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Opportunities and Pitfalls in Representing Clients in Arbitration

By Charles J. Moxley

In the past 30+ years, I have had the privilege of presiding over hundreds of large and complex commercial arbitrations, in the course of which I have worked with many hundreds of litigators in New York and other areas of the country.

I have benefited greatly and learned much from observing excellent lawyering by so many lawyers. In the process, I have been able to form some impressions as to approaches that are effective and sometimes less than effective in representing clients in arbitration.

The purpose of this article is to draw from this experience and suggest some best practices that hopefully may be helpful to litigators who have the opportunity to represent clients in arbitration.

The Arbitration Difference

To effectively represent clients in arbitrations, litigators should be mindful of distinctions between arbitration and court-based dispute resolution. The likelihood of achieving the client's objectives in arbitration can be greatly increased and pitfalls avoided if one acts effectively to navigate such differences, rather than proceeding as if one were in court.

Arbitration Soft Law

Familiarizing oneself with arbitration soft law as to process and procedure is a major first step in getting ahold of such differences. Arbitration is not unlike bench trials when it comes to arbitrators' applying applicable substantive law in a commercial arbitration. In my experience, arbitrators, like judges, generally do their best to apply applicable law to the facts, as required in the particular case.

What may at first appear to be more of a black box is how arbitrators can be expected to proceed concerning process and procedural matters. In New York State and federal courts, procedural matters are generally prescribed by the Federal Rules of Civil Procedure (FRCP) or the Civil Practice Law and Rules (CPLR) and underlying case law. It is a rite of passage for New York litigators to research pleading and discovery issues and issues as to motion practice under the FRCP or the CPLR.

Arbitration is different. Whether one is proceeding under the commercial rules of the American Arbitration Association (AAA), CPR, JAMS, FINRA, the ICC, or other arbitration providers, most such matters are left to the discretion of the arbitrator. While provider rules generally set forth general arbitration objectives as expedition, economy, flexibility, finality, and fairness, they offer little guidance as to how those objectives should inform arbitrators' exercise of discretion in deciding discovery and other pre-hearing matters.

It is expected that successful arbitrators will have good judgment as to such matters and that parties and their counsel will be able to figure out which arbitrator candidates are likely to have such judgment. Still, parties and litigators often find daunting the absence of the level of guidance provided by the FRCP and CPLR. Without such guidance, how can litigators best argue discovery and other procedural matters to their arbitrators or predictably counsel their clients as to how such matters are likely to play out?

The answer, too often overlooked, is arbitration soft law, consisting of guidelines that memorialize considerations that should inform the sound exercise of discretion by arbitrators, depending on the facts and circumstances of the particular case.

Prime examples are the Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations prepared by NYSBA's Dispute Resolution Section and approved by the House of Delegates; the Protocols for Expeditious, Cost-Effective Commercial Arbitration promulgated by the College of Commercial Arbitrators (the CCA), and the CCA's Guide to Best Practices in Commercial Arbitration.[1]

Arbitration soft law can often be a more persuasive source of arguments for counsel and guidance for arbitrators than the FRCP or the CPLR in addressing discovery motions or other preliminary matters in arbitrations being conducted in New York.

The Arbitration Agreement

Of quintessential importance to any arbitration is the parties' agreement to arbitrate.

Arbitration agreements are typically short, doing little more than setting forth parties' agreement to arbitrate disputes within defined parameters and perhaps selecting an arbitration provider. However, arbitration agreements can be detailed, setting forth parameters as to such matters as arbitrator qualifications, designation of arbitration law, require-

ments for pleadings, jurisdiction to decide arbitrability, scope of discovery, procedures for substantive motions, procedural timelines, and other matters parties choose to agree to in advance,[2] rather than leaving them to later discretion or other decision-making by arbitrators.

Unless it is invalid or the parties agree to amend it, the arbitration agreement is binding on the parties, arbitrators, arbitration providers, and any reviewing court. The fundamental basis of contemporary arbitration law is the consent of parties to arbitrate. The governing arbitration agreement, as it may be amended (or its provisions waived), sets forth that consent.

Early Case Assessment

As litigators, we all know the benefits of early case assessment, as contrasted with largely learning about our cases in the course of discovery and motion practice. Early case assessment is essential for representing clients well in arbitration, given the much quicker pace of arbitration and the opportunity, from early in the case, to win the hearts and minds of the arbitrators.

Pleadings That Advance the Case

If the client supports the expense of early case assessment and counsel is serious about moving the case forward, why not lay it all out in detailed pleadings and exhibits that convey the merits of the claims or defenses? It will all come out in discovery in any event. Provider rules for commercial arbitration typically only require the most general of pleadings, and a summary sentence or two may suffice. But why not seize the day? Why not convey the strength of the case to the arbitrators at the earliest opportunity, perhaps well before an adversary focuses on the matter?

Credibility With the Arbitrator

Litigators' credibility with their arbitrators is key. While judges in New York courts may have hundreds of cases on their docket, the busiest commercial arbitrator specializing in complex cases will have a much smaller caseload—maybe 10 to 20 cases, perhaps six to eight active cases at any point in time.

Particularly in an active arbitration with extensive prehearing motion practice, the arbitrator will be forming an impression early on as to which counsel can be relied on in their characterizations of the facts and law and which are essentially posturing or equivocating. Counsel's credibility can be of key importance on some issues.

Party Autonomy

Parties choose arbitration for various reasons. Many are opting for a more flexible, faster, less expensive, and final process, without sacrificing fairness. Others may be more interested in being able to select their decision-makers, but otherwise want something approximating the process they would have gotten in court, perhaps even one subject to the FRCP or CPLR and even the Federal Rules of Evidence.

The Muscular Arbitrator

The bedrock of commercial arbitration is consent. Parties are entitled to the type of arbitration to which they agreed or to which they agree in the course of the arbitration. Where, however, the parties cannot agree as to the type of process for their arbitration, it falls to the arbitrators to decide such matters, subject to the considerations discussed above as to the objectives of arbitration and arbitrators' duty to exercise their best judgment in providing to the parties in such cases the potential benefits offered by arbitration or otherwise agreed to by the parties.[3]

As an antidote to the "litigationization" of arbitration, whereby some cases end up with substantial discovery and motion practice over the objection of at least some parties, contemporary arbitrators are expected to manage their cases proactively to achieve efficient and economical arbitrations, consistently with the requirements of each case.

Interplay of Party Autonomy and Muscular Arbitrators

If the parties are in agreement as to process and schedule for their arbitration, they should be the "muscular" ones and submit their agreed approach to the arbitrator, advising firmly as to their mutual agreement on the matter. If, on the other hand, as more usually happens, the parties disagree as to the appropriate level of process for the case, it becomes the arbitrator's job to determine such matters based on their judgment as to the needs of the case.

That said, many arbitrators believe it is part of their job, even when parties are jointly electing for a litigation-like process and schedule, to push back—to "jawbone" the situation—advising as to the putative benefits of arbitration and how arbitration is generally expected to go. Counsel should remember, however, that when parties are in agreement as to such matters as the scope of discovery or the like, they are generally entitled to have the case proceed as they have agreed. Indeed, if the arbitrators disregard or seek to override parties' agreement in such circumstances, the parties may be entitled to fire the arbitrators and start with a new arbitrator or panel.

The Preliminary Hearing: Devising the 'Architecture' of the Case

The first meeting of counsel with the arbitrator, the preliminary hearing, scheduling conference, or organizational meeting, as it is variously called, is designed to conference the case and design the process and schedule best suited to the needs of the case. Unless the parties have agreed to a more court-like process, this generally means more limited and streamlined discovery[4] and a screening process for proposed dispositive motions.

Where the parties are not on the same page as to the process and schedule for the case, the preliminary hearing will generally be the first opportunity for counsel to conference such matters with the arbitrators and begin to affect the arbitrators' views of the case, harnessing arbitration soft law to achieve this. Counsel should be prepared at the preliminary hearing to discuss the process and schedule for essentially all aspects of the case that can be anticipated. It is a huge opportunity to try to influence the arbitrators' putting in place a process and schedule that seem best suited for being able to represent one's client.

Less Discovery Without Sacrificing Fairness

Do we not need all those emails and other electronic discovery, all those depositions (how can we possibly cross-examine witnesses without having deposed them?), all those interrogatories, and all the rest? We learned from our earliest days in law school that the U.S. system of discovery is designed to enable parties in litigation to avoid surprises and have a fair opportunity to prepare their cases. We have integrated that into the deepest fibers of our litigative DNA. Are we now saying that that whole approach was wrong?

From a huge body of practical experience now available to us, the answer is clear: the modern expansive discovery regime is an overcorrection. The pre-hearing discovery in arbitration can fully enable parties to prepare their claims and defenses, but is far less expansive than that which many litigators have come to expect in court.

This is true on two levels. We can limit discovery to matters actually in contention in a case, rather than to all elements of all potential causes of action. We can avoid requiring production of documents already in the possession of the other side unless there is a special need for such production in the particular case. We can work hard early in the case and throughout on identifying what matters are actually in contention (a process that otherwise may not occur until well into the trial). We can require early production of reliance documents. We can require that parties provide early affidavits with related exhibits—particularizations—setting forth the facts as to matters in contention as to which the party has the information and bears the burden of proof. We can proceed through sworn witness statements and related exhibits early in the case in certain kinds of cases. We can work hard on limiting electronically stored information (ESI) through early agreement on reasonable limitations as to such matters as custodians, date ranges, search terms and related testing, systems to be searched, and the form of production. We can provide for categorical privilege logs, to the extent privilege logs are needed at all. Where depositions are needed, we can work out reasonable limitations as to their number and duration. All these steps and more can serve to substantially re-

duce the scope of discovery in arbitrations without in any way compromising the fairness of the process.

Even more broadly, it is worth questioning whether even such a narrower scope of discovery that may result from such approaches as the above is needed for parties to have a fair opportunity to prepare and try their cases. As discussed below, international arbitration is informed by the approach of civil law systems towards such matters. In international arbitration, even the word "discovery" is an expletive. The "disclosure" that is permitted is narrower than that under our common law system, yet, from my experience, parties and litigators who have been involved in international arbitrations generally feel that the fairness of the process was not compromised by the lower levels of discovery and other differences.

Less Motion Practice Without Sacrificing Fairness

A lament of respondents in arbitrations is that they are often unable to get the dismissal of claims against them that would have been dismissed in court, a lament that is particularly heightened in larger cases where the cost of the motion practice would be far less than the cost of discovery and an evidentiary hearing. This is a serious concern and one that arbitrators must have in mind in considering proposed dispositive motions in arbitrations. However, the avoidance of essentially automatic motions to dismiss and for summary judgment that occur in court is one of the ways arbitration is able achieve its objectives of expedition and economy that underlie the selection of arbitration by many parties.

There is also the reality that there is essentially no review on the merits of arbitrators' decisions. Without the protection judges have that any misjudgments they make in premature decision-making may be corrected by appellate courts, arbitrators generally feel they should bend over backwards to give parties an evidentiary hearing. The standard for dispositive motions is high and arbitrators generally screen proposed motions closely.

Counsel need to understand this mindset in advocating for or opposing potential dispositive motions. But there is certainly a role for dispositive motions in arbitration. Most centrally, counsel can agree to have issues determined on the papers.

Sometimes there will be, for instance, limitations or contract construction issues that both sides would benefit from seeing resolved early on. While the natural reaction of a litigator facing such a proposed motion may be to oppose it, in some circumstances it will make sense to tee up certain pivotal issues for early decision, particularly when it does not seem likely that significant additional information on such matters will emerge from discovery or further investigation.

Many arbitrators are open to the submission of particular issues on dispositive motions, when the resolution of such matters may facilitate settlement. Many arbitrators have seen circumstances where dispositive motions, even if not granted, have facilitated parties' understanding of one another's cases and settlement has resulted.

Non-Party Subpoenas

Contemporary commercial arbitration typically involves complex transactions and participants and witnesses across jurisdictional lines. There is generally no issue as to witnesses who are parties or employees of parties, since they (and their documents) are subject to the authority of the arbitral tribunal. But what about non-party witnesses? What authority do arbitrators have over them?

This is one of the more complex areas to navigate in arbitration. Both federal and state law provide ways for subpoenaing non-party witnesses. However, the rules vary considerably across federal and state jurisdictional lines. Figuring out the applicable rules and convincing the arbitrators as to the matter in any particular instance can be daunting. Fortunately, there are two reports of the New York City Bar Association that analyze the law and options in this regard, which can save huge amounts of time.[5]

This is an area that requires effective advocacy by counsel. Arbitrators have a range of views on the matter. Some will essentially sign any subpoena presented to them unless they know it is unenforceable. Others will only sign subpoenas they know are enforceable.

The above discussion relates to issues as to enforceability, which are ultimately for the courts to decide when a subpoena is contested or ignored. Subpoenas can also be objected to on the basis of their scope. The general understanding is that arbitrators should hear and decide issues as to scope, including objections raised by parties and by recipients of subpoenas.

Having the Chair Decide Discovery Issues

When there is a panel of three arbitrators, parties, under provider rules, generally have the option of having the chair (or other arbitrator in the chair's absence) decide discovery and other routine pre-hearing matters. Whether to take this approach is a judgment call for counsel. It can save a lot of time and expense but puts pivotal judgment calls that could be consequential in the hands of just one of the arbitrators and means that that arbitrator will be further along the learning curve than the other members of the panel when the hearing begins.

Privacy/Confidentiality

There is a widespread misconception that arbitration is confidential. This is not generally the case. Provider rules typically provide that arbitrations are confidential insofar as concerns the arbitrators and the provider but only private as concerns parties and their counsel. Absent a confidentiality agreement among the parties or order of the arbitrator, a party may generally walk outside the hearing room and hold a press conference.

The standard confidentiality order proffered by parties and so-ordered by arbitrators typically only extends to confidential documents produced in the case. If parties want the entire proceeding to be confidential, they need to so stipulate or seek an order from the arbitrator to that effect.

If parties have to go to court to seek to enforce or vacate an arbitration award, confidentially will likely largely be lost. Such court processes generally require the filing of the award in court. Courts generally refuse to seal such awards or related motion papers or court decisions.

Applications for Interim Relief

There are various options in provider rules for seeking interim relief in arbitration, including through the appointment of an emergency arbitrator before the regular arbitrator is appointed. In addition, there are opportunities to go to court for interim relief. However, if one really wants interim relief from one's arbitrators, it is generally not enough to include such a request in a pleading. One should also make a formal application to that effect so as to draw the arbitrator's attention to the matter.

Whether to go to court or to an arbitrator to seek interim relief will depend on the circumstances of the particular case. Arbitrators have much more limited enforcement ability than courts, but there are advantages to beginning to educate one's arbitrators as early in a case as possible.

Mediation Window

It still appears to be part of the New York litigative mindset that counsel regard it as a sign of weakness to suggest mediation. For that reason, it can be helpful if arbitrators include a mediation window in their scheduling order, a time by which the parties will meet and confer as to whether they want to mediate the case.

Differences Between Federal and State Arbitration Law

Substantive law is the law applicable to parties' disputes, whether state or federal law or some combination thereof. Arbitration law is the law that governs the arbitration, typically, the Federal Arbitration Act (FAA) and underlying case law or state arbitration law, such as, in New York, Article 75 of the CPLR, and underlying case law. Arbitration law includes both substantive and procedural provisions, including substantive law as to arbitrability and enforcement of awards and procedural law as to procedures relating to arbitrations.

The interplay of federal and state arbitration law is complex. Perhaps counter-intuitively, general choice of law clauses in parties' contracts are generally understood to supply the substantive provisions, but not the arbitration law, applicable to their disputes.

While parties may, in their arbitration agreements, select the arbitration law they want to be applicable in any arbitration thereunder, they generally do not do so. As a result, the applicable arbitration law in any particular case, when an issue arises, must be agreed to by the parties or determined by the arbitrators.

The FAA generally applies, with limited exceptions, to arbitrations involving interstate commerce. This makes the FAA putatively applicable to the vast majority of commercial arbitrations. However, under the FAA, parties may agree to have state arbitration law apply even to cases involving interstate commerce.

All of this matters because federal and state arbitration law vary in substantial respects. For instance, for a case seated in New York, there are substantial differences between the FAA and Article 75 of the CPLR, including with respect to such matters as non-party subpoenas, sanctions, punitive damages, attorneys' fees, statutes of limitation, and other areas.

Adding to the complexity is that the FAA, insofar as concerns domestic arbitrations, does not generally provide federal subject matter jurisdiction for disputes cases arising thereunder. This means that cases subject to the FAA may end up in state court unless the plaintiff can otherwise establish federal subject matter jurisdiction. When cases subject to the FAA end up in state court, further layers of complexity can arise, as state courts may interpret the FAA differently than the federal courts interpret it.

It can also happen that federal courts are asked to apply state arbitration law in cases in which there is a basis for federal subject matter jurisdictioin, but state arbitration law is applicable, whether by agreement of the parties or otherwise. It is also the case that, on numerous issues, such as concerning non-party subpoenas, different circuit courts of appeal throughout the country have interpreted the FAA differently.

Thus, in any particular case, federal or state arbitration law may apply and that law may have been interpreted differently by federal and state jurisdictions in which such matters may be raised. Tricky choice of law issues can be presented, the results of which can be consequential. Fortunately, there

are several articles that provide useful guidance as to such matters.[6]

Highlighting the need for proactivity in this regard is that some arbitrators may ask counsel as early as the initial preliminary hearing what their position is as to the applicable arbitration law. Counsel are well advised to consider the matter as part of their initial case assessment.

One Versus Three Arbitrators

Some clients and attorneys prefer to have three arbitrators as a hedge against an outlier award. There are also obviously potential benefits in having several arbitrators consider a case. However, the costs can go up exponentially when three arbitrators are selected, each charged with responsibility to hear and decide the case. The costs will likely be not three times the cost of a sole arbitrator, but some multiple of that, as serious professionals consider and deliberate over complex matters.

Concern about an outlier award can be ameliorated when a sufficient comfort level can be achieved to proceed with a sole arbitrator in whom both sides have confidence. There is also the ironic reality that a responsible individual serving as a sole arbitrator, because of the solitary nature of the assignment, may, at least in some instances, feel a deeper sense of responsibility than three arbitrators hearing the same dispute, who may be subject to vagaries of group dynamics.

Standard Versus Reasoned Awards

When I started as an arbitrator as a young associate at Davis Polk years ago, before the cases brought to arbitration had become as complex and sophisticated as they now are, it was more typical for parties to provide a "standard," as opposed to reasoned award, an award that merely sets forth the ultimate determination of the arbitrator, as opposed to their reasoning and the like. While reasoned awards are now expected in the vast majority of cases, standard awards are still an option—and can save parties the cost and delay of a reasoned award.

Parties sometimes feel they need to request a reasoned award to make sure the arbitrator does the work. However, this should be an unnecessary expense if, again, through investigation or access to the network of feedback on arbitrators, one can reach a confidence level as to the arbitrator selected.

Rules of Evidence

Do not be misled by the ease of getting hearsay admitted into evidence or leading questions answered affirmatively in arbitration. Arbitrators are not dummies. There are reasons for the rules of evidence. Particularly where more direct and percipient evidence was available, arbitrators are unlikely to accord much credibility to evidence that inherently lacks credibility.

Avoiding Post-Hearing Briefing in Some Cases

As counsel, after conducting a complex trial, we generally want to marshal the evidence and submit post-hearing briefs. However, in some cases, it may make sense to avoid the time and expense of such briefing.

If we made a good selection of arbitrators; if the pre-hearing briefing adequately covered the legal issues; if the hearing went well; if the arbitrators appear to have been paying attention and grasping matters presented; and if the arbitrators did not highlight any particular areas of need, do we really need post-hearing briefing? Why not give the case to the arbitrators to decide promptly after closing statements? In a significant number of cases (I would estimate as much as 75-80% of cases), good arbitrators, who have done their job throughout, will know how they are going to come out after all the evidence is in.

There will be exceptions, of course, where post-hearing briefing is essential, but there will be many cases where the often substantial time and expense of post-hearing briefing may not add much.

Interviewing Arbitrator Candidates

A not widely known opportunity is that one may generally interview arbitrator candidates. The AAA has particular procedures for this, as do other providers.

Conducting such interviews can be particularly helpful, if one has figured out the needs of one's case and, through skillful general questions, can probe arbitrator candidates as to areas of interest, such as their views as to discovery and dispositive motions. If one is part of the arbitration world network and can come up with such information on one's own, this option may be less important. However, even then, it can be helpful in terms of assessing one's personal reaction to arbitrator candidates, chemistry considerations and the like.

Arbitrability

Ironically, given the objective of arbitration to be a more streamlined process than court-based dispute resolution, the law as to arbitrability has been rendered complex and in some respect unclear by multiple split decisions of the U.S. Supreme Court.

The threshold issue counsel will face, if they want to object to or defend against an objection to arbitrability is whether a court or the arbitrators have authority to decide the issue—the Who Decides question. This question alone can eat up substantial time and expense, as parties dispute the matter before courts and arbitrators. Issues of waiver and estoppel

can also arise if a party disputes such matters in one type of forum or the other without preserving the objection.

The question of the nature of the challenge to arbitrability, including whether it is characterized as substantive or procedural, can affect the answer to the Who Decides issue. Particularly complex issues of arbitrability, including as to the Who Decides issue, can be raised when the dispute concerns non-signatories to the arbitration agreement.

Arbitrability issues, even when it is clear that the FAA applies, will often raise questions of state law. The FAA establishes the substantive rule that arbitration agreements, like other agreements, are enforceable and protected by law. With exceptions, it puts arbitration agreements on the same ground as other contracts. This, however, means that, under the FAA, the validity of an arbitration agreement is subject to issues of state law as to contract validity, just as the validity of any other agreement could be questioned under state law.

Questions also arise concerning when issues as to arbitrability should be decided. Obviously, if the case is a big one that will be expensive, it will generally make sense to get the issue decided early in the case, even if, if factual issues are presented, that means having pre-hearing discovery and an evidentiary hearing on the matter.

On the other hand, if factual issues as to arbitrability are presented that are closely intertwined with issues as to the merits, it may, in some circumstances, particularly in certain types of low dollar cases, make sense to have arbitrability addressed when the merits are heard. How matters such as these should be handled will be dependent on the facts of the particular case.

Where there are issues as to arbitrability, they should be addressed early on. Missteps in addressing them can cost considerable time and expense.

Parallel Litigation

It infrequently happens that parties have multiple related contracts, some of which call for arbitration and some do not, and which may also provide for a variety of judicial and arbitral forums. When disputes arise and parties end up in multiple forums, litigating and arbitrating related matters or even arbitrating related matters before separate panels and even providers, potential risks and opportunities can be presented, including consideration of cost and delay and risks of inconsistent results.

It can be hard to avoid parallel proceedings. There are no readily available processes for consolidating arbitrations and court cases or even parallel arbitrations pending before different arbitration providers. However, if one's client would like to avoid such duplicative proceedings, there are potential options to explore.

Parties can do a lot by agreement. If parties have confidence in their arbitrator, they can agree to move all the disputes to the arbitration. If they prefer the arbitrator in one of several parallel arbitrations, they can agree to have that arbitrator decide the overall disputes. Parties who are in agreement may even be able to devise some hybrid methods for consolidation, in whole or in part, if the consent of the courts or arbitrators involved can be arranged.

Even when the parties are not in agreement, there may be creative applications a party can make to seek some level of coordination between parallel proceedings, such as joint discovery or use by a court or arbitrator of work or decisions from the parallel proceeding. Where parallel matters are pending before the same arbitration provider, such as the AAA, there will in some instances be procedures available for seeking consolidation.

Distinctive Features of International Arbitration

This article has primarily focused on domestic arbitration. Domestic arbitration process is roughly parallel to domestic litigation process, albeit with the focus on the arbitral objectives of expedition, economy, flexibility, finality, and the like. International arbitration is fundamentally different.

For international disputes, arbitration, not court, is the default. Typically, neither side to an international commercial transaction will want to end up in the other side's legal system. International arbitration, because of its international nature, however, will often need to be informed by the other type of the world's legal systems, the civil law system, an ap-

proach followed by the majority of states throughout the world.

Litigation in civil law jurisdictions is different from that in common law jurisdictions in many respects, including the following: far less discovery, generally limited to document production, with even that being largely limited to specifically designated documents and reliance documents; greater focus on documents rather than testimony and less reliance on cross-examination; greater reliance on the privacy of individual persons, even if employees of a party to a case, and a more expansive legal regime as to privacy; less motion practice; a more engaged judiciary that plays a greater role in developing cases than judges in our system; the discouragement of litigation through permitting the recovery of attorneys' fees by prevailing parties in many cases; less tolerance for commencing a case before one reliably has a basis for the case, as opposed to hoping to develop one through discovery; a greater reliance on expert witnesses, often ones appointed by the tribunal; and numerous other differences.

Contemporary international arbitration is largely a hybrid of the two legal systems, with a fair amount of convergence. Which system's attributes will dominate in a particular case will typically turn on the circumstances of the case, including the approaches of the arbitrators presiding over the case. There are also numerous international conventions and guidelines and other forms of soft law applicable to international arbitration that one must get a handle on before being able competently to represent a client in an international arbitration.

Summary

Arbitration is fundamentally different from court-based dispute resolution. Hopefully the above can be helpful as to ways to reap the benefits and avoid potential pitfalls in representing clients in arbitrations.

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Endnotes

1. *See* NYSBA Dispute Resolution Section, Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations, approved by the House of Delegates (April 2009), and the similar Guidelines for International Arbitrations, approved by the House of Delegates (November 2010), https://www.adr.org/sites/default/files/document_repository/NYSBA%20Guidelines%20for%20the%20Arbitrator%27s%20Conduct.pdf; College of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration (2010), https://www.ccarbitrators.org/wp-content/uploads/2021/05/CCA_Protocols.pdf; College of Commercial Arbitrators, The CCA Guide to Best Practices in Commercial Arbitration (4th Ed. Juris 2017).
2. *See* the ClauseBuilder Tool of the American Arbitration Association at https://www.clausebuilder.org, highlighting a wide range of options for inclusion in arbitration clauses.
3. For a discussion of Best Practices of arbitrators, *see* Charles J. Moxley, Jr., Dana Welch & Kelly Turner, Understanding—and Avoiding—Vacatur and Applications for Vacatur, Dispute Resolution Journal (2023).
4. For a discussion of the scope of discovery in arbitration, *see* Charles J. Moxley, Jr., *Beyond the 'Discretion of the Arbitrator': Applying the Standard of 'Reasonable Necessity' to Determine the Appropriate Scope of Discovery in Insurance/Reinsurance Arbitration,* ARIAS-U.S. QUARTERLY, First Quarter, 2009; Charles J. Moxley, Jr., *Discovery in Commercial Arbitration: How Arbitrators Think,* Dispute Resolution Journal, American Arbitration Association, Aug.-Oct. 2008.
5. *See* New York City Bar Association, Obtaining Evidence from Non-Parties in International Arbitration in the United States (International Commercial Disputes Committee July 2010), https://www.nycbar.org/pdf/report/uploads/20071980-ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf; New York City Bar Association, A Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing (International Commercial Disputes Committee and the Arbitration Committee 2015), https://www2.nycbar.org/pdf/report/uploads/20072911-ABCNYModelArbitralSubpoena.pdf.
6. *See* Boaz S. Morag & Katie Gonzalez, *CPR Article 75 or the Federal Arbitration Act: Which One Applies to Arbitrations in New York and Why it Matters,* The International Lawyer (2019), https://www.clearygottlieb.com/-/media/files/morag_gonzalez-article—the-international-lawyer-pdf.pdf; Charles J. Moxley, Jr., *Traps for the Unwary:Major Differences Between New York and Federal Arbitration Law,* New York Dispute Resolution Lawyer (2010), https://nysba.org/app/uploads/2020/03/DisResNewsSpr10.pdf.