TOP FIVE MYTHS ABOUT COMMERCIAL ARBITRATION

By Zela "Zee" G. Claiborne, Esq.

While the use of arbitration is on the rise, there are some persistent misconceptions about the process that may be deterring 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: 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 willapply to the merits of a case usually is set forth in the arbitration provision of parties' contract. If not, it is one of the first things to bedetermined at the preliminary conference with the panel. Arbitrators are guided by the rules of law specified by the parties. In some circumstances, if allowed by the parties' contract and the governing arbitration rules, arbitrators also may be guided by the rules of equity in granting relief. At the end of a case, a reasoned arbitration award should outline the key issues and the decision of the panel as supported by the evidence and the law.

Myth #2: Arbitrators are reluctant to manage with a firm hand.

Over the last 10 years, 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 in style. For example, arbitrators may limit motion practice, encourage the parties to split a pre-determined amount of hearing time on a 50/50 basis, limit time for opening statements, limit objections, ask counsel to use written statements in place of direct examination of experts or other witnesses, impose page limits on briefs, and so forth.

Counsel should review the background of potential arbitrators to find those who take a managerial approach to handling cases. Also, it is common to interview those arbitrators to inquire about their approach to the process.

Myth #3: 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 the speedy and efficient resolution of a dispute. Arbitrators are empowered under the rules of most providers to limit discovery in an effort to ensure that it is in proportion to the size of the dispute at hand.

Counsel have a role in this effort and should work with the panel to prepare a reasonable discovery plan, including an exchange of relevant documents and a limited number of depositions. Interrogatories and requests for admission are not favored in arbitration since they are expensive and often fail to elicit significant information. Finally, counsel may work with the arbitrators and agree on an informal process for the resolution of discovery disputes, usually handled by just one of the arbitrators.

Myth #4: Arbitrators "split the baby."

One of the most persistent myths about arbitration is that arbitrators often "split the baby." However, if parties are concerned about that risk, they can deal with it by selecting seasoned arbitrators who will review the evidence and follow the law when making an award. Further, counsel might consider specifying "baseball" arbitration, where the arbitrators must choose between damages amounts urged by each party, selecting the one found to be most reasonable. This arrangement requires the panel to adopt the outcome proposed by one side, with no authority to select a compromise outcome.

Myth #5: The terms of the ADR provision are written in stone.

While it is true that arbitration is a creature of contract, it is not uncommon for parties to agree to alter the terms of an arbitration provision in order to deal effectively with a dispute that has arisen long after the contract was executed. Parties often stipulate to change terms such as the number of arbitrators, the time to arbitration, the number of hearing days, the arbitration rules to be utilized, and the arbitration provider to administer the case. Despite strong disagreements on the merits, the parties may find it mutually beneficial to work with the panel to modify the process to suit the case at hand. This flexibility is one of the strong points of the arbitration process.

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. ■

Zela ("Zee") G. Claiborne *is an arbitrator and mediator with JAMS. She has been arbitrating commercial disputes since 1991 and is a Fellow in the College of Commercial Arbitrators. Please see www.jamsadr.com/Claiborne for more information.*

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