

## Arbitration 101: Choosing the right forum for dispute resolution

By Erika C. Birg

AAA, ICC, JAMS, USAM, CPR, and SMA are just a handful in the alphabet soup of organizations available to administer your future arbitration. Yet, in many cases, there is little thought given before the dispute arises to the rules and abilities of the organization to resolve that dispute efficiently and effectively. One of my colleagues refers to the arbitration provision as the “midnight clause,” drafted at the last minute, when all that coffee has worn off and the eyelids are starting to droop, the determination of who will referee, and let alone judge the dispute is often not considered at all, and the first organization that comes to mind is selected. That can be a mistake, as the rules and expectations of the organizations differ. There are important things to consider when selecting the organization to administer the arbitration.

First, is there a fit between the organization and your dispute? True story: A small Georgia limited liability company, which handled business within a 200-mile radius, had an arbitration clause that required arbitration by the ICC in New York. The contract was with a domestic, Georgia-based company, and the parties were disputing the quality of goods and services that were provided under the contract, wholly within the state of Georgia. The arbitration clause clearly had been lifted from another contract the author had seen, without considering whether it was practical for this company or dispute.

If the dispute had gone forward to arbitration, and someone sought to enforce the clause as written, the parties would have been in for a big surprise when they realized that they were in a process designed for international commercial disputes rather than local ones under Georgia’s Uniform Commercial Code. They also would be surprised at the cost, given the different pricing structures from New York to Atlanta. Similarly, using SMA for a land-based commercial case would make little sense given their specialization in marine cases. Encourage your contract drafters to take the time to look at the mission statement of the organization. Think about what types of issues the contracting parties might experience in the future, and choose accordingly.

Second, does the roster of arbitrators have the type of arbitrator you are looking for? One of the key differentiating factors between organizations offering arbitration services is the quality of the arbitrators they offer. JAMS, for example, is well-known for having retired judges to handle sophisticated disputes (among other things). And AAA is known for having excellent construction arbitrators to handle multi-faceted disputes (among other things).

Do you need a specialist arbitrator? If you do, then ask whether you will be able to find one with the organization you choose. Talk to your colleagues about who they know that is affiliated with the organizations to get to know your options and what might be a better fit. If it is an IP license, and you expect that maybe trademark claims will be involved, you want to look for an organization that offers highly qualified IP arbitrators or specialty panels. If it is a franchise dispute the AAA, for example, has a separate franchise panel with experienced franchise attorneys. And if it is an international dispute involving a treaty, you may want to be

sure to have an international organization, like ICC, CPR, or AAA's International Center for Dispute Resolution named.

Third, can the organization offer arbitrators where you want to arbitrate? Not all of the organizations have arbitrators located where you want to resolve the dispute. Be sure to check that there are arbitrators that are available in the area. A phone call to the organization in advance will help provide that information. In addition to paying the cost of the arbitrator, having to fly one from across the country to hear your dispute may not be in the budget. Determining the organization's reach throughout the country can prevent that quandary from arising on the back-end. Although some of this can be alleviated by teleconferencing and video-testimony, the ability to be in the same time-zone as your arbitrator and witnesses, and being able to look him/her in the eye as your key witness testifies, may be important. To the extent that you can visualize what type of dispute is likely to arise, think ahead about whether having the arbitrator resident in another jurisdiction will present logistical problems.

Fourth, can you abide by the rules? Each of these organizations has a different set of rules. Typically, international rules require all of the witness statements and evidence to be submitted in advance of the hearing; there is little direct testimony to be given. On the other hand, AAA commercial rules allow a basic type of notice pleading and a stream-lined procedure, including a hearing. (And the AAA has different rules for construction and employment, for example.) Currently, the AAA commercial rules allow dispositive motions to be filed under certain conditions, and for the parties to agree in advance to an appeal to a panel of retired judges to review the arbitration award. These can be valuable assets to an organization seeking to streamline dispute resolution and to maintain some ability to challenge the award.

Because arbitration is designed by the parties to make resolving disputes less formidable, investing the time to know where you want to be administratively if a dispute arises reduces the stress associated with the process. It's all part of planning ahead with the end-goal in mind.



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