

How is international arbitration different than domestic arbitration?

By Emma Nguyen

It is not unusual for a U.S. litigator to encounter a dispute arising under a contract that contains an arbitration clause. Many of these arbitrations may be purely domestic, i.e., arising between U.S. entities, seated in the U.S., and administered by a U.S. institution. International arbitrations, on the other hand, arise between parties from different jurisdictions, and generally feature procedures and practices that differ from domestic arbitrations. Given that arbitrations come in all shapes and sizes, understanding the differences between the various types of arbitrations allows a litigator to exercise greater flexibility to craft an effective strategy that is tailored and specific to the dispute at hand. This primer contains a brief discussion of key differences between a domestic vs. international arbitration.

I. Arbitrators

One of the many benefits of arbitration is the parties' autonomy to select the individual(s), or the process of selecting the individual(s), who will hear their case. Accordingly, selecting the right arbitrator is one of the most important tasks a party must undertake in an arbitration.

In any arbitration, parties often appoint arbitrators with expertise in the subject matter or substantive law relevant to the dispute. Parties to a domestic arbitration often appoint arbitrators or former judges with deep experience adjudicating relevant subject matters, a strategy that should result in a foreseeable outcome. In addition to these principles that also apply to international arbitrations, arbitrator selection in international cases may require consideration of additional factors that should be considered, including an arbitrator's language skills, cultural background, whether they hail from a common law or a civil law jurisdiction, and experience in hearing international disputes. An arbitrator who has little familiarity with international disputes may be at odds with the idiosyncrasies of the relevant rules, procedures, and practices.

II. Procedural Calendar and Written Submissions

While no two arbitrations are exactly alike, a litigator should be mindful of general differences between the lifecycles of domestic arbitrations and international arbitrations in order to craft and negotiate a procedure appropriate to the dispute at hand.

The procedure of a domestic arbitration is typically akin to an abridged U.S. court litigation. After a party initiates the arbitration by filing a demand for arbitration that sets forth their allegations and claims (not unlike a complaint), the other party has the opportunity to file a response (similar to an answer).¹ Then, the parties engage in information exchange, which may, depending on the arbitrators' and the parties' agreement, involve broad U.S.-style discovery (as discussed in the section below). Ahead of the hearing, the parties may file pre-hearing submissions to prepare the arbitrators of salient issues.

In international arbitrations, prior to the document production phase, it is typical for the parties to prepare and exchange written submissions, extensively setting forth the facts, legal arguments, and damages, and accompanied by exhibits, witness statements, and expert reports.² These written submissions are often voluminous and are akin to a "trial on paper." The parties may then exchange document requests and engage in production with the benefit of having seen the other party's case-in-chief laid out in a comprehensive manner and supported by evidence. After the document production phase, parties may have the opportunity to submit another round of responsive written submissions, before proceeding to the merits hearing.

III. Scope of Document Exchange

In many cases, the scope of document exchange is one of the most significant differences between domestic arbitration and international arbitration.

Depending on the arbitrators and the parties' agreement, information exchange in a domestic arbitration may be quite similar to U.S. litigation discovery. Because

¹ See American Arbitration Association, "The Typical Lifecycle of an Arbitration Case with the AAA," [https://www.adr.org/arbitration/#:~:text=The%20arbitration%20process%20typically%20begins, filing%20fee%20to%20the%20AAA](https://www.adr.org/arbitration/#:~:text=The%20arbitration%20process%20typically%20begins, filing%20fee%20to%20the%20AAA;); Westlaw Practical Law, "Procedural Steps in JAMS Arbitration." See also Pepperdine Caruso School of Law, "Demystifying the Arbitration Process," (Oct. 4, 2023), <https://law.pepperdine.edu/blog/posts/demystifying-the-arbitration-process.htm>.

² See Redfern and Hunter on International Arbitration, Chapter 6, Conduct of the Proceedings (7th Ed.).

arbitration is governed by the parties' agreement, the parties are free to expand, restrict, or eliminate discovery altogether. In light of this, voluminous production of documents, depositions, as well as interrogatories and requests for admissions are not out of the question (should the parties so desire).³ While major arbitral institutions, like the American Arbitration Association and JAMS, recommend against adopting such broad discovery measures to preserve efficiency,⁴ it is not unusual for parties to employ various discovery tools from their litigation arsenal to gain helpful evidence or admissions prior to the hearing. Even the JAMS Comprehensive Arbitration Rules & Procedures expressly contemplate that each party is allowed to take one deposition and may be entitled to more, subject to the arbitrators' determination of necessity.⁵

Document exchange is more circumscribed in international arbitration. Tribunals and parties often follow the International Bar Association's (IBA) Rules on the Taking of Evidence, a non-mandatory set of guidelines that aim to "provide an efficient, economical and fair process for the taking of evidence in international arbitration."⁶ The IBA Rules' provisions on document production are designed to harmonize the broader view from common law procedures and the narrower view from civil law jurisdictions.⁷ The resulting compromise is that parties are entitled to request the production of documents from the other party, subject to limitations designed to

³ See JAMS Arbitration Discovery Protocol, at 6 (Jan. 6, 2010) (discussing a procedure for a JAMS arbitrator to determine whether it is appropriate to permit multiple depositions),

https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf.

⁴ See JAMS Arbitration Discovery Protocol, at 4–5 (Jan. 6, 2010) ("Overly broad arbitration discovery can result when all of the parties seek discovery beyond what is needed. This unfortunate circumstance may be caused by parties and/ or advocates who are inexperienced in arbitration and simply conduct themselves in a fashion which is commonly accepted in court litigation. In any event, where all participants truly desire unlimited discovery, JAMS arbitrators will respect that decision, since arbitration is governed by the agreement of the parties."), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf; AAA Practice guide: Controlling E-Discovery Burdens in Arbitration ("Discovery, and e-discovery in particular, is often a chief source of cost and delay in arbitration proceedings. At the same time, effective discovery can be key in providing fair resolution of disputes. Arbitrators can and should encourage Parties to focus on "proportionality" in the discovery process, such that the scope and forms of discovery are proportional to the stakes and issues involved in the case."),

<https://go.adr.org/rs/294-SFS-516/images/AAA%20Practice%20Guide.eDiscovery.pdf>.

⁵ Rule 17(b), JAMS Comprehensive Arbitration Rules & Procedures, <https://www.jamsadr.com/rules-comprehensive-arbitration/>.

⁶ Foreword, IBA Rules on the Taking of Evidence in International Arbitration (Dec. 17, 2020), <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>.

⁷ Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration at 9 (Jan. 2021), <https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D>.

preclude parties from engaging in “fishing expeditions” that are mainstay in U.S. litigation.⁸ Neither the IBA Rules nor its Commentary make mention of depositions (or other litigation tools such as interrogatories).

IV. Enforcement

The different rules that govern enforcement of awards rendered in domestic arbitrations versus international arbitrations also may dictate a winning party’s enforcement strategy. Domestic arbitration awards are either governed by the law of the state of the seat of arbitration or, if the dispute involves interstate commerce, Chapter 1 of the FAA.⁹ To enforce a domestic arbitral award in the U.S., parties must confirm the award in court to convert it into a court judgment. International arbitration awards, however, are governed by the New York Convention (implemented in Chapters 2 and 3 of the FAA), and are enforceable in 172 jurisdictions that are parties to the New York Convention.¹⁰

Additional sources:

- American Arbitration Association, “Arbitration,” <https://www.adr.org/arbitration/#:~:text=The%20arbitration%20process%20typically%20begins,filin%20fee%20to%20the%20AAA.>
- Pepperdine Caruso School of Law, “Demystifying the Arbitration Process,” (Oct. 4, 2023), <https://law.pepperdine.edu/blog/posts/demystifying-the-arbitration-process.htm>.
- Margaret L. Moses, *The Principles and Practice of Int’l Commercial Arbitration* (2008), <https://archive.org/details/theprinciplesandpracticeofinternationalcommercialarbitration/page/n13/mode/2up>.

⁸ Article 3.3, IBA Rules on the Taking of Evidence in International Arbitration (Dec. 17, 2020), <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>; Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration at 9 (Jan. 2021), <https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D>.

⁹ See Practical Law, *Enforcing Arbitration Awards in the US*.

¹⁰ See Margaret L. Moses, *The Principles and Practice of Int’l Commercial Arbitration*, Ch. 10 (2008), <https://archive.org/details/theprinciplesandpracticeofinternationalcommercialarbitration/page/n13/mode/2up>; New York Convention, “Contracting States,” <https://www.newyorkconvention.org/contracting-states>.