The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration—Taking a Test Drive Down the Highways and By-Ways of Best Practices (4th Edition)

Edited by Jim Gaitis, A. Holt Gwyn, John J. McCauley and Laura Kaster
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One Law for the Lion & Ox Is Oppression.
William Blake (*Marriage of Heaven & Hell*)

The College of Commercial Arbitrators is an august group of experienced arbitrators who, over the years, have done more than gather for self-congratulatory sessions over whiskey and cigars in smoke filled pubs. Among their varied contributions to the Dispute Resolution field is a *Guide to Best Practices in Commercial Arbitration*, which the College first issued in 2006. It has now been reissued in a fourth edition, under the editorial leadership of Jim Gaitis, with a trio of fellow editors—A. Holt Gwyn, John J. McCauley, and our own Laura Kaster—co-editor of NYSBA's *Dispute Resolution Lawyer*.

Having become aware of this new *Guide to Best Practices*, I decided to take it for a test drive. If I were to develop a list of tricky arbitration questions that come up for many of us during our work as arbitrators, would this *Guide* be a handy tool? Would it provide a workable roadmap that would lead the reader to illuminating discussion on one's vexing issue?

I invite you to accompany me on the test drive, and encourage you to determine whether the *Guide* drives like a Maserati. If it does, you might be inclined to take it for a ride yourself.

Before our tour, one might marvel at the resources that went into the development of this work. The current volume has 104 contributors,[1] all of whom, by dint of membership in the college, draw on many years of experience as arbitrators practicing at the highest level of our profession. A review of these names reveals a Who's Who of commercial arbitrators on the domestic and international scene. Surely the efforts of this group can generate some guiding light.

Of particular pride is the number of members of NYSBA's Dispute Resolution Section[2] who are in their ranks—approximately 25 percent by my count. While I would choose not to offend by identifying some and not mentioning well-deserving others, I must highlight two contributors whose inclusion is particularly affecting. These are the late David Brainin and Carroll Neesemann. Over 20 years ago, I came to rely on David, in ADR Bar gatherings, to be a consistent voice of balance and intelligence on any issue that was being addressed by the group. Carroll Neesemann, who for years ran Morrison & Foerster's litigation group in New York, was the authority on the law of arbitration in any bar group in which I participated. I miss them both. Years ago, Carroll told me that, in his view, the best arbitrator in New York was his dear colleague John Wilkinson, who is also on this list. NYSBA can be proud to note that both John Wilkinson and fellow contributor Edna Sussmann are past chairs of this Section.

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Let us now shift focus from the people to their task—defining best practices in arbitration. Arbitration, even if narrowed to the commercial zone, is a tremendously varied field. There are matters of all shapes and sizes, in a wide array of substantive areas. Parties themselves have widely varying wishes for the dispute resolution process when they opt to go for arbitration. Some seek speed, efficiency, low cost and informality, while others might wish to preserve due process protections, discovery opportunities, and even application of governing law or opportunities for review that result in processes antithetical to those

envisioned by this first broadly described group. Counsel drafting arbitration clauses or representing parties in arbitration, arbitral forums developing procedural rules and administrative protocols, and arbitrators applying their craft may have widely divergent, yet thoughtfully legitimate, views on what should take place in the arbitral arena.

Some will favor reasoned awards, others a one liner, at best. Some would go straight to hearing, while others would craft elaborate discovery. Some permit motions; others eschew them. Some seek nearly judicial processes; others might wish for a non-attorney expert in their field to decide wisely and pragmatically in a manner reflecting custom of the industry or usage of the trade, even if, *e.g.*, it means overlooking a statute of limitations or the ancient documents doctrine when considering a 20-year history of bordereaux in a reinsurance matter.

With the complexity and variety existing in the arbitration field, one wonders whether—even as the product of leaders in the arbitration field—a best practices guide is an act of hubris. While some might rest with marveling at this complexity, seeing a world in each grain of sand and heaven in each wild flower, arbitrators are a brave and decisive bunch. The College of Commercial Arbitrators, following efforts commenced in 2001 by the American College of Construction Lawyers, then joined by the CCA in 2003, girded up their loins and gave it a try.

The result is an effort to gather best practices while recognizing variety and complexity. The *Guide* embraces this diversity by setting out core concepts and procedural issues and sharing contrasting views in a manner that enables the user to strike a balance and have a clearer sense of the range of considerations that should inform decision making on the given issue. It might be impossible accurately to trace the path of a spinning gyroscope as it maintains balance while in motion. Nevertheless, the balancing act of the CCA has produced a map that we are about to put to the test.

As we ready for the race in our would-be Maserati, it is helpful to view the basic lineaments of this map. The *Guide* is structured in a manner that facilitates an intuitive search for answers. Its 20 chapters and two appendices run in roughly chronological order according to the stage one might be in during an arbitral proceeding.

The first five chapters address matters preliminary to arbitration. After the introduction (Chapter 1) come: appointment, disclosures, disqualification of neutral arbitrators (Chapter 2); non-neutral arbitrators (Chapter 3); fees and expenses—a theme dear to every neutral's heart (Chapter 4); and determining jurisdiction and arbitrability—a law rich review (Chapter 5).

The next five chapters address the work of arbitrators just before conduct of the hearing itself. This covers prehearing conferences and prehearing management (Chapter 6); motions (Chapter 7); discovery (Chapter 8); a newly minted chapter on summoning nonparty witnesses (Chapter 9); and eDiscovery (Chapter 10).

Smack in the middle is conduct of the arbitration hearing itself (Chapter 11). This section is made manageable by moving from consideration of design of the process through management of its elements—including exhibits, testimony, time, logistics, and even site visits—into an extraordinary and fascinating treatment of conduct of the arbitrators themselves during hearings, and finishing with briefing and closing arguments.

The next couple of chapters wrap things up chronologically, addressing awards and substantive interlocutory decisions (Chapter 12), and finally post award matters (Chapter 13). The treatise next presents another freshly crafted chapter on the unique and increasingly timely role of emergency arbitrators (Chapter 14). This is followed by one of the most fascinating, reflective and useful pieces in the *Guide*—a consideration of intratribunal relations (Chapter 15). This chapter alone is a rare gift to the arbitration bar.

The balance of the treatise covers special situations. Following an excellent treatment of class actions—embracing arbitrability, clause interpretation, class certification, and approval of class settlements, among a variety of essential subjects—(Chapter 16), the *Guide* introduces the last of the three new chapters introduced in this 4th edition: unique issues in construction arbitration (Chapter 17). Two comprehensive chapters on international arbitration, one on preliminary matters (Chapter 18) and the next on the conduct of proceedings (Chapter 19), are followed by a thought provoking piece on hybrid processes (Chapter 20). This last piece covers arb/med, med/arb, and arb/med/arb. It does a good job of laying out the ethical thicket that one must navigate when shifting between processes. It spells out areas for disclosure and waivers; highlights challenges to impartiality and the appearance of impartiality; and wisely cautions neutrals to be sure that the operative agreement addresses what information arbitrators will consider should the process morph back into an arbitration after the conduct of *ex parte* discussions in the form of mediation caucuses.

Our overview of the *Guide* remains as incomplete as would be a description of Fisher & Ury's classic, *Getting to Yes*, if one failed to mention the BATNA. Just as the BATNA is first mentioned in the second edition's tail to that classic, here too, the 4th edition features two timely and useful appendices that were created for this new version of the *Guide*. Appendix I presents a guidance note on arbitration and social media. How many of us have wondered what to do with that pesky LinkedIn site, revealing over 500 of one's nearest and dearest friends? Appendix II offers a guidance note on maintaining security of an arbitrator's electronic information. It is a cautionary tale for the tech-unsavvy, to say the least.

Well, we have spent enough time racing the motors as we prepare for our test drive. It is time to take this baby for a run. Let us take a look at how it handles with a few quirky or essential questions.

- Can someone please give me a checklist of issues to address in a pre-hearing call?

Sure. Take a look at the 37-item checklist at Chapter 6.III.C.

- How do I handle differences with fellow arbitral panelists?

Take a look at Chapter 15 and get back to us.

- I am not sure how to bill compared to my other panelists.

Really, you ought to read Chapter 15.

- Is it ok for me to handle a class action arbitration?

Head over to Chapter 16.

- Folks are asking me to move from my role as arbitrator to engage in an arb/med/arb process. Is this permissible, and, if so, how do I structure a good process while preserving my neutrality and the trust of the parties and counsel?

Turn left at Chapter 20.

- What the heck is a Bayesian search? Counsel keep mentioning this in their squabble over e-Discovery.

Consult the glossary in Chapter 10. (Ok, I will admit that I invented this question only after reading Chapter 10. I am glad to know what a Bayesian search is now.)

- I could use some tips in handling technology during our hearing.

Go straight to Chapter 11, then take a left at subsection VII.

- Isn't there a better way to deal with expert testimony than having the first expert opine during claimant's case and waiting two days until the second expert opines during respondent's presentation? I have a hard time remembering what the first one said, and really have some follow up thoughts for the first expert after hearing the second.

You will find some creative ideas on putting experts together in Chapter 10.

- Can I award punitive damages?

You will achieve good mastery (this is a pun) of this issue after consulting Chapter 12.V.B.

- What is the optimal way to organize the timing of Exhibits?

Speed over to Chapter 11.IV.

- During my last visit to Equinox gym, my trainer kept complaining that he needed a more "muscular" arbitrator. What can I do?

Put on the brakes and consider what Chapter 8 has to say on proportionality in discovery, and then move forward to Chapter 10's application of this notion in the e-Discovery context.

- Is it ok for me to do my own legal research? I am not sure counsel have given me all that I need to make the right decision.

There is a traffic jam over at Chapter 6.V.S. Something tells me a good number of arbitrators are considering this question over there.

I suspect the reader has gotten the message. The *Guide* passed this road test with flying colors. Yet no review is fully credible without a little spice. So here are some additions, enhancements or modifications one might look for in a 5th Edition.

Even though John Wilkinson and Carroll Neesemann were among the chief authors of the excellent protocols on the handling of discovery in domestic commercial and international arbitration, which were created by NYSBA's Dispute Resolution Section and received with approval by our House of Delegates,[3] search as I might, I saw no mention of them in the *Guide*. I hope they are offered for reference in the 5th edition. Similarly, one hopes that the authors of Chapter 20 add "ACR" to the acronym used for what is typically referred to as the AAA/ABA/ACR Model Standards of Conduct for Mediators. It is vital to show due regard for all contributors to those essential standards, including the non-attorney neutrals who are part of that organization.

A major component of a wish list for volume five would be guidance on deliberation and decision making itself. This could include tips on how to use a *Daubert*-like analysis when considering what weight to give to an expert's testimony. It could include advice on how to assess, conceptualize, and calculate damages. It might even include thoughts on how to judge credibility of witnesses. It might include a piece on cognitive biases and cross-cultural differences applied to the arbitrators' assessment of testimony, decision making, and impression of and relations with one's fellow arbitrators.

The 37-part checklist for pre-hearing conferences could add two more items: need for translators and interpreters, and whether a record of the hearing is needed. More might be developed on theories addressing whether to create a detailed or terse award.

Once during the fourth battle of Kawanakajima, the famous 16th century *daimyo*, Takeda Shingen, was resting in his tent when his foe, Uesugi Kenshin, rushed in on horseback. With aplomb, Takeda Shingen reputedly lifted his iron fan and effectively deflected a blow from Uesu-

gi's sword, at the same time exclaiming "a snowflake on a blazing fire." The above wish list for volume five is no more than a few snowflakes extinguished by the illumination offered by the *Guide to Best Practices in Commercial Arbitration*. I unequivocally recommend it to the reader.

Endnotes

1. The 104 contributors are: Gerald Aksen; Henri C. Alvarez; Markham Ball; John M. Barkett; John A. Barrett; William L. D. Barrett; William G. Bassler; Albert Bates, Jr.; Axel Baum; Bruce W. Belding; Gary L. Benton; Trey Bergman; R. Doak Bishop; John T. Blankenship; John P. Bowman; John K. Boyce, III; David N. Brainin (deceased); Thomas J. Brewer; John E. Bulman; Joseph F. Canterbury, Jr.; James H. Carter; Richard Chernick; Winslow Christian (deceased); Louis Coffey; Deborah A. Coleman; Peter D. Collisson; Louis A. Craco; Philip E. Cutler; Robert B. Davidson; Louise E. Dembeck; M. Scott Donahey; Paul J. Dubow; James W. Durham; Neal M. Eiseman; Jay W. Elston; Eugene I. Farber; William B. Fitzgerald; James M. Gaitis; Patricia D. Galloway; Walter G. Gans; Barry H. Garfinkel; Eugene S. Ginsberg; Ruth V. Glick; George Gluck; Marc J. Goldstein; Herbert H. (Hal) Gray, III; James P. Groton; A. Holt Gwyn; Sally Harpole; David M. Heilbron; John W. Hinchey; John R. Holsinger; L. Tyrone Holt; Robert A. Holtzman; Carl F. Ingwalson, Jr.; John Kagel; Alan M. Kanter; Laura A. Kaster; Richard H. Kreindler; A. J. Krouse; Urs M. Laeuchli; Louise A. LaMothe; June R. Lehrman; Larry R. Leiby; Nancy F. Lesser; Richard A. Levie; William H. Levit, Jr.; James R. Madison; Richard R. Mainland; John Burritt McArthur; John J. McCauley; Bruce E. Meyerson; Lawrence R. Mills; Carroll E. Neesemann (deceased); Lawrence W. Newman; Susan H. Nycum; Michael S. Oberman; Philip D. O'Neill; Allen Overcash; Gerald F. Phillips (deceased); Elliot E. Polebaum; Lucy F. Reed; Thomas D. Reese; Barbara A. Reeves; Kathleen A. Roberts; Deborah Rothman; John M. Seitman; Vivien B. Shelanski; John A. Sherrill; Stanley P. Sklar; Allison J. Snyder; Francis O. Spalding; Stephen S. Strick; Edna R. Sussman; R. Wayne Thorpe; Christi L. Underwood; Curtis E. von Kann; Robert W. Wachsmuth; David E. Wagoner (deceased); Irene C. Warshauer; Robert P. Wax; Dana Welsh; Michael S. Wilk; John H. Wilkinson.
2. With apologies to any I miss or mischaracterize, I believe the following list, consisting of roughly 25% of the total contributors to this CCA *Guide*, have also belonged to NYSBA's Dispute Resolution Section: Gerald Aksen; William L. D. Barrett; Axel Baum; David N. Brainin (deceased); James H. Carter; Louis A. Craco; Robert B. Davidson; Louise E. Dembeck; Neal M. Eiseman; Eugene I. Farber; Walter G. Gans; Barry H. Garfinkel; Eugene S. Ginsberg; Ruth V. Glick; George Gluck; Marc J. Goldstein; Laura A. Kaster; Carroll E. Neesemann (deceased); Lawrence W. Newman; Michael S. Oberman; Lucy F. Reed; Kathleen A. Roberts; Vivien B. Shelanski; Edna R. Sussman; Irene C. Warshauer; John H. Wilkinson. To the extent I have included any who are not members of this Dispute Resolution Section, we expect applications shortly.
3. One can find these protocols online at: https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Guidelines_for_the_Efficient_Conduct_of_the_Pre-hearing_Phase_of_Domestic_Commercial_Arbitrations_and_International_Arbitrations.html.

Simeon H. Baum, President of Resolve Mediation Services, Inc. (www.mediators.com), has successfully mediated or arbitrated more than 1,000 disputes. He is the founding Chair of NYSBA's Dispute Resolution Section. He advises New York Court system on ADR and has trained their Commercial Division mediators for the last 20 years. In 2011, 2014, and 2018, Best Lawyers selected Mr. Baum as New York's ADR "Lawyer of the Year." He teaches on the ADR faculty at Benjamin N. Cardozo School of Law. SimeonHB@DisputeResolve.com.

ADR Advocacy, Strategies, and Practices for Intellectual Property and Technology Cases (Second Edition)

Edited by Harrie Samaras
Reviewed by Joseph P. Zammit

There can be little doubt that there has been an ever increasing trend over the past two decades toward the use of ADR to resolve business disputes, both domestically and cross-border. More and more, faced with the delay, expense, and public relations risks of traditional court litigation, not to mention the unpredictable nature of jury verdicts, clients themselves have demanded that their counsel consider the advantages of ADR. After a somewhat slow start, this has become just as true in disputes involving intellectual property and technology as in other types of commercial matters.

Yet, despite a growing number of ADR specialists, the American bar in general has failed to keep pace with the sophistication and variety of modern ADR. Old attitudes die hard, and unfortunately many practitioners still seem to approach ADR as simply litigation in a conference room rather than a courtroom. Lawyers (and business people for that matter) could greatly benefit from a comprehensive but concise guide to the gamut of ADR choices, the rules that govern their operation, and the strategies and techniques for successfully employing them. Stepping admirably into the breach, the ABA Section of Intellectual Property Law has given us *ADR Advocacy, Strategies, and Practices for Intellectual Property and Technology Cases* (Second Edition), edited by Harrie Samaras. Ms. Samaras, who is not only the work's editor but also a co-author of five of the book's 13 chapters, is impeccably credentialed for the job. She is a full-time neutral focusing on arbitrating and mediating IP and technology cases, a Distinguished Fellow of the College of Commercial Arbitrators and the Chartered Institute of Arbitrators, as well as a Distinguished Fellow of the International Academy of Mediators, and also consults, teaches, and trains in the area of ADR.