

ARBITRATION

MYTHS & REALITIES

A PRACTICAL GUIDE FOR IN-HOUSE
COUNSEL

An Interdisciplinary Panel

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Myths

- Arbitration is faster than traditional litigation
- Arbitration is cheaper than traditional litigation
- Arbitration yields better results than litigation

Realities

- It depends
- It could be
- Maybe

Considerations

- **Advance planning and addressing key considerations can help ensure that the myths of arbitration become realities for your company.**
- **Some are common sense and apply in litigation as well.**
- **Others will ensure that selecting arbitration as the dispute resolution strategy of choice will produce the desired results.**

Mandatory Or Optional

- **Some companies make a policy choice to arbitrate every dispute**
- **Some will choose to litigate every dispute in Court.**
- **Others will choose to make arbitration optional**
- **Flexibility is key to maximizing the effectiveness of arbitration as a dispute resolution strategy**
- **With a flexible approach, it is best to set tight guidelines on when arbitration is no longer available as an option: a "do not back up, severe tire damage will result" line**

Financial or Substantive Threshold

- Set a financial threshold—typically based on the amount at issue in a dispute—to decide between arbitration and traditional litigation
 - Disputes below the threshold probably should be submitted to arbitration; above the threshold should go to Court.
 - Generally, lower value cases should be submitted to well-managed arbitration
- Rarely arbitrate "bet-the-Company" or "Mission critical" issues
- Determine whether certain classes of cases should *always* be submitted to arbitration; certain classes should *never* be submitted to arbitration; certain classes could go either way.
 - E.g. Employment disputes; personal injury cases; customer disputes; regulated industry disputes (telecom, energy), etc.

Choose Your Arbitration Provider Carefully

- **One of the most important decisions you'll make is the Arbitration framework/agency that will govern the arbitration of your disputes.**
- **There are several Agencies to choose from and each has its own set of rules, procedures and guidelines that must be followed.**
- **The framework/rules you choose will impact significantly the speed and cost of the process.**

Choose the Arbitration Provider Carefully (cont'd)

Available Options

- American Arbitration Association ("AAA")
- International Institute for Conflict Prevention & Resolution ("CPR")
- Judicial Arbitration & Mediation Services ("JAMS")
- National Arbitration Forum ("NAF")
- Federal Arbitration Act ("FAA")
- Revised Uniform Arbitration Act ("RUAA")

Arbitration Providers

Factors to Consider

- **Filing fees & administrative costs**
 - Filing Fee
 - Number of arbitrators,
 - Selection process
 - Arbitrator's fees
- **Specialized matters/expertise required**
- **Procedural & Discovery Rules**
 - Subpoena power for third parties (documents & witnesses)
 - Resolution of Discovery Disputes
- **Availability of Dispositive motions**
- **Recovery of costs and legal fees (be careful what you wish for)**
- **Are awards confidential or public**
- **Recovery of damages (punitive and compensatory)**
- **Ease of domesticating award**
- **Appeal rights (you must be joking)**

Staffing Considerations

- Proper staffing is key to effective cost control
- Case can be handled internally or through outside counsel
- Handling an arbitration with internal resources may be appropriate, but if you do, make sure attorney has access to all resources s/he will need
 - Be realistic as to the resources you will need for discovery and trial—don't skimp!
- If handling it with outside counsel, coordinate closely on strategy and staffing plan.
- Designate an in-house attorney actively to manage litigation, coordinate discovery and supervise involvement of business people.
- Effective in-house management is essential to cost control and strategic case development.

Staffing Considerations (cont'd)

- **The in-house litigation manager must have the authority to set and implement a realistic strategy, assess and measure risk and provide clear direction.**
 - **Be involved from the outset (claim submission, arbitrator selection, scheduling order, discovery process to hearing)**
 - **Set a realistic and livable budget**
 - **Closely monitor and control outside counsel and costs**
 - **Agree on fee approach**
 - **Make effective use of time with business people**

Drafting Contract Provisions

- **General Considerations:**
 - **Make clear which disputes arising from the contract will be arbitrated**
 - **If optional, that either party can opt to arbitrate a dispute even if one party objects**
 - **Identify the arbitration provider or the framework for the arbitration**
 - **Identify which rules will control, which will set up the manner for service and notice, allow for preliminary hearings to set discovery limitations, efficient discovery, setting a date for hearing, limits witnesses and documents, and sets time for award to be issued, etc.**

Drafting Contract Provisions (cont'd)

- **Whether there will be one arbitrator or a panel of three and, if a panel, how those three arbitrators will be selected (whether the parties will each select one and whether those party selected arbitrators will be considered neutral or "party appointed" arbitrators)**
- **Sets forth where the arbitration will be held geographically and the law that will govern**
- **Provides for enforcement of the award.**

Sample Provisions

- **Copies of sample contract provisions are included in the electronic materials we have prepared for you.**
- **Also included are copies of the rules for AAA, CPR, JAMS and NAF.**

Summary

- **If you:**
 - **Negotiate an Arbitration provision that fits your company's needs**
 - **Choose the Arbitration provider carefully**
 - **Manage the process effectively**

The "myths" of Arbitration could become your "reality"