



# NYSBA

**Dispute Resolution Section  
and  
Benjamin N. Cardozo  
School of Law**

**Commercial Arbitration Training  
for Arbitrators and Counsel**

*Comprehensive Training for the  
Conducting of Commercial  
Arbitrations*

**24 CLE credits**

**July 16-18, 2012**

Benjamin N. Cardozo School of Law

55 Fifth Avenue

New York, NY 10003



## AN OVERVIEW OF THE COURSE:

For new arbitrators and seasoned arbitrators interested in taking their skills to the next level – and for litigators interested in learning arbitration Best Practices that they should be able to expect from arbitrators:

The training will be conducted by seasoned arbitrators, counsel, arbitration administrators, and academics, focusing on Best Practices, from the perspectives of arbitrators and counsel, for conducting commercial arbitrations in an economical, expeditious and fair manner, enabling parties to achieve the promise of commercial arbitration.

In addition to interactive sessions on managing an arbitration from the preliminary conference through the hearing and award, the program will include presentations on the law of arbitration, the ethical rules relating to service as an arbitrator, e-discovery, award writing, international arbitration, mental heuristics relevant to arbitral decision-making, and the development of an arbitration practice.

### Topics and Skills:

- Selecting Arbitrators
- Conducting Conflicts Searches
- Conducting the Preliminary Hearing
- Conducting Hearings on Applications for Preliminary Injunctions and Other Interim Relief
- Determining the appropriate scope of discovery, including documents, electronic documents and depositions
- Determining the appropriate scope of motion practice
- Setting deadlines for discovery and motion practice
- Hearing discovery and substantive motions
- Addressing motions to disqualify counsel
- Special considerations for pro se parties
- Determining what non-party subpoenas to sign
- Running the hearing effectively
- Determining what evidence to admit and exclude
- Dealing with difficult arbitrators, counsel and parties
- Issues as to the authority or not of arbitrators to award sanctions
- Preparing awards, both standard and reasoned
- Handling requests to submit additional evidence after the closing of the hearing
- Deciding applications to amend awards
- Arbitration ethics
- Seeking vacatur of awards

*The program faculty has presided over many hundreds of hearings and served as counsel in many arbitrations*

### Faculty:

**Oliver J. Armas**, Member, Chadbourne & Parke, S.C.

**George A. Bermann**, Professor of Law, Columbia University School of Law

**William J.T. Brown**, Counsel, Arbitrator and Mediator

**John F. Byrne**, Arbitrator and Mediator

**Elayne F. Greenberg**, Director, Hugh L. Carey Center for Dispute Resolution, St. John's University

**Stephen A. Hochman**, Mediator and Arbitrator

**Sherman W. Kahn**, Of Counsel, Morrison & Foerster, LLP

**Eric S. Kobrick**, Deputy General Counsel, Corporate Operations, and Chief Reinsurance Legal Officer, AIG

**Daniel F. Kolb**, Member, Davis Polk & Wardwell

**Lea Haber Kuck**, Member, Skadden, Arps, Slate, Meagher & Flom LLP

**Jack P. Levin**, Mediator and Arbitrator

**Luis M. Martinez**, Vice President, International Centre for Dispute Resolution

**Deborah Masucci**, Vice President, Chartis; Chair, ABA Dispute Resolution Section

**Richard L. Mattiaccio**, Partner, Squire Sanders (US) LLP

**Charles J. Moxley, Jr.**, Arbitrator, Mediator and Counsel; Chair, NYSBA Dispute Resolution Section

**Michael S. Oberman**, Partner, Kramer Levin Naftalis & Frankel LLP

**Sandra K. Partridge**, Vice President, American Arbitration Association

**Abigail Pessen**, Arbitrator and Mediator

**James M. Rhodes**, Counsel, Arbitrator and Mediator

**Kathleen M. Scanlon**, Member, The Law Offices of Kathleen M. Scanlon PLLC

**James F. Stapleton**, Arbitrator and Mediator

**David C. Singer**, Partner, Dorsey & Whitney LLP

**Edna Sussman**, Principal, Sussman ADR; Past Chair, NYSBA Dispute Resolution Section

**Irene C. Warshauer**, Arbitrator and Mediator

**Nicholas R. Weiskopf**, Professor of Law, St. John's University School of Law

**Daniel M. Weitz**, Deputy Director, Division of Professional and Court Services and Coordinator, Office of ADR and Court Improvement Programs, New York State Unified Court System

**John Wilkinson**, Arbitrator and Mediator

# NEW YORK STATE BAR ASSOCIATION

## PROGRAM DIRECTORS AND PRESENTERS:

### **CHARLES J. MOXLEY, JR., ESQ.**

Mr. Moxley has presided over hundreds of arbitrations, including in the commercial, securities, insurance and international areas and mediated many cases. He is an Adjunct Professor of Law teaching arbitration and international law at the Fordham University School of Law and the Distinguished ADR Practitioner in Residence at Benjamin N. Cardozo School of Law. A Fellow of the College of Commercial Arbitrators and of the Chartered Institute of Arbitrators, he is a member of arbitration and mediation panels of the American Arbitration Association (“AAA”), the International Institute for Conflict Prevention and Resolution (CPR), the U.S. Council of International Business (USCIB) for the ICC International Court of Arbitration, and Supreme Court, New York County (Commercial Division and Part 137), and of the arbitration panel of ARIAS-US. He also serves as an arbitrator and mediator in ad hoc cases. He is an ARIAS-U.S. Certified Arbitrator and an IMI Certified Mediator. Mr. Moxley lectures and speaks frequently at academic and professional proceedings and has written extensively in the area of arbitration, concentrating on effective conducting of preliminary hearings, management of discovery in arbitration, and arbitration choice of law.

### **EDNA SUSSMAN, ESQ.**

Ms. Sussman is a full-time experienced arbitrator and mediator with experience with hundreds of disputes serving on leading ADR panels, including those administered by the American Arbitration Association (“AAA”), the International Centre for Dispute Resolution (“ICDR”) the International Institute for Conflict Prevention and Resolution (CPR), the U.S. Council of International Business (USCIB) for the ICC International Court of Arbitration, WIPO, the Swiss, Hong Kong, Singapore, Kuala Lumpur and Dubai Arbitration Centers, the Supreme Court, New York County (Commercial Division) and the U.S. District and Bankruptcy Courts in New York. The Distinguished ADR Practitioner in Residence at the Fordham University School of Law, Ms. Sussman serves on the boards of the AAA and the College of Commercial Arbitrators, is a fellow of the Chartered Institute of Arbitrators and has published and lectured extensively on the arbitration and mediation process. For Alternative Dispute Resolution she is listed in Best Lawyers and Super Lawyers and ranked as Tier 1 by US News & World Report.

### **LEA HABER KUCK, ESQ.**

Ms. Kuck is a partner at Skadden, Arps, Slate, Meagher & Flom LLP, and a member of its international litigation and arbitration group. Ms. Kuck concentrates her practice on complex litigation and arbitrations involving a wide range of corporate, commercial and securities matters. She regularly represents clients in disputes arising out of international business transactions and advises clients on a variety of issues relating to international dispute resolution, including forum selection, jurisdiction, service of process, extraterritorial discovery and enforcement of judgments. Ms. Kuck has experience in all phases of litigation, both at the trial and appellate levels, in federal and state courts in the United States as well as international arbitration conducted under UNCITRAL, ICC, ICDR and other arbitration rules. She frequently writes and lectures on topics of international litigation and arbitration.

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**CLE INFORMATION:** The New York State Bar Association’s Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Under New York’s MCLE rule, this program will provide you with a total of **24 CREDIT HOURS. THIS PROGRAM IS TRANSITIONAL AND THEREFORE SUITABLE FOR NEWLY ADMITTED ATTORNEYS.**

**DISCOUNTS AND SCHOLARSHIPS:** New York State Bar Association members and non-members may receive financial aid to attend this program. Under this policy, anyone who requires financial aid may apply in writing, not later than ten working days prior to the program, explaining the basis of his/her hardship, and if approved, can receive a discount or scholarship, depending on the circumstances. For more details, please contact: Bryana Wachowicz, New York State Bar Association, One Elk Street, Albany, New York 12207.

**ACCOMMODATIONS FOR PERSONS WITH DISABILITIES:** NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Bryana Wachowicz at 518.487.5630 or bwachowicz@nysba.org.

# SCHEDULE OF EVENTS

## Monday, July 16, 2012, Morning Session *(3.5 credits in Skills)*

8:00-9:00 a.m. **Registration and Continental Breakfast**

9:00-9:15 a.m. **Welcome and Introductions**

*Charles J. Moxley, Jr., Training Co-Chair*

*Edna Sussman, Training Co-Chair*

*Lea Haber Kuck, Training Co-Chair*

9:15-10:30 a.m. **Session 1: Pre-Preliminary Hearing Issues**

- Arbitrator disclosure of potential conflicts
- Organization meeting of panel members when there is a panel
- Preparing for the preliminary hearing
- Applications for interim relief
- Whether the preliminary hearing should be held in-person or by telephone
- Whether clients should be present at the preliminary hearing
- Whether to send the parties an agenda of items to be covered at the preliminary hearing
- Whether to ask the parties to meet in advance to agree on schedule
- Setting the date and time for the preliminary hearing
- Whether to encourage the parties to start the process of document disclosure in advance of the preliminary hearing
- Related ethical issues

*Faculty:*

*Charles J. Moxley, Jr.*

*Edna Sussman*

*Lea Haber Kuck*

10:30-10:45 a.m. **BREAK**

10:45-12:25 p.m. **Session 2: Preliminary Hearing: Part 1**

- Purposes of preliminary hearing
- Role of Chair and "Wings" in the preliminary hearing
- Arbitrator's opening remarks in preliminary hearing
- Review of what documents the arbitrators have received in advance to make sure there is nothing missing
- Review of arbitration clause
- Requests for interim relief
- Applications for a change of venue
- Determination of applicable law
  - Substantive law applicable to the parties' agreement and conduct, etc.
  - Arbitration law, including whether the Federal Arbitration Act and/or state arbitration law apply
- Issues as to arbitrability
- Possibility of amended pleadings
- Particularization of damages claims or counterclaims
- Applications to disqualify counsel
- Related ethical issues
- Substantive Motions
  - Motions to Dismiss Claims or Counterclaims
  - Motions to Dismiss Punitive Damages Claims
  - Motions to Dismiss Based Upon Statutes of Limitations or Similar Defenses
  - Procedures for Screening Potential Motions

*Faculty:*

*Charles J. Moxley, Jr.*

*Edna Sussman*

*Lea Haber Kuck*

# SCHEDULE OF EVENTS

12:25-1:25 p.m.

## LUNCH

12:40 p.m.

**Lunch Address: *Overview of the Arbitration Process: Law, Practice and Art***

*Speaker:*

*Charles J. Moxley, Jr.*

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## Monday, July 16, 2012, Afternoon Session *(4.5 credits in Skills)*

1:25-3:05 p.m.

### Preliminary Hearing: Part 2

- Discovery
  - Non-electronic documents
  - Electronic documents generally (there will be a more detailed program on electronic documents later in the program)
  - Depositions
  - Interrogatories
  - Differences between domestic and international arbitrations
- Establishing a schedule for document production, including dates for:
  - Document requests
  - Objections to document requests
  - Counsel's conferring in an effort to resolve document disputes
  - Submission of letters to the arbitrator relating to remaining discovery disputes
  - Setting dates for oral argument of discovery disputes
  - Production of non-objected to documents
  - Establishing a completion date for all document production
- Issue of whether to set up a separate process to maintain control of e-discovery
- Approaches as to depositions
  - Avoiding them all together
  - Limiting the number of depositions
  - Limiting the duration of depositions
  - Phasing the depositions
  - Generally precluding speaking objections
  - Getting agreement on alternatives to standard depositions
    - Appearance at the hearing by videoconference
    - Appearance by videotaped deposition
    - Appearance by telephone
- Establishing cut-off dates for discovery
- Related ethical issues

*Faculty:*

*John Wilkinson  
Sherman Kahn  
Charles J. Moxley, Jr.  
Edna Sussman  
Lea Haber Kuck*

3:05-3:20 p.m.

### BREAK

3:20-5:30 p.m.

### Session 4: Preliminary Hearing: Part 3

- Other motions
  - Motions to consolidate or sever
- Possible alternatives to testimony
  - Stipulations of uncontested facts
  - Direct testimony by affidavit
  - Affidavits generally
- Expert witnesses

# SCHEDULE OF EVENTS

## Session 4: Preliminary Hearing: Part 3 *continued*

- Identification of anticipated experts
- Exchange of expert's reports
- First exchange: On issues as to which parties have the burden of proof
- Responsive expert's reports
- Pre-hearing papers
  - Witness lists
    - Whether/when to require summaries of testimony
  - Exhibits
    - Joint exhibits
    - Individual exhibits
    - Organization of exhibits
      - Chronologically
      - By topic
      - Separate page ranges assigned to each side
  - Key exhibits
    - To be exchanged on a joint basis or separately by each side
    - Marking up of key exhibits to designate portions relied upon
  - Pre-hearing memoranda
  - Relationship of pre-hearing memoranda to the question of what kind of post-hearing papers/oral argument will be interposed
- Form of testimony of witnesses
  - In person
  - By videoconferencing
  - By videotaped deposition
  - By telephone
  - By deposition
- Subpoenas for non-party witnesses and their documents
  - Materiality to the case of the documents or testimony sought
  - Legal issues as to the authority of arbitrators to sign subpoenas (to be developed in more detail on Day 3)
  - Ethical issues as to the appropriateness of arbitrators' signing subpoenas
  - Interplay of FAA versus state law on the question of the appropriateness of arbitrators signing discovery subpoenas
- Settlement: Whether to include a suggestion that, as some point, the parties discuss settlement/mediation
- Establishing dates for status conferences
- Form of decision: Standard versus reasoned awards (this topic will be covered in more detail on Day 3)
- Court Reporter
  - Whether the parties will arrange for a court reporter
  - Relationship of that question to the question of whether the parties want a reasoned award
  - What to do when one party wants to retain a court reporter and the other doesn't
- Scheduling of the hearing
  - When to schedule the hearing
  - How many days to schedule
- Report of preliminary hearing and scheduling order
- Related ethical issues

Faculty:

*Charles J. Moxley, Jr.*

*Edna Sussman*

*Lea Haber Kuck*

*James M. Rhodes*

5:30 p.m.

**ADJOURN**

# SCHEDULE OF EVENTS

## Tuesday July 17, 2012, Morning Session *(3.0 credits in Skills)*

8:30-9:00 a.m.

### Registration and Continental Breakfast

9:00-9:30 a.m.

### Session 1: Preparation of the Report of Preliminary Hearing and Scheduling Order

9:30-10:45 a.m.

### Issues Arising Between the Preliminary Hearing and the Hearing

- Overall description of what happens during this period
- Hearings on applications for interim relief
- Discovery motions
- Discovery requests and productions subsequent to the discovery cut-off
- Handling of substantive motions
- Handling of substantive motions made subsequent to the cut-off date
- Requests for delays and extensions of established deadlines
- How to handle parties' notification of change of counsel, particularly when the change causes conflicts for arbitrators or is otherwise a basis for delay
- Non-compliance with deadlines and directives of the arbitrators
- Arbitrators' authority or not to issue sanctions
- Final pre-hearing status conference
- Related ethical issues

*Faculty:*

*Charles J. Moxley, Jr.  
Edna Sussman  
Lea Haber Kuck*

10:45-11:00 a.m.

### BREAK

11:00-12:00 p.m.

### Session 2: The Hearing

- General introduction to the conducting of the hearing
- How to handle and limit breaks
- How, generally, to keep the hearing going efficiently
- How and when to handle objections as to documents
- Desirable affect of the arbitrator during the hearing
- Avoiding ex parte conversations during breaks at the hearing
- Sequestration of witnesses
- Opening statements, if any, by counsel
- Limited requirements as to foundations for documents and other exhibits
- Generally deeming un-objected to pre-marked exhibits as in evidence as of the opening of the hearing
- What, if any, rules of evidence or the like to follow in deciding what evidence to permit as an arbitrator
- Attitude towards hearsay testimony and other evidence in arbitration
- Witness statements/experts
- Counsel's extensive reading from documents
- Cumulative testimony
- Repetitive witnesses
- Harsh cross-examination
- Witnesses on cross who keep repeating their overall points
- Counsel talking with witnesses while they are on cross-examination
- Excessive objections
- Closing statements, if any
- How to handle disclosures that become necessary during the hearing because of the identification of new parties or entities involved in the case
- Related ethical issues

# SCHEDULE OF EVENTS

*Faculty:* Charles J. Moxley, Jr.  
Edna Sussman  
Lea Haber Kuck

12:00-1:00 p.m. **LUNCH**

12:15 p.m. **Luncheon Address: Introduction to the World of International Arbitration – and How It Fits into Today’s World**

*Speaker:* Luis M. Martinez

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## Tuesday July 17, 2012, Afternoon Session *(4.0 credits in APP, 1.0 in Skills)*

1:00-2:30 p.m. **Session 3: International Arbitration: How It Differs from Domestic Arbitration**

- Introduction to the overriding conventions and laws applicable to international arbitration as opposed to domestic
- Discussion of the practices of international arbitration that are different from domestic
- The extent and significance of international arbitration as the default methodology of choice for international business

*Faculty:* Moderator: Charles J. Moxley, Jr.  
Luis M. Martinez  
George A. Bermann  
Edna Sussman  
Lea Haber Kuck

2:30-3:05 p.m. **Session 4: Post-Hearing Issues**

- Post-hearing applications for introduction of additional evidence
- Drafting of the award (general introduction -- There will be a more detailed discussion of this topic on Day 3)
- Post-award requests to change the award
  - Mathematical or formal corrections and the like
  - Substantive changes
  - Notion of *functus officio*
- No Contact with counsel or parties following the award
- Related ethical issues

*Faculty:* Charles J. Moxley, Jr.  
Edna Sussman  
Lea Haber Kuck

3:05-3:15 p.m. **BREAK**

3:15-4:30 p.m. **Electronic Discovery**

- Significance of electronic discovery in terms of cost and delay
- Definition of terms
- Identification of the areas of greatest expense in connection with electronic discovery
- Matters to establish at the outset to minimize the expense and optimize the efficiency of electronic discovery
- ICDR recommended practices as to electronic discovery
- CPR Protocols
- Best practices as to electronic discovery



## SCHEDULE OF EVENTS

*Faculty:* Moderator: Edna Sussman  
Sherman W. Kahn  
Daniel F. Kolb  
Richard L. Mattiaccio  
Irene C. Warshauer

4:30-5:30 p.m. **Counsel and Client Perspectives on Arbitration Best Practices**

*Faculty:* Moderator: Charles J. Moxley, Jr.  
Sherman W. Kahn  
Eric S. Kobrick  
Lee Haber Kuck  
Richard L. Mattiaccio

5:30 p.m. **ADJOURN**

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### **Wednesday, July 18, 2012, Morning Session** (1.5 credits in APP, 3.0 in Ethics)

8:30-9:00 a.m. **Registration and Continental Breakfast**

9:00-10:15 a.m. **Arbitration Law**

- Introduction to the FAA
- Introduction to New York arbitration law – CPLR Article 75
- Interplay of the FAA and New York arbitration law in arbitrations held in New York
- Arbitrability
- The “Who Decides” issue: Who determines arbitrability, the arbitrators or a court?
- Arbitration due process
- Enforceability of non-party subpoenas for documents and testimony
  - Within subpoena range of the seat of the arbitration
  - Beyond subpoena range of the seat of the arbitration
- Standards of review under the FAA and New York arbitration law
- Whether—and the extent to which—arbitrators should decide cases based on law or equity

*Faculty:* Moderator: Charles J. Moxley, Jr.  
William J.T. Brown  
Stephen A. Hochman  
Michael S. Oberman  
Nicholas R. Weiskopf

10:15-11:05 a.m. **Ethics and Heuristics – Ethical, Physiological and Psychological Factors Affecting Our Exercise of Judgment and Decision-Making: System 1 and System 2**

*Faculty:* Moderator: Charles J. Moxley, Jr.  
Elayne F. Greenberg  
Daniel Weitz

11:05-11:20 a.m. **BREAK**

## SCHEDULE OF EVENTS

11:20-1:00 p.m.

### **Arbitration Ethics**

- Disclosure rules
- Codes of Ethics applicable to arbitrators
- Best practices for disclosures by arbitrators
- Ongoing nature of disclosure obligation
- Party-appointed arbitrators
- Appropriateness of an arbitrator's accepting appointment to a new case that involves parties or attorneys who are already appearing before the same arbitrator in another case
- Use of Associates/Assistants
- Appropriateness of an arbitrator's accepting employment as counsel for a party who had previously appeared before the arbitrator in an unrelated case
- Involvement of arbitrators with respect to possible settlement discussions among the parties
- Inclusion of all arbitrators on a panel in arbitrator discussions concerning the case
- Recent ethical decisions

*Faculty:*

*Moderator: Lea Haber Kuck  
Charles J. Moxley, Jr.  
Abigail Pessen  
Kathleen M. Scanlon*

1:00-2:00 p.m.

### **LUNCH**

1:15 p.m.

### **Luncheon Address: *How to be an Effective Advocate in a Commercial Arbitration – and What This Means for Arbitrators***

*Speaker:*

*Lea Haber Kuck*

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## **Wednesday, July 18, 2012, Afternoon Session** *(1.5 credits in Skills, 2.0 in LPM)*

2:00-3:15 p.m.

### **Award Writing**

- Standard versus reasoned awards
- Advantages and disadvantages of each type of award
- Consideration of what should be included in a standard award
- Consideration of what should be included in a reasoned award
- The structure of a reasoned award
- How to go about drafting a reasoned award
- When to start drafting a reasoned award
- Best Practices as to drafting of reasoned award where there is a panel of three arbitrators

*Faculty:*

*Moderator: Charles J. Moxley, Jr.  
John F. Byrne  
Lea Haber Kuck  
David C. Singer  
James F. Stapleton*

3:15-3:30 p.m.

### **BREAK**

3:30-4:00 p.m.

### **The Real World: Practice Development – What Color is Your Dispute Resolution Parachute**

*Faculty:*

*Sandra Partridge*

## SCHEDULE OF EVENTS

4:00-5:15 p.m.

### **Perspectives on Practice Development in the Arbitration World**

- Overview of the arbitration world
- Level of training and experience necessary to be a good arbitrator
- How to go about getting experience as an arbitrator
- Traits that parties and their counsel look for in prospective arbitrators
- Opportunities for arbitration training and skills building

*Faculty:*

*Moderator: Charles J. Moxley, Jr.*

*Oliver J. Armas*

*Lea Haber Kuck*

*Deborah Masucci*

*Sandra Partridge*

5:15-5:30 p.m.

### **Questions and Answers/Final Wrap Up**

5:30 p.m.

### **ADJOURN**

5:30-7:00 p.m.

### **Wine and Cheese Reception**

*To get involved with the NYSBA Dispute Resolution Section visit [www.nysba.org/drs](http://www.nysba.org/drs) for a listing of upcoming Section programs, networking events, committee meetings, reports, and publications.*



NEW YORK STATE BAR ASSOCIATION  
**MEETINGS DEPARTMENT**

One Elk Street  
Albany, NY 12207