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Speech

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Brian S. Harvey*

Speech[1]

Thank you Professor Eisenberg for that kind introduction, and thank you for inviting me to participate in the *Journal of Business & Technology Law*'s Symposium on Business Arbitration and Redefining the Landscape of Efficient Business Practices. I would also like to offer my congratulations for assembling such a distinguished panel for this morning's presentation.

Commercial arbitration today may be in trouble, but it can be fixed.[2] Let us recall some of the fundamentals that distinguish arbitration from traditional, courtroom litigation. These rudiments inform our expectations concerning the benefits of arbitration for resolution of business disputes. The problem is that those high expectations are not always being met.

First and foremost, arbitration is a creature of contract. Parties who choose arbitration can fashion their own process for dispute resolution to accommodate their own particular needs. This can be done, pre-dispute, in a well-crafted arbitration clause. It can be done after the dispute arises with good management by the arbitrator.

Second, we expect arbitration proceedings to be shorter and quicker than litigation in court. For one thing, appellate review of arbitration awards is limited.[3]

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1. This Article is based on the remarks made by the author at the *Journal of Business & Technology Law's* symposium on Business Arbitration: Redefining the Landscape of Efficient Business Practices, co-sponsored with C-DRUM, on Friday, November 2, 2012 at the University of Maryland Francis King Carey School of Law. Mr. Harvey participated in a panel discussion entitled "Making the Most of Your Arbitration Process." It has been edited to remove the minor cadences of speech that appear awkward in writing.

2. Criticisms of domestic commercial arbitration in the United States — and responses to the criticisms — are reviewed in the Report published by the College of Commercial Arbitrators (CCA). *See generally* Coll. Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration (Stipanowich et al. eds., 2010) [hereinafter Protocols], *available at* http://www.thecca.net/CCA_Protocols.pdf. The presentation and this Article draw substantially on the Report and Protocols.

3. The Federal Arbitration Act limits the authority of a federal court to vacate an arbitration award to the following narrow situations:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy;

This means that the drama, uncertainty, and distraction that necessarily result from the conflict will be over with sooner.

And, because of this, we expect arbitration, overall, to be less expensive than civil litigation. After all, court proceedings feature full discovery, significant motions practice, a fairly rigid regimen of what will and will not be admissible in evidence at trial, and wide-open appellate review that can prolong the conflict for several years. All too often, in complex civil cases that involve significant unresolved legal issues, by the time the case ultimately is tried (if ever), the people who actually were involved in the original conflict will have moved on to other endeavors, and whatever business objectives informed the conduct that engendered the conflict will now be outdated or overmatched by changed market conditions.

Arbitration is a flexible process that can respond directly to the needs of the case. Arbitration cases, unlike those in court, do not have to compete with other matters on the public judicial docket in trying to get the attention of the tribunal. So, the arbitrator should be available to assist as needed. With a well-drawn arbitration clause and good, proactive case management by the arbitrator, discovery and other hearing preparation can be tailored to the specific needs of the case.

Business people — and other people as well, for that matter — like to maintain control over things that are important to them. An arbitral forum allows for more control than do the enclaves of Article III judges. (Nothing against Article III judges, but they do have life-time appointments. That, for better or worse, can bring a different dynamic to bear than the ad hoc, temporary nature of any arbitrator's jurisdiction.)

Another advantage of arbitration for some disputants is that it is confidential.[4] Now, there is a view that some forms of arbitration and some features of arbitration generally would benefit from greater transparency.[5] But confidentiality often is an attractive feature for a business in a dispute, especially when the dispute may involve intellectual property or trade secrets. Many disputants would simply prefer

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> or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (2006).

4. *See* Yvette Ostolaza, *Overview of Arbitration Clauses in Consumer Financial Service Contracts*, 40 Tex. Tech L. Rev. 1, 37–64 (2007) (noting that there are terms in arbitration agreements which require parties to keep future arbitration proceedings confidential); *see also* Charles S. Baldwin, IV, *Protecting Confidentiality and Proprietary Commercial Information in International Arbitration*, 31 Tex. Int'l L.J. 451 (1996) (explaining that parties may include provisions in arbitration agreements regarding the confidential treatment of information).

5. *See* Chris A. Carr & Michael R. Jenks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 Ky. L.J. 183, 228 (1999-2000) (asserting that the privatization process brought on by arbitration "thwarts our system of precedent and will have a significant impact on the business community and our society"); *see also* Sid L. Moller, *Birth of Contract: Arbitration in the Non-Union Workplace*, 50 S.C. L. Rev. 183, 201 (1998) (maintaining that private arbitration agreements may engender concerns about the privatization of justice).

to keep their problems out of the limelight. People in conflict often would prefer not to have a public airing of a failed relationship, a transaction gone sour, their lapses in judgment — all the "dirty laundry" and recriminations of a private wrangling.

In commercial arbitration, publicity can be avoided, reputations can be protected, and concerns that the dispute may have marketplace implications can be reduced.

Another great benefit of arbitration is that the parties select their own decision makers. So long as the parties can agree upon their arbitrator, parties in arbitration can choose arbitrators with the particular qualifications they believe are best suited to the matter, whether those are subject matter expertise, availability, past experience, or their reputation for their ability to conduct an efficient, cost-effective arbitration. The arbitration provider institution that I work with, the American Arbitration Association (AAA), strives to recruit and maintain an extraordinarily diverse roster of commercial arbitrators, with subject matter expertise in an exceedingly broad array of disciplines and practice areas, and to fashion lists of arbitrators who meet the parties' particular criteria. The AAA insists that arbitrators on its roster keep their resumes accurate and up to date. When parties choose an arbitrator, arrangements can be made to vet arbitrator candidates by interviewing them or by written questionnaire.

And, finally, arbitration is final. Usually, it is important that a business dispute be resolved promptly. Stretching out the conflict, arguing about the past, can be a terrible distraction for anyone with a business to run. Arbitration allows the conflict to come to an end more quickly than the judicial process does, in part because the statutory framework in which arbitration proceeds — laid out by the Federal Arbitration Act and state arbitration statutes — imposes stringent limits on judicial review of arbitration awards.[6] An arbitrator's award can only be vacated on very narrow grounds, such as corruption, fraud, evident partiality, or exceeding the arbitrator's powers — and these grounds can be difficult to establish.[7]

Because of these benefits over civil litigation in court, commercial arbitration became the preferred method of resolving business disputes, so much so that, in the 2000s, many trial lawyers came to lament the "vanishing jury trial."[8] Big cases are seldom tried by juries these days.

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6. *See, e.g.*, Bosack v. Soward, 586 F.3d 1096, 1097, 1102 (9th Cir. 2009) (noting that Federal Arbitration Act which "enumerates limited grounds on which a federal court may vacate, modify, or correct the award" limits review of a district court's confirmation of an arbitral award); *see* Stephen Wills Murphy, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 4, 887, 889–90 (2010) (emphasizing the strict limits imposed on judicial review of arbitration under both the Federal Arbitration Act as well as under state arbitration statutes).

7. *See* 9 U.S.C. §10(a) (2006) (setting forth limited grounds for vacatur of arbitration awards in federal court).

8. *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDS. 459, 459 (2004) (emphasizing that increased use of arbitration in

But the pendulum swings. Some people in the commercial arbitration community today believe it is a troubled institution.[9] It has, in some cases, become too much like court litigation. For example, arbitration all too often features full-blown discovery. I regularly see arbitration clauses that expressly permit all discovery processes permitted by the Federal Rules of Civil Procedure — requests for admission, requests for production of documents, interrogatories, and depositions.[10]

So, as declared in the Report preceding the College of Commercial Arbitrators' *Protocols for Expeditious, Cost Effective Commercial Arbitration*, "[c]ommercial arbitration is, to a large extent, a victim of its own success."[11] The problem is serious. A study recently commissioned by the American Arbitration Association found that 46 percent of corporate chief legal officers surveyed indicated that arbitration is *not* cheaper than civil litigation.[12] In the same study, "only 35 percent of corporate attorneys said they expect arbitration clauses to increase over the next five years."[13] This suggests that 65 percent thought that arbitration clauses would not increase. These figures are reported by William K. Slate II, past President and CEO of the American Arbitration Association, at an AAA neutrals conference in the fall of 2010.[14]

The fall of 2010 also saw the production of the College of Commercial Arbitrators Protocols — a call to action. The four Protocols provide concrete action steps for each of the four constituencies of the arbitration community: users of arbitration services (mainly, in-house counsel), outside counsel who are assigned to

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the past several years has resulted in a substantial decrease in the number of federal and state civil cases ending in trials). *Cf.* Patricia Lee Refo, *Opening Statement: State Budget Cuts Threaten Judicial Independence*, ABA Sec. Litig., Fall 2003, at 1 (noting that state courts around the country are suffering from a lack of funding for basic court operations, which has had a crippling effect on the administration of civil and criminal justice).

9. *See, e.g.*, Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration And Other Global Alternative Dispute Resolution Processes*, 40 Loy. L.A. L. Rev. 1337, 1342 (2007) (noting that "the rising costs and sluggish pace of arbitration have led some companies to shy away from" arbitration); *see also* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 Ind. L.J. 425, 441 (1987-1988) (noting that critics of arbitration have observed that arbitration often fails to meet popular expectations and that, as a system founded on private agreement, mostly independent from the judicial process, arbitration has built-in limitations); *see also* G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. Rev. 517, 517 (1989) (noting an increase in the criticisms of the existing remedial schemes for shareholder derivative actions within commercial arbitration).

10. *See* Meredith R. Miller, *Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process*, 75 Tenn. L. Rev. 3, 365, 392–93 (2008) (explaining that because the Federal Arbitration Act does not address the availability of discovery in arbitration, the arbitrator is often left with the discretion to determine "whether a party is entitled to document requests or depositions").

11. Protocols, *supra* note 2, at 5.

12. William K. Slate II, President & CEO, Am. Arbitration Ass'n, Keynote Address at the Orlando Neutrals Conference: All Hands on Deck 3 (Nov. 5, 2010), https://apps.adr.org/ecenter/neutralMediatorUpdates/Orlando%20Neutral%20Conf.pdf.

13. *Id.*

14. *Id.*

represent a party in arbitration, arbitrators themselves, and arbitration provider organizations, such as the American Arbitration Association and JAMS.[15]

The CCA Protocols have become the seminal document for those who are serious about preserving arbitration as a preferred method for resolution of business disputes. They provide sets of guidelines for arbitration similar in importance to the contribution of the Sedona Guidelines for E-Discovery.

It is on the action steps of the *Protocol for Arbitrators* that I would like to focus. There are ten. The first is:

1. Arbitrators should get training in managing commercial arbitrations.[16]

Provider organizations like the American Arbitration Association have redoubled their educational mission by offering continuing arbitrator education courses that focus closely on reducing the amount of time and money it takes to complete an arbitration proceeding.

One of the extremely beneficial results of the efforts that led to the Protocols is that practicing arbitrators may now turn to a wealth of readily available and well-written resources on best practices in commercial arbitration. These materials are useful for all involved in the arbitration process. Foremost among these, along with the Protocols, is the College of Commercial Arbitrators *Guide to Best Practices in Commercial Arbitration*.[17]

The availability of such resources for practicing arbitrators is a recent phenomenon. When I began my practice as an arbitrator, about ten years ago, there was very little published guidance on the nuts and bolts of being a good arbitrator. Once I was admitted to the AAA roster I had an initial training course, but when it came to best practices as an arbitrator I mostly had to figure it out on my own. No longer is this the case. The availability of these thoughtful writings on sound arbitration practice benefits all who work in the commercial arbitration community, not just arbitrators.

2. Arbitrators should insist on cooperation and professionalism.[18]

More than a judge, an arbitrator has the opportunity to set the tone for the proceedings. Establishing a tone of professionalism and mutual respect among participants greatly increases the prospects for developing cooperative approaches to expedite the proceedings — which should help keep the costs down. It is absolutely essential that arbitrators lead by example by being well prepared and

15. Protocols, *supra* note 2.

16. Protocols, *supra* note 2, at 68.

17. Coll. Commercial Arbitrators, Guide to Best Practices in Commercial Arbitration (James M. Gaitis et al. eds., 2nd ed. Juris Net 2010) [hereinafter Guide to Best Practices].

18. Protocols, *supra* note 2, at 68.

punctual for all proceedings. Arbitrators should set deadlines for their own activities in a case, such as a deadline for issuing rulings on motions or for resolving disputes that may arise concerning information exchange or hearing preparation.

3. Arbitrators should actively manage and shape the arbitration process; they should enforce contractual deadlines and timetables.[19]

Studies show that experienced counsel and users of arbitration appreciate arbitrators who take control and assume an active role in the management of the process. Arbitrators should encourage and guide efforts to streamline the process, make a serious effort to avoid unnecessary discovery or motions, and generally conduct the arbitration fairly and thoughtfully but also expeditiously. Commercial arbitrators have considerable discretion under arbitration rules to fashion a process that is appropriate for the case at hand and as expeditious as possible, while still affording all parties a full and fair hearing. If the appropriate collegial tone has been set at the outset, and if the arbitrator proactively seeks the input and cooperation of the parties, arbitration participants will support the considered application of arbitral discretion on process issues.

Contractual deadlines and timetables should be enforced except in those extraordinary circumstances that were beyond the contemplation of the parties when the deadlines were established.

This is not to say that the arbitrator needs, in all circumstances, to insist blindly upon strict implementation of pre-dispute contractual stipulations that might impair the cost-effective and timely resolution of the dispute, once a concrete dispute has indeed emerged. Of course, the parties can agree to modify pre-dispute agreements, and the opportunity always exists for the engaged arbitrator to guide the parties toward an approach that realistically advances the goals of expedition, cost-savings, and fairness.

4. Arbitrators should conduct a thorough preliminary conference and issue comprehensive case management orders.[20]

The single most important tool for ensuring a cost-effective, fair, and efficient arbitration is the initial preliminary hearing or conference at which the schedule and other procedural rules for the life of the case will be established. Traditionally, the preliminary hearing has been conducted by telephone conference, in order to keep costs down, serve convenience, and to show, from the outset, a preference for inexpensive processes. But arbitrators in complex commercial cases are increasingly seeking counsels' agreement to conduct this initial event in person. Getting together at the outset for a face-to-face meeting has many advantages for the dispute

19. Protocols, *supra* note 2, at 69.
20. *See* Protocols, *supra* note 2, at 70.

resolution process, not the least of which is simply enabling everyone to meet (and size up) everyone else. In-person meetings obviously present opportunities for the arbitrator to foster an atmosphere of courtesy and respect — which is critical to keeping the matter on track — and are much more conducive to cooperation and mutual brainstorming than are a conference call with all the limitations of conversing by speakerphone.

Thorough preparation is critical for a successful preliminary conference. The *Guide to Best Practices* has numerous suggestions for preparation and conduct of the preliminary hearing.[21] It should be consulted. Both the *Guide to Best Practices* and the *Protocol for Arbitrators* include summary checklists of the matters that should be considered in preparation for the preliminary hearing.[22]

The arbitrator should send around an agenda for the conference in advance and invite counsel to add to it. Counsel should be requested to review each agenda item and to meet and confer, try to reach agreement on as many of the items on the agenda as they can, and to provide a joint report by email prior to the conference on their points of agreement and disagreement.

5. Arbitrators should schedule consecutive hearing days.[23]

If it takes more than one block of consecutive days to complete the evidentiary hearing, delay and expense are greatly multiplied. It makes much more sense to over-schedule consecutive days, and then free them up for other matters, than to schedule too few days, and have everyone incur the travel time, down time, and catch-up time necessary to convene the proceedings for a second, third, or fourth occasion.

Counsel often underestimate the amount of time needed to present their case. It is important for the arbitrator to encourage realistic estimates of the number of days needed for the hearing. As the hearing date approaches, another pre-hearing management conference can be conducted — again, preferably in person — to seek estimates and commitments for the allotment of witness time.

21. *See generally* Guide to Best Practices, *supra* note 17, at 67–91 (providing suggestions for preparing and conducting preliminary hearings).

22. *See* Protocols, *supra* note 2, at 71 (providing a summary checklist of the matters that ought to be determined at the preliminary conference); *see also* Guide to Best Practices, *supra* note 17, at 84–85 (suggesting topics for arbitrators to consider during the pre-hearing stage).

23. Protocols, *supra* note 2, at 72.

6. Arbitrators should streamline discovery and supervise all pre-hearing activities.[24]

The authority of an arbitrator in domestic United States arbitrations generally derives from the Federal Arbitration Act (FAA).[25] The FAA was enacted in 1925, some thirteen years before the adoption of the Federal Rules of Civil Procedure and their liberal discovery provisions.[26] It is important to remember that the FAA does not directly provide for pre-hearing discovery at all. It certainly does not give parties legal rights they have under the Federal Rules of Civil Procedure to obtain from others documents that need not be admissible in evidence on their own, but are merely "calculated to lead to the discovery of admissible evidence."[27] Section 7 of the FAA provides: "The arbitrators . . . may summon in writing any person *to attend before them . . . as a witness* and *in a proper case* to bring with him or them any book, record, document, or paper which may be deemed *material* as evidence in the case."[28] The document must be *material.* It must itself *matter* to the outcome, not simply "lead to" something else that might matter.

The key to containing discovery is the scheduling and procedure order ensuing from the preliminary hearing. Excellent resources are now available for best practices in this area, such as the New York State Bar Association's Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations (New York Bar Pre-Hearing Guidelines),[29] and the New York State Bar Association's Report on Arbitration Discovery in Domestic Commercial Cases.[30] These resources provide helpful suggestions for limiting pre-hearing processes, including document discovery, dealing with electronically stored information, depositions, discovery motions, and dispositive motions. For example, parties can adopt the New York Bar Pre-Hearing Guidelines and make them binding as part of

24. PROTOCOLS, *supra* note 2, at 72.

25. 9 U.S.C. §§ 1–307 (2006). *See generally id.* §§ 1–16 (granting arbitrators in the United States limited legal authority).

26. Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–14 (2006)); *see* 308 U.S. 649 (1937) (order adopting Federal Rules of Civil Procedure).

27. Rule 26(a) of the Federal Rules of Civil Procedure permits discovery in federal civil actions "regarding any non-privileged matter that is relevant to any party's claim or defense . . . ." FED. R. CIV. P. 26(a); *see* FED. R. CIV. P. 26(b)(1) ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

28. 9 U.S.C. § 7 (emphasis added).

29. N.Y. STATE BAR ASS'N, DISPUTE RESOLUTION SECTION, GUIDELINES FOR THE ARBITRATOR'S CONDUCT OF THE PRE-HEARING PHASE OF DOMESTIC COMMERCIAL ARBITRATORS AND GUIDELINES FOR THE ARBITRATOR'S CONDUCT OF THE PRE-HEARING PHASE OF INTERNATIONAL ARBITRATIONS, *available at* http://www.nysba.org/Content/NavigationMenu/Publications/GuidelinesforArbitration/DR_guidelines_booklet_proof_10-24-11.pdf (last visited Apr. 8, 2013) (setting forth the New York Bar Pre-Hearing Guidelines).

30. *See generally* N.Y. STATE BAR ASS'N, DISPUTE RESOLUTION SECTION ARBITRATION COMM., REPORT ON ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES, *available at* http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/DiscoveryPreceptsReport.pdf (last visited Apr. 1, 2013) (presenting a report on arbitration discovery in domestic commercial cases).

their arbitration agreement. Or, even if the parties do not make these provisions part of their contract, the arbitrator may rely on them as a resource for efficient management of the pre-hearing phase of the case.

Another useful resource is the International Bar Association (IBA) Rules on the Taking of Evidence, particularly Section 3.3, which addresses the categories of document discovery that are permissible in arbitration, and requires a party requesting documents to include in its request:

- a statement as to how the documents are relevant and material to the outcome of the case,
- either a statement that the documents requested are not in the possession, custody or control of the requesting party or a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents, and
- a statement of the reasons why the requesting party assumes the documents requested are in the possession, custody or control of another party.[31]

Although the IBA Rules on the Taking of Evidence target international arbitration, they provide useful suggestions for parties wishing to contain the cost of discovery in domestic commercial arbitration.

7. Arbitrators should discourage the filing of unproductive motions and should limit motions for summary disposition to those that hold reasonable promise for streamlining or focusing the arbitration process, but should act aggressively on those.[32]

In civil litigation, motions for summary judgment are routine. The main purpose of discovery in court proceedings often is to compile written materials and deposition transcripts for use as exhibits in support of the effort to have the judge decide the case without live witness testimony and to keep the case from going to a jury which may be perceived as not particularly sympathetic to business interests. It is unusual these days for a civil case to proceed in federal court without a summary judgment motion being filed.

There is a place for such motions in arbitration. But it is not nearly as commodious a place as their native home in civil litigation. If a procedural defense might significantly narrow or obviate the claims of the arbitration demand — such

31. *IBA Rules on the Taking of Evidence in International Arbitration*, Int'l B. Ass'n (2010), *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence.

32. Protocols, *supra* note 2, at 73.

as a defense of non-arbitrability or lack of jurisdiction, a statute of limitations defense, or a matter concerning whether a party is properly in the arbitral tribunal — it is often well to address the issue by prompt briefing and an expeditious ruling.

But the usual, broad-form motion for summary adjudication of the merits of the dispute is, generally speaking, somewhat less welcome in arbitration than in civil litigation. To be sure, arbitrators have the authority to grant such motions.[33] But the absence of appellate review may leave an arbitrator reluctant to impose a summary disposition without an opportunity to present live witness testimony and be heard at an evidentiary hearing.

I typically provide in the scheduling and procedure order that parties wishing to file a dispositive motion must seek leave to do so by filing a short, two-or three-page document explaining how the motion would be likely to advance the ultimate determination of the matter.[34] The other side then may file a document of the same length in opposition. Usually I will then commit to determine promptly what if any further proceedings or submissions are necessary for the prompt determination of the request to file a dispositive motion. Lately, I have taken to giving myself a deadline — perhaps a week or ten days — to decide the request.

If there is any motions practice, and the motion is not successful, I often do not require any further pre-hearing briefing. In these circumstances the resources devoted to the motion, or a request to file one, can serve the alternative purpose of educating the opponent and the arbitrator on the issues expected to be heard and determined at the hearing.

8. Arbitrators should be readily available to counsel.[35]

Arbitrators are independent. Usually they do not have the demanding scheduling obligations that judges face, such as the Speedy Trial Act[36] and other demands of a criminal docket, or civil trials that drag on for weeks or months.

In the initial scheduling and procedure order, the arbitrator should commit to be available to the parties as needed, so long as the parties have made an effort to work out any issues themselves before calling upon arbitrator time. Some arbitrators even ask for regular reports of the status of the case.

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33. UNIF. ARBITRATION ACT § 15(b) (2000); *see also* Alfred G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, DISP. RESOL. J., Aug–Oct. 2007, at 17.

34. *See* AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 31(2009) (providing that "the arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case").

35. PROTOCOLS, *supra* note 2, at 74.

36. *See* 18 U.S.C. § 3161(a) (2006) (providing generally for speedy trial in federal criminal proceedings); *see also* James K. Robinson, *Thirtieth Annual Review of Criminal Procedure*, 89 GEO. L.J. 5, 1045, 1384–85 (2001) (noting that the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174 (2006), "establishes specific time limits for completing the key stages of a federal criminal prosecution").

9. Arbitrators should conduct fair but expeditious hearings.[37]

Hearing time is precious and expensive. It is precious because all involved are, for once, in the same place at the same time, and they may have travelled a long way, laying aside their usual business, to be there. It is expensive because many of the participants, of course, will be keeping track of their time for billing purposes, including the arbitrator or arbitrators. It is critical to use this valuable time wisely. Chapter 9 of *Guide to Best Practices* provides thirty-seven pages of guidance on how to accomplish that goal.[38] Again, it is an excellent primer for anyone preparing for an arbitration hearing and should be reviewed in detail. The *Protocol for Arbitrators*, as well, includes a checklist of major steps toward an efficient arbitration hearing.[39]

I will not repeat the check lists here. The most important point is to set the stage so that there is an awareness that, when the arbitration participants are "on the record" at the hearing, even if (or perhaps especially if) there is no transcript being prepared, all those who participate should be crisp and efficient. The value of punctuality and sticking to a schedule cannot be overstated. It is important that the parties' representatives and witnesses be treated with due regard and respect for their own calendars. In their minds, there are probably better ways to spend one's time than sitting, waiting to be called to testify. Whenever possible, for example, witnesses should not be made to wait in a conference room while counsel and the arbitrator hassle out some procedural issues; these should have been anticipated and addressed, if practicable, prior to the commencement of the hearing.

Moving to the next witness without taking a break is helpful. And when breaks are taken, taking a moment right away to ask if any housekeeping or procedural issues need discussion before going on the record and after going off the record helps move things along and affords opportunity to encourage agreement on procedural issues.

10. Arbitrators should issue timely and careful awards.[40]

At the preliminary hearing, the arbitrator typically will ascertain what type of award the parties want — a so-called "standard" or "bare" award that simply states the result — who wins, and the amount, if any, of money to change hands — or a "reasoned award," which may read like a judicial opinion.

I often spend a lot of time writing awards and other decisions in the case, more time that I can ever expect to bill as part of my arbitrator's fee. But I find the exercise extremely helpful in coming to the correct result in a difficult case.

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37. Protocols, *supra* note 2, at 74.

38. *See generally* Guide to Best Practices, *supra* note 17, at 129–65 (providing guidance on effective use of hearing time).

39. Protocols, *supra* note 2, at 75–76.

40. *See* Protocols, *supra* note 2, at 76.

Conclusion

In conclusion, we should keep in mind that, of course, there can be no single template of best practices suitable for all commercial arbitrations, regardless of the relative complexity of the case. Simpler cases, for example, may call for simpler processes. But, by fostering a cooperative approach, the best arbitrators can bring experience to bear to help the parties identify practices and processes that will work best for their unique case and maintain the promise of efficiency and fairness in commercial arbitration.