



Insights: Perspectives

3 Takeaways: Arbitration of Disputes Regarding U.S. Federal, State, and Local Entities

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Kilpatrick Townsend partner **Larry Prosen** recently spoke at the 2018 **CIArb** Conference in Washington, D.C. on the topic of "Arbitration of Disputes Regarding U.S. Federal, State, and Local Entities."

3 key takeaways from Mr. Prosen's presentation, include:

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GENERAL OBSERVATIONS

- Disputes with the U.S. Government require "exhaustion of administrative remedies" -- which still rings true -- and Waiver of Sovereign Immunity.
- Required to allow a private party to "sue" or enter into dispute with a governmental body:
 - Federal – Tucker Act waives sovereign immunity for contract disputes.
 - States – Each have some form of waiver by statute.

FEDERAL

- Federal law and FAR Subpart 33.2 defines Alternative Dispute Resolution (ADR) and encourages agencies to use ADR "to the maximum extent possible."
- Despite (a) this stated preference for ADR and (b) granting of authority, federal agencies rarely arbitrate disputes.
- Court of Federal Claims (CFC) versus Boards of Contract Appeals (BCA) - Civilian Board of Contract Appeals (CBCA) and Armed Services Board of Contract Appeals (ASBCA):
 - Both recognize and have a real preference for ADR but rarely for arbitration.
- The Federal Aviation Administration (FAA) Office of Dispute Resolution for Acquisition (ODRA) has a guide and preference for arbitration.
- Many cases are resolved via mediation at both types of tribunals.

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STATE AND LOCAL

Lack of uniformity at state and local levels.

- States rarely agree to waive the "home court advantage" of state court.
- States often will look to ADR (mediation) but not to arbitration.

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