

Start in Court, but End in Arbitration: How and Why Disputes Started in Court Can Benefit From Arbitration

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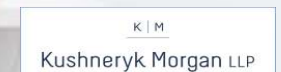
Arbitration Place and Kushneryk Morgan LLP

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Agenda

- **Introduction**
- **Advantages of Arbitration**
- **Best Use of Arbitration**
 - Pre- and Post-Dispute Arbitration
 - Arbitration as an Option During Ongoing Court Proceedings
 - Use of Arbitration for Specific Dispute Elements
- **Choosing Your Arbitrator**
 - Arbitration Agreement Requirements
 - Diversity Considerations
 - Managing Conflicts of Interest
 - Interviewing Potential Arbitrators: Ethical Considerations
- **Conclusion**



Toronto Court Availability as of May 21, 2024

Associate Judges Motions (Under 90 Mins) In Person: No posted availability
 Associate Judges Motions (90 Mins - 120 Mins) In Person: No posted availability
 Associate Judges Motions (Under 90 Mins) Virtual: May 13, 2025
 Associate Judges Motions (90 Mins - 120 Mins) Virtual: April 30, 2025
 Express Court (Short Motions before an Associate Judge): No posted availability
 Civil Case Conference (before a Judge): January 8, 2025
 Removal of Solicitor Motions (Associate Judge): No posted availability



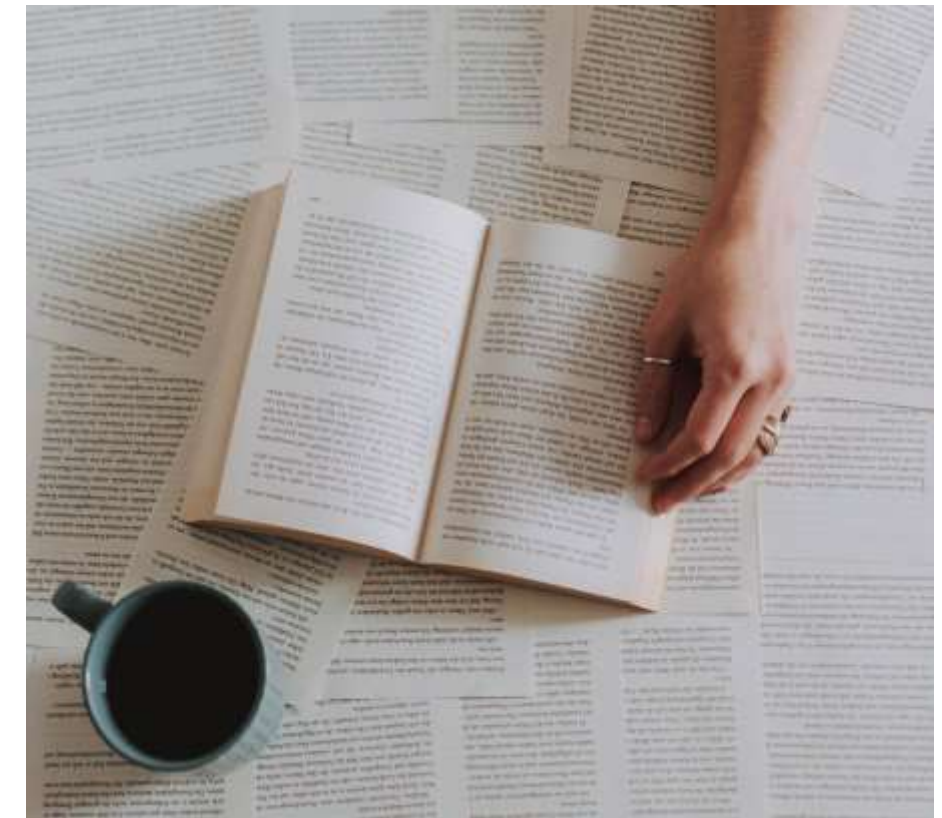
KIM
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Institut d'arbitrage et de
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Arbitration

- Expediting dispute resolution
- Greater availability and case management continuity
- Ensuring cost-effectiveness
- Flexibility
- Tailor made procedure
- Confidentiality
- Choice of decision maker



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Best Use of Arbitration



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Pre- and Post-Dispute Arbitration



Pre-dispute arbitration agreements - arbitration agreements entered into **before** a dispute arises:

- A well-constructed clause can **provide certainty** by defining the process prior to a dispute, after which obtaining agreement becomes more problematic; and
- Usually contained as **an arbitration clause** – a part of a larger contract.

Post-dispute arbitration agreements are entered into by parties **after** the dispute has arisen.



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Pre- and Post-Dispute Arbitration (continued)

Tips for drafting a post-dispute arbitration clause:

- Consider the **scope** of the dispute to be arbitrated
- Consider using a **model clause**
- Choose a suitable **seat of arbitration**
- Consider **the number of arbitrators** and **the place** where the arbitration will occur
- Expressly state **the governing law** for the agreement to arbitrate
- Consider appropriate **procedure**:
 - regular procedures / the expedited procedures
 - specialized rules (e.g. construction, patent, healthcare)
 - customized procedures.

The arbitration clause must be agreed to by the parties to the dispute to be arbitrated.



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Arbitration as an Option During Ongoing Court Proceedings

Moving court-based litigation to arbitration can include:

- the entire proceeding and all future disputes related to the proceeding
- only the remaining proceeding if court-based litigation has progressed
- part of the proceeding, such as central procedural or core substantive issues only
- limited steps such as refusals motions or motions to strike



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Arbitration as an Option During Ongoing Court Proceedings (continued)

Remedies in Arbitration

The *Arbitration Act* provides arbitrators with jurisdiction to award:

- damages,
- specific performance,
- injunctions (that do not affect non-parties to the arbitration); and
- other equitable remedies.

Enforcement of arbitration awards is dealt with by the courts.



Arbitration as an Option During Ongoing Court Proceedings (continued)

How to get a party to agree to arbitrate during ongoing proceedings?

- i. Make a settlement offer at the same time
- ii. Offer to pay cost of arbitration (or at least pay it up front)
- iii. Delay may not be in the interests of both parties
- iv. Consider Med-Arb





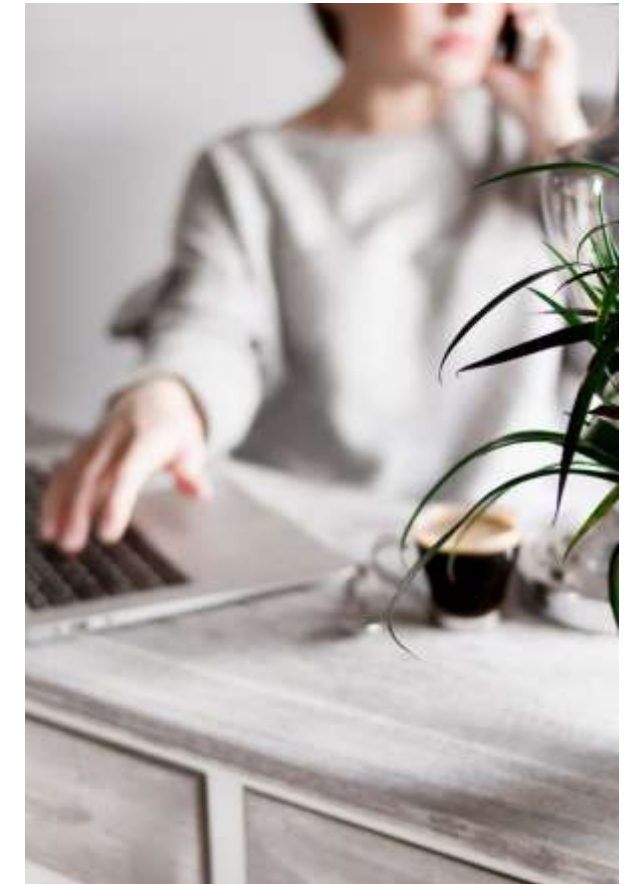
Arbitration as an Option During Ongoing Court Proceedings (continued)

Use of Arbitration for Specific Dispute Elements

- i. Refusals and document production motions
- ii. Evidence preservation motions
- iii. Case management and timetables
- iv. Motions to strike
- v. Interim injunctions
- vi. Consider continuing in arbitration based on initial experience



Choosing Your Arbitrator



Choosing Your Arbitrator

1. Arbitration Agreement Requirements

If the arbitration is pursuant to a pre-existing arbitration agreement between the parties, does that agreement require:

- a single arbitrator or a panel?
- a specific type of arbitrator (i.e., that the arbitrator be a lawyer or a different professional, or located in a particular place, or is a member of a particular organization)?
- what happens if the parties cannot agree on the appointment of an arbitrator?
- the use of certain procedure rules (i.e., ADRIIC Arbitration Rules)?
- what is the seat of the arbitration? If the seat of arbitration is Ontario, which legislation applies: *the Arbitration Act, 1991*, or *the International Commercial Arbitration Act, 2017*?



Choosing Your Arbitrator

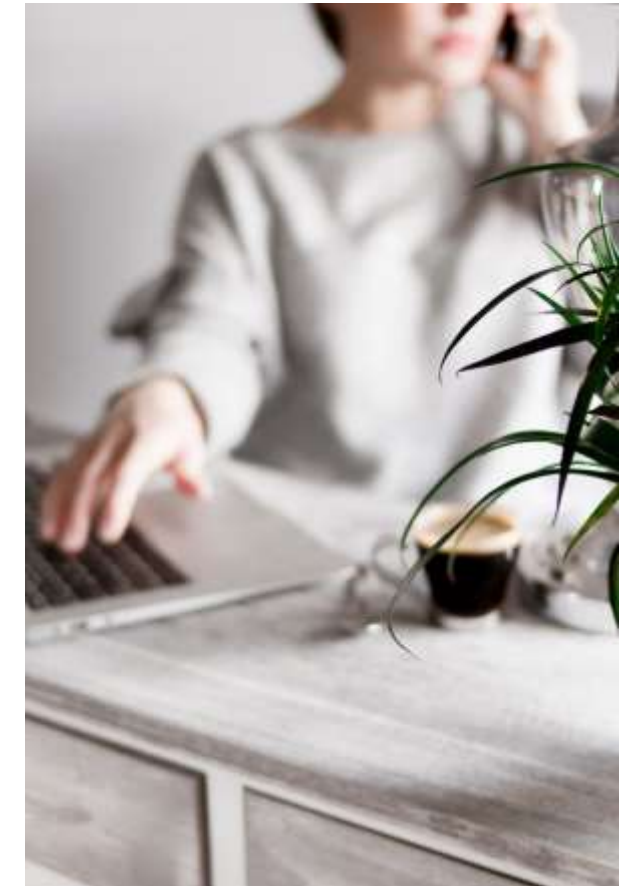
2. Diversity Considerations

Diversity:

- enhances outcomes for clients
- helps build inclusion within the legal system

Steps All Lawyers Can Take to Increase Neutral Diversity:

- Request diverse names when seeking recommendations for arbitrator.
- When proposing arbitrators to opposing counsel, include diverse candidate.
- When drafting ADR clauses:
 - a. consider requiring that arbitrators from diverse backgrounds be considered for arbitration; and
 - b. consider whether the credential requirements in your arbitration clause are unnecessarily excluding diverse candidates.



Choosing Your Arbitrator

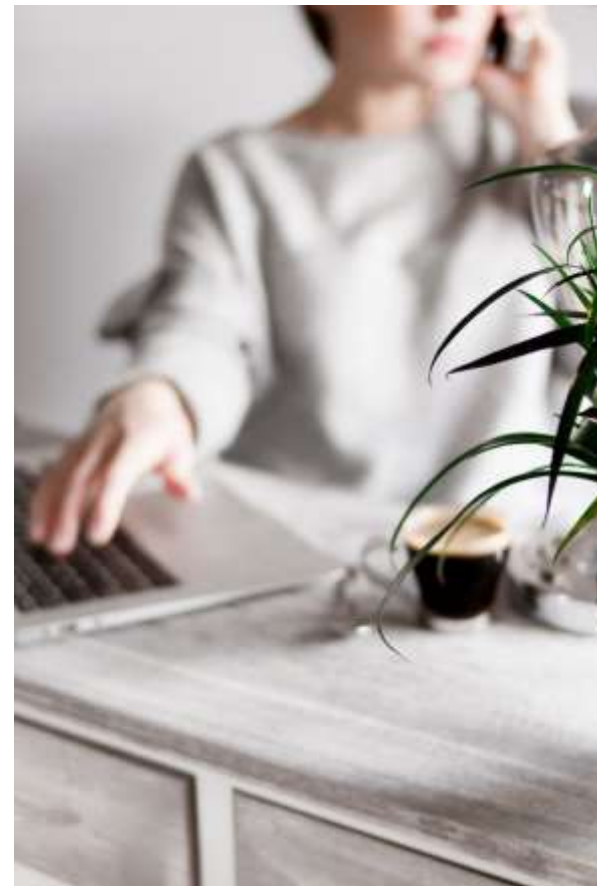
3. Managing Conflict of Interest

Framework

- Most institutional arbitral rules address **conflicts of interest**

Types of conflicts:

- a connection with a party
- a connection to one of the parties' legal representatives
- an issue in the arbitration that the arbitrator has already expressed a view on
- Arbitrator's **duty to disclose**
- **Impartiality:** The same test applicable to a court is applicable to an arbitrator acting in a judicial capacity: "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the arbitrator], whether consciously or unconsciously, would not decide fairly"?



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Choosing Your Arbitrator

3. Managing Conflict of Interest

Examples

CC/Devs v India: an arbitrator **had pronounced a view on a key legal issue in the case**, having served on three previous tribunals that had considered the issue and then written a chapter in a textbook defending his view. It was held that this could give rise to **doubts** to an objective observer as **to the arbitrator's ability to approach the question with an open mind.**

Jacob Securities v. Typhoon Capital B.V.: Arbitrator used to be a member of a law firm. However, in this case, he **was not personally associated with any of the work done by his former firm relating to Project Gemini.** The Court found **no reasonable apprehension of bias.**

Telekom Malaysia Berhad v Republic of Ghana: **the arbitrator was concurrently acting as counsel in another case.** The arbitrator had to resign in view that he would be predisposed towards investors by virtue of his concurrent role.



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Choosing Your Arbitrator

4. Interviewing Arbitrators: Ethical Considerations

- Arbitrators previously were reluctant to give pre-appointment interviews, but now there is a growing acceptance of such a practice.
- Great care is required to ensure that such interviews do not compromise the integrity of the arbitral process, and that the prospective arbitrator remains able to carry out his key role as an impartial and independent decision maker.

The IBA Guidelines on Party Representation in International Arbitration: *ex parte* communications with a prospective arbitrator should be limited to providing a general description of the dispute and obtaining information regarding the suitability of the prospective arbitrator.

“Out of bounds”: “a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute”.



Choosing Your Arbitrator

4. Interviewing Arbitrators: Ethical Considerations

Practical steps:

1. Be aware that **all communications with the arbitrator are potentially producible**, and **may form the basis for a challenge** of their appointment. Think carefully about what you wish to achieve through the interview, and how this is documented.
2. **Prepare an initial briefing note** to the prospective arbitrator, which should be sent across in advance of the interview. This should cover the following issues to enable him or her to run the conflict checks and to confirm general availability:
 - a. the identities of the parties and counsel;
 - b. the names of arbitrators who have already been appointed;
 - c. the applicable procedural rules and the quantum of the dispute;
 - d. the seat and/or venue of the arbitration;
 - e. any specific nationality, language and/or other requirements under the arbitration agreement; and
 - f. the estimated timeline of proceedings.



Key Takeaways

- Arbitration offers an effective, efficient dispute resolution process.
- Arbitration can be used for all or part of a dispute, even if a proceeding has been commenced in court.
- Selecting the arbitrator is a key benefit of arbitration and needs to be undertaken with care.



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Questions?



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Eric has acted as an arbitrator in ad hoc and institutional arbitrations, having been appointed by both parties and institutions. He is a member of Arbitration Place's NextGen Roster and has taught the Toronto Commercial Arbitration Society's Gold Standard Course in Arbitration. He has also acted as a mediator. Eric's expertise in arbitration and commercial litigation have been recognized by Lexpert, Who's Who Legal and Best Lawyers.

Eric is also a founding partner of Kushnery Morgan LLP, a boutique law firm in Toronto focusing on corporate governance, commercial litigation and arbitration, and securities.

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