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New York Law Journal

Confessions of Two Former General Counsels—Has Arbitration Changed or Have We?

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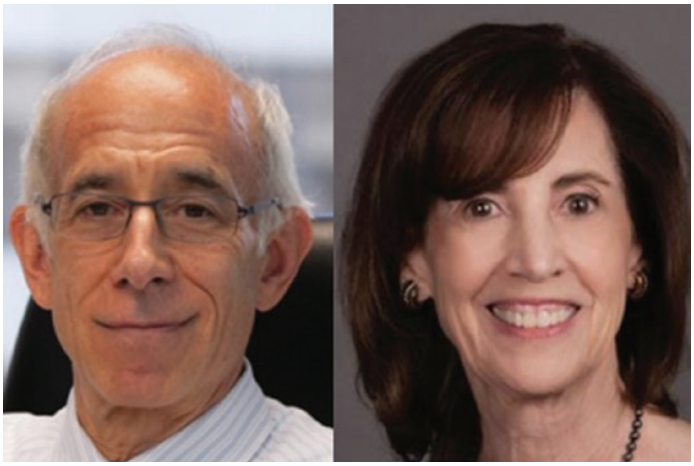
April 24, 2024

Ten years ago if you asked us what we thought of arbitration we probably would not have had too many positive things to say. As former general counsels, we approached commercial disputes that could not be resolved via negotiation or mediation as bound for court. Not that we welcomed the idea of litigation, but we were skeptical of domestic arbitration as an alternative. Why? Well, there were a number of reasons.

For one, we did not know as much about it as we should, and, like it or not, we were very used to litigation. Arbitration seemed like a non-transparent process where you had to take a shot on unknown individuals rendering a decision that was not subject to appeal. Maybe they would apply the law or maybe not. And if you had a strong case, arbitrators would likely be inclined to "split the baby" and produce a compromise award. And if you were a defendant and, as our large corporations generally were, courts provided an opportunity for dispositive motions ending frivolous cases early on while arbitration did not.

Today, we no longer feel that way. Now, some might say, "where you stand depends upon where you sit," and we now sit… as arbitrators. But we suggest that there is more to it than that. Indeed, a lot has changed over the last 10 years. For starters, the major arbitration providers have responded to these criticisms.



Courtesy photos

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Arbitral organizations have amended their arbitration rules in recent years to standardize important practices in areas such as confidentiality, consideration of consolidation/joinder motions and cybersecurity. They have adjusted the dollar thresholds for application, not only of expedited procedures, but for large and complex commercial disputes.

In addition, they show real interest in innovation, responding to party surveys and practitioners to promote efficiency and reflect advances in technology.

They have each made efforts to enhance the qualifications and training of those who are invited to join their rosters. And there has been a major push by many of these organizations for diversity among the arbitrators and the case managers themselves. Importantly, there has been emphasis on subject matter expertise and professionalism among the ranks, reducing the concern that the quality of arbitrators is an unknown risk.

At the same time, during these last 10 years, law schools have added alternate dispute resolution, and arbitration, in particular, in their core curriculums. This has led to a new generation of advocates, more accustomed to the efficiency and flexibility afforded through arbitration. In turn, commercial contract negotiators have become increasingly conscious of drafting tailored arbitration clauses, with built-in mechanisms aimed at choosing an unbiased arbitration tribunal and, where appropriate, limiting discovery.

Nonetheless, some of the same concerns we had as general counsels still linger. Do arbitrators, more than judges, have the propensity to "split the baby" when rendering an award? Are arbitrators inclined to side with the deeper-pocketed party in the hope of return business? Well, let's take those often-leveled complaints one at a time.

First, as to the unfortunately phrased "split the baby" concern, empirical studies have shown that compromise awards are relatively rare in commercial arbitrations. (*See*, for example, Irene Ten Cate, *"Splitting the Baby",* Brooklyn Law School Legal Studies, November, 2022). And in our own experience, neither of us is aware of a panel splitting the baby where the facts and the law led to a different result. In contrast to mediation, arbitrators are not focused on seeking the approval of, or at least the acquiescence of, both sides, but rather on applying the law to the facts and objectively calling balls and strikes.

Second, as to bias, our experience is that arbitrators, and the broader arbitration community, are focused on and deeply aware of the importance of avoiding all forms of bias (including implicit bias) , and cognizant of the necessity of avoiding potential conflicts of interest. And concerns about bias are not unique to arbitration.

Indeed, one only has to read recent news accounts to realize, rightly or wrongly, that partiality and conflicts of interest amongst judges is very much on the public's radar, including at the highest levels. In the arbitration world, rigorous disclosure requirements have been implemented.

Under the rules of the leading arbitral institutions, arbitrators are required to disclose any material interest, financial or otherwise, that might influence an arbitrator's impartiality. Arbitrators are well aware that the failure to disclose can give rise to vacaturs.

Moreover, an arbitration tribunal, comprised of three arbitrators, lessens the concern that a single arbitrator might have some pre-conceived bias or some predilection to rule for a party that appointed them or would be more likely to do so in the future.

There is another and important distinction between judges and arbitrators relating to receiving feedback from the parties. In litigation, judges operate essentially in a bubble. In arbitration, the parties have the opportunity to provide feedback to the arbitral institution, both for the arbitrators themselves as well as the process. And, you can be assured that, if both parties provide negative feedback concerning an arbitrator, that arbitrator is not likely to be listed often, if at all. Equally important, the arbitration process can improve from receiving constructive feedback from the parties.

What about an oft-repeated concern relating to the inability to appeal from an arbitration award? For that there is a two-fold answer. First, most of the major arbitral institutions have built into their rules a mechanism for filing an appeal if both sides agree. Second, this option is very rarely utilized, in large part because parties choose arbitration for finality and to avoid endless appeals. In fact, limitation on appellate review is perceived by many as an important advantage of arbitration.

In evaluating the choice between litigation and arbitration, we believe it is important to consider the unique advantages that arbitration can deliver. Arbitration rules provide the parties the opportunity to mold a process that is best designed to address their particular case. The ensuing efficiencies can relate, not only to a streamlined discovery process, but to creative ways to manage expert testimony and reduce the time and expense involved in eliciting testimony.

Some litigators may feel a degree of discomfort with the fact that the formal rules of evidence may not be binding in arbitration. However, some view this as a benefit in that the removal of technical requirements creates a more efficient process to get at the facts. In any event, the parties decide. They may choose arbitral rules that require the application of both the Federal Rules of Evidence and the Federal Rules of Procedure (*See*, FedArb Rule 1.04), or they may choose AAA or CPR Rules, which provide that the rules of evidence do not apply and, at the same time, give some flexibility to allow for the parties to agree otherwise (*See,* AAA Rules R-1(a) and CPR Administered Arbitration Rule 1.1).

Please don't get us wrong. Arbitration is not a panacea. It has its issues. There are many commercial litigators who still feel arbitration can be too litigation-like, leaving the parties mired in discovery, and leading to significant costs. Of course, inasmuch as the parties can limit discovery either in their arbitration agreement or joint agreement at the commencement of the case, these costs can be avoided or controlled by the parties and their counsel.

In addition, we acknowledge that there continues to be a greater opportunity to get a case dismissed on motion in court than in arbitration as some arbitrators are reluctant to grant dispositive motions. This results from legitimate concerns that granting dispositive motions might jeopardize the enforceability of the arbitration award by failing to give parties the opportunity to provide relevant evidence at a hearing.

At the same time, concerns about granting motions to dismiss, supported by the facts and law, are often misplaced and point to the importance of choosing the right arbitrator who has the confidence to address dispositive motions properly. Recent changes in arbitral rules have made clear that arbitrators are clothed with the authority to grant dispositive motions.

There is no question that arbitration does not always provide the perfect solution. But we suggest the same can be said for the costly and, quite often, frustrating litigation experience. As such, we believe that if you want a process that can provide you with flexibility, the ability to choose the decider(s), and the potential for a relatively efficient and speedy process, arbitration may well be your answer.

We may not be entirely objective but, as former general counsels and now full-time neutrals, we are uniquely situated to provide an inside view on what once seemed to us to be an opaque and somewhat flawed process and to debunk some of the outdated misconceptions. Yes, arbitration has changed … and so have we.

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