

US arbitral institutions and their rules

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When arbitrating in the United States, disputants can choose from a number of institutions. This Practice Note is intended to familiarise practitioners with the most commonly used arbitral institutions in the United States: the American Arbitration Association (AAA); the International Institution for Conflict Prevention and Resolution (CPR); and JAMS. This Practice Note outlines the key differences between the institutions in terms of panel selection, applicable rules and arbitration fees.

In this Practice Note, the following definitions will be used:

- o AAA Commercial Arbitration Rules and Mediation Procedures (2013) (AAA Rules)

References:

AAA Rules

- o CPR Rules for Non-administered Arbitration of Business Disputes (2007) (CPR Rules)

References:

CPR Rules

- o JAMS Comprehensive Arbitration Rules & Procedures (2010) (JAMS Rules)

References:

JAMS Rules

AAA, CDR and JAMS--profiles

AAA

AAA, the oldest provider of ADR worldwide, was formed following the enactment of the Federal Arbitration Act 1926 (FAA). AAA provides administrative services for dispute resolution throughout the United States, see Practice Note: AAA arbitration--overview, and internationally through its International Centre for Dispute Resolution (ICDR) see Practice Note: ICDR arbitration--overview.

CPR

CPR was founded in 1979 as an effort to bring together corporate counsel and their law firms to find a way to lower the cost of litigation. CPR provides both administered and non-administered arbitration services.

Unlike AAA or JAMS, CPR does not receive a portion of the fees paid to its arbitrators. CPR is funded largely through annual dues, third party grants (no government money), program fees (generally associated with annual programs) and gifts. The arbitrators also pay a nominal amount to be on the panel.

CPR does not charge a filing fee and as such it is arguably a cheaper option than using other institutions, but since the bulk of the expense in any case is the arbitrators' fees themselves, this is unlikely to be a major consideration for choosing this institution.

With a focus on expanding the use of alternative dispute resolutions, the CPR has promoted the 'CPR pledge' in which parties commit to considering ADR mechanisms before filing suit. To date, more than 4,000 operating companies and 1,500 law firms in the US have signed on to this pledge.

JAMS

Also founded in 1979, JAMS is amongst the largest private ADR providers in the world. Founded by the Hon Warren Knight, JAMS offers nearly 300 full-time neutrals to resolve disputes in most legal fields. In 2011,

JAMS partnered with the ADR Centre in Italy and formed JAMS International to provide mediation and arbitration of cross-border disputes.

Other arbitral institutions

The degree of consistency which AAA, CPR and JAMS provide to parties has contributed to their international reputation. Administering thousands of cases per year, these institutions offer parties confidence that the dispute resolution process will be administered reliably. Unlike arbitration awards by the ICC, however, these three institutions do not review the final award before it is issued.

Beyond these three institutions, a number of other highly qualified institutions provide ADR services, often focusing more specifically upon a particular sector, which may provide added benefit for certain disputes, ie FINRA (the Financial Industry Regulatory Authority) offers the largest dispute resolution forum in the securities industry field, ARIAS (the AIDA Reinsurance and Insurance Arbitration Society) leads in the reinsurance field and the ICC (International Chamber of Commerce) enjoys a strong worldwide reputation, frequently administering arbitration cases in the United States, see Practice Note: ICC arbitration--overview.

Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), 149 nations have agreed to enforce international arbitration awards in their territory. While the Convention serves as the primary mechanism in which arbitration awards are enforced across borders today, New York Convention, art V, s (d) provides that recognition and enforcement may be refused if the:

References:

New York Convention

'arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.'

An arbitral institution's prominence and international name recognition may therefore contribute to the deference afforded to it regarding the validity of its procedures, the legitimacy of the tribunal and the authority of its award.

AAA, CPR and JAMS--rules and procedures

Tribunal composition plays a key role in the arbitration process. Arbitrators' quality and expertise, as well as the selection process should factor highly in determining which institution to use. As AAA, CPR and JAMS provide the framework in which this process takes place, parties should ensure that they understand the differences between these institutions with regard to:

- o tribunal selection process
- o the extent to which neutral lists of potential arbitrators are available to prospective parties
- o the degree to which parties may choose (and refuse) individual arbitrators, and
- o the level of qualifications required

Tribunal selection and lists of arbitrators

As to the availability of a list of potential arbitrators prior to the commencement of arbitration proceedings:

- o JAMS publishes its list of arbitrators on its website for all interested parties to examine
- o AAA treats its list as proprietary and it is therefore not publicly available. Accordingly, prior to selecting AAA as the dispute resolution institution, the parties will have no idea of the arbitrators available to them should a dispute arise
- o CPR takes a blended approach, allowing only individuals or companies who are CPR members to access the CPR list

These three institutions also differ in the manner in which the tribunal is selected once a dispute arises:

- o AAA does not provide a complete list of arbitrators to the parties once a dispute arises. The parties must first inform AAA of the nature of their dispute and AAA will then provide a list of ten recommended arbitrators from which the parties may choose. Parties strike out the individuals whom they disfavor, rank the remaining names and ask AAA to select the tribunal from these individuals based upon their availability. If the AAA list proves insufficient, parties may request another list of ten arbitrators. This process can be repeated as many times as necessary until the tribunal has been constituted
- o CPR and JAMS provide their complete list to the disputing parties and the parties can then choose their preferred arbitrators from these lists
- o a unique feature of CPR's tribunal selection process is that of 'screened' selection. Under this optional approach, the tribunal would not know which party has selected them, enhancing their neutrality

Requirements

While all three institutions monitor the quality of their arbitrators as a source of pride, they differ in their approach to selecting the arbitrators serving on their lists.

- o JAMS, founded by a judge, developed a list dominated by retired judges in the institution's early years, a preference still obvious in its current list of arbitrators
- o JAMS and AAA typically require exclusivity from their arbitrators, although this limitation does not apply to serving on the CPR panel
- o arbitrators for JAMS and CPR must hold a law degree, but AAA neutrals can include industry experts who are not lawyers

In addition to offering arbitrators with broad expertise, AAA, JAMS and CPR each also have arbitrators who focus on particular industries, ie financial services, construction and technology.

Moreover, all three institutions vigilantly maintain their reputations by regularly reviewing arbitrators' performance and character. Those who fail to meet the institutions' high standards are removed from the respective list.

Applicable rules

AAA, CPR, and JAMS have all established their own sets of arbitral rules. An arbitral forum with an established set of rules increases predictability and streamlines the dispute resolution process. Unlike the lists of arbitrators, these rules are readily available to be examined by interested parties.

References:

AAA Rules

CPR Rules

JAMS Rules

Developed over time, each set of rules is comprehensive, addressing most of the common issues that can arise in the course of a dispute and all three institutions routinely update their rules to reflect the latest trends and developments. Hence, if a particular rule of one institution gains wide traction, it is likely the other institutions will also adopt it. This constant competition has led to the convergence of rules and a common adoption of best practices.

Note that while these institutional rules are available, all three institutions give primacy to the express will of the disputing parties. The institutional rules are thus subordinated to the language in a given agreement and may be freely adjusted to suit parties' particular needs.

Federal and state or common law

Parties should be mindful that the arbitral rules of each institution do not operate in a vacuum and may be subject to limitations based on the FAA or on applicable state or common law.

For example, CPR allows the arbitration tribunal 'to require and facilitate such discovery as it shall determine appropriate' (CPR, r 11). However, should the arbitral tribunal demand a pre-hearing third-party subpoena (ie documents or information from a third party), the third party may challenge that order in state or federal court. Section 7 of the FAA provides that:

'the arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case,' (Federal Arbitration Act (FAA), 9 USC § 7)

There arises, then, a question as to whether the power of the arbitral tribunal extends to pre-hearing third-party subpoenas under CPR rules. This issue has led to a split in the court circuits, with the second (*Life Receivables Trust v Syndicate 102 at Lloyd's of London* 549 F.3d 210 (2d Cir. 2008) not available in Lexis®Library) and third (*Hay Group, Inc v EBS Acquisition Corp* 360 F.3d 404 (3d Cir. 2004) not available in Lexis®Library). Circuits taking a restrictive approach, the sixth (*American Federation of Television and Radio Artists, AFL-CIO v WJBK-TV (New World Communications of Detroit, Inc)* 164 F.3d 1004 (6th Cir. 1999) not available in Lexis®Library) and eight (*Re Security Life Insurance Co of America* 228 F.3d 865 (8th Cir. 2000) not available in Lexis®Library). Circuits holding this power implicit under FAA, s 7 and the fourth (*COMSAT Corp v National Science Foundation* 190 F.3d 269 (4th Cir. 1999) not available in Lexis®Library) circuits staking out a middle ground.

Discovery

In regards to discovery:

- o the AAA rules provide that there should be no discovery unless ordered by the arbitrator or based upon party agreement (AAA, r R-22)

References:

AAA Rules

- o CPR allows the tribunal to determine the extent of discovery (CPR, r 11)

References:

CPR Rules

- o JAMS requires the parties to co-operate in good faith in the voluntary and informal exchange of all non-privileged documents and other information and each party may presumptively take one deposition of the opposing party, unless the arbitrator determines that more is warranted (JAMS, r 17)

References:

JAMS Rules

All three institutions also provide expedited procedures that parties can choose upon mutual agreement.

Number of arbitrators

The three institutions also differ in the number of arbitrators required to serve on the panel:

- o in the absence of an express agreement between the parties, AAA uses one arbitrator, unless the AAA, in its discretion, determines that more arbitrators are necessary due to a case's size, complexity or other circumstances (AAA, r R-16).

References:

AAA Rules

- o JAMS requires one arbitrator to conduct the arbitration unless the parties agree otherwise (JAMS, r 7)

References:

JAMS Rules

- o CPR requires three arbitrators to serve on the panel unless the parties agree otherwise (CPR, r 5)

References:

CPR Rules

Awards issued on default

AAA, CPR, and JAMS also differ in their approach to the absence of parties and the issuance of award on default:

- o AAA does not allow an award solely based upon default and requires the present party to submit evidence supporting the award (AAA, r R-31)

References:

AAA Rules

- o JAMS takes a similar approach to AAA, but also allows the arbitrator to arrange for a telephone hearing or to receive necessary evidence to render an award by affidavit (JAMS, r 22)

References:

JAMS Rules

- o CPR does allow the tribunal to issue an award on default, providing that the non-defaulting party produces appropriate evidence and legal arguments in support of its contentions (CPR, r 16)

References:

CPR Rules

Costs of arbitration

Approaches to costs vary between the three institutions.

With respect to filing fees, AAA uses a sliding scale based upon the amount in dispute, while CPR's non-administered arbitration is initiated without any filing fee.

These three providers also differ in their approach to administrative and case management fees, just as the range of arbitrator compensation varies depending on the neutrals selected. Administrative and filing fees can fluctuate widely between institutions, just as arbitrators' hourly rates can vary significantly, even within the same institution.

Choosing the right institution

Choosing an appropriate arbitral institution can serve as the first step towards successfully resolving a dispute. While many times the panellists' expertise alone could lead parties to elect one arbitral institution versus another, parties seeking to limit or expand aspects of the process (ie discovery) may focus on the institutional rules as the determining selection factor.

Parties should keep in mind that other respectable institutions could equally be the best option in certain disputes.

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