

THE **ART**  
OF  
**ARBITRATION**  
(PAINTING YOUR WAY TO  
PAYMENT!)

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**NACM | Credit Congress | 2015**

# DISPUTE RESOLUTION



➤ Mediation

➤ Litigation

➤ Arbitration

# MEDIATION

# MEDIATION - OVERVIEW



- Confidential by law in most states
- Voluntarily agreed to
- Court ordered
- Before and/or during litigation or arbitration
- May or may not result in settlement

# THE MEDIATOR



- Neutral third party
- Appointed and/or agreed
- Assists with resolving dispute
- DOES NOT decide the case/claims
- Attempts to facilitate settlement and a compromise resolution of the dispute

# THE MEDIATOR



- Qualities to Look For:
  - Appropriate personality for case, parties, etc.
  - Good listener
  - Knowledgeable – case, facts, claims, defenses, industry, etc.
  - Credible
  - Common sense, grounded
  - Independent but adaptable
  - Influencer
  - Diplomatic
  - Patient
  - Good timing
  - Creative

# MEDIATION STRUCTURE



- Joint opening caucus or session
- Parties separated into conference rooms
- Shuttle “diplomacy” by mediator
- Settlement reached
- Settlement not reached

# LITIGATION



# U.S. COURT SYSTEM

## FEDERAL COURTS



## CIVIL LAW



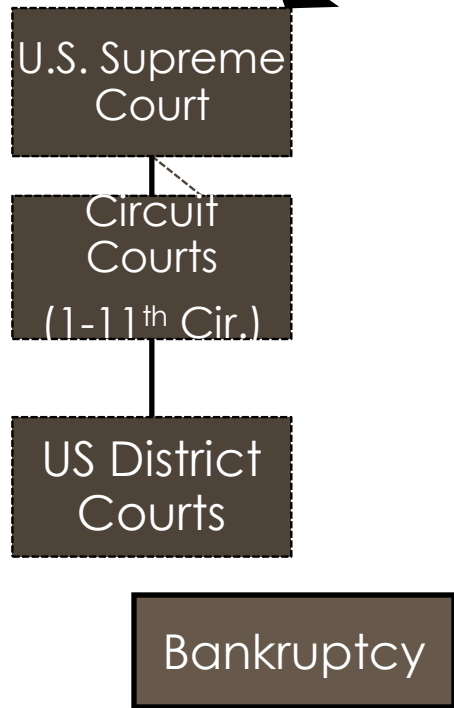
## STATE COURTS



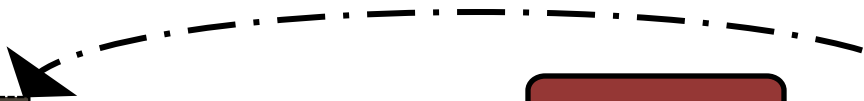
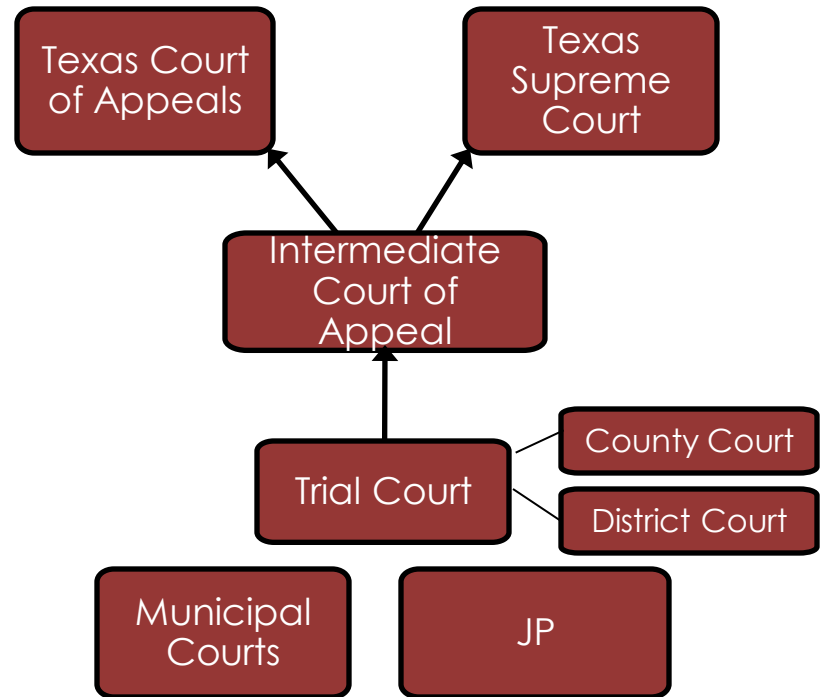
## CRIMINAL LAW



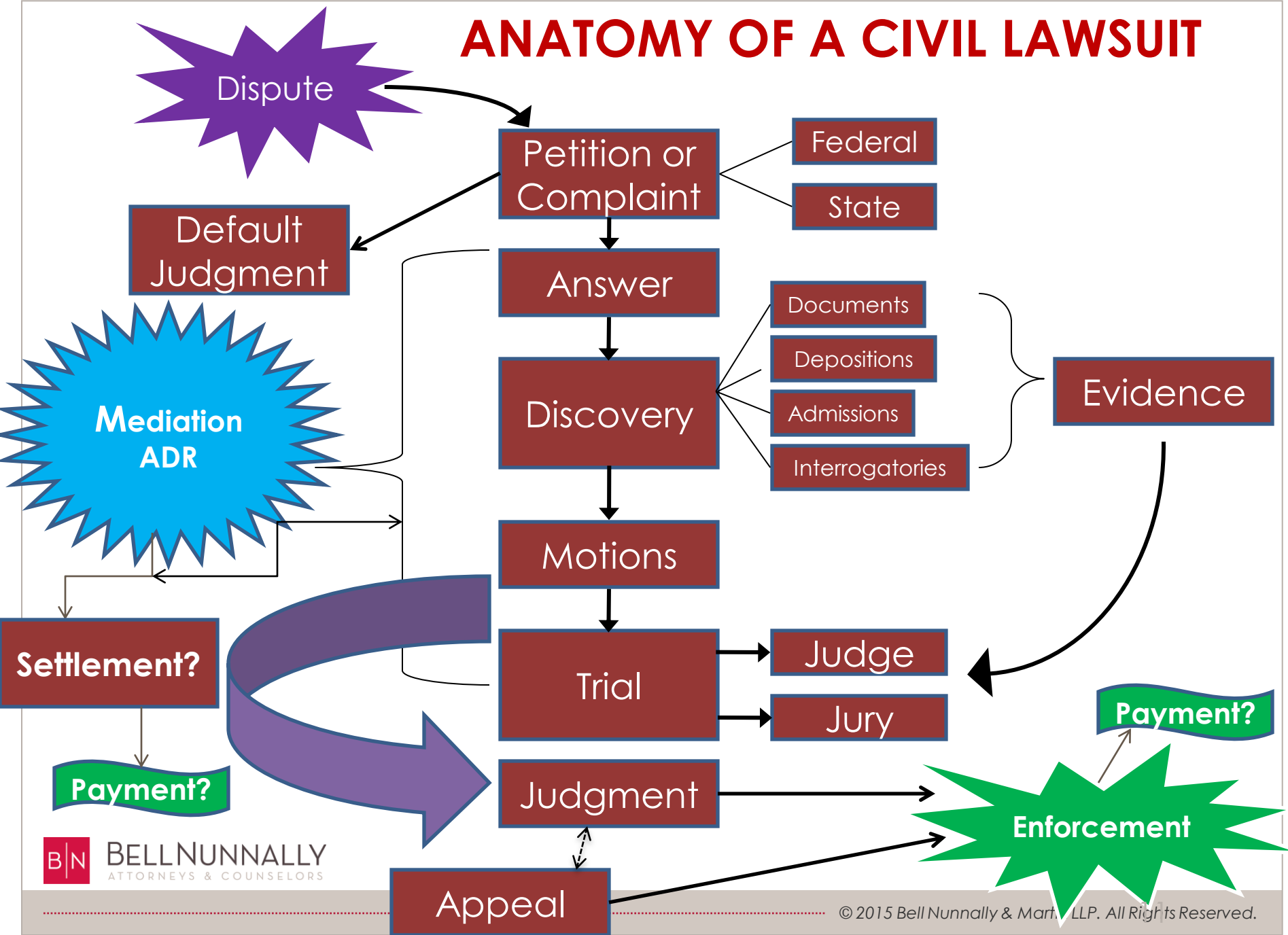
# Federal Court



# State Court (Texas)

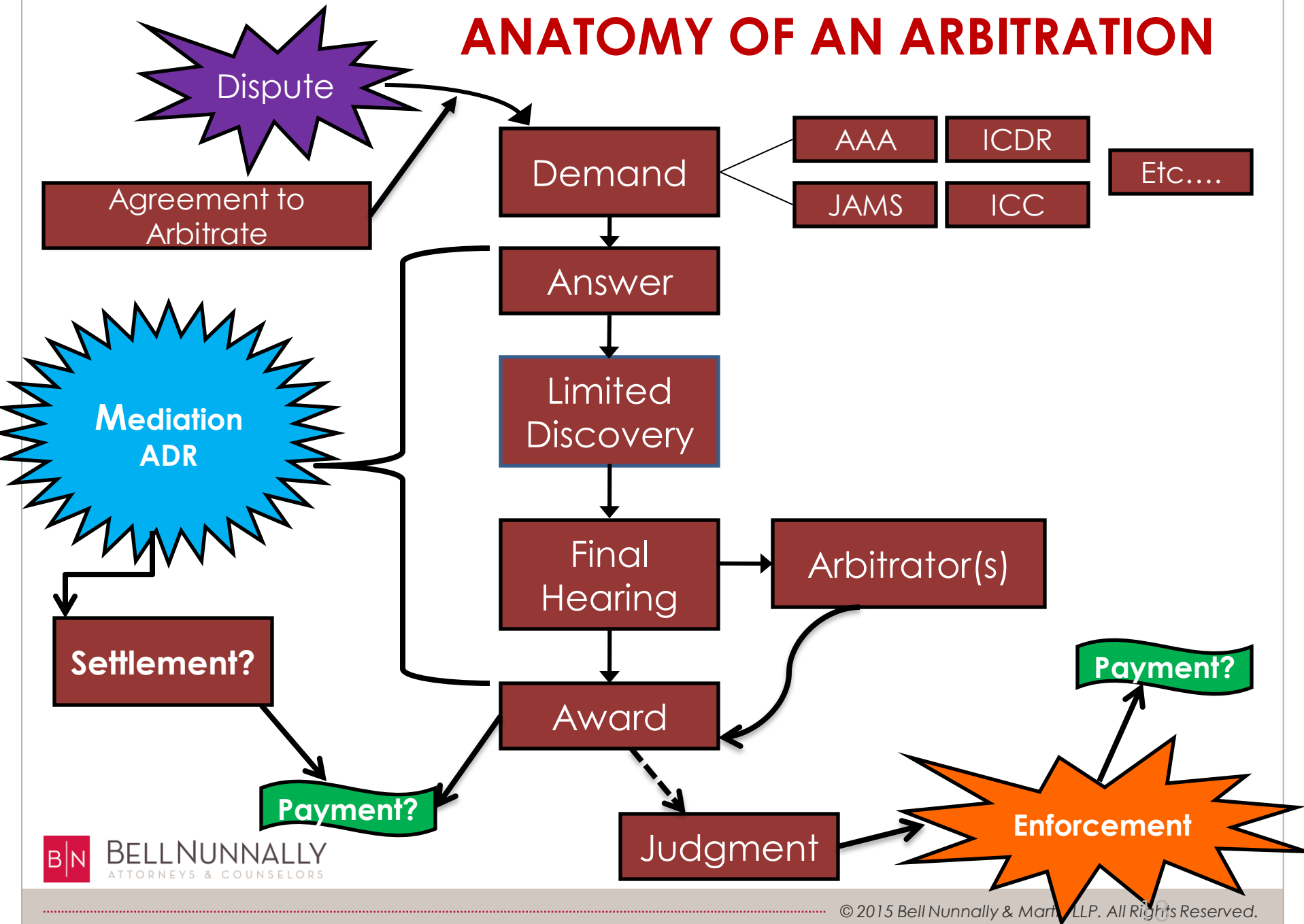


# ANATOMY OF A CIVIL LAWSUIT



# ARBITRATION

# ANATOMY OF AN ARBITRATION



# ARBITRATION – OVERVIEW



- Agreed to by the parties
- Typically in a contract with an arbitration clause
- Private forum selected (AAA, JAMS, ICC, etc.)
- Parties jointly select arbitrator(s)
- Arbitrator(s) DO DECIDE the case
- Takes the place of litigation
- Mediation used in conjunction with arbitration

# TO ARBITRATE... OR NOT?



## ★ Why chose binding arbitration?

- ✓ Enforcement concerns
- ✓ Neutrality issues
- ✓ Confidentiality needs
- ✓ Technical/Specialization requirements
- ✓ Choice of decision maker
- ✓ Costs
- ✓ Time

# TO ARBITRATE... OR NOT?



- ★ Must fit your goals and objectives....but
- ★ Crystal balls are in short supply
- ★ Important to understand what you are getting into by electing binding arbitration



# ARBITRATION – HIGHLY FAVORED



- Arbitration clauses are highly favored under the law.
- Federal Arbitration Act (FAA) (1925)
  - Embodies “a liberal federal policy favoring arbitration”
  - Establishes that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”
    - ✦ Moses H. Cone, US SCT 1980

# ARBITRATION – HIGHLY FAVORED



- Ambiguous, voidable, illegal, fraudulent contracts
  - May not affect arbitration clause
- Hard to waive right to arbitration
  - Showing of prejudice often required
- Non-signatories
  - May force signatories to arbitrate a dispute
  - May be swept into arbitration
- “Unconscionable” arbitration clauses may be unenforceable
  - Buried, obscured, fine print, not enough time to read, pressure to sign, extreme unequal bargaining power

# ARBITRATION – NON-SIGNATORIES



- Non-signatories can find themselves swept into arbitration under certain theories:
  - **Incorporation by reference**
    - ✦ Where one contract incorporates the arbitration agreement
  - **Assumption**
    - ✦ By conduct evidencing intent to be bound by the arbitration agreement
  - **Agency**
    - ✦ Agent binds principal and vice versa

# ARBITRATION – NON-SIGNATORIES



- Non-signatories can find themselves swept into arbitration under certain theories:
  - **Alter ego**  
Where signatory exercises complete dominion or control over non-signatory to perpetrate a fraud. . .
  - **Estoppel or Third-party beneficiary**  
Can't get the benefit of the contract and disclaim the arbitration clause at the same time.

# ARBITRATION – NON-SIGNATORIES



★ Theories non-signatories may use to force signatory to arbitrate a dispute:

- Agency
- Third-party beneficiary
- Estoppel

# ARBITRATION CLAUSES



# ARBITRATION CLAUSES



- **The Very Basics:**

- ✓ Agreement to arbitrate,
- ✓ What disputes will be arbitrated (broad form or narrowed)
- ✓ Select the forum/institution and the governing rules
- ✓ Agreement that a judgment may be entered on the arbitration award

→ Balanced, fair, unbiased, not over reaching, not overly detailed or overly complex

→ Enforceable!

# ARBITRATION CLAUSES



- **AAA Standard (Broad form) Clause:**

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.



# ARBITRATION CLAUSES



- **More essentials ....**

- ✓ *Agreement to arbitrate,*
- ✓ *What disputes will be arbitrated*
- ✓ *Select the forum and the rules of the forum that will govern*
- ✓ *Agreement that a judgment may be entered on the arbitration award*
- ✓ **Location of the arbitration**
- ✓ **Language of the proceeding (international)**
- ✓ **Applicable substantive law (e.g., New York or Texas)**
- ✓ **Applicable procedural law (e.g., the FAA)**
- ✓ **Number of arbitrators and how selected**

# ARBITRATION CLAUSES



- **Sample clause:**

Any dispute arising out of or relating to this contract, or the breach thereof, shall be finally resolved by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction. The arbitration will be conducted in the English language in the city of Dallas, Texas, in accordance with the Federal Arbitration Act (FAA). There shall be one arbitrator, named in accordance the AAA Commercial Arbitration Rules.

# ARBITRATION CLAUSES



- A word about the number of arbitrators...
  - One standard
  - Three not uncommon for more complex matters
  - Be aware of party appointed arbitrators and their role on a panel

# ARBITRATION CLAUSES



- **A little more to think about possibly including:**
  - ✓ “Mediation first” clause
  - ✓ Reasoned award requirement
  - ✓ Emergency relief rules
  - ✓ Adoption of applicable “appellate” rules
  - ✓ Whether claims against parent, subsidiaries, affiliates are covered by the arbitration agreement
  - ✓ Scope of discovery
  - ✓ Rules of evidence
  - ✓ Special confidentiality concerns
  - ✓ Authorize award of attorneys’ fees by arbitrator

# ARBITRATION CLAUSES



- **Too much, unfair, biased = unenforceable:**
  - ⌘ Company picked the pool of potential arbitrators; no neutrality requirements.
  - ⌘ Employee required to file list of fact witnesses, with list of facts known by each; Company not required to provide notice of its defenses.
  - ⌘ Company could move for summary disposition; employee could not.
  - ⌘ Company could modify arbitration rules at will and with no notice.
  - ⌘ Company could cancel arbitration agreement; employee could not.

# ARBITRATION FORUMS



- **What to look for:**

- ⌘ Credible

- National, international standing
- Reputable, qualified, affiliated arbitrators
- Neutral

- ⌘ Structure, administration and involvement

- ⌘ Fee structures

- ⌘ What the “rules” do and don’t cover

- ⌘ Specialty forum? (WIPO, CIETAC)

- ⌘ Mandatory forum? (FINRA)

- ⌘ Fits your needs

# ARBITRATION FORUMS



- The American Arbitration Association (AAA)
- The International Center for Dispute Resolution (ICDR)
- The Judicial Arbitration and Mediation Services (JAMS)
- International Institute for Conflict Prevention & Resolution (CPR)
- The International Chamber of Commerce (ICC)
- The China International Economic and Trade Arbitration Commission (CIETAC)
- The Financial Industry Regulatory Authority (FINRA)
- The World Intellectual Property Organization (WIPO)

# ARBITRATION PROS & CONS





# ARBITRATION PROS & CONS



## Privacy

- Private forum
- Confidential
- Dispute not “aired” in public
- In contrast to litigation in a public court

# ARBITRATION PROS & CONS



## Arbitrator Selection

- Waiving right to jury trial
- Get to have a direct “say” in who will decide your fate
- Judge in a court case is (randomly) assigned
- Jury comes from a random pool of people
- Arbitrators can be selected based on their industry experience or technical background
- Arbitrators can be lawyers, former judges, or non-lawyers in an applicable industry or with certain technical expertise

# ARBITRATION PROS & CONS



## Arbitrator Selection

- Arbitration forum will often generate a list of potentials that the parties will investigate, rank and/or strike
- If party appointed arbitrators are involved in a panel, the parties (and their attorneys) will have freedom to select arbitrators from their networks (that are still neutral of course!). The party appointed arbitrators may then be responsible for selecting the “neutral” arbitrator.
- Disclosures are normally made by the arbitrator(s) and the parties have the ability to object based on conflicts of interest and other grounds under the applicable rules.

# ARBITRATION PROS & CONS



## Costs

- Litigation involves more discovery = more costs
- In litigation may go to jury trial = more costs
- Arbitration supposed to be more streamlined
  - Often still involves some discovery
  - No summary disposition
  - Final hearing usually required
- Arbitrators charge for their time
- Arbitration forums have filing fees, which can be significant, depending on amount in controversy
- Judge in court case does not bill you!

# ARBITRATION PROS & CONS

AMOUNT OF CLAIM	INITIAL FILING FEE	FINAL FEE
Up to \$75,000	\$750	\$800
Above \$75,000 to \$150,000	\$1,750	\$1,250
Above \$150,000 to \$300,000	\$2,650	\$2,000
Above \$300,000 to \$500,000	\$4,000	\$3,500
Above \$500,000 to \$1,000,000	\$5,000	\$6,200
Above \$1,000,000 to \$10,000,000	\$7,000	\$7,700
Above \$10,000,000	Base fee of \$10,000 plus .01% of the amount above \$10,000,000 up to \$65,000	\$12,500
Nonmonetary Claims <sup>1</sup>	\$3,250	\$2,500
Deficient Claim Filing Fee	\$500	

# ARBITRATION PROS & CONS

Amount in dispute US\$

Number of arbitrators  1  3

Calculate

## Requested estimation

Amount in dispute 100000  
Number of arbitrators 1  
Year (scale) 2010

## Fees per arbitrator

Min \$4325  
Avg \$10060  
Max \$15794

## Advance on costs (without arbitrator expenses)

Average fees multiplied by number of arbitrators \$10060  
Administrative expenses \$5365  
Total \$15424

Amount in dispute US\$

Number of arbitrators  1  3

Calculate

## Requested estimation

Amount in dispute 500000  
Number of arbitrators 1  
Year (scale) 2010

## Fees per arbitrator

Min \$9857  
Avg \$26924  
Max \$43990

## Advance on costs (without arbitrator expenses)

Average fees multiplied by number of arbitrators \$26924  
Administrative expenses \$14165  
Total \$41088

# ARBITRATION PROS & CONS

Amount in dispute US\$

Number of arbitrators  1  3

Calculate

<b>Requested estimation</b>	
Amount in dispute	1000000
Number of arbitrators	3
Year (scale)	2010
<b>Fees per arbitrator</b>	
Min	\$14627
Avg	\$39378
Max	\$64130
<b>Advance on costs (without arbitrator expenses)</b>	
Average fees multiplied by number of arbitrators	\$118136
Administrative expenses	\$21715
Total	\$139850

# ARBITRATION PROS & CONS



## Time

- Litigation can take years for final resolution, through trial and/or appeals
- Arbitration is typically faster than litigation with potential for final resolution within months rather than years
- Parties have more “say” in the schedule in arbitration
- Court cases can be delayed by court’s schedule



# ARBITRATION PROS & CONS



## Time

- Litigation can take months or years.
- Arbitration has the potential for final resolution within months rather than years
- Parties have more “say” in the schedule in arbitration
- Court cases can be delayed by court’s schedule

# ARBITRATION PROS & CONS



## Finality

- No appeals in arbitration (typically)
  - New “appeals” rules can be elected in the arbitration agreement... uncharted waters at this point
- Limited ability to “vacate” an arbitration award:
  - Fraud of opposing party, corruption, evident bias, other misconduct of tribunal, tribunal grossly exceeding its authority. .
- Good if you are the winner....
- Arbitration award must be registered as a judgment in court for enforcement purposes

# ARBITRATION PROS & CONS



## Limited Discovery

- Do you need information from the other side to prove your claim or defense? Problematic...
- Leads to unpredictability at final hearing
- However, if the parties agree, they can set the stage for appropriate, customized discovery (type/amounts) for their case
- Subpoena power limited

# ARBITRATION PROS & CONS



## Informality

- No summary disposition in arbitration
- Final hearing not typically subject to rules of evidence
- Arbitrators are supposed to follow the law, but don't have to follow case authority or precedent
- “Wild West”
- Potential for inconsistent results
- BUT parties have more flexibility in presenting their case

# ARBITRATION –WHAT YOU CAN DO!



- Read the contract or contracts!
- Read the arbitration clause! Ask questions...
- Understand your company's arbitration clause
- Determine if you do have a “mediation first” clause or “good faith negotiations” first clause

# ARBITRATION –WHAT YOU CAN DO!



- Gather all of the relevant agreements for your attorney
  - Transaction may involve more than one agreement
  - Arbitration clause could be lurking in a related agreement
  - Helps to make informed decision re: first filing a lawsuit or arbitration demand

# ARBITRATION –WHAT YOU CAN DO!



- Document communications with debtor customer- be mindful of what you put in writing!
- Gather all communications, demands, etc with debtor customer
- Do due diligence as much as possible on the front end of the transaction
- Organize, organize, organize

# ARBITRATION –WHAT YOU CAN DO!



- Put your industry hat on when selecting arbitrators.
  - Participate, provide your insights to your attorney.
  - Want an arbitrator that is knowledgeable, experienced, fair, unbiased.
  - Your chance to have a direct impact on the case!



# ARBITRATION –WHAT YOU CAN DO!



- Provide feedback to your company on why the arbitration process worked, did not work, should be continued/discontinued
  - Transactional attorneys often help decide to use and then draft arbitration clauses
  - Plus no one may have been really THINKING about the arbitration clause when the deal was cut! Often boiler plate, often an after thought, often assumed to be ok.... Etc....

# QUESTIONS?



- **Q&A**

- **Thank You!**