The Art of Arbitration

Experts Weigh In on What to Consider Before Filing for Arbitration

By Jann Johnson

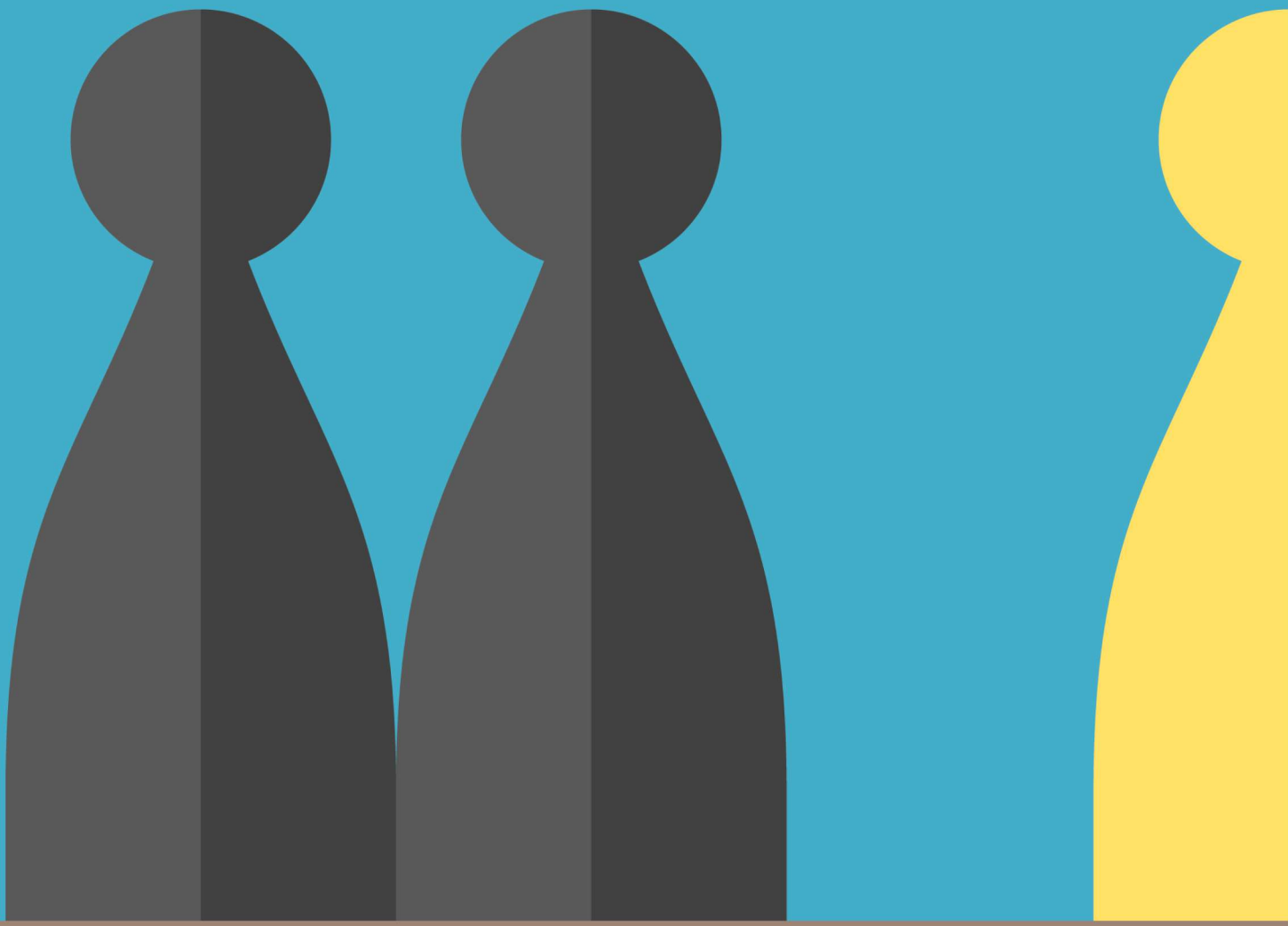
Many arbitrations arise out of a contractual obligation, so we gathered several knowledgeable arbitrators and attorneys to share their insights into critical considerations before commencing arbitration. See what they have to say about arbitrator selection, reviewing arbitration clauses, managing client expectations, and controlling costs.

WHAT SHOULD COUNSEL AND THEIR CLIENTS CONSIDER WHEN SELECTING AN ARBITRATOR?

ANNE BLUME: I have four guideposts for arbitrator selection: I want someone who will be fair, thorough, prepared, and thoughtful. I do not really need somebody with experience in the subject matter if they meet those four qualities.

JUDGE PHILIP BRONSTEIN: You need arbitrator footprints. Sometimes these footprints come from counsel who has experience with that arbitrator. Sometimes you look to reported decisions. Counsel should be diligent in arbitrator selection.

KEVIN SIDO: I see a twist on selection in instances where there is a three-arbitrator panel. Typically, each side picks an arbitrator and they select someone they know for the third arbitrator, the chair. However, I also have seen it done differently. Each side still picks an arbitrator, but then those two might deliberately choose the third arbitrator from outside the jurisdiction—somebody who maybe is not nearly as well known to the lawyers at hand. The result represents the appearance of more neutrality, if that is possible.



BLUME: Whether you are using one or three, you must do your homework when choosing an arbitrator. I appreciate it when arbitration providers keep data on arbitrators so that I can get a better overall picture, review their experience, and obtain references if needed. You are not able to choose the judge in litigation, but in arbitration you choose the arbitrator and your appellate rights are very limited. For that reason, due diligence is extremely important.

WHAT ARE SOME RECOMMENDATIONS FOR COUNSEL AND THEIR CLIENTS WHEN FACED WITH A VAGUE OR OVERLY SPECIFIC ARBITRATION CLAUSE?

JUDGE DENNIS BURKE: The smarter, cooperative, and more professional lawyers review the arbitration clause together. If it is vague or difficult to work with, then they can make changes to the clause as long as they are in agreement. If the clause identifies specific arbitration rules, then counsel can agree to use other arbitration rules—maybe rules that allow them to move the arbitration along more efficiently, if that is one of their objectives.

SIDO: When transactional attorneys write arbitration clauses into contracts, they cannot possibly write clauses to fit all

Meet the Panel

Anne Blume, Co-Managing Partner, Cozen O'Connor

Kevin R. Sido, Partner, Hinshaw & Culbertson LLP/Senior Mediator and Arbitrator, ADR Systems

Hon. Philip L. Bronstein, (Ret.), Senior Mediator and Arbitrator, ADR Systems

Hon. Dennis J. Burke, (Ret.), Senior Mediator and Arbitrator, ADR Systems

future arbitrations. Once counsel begin thinking about the clause language, they can come to agreement on amendments to the arbitration clause and the best rules to use. I agree with Judge Burke, when counsel work together to get this done, everyone benefits.

BLUME: When drafting contracts, it is difficult to envision what type of dispute you may have in the future. When you have a vague arbitration agreement or clause, you should rewrite it to suit your needs and the specific dispute. Confidentiality, procedures, and discovery—in other words, all of those things that would not typically be in an arbitration agreement or clause—should be included.

JUDGE BRONSTEIN: With a vague clause, it is mutually beneficial to craft something that works for all. With a specific clause, one party may feel advantaged; therefore, you might not get that mutuality. Specific clauses do not often meet the needs of parties. As Anne said, you cannot see the future. You might have a lot of "process" for a minor dispute that does not serve either side.

BLUME: Is a vague clause or specific clause better? That is a tough question. I think lawyers will fight over what they can fight over—and that is the rules. Specificity is probably better because then you know what you have going in rather than hoping you can get the other side to agree to various changes in the rules. This is especially true when you have a contract with a foreseeable type of dispute and you can provide for appropriate dispute resolution.

SIDO: I agree. A vague clause leaves too much open. You would want to establish procedural matters such as how experts will be examined at the hearing, to what extent the rules of evidence will apply, and so forth. A specific clause is better.

JUDGE BURKE: My vote also goes to specific rather than vague because you will not always have two attorneys who can work together. If counsel for both sides have a vague clause and they can agree to amend it to add more specificity, then the arbitration is likely to run much more smoothly.

"I APPRECIATE IT WHEN ARBITRATION PROVIDERS KEEP DATA ON ARBITRATORS SO THAT I CAN GET A BETTER OVERALL PICTURE, REVIEW THEIR EXPERIENCE, AND OBTAIN REFERENCES IF NEEDED," SAYS BLUME.

WHY IS IT CRUCIAL TO MANAGE CLIENT EXPECTATIONS IN ARBITRATION?

SIDO: Managing client expectations before arbitration is very important. You need to prepare witnesses for what might seem like a Wild West-style of questioning in arbitration. They need to appreciate that no matter what they think they know about the rules of evidence, it will be different in arbitration. Hearsay may come in, for example.

JUDGE BRONSTEIN: You mean "good hearsay."

SIDO: Exactly. I would advise my clients to forget anything they have seen about courtroom scenes on television or in movies—arbitration is much more freewheeling and less structured when it comes to the style of questioning, order of witnesses, objections, and arguments. I would also let them know that documents might appear as exhibits that may or may not have been previously produced. While surprises should be avoided, arbitration rules might permit some surprises.

BLUME: In my world, it is all about managing my client's expectations in arbitration. With a detailed arbitration clause, you can tell your clients with more certainty what is likely to happen. When you have a clause with a lot of ambiguity, you are relying on the goodness of your opposing counsel—good luck.

JUDGE BURKE: Prepare the client not to react to negative evidence because it can be detrimental to the arbitration. The cost and efficiency of the arbitration can be impacted.

BLUME: For me, managing the expectations of my client starts on day one when I look at the arbitration clause and decide what I need to know and how I will present my case.

WHAT ARE KEY CONSIDERATIONS WHEN SEEKING TO CONTAIN COSTS IN ARBITRATION?

JUDGE BURKE: I think we also need to talk about the things that increase the cost of arbitration.

JUDGE BRONSTEIN: Discovery and motion practice.

SIDO: Agreed.

BLUME: Completely.

JUDGE BURKE: I would add delays to that list.

SIDO: Judge Bronstein is right about discovery. Some lawyers still think they are in court, even in arbitration. Others need a security blanket; they cannot imagine trying a case without having already taken the deposition of this witness or that witness. They cannot imagine being thoughtful about questioning witnesses rather than knowing that the answer to their next

question is on page 22 of the transcript. I think the true spirit of arbitration is no discovery at all.

JUDGE BRONSTEIN: I try to work with counsel in preliminary meetings to nail down what discovery is essential to the case. Often, through discussion, counsel will back off from their initial positions. This happens most frequently when the parties understand that full-breadth discovery will only serve to prolong and complicate proceedings without substantial gain to either party, likely defeating their goal of prompt adjudication at a reasonable cost. The arbitrator should work with counsel and achieve consensus rather than requiring a ruling in motion practice. If counsel are left feeling that they have been dealt with fairly, then it will go a long way to obviating discovery issues down the road.

BLUME: Yet the purpose of discovery is to obtain evidence. It is not really discovery to know what is going to be evidence.

SIDO: You make an interesting point. Litigants in arbitration need to know whether their arbitrator is willing to receive evidence that is not live or in the form of an affidavit. Receiving telephone testimony is probably not bad. Video evidence depositions are not a big deal. These are questions that counsel need to explore before arbitration if those witnesses are not within the subpoena power of the arbitrator. These are the types of issues that can make an arbitration explode and increase costs.

SIDO: I think the only way to contain costs in arbitration is appealing to your adversary. You may need to bring them around to an expedited process if your goal is to keep a lid on costs.

BLUME: Precisely. If you cannot reach an agreement, then you take the issue to the arbitrator and attempt to limit discovery and motion practice.

SIDO: On the subject of motions in arbitration, I think this is a touchy point, as Judge Bronstein alluded to earlier. One of the grounds for upsetting the award would be the failure to receive relevant evidence. I think arbitrators err on the side of too much rather than too little weight assigned to questionable evidence.

JUDGE BURKE: You are absolutely right. You can get in a lot of trouble keeping it out, but if you let it in and it is irrelevant, then it is immaterial. The presumption is that you did not use it in your decision.

BLUME: Not all discovery is necessarily a huge cost escalator. It depends on the purpose and scope of the discovery. Sometimes an expert will want to consider testimony in order to confirm their opinions. There are times when you want to know what the witness will say in advance.

JUDGE BRONSTEIN: A key to holding down costs is a thorough pre-hearing conference. The parties should meet to discuss whether the pleadings are sufficient, containing all the facts and issues we will be grappling with during the arbitration. That will help save time during the arbitration. It provides clarity for the scheduling order and what will likely be coming in during the arbitration. Another key to holding down costs is the parties conferring before bringing issues to the arbitrator during the arbitration. Meet in person, not over the phone. Tweak out the problems, then take it to the arbitrator. I cannot stress this enough.

JUDGE BURKE: A good arbitrator manages the arbitration process, keeps the arbitration moving forward, and quickly addresses issues, especially discovery and motion practice. ■

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