Article 75 as construed by the courts in New York. Part IV identifies the rules that determine whether an agreement to arbitrate in New York is subject to the FAA, Article 75, or both by first identifying the conditions that trigger the applicability of the FAA, and second discussing how the FAA authorizes parties to agree to arbitrate under state arbitration laws.

Part V explains the two methods by which courts in New York have found parties to have manifested the intention to have the standards of Article 75 (rather than those of the FAA) apply to their arbitration. Part V closes with a discussion of the circumstances under which certain procedural provisions of Article 75 apply to an arbitration, otherwise governed by the FAA, where the FAA is silent, and Article 75 provides a procedural gap filler rule.

In Part VI, the article turns to the effect that the parties' choice of a set of institutional arbitration rules, such as those promulgated by the American Arbitration Association (AAA), International Centre for Dispute Resolution (ICDR), International Chamber of Commerce (ICC), JAMS, the International Institute for Conflict Prevention and Resolution (CPR) (collectively, Institutional Arbitration Rules), has on the foregoing analysis and how this choice interacts with the separate choice to have New York arbitration law play a role in the proceedings.

Finally, in Part VII, we offer some suggestions to practitioners and parties—equally applicable to international and domestic arbitrations sited in New York—regarding the drafting of the choice-of-law clause and, in particular, the arbitration agreement, so as to avoid unanticipated consequences that can result from inattention to the inter-relationship between these provisions when parties elect New York law and decide to arbitrate in New York.

13. *See* Wilson & Lowery, *supra* note 6, at 527–28.

II. Background

As a threshold matter, both the FAA and Article 75, particularly as construed by the courts over the last thirty-five years, reflect a common policy strongly favoring arbitration as a dispute resolution mechanism, advanced by rigorous judicial enforcement of private agreements to arbitrate commercial disputes and the resulting arbitral award.[14] Indeed, when Congress enacted the FAA in 1925 to eliminate judicial hostility to the enforcement of private agreements to arbitrate,[15] its drafters modeled the new federal legislation on New York's 1920 Law of Arbitration, now codified in Article 75.[16] At that time, New York was the only state that had adopted legislation which broadly enforced arbitration agreements.[17] But in enacting the FAA, Congress consciously chose to vary certain of the federal statute's provisions, as compared to the New York statute, giving rise from the outset to the possibility of potentially different outcomes.[18]

Accordingly, as set out below, variations have existed between New York state practice under Article 75 and federal practice under the FAA dating back to 1925.[19] Other variations have developed since as to: (i) the delegation of responsibility for first-instance determination of certain issues as between a court and the arbitrators; (ii) certain procedures governing the conduct of the arbitration; and (iii) the precise formulation of the standards under which a court may determine not to enforce an award.[20] In practice, however, these distinctions have not proven to date to be outcome determinative. In other words, the determination that the FAA applies rather than Article 75 or vice versa has not resulted in a given award issued in New York being found to be enforceable under one regime but

14. *See id.* at 525; *see also* Caitlin J. Halligan & Gabriel K. Gillett, *New York Courts at the Forefront of Arbitration Law*, L.A. DAILY J. (June 24, 2016), https://www.gibsondunn.com/wp-content/uploads/documents/publications/Halligan-Gillett-New-York-Courts-at-the-Forefront-of-Arbitration-Law-DJ-6-24-16.pdf.

15. Wilson & Lowery, *supra* note 6, at 521.

16. Halligan & Gillett, *supra* note 14.

17. *See* H.H. Nordlinger, *The Law and Practice of Arbitration in New York*, 13 MO. L. REV. 196, 196–97 (1948). New York was also an early adopter of legislation permitting the judicial enforcement of expert determinations in a similar manner as arbitration awards and incorporating the procedures of Article 75. *See* N.Y. C.P.L.R. § 7601 ("A special proceeding may be commenced to specifically enforce an agreement that a question of valuation, appraisal or other issue or controversy be determined by a person named or to be selected. The court may enforce such an agreement as if it were an arbitration agreement, in which case the proceeding shall be conducted as if brought under article seventy-five of this chapter."). For a more complete discussion of Section 7601 and its role in facilitating this additional and now commonplace method of dispute resolution, particularly in M&A transactions, *see* N.Y.C. BAR ASS'N, PURCHASE PRICE ADJUSTMENT CLAUSES AND EXPERT DETERMINATIONS: LEGAL ISSUES, PRACTICAL PROBLEMS AND SUGGESTED IMPROVEMENTS 38–41 (2013).

18. Brodsky, *supra* note 7.

19. *See id.*

20. *An Arbitration Primer for Litigators*, N.Y. ST. B. ASS'N 1, 8–9 (2015), https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/An_Arbitration_Primer_For_Litigators.html.

unenforceable under the other.[21] But there are exceptions in result with respect to court decisions regarding the consolidation of arbitration proceedings[22] and as to awards that include an assessment of punitive damages, attorneys' fees, or both.[23]

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21. *See, e.g.*, Cty. of Nassau v. Chase, 402 F. App'x 540, 542 (2d Cir. 2010) (finding that although the New York law standard, and not the different federal law standard, for vacating an arbitral award applied, the Court "agree[d] with the District Court that the arbitral award must be confirmed."); Cardinale v. 267 Sixth Street LLC, No. 13 Civ. 4845 (JFK), 2014 WL 4799691, at *4 (S.D.N.Y. Sept. 26, 2014) (declining to determine whether vacatur or modification was governed by the FAA or New York state law as under both, petition must be denied); TiVo, Inc. v. Goldwasser, No. 12 Civ. 7142 (LLS), 2013 WL 586856, at *2 n.1 (S.D.N.Y. Feb. 14, 2013) (declining to resolve dispute whether the FAA or New York law governed where "the award must be confirmed whether reviewed under New York state law, or the standard required by the FAA."); Harper Ins. Ltd. v. Century Indem. Co., 819 F. Supp. 2d 270, 274–75 (S.D.N.Y. 2011) ("The parties dispute whether New York's Civil Practice Law ('CPLR') . . . or the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ('FAA'), should apply to this petition. This question has potentially significant consequences because if the CPLR applies, the petition is likely time-barred . . . [W]e ultimately conclude that regardless of the governing law or whether the petition should be dismissed on equitable or limitations grounds, LMCs have not met their substantive burden for demonstrating that the arbitrators acted outside the scope of their authority. Therefore, we do not address the myriad choice-of-law and procedural matters raised by the parties and simply hold that, assuming the petition has been properly brought to this Court, it is insufficient to warrant vacatur."); Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y.3d 471 (N.Y. 2006) (on remand from the United States Supreme Court, confirming an award under the FAA that had previously been confirmed under CPLR 7511); Mahn v. Major, Lindsey & Africa, LLC, 74 N.Y.S.3d 7, 7–8 (N.Y. App. Div. 2018) ("The matter involved interstate commerce, and was thus governed by the terms of the Federal Arbitration Act (FAA) . . . not the standard set forth in CPLR 7511(b). Nevertheless, since the requirements for vacatur of an arbitration award are nearly identical under the FAA and CPLR 7511, the result remains the same and the award was properly confirmed.") (internal citation omitted); Roberts v. Finger, No. 602657, 2007 WL 1093487, at *6 (N.Y. Sup. Ct. Apr. 3, 2007) ("In this case, it does not appear that the FAA and the CPLR standards applicable to the judicial review of an arbitration award conflict.").

22. The FAA and Article 75 differ on under what circumstances a court can consolidate multiple arbitrations into one proceeding. In *In re Cohen v. S.A.C. Capital Advisors, LLC*, the court considered whether it could invoke New York arbitral rules and consolidate the proceedings in the interest of efficiency, or whether, applying the FAA, it would only be permitted to consolidate if the parties explicitly agreed to consolidation in their arbitration agreement. In re Cohen v. S.A.C. Capital Advisors, LLC, 815 N.Y.S.2d 493, at *5 (Sup. Ct. N.Y. Cty. 2006). This issue is indicative of one in which the outcome of an arbitration could be different if Article 75 applied. While consolidation may not ultimately affect the case's outcome, consolidation may have an impact on arbitration procedure that inevitably impacts a case's resolution.

23. *See* Kudler v. Truffelman, 941 N.Y.S.2d 44, 45 (N.Y. App. Div. 2012) (reversing determination that FAA applied because the parties' medical practice partnership agreement "did not involve interstate commerce," and thus "the award of punitive damages was improper" under New York arbitration law), *leave to appeal denied*, 19 N.Y.3d 815 (2012); *see also* CIT Project Fin., L.L.C. v. Credit Suisse First Boston LLC, No. 600847/03, 2004 WL 2941331, at *5 (N.Y. Sup. Ct. June 17, 2004) (refusing to confirm portion of arbitration award that granted attorneys' fees).

On the other hand, courts in New York have gone out of their way to set out rules as to when the FAA applies and when the parties have chosen—consistent with the FAA—to still have New York state arbitration law govern.[24] Thus, it is conceivable that in the future, one of the several variations between state and federal rules could affect whether a dispute is arbitrated and the enforceability of the resulting award.

Moreover, through the years, various amendments to Article 75 have been proposed, some to further align New York arbitration law with federal law and others to differentiate to an even greater extent New York from federal law.[25] Thus, a 2007 proposal to replace the current Article 75 with the Revised Uniform Arbitration Act[26] would have reconciled New York law with the provisions of the FAA. More recently, a much different bill has been proposed that would heighten the variations between the state and federal law governing arbitrations conducted in New York.[27] The bill proposes amending Article 75 to require arbitral awards to "state the issues in dispute and contain the arbitrator's findings of fact and conclusions of law," to require all arbitrators to be "neutral third-party arbitrator[s],"[28] and to prohibit challenging an arbitrator until the eve of the arbitration hearing.[29] The proposed amendment would also adopt the federal "manifest disregard of the law" test—a test that has never been employed by the New York Court of Appeals—to the existing statutory standards of judicial review of arbitral awards in Article 75.[30] It is unclear whether this amendment is intended to add grounds for challenging an award or to replace the "irrationality" standard the New York appellate courts have been using for years.[31] The consideration of these proposals, particularly ones that would

24. Wilson & Lowery, *supra* note 6, at 527.

25. *See, e.g.*, *Opposition to Proposed Changes to NYS Business-to-Business Arbitration*, N.Y.C. BAR, (May 17, 2018), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposition-to-proposed-changes-to-nys-business-to-business-arbitration-proceedings.

26. N.Y. State Assemb., A07826, 2007–2008 Reg. Sess. (N.Y. 2007).

27. N.Y. State Assemb., A10393, 2018 Reg. Sess. (N.Y. 2018). In addition, a 2019 bill proposes to amend Article 75 by authorizing the vacatur of an arbitration award on the basis of manifest disregard of the law. N.Y. State Assemb., S.B. 2396, 2019-2020 Reg. Sess. (N.Y. 2019).

28. A mandate of party-appointed arbitrator neutrality as a matter of New York law would expressly conflict with the Second Circuit's recent decision in *Certain Underwriting Members of Lloyds of London v. Florida, Dep't of Financial Services*, which held party-appointed arbitrators are not subject to the same standard are neutral arbitrators, and a conflict involving the former may establish evident partiality only when it satisfies the higher standard of demonstrating that an undisclosed relationship between the opposing party and its appointed arbitrator violates any contractual requirement of "disinterestedness or ha[s] a prejudicial impact on the award" and must do so by clear and convincing evidence. Certain Underwriting Members of Lloyds of London v. Florida, Dep't of Fin. Servs. 892 F.3d 501, 510–11 (2d Cir. 2018).

29. N.Y. State Assemb., A.905-C, 2017–2018 Legis. Sess. (N.Y. 2018).

30. *See id.*

31. *See* DANA MACGRATH & RICHARD L. MATTIACCIO, REPORT ON LEGISLATION BY THE ARBITRATION COMMITTEE AND INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE 2

exacerbate variances between Article 75 and the FAA, presents an occasion to review those existing differences, and consequently, the circumstances under which, in an arbitration sited in New York, Article 75 applies either as a mere "gap filler" in the face of FAA silence or as a substitute to the FAA entirely.

It thus remains important to appreciate the distinctions between the FAA and Article 75 and, even more significantly, how each regime is triggered.[32] As established below, although parties are free and encouraged by arbitration practitioners and authors to specify explicitly which set of rules between the FAA and Article 75 that they want to govern their arbitrations, the case law and experience demonstrate that many contract drafters, and presumably many more parties, are unaware that they can end up with Article 75 playing a far greater role than they ever expected. This is not because of how the arbitration clause is written, but because of the words chosen in a separate choice-of-law clause.[33] If enacted, proposed amendments to Article 75 could have a material impact if contracting parties use language in their arbitration agreement that is subject to being interpreted by New York courts as a choice of New York arbitration law to govern their disputes. The risk, perhaps remote, but certainly real, that New York may enact Article 75 amendments that are inconsistent with international arbitration principles—notably, the very basic principle of party autonomy—places in high relief the need for careful drafting of arbitration agreements so that they clearly reflect the intent of the parties.

III. Differences between the FAA and Article 75

The table below identifies the issues on which the FAA and Article 75 differ—either explicitly, by having been construed to adopt conflicting rules, or implicitly, where the FAA is silent on an issue addressed by Article 75:

(2018) (noting that the amendment's provisions "risk disrupting long-established arbitration practices and could introduce considerable uncertainty in the resolution of numerous business-to-business disputes in New York."); *see also* Daesang Corp. v. NutraSweet Co., No. 655019/16, 2018 WL 4623562, *1 n.1 (App. Div. Sept. 27, 2018) (citing the *amicus curiae* brief submitted by the Association of the Bar of the City of New York, which cautioned that "[a]ny suggestion that New York courts will review the arbitrators' factual and legal determinations, as if on appeal, . . . will discourage parties from choosing New York as the place of arbitration.").

32. These questions have periodically been a subject of interest to institutional actors and groups, such as the New York State Bar Association and the New York City Bar Association. *See* Mark Bunim, *Arbitrations in New York: The Federal Arbitration Act vs. the CPLR*, LINKEDIN, (June 29, 2015), https://www.linkedin.com/pulse/arbitrations-new-york-federal-arbitration-act-vs-cplr-mark-bunim/; *see also The Interaction Between the CPLR and the Federal Arbitration Act: Which One Applies and When?*, N.Y. CTY. LAW. ASS'N, (June 19, 2014), http://www.nycla.org/PDF/The%20Interaction%20Between%20the%20CPLR%20and%20the%20Federal%20Arbitration%20Act%20-%2006.19.14.pdf

33. The Article 75 reform proposals currently under consideration should not have any impact, if enacted, on international arbitrations seated in New York precisely because of their inconsistency with the FAA, so long as the parties have not adopted Article 75 as their *lex arbitri*.

PRE-AWARD	
Under Article 75	Under the FAA
The court decides whether the claim was timely filed under the relevant **statute of limitations**.[34]	The arbitrator decides whether the claim was timely filed under the relevant **statute of limitations**.[35]
"Before hearing any testimony, an **arbitrator shall be sworn** to hear and decide the controversy faithfully and fairly by an officer authorized to administer an oath," subject to written waiver or waiver by continuing with the arbitration without objection.[36]	There is no requirement that an **arbitrator** take an **oath**.[37]
An attorney of record in the arbitration, in addition to an arbitrator, may **subpoena** witnesses.[38]	An arbitrator may **subpoena** witnesses.[39]
The court will resolve a challenge to the parties' entire contract for reason related to **illegality**.[40]	An arbitrator will resolve a challenge to the parties' entire contract (as opposed to the arbitration clause itself) for reason related to **illegality**.[41]
The court may order **consolidation** of multiple arbitrations if it finds it would be efficient.[42]	The court is not permitted to **consolidate** multiple arbitrations, absent an explicit agreement from the parties.[43]

34. N.Y. C.P.L.R. §§ 7502(b), 7503 (McKinney 2018).
35. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002).
36. N.Y. C.P.L.R. § 7506(a), (f) (emphasis added).
37. 9 U.S.C. §§ 1–16 (1947).
38. N.Y. C.P.L.R. § 7505.
39. 9 U.S.C. § 7.
40. Utica Mut. Ins. Co. v. Gulf Ins. Co., 762 N.Y.S.2d 730, 733 (N.Y. App. Div. 2003).
41. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006).
42. *In re Cohen*, 2006 WL 399766, at *4–5.
43. *Id.* at *4 (citing cases).

A court may use its equitable powers to **disqualify an arbitrator** for bias and suspend the arbitration proceedings until the parties appoint a new arbitrator.[44]	A court may not **disqualify an arbitrator** during arbitration proceedings.[45]
A party **waives** its right to arbitrate by manifesting "an affirmative acceptance of the judicial process."[46]	An arbitrator decides issues of **waiver** of rights to arbitrate.[47]
The **party resisting arbitration** has the burden of showing that arbitration is inappropriate.[48]	The **moving party** to a motion to compel arbitration has the burden of proving arbitration is proper.[49]
The parties may seek a stay or any other **judicial relief** at any time.[50]	The parties may not seek **judicial relief** until after the final award is issued, once an arbitration commences.[51]

44. *See, e.g.*, Bronx-Lebanon Hosp. Ctr. v. Signature Med. Mgmt. Grp., L.L.C., 775 N.Y.S.2d 279, 280 (N.Y. App. Div. 2004).

45. *See* Marc Rich & Co., A.G. v. Transmarine Seaways Corp. of Monrovia, 443 F. Supp. 386, 387 n. 3 (S.D.N.Y. 1978) ("No section of the [FAA] . . . provides for judicial scrutiny of an arbitrator's qualifications in any proceeding other than an action to confirm or vacate an award. If Congress had wished to authorize such review before arbitration proceedings commence, it could have easily so provided."); *see also* Sanko S.S. Co. v. Cook Industries, Inc., 495 F.2d 1260, 1264 n.4 (2d Cir. 1973) ("In such cases, a refusal by the panel to compel an allegedly partial arbitrator to step down will generally be reviewable by a district court only after an award has been made.").

46. Volpe v. Interpublic Grp. of Cos., Inc., No. 652308/2012, 2013 WL 3989040, at *4 (Sup. Ct. N.Y. Co. Aug. 2, 2013) (quoting Braun Equip. Co. Inc. v. Meli Borelli Assocs., 632 N.Y.S.2d 550, 551 (N.Y. App. Div. 1995)).

47. *Id.* at *3.

48. N.Y. C.P.L.R. § 7503(c) (McKinney 2018).

49. 9 U.S.C. § 4 (1947).

50. N.Y. C.P.L.R. § 7502(c); Sierra USA Commc'ns, Inc. v. Int'l Tel. & Satellite Corp., 824 N.Y.S.2d 560, 564 (N.Y. Sup. Ct. 2006).

51. 9 U.S.C. § 16.

AWARD and POST-AWARD	
Under Article 75	Under the FAA
An arbitrator may not award **punitive damages**.[52]	An arbitrator may award **punitive damages**.[53]
An arbitrator may not award **attorneys' fees** to the prevailing party, unless provided for in the arbitration agreement or an applicable statute.[54]	An arbitrator may award **attorneys' fees** to the prevailing party.[55]
"The court, on application, may reduce or disallow any **fee or expense** it finds excessive or allocate it as justice requires."[56]	The court is not given discretion to review an award's assessment of any **fee or expense**.[57]
An arbitral award must be **written, signed, and affirmed by the arbitrator** within a fixed time by agreement or court order.[58] An arbitrator must deliver copies of the award to the parties.[59]	Silent as to how an arbitration award must be **delivered**.[60]
An award may be **vacated** for "failure to follow the procedure" of Article 75, "unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection."[61]	Silent on whether an award may be **vacated**[62] for failure to follow FAA procedure.[63]

52. Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 356 (N.Y. 1976) ("An arbitrator has no power to award punitive damages, even if agreed upon by the parties. . . . Since enforcement of an award of punitive damages as a purely private remedy would violate strong public policy, an arbitrator's award which imposes punitive damages should be vacated.").

53. *In re* Flintlock Constr. Servs., LLC v. Weiss, 122 A.D.3d 51, 54 (N.Y. App. Div. 2014).

54. N.Y. C.P.L.R. § 7513 (McKinney 2018).

55. PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1202 (2d Cir. 1996).

56. N.Y. C.P.L.R. § 7513 (emphasis added).

57. Unless the losing party can otherwise satisfy vacatur standards of 9 U.S.C. § 10(a)(1)-(4), there is no basis for challenging the amount of fees or category of expense awarded.

58. N.Y. C.P.L.R. § 7507.

59. *Id.*

60. *See* 9 U.S.C. §§ 1–16 (1947).

61. N.Y. C.P.L.R. § 7511(b)(1)(iv) (McKinney 2018).

62. While the FAA and Article 75 have seemingly similar standards for judging the vacatur of arbitral awards, there are inconsistencies in the application of both statutes' grounds. *Compare* 9 U.S.C. § 10 *with* N.Y. C.P.L.R. § 7511. For example, while the FAA (like N.Y. C.P.L.R. § 7511) articulates four grounds for vacating an award, courts applying the FAA may consider an additional "manifest disregard of the law" standard for determining whether vacatur is appropriate. *See* Stolt-Nielsen SA v. Animalfeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008).

63. *See* 9 U.S.C. § 10.

"[T]he appearance of impropriety may be a sufficient or critical factor in **vacating** arbitration awards."[64]	"'Appearance of impropriety' may not be sufficient to **vacate**" an arbitral award.[65]
An arbitral award may be confirmed **within one year from the date the award was delivered** to the losing party by the prevailing party.[66]	An arbitral award may be confirmed **within one year from the date of the award.**[67]
The deadline to move the court to vacate or modify an award is within **ninety days** after the award was delivered to any party.[68]	The deadline to give notice of a motion to vacate or modify an award is "within **three months** after the award is filed or delivered."[69]
Courts can decide if an arbitration has a ***res judicata*** or collateral estoppel effect barring a second arbitration between the same parties and concerning related claims.[70]	The arbitrator or arbitral tribunal will decide if an arbitration has a ***res judicata*** or collateral estoppel effect barring a second arbitration between the parties and concerning related claims.[71]

IV. Applicability of the FAA, Article 75, or Both

When the seat of an arbitration is New York, which set of rules applies? The FAA, Article 75, or both? We start by noting that the answer to this question is *not* provided by legal doctrines that, in other contexts, offer a bright line answer to whether federal law governs rather than state law. For example, whether the state rules under Article 75 or federal rules under the FAA apply to any given issue is *not* answered by the forum in which the dispute is pending. This is because certain provisions of the FAA have been held to be "substantive" and are thus applicable in state as well as federal court; others have been deemed procedural and are thought to apply only in

64. United House of Prayer for All People of the Church on the Rock of Apostolic Faith v. L.M.A. Int'l, Ltd., 107 F. Supp. 2d 227, 230 (S.D.N.Y. 2000) (citing *In re* J.P. Stevens & Co., Inc. v. Rytex Corp., 34 N.Y.2d 123, 126 (N.Y. 1974)) (emphasis added).

65. *Id.* (emphasis added).

66. N.Y. C.P.L.R. § 7510 (McKinney 2018); Siegel v. Landy, 944 N.Y.S.2d 581, 584 (N.Y. App. Div. 2012) (finding an arbitral award vacated where the arbitrator did not follow the procedures set forth in Article 75 and failed to allow a hearing on whether the statute of limitations had run).

67. 9 U.S.C. § 9 (1947).

68. N.Y. C.P.L.R. § 7511.

69. 9 U.S.C. § 12 (emphasis added).

70. N.Y. C.P.L.R. § 7503(b); *see In re* Niagara Frontier Transp. Auth., 979 N.Y.S.2d 910, 910 (N.Y. App. Div. 2014).

71. *See* Citicorp, Inc. v. Abu Dhabi Inv. Auth., 776 F.3d 126, 131 (2d Cir. 2015).

federal court.[72] At the same time, however, despite creating some "substantive" federal law with respect to arbitration, the FAA "is something of an anomaly in the realm of federal legislation: It bestows no federal jurisdiction but rather requires for access to a federal forum an independent jurisdictional basis over the parties' dispute."[73] Thus, before a district court may entertain a petition under the FAA, there must be an independent basis of jurisdiction. Accordingly, New York state courts are often the ones called upon to apply the FAA when the citizenship of the parties or the underlying dispute does not provide a basis for subject matter jurisdiction in federal court. Conversely, the federal courts in New York often invoke the provisions of Article 75 in ruling on arbitration issues, even with respect to arbitration agreements governed by the FAA. Thus, the court in which litigants find themselves does not necessarily determine which rules apply.

A. Does the FAA Apply?

Then how does one know which sets of arbitration rules applies? The first step in the analysis is to determine whether the agreement to arbitrate is subject to the FAA. The FAA dictates that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[74] The Supreme Court has held that the term "involving commerce" in the FAA is the functional

72. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 n.6 (1989) ("we have held that the FAA's 'substantive' provisions–§§ 1 and 2–are applicable in state as well as federal court").

73. *See* Vaden v. Discover Bank, 556 U.S. 49, 59 (2009); *see also* 9 U.S.C. § 4 (1947) ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28 . . . ").

74. 9 U.S.C. § 2. The FAA itself contains one exemption to its coverage for arbitration agreements in "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Supreme Court has explained that this exclusion was not adopted so arbitrations in that sphere would be governed by state law, but rather because at the time of the FAA's adoption, other existing or anticipated federal legislation already governed or would shortly govern arbitrations involving those workers. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 118–19 (2001). In *New Prime Inc. v. Oliveira*, the Supreme Court held that a court rather than an arbitrator is required to determine whether the FAA's section 1 exemption applies, despite any agreement by the parties to have arbitrators decide that issue. New Prime Inc. v. Oliveira, 586 U.S. (2019) (slip op., at 4).

equivalent of "affecting commerce,"[75] which typically signals Congress's intent to invoke the full extent of its powers under the Commerce Clause.[76]

In determining whether a transaction sufficiently affects interstate commerce, courts are not constrained by the parties' *ex ante* intentions in entering into the contract or their contemplated intra-state activity; rather, they assess whether the transaction *in fact* had some effect on interstate commerce.[77] This *ex post* analysis has led courts to consider such factors as the nature of the parties' business,[78] where the parties reside or companies are headquartered,[79] and from which states the materials, equipment, and services used in the project were obtained.[80]

More recently, the Supreme Court explained that "the FAA encompasses a wider range of transactions than those actually 'in commerce'—that is, 'within the flow of interstate commerce.'"[81] Thus, it is not necessary for the individual transaction to have a substantial effect on interstate commerce, so long as the type of activity at issue has the requisite substantial effect:

> Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice . . . subject to federal control." Only that general practice need bear on interstate commerce in a substantial way.[82]

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75. "Commerce" is defined as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . " 9 U.S.C. § 1.

76. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273–74 (1995).

77. *See id.* at 278.

78. *See* Cusimano v. Schnurr, 26 N.Y.3d 391, 399, (N.Y. 2015) (finding an agreement concerning commercial real estate to have sufficient effect on interstate commerce); *see also* Crespo v. Kreisel Co., Inc., 657 N.Y.S.2d 321, 323 (N.Y. Sup. Ct. 1997) (holding that "under no stretch of the term can it be said that the operation of a single apartment building in Manhattan can be said to affect or involve interstate commerce.").

79. ImClone Sys. Inc. v. Waksal, 802 N.Y.S.2d 653, 654 (N.Y. App. Div. 2005) (finding that "[t]he parties' residence and negotiation of the agreement in New York . . . [did] not require the conclusion that the FAA [did] not govern[,]" due to other elements of the transaction that affected interstate commerce).

80. *See* Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp., 4 N.Y.3d 247, 252 (N.Y. 2005) (finding the dispute subject to the FAA because the underlying transaction affected interstate commerce, because "[n]umerous out-of-state entities were involved" in the project and because various materials, equipment, and services for the contract were obtained from different states); *see also* ImClone Sys. Inc., 802 N.Y.S.2d at 653 (although parties reside in the same state and negotiated the contract in New York, plaintiff's status as federally regulated, with products distributed nationally, investors across the country, and a restrictive covenant limiting plaintiff's activities throughout the U.S., was sufficient to find that parties' transaction involved interstate commerce).

81. Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003).

82. *Id.* at 56–57 (citations omitted).

Given the Court's broad interpretation of interstate commerce, the majority of arbitrations will involve some aspect of interstate commerce sufficient to trigger the applicability of the FAA.[83]

The next question under the analysis is: which chapter of the FAA applies? Chapter 1 of the FAA alone applies to agreements to arbitrate that result in a "domestic award."[84] A "domestic award" is an award issued in New York where the parties are citizens of the United States or the relationship between the parties "involves [neither] property located abroad, [nor] envisages performance . . . abroad, [n]or has some other reasonable relation with one or more foreign states."[85] Where, however, parties have chosen New York as the seat of their arbitration and either one or more of the parties is not a U.S. citizen or if all are U.S. citizens, their relationship involves property located abroad, envisages performance abroad, or has some other reasonable relation with one or more foreign states, then, Chapters 2[86] or 3[87] of the FAA (and either the New York Convention or Panama Convention) apply. The resulting award is termed a "nondomestic award," even though it is issued in the United States.[88]

An arbitration in New York that falls under Chapters 2 or 3 of the FAA is also subject to the provisions of Chapter 1 of the FAA "to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."[89] This is because "[t]he basic understanding of the New York Convention" and the Panama Convention is that each Contracting State shall enforce agreements to arbitrate and "recognize arbitral awards as

83. Recent decisions finding the FAA to be inapplicable due to no effect on interstate commerce include: Kudler v. Truffelman, 941 N.Y.S.2d 44, 45 (N.Y. App. Div. 2012) (reversing determination that FAA applied because the parties' medical practice partnership agreement "did not involve interstate commerce"); Laszlo N. Tauber & Assocs. I, LLC v. Am. Mgmt. Assoc., 757 N.Y.S.2d 553, 554 (N.Y. App. Div. 2003) ("The subject lease is for office space in a commercial building located in Manhattan and does not, by its terms, contemplate or facilitate any involvement in interstate commerce."); Barclays Capital Inc. v. Leventhal, No. 651527/2016, 2017 WL 7732816, at *3 (Sup. Ct. N.Y. July 25, 2017) (although the FAA governs arbitration of employment disputes in the securities industry, it does not apply to a dispute over a former security industry employee's failure to pay promissory note issued by parent bank of the former employer).

84. 9 U.S.C. §§ 1–16 (1947).

85. CBF Indústria de Gusa S/A v. AMCI Holdings, Inc., 850 F.3d 58, 71 (2d Cir. 2017) (quoting 9 U.S.C. § 202).

86. *See* 9 U.S.C. §§ 201–208.

87. *See* 9 U.S.C. §§ 301–307.

88. *CBF Indústria de Gusa S/A*, 850 F.3d at 73. Where both the New York Convention and Panama Convention would apply, as for example, the United States is a signatory to both, the Panama Convention formally takes precedence when "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." 9 U.S.C. § 305. That said, the "Inter-American Convention is substantively identical to the New York Convention . . . " PDV Sweeny, Inc. v. ConocoPhillips Co., No. 14-CV-5183(AJN), 2015 WL 5144023, at *4 (S.D.N.Y. Sept. 1, 2015), *aff'd* 670 Fed. App'x 23 (2d Cir. 2016).

89. 9 U.S.C. §§ 208, 307.

binding and enforce them in accordance with the *rules of procedure* of the territory where [the arbitration is to be held or] the award is relied upon, under the conditions laid down in the . . . articles [of the Convention]."[90] The rules of procedure regarding arbitration conducted in the United States and the grounds for vacating or modifying an award issued in this country are found in Chapter 1 of the FAA.

A case in point is *LGC Holdings, Inc. v. Julius Klein Diamonds, LLC*, where the court was asked to determine which vacatur standard applied to a nondomestic award issued in New York and subject to the New York Convention.[91] In that circumstance, both the New York Convention grounds and domestic grounds for vacatur apply to such an award.[92] In order to then resolve whether domestic arbitration law meant the FAA or New York arbitration rules, the court looked to the arbitration agreement.[93] Because the parties' agreement was "silent as to the choice of arbitral law" and "did not contractually agree to apply New York's vacatur standards to their arbitration," the court rejected the applicability of New York law and applied the FAA.[94] Thus, as explained below, New York arbitration law can play a role not just in domestic arbitrations that involve interstate commerce but also to international arbitrations seated in New York depending on the wording of the parties' agreement.[95]

If the FAA or some other specialized federal statute does not apply, then all issues of compelling arbitration, what issues are for the court versus the arbitrator to decide in the first instance, and whether to confirm or vacate an award rendered in a New York arbitration will necessarily be subject to Article 75 alone.[96]

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90. TermRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 934 (D.C. Cir. 2007) (emphasis added) (citing New York Convention, art. III).

91. LGC Holdings, Inc. v. Julius Klein Diamonds, LLC, 238 F. Supp. 3d 452, 462 (S.D.N.Y. 2017).

92. *See, e.g.*, Agility Pub. Warehousing Co. K.S.C. v. Supreme Foodservice GmbH, 495 F. App'x 149, 153-54 (2d Cir. 2012); Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 18, 21 (2d Cir. 1997) (the New York Convention vacatur standards apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement is sought and the Convention also "allow[s] a court in the country under whose law the arbitration was conducted to apply domestic arbitral law . . . to a motion to set aside or vacate that arbitral award").

93. *LGC Holdings, Inc.*, 238 F. Supp. 3d at 466.

94. *Id.*

95. There is one category of arbitral awards subject to the New York or Panama Convention to which New York arbitration law has no application. When under Chapter 2 or 3 of the FAA, a party seeks to recognize and enforce in the United States an award issued abroad, a foreign award in the nomenclature adopted by *CBF Indústria de Gusa S/A*, Article 75 plays no role, as the procedure and standards for recognition are governed exclusively by federal law. 850 F.3d at 73. The FAA also provides original federal subject matter and removal jurisdiction for a proceeding to recognize a foreign award, so that as a practical matter, virtually all such proceedings are litigated in federal court. *See* 9 U.S.C. §§ 203, 205, 302 (1947).

96. The significance of the FAA not applying is that to the extent the New York Legislature has determined that parties cannot be required to arbitrate certain disputes, that policy

B. DOES ARTICLE 75 ALSO APPLY?

If a transaction does involve interstate commerce and therefore the arbitration agreement is subject to the FAA, the question becomes whether and to what extent New York arbitral rules also apply to the parties' agreement. The role, if any, to be played by Article 75 in a New York arbitration that is subject to the FAA is determined by whether the parties explicitly or implicitly agreed in their contract to be bound by New York's arbitration law.

In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.* (*Volt*), the U.S. Supreme Court considered whether state arbitral rules may coexist with the FAA or are preempted by the federal statute.[97] There, the California Court of Appeals determined, as a matter of law, that an agreement that "contained an agreement to arbitrate all disputes between the parties 'arising out of or relating to this contract or the breach thereof'" and provided "[t]he Contract shall be governed by the law of the place where the Project is located" adopted California law not only as the law under which to construe the agreement but also adopted the state's arbitration law.[98] Under California's arbitration law, the parties' arbitration would be stayed pending the resolution of certain litigation involving third parties; whereas under the FAA, no stay would be available and the parties would be required to arbitrate immediately.[99] In light of that difference in result, the question before the Supreme Court in *Volt* was whether the FAA "nonetheless preempted" the parties' deemed agreement to adopt California's arbitration rules.[100]

In finding no preemption, the Supreme Court explained that the "FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[101] Rather, the overarching

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determination is not preempted by the federal principle against hostility towards arbitration. For example, General Business Law § 399-c (GBL 399-c) forbids the inclusion of mandatory arbitration clauses in consumer contracts. But where the FAA applies to a particular consumer contract because the transaction, in fact, affects interstate commerce, courts have held the FAA to preempt GBL 399-c. *See, e.g.*, Andersen v. Walmart Stores, Inc., 2017 WL 661188, *8 (W.D.N.Y. Feb. 17, 2017) (contract for sale of laptop computers where the parties were citizens of/operated in different states); Marino v. Salzman, 51 Misc. 3d 131(A), at *1, 36 N.Y.S.3d 48 (N.Y. App. Term 2016) (security system and security services contract offered by a multi-state company); De Oliveira v. Custom Made, 48 Misc. 3d 1204(A), at *3 (N.Y. Civ. Ct., Queens Cty. 2015) (custom design product contract offered via the internet connecting parties and artisans in different states); Schiffer v Slomin's, Inc., 48 Misc.3d 15, 19, 11 N.Y.S.3d 799 (N.Y. App. Term 2015) (contract for alarm systems offered by a multi-state company).

97. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (holding the California Arbitration Act is not preempted by the FAA where parties were found to have agreed that their arbitration agreement would be governed by California arbitration law).

98. *Id.* at 470.

99. *Id.* at 479.

100. *Id.* at 476.

101. *Id.* at 470.

intent of Congress in adopting the FAA was to have courts "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[102] Because the FAA requires that "arbitration proceed in the manner provided for in [the parties'] agreement,"[103] parties to an arbitration agreement may "[choose] in their agreement to abide by the state rules of arbitration."[104] Thus, although the FAA preempts state laws which mandate a court forum for resolving disputes the parties had otherwise agreed to arbitrate, "it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the [FAA] itself."[105]

Instead, courts have found that the application of state arbitral rules that differ from those provided for in the FAA actually furthers the federal statute's primary purpose of allowing parties to arbitrate according to their terms. Where "the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward."[106]

Similarly, with respect to review of a resulting domestic arbitral award, in *Hall St. Assocs. v. Mattel*, the U.S. Supreme Court held that, although sections 10 and 11 of the FAA provide the exclusive grounds for vacatur or enforcement of an arbitral award subject to the FAA irrespective of the parties' agreement to apply different standards, parties may "contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable."[107]

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102. *Id.* at 478 (state law is preempted when federal law expressly preempts state law or reflects a congressional intent to occupy the entire field, or when the state law actually conflicts with the federal law). The FAA preempts a state law that invalidates arbitration agreements or imposes conditions on agreements to arbitrate. *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686–89 (1996) (finding Montana law preempted where it mandated arbitration agreements to comply with requirements "not applicable to contracts generally"); Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984) (holding the FAA preempted a California state law that barred arbitration of certain claims).

103. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 475 (1989) (quoting 9 U.S.C. § 4).

104. *Id.* at 472.

105. *Id.* at 479. Since *Volt*, no court in New York has found a provision of New York arbitration law to be preempted by the FAA where the parties were found to have agreed that Article 75 would apply even if applying the FAA alone would result in a contrary decision. *See, e.g.*, Manhard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 516 U.S. 811 (1995); *Cty. of Nassau*, 402 F. App'x at 542; *In re* Smith Barney, Harris Upham & Co. v. Luckie, 85 N.Y.2d 193, 202 (N.Y. 1995), *cert. denied sub nom.*, 516 U.S. 811 (1995).

106. *Volt*, 489 U.S. at 479.

107. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 590–92 (2008). To the extent that the FAA governs an arbitration agreement, and the parties have not agreed to be bound by New York arbitration law, it is clear that the FAA "does not permit parties to expand, by their own agreement, the scope of judicial review beyond that authorized by the Act." Life Receivables Tr. v. Goshawk Syndicate 102 at Lloyd's, 496, 888 N.Y.S.2d 458 (N.Y. App. Div. 2009). *See also In re* Mahn v. Major, Lindsey, & Africa LLC, 159 A.D.3d 546 (Sup. Ct. N.Y. Cnty. 2018)

Thus, because the Supreme Court has determined that the overarching goal of the FAA is to implement the parties' agreement,[108] courts have allowed parties to incorporate state arbitral rules, such as Article 75, to govern arbitration proceedings that would otherwise be governed by the FAA alone.[109] Accordingly, when (a) the FAA is applicable to an arbitration conducted in New York because the transaction affects interstate commerce, and (b) Article 75 applies because as a matter of state law the parties have used words in their agreement that have been found to adopt state law, the FAA and New York law both apply as a technical matter. To reiterate, agreements specifying that arbitration will be conducted pursuant to state rules or procedures do not cease being subject to the FAA, but rather the FAA permits parties to "specify by contract the rules under which . . . arbitration will be conducted."[110]

When a court enforces the terms of an arbitration agreement that incorporates state law rules, it does so *not* because the parties have chosen to be governed by state rather than federal law. Rather, it does so because federal law requires that the court enforce the terms of the agreement.[111]

V. Adoption of New York Arbitration Law

So how, as a matter of New York contract interpretation law, can parties be found to have agreed—consistent with their freedom to do so under the FAA—to adopt New York's arbitration law? Article 75 applies in FAA-governed proceedings in one of two ways: (a) where the parties expressly

(where FAA exclusively applied, court refused to honor the parties' agreement); Mogul Decl. Ex. A at 4, Mahn v. Major, Lindsey, & Africa LLC, No. 10 Civ. 04239 (S.D.N.Y. July 13, 2010), ECF No. 21-2 (the parties' agreement in the *Mahn* case was that "[a] party opposing enforcement of an award may bring a separate action in any court of competent jurisdiction to set aside or modify the award, where the standard of review will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury"). It remains undecided whether parties who have been found to have agreed to be bound by New York arbitration law may effectively contract for more searching judicial review of their arbitral award. With respect to an international award subject to the New York or Panama Conventions, some scholars have suggested that parties may not use state arbitration law to expand judicial review for vacating or denying confirmation of a Convention award in the United States beyond what is prescribed by the FAA. *See* Maxi Scherer and Linda Silberman, *Limits to Party Autonomy at the Post-Award Stage: Chapter 14* at 469, *in* LIMITS TO PARTY AUTONOMY IN INT'L COM. ARB. (Franco Ferrari ed., 2016); NYU School of Law, Public Law Research Paper No. 16–28 (citing Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration, Tentative Draft No. 2, § 4–23 at 298 (April 16, 2012) (approved by ALI at May 2012 meeting); Linda J. Silberman, *The Supreme Court's Recent Perspective on Party Autonomy in Arbitration: What Does It Mean for the Proposed ALI Restatement on International Commercial Arbitration?* 5 WORLD ARB. & MED. REV. 3, 318–19 (2011)).

108. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 475 (1989).

109. *Id.* at 470.

110. *Id.* at 479.

111. Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 292 (3d Cir. 2001), *rev'd on other grounds*, by *Hall St. Assocs.*, 552 U.S. at 576.

adopt New York's arbitration law in their arbitration provision, or (b) where they have implicitly done so in their choice-of-law clause, as explained below.[112]

A. Express Incorporation

Parties may explicitly contract for New York's arbitration rules to govern where the FAA would otherwise apply. Although "[g]enerally, when a contract contains an arbitration clause, the clause itself does not have a choice-of-law provision in it," there are exceptions.[113] For example, in *In re Rom Reinsurance Mgmt. Co., Inc.*, (*Rom Reinsurance*), the parties agreed that "'the arbitration laws of New York State' shall govern the parties' arbitration."[114] In *County of Nassau*, the agreement stated that "the decision of the arbitrators will be binding and not subject to appeal, except solely and exclusively on the grounds set forth in the New York Civil Practice Law and Rules."[115] In both cases, the courts held that the quoted language constituted a clear intention to have the arbitration laws of New York, including Article 75, govern exclusively.

In *Rom Reinsurance*, that meant the threshold issue of the statute of limitations was for the court to resolve under CPLR 7502(b) and 7503(a) and not for the arbitrator, as would be the case if the FAA governed exclusively.[116] In *County of Nassau*, that meant confirmation of the award was governed by New York's standard whether the arbitration award "violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power," rather than by the federal "manifest disregard of the law" standard employed by the district court at that time.[117]

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112. In some cases, governed by the FAA, courts have accepted that they "may apply state grounds for vacatur, where they are consistent with the FAA's terms and purposes," but have done so without any analysis of the agreement to determine whether the parties adopted New York arbitration law. ACN Dig. Phone Serv., LLC v. Universal Microelectronics Co., Ltd., 115 A.D.3d 602, 603 (N.Y. App. Div. 2014). *See also* TA Assocs., L.P. v. Gandy, 993 N.Y.S.2d 646 (Sup. Ct. N.Y. Cty. 2014) (noting that the parties did not dispute that both Article 75 and the FAA applied to the arbitration). Although in both cases the outcome was the same under the FAA and Article 75, these decisions do not appear correctly decided in not demanding an affirmative agreement to have New York arbitration law apply before applying the Article 75 standards.

113. *See* Robert L. Haig, Commercial Litigation in New York State Courts § 14:14 (4th ed. 2015).

114. *In re* Rom Reinsurance Mgmt. Co., Inc. v. Cont'l Ins. Co., Inc., 982 N.Y.S.2d 73, 74 (N.Y. App. Div. 2014).

115. Pet'r's Mem. of Law in Opp'n to Mot. to Vacate, and in Supp. Of Cross-Mot. to Confirm, Arbitration Award at 8, Cty. of Nassau v. Chase, No. 08 Civ. 0082 (E.D.N.Y. Dec. 5, 2008), ECF No. 20.

116. *In re Rom Reinsurance*, 982 N.Y.S.2d at 74.

117. *Cty. of Nassau*, 402 F. App'x at 542 (quotation omitted). *See also* Moosazadeh v. Cream-O-Land Dairy, Inc., No. 13 Civ. 6069 (RLM), 2015 WL 1062184, at *1, *3 (E.D.N.Y. Mar. 11, 2015) (award subject to FAA nonetheless reviewed under Article 75 standards where parties' National Arbitration and Mediation (NAM) Dispute Resolution Agreement provided that "either party is free to confirm the award pursuant to [section] 7502" of New York's CPLR).

Indeed, in the cases of express adoption of New York's arbitration law in an agreement otherwise subject to the FAA, the courts have applied New York law without the FAA's provisions playing any role.

The express invocation of New York arbitration law is plainly sanctioned by *Volt* and presents an easy case as a matter of contract interpretation under New York law. As one judge observed: "It is hard to imagine what the parties intended when they agreed that the 'arbitration law of New York State shall govern such arbitration' if they did not intend to have the CPLR apply to petitions to review arbitration awards."[118] But as demonstrated in the next section, parties can find themselves bound by Article 75 even without referring to the CPLR or New York arbitration law in their contract.

B. IMPLICIT ADOPTION

In the typical contract, a separate clause from the arbitration provision states the choice of law governing the contract as a whole. Because

> the FAA does not require that its own rules be applied when parties have affirmatively agreed to arbitrate under a different set of rules[,] [t]his policy has given rise to uncertainty as courts attempt to determine whether parties to a contract intended to incorporate specific state laws respecting arbitration into their agreement simply by adopting a standard choice of law clause in the contract.[119]

The question is whether as a matter of state contract law does the choice-of-law clause adopt state procedural law or only substantive law (assuming the distinction between the two is clear)?[120]

As noted above, in *Volt*, the California court ruled that a clause providing that the agreement "shall be governed by [California law]" effectively adopted California's arbitration law in displacement of the FAA's standards.[121]

In New York, the Court of Appeals has also considered whether parties have agreed to adopt the provisions of Article 75 through the wording of the stand-alone choice-of-law clause in their contract.[122] In *Luckie*, the New York Court of Appeals, without dissent, held that a choice-of-law provision stating that "[t]his agreement and its *enforcement* shall be governed by the laws of the State of New York" manifested not just that New York law would

118. Harper Ins. Ltd. v. Century Indem. Co., 819 F. Supp. 2d 270, 274 (S.D.N.Y. 2011).

119. HAIG, *supra* note 113.

120. Because the issue is to what extent state procedural law is incorporated via a choice-of-law clause, one could in theory draft a choice-of-law clause to read that the agreement is "governed by the substantive law of the state of X." This, however, is not a formulation often seen in the treatises or case law.

121. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 470 (1989).

122. *In re* Smith Barney, Harris Upham & Co. v. Luckie, 85 N.Y.2d 193, 197 (N.Y. 1995), *cert. denied sub nom.*, 516 U.S. 811 (1995).

provide the substantive law under which the contract would be interpreted, but also "that the parties intended that New York law govern the arbitration," separately provided for in the agreement.[123] In *Luckie*, this holding meant that Article 75 applied, specifically CPLR 7502(b) and 7503(b), which delegate statute of limitations questions to the court, to resolve and authorize a stay of arbitration pending that judicial determination, rather than delegating limitations to the arbitrator in the first instance, as does the FAA.[124] The Court further ruled that under *Volt*, applying New York's rule on the resolution of limitations defenses was not preempted by the FAA because the application of "this State's body of arbitration law . . . is not inimical to the policies of the FAA."[125] In other words, unless a state law rule of arbitration agreed to by the parties is inimical to the policies of the FAA, the FAA will not preempt it.

By contrast, in *Matter of Diamond Waterproofing Sys., Inc.*, the unanimous court held that a choice-of-law provision stating that the agreement "shall be governed by the law of [New York]" did not imply an intent to be bound by Article 75, "because the contract's choice-of-law provision does not provide that New York law shall govern the enforcement of the parties' agreement."[126] The New York Court of Appeals so ruled even though this language was found by the California courts in *Volt* to adopt California's arbitration law, a state law determination to which the U.S. Supreme Court deferred.

More recently, in *N.J.R. Assocs. v. Tausend* (*N.J.R. Assocs.*), the New York Court of Appeals adhered to its position that where the parties' choice-of-law clause provides their agreement "shall be governed by, and construed in accordance with, the laws and decisions of the State of New York," such clause "does not include the critical 'enforcement' language" and thus "the

123. *Id.* at 198, 202–03 (emphasis added).

124. *Id.* at 202. The limitations issue courts are empowered to resolve under CPLR 7502(b) is compliance with statutory limitations periods, as opposed to deadlines established by contract for taking action or disputing claims. *Id.* Nonetheless, as *Luckie* itself illustrates, whether a claim is timely under CPLR Article 2 can, in turn, depend on the court resolving such potentially fact-intensive questions under CPLR 202 as where the claim accrued and applying the discovery and tolling rules of New York and potentially a foreign jurisdiction. *Id.* at 206–07.

125. *Id.* at 205.

126. *In re Diamond Waterproofing Sys.*, 4 N.Y.3d at 250. The federal courts in New York have followed *Diamond Waterproofing* on the issue of whether a choice-of-law clause incorporated New York's arbitration law. *See, e.g.*, CRC Inc. v. Comput. Scis. Corp., No. 10 Civ. 4981(HB), 2010 WL 4058152, at *2 (S.D.N.Y. Oct. 14, 2010) ("In the absence of 'critical language concerning enforcement,' however, the FAA's vacatur rules apply" to the exclusion of the provisions of the CPLR); Penrod Mgmt. Grp. v. Stewart's Mobile Concepts, Ltd., No. 07 Civ. 10649(JGK), 2008 WL 463720, at *2 (S.D.N.Y. Feb. 19, 2008) ("In this case, the choice of law provision states only that the Agreement 'shall be construed in accordance with New York law.' . . . This language is insufficient to find that the parties intended Section 7503(b) [rather than the FAA] to govern the issue of waiver" of jurisdictional objections to arbitration).

agreement fails to unequivocally invoke the New York standard" for incorporating Article 75.[127]

C. What if Article 75 is Incorporated by the Critical Word Enforcement?

Although the specific question in each of *Luckie*, *Diamond Waterproofing*, and *N.J.R. Assocs.* was whether the parties intended to adopt the New York arbitration law rule that statutory time limitations are for the court, not the arbitrators, to decide, for the following reasons, the cases establish that use of the "enforced under" or "enforcement governed by" New York law formulation incorporates *all* of New York's arbitration law, not just the provisions of CPLR 7502(b) and 7503(b).

First, if the words "enforced under" New York law serve to adopt CPLR 7502(b) and 7503(b) without mentioning those provisions or the terms "statutes of limitations" or even "arbitration," it is hard to see how this talismanic phrase does not also incorporate the rest of New York's arbitration law, including the multiple other differences from the FAA found in New York law.

Second, the New York Court of Appeals in *Luckie* rejected the argument that *Volt* authorizes parties to agree only to a state law regime that temporarily stays arbitration, whereas CPLR 7503(b) could permanently preclude any arbitration from being pursued if the court finds a claim to be untimely.[128] Rather, the *Luckie* court read the U.S. Supreme Court as broadly sanctioning that the *Volt* parties' agreement incorporated the "entire body of California's statutory arbitration rules . . . without circumscription."[129] The *Luckie* opinion similarly imposed no

127. N.J.R. Assocs. v. Tausend, 19 N.Y.3d 597, 602 (N.Y. 2012) (internal quotation omitted). Lower courts in New York have consistently confirmed that the inclusion of enforcement language in a choice-of-law provision to an arbitration agreement will invoke New York arbitral rules, while the exclusion of such critical language will result in an application of the FAA. *See, e.g.*, *Volpe*, 2013 WL 3989040 at * 8 (because the contract's choice-of-law provision "include[d] the requisite 'enforcement' language," New York law, rather than the FAA, "govern[ed] the interpretation and determination of prerequisites to arbitration," such as whether plaintiff waived his right to arbitration by filing a complaint and invoking the jurisdiction of the courts); *Roberts*, 2007 WL 1093487, at *6-7 (finding that the choice-of-law provision, which stated that the agreement's provisions "shall be enforced according to" New York law "evidences the parties' intention that New York Law governs the Agreement and its enforcement" and applying Article 75 to the issue of vacatur of an arbitral award). One Supreme Court case has come out differently: Joseph Gunnar & Co., LLC v. Bridgeman, 14 Misc. 3d 1238(A), at *4, 836 N.Y.S.2d 499 (Sup. Ct. Nassau Cty. 2007) (finding that the issue of whether the parties delegated to the courts or the arbitrator the issue of timeliness was "not a matter of enforcement but of substantive law" notwithstanding *Luckie* and *Diamond Waterproofing*).

128. *In re* Smith Barney, Harris Upham & Co. v. Luckie, 85 N.Y.2d 193, 196 (N.Y. 1995), *cert. denied sub nom.*, 516 U.S. 811 (1995).

129. *Id.* at 206.

circumscription on the provisions of New York arbitration law incorporated when parties agree to have their contract enforced under New York law.[130]

Third, then Chief Judge Kaye in her separate opinion in *Luckie* was explicit on this point. She read the majority as "conclud[ing] that the express language of the parties' agreements contemplated that the *whole* of New York arbitration law would apply, and following *Volt* we give force to the parties' agreement."[131] Writing for herself, Chief Judge Kaye concurred that "the parties can fairly be understood to have agreed that *all* of New York arbitration law . . . would apply" because the choice-of-law clause provided that the enforcement of the agreement is governed by New York law.[132]

Accordingly, just as the express adoption of New York arbitration law in *Rom Reinsurance* and *County of Nassau* incorporates the whole of such law, so too a choice-of-law clause that makes the enforcement of the parties' agreement subject to New York law, incorporates all of New York arbitration law, and not just the provision dealing with statutes of limitations.

That said, most recently, the First Department in a sharply divided three-two decision in *Matter of Flintlock Constr. Servs., LLC v. Weiss*, ruled that a choice-of-law provision that the agreement was to be "construed and enforced" in accordance with New York law nonetheless "did not unequivocally demonstrate an intent" to be bound by the New York arbitration law rule (the *Garrity* rule) that "exclude[s] claims for punitive damages from the consideration of the arbitrators."[133]

There are reasons, however, to believe that *Flintlock* was wrongly decided and that the Court of Appeals' decisions in *Luckie*, *Diamond Waterproofing*, and *N.J.R. Assocs.* should not be read as limited to incorporating only New York's rule on judicial resolution of statutory limitations defenses.

- First, the *Flintlock* majority relied heavily on the U.S. Supreme Court's decision in *Mastrobuono*.[134] In *Mastrobuono*, the Court held—without the benefit of any New York court decision to which to defer—that a client agreement reciting merely that "it shall be governed by the laws of the State of New York" did not clearly evidence an intent to opt out of the federal default rule that arbitrators may award punitive damages and replace it with one borrowed from New York law that arbitrators may not award punitive damages.[135] The Supreme Court determined

130. *Id.* at 204.
131. *Id.* at 208 (emphasis added).
132. *Id.* at 207 (emphasis added).
133. *In re* Flintlock Constr. Servs., LLC v. Weiss, 122 A.D.3d 51, 54 (N.Y. App. Div. 2014).
134. *Id.* at 55-56 (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995))
135. 514 U.S. at 53. Shortly after *Luckie* was decided by the New York Court of Appeals and *Mastrobuono* was decided by the U.S. Supreme Court, the Second Circuit in *Bybyk* determined that *Luckie* is no longer good law in light of the *Mastrobuono* decision. 81 F.3d at 1200. The *Bybyk* majority erroneously characterizes *Luckie* as "rel[ying] on the Seventh Circuit's decision in *Mastrobuono*, which was subsequently overturned by the Supreme Court." *Id.* The *Luckie* court, while citing the Seventh Circuit decision, did not rely on it. 85 N.Y.2d at 195-196, 202. Thus, the Supreme Court's decision in *Mastrobuono* should not undermine *Luckie* as good law. Moreover, as noted above, the choice-of-law clause in *Mastrobuono* did not include the critical

that the choice-of-law provision evidenced an intent to encompass the "substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators."[136] But the *Flintlock* majority did not give any consideration to the fact that the choice-of-law clause before it included the "enforcement" language that was lacking in *Mastrobuono*.[137]

- Second, the *Flintlock* majority dismissed the relevance of *Diamond Waterproofing* as containing *dicta* because it did not involve the New York arbitration rule relating to punitive damages but did not acknowledge that the New York Court of Appeals, rather than the U.S. Supreme Court, is the final arbiter on whether contractual language is sufficiently clear, as a matter of New York law, to incorporate Article 75.[138]
- Third, the *Flintlock* majority did not address *Luckie*'s holding reaffirmed in *Diamond Waterproofing* that the "enforcement" language provided sufficiently clear intent to be bound by New York arbitration law.[139] As the *Flintlock* dissent noted:

  > *Diamond [Waterproofing]* and its progeny make clear that, even if the FAA applies to an agreement, the parties may still limit the arbitrator's power by invoking New York law. To do so, however, the parties must not only make the agreement subject to New York law, but must also make its "enforcement" subject to New York law. By using such language, the parties "unequivocally" invoke the limitations on arbitration under New York State law.[140]

- Fourth, the First Department's decision in *Flintlock* was not reviewed by the Court of Appeals; the case was appealed to the Court of Appeals

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term "enforcement," whereas in *Luckie* it did. *Mastrobuono*, 514 U.S. at 52; *In re* Smith Barney, Harris Upham & Co. v. Luckie, 85 N.Y.2d 193, 203 (N.Y. 1995), *cert. denied sub nom.*, 516 U.S. 811 (1995). After the *Bybyk* decision, the New York Court of Appeals twice reaffirmed the rule of *Luckie* in and *N.J.R. Assocs.* and *Diamond Waterproofing*. *See* 19 N.Y.3d 597; 4 N.Y.3d 247.

136. *Mastrobuono*, 514 U.S. at 52-53.

137. The relationship between the U.S. Supreme Court's decision in *Mastrobuono* and the New York Court of Appeals' decision in *Luckie* is interesting. *Luckie* was decided on February 21, 1995 and noted that *Mastrobuono* was pending before the Supreme Court. *See* 85 N.Y.2d at 195-196, 202. The Supreme Court decided *Mastrobuono* just two weeks later, on March 6, 1995, but without citing *Luckie* at all. 514 U.S. 52. Given the emphasis in *Luckie* on the word "enforcement" which was missing from the choice-of-law clause in *Mastrobuono*, the outcome in *Mastrobuono* appears fully consistent with New York law as construed in *Luckie* and its progeny. *See id.* This is despite the fact that the Supreme Court did not have a New York state court's interpretation of the choice-of-law clause in *Mastrobuono* to which to defer, as it did to the California Court of Appeals' decision in *Volt*. *See* 489 U.S. at 479. *Mastrobuono* came to the U.S. Supreme Court following an arbitration conducted in Illinois applying New York substantive law, whose award was confirmed by the federal district court and the Court of Appeals for the Seventh Circuit.

138. *In re Flintlock*, 122 A.D.3d at 55.

139. *Id.* at 51-57.

140. *Id.* at 63.

but was dismissed on the motion of the parties before the Court could rule.[141]

Thus, although *Flintlock* engenders some doubt as to precisely what provisions of New York arbitration law are binding on the parties when they agree that New York law governs the "enforcement" of their agreement, absent a decision from the New York Court of Appeals to the contrary, *Luckie* continues to reflect the position that the "whole" of New York's arbitration law applies when the parties have subjected the "enforcement" of their agreement to New York law.[142]

D. Can Both Sets of Rules Apply Simultaneously?

The judicial decisions on cases that have applied Article 75 to an FAA-governed arbitration as a result of the choice-of-law clause have involved conflicts between the provisions of the FAA and Article 75, with the result that where the parties were found to have adopted New York arbitration law, the conflicting New York standard prevailed, as permissible under the FAA as construed in *Volt*.[143] As the Court of Appeals explained in *Luckie*, "[u]ndeniably, in the absence of an explicit choice of law provision, governing Federal law would have precluded the courts in the appeals before us from addressing the Statute of Limitations issue or from issuing stays under our arbitration act."[144] But what happens if there is a provision of Article 75 that arguably does not conflict with any provision of the FAA, because the FAA simply does not address the issue? What role do the provisions of Article 75 that do not conflict with the FAA play? May parties rely on Article 75 and, if so, only as a result of a choice-of-law clause found to incorporate Article 75? Or is agreeing to arbitrate in New York alone sufficient to make applicable all provisions of Article 75 not in conflict with the FAA?

This issue has arisen with respect to the procedure for moving to vacate or correct an award issued in New York that is subject to the FAA. As noted above, Section 12 of the FAA dictates the date by which notice of a motion to vacate or modify an award must be served but is silent on the filing of such motion in a court.[145] By contrast, CPLR 7511(a) addresses the deadline for filing a motion to vacate or modify.[146] The Second Circuit has thus held that such a motion must be both timely served under the FAA and timely filed under Article 75 on the theory that because Section 12 addresses only

141. *In re* Flintlock Constr. Servs., LLC v. Weiss, 28 N.E.3d 25 (N.Y. 2015) (dismissing appeal "upon the ground that the issues presented have become moot").

142. *In re* Smith Barney, Harris Upham & Co. v. Luckie, 85 N.Y.2d 193, 208 (N.Y. 1995), *cert. denied sub nom.*, 516 U.S. 811 (1995).

143. *See, e.g.*, *TA Assocs., L.P.*, 43 Misc.3d 1233(A), at *3 (noting that the parties did not dispute that both Article 75 and the FAA applied to the arbitration); *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 468 (1989).

144. 85 N.Y.2d at 202 (internal citation omitted).

145. 9 U.S.C. § 12 (1947).

146. N.Y. C.P.L.R. § 7511(a) (McKinney 2018).

service, "the ninety-day limitations period in C.P.L.R. section 7511 governs the timeliness of [petitioner's] petition" to vacate.[147] This decision is not based on any choice-of-law clause in the parties' agreement, but rather on the fact that Article 75 provides procedural rules (governing arbitrations conducted and awards issued in New York) on issues not addressed by the FAA.[148]

Similarly, when a New York court, state or federal, is being asked to consider an application for an attachment or preliminary injunction in aid of an arbitration subject to the FAA, it often looks to CPLR 7502(c) as providing the standards for granting such relief, again without regard to whether the parties intended to adopt New York arbitration law through their arbitration or choice-of-law clause.[149] Indeed, "the New York Legislature amended CPLR 7502(c) in 2005, making clear that New York courts can grant interim relief for arbitrations" subject to the New York or Panama Conventions, which by definition involve arbitration agreements governed by the FAA.[150]

VI. What Role is Played by Institutional Arbitration Rules Selected by the Parties?

The remainder of the Article 75 provisions as to which the FAA is silent may still serve a role in the *sui generis* case, particularly if the parties have agreed to arbitrate, but not under particular Institutional Arbitration Rules, such as the AAA, JAMS, CPR, etc.[151]

But where, as has become commonplace, the parties have agreed to arbitrate under Institutional Arbitration Rules, those Rules generally address

147. *See* Hakala v. J.P. Morgan Sec., Inc., 186 F. App'x 131, 133 (2d Cir. 2006) (affirming dismissal of petition to vacate, because it was filed ninety-one days after petitioner received the panel's award). In *Martin v. Deutsche Bank Sec., Inc.*, the same court affirmed the dismissal where the petitioner filed his petition to vacate timely under CPLR 7511(a) but failed to serve it in accordance with Fed. R. Civ. P. 5 on respondent's counsel within the three months provided for in FAA § 12. 676 F. App'x 27 (2d Cir. 2017).

148. *Hakala*, 186 F. App'x at 133.

149. CPLR 7502(c) provides that a court may issue an "order of attachment or for a preliminary junction in connection with an arbitration . . . but only upon the ground that the award . . . may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application . . . except that the sole ground for the granting of the remedy shall be as stated above." N.Y. C.P.L.R. § 7502(c). *See, e.g.*, SG Cowen Sec. Corp. v. Messih, 224 F.3d 79, 83 (2d Cir. 2000) (finding that Article 63's traditional equitable criteria must be satisfied in addition to CPLR 7502(c)'s "rendered ineffectual" test in order to obtain a preliminary injunction); Mishcon de Reya New York LLP v. Grail Semiconductor, Inc., 2011 WL 6957595, at *8 (S.D.N.Y. Dec. 28, 2011) (applying CPLR 7502(c)'s "rendered ineffectual" test). On the other hand, the Second Circuit has ruled (without citing to CPLR 7502(c)) that "[t]he standard for such [a preliminary injunction to preserve the status quo pending arbitration] is the same as for preliminary injunctions generally." Benihana, Inc. v. Benihana of Tokyo, LLC, 784 F.3d 887, 895 (2d Cir. 2015).

150. HAIG, *supra* note 113, § 61:41.

151. *Id.* § 61:29.

most of the issues dealt with in Article 75 that are not addressed by the FAA, including the following: the selection of an arbitrator,[152] the conduct of the arbitration,[153] whether the arbitrator must swear an oath,[154] the time for issuance of the award,[155] the method of delivering the award,[156] and whether the award must be affirmed by the arbitrator.[157]

Generally, the incorporation of Institutional Arbitration Rules into parties' contracts has long been honored and enforced by the courts. Institutional Arbitration Rules have played a role most often with respect to offering evidence of the parties' intent with respect to who decides in the first instance—as between the arbitrators or the court—whether a dispute is arbitrable or whether an agreement containing an arbitration clause is valid and binding on the parties.[158] Courts rely on Institutional Arbitration Rules

152. *Compare* N.Y. C.P.L.R. § 7504 (McKinney 2018) ("[c]ourt appointment of arbitrator"), *with* AAA Commercial Arbitration Rules R-12 – R-14.

153. *Compare* N.Y. C.P.L.R. §§ 7506(b)-(e) (mandating at least eight days' notice of any hearing; conferring on arbitrator right to "adjourn or postpone" a hearing; entitling parties to submit "evidence and to cross-examine witnesses"; recognizing right of a party to be represented by counsel; and requiring all panel members to conduct the hearing, but award may be issued by a majority), *with* AAA Commercial Arbitration Rules R-20, R-26, R-32(a), R-44(a).

154. *Compare* N.Y. C.P.L.R. §§ 7506(a), (f) (requiring an arbitrator to be sworn to "decide the controversy faithfully and fairly," subject to written waiver or continued participation in "the arbitration without objection"), *with* AAA Commercial Arbitration Rules R-27 ("Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so.").

155. *Compare* N.Y. C.P.L.R. § 7507 (court may fix time for award to be made), *with* AAA Commercial Arbitration Rules R-45.

156. *Compare* N.Y. C.P.L.R. § 7507 (arbitrator shall deliver award to each party as specified in their agreement or else "personally or by registered or certified mail, return receipt requested"), *with* AAA Commercial Arbitration Rules R-49 ("Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law."); ICDR International Arbitration Rules arts. 30(4)—(5) ("The award shall be communicated to the parties by the Administrator." "If applicable law requires an award to be filed or registered, the tribunal shall cause such requirement to be satisfied. It is the responsibility of the parties to bring such requirements or any other procedural requirements of the place of arbitration to the attention of the tribunal.").

157. *Compare* N.Y. C.P.L.R. § 7507 ("award shall be in writing, signed and affirmed by the arbitrator"), *with* AAA Commercial Arbitration Rules R-46 ("Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.").

158. Under *First Options of Chicago, Inc. v. Kaplan*, gateway questions of arbitrability are reserved for the court, unless there is "clear and unmistakable evidence" of the parties' intent for these issues to be resolved by the arbitrator. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1995). Courts have uniformly found that an agreement to arbitrate under Institutional Arbitration Rules constituted "clear and unmistakable evidence" of the parties' delegation to an arbitrator. *See, e.g.*, Contec Corp. v. Remote Sol. Co., Ltd., 398 F.3d 205, 208 (2d Cir. 2005) ("We have held that when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."); *see also* Life Receivables

that uniformly delegate that determination to the arbitrator.[159] Similarly, courts will defer to Institutional Arbitration Rules agreed to by the parties rather than inject themselves on such issues as arbitrator selection or challenges to arbitrators on grounds of conflicts or partiality.

In turn, the Institutional Arbitration Rules generally and not surprisingly defer to the requirements of "applicable law"; for example, several of the AAA Commercial Rules of Arbitration establish default principles that are subject to such caveats as "if required by law," "to the extent the law allows," "unless the law provides to the contrary," or "unless such choice is prohibited by applicable law."[160] The JAMS Comprehensive Arbitration

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Trust v. Goshawk Syndicate 102 at Lloyd's, 66 A.D. 3d 495, 495 (1st Dep't 2009) ("Although the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules, . . . courts will 'leave the question of arbitrability to the arbitrators.' (citation omitted)), *aff'd*, 901 N.Y.S.2d 133 (2010). On January 8, 2019, the Supreme Court – which has never addressed whether the incorporation of Institutional Arbitration Rules constitute such "clear and unmistakable evidence" – remanded to the Fifth Circuit to determine whether an arbitration agreement adopting the AAA Rules (which provide, like most Institutional Arbitration Rules, that the arbitrator has the power to determine her own jurisdiction) establishes "clear and unmistakable evidence" that the parties intended to arbitrate arbitrability. Henry Schein, Inc. v. Archer and White Sales, Inc., 585 U.S. (2019) (slip op., at 8). The ALI's draft Restatement of the U.S. Law of International Commercial and Investor-State Arbitration has taken the position that the incorporation of institutional arbitral rules does not constitute "clear and unmistakable evidence" of parties' intent to arbitrate arbitrability. Restatement of the U.S. Law of International Commercial and Investor-State Arbitration § 2-8 reporter's note b(iii) (Tentative Draft No. 4, 2015).

159. *See, e.g.*, AAA Commercial Arbitration Rules R-7(a)–(b) ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim"; "The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part."); JAMS Arbitration Rule 11(b) ("Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter."); CPR Administered Arbitration Rules 8.1–8.2 ("The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement"; "The Tribunal shall have the power to determine the existence, scope or validity of the contract of which an arbitration clause forms a part."); ICC 2017 Arbitration Rules arts. 6(3)–6(9) (allocating responsibility for determining jurisdiction between the tribunal and the ICC Court); ICDR 2014 International Arbitration Rules arts. 19(1)–(2) ("The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s), or with respect to whether all of the claims, counterclaims, and setoffs made in the arbitration may be determined in a single arbitration"; "The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part.").

160. AAA Commercial Arbitration Rules R-11(b), R-18(a)(iii), R-23(e), R-25–R-27, R-31, R-44(a), R-45, R-46(a), R-49, R-57(a). The ICDR is the AAA's international division, whose International Arbitration Rules apply when the parties have agreed to arbitrate under them or "have provided for arbitration of an international dispute by the [ICDR] or the [AAA] without designating particular rules." ICDR International Arbitration Rules art. 1(1). The ICDR's

Rules & Procedures similarly provides: "If any of these Rules, or modification of these Rules agreed to by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected."[161] The CPR Arbitration Rules (Administered and Non-Administered) offer a slightly different default rule in that the CPR Rules "shall govern the arbitration except that where any of these [Rules] is in conflict with a mandatory provision of applicable arbitration law, that provision of law shall prevail."[162] In contrast, the ICC Rules by their terms do not defer to local applicable law, as these rules are intended to apply to arbitrations around the world and not just in the United States.[163]

Because the FAA is silent with respect to arbitrator oaths, the right to be represented by counsel, and the method of delivery of an award, for example, the only "law to the contrary" to which Institutional Arbitration Rules defer is state arbitration law such as Article 75. Thus, for example, AAA Commercial Arbitration Rule R-27 provides that "[b]efore proceeding with the first hearing, each arbitrator may take an oath of office, and, if required by law, shall do so."[164] In an arbitration in New York under the AAA's Commercial Arbitration Rules, the arbitrator's oath is mandatory because CPLR 7506(a) requires an oath.[165]

International Arbitration Rules retain the AAA Commercial Arbitration Rules' deference to local applicable law. *See, e.g.*, ICDR International Arbitration Rules arts. 30(5), 37(1).

161. JAMS Comprehensive Arbitration Rules & Procedures, Rule 4 (2014).

162. 2013 CPR Administered Arbitration Rules, Rule 1.2 (effective July 1, 2013); *see* 2018 CPR Non-Administered Arbitration Rules, Rule 1.2 (effective March 1, 2018). The ICDR International Arbitration Rules contains a similar provision that reads as follows: "These Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail." ICDR International Arbitration Rules art. 1(2).

163. *See* ICC Arbitral Rules art. 19 ("The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, *whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration*.") (emphasis added).

164. AAA Commercial Arbitration Rules R-27.

165. N.Y. C.P.L.R. § 7506(a) (McKinney 2018). When Institutional Arbitration Rules do not, by their terms, defer to "applicable law," the adoption of such Rules into an arbitration agreement can further complicate the analysis of what law governs where New York and federal arbitration law diverge. For example, AAA Commercial Arbitration Rules authorize arbitrators to award "any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement." AAA Commercial Arbitration Rules R-47(a). In considering the issue of the availability of punitive damages in *Flintlock*, the First Department noted that the parties had agreed to arbitrate under AAA Rules which authorize the award of "any remedy which [is] just and equitable and within the scope of the agreement," suggesting that this agreement further reinforced the majority's holding that the parties' choice-of-law clause was insufficient (despite *Luckie*) to adopt New York's *Garrity* rule and override the authority of the arbitrators under the FAA to award punitive damages. *In re* Flintlock Constr. Servs., LLC v. Weiss, 122 A.D.3d 51, 54 (N.Y. App. Div. 2014) (internal quotation marks omitted) (citing AAA Commercial Arbitration Rules R-47(a)). By contrast the ICDR's International Arbitration Rules contain both a default rule against the award of punitive damages specifically and a prohibition generally

VII. Pointers for Practitioners

Accordingly, given the number of differences between New York arbitration law under Article 75 and federal law under the FAA, parties and practitioners need to be aware of the ways in which a choice of law clause, an agreement to arbitrate, and any Institutional Arbitration Rules chosen to govern the arbitration interact with one another to produce different results. The take-away from this review of those differences and the case law is that it is best to make explicit in the parties' agreement what law governs what issues when electing to arbitrate in New York.

The New York Legislature and its courts encourage the adoption of New York law to govern agreements involving at least $250,000 by enforcing agreements to do so "whether or not such contract, agreement or undertaking bears a reasonable relation to this state."[166] As to how such a choice-of-law clause should read, most sources encourage inclusion of "enforcement" or "enforced under" language in such clauses. Effective in 2018, the New York County Supreme Court Commercial Division adopted the following model clause recommended for inclusion in contracts to be governed by New York law: "THIS AGREEMENT *AND ITS ENFORCEMENT*, AND ANY CONTROVERSY ARISING OUT OF OR RELATING TO THE MAKING OR PERFORMANCE OF THIS AGREEMENT, SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK, WITHOUT REGARD TO NEW YORK'S PRINCIPLES OF CONFLICTS OF LAW."[167]

In addition, a number of treatises and practice guides recommend choice-of-law clauses that include not just interpretation but "enforcement" under New York law, even if they do not offer an affirmative justification for

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against the tribunal deciding a dispute "as *amiable compositeur* or *ex aequo et bono* unless the parties have expressly authorized it to do so." ICDR International Arbitration Rules art. 31(3). "Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary, or similar damages unless any applicable law(s) requires that compensatory damages be increased in a specified manner." ICDR International Arbitration Rules art. 31(5).

166. N.Y. General Obligations Law § 5-1401(1) (McKinney 2018).

167. Administrative Order of the Chief Administrative Judge of the Courts, AO/204/17 (Oct. 26, 2017) (internal quotation marks omitted) (emphasis added). In both IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A and Ministers & Missionaries Benefit Bd. v. Snow, the New York Court of Appeals held that choice-of-law clauses that do not include a carve-out for application of New York's conflicts of laws principles still require application of New York's substantive law without any consideration of common law or statutory choice-of-law rules. Ministers & Missionaries Benefit Bd. v. Snow, 26 N.Y.3d 466, 468 (N.Y. 2015); IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A., 20 N.Y.3d 310, 315–16 (N.Y. 2012). Despite the clarity of two decisions by the highest court in New York that such language is not required and serves no purpose, practitioners still include the "without regard to New York's principles of conflicts of law" carve-out as a matter of habit and as belt and suspenders. It should also be noted that the highest court of each state has not yet decided this question such that when choosing state law other than New York, the carve-out may in fact be necessary to avoid *renvoi* and to assure application of the substantive law of the chosen jurisdiction.

including "enforcement" within the choice-of-law clause (other than with respect to its potential consequences in cases where the parties have also elected to arbitrate their disputes in New York).[168]

Accordingly, while one could consider omitting the word "enforcement" or "enforced" from the choice-of-law clause in a contract that provides for arbitration in New York, given the ubiquity of choice-of-law clause models that include those terms, and given the ability to eliminate any ambiguity via the drafting of the arbitration clause, it is critical that practitioners reviewing agreements make an explicit election as to the role intended to be played by New York arbitration law. Hence, one leading text provides the following suggestion concerning the drafting of an arbitration clause: "parties . . . should . . . make clear whether they intend that the FAA or the arbitration law of the choice of law state should apply."[169] Authors also offer suggestions to parties on how to draft contracts to achieve such clarity.[170]

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168. *See, e.g.*, HAIG, *supra* note 113, § 14:18 (a choice-of-law clause with the "enforcement" language "is designed to insure that, should any conflicts arise under the parties' contract, a court would apply the substantive law of New York to the dispute, but would not first look to New York's conflicts of law rules. The clause is also designed to allow questions of timeliness of a claim to be determined by a court and not an arbitrator."); TINA L. STARK, NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE, § 6.02[3][G], at 126 (2003) (noting that by adding "enforcement" to a choice-of-law clause, a state's arbitration rules will apply to the arbitration proceedings and citing *Luckie*). Indeed, it is not clear what adding "enforcement" or "enforced under" to a New York choice-of-law clause achieves where the parties litigate their disputes in a New York court. In Ministers & Missionaries Benefit Bd. and IRB-Brasil, the addition of the word "enforcement" was not necessary to the holdings that a clause that recited the agreement "shall be governed by New York law" "obviates the application of both common-law conflict-of-laws principles and statutory choice-of-law directives" and adopts New York substantive law full stop. *Ministers & Missionaries*, 26 N.Y.3d at 468; *IRB-Brasil*, 20 N.Y.3d at 315–16. In 2138747 Ontario, Inc. v. Samsung C & T Corp., 144 A.D.3d 122, 147 (1st Dep't 2016) the Appellate Division held that the word "enforced" in a choice-of-law clause "should be interpreted as reflecting the parties' intent to apply both the substantive and procedural law of New York State to their disputes." New York's "procedural law" includes its statutes of limitations because "they are deemed 'as pertaining to the remedy rather than the right.'" *Id.* at 126 (citation omitted). On further appeal, the New York Court of Appeals affirmed that New York's statutes of limitation include its borrowing statute, N.Y. CPLR § 202, which requires a claim also to be timely under a foreign jurisdiction's statute of limitations if the cause of action accrued there. 103 N.E.3d 774, 776 (N.Y. 2018). The defendant argued that by agreeing that its contract would be "'enforced'" according to New York law, the parties agreed that only New York's statute of limitations applies. The Court of Appeals rejected the argument, concluding "that the mere addition of the word 'enforced' to the NDA's choice-of-law provision does not demonstrate the intent of the contracting parties to apply solely New York's six-year statute of limitations in CPLR 213(2) to the exclusion of CPLR 202." *Id.* at 778. *A fortiori*, had the choice-of-law clause omitted the critical "enforcement" language, there is no doubt the borrowing statute would have applied, as the New York courts have applied it and thus considered the applicability of a foreign forum's shorter limitations period where there was no choice-of-law clause or without analysis of the choice-of-law clause. *See, e.g.*, Ins. Co. of N. Am. v. ABB Power Generation, Inc., 91 N.Y.2d 180, 185 (N.Y. 1997).

169. HAIG, *supra* note 113, § 14:14.

170. *See* PAUL D. FRIEDLAND, ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS 219 (2d ed. 2007); *see also* HAIG, *supra* note 113, § 14:14.

But how do parties entering into a transaction involving interstate commerce know whether they "wish" to have their arbitration agreement and any arbitration in New York "governed by the Federal Arbitration Act . . . to the exclusion of state law inconsistent therewith," or "governed by the provisions of New York's Civil Practice Law and Rule?"[171] In advance of disputes arising, any attempt to make a reasoned assessment as to which regime is more advantageous would require the drafter to know whether, based on the commercial relationship, her client is likely to be the claimant or the respondent, whether there is a likelihood of assertion of even arguably time-barred claims, whether punitive damages are a possibility, whether irrationality versus manifest disregard is a more favorable vacatur standard, and any number of other unknown and unknowable considerations. All one does know is that it is strongly advisable to make a conscious choice by drafting the choice-of-law clause and/or the arbitration clause so as to eliminate the risk—for better or for worse—of litigation over the applicable arbitration law (FAA or Article 75) and the unpredictability, additional expense, and delay that such litigation may engender.

To the extent the parties have agreed not only to arbitration in the abstract but arbitration under Institutional Arbitration Rules, as is often recommended,[172] the most internally consistent position to take is to specify in contracts implicating interstate or cross-border commerce that the arbitration agreement and any arbitration "shall be governed by the Federal Arbitration Act . . . to the exclusion of state law inconsistent therewith."[173] This is because the Institutional Arbitration Rules universally give the arbitrators the greatest autonomy to determine their own jurisdiction, how the proceedings are to be conducted, and what relief to award. In this respect, the Institutional Arbitration Rules are aligned with the FAA as construed by the courts in minimizing judicial interference with the arbitration and the resulting award. Accordingly, agreement to Institutional Arbitration Rules is most consistent with agreement to have the FAA govern over any conflicting New York arbitration law rule.

On the other hand, to the extent a party anticipates some benefit from having the arbitration governed by Article 75 and being able to seek court intervention more readily, then one would be less likely to agree to arbitrate

171. FRIEDLAND, *supra* note 170, at 219.

172. *See id.* at 1-2 (offering model clauses for various Institutional Arbitration Rules); THOMAS J. STIPANOWICH & PETER H. KASKELL, COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS § 2.3, at 42 (2001) ("[w]ell-drafted arbitration clauses do not 'reinvent the wheel' but incorporate the rules of a respected organization by reference").

173. FRIEDLAND, *supra* note 170, at 219. Although the language "to the exclusion of state law inconsistent therewith" may appear to constitute unnecessary surplusage, its omission may give rise to the inference that the parties intended to eschew even those provisions in Article 75 as to which the FAA is silent, such as, for example, the judicial authority under CPLR 7502(c) to enter pre-award attachments or injunctions, or the CPLR 7506(a) requirement of an arbitrator oath. *See id.*

under Institutional Arbitration Rules.[174] In the circumstance of arbitration under no set of agreed rules, specifying that the arbitration is to be "governed by the provisions of New York's Civil Practice Law and Rule" may make sense in a specific case in that Article 75 will supply some of those rules.

The one combination that does not seem logical in a contract involving interstate or cross-border commerce is an agreement to arbitrate under Institutional Arbitration Rules, while having the arbitration agreement and arbitration explicitly governed by Article 75. This is because the primary reasons for wanting a New York arbitration to be subject to all of Article 75 (e.g., avoidance of an award of punitive damages and/or attorneys' fees) may be undermined by the incorporation of contradictory Institutional Arbitration Rules. Moreover, the incorporation of these conflicting rules has a high likelihood of creating uncertainty as to how a tribunal would rule.

174. In *Rom Reinsurance* and *County of Nassau*, when the parties explicitly agreed their arbitrations would be governed by New York law, they do not appear to have also chosen to arbitrate under any Institutional Arbitration Rules.

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