

THE PROS AND CONS OF ARBITRATION IN THE UNITED STATES

Presenter



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Raechel Kummer focuses her practice on complex commercial and class action litigation and high-stakes governmental and internal investigations. Raechel has argued as lead counsel in the US Court of Appeals for the Third, Seventh, Ninth, Eleventh, and DC Circuits, and served as lead counsel in bid protest litigation in the US Court of Federal Claims and in multiple jury trials.

Raechel represents technology and mobility companies, retail and ecommerce companies, energy companies, and companies in the construction industry in high-exposure lawsuits involving contract and fraud claims, regulatory challenges, privacy claims, high-value tax issues, bankruptcy, copyright infringement, and white collar matters.

U.S. Federal Law Encourages Arbitration

- The U.S. Federal Arbitration Act (“FAA”) reflects a “liberal federal policy favoring arbitration agreements.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983)).
- The FAA created substantive federal law that is applicable in both federal and state courts.
- The FAA preempts any contrary state law in the U.S.
- Section 2 of the FAA provides that arbitration agreements governed by the FAA “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.
- Under the FAA, any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration.

Arbitration Is Popular In The U.S.

- There are a range of arbitration providers in the US, include the American Arbitration Association (“AAA”), JAMS, and ADR Services, Inc.
- AAA resolved more than 10,000 cases and nearly \$15 million in claims in 2022 alone. *See American Arbitration Association, 2022 AAA-ICDR B2B Case Statistics (2022).*

Timeliness

- Arbitrations tend to be much faster than litigation.
- AAA estimates that, on average, U.S. district court cases took more than one year longer to resolve than cases decided by arbitration.
 - shortened discovery times
 - simplified procedures

See American Arbitration Association, [Measuring the Costs of Delays in Dispute Resolution](https://go.adr.org/impactsofdelay.html), <https://go.adr.org/impactsofdelay.html>.

Arbitration Costs

- Arbitration is frequently a cost effective method of dispute resolution.
- Arbitration proceedings are often shorter and less complicated than litigation in court.
- Discovery is typically limited.
- Motions practice is typically limited.
- Parties may incur fewer attorneys' fees.
- Parties can customize an arbitration with the arbitrator to suit their specific budget and needs.
- Binding arbitration likely avoids any appellate process.

However, Arbitration Costs Are Rising

- Arbitration is not always cheaper than litigation.
- Particularly in complex commercial cases, arbitration providers may charge significant administrative fees.
- The parties are responsible for the arbitrator's hourly rate, and arbitrator's fees may range from about \$300 per hour to upwards of \$1,300 an hour.
- Frequently, parties elect to proceed before a single arbitrator, but in other instances, parties proceed before a three-arbitrator panel.
- Depending on the type of dispute, arbitration can involve numerous depositions, including third party depositions, interrogatories, significant document productions, motions to dismiss and motions for summary judgment, and a potentially lengthy hearing.

Mass Arbitrations

- There is a recent trend in the U.S. where plaintiffs who agreed to a class action waiver and mandatory arbitration clause are attempting to bring so-called mass arbitrations.
- Plaintiffs have filed (or threatened to file) hundreds of individual claims simultaneously to attempt to leverage the potentially significant arbitration administration fees typically due for each individual arbitration at the outset of the matter to force settlement.
- It is unclear how these mass arbitrations will develop.

Construction Specific Rules

- Arbitration can provide enhanced benefits for the resolution of construction industry disputes in the U.S.
- AAA and JAMS both offer specific rules and procedures for construction industry disputes.
- AAA offers a range of procedures– regular track procedures, procedures for resolving disputes through document submissions, fast track procedures for claims less than \$100,000, and procedures for large, complex disputes claiming greater than \$1,000,000
- JAMS offers both standard procedures and an expedited option for binding arbitration.
- JAMS also offers a specific panel of Construction Project Neutrals who can provide non-binding mediation services to help resolve controversies that might arise from the design phase through the final certificate of occupancy and acceptance of the Project.
- Procedures may include a preliminary management hearing, pre-hearing exchange of information, and a formal hearing prior to an arbitration award.

Construction Focused Arbitrators

- AAA, for example, maintains a National Construction Panel, where the majority of the arbitrators “are actively engaged in the construction industry with attorney arbitrators generally devoting at least half of their practice to construction matters.”
- https://www.adr.org/sites/default/files/ConstructionRules_Web_0.pdf

Arbitration Providers May Offer Fee Schedules Specifically for Construction Disputes

Amount of Claim	Initial Filing Fee	Final Fee
Less than \$75,000	\$925	\$800
\$75,000 to less than \$150,000	\$1,925	\$1,375
\$150,000 to less than \$300,000	\$2,900	\$2,200
\$300,000 to less than \$500,000	\$4,400	\$3,850
\$500,000 to less than \$1,000,000	\$5,500	\$6,825
\$1,000,000 to less than \$10,000,000	\$7,700	\$8,475
\$10,000,000 and above	\$11,000 plus .01% of the claim amount above \$10,000,000 up to \$65,000	\$13,750
Undetermined Monetary Claims	\$7,700	\$8,475
Nonmonetary Claims*	\$3,500	\$2,750
Deficient Filing Fee	\$500	
Additional Party Fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. <i>See below for additional details.</i>	

Conclusion

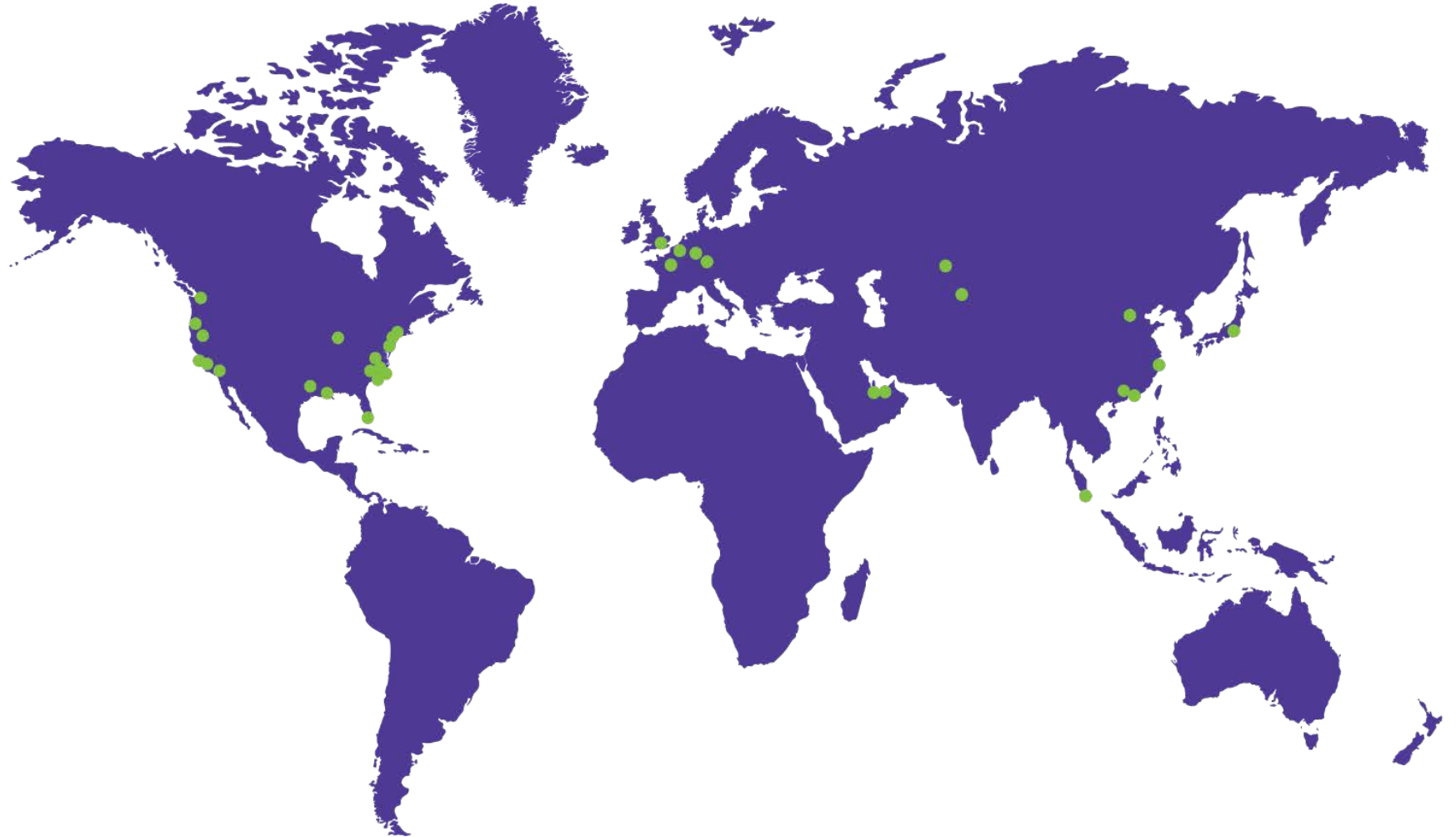
- Binding arbitration may provide an effective method to resolve construction industry disputes.
- AAA and JAMS have developed construction specific rules and procedures that are publicly available for review online.

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