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Debunking Some Common Arbitration Myths: Benefits over court proceedings include cost, flexibility

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Arbitration has been dogged by myths that can lead to a distorted view of it compared with litigation, and even in some cases outright avoidance of the process. We consider three myths about arbitration, explain why they are incorrect as general characterizations, and suggest how to achieve the benefits of arbitration.

Not faster and cheaper

Arbitration can and should be faster and cheaper than court litigation. However, misguided actions of those controlling an arbitration – parties, counsel and arbitral tribunal – can result in it becoming more protracted and expensive.

Although arbitration entails certain costs not found in court proceedings - in particular, the cost of the arbitral tribunal and the institution (in administered arbitration) - these costs are a relatively small portion of the total cost.

Time and costs can quickly escalate when parties, counsel and the tribunal approach arbitration just like litigation. Too often in Canada, parties and counsel use civil procedure rules rather than adopt proven arbitration rules.

Delays and costs can be further aggravated by poorly drafted arbitration agreements, inexperienced arbitration counsel, tribunals that lack arbitration case management skills and when the objectives of corporate counsel and arbitration counsel are not aligned.

A principal benefit of arbitration is flexibility. As it is consensual, parties and counsel, with the tribunal's assistance, are free to fashion the process to address their specific requirements, to focus on the real issues, and to give priority to a speedy and efficient resolution of the dispute.

Other features of arbitration should almost automatically make it faster and cheaper than court litigation. The fact that the arbitral tribunal manages the case from start to finish, and thus becomes familiar with the case from the outset, avoids the time and cost of educating each motions judge through the course of court litigation.

Many procedural issues in court involve formal motions, with scheduling delays and repetitive, voluminous materials. In arbitration such issues can be handled quickly, with less formality and on short notice, often by telephone or in writing. This means savings of time, work and cost.

Confidential

Many people believe that arbitration is *always* confidential, but this is a myth. Confidentiality is possible but it is not assured.

Arbitration is private – a stranger cannot attend an arbitration hearing. An arbitration is solely between the disputing parties and the tribunal.

While in some jurisdictions arbitration is presumed confidential, in other jurisdictions the presumption is the opposite: It is not confidential unless the parties agree otherwise or an arbitral tribunal, with authority to do so, orders confidentiality.

Confidentiality is not codified in the UNCITRAL model law on international commercial arbitration as implemented across Canada. While some Canadian judicial decisions recognize confidentiality, there has been no appellate determination.

Confidentiality may be agreed in the arbitration clause or the contract of which it is a part, or confidentiality may be provided for in arbitral rules adopted by the parties.

Not all arbitration rules address confidentiality. Most allow parties to opt into confidentiality measures. For example, under the ICC rules, an arbitral tribunal can make confidentiality orders at a party's request. Conversely, the LCIA rules allow parties to opt out of a general principle of confidentiality that attaches to the award and all materials and documents produced in the arbitration.

It is good practice, therefore, to expressly provide for the nature and extent of confidentiality in an arbitration agreement, if confidentiality is desired. Despite contractual provisions, some confidentiality will be lost if the arbitration winds up in court. That cannot be avoided as courts have jurisdiction to grant interim measures, set aside awards, and recognize and enforce foreign awards. However, most other court involvement can be avoided with a well-drafted clause and the use of an arbitral institution to deal with arbitrator appointment, challenges and replacement.

'Splitting the baby'

The myth that arbitrators 'split the baby' persists, implying that arbitrators are less likely than courts to decide clearly in favour of one side.

Recently, the Rand Institute for Civil Justice reported a widespread belief among American corporate counsel (over 70%) that arbitrators, in coming to their decisions, make compromises between the parties' positions.

Empirical studies reach a different conclusion. A 2001 American Arbitration Association report, and a 2007 report by the International Centre for Dispute Resolution report, confirms that arbitrators rarely divide the result between the parties. This conclusion was confirmed by White & Case's 2012 International Arbitration Survey, where in-house counsel and arbitration practitioners said they believe that tribunals had 'split the baby' in only 17% of their arbitrations.

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