# Traps for the Unwary: Major Differences Between New York and Federal Arbitration Law

By Charles J. Moxley, Jr.

Parties who include an arbitration clause in their contract also typically include a choice of law clause, designating the law applicable to the contract. A typical clause might read, "This agreement shall be governed by and interpreted in accordance with the law of the State of New York."

In making this selection, parties often assume they are adopting the law that will apply not only to their rights and obligations under their contract but also to any arbitration that may ensue between them under the contract.

This is not necessarily the case. General choice of law clauses are generally understood to designate the substantive law applicable to the parties' dispute, the contract, tort, statutory or other such law, but not the law applicable to any arbitration between the parties under the contract.[1]

There will often be substantial differences between the various bodies of arbitration law that could apply to any potential arbitration. By only designating the substantive law, parties miss the valuable opportunity to designate the arbitration law that best suits their purposes. They also potentially subject themselves to expensive and time-consuming side disputes as to applicable arbitration law in any arbitration that may ensue between them and in collateral court cases.

This article will explore significant differences between New York and federal arbitration law and suggest the advisability of designating the applicable arbitration law in arbitration clauses.[2]

## Areas of Conflict Between New York and Federal Arbitration Law

New York arbitration law is primarily set forth in New York CPLR Article 75 and case law, although there are rules of law in other statutes that apply to arbitration, typically within limited contexts.[3] Federal arbitration law is generally set forth in the Federal Arbitration Act[4] (FAA) and case law.

The central thrust of the FAA is Section 2, which establishes the enforceability of all arbitration agreements relating to interstate commerce, save upon such grounds as exist at law or in equity for the revocation of any contract.[5] Any state law that purports to restrict the arbitrability of a dispute affecting interstate commerce is preempted.

The FAA was enacted in 1925, five years after New York CPLR Article 75 (as originally enacted). The text of the FAA was largely based on Article 75. New York arbitration law and the FAA remain quite similar, although there are a number of significant areas where they diverge.

### Challenges to the Validity of the Parties' Overall Agreement, Including Challenges Based on Alleged Fraud in the Inducement

Under New York arbitration law, a challenge to the parties' overall agreement on the ground that it is permeated with illegality is generally to be decided by the court.[6] Under the FAA, that is a question for the arbitrator.[7] Challenges to the validity of the arbitration clause itself are generally decided by the court under both New York arbitration law and the FAA.[8]

### The Extent to Which a Party's Appearance in an Arbitration Waives Its Jurisdictional Objection

CPLR 7503(b) provides that, by participating in an arbitration, a party waives the right to apply to a court to stay the arbitration based on the invalidity of the arbitration agreement or statute of limitations. By participating in the arbitration, the party becomes subject to the decision of the arbitrator on such issues; if the party wants to contest arbitrability, it must make an application in court to stay the arbitration without first contesting the matter before the arbitrator. In contrast, the Second Circuit has held that the FAA imposes no such waiver: A party may oppose arbitrability in the arbitration (or even potentially participate more broadly in the arbitration) and thereafter dispute arbitrability in court.[9]

### Statute of Limitations

CPLR 7502(b) provides that a party may submit to a court the question of whether an arbitration is barred by a statute of limitations.[10] The U.S. Supreme Court has reached the opposite result under the FAA, finding that such objections are generally to be decided by the arbitrator when the parties have agreed to submit their dispute to arbitration.[11]

There is a further conflict of state and federal case law as to whether a court or arbitrator should determine limitations issues in cases where the FAA is applicable but the parties' agreement includes a choice of law clause designating New York arbitration law.

The New York Court of Appeals has suggested in dictum that, even in cases where the FAA is applicable, limitations defenses should be heard by *the court* if the parties adopted New York arbitration law (which, in its view, they would do by providing that New York law would apply to the "enforcement" of their agreement).[12] The basis for

this conclusion is that, under the FAA, party autonomy in choosing arbitration is paramount: If the parties, through selecting New York arbitration law, chose to have the court determine limitations questions, that choice should be respected. In contrast there are local federal cases providing that, even in such circumstances, the FAA requires that arbitrators determine limitations questions.[13]

### Punitive Damages

New York arbitration law generally prohibits arbitrators from awarding punitive damages, even if the parties agreed that the arbitrators would have such a power. The Supreme Court in *Mastrobuono* found that the FAA permits arbitrators to award punitive damages.[14] The New York state courts have been inconsistent after *Mastrobuono*, with some courts following the decision[15] and at least one not following it and sticking to the strong New York public policy against punitive damages.[16]

### Attorneys' Fees

CPLR 7513 generally precludes arbitrators from awarding attorneys' fees, unless otherwise provided in the parties' agreement to arbitrate.[17] Federal law contains no such prohibition.[18]

## Consolidation of Arbitrations

New York courts have held that they have the power to consolidate arbitrations upon the same general bases applicable to the consolidation of actions[19] and indeed have suggested that arbitrators have this same power to consolidate.[20] In contrast, the Second Circuit, along with most federal circuits, has held that the courts do not have the power under the FAA to consolidate arbitrations absent the parties' agreement.[21]

### Pre-Award Removal of Arbitrator

There is authority to the effect that New York permits the pre-award removal of an arbitrator by a court, whereas the FAA does not.[22]

### Unenforceability of New York's Heightened Burden of Proof Requirement to Establish That an Arbitration Clause Had Been Added to an Existing Contract

The Second Circuit, reviewing the New York Court of Appeals' rule that the addition of an arbitration clause to an existing contract had to be proved by "express, unconditional" evidence rather than by the preponderance standard applicable to other amendments, found the rule to be preempted as discriminating against arbitration.[23]

### Whether Arbitrators Have Authority to Issue Subpoenas to Non-Parties for Production of Documents Pre-Hearing

CPLR 7505 provides that an arbitrator and any attorney of record in an arbitration proceeding have the power to issue subpoenas. While the case law is sparse and inconsistent,[24] there is some authority in New York that arbitrators can issue subpoenas to non-parties for discovery purposes.[25] While the issue of whether the FAA permits arbitrators to subpoena non-parties for discovery purposes, as opposed to for purposes of calling the witnesses to the hearing, has divided the Circuit Courts, the Second Circuit has found that arbitrators do not have such a power, *i.e.*, that they may only subpoena non-parties' documents to a hearing.[26]

### Precluding Parties from Applying in Court to Stay Arbitrations

CPLR 7503(c) provides a procedure whereby a party, by its demand for arbitration or notice of intention to arbitrate, may notify another party that, unless the party applies to stay the arbitration within twenty days after such service, it shall thereafter be precluded from asserting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. The FAA contains no such provision. The law is unsettled whether CPLR 7503(c) is applicable to proceedings in state and federal court in New York, respectively, with respect to arbitrations to which the FAA is applicable.[27]

### Prerequisites to Having Judgment Entered Upon an Arbitral Award

FAA Section 9 requires that, for a party to obtain judgment on an arbitration award, the party's agreement must provide that a judgment shall be entered upon the award. CPLR 7510, the analogous New York provision, contains no such requirement. It appears to be questionable but unsettled whether this requirement of FAA Section 9 is applicable in New York state courts to cases to which the FAA is applicable or whether federal courts sitting in diversity in New York in such cases could issue judgment on an award under CPLR 7510 where Section 9 had not been complied with.[28]

### Challenges to Arbitral Award Based on Arbitrators' Refusal to Grant Adjournment

Unlike FAA Section 10(a), CPLR 7511(b)(1) does not specify that an arbitrator's refusal to postpone a hearing upon sufficient cause is misconduct constituting a ground for vacating an award, instead relying on the general language of "misconduct" to address the issue. Interestingly, New York Civil Practice Act (CPA) 1461(3), the predecessor to CPLR 7511(b)(1), contained the same language as FAA Section 10(a).[29]

### Time for Making an Application to Vacate an Award

Under CPLR 7511(a), an application by a party to vacate an award must be commenced within 90 days after the delivery of the award to him. Under FAA Section 12, notice of motion to vacate an award must be served on the adverse party within three months after the award is filed or delivered.[30]

### Availability of Interim Appeals

Under the CPLR, a party may file an interlocutory appeal to the Appellate Division from any ruling of the Supreme Court. Under FAA Section 16 (b), the federal "final judgment rule" applies, *inter alia*, to foreclose an interlocutory appeal from a District Court order compelling arbitration.[31]

## Beyond Preemption: Areas Where New York Courts Have Applied the FAA Where Ostensibly Not Constitutionally Required to Do So

Discussed above are respects in which New York and FAA arbitration law differ. There are also a number of areas where New York state courts, generally without elaboration, have applied FAA arbitration law where ostensibly federal courts would not have applied it, specifically with respect to various FAA provisions that appear by their terms to apply only in federal courts.[32]

### Enforcing Agreements by Their Terms Without Adding New Terms, Even if the New Terms Are Supported by State Law and Not Inconsistent with the Parties' Agreement

CPLR 7506(b) empowers the New York courts to direct an arbitrator to proceed promptly with the hearing and determination of the controversy. The New York Court of Appeals has held that, absent a choice of law clause explicitly adopting this provision (or perhaps New York arbitration law generally), this provision of the CPLR does not apply to an arbitration to which the FAA is applicable, since it would involve the court in effectively adding to the parties' agreement something to which they had not agreed.[33]

### New York State Courts' Application of FAA § 7 to Subpoenas Issued by Arbitrators in Cases Involving Interstate Commerce

As noted above, CPLR 7505 empowers arbitrators to issue subpoenas in arbitrations over which they preside. Correspondingly, FAA Section 7 empowers arbitrators, or a majority of them in a particular case, to issue subpoenas and provides for the enforcement of such subpoenas by the federal district court in which the arbitrators are sitting.

Since FAA Section 7 on its face provides only for enforcement in federal court, but disputes relating to arbitrations affecting interstate commerce may be litigated in state court, one might expect CPLR 7505 to apply to such disputes litigated in state court. Nonetheless, the First Department in at least one case has reflexively applied FAA Section 7 to issues relating to subpoenas in arbitrations to which the FAA is applicable.[34]

### Application by New York State Courts of the Provisions of FAA §§ 9, 10, and 11 to Issues as to the Review of Awards Issued by Arbitrators in Cases Involving Interstate Commerce

CPLR 7510 and 7511 set forth standards for confirming, vacating, and modifying arbitration awards. FAA Sections 9, 10, and 11 set forth the corresponding federal standards for confirming, vacating, and modifying arbitration awards.

FAA Section 10 refers specifically to vacating arbitration awards in federal district courts, without reference to state courts. Section 9 refers to confirming awards in federal court, although it also refers to the possibility of the parties specifying the court in which judgment on an award shall be entered, without specifying what that court might be, or whether it might be a state court. Section 11 refers to modifying awards in federal district court.

Accordingly, one might expect that a New York state court hearing such a motion in an arbitration to which the FAA is applicable would apply the standards set forth in CPLR 7510 and 7511, as applicable, unless the parties' agreement provided otherwise.

Yet the New York courts, including the Court of Appeals, have often proceeded, seemingly automatically and reflexively, from the determination that the FAA is applicable to the application of the standards of FAA Sections 10 and 11 for modifying and vacating awards.[35]

## Legal Determination of Arbitration Choice of Law

The FAA governs arbitration agreements that involve interstate or maritime commerce, preempting state law as to such matters. The Supreme Court has interpreted the term "commerce" as used in the FAA very broadly as extending as expansively as the Commerce Clause to any dispute affecting interstate commerce.[36] This means that most arbitrations affect interstate commerce and are therefore subject to the FAA.

### Parties Who Want New York Arbitration Law to Apply

The fundamental rule of the FAA is that parties' arbitration agreements are to be enforced as written, except upon such grounds as exist at law or equity for the revocation of any contract. This includes parties' agreements that their arbitrations shall be governed by a particular arbitration law, as long as that law does not conflict with the FAA.[37]

The New York Court of Appeals has reached essentially the same conclusion, finding that, where the parties agreed that New York law would apply to the "enforcement" of their agreement, they thereby adopted New York arbitration law, including the rule that statute of limitations issues should be determined by the court, not the arbitrator.[38]

Accordingly, even though an arbitration involves interstate commerce, so that the FAA would otherwise be applicable to it, state arbitration law will generally be applicable if the parties by their arbitration agreement so provide. Therefore, parties who want New York or other state arbitration law to apply to potential arbitrations between them should so provide in their agreement. Where there appears to be a risk that the particular rule of New York arbitration law could be said to conflict with the FAA, the enforceability of the parties' selection of that rule of law might be more certain if the rule were explicitly adopted rather than through a general adoption of New York arbitration law.

In addition, as noted above, courts in New York have tended to apply the FAA in an overly preemptive way: they have tended to apply portions of the FAA that are not necessarily applicable in state courts. This is another reason why parties who want New York arbitration law to apply should so provide in their agreements.

### Parties Who Want Federal Arbitration Law to Apply

Parties who want federal arbitration law to apply also need to be careful and should specify the FAA as the governing arbitration law. State arbitration law will generally apply if the arbitration does not involve interstate commerce. Even though interstate commerce is broadly defined in this respect, uncertainties can still arise as to whether a particular dispute involves interstate commerce, and courts in New York in cases ostensibly involving interstate commerce have applied New York arbitration law without consideration of the FAA.[39] At a minimum, there is a risk of expensive and time-consuming disputes between the parties in the arbitration and in court over choice of arbitration law if they do not provide for the matter in their agreement.

There is also the issue of the scope of the FAA even in cases affecting interstate commerce. As noted above, the Supreme Court has repeatedly noted that only certain provisions of the FAA are applicable in state courts. Accordingly, absent agreement by the parties to the contrary, New York arbitration law may be found to be applicable in some respects by New York courts with respect even to arbitrations subject to the FAA. Parties should be able to avoid this by providing in their agreement that the FAA shall apply to any arbitration between them under the agreement.

## Conclusion

Given potentially significant differences between New York and federal arbitration law and the uncertainties as to how arbitrators and courts will determine which body of arbitration law is applicable to a particular arbitration, it is important for parties to provide in their contracts what arbitration law will be applicable to any arbitrations that arise between them.

Determining such matters by contract not only accords the parties the arbitration law they want but also presumably decreases the likelihood of expensive and time-consuming disputes between the parties as to such matters in any ensuing arbitration and in collateral litigation.

## Endnotes

1. *See Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62-64, 115 S. Ct. 1212, 1218-19, 131 L. Ed. 2d 76, 87-88 (1995); *see also*, 5 N.Y. Jur.2d Arbitration and Award § 64.
2. *See generally*, William T. Brown, *The Dark Before the Dawn: The Revised Uniform Arbitration Act*, 2 N.Y. Disp. Res. Lawyer 43 (Spring 2009); 13-75 New York Civil Practice: CPLR ¶ 7501.03, "The Federal Arbitration Act and Other Statutory Sources of Arbitration in New York"; T. Barry Kingham, 2 N.Y. Prac., Com. Litig. in New York State Courts, § 11:19, *Enforcement of Forum Selection and Arbitration Clauses* (2d ed. 2008); George K. Foster, *Confusion among Courts over the Interplay of State, Federal, and International Arbitration Law*, Nat. L. J. (Dechert on Choice of Law); 21 Williston on Contracts § 57:5 "Federal Arbitration Act—Preemption of State Law"; 5 N.Y. Jur. 2d Arbitration and Award § 64, *Effect of Federal Arbitration Act—Where Agreement Contains Provision Choosing New York Law* (2008).
3. *See, e.g.*, N.Y. General Business Law § 399(c) (consumer contracts); Gen. Bus. Law § 198-a(k) (New Car Lemon Law) and other laws described in 13-75 New York Civil Practice: CPLR ¶ 7501.03, "The Federal Arbitration Act and Other Statutory Sources of Arbitration in New York."
4. 9 USC §§ 1 *et seq.*
5. The Supreme Court has stated repeatedly that § 2 is the only section of the FAA that it has applied in state court. *See, e.g.*, Brown, *supra* n. 2 at 41, *citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 477 n. 6, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n. 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

   However, the Supreme Court has stated in dictum that state courts, as much as federal courts, are obliged to grant stays of litigation under FAA § 3. The Court characterized it as less clear but an open question as to whether the same is true of an order to compel arbitration under FAA § 4. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26-27, 103 S. Ct. 927, 942-43, 74 L. Ed. 2d 765, 786-87 (1983). Responding to objections that FAA § 2 is the only section of the FAA that the Supreme Court has applied in state court and §§ 3 and 4 do not apply in state court, the Court, focusing on § 4, has also noted that that section "ultimately arises out of § 2." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 1209, 163 L. Ed. 2d 1038, 1044 (2006).
6. *Utica Mut. Ins. Co. v. Gulf Ins. Co.*, 306 A.D.2d 877, 762 N.Y.S.2d 730 (4th Dep't 2003); *Teleserve Sys. v. MCI Telcoms. Corp.*, 230 A.D.2d 585, 659 N.Y.S.2d 659 (4th Dep't 1997); *see also*, David Elsberg, *Validity of Pacts with Arbitration Clauses: Courts Split*, N.Y.L.J., Dec. 18, 2006 (reporting that New York courts have been resistant to enforcing the FAA rule that arbitrators, not courts, should decide challenges to the parties' overall agreement).
7. *Buckeye Check Cashing*, 546 U.S. at 445-46; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).
8. *Buckeye Check Cashing*, 546 U.S. at 445-46; *Utica Mut. Ins.*, 306 A.D.2d at 762.
9. *Penrod Mgmt. Group v. Stewart's Mobile Concepts, Ltd.*, 2008 U.S. Dist. LEXIS 11793 (S.D.N.Y. Feb. 16, 2008).
10. *See* 13-75 New York Civil Practice: CPLR ¶ 7502.14.
11. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002).

12. *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 826 N.E.2d 802, 793 N.Y.S.2d 831 (2005).

13. *See, e.g., Goldman, Sachs & Co. v. Griffin*, 2007 U.S. Dist. LEXIS 36674 (S.D.N.Y. May 17, 2007).

14. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995); *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793, N.Y.S.2d 831 (1976); *Matter of Mohawk Val. Community Coll. v. Mohawk Val. Community Coll. Professional Ass'n.*, 28 A.D.3d 1140, 814 N.Y.S.2d 428 (4th Dep't 2006); *Application of Dreyfus Service Corp. v. Kent*, 183 A.D.2d 446, 584 N.Y.S.2d 483 (1st Dep't 1992).

    The Court in *Mastrobuono* held that a general choice of law clause in the parties' contract providing that the contract shall be governed by New York law did not establish the parties' intent to incorporate the New York law allocating power between the courts and arbitrators—that a general choice of law clause adopting New York law does not adopt New York arbitration law.

15. *Prudential Sec. v. Pesce*, 168 Misc. 2d 699, 642 N.Y.S.2d 466, 1996 N.Y. Misc. LEXIS 141 (Sup. Ct. N.Y. Co. 1996).

16. *Dean Witter Reynolds, Inc. v. Trimble*, 166 Misc. 2d 40, 631 N.Y.S.2d 215 (Sup. Ct. N.Y. Co. 1995); *see also*, 5 N.Y. Jur. 2d Arbitration and Award § 64.

17. *See, e.g., Grossman v. Laurence Handprints-N.J., Inc.*, 90 A.D.2d 95, 455 N.Y.S.2d 852 (2d Dep't 1982); *CIT Project Fin., L.L.C. v. Credit Suisse First Boston LLC*, 5 Misc. 3d 1030A, 799 N.Y.S.2d 159 (Sup. Ct. N.Y. Co. 2004). New York courts have also held that arbitrators may award attorneys' fees when both sides have sought the recovery of such fees. *See, e.g., Bear Stearns & Co., Inc. v. Fulco*, 21 Misc. 3d 823, 2008 NY Slip Op. 28379 (N.Y. Co. 2008).

18. *See Merrill Lynch, Pierce, Fenner & Smith v. Adler*, 234 A.D.2d 139, 651 N.Y.S.2d 38 (1st Dep't 1996).

19. *See Matter of Cohen v. S.A.C. Capital Advisors LLC*, 11 Misc. 3d 1054A, 815 N.Y.S.2d 493 (2006); 13-75 New York Civil Practice: CPLR ¶ 7502.05.

20. *Avon Products, Inc. v. Solow*, 150 A.D.2d 236, 541 N.Y.S.2d 406 (1st Dep't 1989), *later proceeding at* 151 A.D.2d 342, 544 N.Y.S.2d 728 (1st Dep't 1989).

21. *See generally Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008); *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219 (2d Cir. 2001); *Home Ins. Co. v. New England Reinsurance Corp.*, 1999 U.S. Dist. LEXIS 13421 (S.D.N.Y. 1999); Robert W. DiUbaldo, *Evolving Issues in Reinsurance Disputes: The Power of Arbitrators*, 35 FORDHAM URB. L. J. 83, 83-89 (2008).

22. *AIU Ins. Co. v. Am. Int'l Marine Agency*, 2006 N.Y. Misc. LEXIS 2352, 236 N.Y.L.J. 36 (2006).

23. *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42 (2d Cir. 1993).

24. *See generally*, Weinstein, Korn & Miller, 13-75 New York Civil Practice: CPLR § 7505.06; Dennis M. Rothman, Expert Analysis, 13-75 New York Civil Practice: CPLR § 7505.

25. *See, e.g., Schumacher v. Genesco, Inc.*, 82 A.D.2d 739, 440 N.Y.S.2d 4 (1st Dep't 1981); *Motor Vehicle Acci. Indemnification Corp. v. McCabe*, 19 A.D.2d 349, 353, 243 N.Y.S.2d 495, 499 (1st Dep't 1963); *Katz v. State Dep't of Corr. Serv's*, 64 A.D.2d 900, 407 N.Y.S.2d 967 (2d Dep't 1978). *But see, De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 321 N.E.2d 770, 362 N.Y.S.2d 843 (1974).

26. *See generally, Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008).

27. *See Matter of Fiveco, Inc. v. Haber*, 11 N.Y.3d 140, 893 N.E.2d 807, 863 N.Y.S.2d 391 (2008); *I. K. Bery, Inc. v. Irving R. Boody & Co.*, 2000 U.S. Dist. LEXIS 1872, footnote 10 (S.D.N.Y. 2000).

28. *Franklin Hamilton, LLC v. Creative Ins. Underwriters, Inc.*, 1:08-cv-7449 (JFK), 2008 U.S. Dist. LEXIS 92980 (S.D.N.Y. November 6, 2008).

29. *See Matter of Ames v. Garfinkel*, 11 Misc. 3d 1051A, 814 N.Y.S.2d 889 (Sup. Ct. N.Y. Co. 2006).

30. *See id.*

31. *See id.*

32. *See* Brown, *supra* n. 2 at 42-3; Richard L. Barnes, *Prima Paint Pushed Compulsory Arbitration under the Erie Train*, 2 Brook. J. Corp. Fin. & Com. L. 1 (2007); Jill I. Gross, *Over-Preemption of State Vacatur Law: State Courts and the FAA*, 3 J. Am. Arb. 1 (2004).

33. *Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173, 647 N.E.2d 1298, 623 N.Y.S.2d 790 (1995). The New York Court of Appeals in *Salvano* held that, for parties to adopt New York arbitration law, they must, under the United States Supreme Court's decision in *Volt*, do so with specificity. In the Court of Appeals' view, the key issue is the parties' expressed intent.

34. *Imclone Sys. v. Waksal*, 22 A.D.3d 387, 802 N.Y.S.2d 653 (1st Dep't 2005).

35. *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 846 N.E.2d 1201, 813 N.Y.S.2d 691 (2006). Indeed, even in *Roberts v. Finger*, 15 Misc. 3d 1118A, 839 N.Y.S.2d 436 (Sup. Ct. N.Y. Co. 2007), where Justice Moskowitz applied CPLR 7511 to the review of an arbitration decision to which the FAA applied, she only did so because of her conclusion that the parties, by their agreement, had adopted New York law and CPLR 7511 did not conflict with the FAA. However, the Court in *Matter of Ames v. Garfinkel*, 11 Misc. 3d 1051A, 814 N.Y.S.2d 889 (Sup. Ct. N.Y. Co. 2006), noted that the fact that the FAA is applicable to an arbitration does not necessarily mean that all provisions of the FAA are applicable. It focused, for instance, on CPLR 7511 and FAA § 10(a), relating to the grounds for vacating an award, but the First Department, in upholding the trial court's confirmation of the award, referred only to the FAA standards for vacatur. *See Uram v. Garfinkel*, 16 A.D.3d 347, 792 N.Y.S.2d 430 (1st Dep't 2005).

36. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

37. *See, e.g., Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 476, 109 S. Ct. 1248, 1254, 103 L. Ed. 2d 488, 498 (1989).

38. *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252-53, 826 N.E.2d 802, 805-806, 793 N.Y.S.2d 831 834-35 (2005); *see also, Roberts v. Finger*, 15 Misc. 3d 1118A, 839 N.Y.S.2d 436 (Sup. Ct. N.Y. Co. 2007).

39. However, as noted, the New York state courts at times seem to ignore the scope of FAA and hence impliedly the scope of the Commerce Clause, essentially deciding cases as if the FAA did not exist, or referencing the FAA and essentially ignoring its scope as defined by the Supreme Court. *See, e.g., Ragucci v. Professional Constr. Servs.*, 25 A.D.3d 43, 803 N.Y.S.2d 139 (2d Dep't 2005); *Baronoff v. Kean Dev. Co., Inc.*, 12 Misc. 3d 627, 818 N.Y.S.2d 421 (Nas. Co. Sup. Ct. 2006).

**Charles J. Moxley, Jr. is a litigator, arbitrator, and mediator, specializing in complex commercial disputes. Currently the Distinguished ADR Practitioner in Residence at Cardozo Law School, Mr. Moxley is a fellow of the College of Commercial Arbitrators and a member of arbitration and mediation panels of the American Arbitration Association, the International Institute for Conflict Prevention and Resolution (CPR), the U.S. Council of International Business (USCIB) for the ICC International Court of Arbitration, and Supreme Court, New York County, and is an ARIAS-U.S. Certified Arbitrator. He is Of Counsel to Kaplan Fox & Kilsheimer LLP, an Adjunct Professor at Fordham Law School, and Co-Chair of the Legislation Committee of the Dispute Resolution Section of the New York State Bar Association.**