

The American Arbitration Association Sets Agenda For 2018

By **Caroline Simson**

Law360, New York (January 19, 2018, 9:44 PM EST) -- American Arbitration Association president and CEO India Johnson doesn't much care for it when arbitration is referred to as being big business, telling Law360 recently she considers arbitration a means of serving the public and providing a "solution to a problem."

Here, Law360 takes a closer look at how the AAA and its International Centre for Dispute Resolution are focused in 2018 on improving their offerings by tackling issues like cybersecurity, arbitrator challenges, and greater cost savings for involved parties.

New Cybersecurity Initiative

With the news over the last few years that numerous law firms had been hacked, cybersecurity has been on the minds of many lawyers, and it's no different for arbitral institutions. The Permanent Court of Arbitration in 2016 was hacked during the course of a contentious and widely reported arbitration it administered between the Philippines and China, which centered on historic rights and maritime entitlements in the South China Sea.

Such instances reinforce the importance of arbitral institutions taking steps to ensure that the data collected during an arbitration is sufficiently protected, particularly as the administration of such proceedings becomes more technologically advanced and thousands of pages of documents are replaced with uploaded files.

But while institutions like the AAA have already been investing in technology to ensure their systems remain secure, arbitration has a unique weak link: the arbitrators themselves, many of whom are sole practitioners working from home. So Johnson said the AAA will begin working with its arbitrators on cybersecurity training.

"Our next mission is to raise the technological capability of panelists ... so we will be requiring that they get to a certain level and have certain capabilities," she said. "It will be very strenuous for us because we'll have to work with hundreds of people to get them up to speed ... But I'm hopeful they'll see the value add of us helping them to find the tools to help them be secure."

The 'Streamlined Three-Arbitrator Panel Option'

Arbitration was originally envisaged as a faster and cheaper method of dispute resolution than going to a court, but nowadays that tends to be more the exception than the rule. So Johnson said the AAA has now formalized an option to allow parties to go through the initial portion of an arbitration with just one arbitrator, rather than the full three-arbitrator panel.

Parties typically are leery of having their case rest on the shoulders of a single arbitrator, but Johnson said there's no reason why initial discussions revolving around preparatory issues can't be resolved by one arbitrator instead of the usual three.

"It feels safer to have three arbitrators to decide the merits of the dispute, but you don't necessarily need that for every step of the way," she said. "[This] should save time and a lot of money because you're not constantly trying to schedule three people, you don't have three people billing for looking at everything."

She said this streamlined panel option has worked well on an informal basis for the AAA's domestic disputes — in such instances, a presiding arbitrator would take the initiative to work with the parties to tackle these initial procedural issues — but that a more formal version will now be available to parties. The option will be available to parties who both decide to opt in, she said.

Parties who opt in to this streamlined option will have two options. Under the first, parties will choose the entire three-arbitrator panel at the beginning of a proceeding, with only the chair managing preliminary and exchange of information stages of the case and the other two arbitrators participating only in the evidentiary hearing and in making the final decision. Under the second, a single arbitrator is selected at the beginning of a proceeding and the two remaining arbitrators would be appointed at least 60 days in advance of the evidentiary hearings.

Publishing of Arbitrator Challenges

Another new initiative in 2018 will be to make information on arbitrator challenges in its international proceedings publicly available, something the AAA has done for domestic cases for years, according to Johnson.

She said that once a decision on an arbitrator challenge is finalized, an anonymized version will then be publicly available so users can see what makes a successful or unsuccessful arbitrator challenge in real cases.

She noted the idea is not to cut down on the number of challenges, but to educate people about the process and ensure that arbitrator challenges are well-founded.

"Everyone would agree that some challenges are made knowing they're going to fail, but for whatever reason they do it [and] they have a strategy behind why they're doing it," she said. "Publishing what kinds of things were close calls and what kinds of things were not close at all, I think, should help people be more selective in what they choose to challenge and how they go about it."

New Arbitrator Search Tool

Another initiative that the AAA has borrowed from its domestic procedures to implement in ICDR proceedings in 2018 is an arbitrator search tool, where parties will be given a link where they can go and look at the entire database of arbitrators so they can try to agree on who they select.

The tool, which has been very popular for the AAA in domestic disputes, allows parties to search for arbitrators with various types of expertise or other search criteria. It's already available to ICDR users but has only been used in a handful of these international cases so far, Johnson said.

"There's never been any new thing for lawyers that I later surveyed them about and had 100 percent of them say it was a great thing, so I'm hopeful the international community will feel the same way," she said.

Previously, parties to an international dispute would each search for an arbitrator on their own, and those two arbitrators would then appoint a chair. But that method can be time-consuming, so under AAA rules after a certain period the institution will send a list of 15 arbitrators the parties can choose from.

But the crucial difference is that in that instance, it's the institution picking those 15 arbitrators, not the parties, Johnson said. That means the parties aren't able to see who else was available. With access to the larger list, it may be more likely that the parties could come to an agreement on which arbitrator to pick.

"I've seen lawyers agree to one arbitrator on multimillion dollar cases, simply because they both went in and found someone they both wanted, and then they got together and agreed they go with one [arbitrator] instead of three," she said. "They saved a fortune."

--Editing by Pamela Wilkinson and Kelly Duncan.