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Understanding—and Avoiding—Vacatur and Applications for Vacatur

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Parties are often motivated to choose arbitration to achieve a faster and more economical resolution of their disputes. Arbitration also offers flexibility, privacy, the ability to select the decision-makers, and, importantly, finality.

When the losing party successfully moves to vacate the award in court, these benefits are lost. The benefits may also be lost even when an application for vacatur is unsuccessful. Speed and economy, flexibility, privacy, the desired decision-maker, and even finality—all of these objectives are compromised once an application for vacatur is made.

This article addresses how to avoid vacatur and, to the extent possible, how to avoid applications for vacatur. We review grounds for vacatur and recent vacatur decisions of courts across the United States. We then discuss approaches for conducting arbitrations in such a way as to minimize the prospect not only of vacatur, but also of applications for vacatur.

I. Introduction

While no hard data exists, anecdotally it appears that compliance with arbitral awards is high. Some estimates suggest that parties voluntarily comply with about 65% of awards. When a party instead seeks to vacate an award, studies of federal and state cases have found that vacatur is granted in as few as 2.4% to about 18% of vacatur petitions, depending on the ground being asserted and the circumstances of the particular case.[1] As these studies show, it is hard for a party to prevail on a vacatur petition.

[1] *See* John Burritt McArthur, *The Reasoned Award in the United States: Its Promise, Preparation, Problems, and Preservation* 4-5 (2022); Thomas J. Brewer, *Arbitrator Boundaries: Exploring the Evolving Limits on Arbitrator Authority, in AAA Yearbook on Arbitration and the Law* 474 (2012); Lawrence R. Mills et al., *Vacatur of Arbitration Awards: A Real-World Review of the Case Law* 3-8 (2005). *See also* Tracey B. Frisch*, Death by Discovery, Delay, and Disempowerment: Legal Authority for Arbitrators to Provide a Cost Effective and Expeditious Process,* 17 Cardozo J. of Conflict Resol. 155 (2015). For an international perspective, *see, e.g.*, Roger P. Alford et al., *Empirical Analysis of National Courts Vacatur and Enforcement of International Commercial Arbitration Awards*, 39 J. Int'l Arb. 299 (2022).

Yet vacatur applications, even when unsuccessful, frustrate the arbitral objectives of efficiency and expediency—objectives arbitrators are otherwise quite effective in achieving. Court cases, including appeals, typically take years to conclude.[2] In contrast, the median time from filing to award is typically less than seven months for cases administered by the American Arbitration Association (the "AAA"), including its international division, the International Centre for Dispute Resolution (the "ICDR").[3] Even the AAA's large, complex commercial cases typically conclude within a year from the preliminary hearing. Only rarely do arbitral proceedings extend beyond a year and a half, even in the largest and most complex of cases.

This article focuses on two broad topics:

1. How arbitrators can avoid vacatur of their awards under federal and state arbitration law; and

2. How, through good and effective arbitration practices, arbitrators can minimize even the filing of applications for vacatur.

In addressing the first topic, we examine a sample of U.S. federal and state court decisions granting or denying vacatur. Our selection of cases is not intended to provide a comprehensive survey of decisional law on vacatur, but rather to highlight red flags arbitrators should bear in mind.

For the second topic, we provide practical suggestions as to how arbitrators may conduct their cases so as to foster such a level of user satisfaction that even losing parties will be disinclined to seek vacatur, and their attorneys will counsel that vacatur applications would be futile. We also provide suggestions about how to

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[2] *See* Roy Weinstein et al., *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings* (Mar. 2017), https://static1.squarespace.com/static/61b53e492ea58d13b806ccb3/t/61bb8320fa9ba06e1700a3bc/1639678753466/Efficiency_Economic_Benefits_Dispute_Resolution_through_Arbitration_Compared_with_US_District_Court_Proceedings.pdf; *see also* https://go.adr.org/impactsofdelay.html.

[3] Based on the initial claims of 2,384 AAA business contract cases awarded in 2015. AAA, *Businesses and Law Firms: What* Not *To Believe About Arbitration* (Aug. 3, 2016), https://www.adr.org/sites/default/files/document_repository/2016_Myth_Busters_WhitePaper_080316_0.pdf.

achieve, to the extent possible, bulletproof awards that courts will be unlikely to vacate.

II. What Are the Grounds for Vacating Arbitration Awards?

The Federal Arbitration Act ("FAA") specifies four grounds for vacatur:

1. Award procured by "corruption, fraud or undue means";
2. "Evident partiality or corruption" in the arbitrators;
3. 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; or of any other misbehavior by which the rights of any party have been prejudiced"; and
4. 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).

Some federal circuit courts and states also consider other grounds, including the following:[4]

1. Manifest disregard of the law: The Second, Fourth, and Ninth Circuit Courts of Appeals recognize this additional ground; the Fifth, Seventh, Eighth, and Eleventh Circuits do not. It is an open question in the First, Third, Tenth, D.C., and Federal Circuits, with the Sixth Circuit having issued inconsistent decisions on the issue. This analysis is based on a review of decisions as of 2018.[5]

[4] Grounds for vacatur pursuant to state arbitration law, in circumstances where the FAA is not applicable or where the parties have chosen state arbitration law, vary somewhat. However, the authors believe the issues elaborated in this article are generally illustrative of vacatur risks under both federal and state law.

[5] *See* Stuart M. Boyarsky, *The Uncertain Status of the Manifest Disregard Standard One Decade After Hall Street*, 123 Dickinson L. Rev. 1 (Fall 2018).

2. Contrary to public policy: This ground is generally based on a statute or judicial precedent that is deemed to embody a "public policy" with which the award conflicts.

A. Vacating Awards—The "Exceeding Powers" Ground

"Exceeding powers," while the fourth ground listed in the FAA, is the most common ground on which parties seek, and courts grant, applications for vacatur. A survey of cases from 2010 to 2017 found that courts vacate arbitration awards in approximately 17.4% of petitions seeking vacatur on this ground.[6] Earlier studies reflect similar percentages of vacatur applications granted on the basis that arbitrators exceeded their powers.[7]

In deciding whether arbitrators exceeded their powers, courts will consider whether the arbitrators strayed outside the parties' arbitration agreement. Where arbitrators decide matters not permitted by such agreements, courts may find that the arbitrators exceeded their powers. For example, in *Stolt-Neilsen S.A. v. Animalfeeds Int'l Corp.,* 559 U.S. 662 (2010), the arbitrators exceeded their powers by interpreting the parties' arbitration agreement as permitting class arbitration, where the parties had stipulated the clause was silent as to that issue. As a result, the court vacated the award. *But cf. Oxford Health v. Sutter,* 569 U.S. 564 (2013) (holding that the arbitrator may interpret an arbitration agreement, regardless of whether their interpretation was correct; award survived limited scope of judicial review because it was based on the arbitrator's consideration and interpretation of the parties' contract).

Below we summarize a handful of cases as examples of vacatur pursuant to the "exceeding powers" ground, highlighting significant red flags for arbitrators.

1. Non-Signatories, Including the Threshold Issue of "Who Decides?"

In *Benaroya v. Willis*, 23 Cal. App. 4th 462 (2018), the court granted vacatur under California arbitration law where the arbitrator had asserted jurisdiction over non-signatories, *i.e*., parties who had not signed the contract containing the arbitration

[6] McArthur, *supra* note 1, at 7-4.

[7] Brewer, *supra* note 1, at 474; Mills et al., *supra* note 1, at 8.

clause. The court found that a delegation clause in the arbitration agreement (*i.e.*, a clause delegating authority to decide jurisdiction to the arbitrator by the incorporation of the applicable provider's rules) did not allow the arbitrator to decide if he had jurisdiction over non-signatories, as that issue is a "gateway" issue for a court to decide. Notably, the court did not discuss or even mention the FAA or federal arbitration law, notwithstanding the obvious interstate nature of the dispute.

Similarly, a Delaware federal district court held that the court, not the arbitrator, must decide whether non-signatories are bound to an arbitration agreement. *GNH Group, Inc. v. Guggenheim Holdings, L.L.C.*, *et al.*, Civil Action No. 19-1932-CFC (D. Del. July 27, 2020). In reaching that conclusion, the court analyzed and interpreted the FAA and related caselaw. The court found that the delegation clause at issue did not provide "clear and unmistakable evidence" that the non-signatory agreed to have the arbitrator decide jurisdiction as to it. The court noted that, while the "Who decides?" issue is determined under the FAA, the decision as to whether the non-signatory is bound to arbitrate under a theory such as agency or alter ego is determined under state law—in that case, Delaware law. *Compare Becker v. Delek US Energy, Inc.*, 39 F.4th 351 (6th Cir. 2022) (holding that, under *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), where non-signatory did not specifically challenge delegation provision of arbitration clause, arbitrator could decide if the non-signatory is bound to arbitration agreement).

2. Entertaining a Claim Not Previously Disclosed

In *Matter of 544 Bloomrest, LLC v. Harding*, 2022 N.Y. Slip. Op. 00936 (N.Y. App. Div., 1st Dept. Feb. 10, 2022), the respondent sought to vacate an award which included punitive damages, sanctions, and attorneys' fees. The court reversed the portion of the award granting the claimant such relief because the claimant had not requested it.

3. Disregarding a Clear Contractual Provision

The Fifth Circuit Court of Appeals vacated an arbitration award in *Poolre Ins. Corp. v. Organizational Strategies, Inc.,* 783 F.3d 256 (5th Cir. 2015). Two contracts were at issue, each containing its own arbitration agreement. One arbitration agreement called for the application of AAA rules, while the other called for the application of ICC rules. The arbitrator joined all parties to the proceeding under the AAA rules.

The court found that ruling contradicted an express provision in one of the arbitration clauses. Significantly, the court vacated *the entire arbitration award*, including the portion of the award addressing issues arbitrable under the AAA rules, finding that the entire process had been tainted by the arbitrator's combining the two disputes.

This broad-scale vacatur demonstrates the risks of an arbitrator's exceeding her powers: Such an overreach threatens not only the portion of an award that exceeded those powers, but also the portion that was well within them.

Similarly, when an arbitrator disregarded express terms of a subcontract he thought too onerous, the court vacated the resulting award. *Aspic Engineering and Constr. Co. v. ECC Centcom Constructors LLC*, 268 F. Supp. 3d 1053 (N.D. Cal. 2017). The court indicated that the arbitrator's contract interpretation might have passed muster had it been at least plausible. But, the court noted, an interpretation that directly conflicts with the parties' contract cannot be a plausible interpretation. The arbitrator exceeded his powers by substituting his own version of what he thought was fair and ignoring express contractual provisions.

4. Awarding or Refusing to Award Attorneys' Fees and Costs

A court held that an arbitral panel had exceeded its powers by awarding attorneys' fees where there was no contractual, statutory, or precedential basis for the award of such fees. *Caro v. Fid. Brokerage Servs., LLC*, No. 3:12-CV-01066, 2014 WL 3907920 (D. Conn. Aug. 11, 2014). The court also found there was no basis in the record for the fee award. Accordingly, the court vacated the portion of the award that granted attorneys' fees.

5. Ordering a Remedy Outside the Contract

In *Seagate Technology, LLC v. Western Digital Corp.*, 854 N.W.2d 750 (Minn. 2014), the arbitrator found that the respondents had falsified documents and, as a result, included in the award the sanction of disregarding their evidence. The lower court vacated the award on the ground that the arbitration agreement did not permit sanctions and, hence, the arbitrator had exceeded his authority. On appeal, the higher court reversed vacatur, confirming the award because the parties' arbitration agreement incorporated AAA rules that permitted the arbitrator to grant any relief that

would have been available in court, including sanctions. The court therefore found that the arbitrator had not exceeded his authority.

The *Seagate Technology* decision yields numerous lessons. It highlights the importance of arbitrators explaining their decisions in some detail for potential reviewing courts. Counsel and even the courts may not be familiar with some issues of arbitration law and practice. Arbitrators need to be arbitration experts and explain in their awards the bases for their substantive decisions.

In *Seagate Technology*, each of the Minnesota state courts—the trial court, the intermediate appellate court, and the Supreme Court—reached a different decision on different grounds on the somewhat esoteric subject of sanctions under provider rules and arbitration law. Perhaps the matter would have achieved earlier finality had the arbitrator provided a more fulsome explanation as to the bases under the applicable provider rules and the law for his award of sanctions.

Herrera v. Santangelo Law Offices, P.C., No. 20CA2105 (Colo. App. Aug. 11, 2022) also involved sanctions, specifically, sanctions awarded against the attorney representing a party in an arbitration. The *Herrera* court vacated the arbitrator's award of sanctions against the attorney, finding the attorney was not bound to the parties' arbitration agreement, and no inherent authority existed under Colorado law for an arbitrator to sanction non-party attorneys appearing before them.

6. Impermissibly Vague Award

A further example of a court vacating an award under the "exceeding powers" ground is *Tully Const. Co. v. Canam Steel Corp.*, No. 13 Civ. 3037, 2015 WL 906128 (S.D.N.Y. Mar. 2, 2015). In *Tully*, a construction case, the court found the arbitrator exceeded his powers by not issuing a reasoned award on key issues in a case where the parties' arbitration agreement called for a reasoned award. The arbitrator failed to provide even the most minimal reasons for certain of his decisions, providing only bottom-line conclusions.

7. Practical Tips for Avoiding "Exceeding Powers" Arguments

Arbitrators need to heed the lessons of the caselaw and stay within their powers in any given case. But they need to do more than that: They must provide such a fair

and reasonable process that the losing party feels no desire to seek vacatur and its attorneys recognize the futility of doing so. Here are some suggested steps to take.

Heed the arbitration agreement

The arbitration agreement defines the arbitrator's powers and the scope of her jurisdiction. The arbitrator's overriding task is to stay within the arbitration agreement. Arbitrators, at every stage of the process, must be mindful of the arbitration agreement and consider it carefully before rendering any award.

Decide the case the parties present

In fostering user satisfaction and minimizing emotions that may fuel vacatur applications, arbitrators should generally stay within the confines of the issues the parties present for resolution as they frame such issues. An arbitrator's most basic responsibility, in our view, is to decide the factual and legal issues the parties present. The arbitrator is not deciding the case *she* would have presented if she were counsel for one side or the other, or the case she thinks would best set up the issues presented.

Of course, arbitrators are not potted plants. If there is directly applicable caselaw of which the arbitrator is aware that the parties have not raised, the arbitrator certainly can consider it if she thinks it is important. But, the arbitrator should first ask the parties for their views as to the caselaw's applicability, if any, to issues presented. This may be of particular importance with respect to the law of arbitration, as many attorneys appearing in an arbitration may not be familiar with it. Similarly, if the arbitrator does not understand some aspect of testimony or other evidence presented, she should feel free to raise questions.

Conduct a comprehensive preliminary hearing

Few steps are as fundamentally important as the initial and follow-up preliminary hearings. Conducting comprehensive preliminary hearings helps the arbitrator establish the framework for an efficient, economical, and fair process and enables the parties to develop their cases early on. In a preliminary hearing scheduling order, the arbitrator, subject to the needs of the particular case, should set forth a comprehensive schedule for the case, including specific deadlines for disclosure of claims, amendments to claims, changes in claim amounts, information exchange, motion practice, and the like.

Even with the case schedule in place, parties can consent to revise the process. For example, if a claim arises that may not be within the scope of the parties' arbitration agreement, the parties can agree to include that claim in the arbitration. The arbitrator should confer with the parties on such matters and document all significant party agreements and arbitrator decisions in successive scheduling or procedural orders.

If a non-signatory contests the arbitrator's jurisdiction over some or all of the parties and/or claims in the case, the arbitrator should ask the parties to provide briefing, both as to whether the arbitrator has authority to decide the disputed issues, and, if so, how the arbitrator should decide them.

Similarly, if a party seeks to disqualify an opposing attorney, the arbitrator should ask if the parties agree that the arbitrator has jurisdiction to decide the disqualification request. If they do not agree, the arbitrator should ask for briefing and then decide if the disqualification request is within the scope of the arbitration agreement and consistent with arbitrator's authority under applicable law.

Decide everything the parties present

Arbitrators must address every issue, claim, and defense presented to them for decision and should decide all issues clearly and decisively. As long as an arbitrator has heard and considered the parties' evidence and arguments, and has reasonably decided the issues, reviewing courts are likely to uphold an award. Additionally, the parties are more likely to feel that the arbitrator has treated them fairly, thus minimizing the risk of a vacatur application.

Arbitrators should ensure that they address in their award every asserted claim, counterclaim, and affirmative defense, except in cases where certain issues need not be reached because resolution of other issues makes them redundant or otherwise disposes of them. In that circumstance, an arbitrator should state the basis for not addressing such matters.

Some arbitrators discuss all claims and defenses at issue during a final pre-hearing conference. Others require the parties set forth in their pre- and post-hearing briefs the specific claims or counterclaims asserted and the relief sought, along with the specific findings to be included in the award. Such approaches can help ensure that

arbitrators decide everything the parties expect them to decide, leaving no loose ends.

Importantly, arbitrators should obtain from the parties all the information needed to decide all issues, even issues the arbitrators may not reach until the latter part of their award writing. Arbitrators should not close the hearing without making sure they have all necessary information to draft the award, including, as applicable: any necessary information for calculating damages, bases for determining interest, including rates, accrual dates, modes of calculation, and potential *per diem* amounts, and attorneys' fees. If arbitrators have to request some of this information, they should do so in a manner that does not reveal their thoughts on the dispute's ultimate resolution. While arbitrators can re-open the hearing when necessary, it is better not to have to do so.

Paper all aspects of decisions

Arbitrators should decide the issues before them clearly and definitively. Except for standard awards, which are meant to be succinct and address only the arbitrator's ultimate decisions, arbitrators should state the reasons for their liability and damages determinations and other issues raised. Additionally, they should address every aspect of any monetary award, including damages, interest, costs, and fees.

To ensure that the parties feel heard, arbitrators should provide the reasons for their conclusions even on relatively routine matters—for example, the calculation of damages and the allocation of arbitration costs. That way, parties know that the arbitrator was paying attention, considering the arguments presented, and deciding matters on a reasonable basis. A recent Second Circuit decision also highlights the importance of arbitrators complying with parties' requirements for a reasoned award. In *Smarter Tools Inc. v. Chongqing SENCI Import & Export Trade Co.*, 57 F.4th 372 (2d Cir. 2023), on a prior challenge, the district court had remanded the original award to the arbitrator as not sufficiently reasoned. In affirming the district court's confirmation of the amended award, the Second Circuit held: "Remand for the arbitrator to produce an award in a form consistent with the parties' agreement both 'effect[s] the intent' of the parties and 'promote[s] justice' between them, consistent with [FAA] Section 11 [allowing for modification of an award]. We thus find no error in the district court's decision to remand for the production of a reasoned

award, rather than vacating the original award and forcing the parties to begin anew." *Id.* at 282 (citation omitted).

Educate the court

Arbitrators are sometimes called upon to decide issues concerning the law of arbitration, such as arbitrability, non-party subpoenas, sanctions, punitive damages, attorneys' fees, and disqualification of counsel. Counsel and potential reviewing courts may not be familiar with law in such areas.

Write for the losing party

Reasons for arbitrators' awards are often more important to losing than to winning parties. It is important, in fostering user satisfaction, to show that the arbitrator listened to and heard the losing party, fully considering its arguments and evidence.

B. Vacating Awards—The "Evident Partiality or Corruption" Ground

This ground for vacatur—commonly known as "bias"—frequently arises from an arbitrator's insufficient disclosures. A party, however, may also assert this ground in cases where an arbitrator crossed the line to become an advocate for the other side. Courts typically find that the "appearance of bias" requires an objective assessment of whether a reasonable person would believe the arbitrator was partial to one party or the other.

In *Equicare Health Inc. v. Varian Medical Systems, Inc.*, No, 5:21-mc-80183-EJD (N.D. Cal. Apr. 19, 2023), the U.S. District Court for the Northern District of California vacated an award because one of the arbitrators had failed to disclose that an attorney appearing in the case had been part of a litigation team that had represented the arbitrator and his firm five years prior in a malpractice lawsuit. The court found that the non-disclosure, because of its significance, rose to the level of evident partiality under the Ninth Circuit's standard of whether the undisclosed relationship "might create an impression of possible bias." The court found it was not relevant that the arbitrator had not remembered the relationship, as he had a duty to conduct thorough due diligence, and had failed to do so. Nor did it matter that the attorney in question had disclosed the relationship to the arbitration provider, as the provider did not forward the attorney's disclosure to the parties. Finally, the court found it

irrelevant that the award had been unanimously rendered by the three members of the panel. Instead, what mattered was that the non-disclosure placed at issue the integrity of the process.

In *Monster Energy v. City Beverages, LLC,* 940 F.3d 1130 (9th Cir. 2019), the Ninth Circuit Court of Appeals vacated an award for "evident partiality" where the arbitrator failed to disclose (1) his sufficiently substantial ownership interest in JAMS, and (2) JAMS' extensive business with Monster Energy, creating the impression of bias in favor of Monster Energy. The court found the arbitrator's *partial* disclosure—"Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS"—was inadequate to fully inform the parties of the arbitrator's ownership interest in JAMS and of JAMS' relationship with Monster Energy.

There are fewer cases vacating awards for "evident partiality" on the ground that an arbitrator moved from sitting as a neutral to acting like an advocate. However, a Colorado trial court found an arbitrator had done just that. *Brightstar, LLC v. Ginsburg,* No. 2020CV33204 (D. Ct. Colo. May 6, 2022). The *Brightstar* court vacated the award at issue because the arbitrator's overzealous questioning of one party demonstrated evident partiality—a serious lesson for arbitrators.

1. Practical Tips for Avoiding Partiality Arguments

Make and supplement disclosures

Courts vacating an award on the ground of "evident partiality" typically find that arbitrators have omitted or provided incomplete disclosures. This highlights the importance of arbitrators making fulsome and complete disclosures. To be able to do so, it is essential that arbitrators maintain databases that identify law firms and lawyers who have appeared before them, and arbitrators with whom they have served. Some arbitrators also now maintain information about expert witnesses who have appeared before them.

It is also important that arbitrators disclose the limits on their searches; for example, that they do not have access to the conflicts database of their prior law firms or that their level of activity in bar associations, trainings, listservs, and the like is so extensive as not to permit reliable disclosures of persons with whom they have come

in contact. Such limitations also can relate to arbitrators' social media connections, and to the extent of their knowledge of their family members' activities. When arbitrators disclose the limitations of their conflicts searches, parties and their counsel can decide whether or not to proceed with such arbitrators without requiring more detailed information. However, when arbitrators know of a disclosable connection with a person associated with a case, they must disclose it.

If a disclosable issue arises during the course of a case, the arbitrator must disclose it immediately. Where the AAA is administering the arbitration, the arbitrator should provide the supplemental disclosure to the case manager instead of directly to the parties. This allows the case manager to communicate the disclosure to the parties and handle any resulting objections. Arbitrators should follow this process even where supplemental disclosures arise during a hearing or status conference and require a brief interruption in those proceedings.

Maintain neutrality

An arbitrator must not engage in aggressive questioning of witnesses—that is the advocate's job. *See Brightstar, supra* page 13. An arbitrator's questions in real time to clarify a witness's testimony generally will be fine. Beyond questions that are of a clarifying nature and neutrally phrased, the arbitrator may want to wait until counsel have completed their direct and cross examinations before weighing in. Even then, the arbitrator should take care to ask questions in a manner consistent with how the parties are presenting and defending the case. While there are a range of opinions and approaches in this regard, in our view it is the parties' case and, subject to the case's exigencies, the arbitrator should not take it over.

Importantly, in virtually all circumstances, arbitrators should not ask questions in a manner that telegraphs their thoughts. For arbitrators serving on a panel, it will often make sense, with respect to potentially sensitive questions, for the panel to confer internally as to whether to ask such questions, and, if so, how to phrase them. Arbitrators serving as party-appointed, neutral arbitrators should take care with their questioning so as to avoid the appearance of non-neutrality, which also may risk the loss of credibility with the chair and the other wing arbitrator.

The same applies to an arbitrator's facial expressions and body language. Counsel and parties will be watching the arbitrators, trying to gauge their reactions to witness

testimony and counsels' arguments. The arbitrators must ensure that their countenances reflect impartiality, so that counsel and parties do not know their thinking or which way they are leaning.

Atmospherics make a difference here. Everyone has bad days. There also may be situations, witnesses, parties, counsel, attitudes, or comments that rub the arbitrator the wrong way. But arbitrators cannot let their feelings become evident. Arbitrators cannot afford to display pique. Arbitrators should never be rude to counsel, parties, or witnesses or even, at least up to a point, respond to rudeness from others. They should be particularly careful when one party is acting up. While an arbitrator may be annoyed, it is his or her job to be equanimous. And, while arbitrators may occasionally need to call out one side's misconduct (*e.g.*, abusive tactics, disrespect of witnesses, etc.), they must maintain an air of impartiality in doing so.

If a party moves for sanctions, the arbitrator, to avoid the appearance of bias, should consider deferring a decision on the matter until the final award. We suggest that doing so should be the default rule, subject to the exigencies of the particular situation.

Even as arbitrators become more comfortable in their role, they must not forget to maintain a certain level of aloofness. An arbitrator should refrain from what might otherwise be the normal ease of chit-chat with parties and counsel. While arbitrators might believe that they are being merely open and friendly when engaging in light discussions, conversations run the risk of being misunderstood or even characterized as biased. The losing party may seek to exploit even a hint of bias when seeking vacatur.

C. Vacating Awards—"Arbitrators Were Guilty of Misconduct by Refusing To Hear Material Evidence or Refusing To Grant a Continuance for Good Cause Shown" Ground

Some newer arbitrators worry too much about whether they risk vacatur if they exclude evidence and, as a result, end up permitting too much discovery, allowing the introduction of cumulative evidence, or refusing to grant dispositive motions when there is good cause to do so—so-called "due process paranoia." Arbitrators need to hear the parties out about the discovery they want to take, the evidence they wish to

submit, or arguments on dispositive motions, and then make clear and decisive rulings, explaining their reasoning.

1. Refusing to Hear Material Evidence

In deciding whether to vacate an award based on an arbitrator's alleged refusal to hear material evidence, courts generally determine whether the refusal to allow certain discovery or to hear certain evidence denied the losing party a fundamentally fair hearing or prejudiced that party. For example, the appellate court affirmed the award in *Rosensweig v. Morgan Stanley*, 494 F.3d 1328 (11th Cir. 2007), rejecting the losing party's argument that the arbitrators were "guilty of misconduct" because they failed to allow the party to present additional evidence.

The *Rosensweig* court found the party challenging the award had failed to establish that it had been deprived of a fair hearing or prejudiced by the panel's exclusion of evidence. While the arbitral panel did not provide an explanation for the exclusion, the court noted that there appeared to be a "reasonable basis" for that decision, including that the panel "reasonably could have concluded that the additional testimony would have been cumulative." *Id.* at 1334. Moreover, there were other bases in the record supporting the panel's award. *See also, Bain Cotton Co. v. Chestnut Cotton Co.*, 531 F. App'x 500 (5th Cir. 2013) (denying motion to vacate award where arbitrators had denied discovery requests, even while noting that, in the circumstances presented, "[h]ad this discovery dispute arisen in and been ruled on by the district court, it is not unlikely that the denial of Bain's pleas would have led to reversal").

In *Tempo Shain v. Bertek*, 120 F.3d 16 (2d Cir. 1997), the Second Circuit Court of Appeals vacated an award on the "refusing to hear material evidence" ground. The arbitrators had refused to hold the record open for the testimony of a witness who had been the losing party's sole negotiator in contract negotiations. The court decided that this witness possessed otherwise unavailable information about the losing party's claim. The arbitral panel, however, had concluded, without explanation, that the witness' testimony would be cumulative. The Second Circuit found no "reasonable basis" in the record for that conclusion. Accordingly, the court vacated the award, finding that the losing party had been subjected to fundamental unfairness and misconduct. *Id.* at 21.

These decisions highlight the importance of arbitrators explaining their rulings. In both *Rosensweig* and *Bain Cotton Co.*, it seems the arbitrations would have been well-served if the panels had done more to explain reasons for their rulings that denied testimony or discovery. Perhaps in those and other similar cases, if the arbitrators had explained their rulings more clearly, even the vacatur applications could have been avoided. In *Tempo Shain*, the arbitrators' failure to explain their decision and show its reasonableness led not only to a vacatur application, but to actual vacatur.

2. Refusing to Grant a Continuance for Good Cause Shown

Courts typically will uphold arbitrators' discretion regarding continuing, or not continuing, a hearing, particularly where the arbitrators provide a reasonable basis for their decision. For example, the court in *Bartlit Beck v. Okada*, 25 F.4th 519, 524 (7th Cir. 2022), rejected the losing party's request to vacate an award on the ground of refusal to grant a continuance. The court found the record reflected that the arbitrators had a reasonable basis for their decision.[8] In *Bartlit Beck*, the losing party had communicated to the panel that he would not attend the hearing in any event, and did not provide any substantiation for his later assertion that ill health precluded his attendance. The court found that, on this record, the party seeking vacatur failed to show any unreasonableness or fundamental unfairness in the panel's proceeding with the hearing in his absence.

3. Practical Tips for Avoiding Arbitrator "Misconduct" Arguments

<u>Provide reasons for denying request to submit evidence</u>

When there is a dispute over a party's proffer of additional evidence, the arbitrator should hear the parties' arguments, and when ruling, provide reasons, so that the parties and any reviewing court will understand the reasonableness of the ruling and

[8] This decision is also of interest because it highlights differences between standards for enforcement under Chapter 1 of the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

fairness of the process. Often it will not even be necessary to reach a ruling on cumulative evidence; a simple suggestion by the arbitrator that she got the point may be enough to induce counsel to move on.

Analyze and decide, with reasons, continuance requests

If a party seeks a continuance, the arbitrator should evaluate whether the request is likely a delay tactic or based on good cause. The arbitrator might ask for oral argument on a continuance request, particularly if the arbitrator questions the basis for the request. When deciding a continuance motion, and in particular when denying such a motion, the arbitrator should paper that decision, demonstrating that she considered the matter and had appropriate reasons for her decision.

Deprivation of fundamental fair process is obviously a broad and potentially far-reaching standard. It is important, accordingly, that arbitrators, by their affect as well as their reasoning, demonstrate the fundamental fairness of their decisions. An arbitrator's reasonable explanation for what she is doing, along with a fair and open process in reaching her decisions, will go a long way in preventing both a court from concluding that the arbitrator acted unreasonably, and, in the first instance, parties from feeling they were treated unfairly.

D. Vacating Awards—Award Procured by "Corruption, Fraud or Undue Means" Ground

The FAA's "corruption, fraud or undue means" ground is reportedly the least-frequently-granted ground for vacatur. A court may vacate an arbitration award on this basis where there has been fraud during the arbitration process, such as, for example, the presentation of perjured testimony or forged documents that impacted the award.

In *France v. Bernstein*, 43 F.4th 367 (3d Cir. 2022), the court found false testimony and failure to produce documents sufficient to vacate an award. After the award was rendered, the losing party in *France* found out, through discovery in a parallel court case, that the respondent had failed to produce in the arbitration material documents and, moreover, had testified falsely about a material issue both in his deposition and at the evidentiary hearing. The court found that the respondent had misrepresented material facts and fraudulently obtained the award. Claimant accordingly had

demonstrated a sufficient nexus between the respondent's fraud and the award. As a result, the court granted vacatur.

In another case, however, perjured testimony in and of itself did not warrant vacatur. In *Odeon Capital Group LLC v. Ackerman*, 864 F.3d 191 (2d Cir. 2017), the court denied vacatur because the losing party did not demonstrate that the alleged fraud—perjured testimony at the arbitration hearing—was material to the award.

1. Practical Tips for Avoiding "Corruption, Fraud or Undue Means" Arguments

An arbitrator may not be able to stop a party from lying or forging documents. But arbitrators can make sure they themselves do not get involved in anything that could provide even a whiff of corruption. For example, arbitrators should not accept anything from parties or their lawyers, whether sports or theater tickets, dinner, or lunch. Additionally, arbitrators should not socialize with a party, its counsel, or witnesses during the pendency of an arbitration, and for some reasonable time thereafter. Arbitrators should take particular care during breaks in a hearing or in elevators when it might otherwise feel natural to carry on informal conversations. Even the most banal interchanges with parties or their counsel can be misunderstood or opportunistically misconstrued.

E. Vacating Awards—Manifest Disregard

Courts in certain circuits and states may grant vacatur where an arbitrator knows, but ignores, the law. This closely ties into the FAA's "exceeding powers" ground for vacatur. Courts may find manifest disregard where (1) the applicable legal principle is clearly defined and not subject to debate, and (2) the arbitrator refused to follow that legal principle. It is not enough that an arbitrator got the law wrong; instead, the arbitrator must have been aware of the law in question, yet disregarded it. *See, e.g.*, *EHM Prod. v. Starline Tours of Hollywood*, 1 F.4th 1164 (9th Cir. 2021) (rejecting vacatur on ground of manifest disregard, noting it was not sufficient that the arbitrator got the law wrong or failed to understand it; instead, more was required, *i.e.*, that the arbitrator intentionally ignored or disregarded applicable law).

In *Warfield v. Icon Advisers, Inc.*, No. 20 CV 195-GCM (W.D.N.C. June 16, 2020), the court vacated an award on the basis of manifest disregard. The district court

found that the panel awarded damages to claimant, an at-will employee, for wrongful discharge, notwithstanding that counsel had advised the panel that under North Carolina law at-will employees generally are not entitled to damages for wrongful termination. While the Fourth Circuit reversed vacatur, it did so because it found that the law on the issue was not settled, so the arbitrators "could not have manifestly disregarded the law." *Warfield v. ICON Advisers, Inc.*, 26 F.4th 666, 2022 U.S. App. LEXIS 5066 (4th Cir. Feb. 24, 2022). *See also Lex v. Weinar*, No. 13-96, 2015 WL 1455810 (E.D. Pa. Mar. 31, 2015) (vacating interest portion of award on the basis of manifest disregard where interest award was based on compound interest; Pennsylvania law only allowed simple interest; there was no basis in law or fact to apply compound interest).

Notably, courts at times have extended the scope of manifest disregard to encompass not only manifest disregard of the *law* but also manifest disregard of "*the terms of the parties' agreement*," but not to manifest disregard of "*the evidence*." *See, e.g.*, *Tully Const. Co. v. Canam Steel Corp.*, No. 13 Civ. 03037, 2015 WL 906128 at *5, *9 (S.D.N.Y Mar. 2, 2015) (discussed *supra*), citing *Am. Centennial Ins. Co. v. Global Int'l Reinsurance Co., Ltd.*, No. 12 Civ. 1400 (PKC), 2012 WL 2821936, at *7 (S.D.N.Y. July 9, 2012).

1. Practical Tips for Avoiding "Manifest Disregard" Arguments

As noted above, a court may find manifest disregard of the law where the arbitrator knew the law but chose to disregard it. An arbitrator can head off this potential challenge by first citing the legal authorities and contractual provisions the parties (particularly the losing party) relied on and then stating the basis for the arbitrator's interpretation of that law. An obvious effort to interpret and apply applicable law can go a long way to avoiding a hook for a vacatur application based on manifest disregard.

F. Vacating Awards—Ordering a Remedy that Is Illegal or Contrary to Public Policy

This fairly limited ground for vacatur may be invoked when an arbitrator issues an award inconsistent with what is deemed to be overriding state or federal public policy. In such circumstances, courts have engaged in a broader scope of review than generally typifies judicial review of arbitral awards.

For example, the court in *Ahdout v. Hekmatjah*, No. B255395, 2015 WL 4322018 (Cal. App. Ct. July 15, 2015) (unpublished), upheld the vacatur of an award where the arbitrator denied a claim for disgorgement of amounts paid to an unlicensed contractor. California statutory law provides, as a matter of public policy, that one who uses the services of an unlicensed contractor can recover all compensation paid to that contractor. In an earlier appeal, the court had stated, "Because section 7031 constitutes an explicit legislative expression of public policy regarding unlicensed contractors, the general prohibition of judicial review of arbitration awards does not apply." *Ahdout v. Hekmatjah*, 213 Cal. App. 4th 21, 37 (2013).

More recently, a California appellate court vacated an award on public policy grounds in *Honchariw v. FJM Private Mortgage Fund LLC*, 83 Cal. App. 5th 893 (2022). In that case, the arbitrator, in his award, had upheld a late fee on a mortgage payment. The court found that the fee constituted an unlawful penalty in contravention of public policy as set forth in a California statute. Because the awarded late fee violated public policy, the award exceeded the arbitrator's powers, and as a result, the review "escapes the general prohibition against review of arbitral decisions." *Id.* at 897.

1. Practical Tips for Avoiding "Public Policy" Vacatur

The *Ahdout* case highlights the reality that arbitrators may find themselves presiding over cases where a party argues that public policy, pursuant to a statute or perhaps caselaw, mandates a result the arbitrator believes unfair or inappropriate. Where there is a clearly applicable public policy, arbitrators generally must act consistently with it, no matter their personal views.

Ahdout also provides a wake-up call to arbitrators. Where issues of public policy are concerned, the usual deferential scope of review of awards is not applicable: arbitrators must get it right in terms of complying with established public policy.

Issues of binding public policy arise so infrequently that, when they do come up, arbitrators should remember a fundamental rule in arbitration: provide the parties with an opportunity to brief or otherwise address any disputed issue before rendering a decision. And, as discussed above, arbitrators generally should explicate the bases of their decisions, providing a fulsome explanation to the losing party and any reviewing court.

III. Ideas for Fostering User Satisfaction to Avoid Even the Filing of Vacatur Applications

Vacatur applications, even when unsuccessful, can cause lengthy delays and substantial additional expense. The arbitration that was completed in one year can now take another year or more to work its way through the courts, costing the parties more time and money. The fundamental benefits of arbitration can be compromised or lost.

It is crucial that arbitrators not only avoid red flag situations that might lead to vacatur, but also foster a high level of satisfaction and write bullet-proof awards so that even losing parties and their counsel feel they received a fair process and losing counsel recognize the futility of seeking vacatur.

In what follows, we provide additional suggestions about ways arbitrators can maximize user satisfaction and minimize vacatur applications.

A. Arbitrators Are Service Providers

Arbitrators are service providers. The extraordinary service we are privileged to provide is the fair resolution of disputes. This most fundamentally means deciding the cases in which we are selected based on the evidence and arguments the parties present and on the applicable contract provisions and law.

Arbitrators generally should not decide cases based on caselaw or statutes the parties have not cited. There are, however, differing opinions as to whether arbitrators

may or should conduct independent legal research. There is a broad consensus, however, that, if arbitrators know of law important to legal issues presented, they may consider that law, but they first should provide the parties with the opportunity to comment on the cases or statutory provisions. Parties should never feel that the panel ignored the law they argued or decided the case based on the panel's own view of the law.

Arbitrators should strive for an attitude of humility and attentiveness to the parties' arguments and evidence. After hearing the parties out, arbitrators must decide the matters presented clearly and definitively.

In administering their cases, arbitrators always should be mindful of the arbitral objectives of expedition, efficiency, flexibility, and fairness. Arbitrators also should maintain a consistent and evident level of respect for attorneys, their clients, and witnesses.

B. Remember Arbitration Is Not Litigation—Be an Arbitration Expert

Arbitrators are the primary arbitration experts in many cases. Often counsel are court-based litigators without much experience in, or knowledge about, arbitration. Arbitrators should be open to introducing the parties to any useful and relevant arbitration soft law.

Arbitrators should communicate to counsel and the parties the differences between arbitration and court-based dispute resolution, including with regard to the scope of discovery, motion practice, non-party subpoenas, and applicability (or not) of state and federal procedural rules.

Arbitrators should be alert to circumstances where they may need to remind counsel and parties of the differences between arbitration and court-based practices and processes, particularly as to speed and economy. This is key to promoting user satisfaction and avoiding vacatur applications.

C. Encourage Focused Discovery

Arbitrators importantly should foster the more focused discovery that arbitration makes possible, while assuring that the parties, subject to their arbitration clauses,

receive the discovery reasonably needed to develop and present their claims and defenses. If arbitrators fail to educate parties and counsel as to how discovery in arbitration differs from discovery in litigation, the parties and their counsel may well be dissatisfied with the process, potentially resulting in otherwise unnecessary petitions to vacate.

Many arbitrators conduct oral argument on discovery disputes to enable them to best make informed decisions and to ensure that parties feel they are being heard. It is crucially important that arbitrators promptly decide and paper all rulings, including on discovery, with an eye toward showing even the losing side the fair and appropriate reasons for those rulings. At the same time, arbitrators should keep in mind the size and complexity of the case to ensure that the time and cost associated with rulings are proportional to the matter.

D. Consider Dispositive Motions Where They Make Sense

While arbitrators should avoid turning arbitration into court-styled litigation, where dispositive motions are a matter of course, dispositive motions can be useful when they have the potential to resolve the case, substantially narrow the issues or facilitate parties' settlement discussions.

The arbitrator may decide whether to provide reasons for denying a dispositive motion or to render a simple denial. How the arbitrator decides to proceed in this regard will depend on the specific case, but the arbitrator should be attentive to how the form of their decision—short versus reasoned—might impact party satisfaction.

In many cases, the arbitrator will want to discuss this topic with counsel. In some instances, parties may want to hear the arbitrator's reasons for denying a proposed or actual dispositive motion, as it may inform settlement discussions and help streamline the case. In other instances, the arbitrator's reasons for denying a dispositive motion may be so inchoate or preliminary that such a discussion would be premature. Similarly, arbitrators should consider how much reasoning to provide parties when denying an application for interim relief.

E. Be Ready To Address Non-Party Subpoenas for Discovery

Some arbitrators believe they should provide a forum for disputes that involve witnesses located in distant places through liberally signing non-party subpoenas absent a showing that such subpoenas would be unenforceable. Other arbitrators take a more conservative approach, only issuing non-party subpoenas upon a showing of enforceability. Yet other arbitrators take a view somewhere in between. This can be a contentious issue within panels.

Whatever approach an arbitrator takes regarding subpoenas, it is important for arbitrators to be open and transparent as to their reasons for any ruling on the matter. Such transparency will better ensure that the parties and their counsel feel they were dealt with fairly and reasonably in light of the needs of the case and applicable contract provisions and law.

This is an area of arbitration law that may differ significantly from one jurisdiction to another—and hence arbitrators, through their orders and in discussion with counsel, may at times need to educate counsel.[9]

F. Be Responsive, Flexible, and Hard-Working

Arbitrators should respond quickly, thoughtfully, and decisively to parties' disputes and applications, even when doing so requires work outside of normal business hours. Ultimately, the arbitration process has to be more about the parties' convenience than the arbitrator's.

Additionally, throughout the process, arbitrators should be alert to, and thinking about, opportunities to achieve the goal of flexibility. The process in each case should be bespoke.

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[9] Two reports of the International Commercial Disputes Committee of the New York City Bar Association provide helpful perspective on these issues. *See A Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing*, https://s3.amazonaws.com/documents.nycbar.org/files/20072911-ABCNYModelArbitralSubpoena.pdf; and *Obtaining Evidence from Non-Parties in International Arbitration in the United States*, https://www.nycbar.org/pdf/report/uploads/20071980-ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf.

Arbitrators need to work as hard as the parties, becoming as fluent in the facts and law of the case as counsel.

G. Be Transparent

Arbitrators should involve the parties when considering significant process alternatives rather than just debating procedural matters among themselves. Potential topics for discussion include matters like the scope and particulars of discovery, nonparty subpoenas, motion practice, schedule, the form of decisions on interim matters, and the form of the award.

Arbitrators should maintain this type of transparency throughout the process.

H. Protect the Award

Awards are particularly strong when based on arbitrators' interpretation of contract language, law, and witness credibility.

Arbitrators, however, should be careful about how they address credibility. As a general matter, an arbitrator should avoid being too hard on lawyers or witnesses. It may make sense for an arbitrator to articulate credibility findings generically without identifying individuals.

Arbitrators should ensure that they address everything presented for decision, other than matters made redundant by other decisions. Arbitrators must take care that they are not ignoring or missing questions presented, or failing to decide issues clearly and decisively. As long as arbitrators have heard the parties out, considered the evidence and proofs presented, and ruled clearly and in a reasoned way, courts likely will uphold the award.

I. Follow AAA Commercial Arbitration Rule R-40(a)

AAA Commercial Arbitration Rule R-40(a) sets forth questions arbitrators should ask before closing a hearing, particularly whether the parties have any further proofs to offer or witnesses to be heard.

Asking such questions is important to protecting the award, fostering user satisfaction, and identifying any open issues that need to be addressed. And while Rule R-40(a) applies to closing the hearing, the same idea applies to all orders and rulings—

the arbitrator should not issue decisions until both sides have had full opportunity to weigh in on open issues or other matters of concern.

While arbitrators should not be coercive, where an issue needs to be addressed, it is imperative for the arbitrators to uncover any open issue and address it before closing the hearing. The alternative is unappealing, as it may mean that the case comes back to the arbitrator or another arbitrator or panel, perhaps even years later, for resolution of missed issues. If that happens, the parties could incur years of additional effort and expense, frustrating the arbitral objectives of expediency, economy, flexibility, privacy, and finality.

J. Apply the Golden Rule

Many arbitrators come from a litigation background. We suggest the following golden rule for arbitrators: Do unto the parties and attorneys in your cases as you would have liked judges and arbitrators to have done unto your clients and yourself in cases in which you were counsel.

K. Appreciate the Role of Venting

In mediations, dispute resolution neutrals regularly accord parties the opportunity to vent their feelings and frustrations. There similarly can be a role for venting in at least some arbitrations, particularly arbitrations where parties have strong emotions, such as those involving business divorces. While arbitrators want to provide an expeditious and efficient process and hear only evidence that is relevant within the confines of the applicable contract and law, it may be appropriate, in certain cases (and within reason), to afford the parties reasonable opportunity for venting.

* * *

There will no doubt be cases where the stakes, feelings, grievances, or perceived principles at issue are so substantial that there can be no avoiding vacatur applications. It seems evident, however, that an arbitrator who follows the practices we suggest above will, in many cases, discourage, if not prevent, vacatur applications, as well as actual vacatur.

This conclusion seems bolstered by our review of the cases we discuss above. In many of the decisions, including those denying vacatur, the arbitrator's failure to

follow these practices may well have contributed to the losing party's decision to seek vacatur. Losing parties and attorneys who do not feel they got a fair shake may be inclined to continue the battle into court even against steep odds. By contrast, arbitrators can minimize the risk of vacatur applications, as well as actual vacatur, by ensuring throughout the process that the parties feel they have been treated fairly and by avoiding in their awards the red flag situations articulated in this article.