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Regional Aspects of International Arbitration: the United States

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History of U.S. Arbitration

- **Common Law** – arbitration agreements were **unenforceable** in courts – the private nature of the arbitration proceeding was a clear encroachment on the domain of the Courts.
- **The United States Arbitration Act of 1925** – first federal arbitration statute, allowed the arbitration of commercial agreements. Now codified as **Federal Arbitration Act, 9 U.S.C.A. § 1 et seq.**
 - FAA controls all arbitrations that involve interstate commerce and admiralty
 - All arbitration provisions that invoke the FAA



History of U.S. Arbitration

- **American Arbitration Association** was founded in 1926 by the merger of the Arbitration Society of America and the Arbitration Foundation to provide dispute resolution and avoid civil court proceedings.
- **JAMS (formerly known as Judicial Arbitration and Mediation Services, Inc.)** was founded in 1979 in California. JAMS merged with Endispute (WDC) in 1994.
- **International Institute for Conflict Prevention & Resolution** was founded in the 1980 by corporate and law firm leaders to formulate best practices for arbitration and mediation.



U.S. Federal Arbitration Act

- Federal Arbitration Act, 9 U.S.C. Section 1 et seq.
 - US law gives broad effect to private agreement to arbitrate.
 - “Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. . . . The parties to such a contract may agree to have an arbitrator decide not only the merits of a particular dispute, but also “ ‘gateway’ questions of ‘arbitrability.’ ” Therefore, when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless.”

Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 526 (2019)



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Legislative Framework

- Each State in US has its own state arbitration legislation.
- The Federal Arbitration Act (9 U.S. C. Section 1 et seq.) pre-empts and displaces state arbitration provisions that are deemed inconsistent with the FAA. State laws that are not in conflict can-co-exist.
- International arbitrations sited in the US are primarily subject to the Federal Arbitration Act, which codifies US ratification of the New York and Panama Conventions



Legislative Framework

- New York Convention
 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1985
- Panama Convention –
 - Inter-American Convention on International Commercial Arbitration



Advantages / Disadvantages

- 1) Discovery - more limited discovery than in U.S. court litigation.
- 2) Appellate process – inability to appeal; increased desire for appellate process
- 3) Speed of Arbitration – potentially greater speed and efficiency than court litigation??
- 4) Motions for summary judgement / disposition - ??



Advantages / Disadvantages

- 5) Freedom to select decision makers
- 6) Subpoena of third party documents

- 7) Subpoena of third parties
- 8) Privacy and Confidentiality – closed to public unlike court proceedings and filings, which are open to public

- 9) Greater ability of winning parties to recover fees as opposed to US court litigation where attorneys fees are presumptively borne by each party



Arbitration Clauses - what to provide

- An arbitration clause should be tailored to the transaction to which it relates. It should be proper for the deal – not just necessarily a standard clause.
- What to include
 - Agreement to arbitrate
 - Which disputes will be arbitrated
 - Rules that will govern the arbitration
 - Applicable institution (AAA, CPR, JAMS), if any
 - Place of arbitration
 - Applicable law and procedural law
 - Number of arbitrators and manner of selection
 - Agreement that judgment may be entered on the award (required by the FAA for enforcement of the award) (9 U.S.C.A. § 9)



Major Arbitration Organizations

- American Arbitration Association (AAA) (www.adr.org) and its International Centre for Dispute Resolution (ICDR) (www.icdr.org)
- International Chamber of Commerce (ICC) (www.iccwbo.org) – which has opened an office in NYC to administer ICC arbitrations in North America
- The Institute for Conflict Prevention and Resolution (CPR) (www.cpradr.org)
- JAMS (www.jamsadr.com)
- The Financial Industrial Regulatory Authority (FINRA) (www.finra.org) which operates the largest dispute resolution forum in the securities industry.
- STILL – people engage in private arbitration – without a set a rules.



Comparison: AAA / JAMS / CPR

(x – applicable rule)

Rule/Topic	AAA	JAMS	CPR (administered)
Filing Fee up to \$1 million)	Standard fee: \$5,000 (initial) + \$6,200 (final)* * 2 parties	Non-refundable filing fee - \$1,500* plus 12% of all Professional Fees (arbitrator(s) fees) plus \$1,500 filing fee for counterclaims.	Non-refundable filing fee - \$1,750 plus Admin. Fee - \$6,250
Number of arbitrators	One neutral arbitrator unless the AAA, in its discretion, directs that three arbitrators be appointed. (16)	One neutral arbitrator (7)	Three arbitrators, unless the parties agree otherwise . (5)
Mediation “required”	If a claim is above \$75,000, parties shall mediate unless one party opts out. (9)	Not required, but parties can agree to submit case to JAMS for mediation.	Tribunal may request CPR to arrange for mediation by a mediator acceptable to the parties – not a member of the Tribunal. (21)



Comparison: AAA / JAMS / CPR

(x – applicable rule)

Rule/Topic	AAA (2 parties)	JAMS	CPR (administered)
Ability to determine Jurisdiction	The arbitrator has power to rule on his or her own jurisdiction. Objections regarding arbitral jurisdiction must be submitted no later than the filing of the answering statement. (7)	Arbitrator has authority to determine jurisdiction and arbitrability issues, including existence, validity, interpretation, scope of and parties to an arbitration agreement as a preliminary matter. (11)	Tribunal has power to hear and determine challenges to its jurisdiction, including objections regarding existence, scope or validity of the arbitration agreement. (8)
Discovery	The arbitrator may, on application of a party or on the arbitrator's own initiative require the parties to exchange documents in their possession or custody on which they intend to rely, or otherwise manage the exchange of information to achieve a fair, efficient and economical resolution of the case. (22 / 23)	Parties are expected to exchange all relevant ESI and documents within 21 days after all pleadings or notices of claims have been received. (17)	The Tribunal can facilitate discovery as it determines is appropriate but must take into account the needs of the party and the desirability of making discovery expeditious and cost effective. (11)
Dispositive Motions	Moving party must show that motion is likely to success and dispose of or narrow the issues in the case. (33)	Permissible upon agreement or if opposing party has reasonable notice to respond. (18)	No rules specifically addressing motions for summary disposition.



Comparison: AAA / JAMS / CPR

(x – applicable rule)

Rule/Topic	AAA (2 parties)	JAMS	CPR (administered)
Applicable Law	No provision	No provision	Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the Tribunal shall apply such law(s) or rules of law as it determines to be appropriate. (10)
Arbitration Appeal	No provision	Optional – after agreement, option cannot be withdrawn. (34)	Optional appellate process with arbitration appeal panel available.
Award deadline	Thirty days after the end of hearing or if hearings are waived, thirty days after arbitrator receives all materials from parties. (45)	Thirty days after hearings or if hearings are waived - thirty days after arbitrator reviews all materials. (24)	The Tribunal is to submitted the final award to CPR (and promptly to the parties thereafter) within thirty days after the close of hearings. CPR and the Tribunal shall use their “best efforts” to comply with this schedule. (15.8)



Rights of Appeal

Federal Arbitration Act (Section 10) provides that an award can be vacated:

- “(1) where the award was procured by **corruption, fraud, or undue means**;
- (2) where there was **evident partiality or corruption** in the arbitrators, or either of them;
- (3) where the arbitrators were **guilty of misconduct in refusing to postpone the hearing**, upon sufficient cause shown, or in **refusing to hear evidence pertinent and material** to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators **exceeded their powers, or so imperfectly executed** them that a mutual, final, and definite award upon the subject matter submitted was not made.”



Rights of Appeal

Federal Arbitration Act (Section 11) provides that an award can be modified or corrected:

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- “(a) Where there was an **evident material miscalculation of figures or an evident material mistake** in the description of any person, thing, or property referred to in the award.
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- **(b)** Where the arbitrators have awarded **upon a matter not submitted to them**, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- **(c)** Where the award is **imperfect in matter of form not affecting the merits of the controversy.**”
- (NY CPLR has similar grounds)



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