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Top Five Myths about Commercial Arbitration

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Persistent misconceptions about arbitration may discourage some from using this economical alternative to court trials. Here are a few of those myths along with the reality of commercial arbitration practice:

Myth #1: The terms of the ADR provision are written in stone

Despite strong disagreements on the merits, counsel often find it mutually beneficial to modify the process to suit the case at hand. Parties regularly stipulate to modify the arbitration provision, including changing the provider administering the case, the applicable rules, appeal procedure, the number of arbitrators, time to prepare for and hold hearings, or the number of hearing days.

Myth #2: Arbitrators do not follow the law

Perhaps this myth stems from the fact that the arbitration process is more informal than a court trial. However, the law that will apply to the merits of a case usually is set forth in the parties' arbitration provision. If not, the selection of applicable law is discussed and determined at the preliminary conference with the panel. Arbitrators are guided by the rules of law specified by the parties and, if allowed by the parties' contract and the governing arbitration rules, by the rules of equity. A reasoned arbitration award should outline the key issues and the decision of the panel as supported by the evidence and the law.

Myth #3: Arbitrators are reluctant to manage with a firm hand

One of the strongest trends in arbitration has been to make the process both efficient and fair by encouraging arbitrators to be decisive and managerial. For example, arbitrators may limit motion practice, encourage the parties to split hearing time on a 50/50 basis, limit time for opening statements, limit objections and request written statements in place of direct examination of witnesses.

Counsel should review the background of potential arbitrators to find those who take a managerial approach and may even want to interview candidates to inquire about their management of the process.

Myth #4: Arbitration discovery is insufficient

Counsel often specify the Federal Rules or state discovery rules in their arbitration agreements in the belief that discovery under most arbitration rules is insufficient. However, one of the benefits of arbitration is speedy and efficient resolution. Arbitrators are empowered under most rules to limit the exchange of information so that the amount of discovery is in proportion to the size of the dispute. Counsel have a role in this effort and should work to prepare a reasonable discovery plan.

Myth #5: Arbitrators "split the baby"

One of the most persistent myths is that arbitrators "split the baby." Parties concerned about that risk should select seasoned arbitrators who will review the evidence and follow the law. Counsel might also consider specifying "baseball" arbitration, where the arbitrators must choose between damages amounts urged by each party.

Ultimately, counsel and their clients may want to give arbitration a second look, re-examining these arbitration stereotypes and taking a fresh look at the benefits of a flexible process. Visit the JAMS Arbitration Practice page for more information.

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