KILPATRICK TOWNSEND

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

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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