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Dispelling the Top Eight Myths About Arbitration

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Introduction

- Myths about arbitration persist because, unlike court, arbitrations are usually private
- The proceedings, hearings, and awards are not typically open to public viewing or comment
- However the myths are not borne out by the facts
- Attorneys and arbitrators can control the proceedings to enhance their efficacy and efficiency

Myth 1: Arbitrators Do Not Follow the Law Or Are Inexperienced

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Fact: Arbitrators Are Experienced Attorneys Trained To Follow the Law

- Most Arbitrators Are Experienced Attorneys With Prior Or Current Law Practices.
- Arbitrators are typically trained in arbitration practice by ADR provider organizations such as AAA and JAMS.
- Most arbitrators have legal subject-matter expertise such as employment, real estate and intellectual property law.
- Many arbitrators have industry-specific expertise, such as construction, energy, and health-care.
- Arbitrators may be former federal or state judges.

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Fact: Arbitrators Are Subject to Strict Ethical Standards

- The Revised Uniform Arbitration Act requires arbitrators to disclose financial or personal interests and existing or past relationships likely to affect the impartiality of the arbitrator
- Some states have stricter disclosure obligations for arbitrators. See, e.g. Cal. Civ. Proc. Code secs. 1980 et seq.; Mont. Code Ann. sec 27-5-116; Colo. Rev. Stat. sec. 13-2-212
- The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes is similar to the RUAA and makes the required disclosures a continuing duty of arbitrators

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Practice Tips

- In drafting arbitration agreements attorneys can specify the law to be applied
- Counsel can also set forth the legal qualifications for the arbitrators in the arbitration agreement e.g. patent attorney, trial attorney, or former judge
- And counsel can specify any industry expertise required of the arbitrator e.g. biotechnology, health care, or oil & gas

Myth 2: Arbitrators Always Split the Baby

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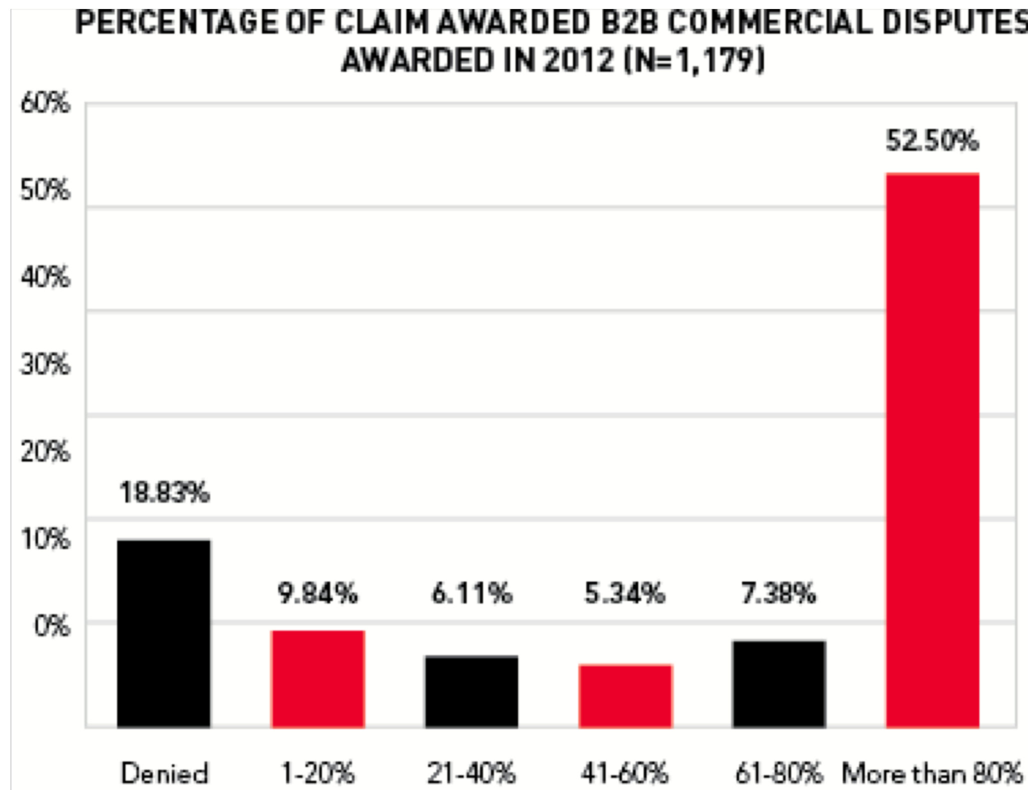
Fact: According to a survey of AAA B2B commercial awards issued in 2012, only 5% fell in the 41 to 60% category



Practice Tips

- Parties should consider the effects of overstated claims or counterclaims
- Consider "Baseball or Hi-Low" arbitration for cases where liability is not contested
- Include in the arbitration clause that the award is in the form of a reasoned opinion or findings

Myth 3: There Is No Discovery In Arbitration

Facts

- Discovery is as Common in Arbitration as in Litigation
  - While there is no statutory or common law right to discovery, arbitral rules provide broad guidelines
  - Extensive document and e-document production is common in arbitration
  - In larger cases, limited depositions are common

- Tips
  - Draft the arbitration clause to customize more or less discovery
  - Use a Protective Order to ensure confidentiality

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Fact: Arbitrators Balance Goals of Efficiency and Fairness

- Comply with arbitration agreement and governing rules
  - Institutional rules will address discovery
- Determine scope of discovery
- Employ techniques to streamline the process
  - Pre-hearing Order will set schedule for discovery production
  - Set a procedure to resolve discovery disputes
  - Help parties determine the scope of the discovery
  - Understand the limits of third party subpoenas
  - Involve parties, corporate counsel to participate

(Con't)

- Arbitrators balance the proportionality of discovery to the value of the case
  - Involve counsel and parties to weigh in on cost and value of retrieving information

Fact: Arbitrators Manage Discovery Disputes Effectively

- Use pre-hearing conference call to set the rules
- Encourage parties to cooperate
- Stage the discovery process
- Actively supervise with status update calls
- Have a streamlined process for resolving disputes
- Have each determination memorialized in written form
- Keep firm time limits

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Myth 4: Dispositive Motions Are Not Permitted In Arbitration

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Fact: The rules of the major providers allow for dispositive motions but apply different approaches

- **JAMS Rule 18:** The Arbitrator may permit a party to file a motion for summary disposition of a particular claim or issue, either by agreement of all interested parties or at one party's request, provided interested parties have reasonable notice to respond
- **AAA Rule R-33:** The Arbitrator may allow a dispositive motion to be filed only if the Arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case
- **FINRA Rule 12504:** Limits motions to dismiss a claim or party to releases, prior settlements, prior adjudication of same claims between the parties (i.e., res judicata or collateral estoppel)

CPR Guidelines on Early Disposition of Issues in Arbitration, Section 2: Early disposition procedures are appropriate when a party can demonstrate early disposition of a factual or legal issue may be accomplished efficiently and fairly. The Arbitrators and parties should weigh the difficulty and cost of establishing the issue in question and the effect early disposition of the issue will have on the proceedings that follow.

Enforcement of dispositive motions in arbitration: Courts will enforce awards based on dispositive motions.. *See, e.g. Sherrock Brothers, Inc. v. Daimler-Chrysler Motors Co., LLC*, 260 Fed. Appx. 497 (3rd Cir. 2008) (under FAA and AAA Commercial Rules, arbitrator did not deny party a fundamentally fair hearing by basing award on motion for summary judgment)

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Practice Tips

Identify issues, claims and defenses amenable to dispositive motions; examples:

- Statute of limitations
- Enforceability of limitation of liability or damages clauses
- Application of prior release or settlement agreement
- Statute of frauds
- Whether a legal duty is owed
- Other issues that do not require determination of disputed facts (*i.e.,* summary judgment type standard)

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Practice Tips

- Check rules for timing and requirements for permission to make a dispositive motion
- Try to negotiate agreement with opposing counsel concerning motions; arbitrators more likely to allow agreed-upon motions to be brought
- Consider alternatives of phasing hearing on issues if disputed facts otherwise preclude dispositive motions

Myth 5: Arbitration Procedural Rules Are Not Sufficient, Unlike Court Proceedings

Fact: Major Provider Rules Contain Detailed Procedural Rules Governing the Arbitration

- Provider rules typically provide procedures for appointment, challenge and disqualification of arbitrators. e.g. AAA Rule R-12, R-13, & R-18
- Simplified pleadings are required by major provider rules such as AAA and JAMS. e.g. AAA Commercial Rules R-4 & R-5
- Major providers' rules specify a streamlined procedure for discovery. e.g. AAA Commercial Rule R-22
- In larger cases arbitrators may permit limited depositions. e.g. AAA Commercial Rule L-3(f)

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Fact: Major Provider Rules Contain Detailed Procedural Rules Governing the Arbitration

- Specific procedures for dispositive motions are provided in the rules of major providers. e.g. AAA Rule 33
- Major providers' rules provide for the powers of the arbitrator, emergency protective orders, and the form and scope of the award. e.g. AAA Rules 38, 46,& 47
- Procedures for serving of notices, conduct of the hearings, taking of evidence, oaths, transcripts, and other matters are also provided in major provider rules. e.g. AAA Rules 32, 34, & 43

Practice Tips

- In drafting arbitration agreements, attorneys can and should incorporate the rules of major providers which will govern the arbitration

- In so doing attorneys limit the necessity of seeking assistance from a court where the parties cannot agree on procedural matters e.g. Filling a vacancy in the position of arbitrator due to his/her illness;. See AAA Rule R-20; or amending a party’s claim e.g. AAA Rule R-6

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Practice Tips

- By limiting the need for court assistance the parties reduce the time and expense of resolving their dispute

- Further, attorneys can modify the provider rules in the contract to provide more rigorous requirements e.g. specifying a shorter deadline for arbitrator selection

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Myth 6: Arbitration Takes As Long As Litigation

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Fact: Arbitration takes much less time to disposition than litigation

- The US District Courts median time from filing to disposition is 2 years and 2 months
  http://go.adr.org/impactsofdelay.html

- AAA-ICDR Arbitration median time from filing to disposition is 218 days* (7 months)
  * This is based on arbitrations awarded in 2014 excluding no-fault, accident claims and labor cases

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Practice Tips

- Specify realistic time for disposition of the arbitration
- Avoid clauses providing for extensive discovery or formal rules of evidence
- Simplify the arbitrator selection process and consider the impact of utilizing party-appointed arbitrators

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Myth 7: Arbitration Costs as Much As Litigation

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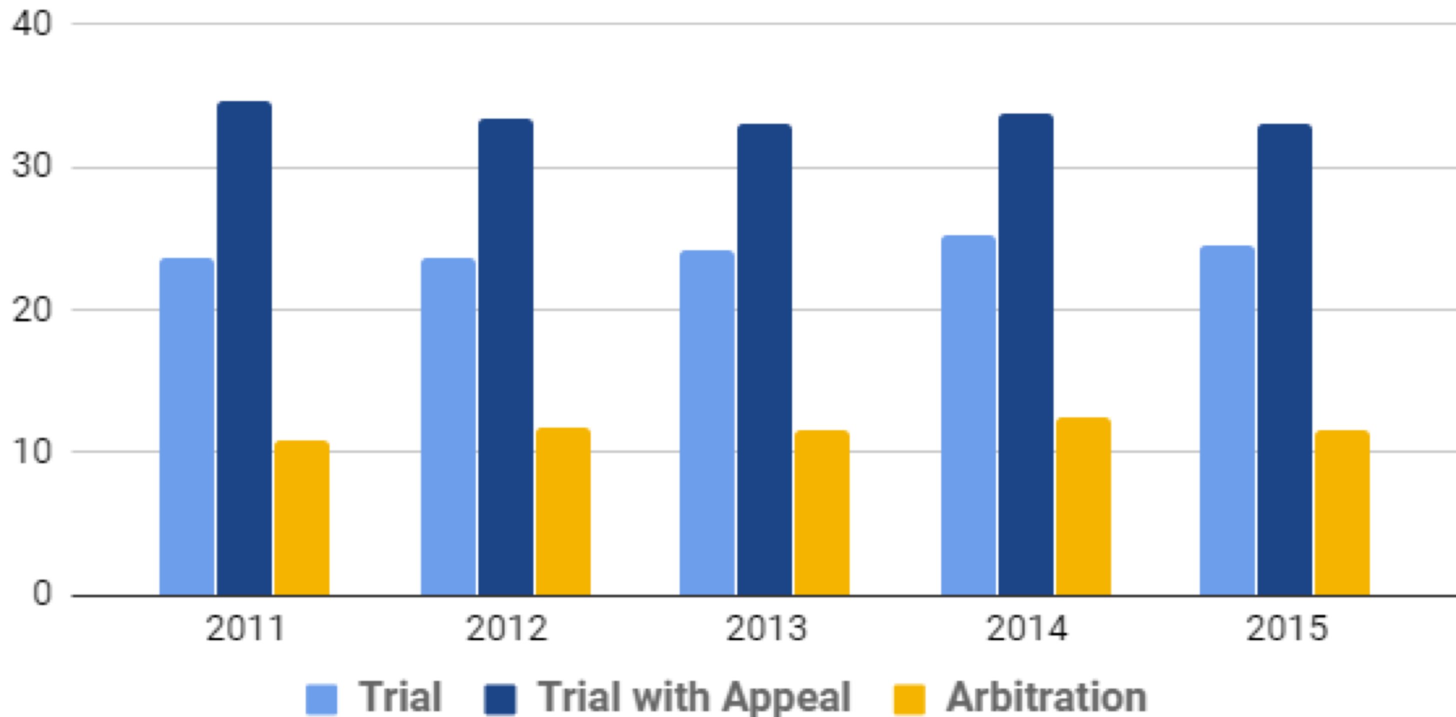
Fact: Micronomics March 2017 Study Shows Arbitration is Faster and More Efficient



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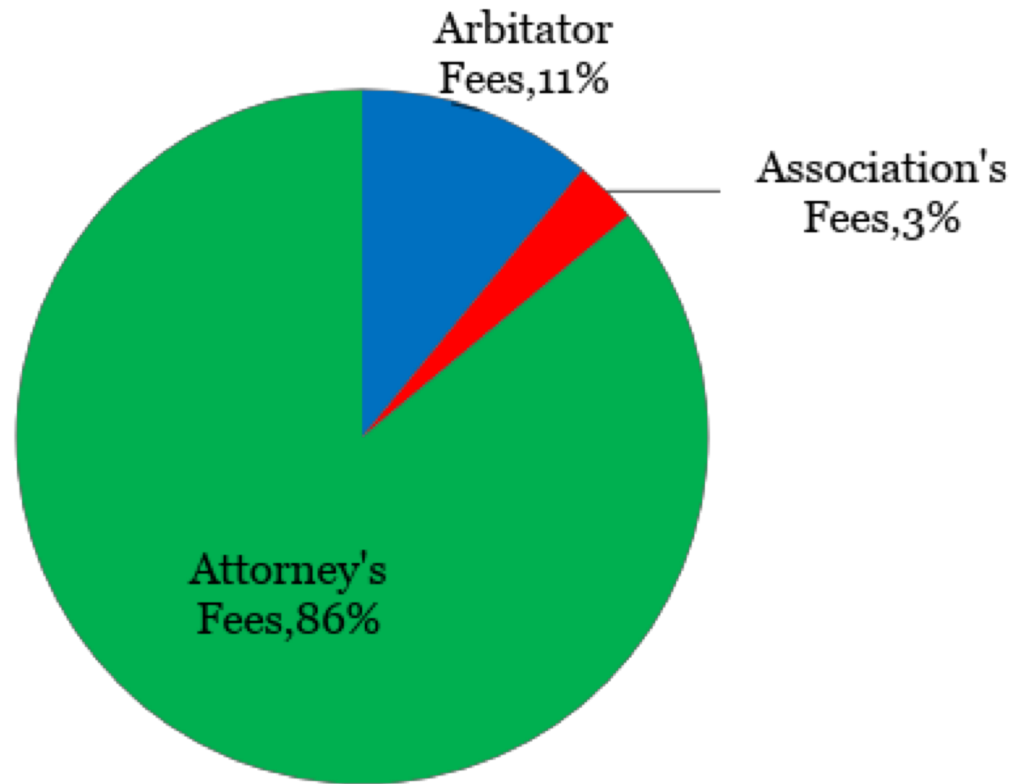
Fact: Attorneys fees are the largest cost of arbitration (Based on 2013 AAA awarded cases)



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Cost of Resolution Delay: Court Trials/Appeals v Arbitration

	U.S. District Courts v. Arbitration (Delay to Trial)		U.S. Appellate Courts v. Arbitration (Delay through Appeal)	
Year	Based on Delay in Entire U.S. ($Billions)	Based on Delay in States with Highest Caseload in 2015 ($Billions)	Based on Delay in Entire U.S. ($Billions)	Based on Delay in States with Highest Caseload in 2015 ($Billions)
1. 2011	$2.6	$3.2	$5.1	$5.7
2. 2012	$1.9	$2.5	$3.7	$4.2
3. 2013	$2.0	$2.5	$3.7	$4.1
4. 2014	$2.1	$2.8	$3.6	$4.3
5. 2015	$2.3	$2.7	$4.0	$4.5
6. Total	**$10.9**	**$13.6**	**$20.0**	**$22.9**

Direct Economic Opportunity Cost (Lost Resources) Associated with Delay to Trial and Delay through Appeal, 2011-2015

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Practice Tips

- Customize the arbitration clause
- Select a managerial arbitrator
- Select one arbitrator instead of tri-partite panel
- Bring in corporate representatives early in the case

Myth 8: The Parties Never Know How the Arbitrators Decided Their Award

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Fact: In larger cases the Arbitrators are typically required by rule or stipulation to provide a reasoned award, much like a statement of decision in a bench trial

JAMS Rule 24(h): Unless all parties agree otherwise, the award shall contain a concise written statement of the reasons for the award

AAA Rule R-46(b): The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate

FINRA Rule 12904(g): The parties may request an "explained decision" decision -- a fact-based award stating the general reasons for the arbitrators' decision. Inclusion of legal authorities and damage calculations is not required

CPR Rule 15.2 (administered and non-administered): All awards shall state the reasoning on which the award rests unless the parties agree otherwise

Practice Tips

Drafting: Require a reasoned award in the arbitration clause

Negotiate: If the arbitration clause is silent, ask for a stipulation with opposing counsel that a reasoned award be issued

Request: If no agreement on form of award is reached, request the arbitrator issue one, during the pre-hearing conference or before closing argument

Post-hearing briefing: Include specific relief that you are seeking with proposed, succinct reasons to prompt such inclusion in an award even if no agreement was reached on form of award

Know the rules of your tribunal!

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Questions