NYSBA FALL 2014 | VOL. 19 | NO. 2

NYLitigator

A Journal of the Commercial & Federal Litigation Section
of the New York State Bar Association

Inside

Arbitration Dos and Don'ts for the Trial Lawyer

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A client has just asked you to represent it in the arbitration of a contract dispute. The case looks pretty much like others you have taken to bench or jury trial victories. You think you are all set.

Think again. You would not try a jury trial as if it were a bench trial, or vice versa. Why assume that you should try a case in arbitration as if it were in court?

Arbitration rules, handbooks and training programs can provide valuable insight into the steps leading to the evidentiary hearing. The literature and training programs will take the practitioner in detail through the filing of claims; the initial administrative conference in administered cases; the arbitrator selection process; the first conference with the arbitrator(s) leading to the crucial first procedural order; the pre-hearing exchange of documents; limitations on discovery, motions, subpoenas on nonparties, and evidentiary objections; the filing of witness lists, pre-marked exhibits, witness statements, expert reports, and pre-hearing memos; and post-hearing confirmation or vacatur of awards. Relatively little can be found in the literature, however, about the evidentiary hearing itself.

In the real world, much depends on the arbitrator's background, so the common wisdom is that cases are frequently won or lost at the arbitrator selection phase. A second commonplace that should resonate with every trial lawyer is the need to learn as much as possible about the arbitrator and adapt attorney style to what works with an arbitrator assigned to the case. For example, some arbitrators like the hearing to feel like a bench trial. Others like every step in the process to function more like a business meeting. An attorney representing a party needs to know this in advance or take cues from the arbitrator during the preliminary conference.

Unlike jury selection, which often follows motions and discovery practice, an attorney in arbitration needs to determine at the beginning of the case what sort of arbitrator would be receptive to the case on the merits and to his or her style. Arbitrator selection is a subject worthy of dedicated study.[1] The mechanics of arbitrator selection can vary depending on the nature of the case, the governing rules, and the terms of the arbitration clause. Still, some characteristics do appear across the commercial arbitrator spectrum.

Commercial arbitrators generally like to think of themselves as problem solvers and look to counsel to provide the tools arbitrators need to solve those problems. Arbitrators like to see the attorneys (a) focusing on the merits, (b) finding common ground on preliminary matters, and (c) using the time allotted efficiently and cost-effectively. They do not appreciate extensive attorney wrangling over procedure either before or at the hearing.

Arbitrators pride themselves on getting the point the first time it is made. They do not appreciate duplicative argument, briefing or testimony. They rarely see the point of having multiple witnesses testify to the same facts. They appreciate effective cross-examination, but they expect the cross-examiner to remain courteous and stay within pre-agreed time limits.

A good deal of planning, preparation and compromise with opposing counsel goes into effectively representing a client at a low-key, business-like, problem-solving evidentiary hearing. The following "dos and don'ts" are some practical tips offered to help a lawyer get started thinking about how to work with, not against, arbitration custom and practice in order to achieve good results for clients.

Dos	Don'ts
A. Study the Rules and Guidelines	
Read the arbitration rules and guidelines from cover to cover. • Think about how they differ from what you are used to in court; • Assume the arbitrator(s) will enforce the rules and follow the guidelines; and • Review the literature on commercial arbitration, especially when it is addressed to counsel's obligations.[2]	Don't read only the published rules applicable to the case. Also review the most relevant guidelines and protocols that tend to shape the conduct of the arbitrator(s) in specific categories or phases of arbitration.[3]
B. Advise the Client About Arbitration	
Provide your early case assessment with the arbitration process in mind. • Positions can be stronger or weaker in arbitration; figure it out *before* you advise the client. • Provide the client with realistic projections of arbitration cost and time in your early case assessment, and update your assessments.[4]	Don't overlook the strategic and tactical advantages or potential disadvantages of arbitration when you provide the client with your case assessment. Don't assume your client knows what to expect in arbitration; determine its experience level and adjust your advice accordingly.
Introduce the concept of mediation as a related step in the arbitration process.[5] • Make clear that arbitrators are generally not expected or supposed to get involved in settlement discussions but appreciate it when the parties give it a try. • Point to the provider organization's policies or procedures that favor mediation and that may treat mediation as a normal step within the arbitration process.[6]	Don't be deterred by a client's concern that suggesting mediation may send a signal of weakness. Explain that, if the arbitrator(s) find out that your side wants to pursue mediation or some other settlement device, the only risk is that your side will come across as sane.
Send the client a few articles if it is skeptical. • Providers and bar groups offer guides for the lawyer and non-lawyer alike;[7] read them, send the best-suited one to your client, and have a discussion with the client about the pros and cons of the process.	Don't unnecessarily place stress on your credibility with a client that is highly resistant to the advice. You can point to provider institution user handbooks and to neutrals on record providing the same advice.
C. Map Case Strategy Before the First Conference with the Arbitrator(s)	
Have an early game plan, ideally, before arbitrator selection. • Before the first conference with the arbitrator(s), know what you need in terms of exchanges of documents and other information. The first procedural order is your road map for the case.	Don't improvise. Your game plan may have to be adjusted, but, without one, you will not make good use of those crucial early encounters with the arbitrator(s), and the first procedural order will feel like a straightjacket as the case evolves in unexpected ways.

Dos	Don'ts
D. Assume Very Little Discovery	
Develop your core case and defenses on the assumption of little or no discovery. • Search your client's records to dig out all the essential documents. • Line up, interview and lock in the availability of all of your key witnesses. • Use the Internet. • Consider a private investigator, if needed, to fill in the blanks. • Look to some limited discovery for the gravy and, whenever possible, not for the meat and potatoes. Prepare your basic discovery plan before arbitrator selection. • If discovery is essential to your case, select arbitrator(s) with an active case load in court, or with experience as counsel in litigation, or as a judge in a court that allows broad discovery.	Don't think that you can build a case out of the other side's files or deposition testimony of its witnesses. Broad discovery is rarely allowed in domestic arbitration, and is just not available in international commercial cases. Arbitrators are trained to limit discovery, related expense, and the time needed to get to an award.[8] Don't assume that all arbitrators appreciate the challenges you face as counsel. Look for clues in the arbitrator candidate's professional experience. Has the arbitrator ever tried a case in court or in arbitration? How important will arbitrator empathy for the trial lawyer be as you prepare and present your case?
E. Gear Up for Arbitrator Selection	
Network to find the right arbitrator(s). • Ask experienced arbitration counsel and other neutrals about potential arbitrators. • Select arbitrator(s), especially the chair or sole arbitrator, with a proven ability to manage the process.[9]	Don't rely entirely on an official arbitrator biography if you can reach out to lawyers who have had experience with that arbitrator. There are online resources to help in some circumstances.[10]
Know the rules governing arbitrator selection in your case before starting the selection process. • The process of arbitrator selection can vary depending on the arbitration clause and the governing rules and procedures. • To some degree, an arbitration clause can vary the procedures that are generally incorporated by reference.	Don't expect busy case managers to focus right away on any special provisions on arbitrator selection or qualifications in your arbitration clause; point out those provisions before the case manager gets too far along in the arbitrator selection process.
F. Ask for an Early Administrative Conference and Work Collaboratively with the Case Manager at All Times	
Ask for an administrative meeting with the case manager prior to arbitrator selection. • Make clear what your preferred criteria are for arbitrator selection. • Engage in *ex parte* communications with the case manager to the extent allowed by the rules. • Propose an administrative conference with all counsel present.	Don't miss any opportunity to show the case manager that you are trying your best to be practical and that you are a straight shooter. Counsel cannot have ex parte communications with arbitrators, but case managers can and do talk with the arbitrator(s), and vice versa, whenever they think it serves a purpose.

Dos	Don'ts
Treat case managers like the important people they are. • Be practical and helpful; it's a joint problem-solving exercise. • Case managers can help counsel avoid costly missteps.	Don't condescend. Case managers may or may not have law practice experience or law degrees, but they are hard-working professionals and they understand some aspects of the arbitral process better than counsel ever will.
G. Address Confidentiality Up Front	
Assess the confidentiality of the process before exchanging sensitive information. • Not all arbitration rules provide the same level of confidentiality.[11] • Determine whether express confidentiality protections should be negotiated with the other side or, failing agreement, whether a procedural order regarding confidentiality should be sought from the arbitrator(s).[12] • Ask the arbitrator(s) to embody any agreement in a procedural order.	Don't assume that the parties are bound to confidentiality without checking the rules. Don't rely on customary practice in litigation. Don't rely on informal agreements, especially if the confidentiality stakes are high.
H. Confer With Opposing Counsel to Work Out as Much as Possible	
Reach out to counsel for the other side to try to agree on the basics, including: • Selection criteria for panel-selected arbitrator(s); • The extent and timing of the exchange of documents and other information; and • When, during the arbitration, mediation is most likely to be fruitful. Develop an agenda for the administrative conference. • Try to develop, collaboratively with opposing counsel, a list of at least some points to be addressed at the first conference.	Don't just spot an issue, pick a fight, and run to the arbitrator(s) to resolve it. The case manager or arbitrator(s) may conclude that there are no other adults in the room besides themselves. That will not help you when you need to ask for some leeway on any number of issues. Don't expect case managers to be mind-readers. If you need something out-of-the-ordinary to be addressed, make sure it makes it onto the agenda.
I. File an Early Witness List	
File as comprehensive a list of witnesses as possible, as early in the case as possible. • Include in the witness list the current affiliations of witnesses.	Don't hold back on identifying your witnesses in the hopes of springing a surprise witness at the hearing. Generally, surprise is not allowed or is mitigated by allowing opposing counsel time to regroup. If you do hold back, you run the risk of arbitrator disclosures later in the case, resulting in (a) a disruptive replacement of an arbitrator mid-stream, or (b) continued service of an arbitrator who might not have been selected in the first place if the disclosure had been made earlier.

Dos	Don'ts
J. Propose Rather Than Impose	
Present joint proposals as just that: proposals for consideration by the arbitrator(s). • Arbitration is a creature of contract, but joint proposals that go too far in transforming arbitration into litigation can undermine the nature and integrity of the arbitral process.	Don't send the arbitrators edicts. Arbitrator(s) need to be persuaded that whatever you jointly propose is a reasonable approach because they are trained by the provider organizations to achieve efficiency and to maintain the distinctiveness of the arbitration process.
Prepare to present to the arbitrator(s) some of your own reasonable proposals to resolve open issues.	Don't just expect the arbitrator(s) to figure it out; you may not like how it goes, especially if opposing counsel offers solutions.
K. Remember the Golden Rule	
Be courteous and cooperative in dealing with arbitrators, case managers, opposing counsel and staff, and witnesses. • And, if you want to convey the impression to the arbitrator(s) that you think you have a good case, show good humor at all times.	Don't grandstand for clients or, if things seem to be going badly, shift into high (make-the-record-for-appeal) gear. There is no effective right of appeal. Don't go on the offensive, unless it is a charm offensive.
L. Be the Problem-Solver in the Room	
Anticipate practical needs and likely disputes. • Try to resolve disputes with opposing counsel. • Try to present unresolved disputes at scheduled conferences.	Don't pepper the arbitrator(s) with many disjointed requests that could have been presented at one time.
Keep your presentation interesting but low-key.	Don't waste time on theatrics. There is no jury to wake up or to impress. Would you bring a megaphone to a poker game?
M. Limit Discovery Requests to What Is Absolutely Essential	
Whatever discovery you might ask for in court, cut it back. • You may get more from opposing counsel than from the arbitrator(s). • Consider the legal limits on arbitrator power to compel discovery from non-parties.[13]	Don't assume Federal Rules-style discovery is inscribed in the Bill of Rights. Even if broad discovery is written into your arbitration clause, arbitrators have discretion to streamline the process, and they feel pressure from provider associations to do just that.
Consider tools to cut discovery time and costs. • Computer-assisted electronic document review a/k/a "predictive coding" is one example. • Arbitrators appreciate a creative and practical approach.	Don't underestimate arbitrator receptiveness to creative solutions or the ability of technology to solve or mitigate problems created by technology.

Dos	Don'ts
If the arbitration is international (i.e., between commercial parties of different nations): • Do not expect to be able to take *any* discovery depositions at all.[14] • Exchange of written fact witness statements in lieu of live direct is the norm.[15] – Fact witness statements are often the only way to avoid surprise under international procedures. • Document exchange is limited.[16] – Prepare extremely specific requests for documents you don't already have but really need.	Don't try to look for the needle in the other side's haystack. The world detests American-style discovery. International arbitration practice and procedure reflect that consensus. If the case is governed by international arbitration rules, the fact that arbitration is taking place in the U.S. does not make discovery any more available.
If the case is domestic in nature: • Expect to be told you can take, at most, a very limited number of depositions of limited duration.[17] –The smaller the case, the fewer and shorter the depositions, so figure out what you *really* need, and go for that.	Don't assume that proportionality is a term first coined in response to discovery excesses in Federal Rules practice. Providers have been training commercial arbitrators for years to limit discovery to what is needed *and* proportional.
Expect push-back in response to a litigation-like discovery plan: • Even if you work out a joint proposal and present it on a silver platter. • Advise your client realistically and up front about the limits of discovery in arbitration. There are guidelines and articles explaining the limits of discovery in arbitration. Send one or two to your client if it does not believe you when you explain the limitations on discovery in arbitration.	Don't panic if you are used to broad discovery before trial. In arbitration, the hearing-by-installment approach usually affords ample opportunity to regroup. Arbitrators have the flexibility to remedy genuine surprise and are sensitive to the need for procedural fairness.
N. Present Disputes Informally	
Provide the arbitrator(s) with a brief, written, jointly submitted or at least even-handed preview of the dispute.	Don't expect the arbitrator(s) to rule on complex and important discovery disputes at a conference without having had time to think about it and confer with one another.
O. Propose Dispositive Motions When They Meet Arbitration Standards	
Propose a dispositive motion only if it is likely to succeed *and* to streamline the case.[18] • Prepare a one or two-page letter outlining the grounds, likelihood of success, and likely economies to be achieved from the dispositive motion.	Don't ask to make dispositive motions just to condition arbitrator thinking in your favor. It is not efficient, and busy arbitrators might conclude that you are trying to make extra work for yourself.

Dos	Don'ts
P. Use Witness Statements and Exchange Experts' Reports	
Consider agreeing to the use of witness statements as part of direct testimony even if not required to do so. • Fact witnesses rarely crack on direct examination. • Exchange experts' reports. Parties rarely have an opportunity to take the deposition of opposing experts in arbitration. You may as well take some credit for adopting an approach that otherwise will be imposed. • Incorporate your expert report as an integral part of the expert's sworn testimony.	Don't fight tooth-and-nail against the witness statement procedure just because it is unfamiliar or can sometimes be abused; you can negotiate the ground rules to limit abuse. Don't assume that witness statements and experts' reports prevent the witness from telling her story. Arbitrators can be persuaded to let witnesses give brief overviews of direct testimony and to update or correct statements or reports just before cross-examination at the hearing.
Prepare fact witness statements with the witness and in the witness' own voice.	Don't submit a witness statement that reads like a memo of law. It will not be effective and your witness may deserve better.
Q. Design Helpful Hearing Submissions	
Organize hearing exhibits so that they are arbitrator-friendly. • Arbitrators pick up bundles of hearing exhibits and read them.	Don't submit exhibit volumes that resemble shuffled decks of playing cards.
Submit a separate volume of joint exhibits that are the key, undisputedly authentic documents in the case. • Parties may disagree as to the meaning of undisputedly authentic and relevant documents, but that does not mean the documents are not authentic or are not key to the dispute.	Don't create logistical challenges for the arbitrator(s) by burying the basic documents in larger document groupings. Many arbitrators work without any office support.
Provide documents in whatever form(s) the arbitrator(s) request. • Arbitrators on the same panel may have very different working styles. • Offer to have a courtesy paper set in the hearing room for each arbitrator.	Don't assume that all arbitrators have the same technological savvy. Some may consider the courtesy set to be essential; others may see it as unnecessary and wasteful. The key is to find out each arbitrator's preference.
Keep the record organized and make it easy for the arbitrator(s) to focus on what's important. • Consider with an open mind an arbitrator's request for authorization to work with a colleague on some aspects of a complex, large-record case. Arbitrators do not have access to law clerks and they cannot ask for help from law firm colleagues unless the parties expressly authorize it.	Don't automatically react negatively if an arbitrator, particularly in a complex, big-document commercial matter, asks for authorization to draw on a colleague for support for specific tasks. Depending on how the arrangement is structured, it could result in time and cost savings, and a better structured or reasoned award.
Keep Pre-Hearing Memos Concise. • Say things once.	Don't engage in repetition. Repetition tends to annoy arbitrators. Don't engage in repetition. Don't.

Dos	Don'ts
R. Decide on a Form of Award Well Before the Hearing	
Inform the arbitrator(s) before the evidentiary hearing as to what form of award is required. • Depending on the applicable rules, arbitrator(s) may decide on the form of award much sooner in the case, but the eve of the evidentiary hearing should be the absolute minimum notice so the arbitrator(s) can identify the tools they need to receive from the parties.	Don't ask for a reasoned award without agreeing to provide the arbitrator(s) with a hearing transcript or, if no transcript is made, to provide the arbitrator(s) with proposed findings of fact or some less formal version thereof.
S. Discuss the House Rules in Advance of the Hearing	
Clarify any restrictions on communicating with witnesses during their testimony, or on the witness' attendance during the testimony of other witnesses. • Ask the arbitrator(s) to set forth any restrictions in a procedural order.	Don't assume that you, the arbitrator(s) and opposing counsel all have the same practice experience background with respect to the handling of witnesses and other hearing-room conduct.
T. Propose Hearing Procedures That Maximize Time for Witness Testimony and That Help Keep the Arbitrator(s) Organized	
Keep housekeeping at the hearing to a minimum. • Try to limit discussion of administrative details to the beginning or end of the hearing day. • Try to work out problems off the record and then confirm agreements on the record.	Don't burden the transcript with lengthy discussions unrelated to the merits. The transcript (even in paper form) should be user-friendly for the arbitrator(s) in preparing the award.
Submit an order of presentation of witnesses in advance of the hearing. • Update the line-up at the end of each day for the next day.	Don't try to surprise the arbitrators with your next witness. Arbitrators like to prepare for witnesses too.
Have your next witness in the batter's box.	Don't waste expensive hearing time waiting for a witness who is stuck in traffic. Some arbitrators, and some clients who hear an arbitrator grousing about it, might hold it against you.
Make evidentiary objections briefly, in writing, and focused on significant matters; time the objections so as not to disrupt hearing flow. • Limit evidentiary objections during the hearing to important questions of time management, relevance, weight and confidentiality.	Don't use evidentiary objections to break a witness' rhythm or to run the clock. Arbitrators recognize the tactic, and may deduct points from your credibility score and/or help the witness get back on track. Don't fuss over prejudice unless the evidence is irrelevant and borders on the outrageous. Arbitrators think they are too sophisticated to have to worry about becoming prejudiced, but might draw the line at attempts to delve into clearly non-probative personal matters.

Dos	Don'ts
Ask the arbitrator(s) whether closing arguments or post-hearing briefs would be more helpful. • Ask the arbitrator(s) what points they would most like to be addressed in closing arguments and/or briefs, and adjust accordingly. • This is not just about being courteous. You want to know what might be troubling the arbitrator(s) and you want to deal with it as best you can. • Make use of arbitrator flexibility. For example, in some cases it might make sense to have a closing argument as to some issues plus a short brief on a point or two that are better addressed in writing, with a chart that the arbitrators might find helpful but requires a bit more time to prepare, etc.	Don't just repeat in closing the themes you have been developing all through the case; address what's on the mind(s) of the arbitrator(s) at that point in the hearing. It is your last chance to put the arbitrator(s) at ease with respect to what may be bothering them about your case or defenses. Don't repeat arguments that are not essential to your case and that have not gotten any traction with the arbitrator(s) just because your client likes to hear them. You are not there to entertain or soothe the client but to get the client the best possible result.
Provide the arbitrator(s) with hearing transcripts at the same time you receive them. • If you are getting daily copy, offer it. • Ask each arbitrator what form (paper, electronic, software) is preferred, and include any court reporter index.	Don't just do the minimum or the usual; go out of your way to make it as easy as possible for the arbitrator(s), particularly when doing so has no material impact on cost.
Supply a joint, definitive, final list of all the documents in evidence. • This is especially important in the larger-document cases or when exhibits have been moved into evidence without testimony. • Arbitrators like to have a reliable checklist to make sure they have reviewed and considered all the evidence in the record.	Don't rely on the court reporter to provide the exhibit list if there are exhibits in evidence that were not used with witnesses or not formally moved in evidence on the record.
U. Be Courteous to the End	
Thank the arbitrator(s) and case manager, each by name, for their service and attention. Acknowledge the members of your team at all levels. Thank the opposing attorney(s). If counsel was generally obstructive but cooperated in some small way, thank counsel specifically for that small detail even though (or perhaps because) it might seem like faint praise. Acknowledge the hard-working junior members of the other side's team, including non-lawyers, for their contribution and cooperation, even if you cannot utter a word of thanks to lead counsel.	Don't just say thank you; when you say it, say it like you mean it.

Endnotes

1. For a practical overview of some key considerations in arbitrator selection, *see* Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator*, 2005 DISP. RESOL. J., 1, *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003897 (last visited Sept. 9, 2014).

2. *See* STIPANOWICH, ET AL., PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION 61-67 (2010), *available at* http://www.thecca.net/sites/default/files/CCA_Protocols.pdf (last visited Sept. 9, 2014) [hereinafter CCA Protocols].

3. *See generally*, NEWMAN, ET AL, GUIDELINES FOR ARBITRATORS CONDUCTING COMPLEX ARBITRATIONS (2012), *available at* http://www.c-pradr.org/Portals/0/Resources/ADR%20Tools/Tools/Arbitration%20Award%20Slimjim%20for%20download.pdf (last visited Sept. 9, 2014); NEWMAN, ET AL., GUIDELINES ON EARLY DISPOSITION OF ISSUES IN ARBITRATION (2009), *available at* http://www.cpradr.org/RulesCaseServices/CPRRules/GuidelinesonEarlyDispositionofIssuesinArbitration.aspx (last visited Sept. 9, 2014) [hereinafter CPR Early Disposition Guidelines]; NEWMAN, ET AL., PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION (2009), *available at* http://www.cpradr.org/RulesCaseServices/CPRRules/ProtocolonDisclosureofDocumentsPresentationofWitnessesinCommercialArbitration.aspx (last visited Sept. 9, 2014); N.Y. State Bar Ass'n, Section on Disp. Resol., *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations* [hereinafter NYSBA Domestic Guidelines] and N.Y. State Bar Ass'n, Section on Disp. Resol., *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitration* [hereinafter NYSBA International Guidelines], both *available at* http://old.nysba.org/Content/NavigationMenu/Publications/GuidelinesforArbitration/DR_guidelines_booklet_proof_10-24-11.pdf (last visited Sept. 9, 2014); *Protocol for E-Disclosure in Arbitration*, CHARTERED INST. OF ARB., Oct. 2008, *available at* http://www.ciarb.org/information-and-resources/E-Discolusure%20in%20Arbitration.pdf (last visited Sept. 9, 2014) [hereinafter CIArb E-Disclosure Protocol]; *Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations*, JAMS, Feb. 1, 2011, *available at* http://www.jamsinternational.com/wp-content/uploads/JAMS-International-Efficiency-Guidelines.pdf (last visited Sept. 9, 2014) [hereinafter JAMS Efficiency Guidelines]; Int'l Bar Ass'n, *IBA Rules on the Taking of Evidence in International Arbitration* (2010), *available at* file:///C:/Users/tmb/Downloads/IBA%20Rules%20on%20the%20Taking%20of%20Evidence%20in%20Int%20Arbitration%20201011%20FULL.pdf (last visited Sept. 9, 2014); THE CODE OF ETHICS FOR ARB. IN COM. DISP., *available at* http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf (last visited Sept. 9, 2014).

4. *See* CCA Protocols, *supra* note 2, at 61-63.

5. The AAA Commercial Arbitration Rules now provide for mediation in the course of arbitration unless the parties opt out. *See* Am. Arb. Ass'n, *Commercial Arb. Rules and Mediation Procedures R-9*, at 14 (2013), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased (last visited Sept. 9, 2014) [hereinafter AAA Commercial Arb. Rules].

6. *Id.; see also* Luis M. Martinez and Thomas Ventrone, *The International Centre for Dispute Resolution Mediation Practice*, 494-95, *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002567 (last visited Sept. 9, 2014); Int'l Chamber of Com., Mediation Guidance Notes, ¶¶ 28-35, *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Rules/Mediation-Guidance-Notes (last visited Sept. 9, 2014).

7. *See, e.g.*, Am. Arb. *Ass'n, A Guide to Commercial Mediation and Arbitration for* Business People (2013), *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2019455 (last visited Sept. 9, 2014); Am. Bar Ass'n, *Benefits of Arbitration for Commercial Disputes, available at* http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf (last visited Sept. 9, 2014); Int'l Chamber of Com., *Introduction to ICC Arbitration, available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/ (last visited Sept. 9, 2014).

8. *See, e.g.*, JAMES M. GAITIS, ET AL., THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES 137-76 (3D ED. 2013) [hereinafter CCA Best Practices Guide]; CCA PROTOCOLS, *supra* note 2, at 72-73; CIArb E-Disclosure Protocol, *supra* note 3, at 6; INT'L DISPUTE RESOLUTION PROCEDURES, INT'L CENTRE FOR DISPUTE RESOL., art. 21.1, June, 2014, *available at* https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased (last visited Sept. 9, 2014) [hereinafter ICDR Dispute Resol. Procedures] ("The arbitral tribunal shall manage the exchange of information among the parties with a view to maintaining efficiency and economy."); Mitchell Marinello & Robert Matlin, *Muscular Arb. and Arbitrators Self-Mgmt. Can Make Arb. Faster and More Econ.*, 67 DISP. RESOL. J. 69, 73-75, *available at* http://www.novackmacey.com/wp-content/uploads/2013/06/Muscular-Arbitration-and-Arbitrators-Self-Management-Can-Make-Arbitration-Faster-and-More-Economical-Dispute-Resolution-Journal-Vol.-67-No.-4-2013-PDF.pdf (last visited Sept. 9, 2014).

9. *See* CCA Protocols, *supra* note 2, at 32-34.

10. *See, e.g., Due Diligence Eval. Tool for Selecting Arbitrators and Mediators*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (2010), *available at* http://www.cpradr.org/Portals/0/File%20a%20Case/Engagement%20Guidelines%20final.pdf (last visited Sept. 9, 2014); Energy Arbitrator's List, Int'l Centre for Disp. Resol., *available at* http://www.energyarbitratorslist.com/ealsearch/faces/eal?_adf.ctrl-state=1bae1uglv_4 (last visited Sept. 9, 2014).

11. *Compare* AAA Commercial Arb. Rules, *supra* note 5, M-10 (for mediation only), and ICDR Dispute Resol. Procedures, *supra* note 8, art. 37, and *Comprehensive Arb. Rules & Procedures*, JAMS, R-26, Oct. 1, 2010, *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2010.pdf (last visited Sept. 9, 2014) [hereinafter JAMS Comprehensive Arb. Rules], *with* Rules, Int'l Inst. For Conflict Prevention & Resol., Inc., R-20, July 1, 2013, *available at* http://www.cpradr.org/RulesCaseServices/Arbitration/AdministeredArbitration/Rules.aspx (last visited Sept. 9, 2014) [hereinafter CPR Rules], *and* ICC Rules of Arb., Int'l Chamber of Com., art. 22, Jan. 1, 2012, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_b1 (last visited Sept. 9, 2014) [hereinafter ICC Rules of Arb.]; see also CCA Best Practices Guide, *supra* note 8, at 439-40, Table 17.3.

12. *See* AAA Commercial Arb. Rules, *supra* note 5, art. R-23; CPR Rules, *supra* note 11, art. R-11; JAMS Comprehensive Arb. Rules, *supra* note 11, art. R-26(b).

13. If the arbitration is governed by the Federal Arbitration Act (FAA), the courts are split as to whether FAA Section 7 authorizes the arbitrators to issue subpoenas for discovery document production or deposition testimony, or whether Section 7 only extends to subpoenas for attendance at the evidentiary hearing. *See generally*, CCA Best Practices Guide, *supra* note 8, at 149-52. If the arbitration is governed by state arbitration law, the power of the arbitrator(s) to issue subpoenas to nonparties may vary from state to state.

14. ICDR Dispute Resol. Procedures, *supra* note 8, art. 21.10 ("10. Depositions…generally are not appropriate procedures for obtaining information in an arbitration under these Rules."); JAMS Efficiency Guidelines, *supra* note 3, at 3 ("In JAMS international arbitrations, the prevailing practice is that depositions are not

permitted."). *Compare* NYSBA Domestic Guidelines, *supra* note 3, at 13-14, *with* NYSBA International Guidelines, *supra* note 3, at 28.

15. *See, e.g.*, ICDR Dispute Resol. Procedures, *supra* note 8, art. 21.10 ("Unless otherwise agreed by the parties or directed by the tribunal, evidence of witnesses may be presented in the form of written statements signed by them."); JAMS Efficiency Guidelines, *supra* note 3, at 3 ("In international arbitrations, the use of written witness statements in lieu of direct testimony…is a common, broadly accepted practice.").

16. *See* NYSBA International Guidelines, *supra* note 3, at 27-28.

17. *See* NYSBA Domestic Guidelines, *supra* note 3, at 14.

18. *See* AAA Commercial Arb. Rules, *supra* note 5, R-33 ("The arbitrator may allow the filing of and make rulings upon a dispositive motion 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."); CPR Early Disposition Guidelines, *supra* note 3, Guideline 2.4 ("It is important to bear in mind that even if early disposition of an issue may be accomplished quickly and fairly, it nevertheless may not be appropriate if it is not likely, if granted, to result in a material reduction of the total time and cost in reaching final resolution of the case.").

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