

**Webinar Series:**  
**U.S. LEGAL ISSUES**  
*for Foreign Businesses in the United States*



Presented by:  
**Reinhart**  
Attorneys at Law

Session four of a five-part webinar series

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## **U.S. DISPUTE RESOLUTION**

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## Modes of Dispute Resolution

- Court litigation
  - Disputes decided by a judge or jury
- Arbitration
  - Disputes decided by a third-party neutral
- Mediation
  - Third-party neutral facilitates settlement discussions between parties to resolve disputes

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## OVERVIEW

Part I: Court litigation vs. arbitration  
– pros and cons of each

Part 2: Mediation before or during litigation  
and arbitration

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## Court Litigation Statistics

- Case filings are down
  - may be due to more alternative dispute resolution methods like arbitration and mediation
- Most cases settle
  - less than 2% of civil cases go to trial
- 2013 median length of federal cases
  - Trial courts: 8.5 months
  - Appeal: 9 months



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## Arbitration Statistics

- One study found that 86% of corporate counsel are satisfied with international arbitration
- One study found that a majority of parties find arbitrators are more likely to understand the controversy than a judge
- One arbitration guide stated that the median time frame for arbitrating claims involving \$75,000 to \$500,000 was 9.9 months; for claims over \$1 million, the median was 13.8 months, for claims over \$10 million, the median was 15.8 months

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## Modes of Dispute Resolution

Each mode of dispute resolution has distinctive advantages and disadvantages related to:

- Efficiency
- Flexibility
- Predictability

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## Is Court Litigation Efficient?

### **Advantages**

- Cost of entry is low
- Potential for early case disposition
- Plaintiffs often have choice of forum
- Parties may be able to obtain quick and early relief

### **Disadvantages**

- Litigation may take years to resolve
- Attorneys' fees and experts' costs may exceed recovery
- Discovery can be invasive, burdensome and expensive

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## Is Arbitration Efficient?

### Advantages

- may be cheaper
- can be quicker
- parties can agree on procedures and timing



### Disadvantages

- not always quicker, cheaper or less contentious
  - disputes over arbitration can lead to increased costs
  - 3 arbitrators can be expensive
- may not work best in complex cases with multiple parties
- courts might be better at providing quick equitable relief (e.g., injunctions)

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## Court Litigation - Is it "Too Formal"?

### Advantages

- Formal rules provide predictability
- Broad discovery tools are available to obtain evidence
- Evidentiary rules may help exclude less reliable evidence
- Written record of proceedings and decisions usually available
- review of judge's and jury's decision by appellate courts – errors may be corrected

### Disadvantages

- Increased formalities can be intimidating
- Judges may have less flexibility to fashion resolution for parties
- Focus of judge is to resolve dispute according to the law rather than what the judge thinks is fair
- Hearings and trial are open to public (not confidential)
- American rule is that each side pays its own attorneys' fees
  - Exception is where a statute or contract provides for attorneys' fees

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## Arbitration - Is it "Informal"?

### Advantages

- Schedules usually more flexible
- Arbitrator may use a less strict form of "court" rules or no "court" rules at all
  - Informality might allow evidence that may not be admissible in court
- Arbitrators have greater flexibility in creating an award
- Arbitrations can be private and confidential

### Disadvantages

- Informality can create disputes or confusion regarding the process (or you may not like it)
- Relaxed rules of procedure and evidence also can be frustrating



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## Court Litigation - Predictability

### Advantages

- Formal rules provide predictability
- Public decisions create precedential authority that can guide other parties in future conduct and planning



### Disadvantages

- Judges and juries with less knowledge about subject matter of dispute may not understand the case
- Costs of litigation can be unpredictable

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## Arbitration - Predictability

### Advantages

- Parties can agree in advance on arbitrator qualifications, location, rules and law to be applied, and even on limits concerning the arbitration award



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### Disadvantages

- May be limited discovery
- "Bad" arbitrators
- Outcomes difficult to predict because arbitrators have more discretion than judges
- The privacy of arbitrations reduces predictability and transparency
- Limited review if you receive a "bad" decision

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## Court Litigation vs. Arbitration



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## What is Mediation?

- Process by which neutral mediator helps parties try to resolve their dispute
- Mediator does not decide disputed issues like an arbitrator or judge
- Mediator may offer opinions about the strength or weakness of a position
- Mediator may also offer suggestions for how to settle a dispute

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## Is Mediation Required?

- Mediation is usually voluntary
- Some courts require it
- Some contracts require mediation prior to arbitration or litigation
- Usually only successful if both parties are ready to mediate, so best if it is voluntary

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## When Do We Mediate?

- Can do it anytime
  - before a formal case is filed
  - after a case is filed but before either party incurs substantial fees and costs
  - after parties have had time to investigate the case and/or file motions
  - just before the trial or arbitration hearing

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## What is the Mediation Process?

- Typical Steps:
  - sign mediation agreement
  - follow mediator's rules
    - may involve some joint discussions with mediator
    - often separated into two rooms with mediator going back and forth ("shuttle diplomacy")
  - if successful, sign settlement agreement



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## What is the Secret to a Successful Mediation?

- Both sides need to be ready to negotiate
- Preparation
- Going into it with a good understanding of the risks and rewards of settling and not settling
- A good mediator

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## Questions?



### Asking Questions

Please contact your Reinhart attorney or any of the presenters.

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(will be available in early June)

Jeremy R. Bridge