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Calling All Arbitrators: Reclaim Control of the Arbitration Process—the Courts Let You

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Introduction

Arbitration has been billed as the cost-effective, expeditious alternative to commercial litigation. It has, however, to a large extent, become a costly, dilatory and unpredictable melding of litigation and arbitration, primarily due to the parties' representatives who are responsible for grafting the implements of litigation onto the much simpler system of arbitration. Regrettably, arbitrators are often their "aiders and abettors" when they permit attorneys to wrest control of the process. Such arbitrators are fearful that the courts, when reviewing their conduct, will vacate their awards. That fear is unfounded and this article will show you why that is so. The consequence of arbitrators relinquishing responsibility for managing the arbitration process is twofold: First, it will lead constituents of arbitration—i.e., businesses and attorneys—to lose respect for the process. Second, it will cause those arbitrators to suffer a loss of income (not surprisingly), since users of the process want an efficient arbitration and will no longer select them. The purpose of this article is to provide a backbone transplant to my fellow arbitrators, to endow them with the courage to reclaim control of the process while still affording all parties a fair opportunity to present their case.

The places to look to resolve this problem are court decisions on motions to vacate awards. Hindsight can be 20/20 and we can learn from it. The disappointed parties who filed these motions hoped for an arbitration afterlife, but what they more often found was a second loss in the courts.

Despite the occasional headline declaring the overturning of an arbitration award, courts have overwhelmingly held that they will not second-guess arbitrators since the parties voluntarily agreed to arbitrate their dispute. Doubts as to the correctness of arbitrator conduct are outweighed by the agreement of the parties to forgo certain judicial procedures in exchange for a hearing by an experienced arbitrator of their choosing who is mandated by ethical principles to "cut to the chase." Since arbitration is intended to be

a final and binding process, courts steadfastly resist efforts by parties to get a "second bite of the apple"—i.e., another arbitration hearing between the same parties.

This article explains the grounds for vacating arbitration awards primarily based on arbitrator conduct and rulings. Arbitrators are given wide latitude in managing cases, but when they go seriously "off course"—such as in failing to make required disclosures, or deciding issues not in the pleadings, or taking part in ex parte communications, or refusing to grant a reasonable adjournment request or admit pertinent and material evidence, or denying parties the basics of due process—courts will vacate their awards. But not often.

I. What the Law Demands of Arbitrators

Generally speaking, arbitration requires an impartial decision maker, fair procedures and an adequate opportunity for the parties to present their case. Thus, if an impartial arbitrator provides the parties with an opportunity to make their arguments and offer evidence to enable the arbitrator to make an informed decision, the benchmark of fundamental fairness is met.1 However, since arbitration is intended to be an efficient and less costly process than litigation, arbitrators have authority (accorded by well-established arbitration rules) to manage the process efficiently, provided they give the parties a fair hearing.2

II. Grounds to Vacate an Award

The circumstances in which a party may seek to vacate an award are limited by statute and common law (court decisions). The grounds in

§ 10 of the Federal Arbitration Act (FAA)3 apply to agreements "involving commerce." These grounds are:

• when the award was procured by corruption, fraud or undue means—§ 10(a)(1);

• when there was evident arbitrator partiality or corruption—§ 10(a)(2);

• when the arbitrator refused to postpone the hearing, or to hear evidence pertinent and material to the case, or engaged in any other misbehavior that prejudiced the rights of a party—§ 10(a)(3); or

• when the arbitrator exceeded his or her powers, or so imperfectly executed them that a mutual, final and definite award was not made—§ 10(a)(4).

The 1955 Uniform Arbitration Act (adopted in whole or in part in most states) and the 2000 Uniform Arbitration Act (to date enacted in 10 states)4 contain similar grounds. In addition, the courts have created grounds for vacatur that, with one exception, allow a losing party to challenge the award based on its content, rather than on arbitrator conduct. The judicially crafted "common law" grounds are:

• an award in manifest disregard of the law;

• an award contrary to public policy;

• an award lacking a factual basis (i.e., irrational, arbitrary or capricious); or

• due process was not afforded to one or more parties.

However, these grounds are not recognized in all states. For example, Tennessee and Colorado do not recognize manifest disregard as a possible ground for vacatur.5

This article will look at each ground primarily in the context of claims that the arbitrator (as opposed to the party representative) did something wrong. Motions to vacate based on arbitrator rulings on jurisdiction or the merits of a case make up a separate category of cases; this type of challenge generally does not involve an arbitrator's hearing management skills. However, cases of this type will be briefly discussed because they make up most of the case law based on judicially created grounds for vacatur.

In order to challenge an arbitration award, the aggrieved party must allege a recognized ground for vacatur. Invariably, the moving party will assert multiple grounds based on the same conduct. The next section looks at each ground for vacatur as interpreted by the courts.

III. Specific Grounds

A. Corruption, Fraud, Undue Means

1. Standard. Federal courts rarely have found that arbitrators engaged in corruption, fraud or undue means within the meaning of § 10(a)(1) of the FAA. The reason is that courts impose a very high burden of proof on the party seeking vacatur on this ground.6 That burden is one of clear and convincing evidence, not a preponderance of the evidence.7

If the moving party can meet this exacting burden of proof, it must also establish that due diligence could not have resulted in discovery of the fraud prior to or during the arbitration.8 If not earlier discoverable by the exercise of due diligence, the moving party must demonstrate that the malfeasance was materially related to an issue in the arbitration.9 That is, the moving party must demonstrate that the undisclosed and undiscoverable misconduct influenced the outcome of the arbitration.10

What constitutes corruption, fraud or other undue means? In Rosenthal-Collins Group v. Reiff,11 an Illinois appeals court stated that "ex parte contact [between the arbitrator and a party to the dispute] involving disputed issues raises a presumption that an arbitration award was procured by fraud, corruption or other undue means."12 This presumption, however, can be rebutted by sufficient evidence showing that the presumption is unwarranted. If such evidence can be shown, the Illinois court said, "no reliance should be placed on the fact presumed."13

2. Example (Award Vacated). In Rosenthal-Collins Group, the plaintiff moved to vacate the arbitrator's award based on the claim that, after the hearing but before the award was issued, the defendant sent two letters to an arbitrator on the panel for the purpose of rebutting the plaintiff's claim at the hearing that the defendant was a convicted drug dealer. The letters were received by the arbitrator's law firm, but possibly not by the arbitrator, who was said to be out of the country. The defendant argued that the panel had already decided the case before he sent the letters to the arbitrator. The trial court vacated the award after granting limited discovery on the matter. It reasoned that it was impossible to really know when the letters were sent and there was contradictory evidence in the record about the timing. Applying de novo review (because the trial court's decision was based solely on a review of documentary evidence), the Illinois Court of Appeals affirmed the decision to vacate the award.14 It held that the receipt of

letters by the arbitrator's law firm was enough to create a presumption that the arbitration was tainted by an ex parte contact. In making this ruling, the court found it significant that the award was subject to change when the letters were received by the law firm. Possibly of greater importance was the fact that there were no sworn statements in the record by the arbitrator to whom the letters were sent, or any of his law firm's employees, to establish that he was out of town during the relevant period and was never informed of the contents of the letters.

Thus, arbitrators must be vigilant to prevent ex parte contacts and if such contacts are initiated by a party but not completed, arbitrators should create a strong record to show that the ex parte contact never took place.

B. Evident Partiality or Corruption

1. Standard. An arbitrator must be neutral and avoid the appearance of bias. Thus, motions to vacate for evident partiality or bias are frequently based on the arbitrator's failure to disclose conflicts of interest and other information that could give the appearance of bias. To prevail on a claim of bias, the moving party must be able to demonstrate that the arbitrator had an interest in the subject matter of the arbitration or a preexisting business or social relationship with one of the parties or counsel, which would color the arbitrator's judgment.15 According to the 2004 American Arbitration Association (AAA)–American Bar Association Code of Ethics for Arbitrators in Commercial Disputes (Ethics Code), arbitrators have a duty to disclose such information prior to and even after selection, since there is a continuing obligation to disclose.16 Under Canon II A(2), this duty applies to personal, financial, or other relationships with a party, its lawyer, any co-arbitrator, or any individual whom the arbitrator has been told will be a witness. Information that is pertinent is the kind that could lead a reasonable person to believe that the arbitrator might be biased toward or against a party.17 State laws may have their own disclosure requirements, so arbitrators should become familiar with the requirements of the states in which they work.

Supreme Court Justice Byron White suggested in Commonwealth Coatings Corp. v. Continental Casualty Co. that a "disclosable" business interest is one that involves "more than trivial business with a party."18 Thus, the nature and character of the arbitrator's undisclosed relationship or interest is critical to a court's determination of whether there was evident partiality.

The arbitrator's duty to disclose raises the issue of whether there is also an obligation to investigate potential conflicts of interest by the arbitrator's current and former employers. Canon II.B of the Ethics Code says that arbitrators should make a reasonable effort to inform themselves of the kinds of interests or relationships they are required to disclose.19

What constitutes bias? Examples include nondisclosure of prior employment by a party or prior representation by a firm (or its predecessor-in-interest) with which the arbitrator is or was associated. An Illinois court has stated that a rebuttable presumption of bias is created by negotiating in another matter with the same parties to the current proceeding.20

2. Examples (Nondisclosure/Awards Vacated). In a 1997 case, the Arizona Court of Appeals vacated an award for evident partiality when the arbitrator failed to disclose that he had represented investors with similar claims in other arbitrations against the predecessor-in-interest to the brokerage firm respondent. Another problem the court cited was that the arbitrator had precluded the brokerage firm from presenting evidence or defenses at the hearing as a sanction for providing an untimely Answer and not responding to document requests, which the rules of the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE) permit and which all arbitration forums should authorize.21

In a 2004 case, the California Court of Appeal vacated a labor award in the union's favor when the arbitrator failed to disclose service in an earlier case involving the union's attorney.22

In a 1994 California case, a trial court found a perception of possible bias based on the arbitrator's failure to disclose a prior business relationship between his former firm and a party, even though the arbitrator was unaware of the relationship.23 The court said that a finding of actual bias was unimportant since a "reasonable impression of possible bias'' is sufficient legal cause for vacating an award under § 1286.2 of California's Code of Civil Procedure. This case indicates that in California, arbitrators have a duty to investigate potential conflicts arising out of business conducted by the arbitrator's former firm.

In a 2003 case, a New York trial court held that the failure of an arbitrator in an uninsured/ underinsured motorist insurance coverage case to disclose that 25 years before he had been employed as counsel to the insurance company was a ground to vacate an award.24 And in a case decided nine years earlier, in 1994, an intermediate appeals court in New York vacated an award based on the arbitrator's failure to disclose that he had received an ex parte communication from the representative of a third party to the arbitration (which had received the arbitrator's name from the law firm representing a party to the arbitration), stating that it was considering an arbitrator for another matter.25 "Significantly," said the court, "the [arbitrator] did not disclose this communication to the parties at any time prior to the issuance of the panel's determination...." The court found that the communication raised a question of possible bias, compromising the integrity of the arbitration process.

In a 2004 case, the 9th Circuit held that the arbitrator's failure to disclose that his law firm had frequently represented an affiliate of a party gave rise to an "objectively reasonable perception of possible bias."26 The court said that evidence that the arbitrator was unaware of the representation only indicated that he was not actually biased, but that did not, in the court's opinion, dispel the "perception of potential bias."

This case indicates that in the 9th Circuit, arbitrators have a duty to investigate potential conflicts arising out of business conducted by the arbitrator's current employer.

3. Examples (Nondisclosure/Awards Upheld). There are innumerable cases holding that various types of nondisclosures do not create a perception of bias requiring vacatur of an award. Here are a few examples.

In a 1996 case, a federal district court in the District of Columbia held that an arbitrator had no duty to disclose business relationships between his former law firm and a party in unrelated matters.27 This case involved a "med-arb" (an arbitration following an unsuccessful mediation) in which Kenneth R. Feinberg served as both mediator and arbitrator. The prevailing party moved to vacate Mr. Feinberg's $1.1 million award on the ground that Mr. Feinberg's former law firm had represented the respondent on matters unrelated to the dispute. Since Mr. Feinberg did not know of that representation at the time of the arbitration, the "[a]ppellant's argument, therefore, depends on the proposition that Feinberg had a duty to make inquiry as to whether or not his former law firm had ever had any connection with any of the parties to the arbitration and thereafter make disclosure of the results." The court ultimately concluded, "We can find no source for any such generalized duty."

In a 2003 case, a federal district court in California held that an arbitrator's failure to disclose government investigations of an affiliate of his employer regarding matters similar to those at issue in the NASD securities arbitration (i.e., stock analyst fraud) did not warrant granting the investor's motion to vacate in the absence of a disqualifying relationship between the arbitrator or his firm and a party.28 The court found "no evidence of any social, business or financial relationships" between the arbitrator or the brokerage firm under investigation and the respondent brokerage firm "that would be affected by the outcome of the arbitration." The court concluded that the investor failed to raise a "reasonable probability" of partiality.

In 2002, the 7th Circuit held that a party-appointed arbitrator's failure to disclose his role over four years earlier as counsel to a subsidiary of the appointing party in an unrelated matter did not warrant vacatur for evident partiality. The court reasoned that the award should be upheld because the arbitrator met the statutory impartiality standards for a judge. The court also emphasized the understanding that party-appointed arbitrators (prior to the 2004 revision of the Ethics Code29) are understood to be advocates for the appointing party.30

The 9th Circuit held that being a limited partner in the same limited partnership in which a party's expert invested as a limited partner does not gives rise to an objectively reasonable impression of bias. That was the holding in Apusento Garden (Guam) v. Superior Court of Guam,31 where the party seeking vacatur of the award argued that such relief should be granted due to the arbitrator's failure to disclose this financial relationship. The court disagreed, noting that limited partners are passive investors and that the arbitrator and the expert had no knowledge of their financial relationship.

4. Examples (Arbitrator Statement and Rulings/Awards Upheld). Can a successful motion to vacate be made on the ground that something the arbitrator said or did during the arbitration constituted bias? The courts generally have not vacated awards for bias based on the arbitrator's management of the process or statements made during the hearings.

The 4th Circuit Court of Appeals held that bias was not established by an arbitrator's comments during a securities arbitration.32 The investor in Remmey v. Paine Webber complained that the chair of the panel was especially solicitous to the respondent brokerage firm and made several comments indicating empathy for that party. "A review of the record," the court said:

indicates that [the 88-year-old chair's] style, although colloquial, was consistent throughout the proceeding. It was no more a sign of bias for [the arbitrator] to tell [a witness] to 'enjoy the wedding' than it was for him to tell [the] appellant's step-daughter she was 'with friends.' His humor—or attempts at humor—were even directed at himself.

The court found that since the arbitrator was simply attempting to create a relaxed, informal atmosphere, the conduct complained of did not indicate bias. "It is well established that a mere appearance of bias is insufficient to demonstrate evident partiality," the court said.

In a 1992 case, the Illinois Supreme Court found evidence sufficient to rebut the presumption of bias created by the arbitrator's negotiating in another matter with the same parties to the arbitration. The evidence consisted of sworn affidavits and deposition testimony from the arbitrator, the defendant and its law firm, indicating that disputed issues in the arbitration were not discussed.33

Over 20 years ago, in 1981, a federal district court in the District of Columbia recognized that making legitimate efforts to expedite the arbitration proceedings might involve some abrasive conduct by the arbitrator. The court ruled that showing personal hostility toward a party's attorney and interrupting the proceedings did not establish evident partiality. It said, "An arbitrator's legitimate efforts to move the proceedings along expeditiously may be viewed as abrasive or disruptive to a disappointed party. Nevertheless, such displeasure does not constitute grounds for vacating an arbitration award.'' The court explained, "Absent some sort of overt misconduct, a disappointed party's perception of rudeness on the part of an arbitrator is not the sort of 'evident partiality' contemplated by the Act as grounds to vacate an award."34

In a 1998 federal case in Pennsylvania, the district court said that evident partiality was not established where the chair of the arbitration panel denied the respondent a continuance to secure the testimony of a missing witness. On the last hearing day, the respondent asked for a postponement, stating for the first time that he had a rebuttal witness who was not available to testify that day. The court denied the request to vacate, stating:

Although the applicable rules of arbitration procedure did not require [the respondent] to identify [the rebuttal witness] as a witness because he was being called in rebuttal, [the respondent's] counsel should have informed the arbitration panel before the last day of the hearing that she was planning to call [that individual] because she knew that [he] would not be available. The arbitrators had set the schedule in this case based on the availability of themselves and the parties. It simply was poor judgment on the part of [respondent's] counsel to wait until the last day of the hearing to inform the arbitrators that it planned to call a witness who simply was not available that day.35

A federal district court in Virginia ruled in 1991 that evident partiality was not shown through allegations of procedural or evidentiary errors, or by legitimate efforts to move the case along, or by the failure of the arbitrators to follow the rules of evidence.36

Finally, in 1995, a federal court in Wisconsin upheld an award and rejected the respondent brokerage firm's claim of evident partiality based on this statement by the arbitrator at the hearing: "It seems that you have demonstrated that [a witness] was not

exactly a paragon of virtue with his conduct in his affairs and what he did wrong with respect to numerous other accounts has questionable relevance as far as this hearing is concerned." In the court's view, this statement showed that the arbitrator's assessment of the witness was drawn from the evidence presented to the panel and did not show that the arbitrator was partial to one side or the other. "An arbitrator," said the court, "may develop an opinion during the course of the hearing and even express it."37

C. Misconduct by the Arbitrator

1. Standard. The test for arbitrator misconduct under § 10(a)(3) is whether the arbitrator's determination prejudiced a party's right to a fair hearing.38 This ground for vacatur has been raised when awards were issued on a motion for summary judgment, or for dismissal of all claims. Vacatur has also been sought when the arbitrator, during the hearing, refused to grant a postponement or allow discovery or hear evidence.

New York courts have held that an aggrieved party must immediately object to an arbitrator's misconduct or else the claim will be deemed waived.39

In evaluating an arbitrator's decisions as a process manager, such as the decision to deny a postponement request, courts consider whether there was a reasonable basis for the decision and whether the denial created a fundamentally unfair proceeding. If there is a reasonable basis for the arbitrators' decision, courts will be reluctant to interfere with the award.40

Whether evidence proffered by a party is relevant is a decision within the discretion of the arbitrators.41 An arbitrator's determination of what is pertinent and material will be set aside only if that determination severely prejudiced the rights of a party so as to deny that party a fundamentally fair hearing.42 Thus, the Southern District of New York has said that where the hearing is fair overall, even improperly excluded evidence will not be a ground for vacatur. According to this court, "The arbitrators must not only have been in error when they chose to exclude evidence but that error must have been so severe as to have damaged the rights of the party to the extent that he was deprived of a fair hearing.''43

2. Examples (No Misconduct/Awards Upheld). Where excluded evidence is cumulative, the decision to exclude it does not constitute misconduct. For example, in a dispute over a terminated arbitrageur's entitlement to a bonus, a New York intermediate appeals court found that the challenged award was proper, despite the arbitrators' refusal to hear testimony of a proposed witness who would have presented a different version of events than the one provided by the respondent. The court ruled that the refusal to hear evidence was not fundamentally unfair since the panel had been apprised of the contents of the proposed witness's testimony during the hearing and his testimony would have been cumulative.44

Similarly, where the arbitrator excluded proposed rebuttal testimony covering issues discussed at length in the case-in-chief of the party putting on the witness, an appeals court in New York held that the arbitrator's decision did not constitute misconduct sufficient to vacate the award, since the rebuttal testimony was improper for rebuttal.45

In a 1997 construction case, a Washington appeals court did not consider the arbitrator's dismissal of both parties' claims without conducting a hearing on the merits to be

misconduct warranting vacatur of the award where the arbitrator concluded that neither party was entitled to damages because neither had complied with the claims procedures in their agreement.46

An arbitrator's refusal to require production of additional evidence, even if a clearly erroneous decision, did not warrant vacatur of the award unless the refusal was so egregious as to clearly deprive a party of a fundamentally fair hearing.47

Will a party be able to successfully attack an award if it was, allegedly, a "grossly incorrect award"? In a dispute over a charter party, the defendant argued that the award, which was the product of a majority decision, should be vacated by the court on the ground, inter alia, of misconduct under § 10(a)(3) of the FAA. The court said that vacatur was not warranted since there was no evidence of a lack of fundamental fairness. The court stated, "[E]xcept where fundamental fairness is violated, arbitration determinations will not be opened up for evidentiary review." Moreover, the aggrieved party failed to cite any precedent to establish its claim for vacatur under

§ 10(a)(3).48

Soliciting and accepting a gift from a party certainly sounds like misconduct. But when the party who gave the gift ultimately seeks to vacate the award, the court may balk at allowing that party to benefit from its own misconduct. That's what happened in Matter of Kubarcych.49 The losing party in this arbitration had, during the course of the case, secretly furnished New York Knick basketball tickets to the arbitrator at the arbitrator's request. When the basketball game and arbitration were over, the losing party moved to vacate the award, claiming arbitrator misconduct, despite the fact that he knew his conduct was improper (having been admonished by the AAA administrator against such conduct). The prevailing party had no knowledge of this ex parte conduct. The court ruled that the loser in this case waived its claim, since an alleged aggrieved party must immediately object to an arbitrator's misconduct. "It is therefore simply a case of his being 'hoist with his own petard' (Shakespeare, Hamlet, Act III, Scene 4)," said the court. "[T]he sheer effrontery of his contentions (often termed chutzpah) would in and of itself be a sufficient reason for its denial."

In an unpublished decision in Alexander Julian v. Mimco Inc., decided in 2002, the 2nd Circuit rejected the claim that the arbitrator engaged in misconduct by setting the hearing on a day when the defendant's attorney was scheduled to be in federal court. The court acknowledged the "tremendous amount of discretion" vested in arbitrators but found no evidence of fundamental unfairness, even though the defendant did not attend the hearing. The defendant had ample notice of the hearing date and it would have been unfair to the parties to set that date too far in the future. Moreover, said the federal appeals court, the defendant could have sent another lawyer from its counsel's office to attend the hearing or it could have obtained substitute counsel.50

The 4th Circuit held that the panel's consideration of settlement evidence as potentially mitigating evidence in a franchise dispute did not render the arbitration proceeding fundamentally unfair. The panel believed the settlement evidence was relevant to the mitigation defense. It also believed that the use of such evidence for this purpose did not violate the rule against using settlement communications to establish liability. The court

did not decide whether the panel was right or wrong on this point, only that its use was not fundamentally unfair.51

Similarly, a federal district court in New York held that the panel's review of settlement figures was not prejudicial misconduct. "It appears that the arbitrators had concluded that the settlement was not relevant to the resolution of the arbitration issues. The viewing of the settlement agreement by the arbitrators was a routine and fair in camera inspection.''52

An arbitrator's refusal to grant an adjournment was not considered an abuse of the arbitrator's discretion by a New York appellate court, where the request was founded on the requesting party's personal choice not to attend due to another commitment. The court stated: "Appellant risked the possibility that he would be unavailable to testify by leaving the jurisdiction for a prolonged period of time when he knew or should have known that his case would be called for a hearing."53

Similarly, in Bisnoff v. King, the Southern District of New York held that the denial of a stockbroker's request for a postponement on health grounds did not warrant vacatur of an award on misconduct grounds.54 While the arbitrators denied the postponement request, they said that the broker, who had suffered a heart attack a few months earlier and claimed to suffer from recurring symptoms, could appear for a videotaped deposition and present telephone testimony at the hearing. When the broker sought reconsideration of the panel's decision, the arbitrators asked for a written prognosis of his medical condition. They also asked how many hours he was then working. The broker's credibility was apparently more strained than his heart, for the arbitrators learned from the broker's responses that, despite his illness, he was then working about 30 hours a week as a stock broker. Noting that this is a stressful occupation (an understatement at best), the panel again denied his postponement request.

The broker advised the panel in a letter that he had no intention of testifying under any circumstances and neither he nor his attorney appeared at the hearing. The panel conducted the hearing in their absence and ultimately issued an award in favor of the investor. In a very wise move, one of the arbitrators wrote a letter informing the broker that their decision to proceed with the hearings was partially based on the fact that he had been working so many hours per week. The court upheld that award, finding that the panel's decision to deny the adjournment was "reasonable." The broker contended that the panel's denial of a postponement caused substantial and irreparable prejudice by foreclosing him from presenting material and pertinent evidence at the hearing. The court rejected this argument since the broker was offered the opportunity to present evidence by alternative means. Moreover, the court observed that the panel gave a clear and reasonable explanation for its conclusion that the petitioner was fit to participate in a hearing by videotaped deposition and/or telephone testimony.

The court said it was not authorized to second-guess the panel's "uncomplimentary assessment" of the broker's credibility. It found ample "circumstantial evidence" supporting the panel's determination that the broker's stated reason for seeking the adjournment was not credible and that his real purpose was to delay. This evidence was the broker's participation in the preliminary conference only one month after his heart attack, his failure to mention the heart attack or potential medical problems during the

preliminary hearing, his waiting 2½ weeks before the hearing to bring up his medical problems, and his working 30 hours a week in a stressful job.

The court also held that the decision to deny the postponement was fundamentally fair since the broker received an opportunity to proffer evidence through less stressful alternatives. The fact that he did not participate at the hearing was his decision.

In 1991, a federal district court in the District of Columbia similarly held that the arbitrators' refusal to postpone the hearing, despite the hospitalization of the losing party's daughter for a broken arm, was not misconduct that would warrant vacatur of the award. The court observed that the daughter's injury was never presented as a life-threatening situation and there were no medical complications arising out of the injury.55

A federal district court in California found that the arbitrators acted within the scope of their discretion in declining to postpone the hearing and conducting it in the claimant's absence. Here the claimant investor received more than two months' notice of the hearing date, yet he neglected to hire an attorney or prepare for the hearing. The court also noted that he waited until the very week of the hearing to request an extension of time.56

In a federal case in New York, the court found that the party seeking vacatur failed to make a clear showing that the arbitrators abused their discretion in refusing to grant discovery and in excluding evidence that the complaining party deemed relevant. The court observed that whether proffered evidence is relevant is a decision that is within the discretion of the arbitrators.57

Even when the arbitrators excluded a portion of an expert's testimony, a court still upheld the award, stating that arbitrators are not obliged to observe the same "niceties'' required by the Federal Rules of Civil Procedure, and that they must only grant a fundamentally fair hearing. If the hearing was fair overall, said the court, even improperly excluded evidence will not be a sufficient ground for vacatur.58

3. Examples (Misconduct/Awards Vacated). The 1st Circuit has held that the refusal to grant an adjournment constituted a denial of fundamental fairness where the party requesting the adjournment argued that he could not proceed because his wife had cancer.59

Inadequate notice can also lead to vacatur. In Wedbush Morgan Securities v. Brandman, the NYSE's arbitration department sent a notice of the hearing and the rescheduled hearing to the respondent's former counsel, even though the department had been advised by the respondent that he was no longer represented by an attorney. When the respondent found out about the scheduled hearing, he notified the NYSE and said that he was still seeking counsel. However, the hearing proceeded in his absence and resulted in an award against him. When he moved to vacate the award, a New York trial court granted the motion, finding that his rights were prejudiced because he was not properly apprised of the hearing and afforded an opportunity to obtain counsel.60

Other instances of vacatur on misconduct grounds have resulted when, for example, there was a refusal to permit a party to cross-examine the other party's expert witness,61 and when a party was not given the opportunity to completely present his proof on the merits of his grievance.62 In the former case, a federal district court in Pennsylvania granted a broker's motion to vacate an NYSE arbitration award when the arbitrators failed to allow

his counsel to participate in colloquy concerning the basis for cross-claims against the broker and for failing to allow counsel to cross-examine the customer's expert.

D. Exceeding Powers

1. Standard. The standard for granting a motion to vacate under § 10(a)(3) is whether a party's rights were prejudiced by an arbitrator who, in making the award, exceeded his or her powers or so imperfectly executed them that a final and definite award on the subject matter submitted was not made.63

2. Examples (Powers Not Exceeded/Awards Upheld). In 1995, in Schlessinger v. Rosenfeld Meyer & Susman,64 the California Court of Appeal ruled that since the California Arbitration Act does not preclude dispositive motions, arbitrators may (but are not required to) hear such motions under the Act. The court explained, "In a case where a legal issue or defense could possibly be resolved on undisputed facts, the purpose of the arbitration process would be defeated by precluding a summary judgment or summary adjudication motion and instead requiring a lengthy trial." Having established that arbitrators may rule on dispositive motions, the court held that the arbitrator in this case did not exceed his authority under the Act by granting summary judgment based on written submissions and telephonic conferences with the attorneys, and he did not refuse to hear evidence material to the controversy.

The court also held that while the requires the arbitrator is required to "hear evidence" and a party is entitled to cross-examine witnesses if they appear at a hearing, parties do not have an absolute right to present oral testimony in every case."

The district court in the District of Columbia held that arbitrators do not exceed their powers in an NASD wrongful termination case by dismissing the Statement of Claim and assessing the claimant half of the costs of an adjournment requested by both parties, filing and forum fees, and administrative costs. The court held that the arbitration panel acted within the scope of its authority since the NASD Code of Arbitration Procedure gives its arbitrators the authority to assess forum and adjournment fees and costs for pre-hearing proceedings, as well as the authority to decide who pays those fees. In addition, said the court, the arbitrators did not exceed their powers by refusing to stay the arbitration based on claimant's court challenge to the assessment of fees.65

A federal court in Kentucky held that an NASD arbitrator did not exceed his authority by granting a motion to dismiss the plaintiff's claims against one defendant prior to discovery and a hearing on the merits. The claimant argued that this was a refusal to hear evidence that warranted vacatur of the award, but the court found that the claimant failed to show that the excluded evidence was material to the panel's determination, or that it was so prejudicial as to deny the parties fundamental fairness. Significantly, the court also emphasized that the claimant had the opportunity to respond to the motion to dismiss and, therefore, was not denied an opportunity to present her case. Furthermore, the court added that the claimant was not entitled to full-blown discovery and that the case could be decided on a pre-hearing motion.66

These cases make clear that arbitrators do not exceed their power by ruling on dispositive motions in an appropriate case, as long as each side has an opportunity to present its case, usually at the hearing on the dispositive motion.

In a Texas case, the intermediate appeals court held that an arbitrator did not exceed his powers in permitting the respondent to file a counterclaim after the deadline provided in the AAA rules. The court found that the arbitrator had discretion under these rules to extend the deadline for filing a response and counterclaim.67

Claims that the arbitrators exceeded their powers have also been made based on allegations that the arbitrator decided a claim not subject to arbitration or not set forth in the claim.68 Similarly, vacatur motions have been made based on the arbitrators' failure to decide all of the claims submitted to them, which generally might be characterized as the arbitrators having imperfectly exercised their powers. However, these types of challenges are not directed at arbitrator management issues per se, so they will not be discussed further. Arbitrators should take care in making their jurisdictional rulings and deciding only the claims submitted that are subject to the parties' agreement to arbitrate.

In an interesting, recent case dealing with the timing of an award under § 10(a)(3), the 7th Circuit held that issuing a late award in violation of the applicable arbitration rules is not a ground for vacatur, unless the parties provide in their agreement that "time is of the essence," which was not the case here.69

3. Examples (Powers Exceeded/Awards Vacated). When one arbitrator was disqualified at the hearing and the other two arbitrators continued the hearing over the objection of the respondent brokerage firm, the 11th Circuit found that the arbitrators exceeded their powers because the arbitration agreement required three arbitrators to decide the dispute. The court held, "Because the arbitrators violated the provisions of the arbitration agreement requiring arbitration before at least three arbitrators, they exceeded their authority under the arbitration agreement.''70

The 9th Circuit held that when an investor altered the standard-form option agreement to require the arbitrators to issue findings of fact and conclusions of law and the arbitrators thereafter failed to do so, they exceeded their powers.71 Arbitrators should render their award in the form required by the agreement.

E. Manifest Disregard of the Law, Irrational Awards, Lack of Due Process

1. Standards. The nonstatutory grounds for vacatur provide a means to second-guess arbitrator decisions. However, since courts, by and large, do not criticize arbitration awards, parties that challenge awards on these grounds have an even more difficult time of succeeding than when they seek vacatur on one of the statutory grounds. Thus, arbitrators have even less to be concerned about if a party raises these grounds during the course of a case (in memoranda of law or arguments during a hearing).

Manifest disregard of the law has been interpreted in different ways, even by the same court. However, most courts require more than an error or misunderstanding of the law. First, they require the existence of a governing legal principle, which must be well-defined, explicit and clearly applicable. Second, the law must have been obvious and capable of being readily and instantly perceived by an average person qualified to serve as an arbitrator.72

In the 2003 decision in Prestige Ford v. Ford Dealer Computer Services, the 5th Circuit, said

To adopt a less strict standard of judicial review would be to undermine our well-established deference to arbitration as a favored method of settling disputes when agreed to by the parties. Judicial inquiry under the manifest disregard standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit and clearly applicable.73

In 2004, in Wallace v. Buttar, the 2nd Circuit added the further caution that the doctrine of manifest disregard of the law should be used sparingly. In this important case, the court stated:

In sum, the Second Circuit does not recognize manifest disregard of the evidence as proper ground for vacating an arbitrator's award. We recognize only the doctrine of manifest disregard of the law, which doctrine holds that an arbitral panel's legal conclusions will be confirmed in all but those instances where there is no colorable justification for a conclusion.74

In deciding whether there has been manifest disregard of the law, a court may not review the weight the arbitrators accorded conflicting evidence; nor may it question their credibility findings.75

The difficulty in prevailing on this judicially created ground for vacatur is well-known among practitioners. Indeed, the 2nd Circuit stated in a January 2003 decision that since 1960, it had vacated awards in whole or in part for manifest disregard of the law in just four cases out of a total of 48.76 Thus, over a 40-year period, that court vacated only 8% of arbitration awards on this ground.

Courts that do not recognize the doctrine of manifest disregard of the law often use the "irrational" award or "arbitrary and capricious" standard.77 It has been said that "a scintilla of evidence,"78 or a "barely colorable" or "rational justification," or a "proper basis" is all that is needed to deny a petition to vacate alleging that an irrational award was rendered. It has also been said that a labor award will be held to be irrational only "if ... no judge or group of judges could conceivably have made such a ruling" or if the award was "actually and indisputably without foundation in reason or fact."79 Similarly, an award could be vacated if based on "reasoning so palpably faulty that no judge ever could conceivably have made such ruling; or, mistakenly based on a crucial assumption that is concededly not fact.80

In In re Goldbrunn,81 the arbitration award was challenged in bankruptcy court on the ground that it had no factual basis. Quoting the 11th Circuit, the court noted that for an award to be vacated on this ground, there must be "more than an error of law or interpretation. Rather, there must be no ground for the Panel's decision."

In one case where the arbitrators did not provide a rationale for the amount of the award, the court remanded for further explanation, noting that an "incomprehensible" award would clearly be set aside if it were a jury verdict.82 Few arbitration rules require reasoned awards, although the Securities and Exchange Commission, in early 2005, approved a new NASD rule permitting claimants to request them and requiring the arbitrators to prepare them when requested to do so.

One court has said that an award should not be considered irrational merely because the amount awarded may have involved an element of speculation.83

2. Examples (No Manifest Disregard/Awards Upheld). In Hoeft v. MCL Group, the 2nd Circuit held that the moving party failed to prove that an arbitrator manifestly disregarded the law by refusing to apply generally-accepted accounting procedures, or that GAAP was a sufficiently well-defined standard to constitute the law applicable to the case. The court found that the arbitrator decided the issue he was asked to decide.84

In Goldman v. Architectural Iron Co., the 2nd Circuit also held that manifest disregard of the law had not taken place when the arbitrator decided that a homeowner was acting as a general contractor for the project and not as a consumer. The court found that the question before the arbitrator required application of "an unclear rule of law to a complex factual situation."85

The 6th Circuit, in Dawahare v. Spencer, confirmed a $50,000 award in favor of an investor (who sought $600,000 in damages for churning and unsuitable investments) over the investor's claim that the arbitrators disregarded the law of damages in rendering an insufficient award. The court ruled, "This is not a case where one of the parties clearly stated the law and the arbitrators expressly chose not to follow it.'' The court noted that in the arbitration hearing, the investor's attorney had offered several damage theories and told the arbitrators that he would leave it to their wisdom. The court essentially held that the failure to cite any law in support of the investor's damages claim was fatal to arguing that the arbitrators disregarded that law.86

In Josephthal & Co, v Cruttenden Roth Inc., a district court in the Southern District of New York upheld an award of damages against a claim that the panel, in calculating the award, manifestly disregarded the law. The case involved a dispute between two brokerage firms over the compensation to be earned from a public offering. The arbitrators ruled that the firm holding the shares could sell them as long as the proceeds of sale were placed in an unencumbered, separate escrow account. One of the firms contended that the panel acted in manifest disregard of the law by not measuring the other party's damages at a particular time. In order to establish manifest disregard of the law, the court said that the arbitrators had to have "intentionally ignored what they knew to be obviously applicable and clearly governing law and, further, expressly did so on the record." The court said that it is not at liberty to set aside an award because of an "arguable difference regarding the meaning or applicability of laws urged upon it ... Moreover," the court said, an error in applying the 'wrong' theory of damages is not a manifest disregard of the law." Nor is a miscalculation of damages.87

3. Examples (Manifest Disregard/Awards Vacated). In an employment discrimination case, a court held that the arbitrators manifestly disregarded the law by failing to grant attorney's fees to the prevailing party in a dispute under the Age Discrimination in Employment Act.88

In Warren Hardy v. Walsh Manning, in which I represented the victorious Mr. Hardy in a "market manipulation" arbitration, the 2nd Circuit held that the standard for vacating an award based on manifest disregard of the law gives extreme deference to arbitrators. In this case, however, the court found the standard for demonstrating manifest disregard was shown, "at least to the extent of requiring a remand" on the issue of the panel's ruling on derivative liability against an individual respondent.89 And when ordered by the

appellate court to reconsider their earlier reasoned award, the arbitrators' more articulate explanation in a re-written award was later confirmed by a federal district court.

In this NASD case, Mr. Hardy, a British resident, alleged that the brokerage firm and Skelly, its president, had engaged in stock manipulation with respect to Hardy's account. The arbitration panel found that the brokerage firm and its president were jointly and severally liable "based upon the principle of respondeat superior liability." The 2nd Circuit held that it is "certainly possible to find that the panel disregarded the principles of respondeat superior, the very principles that it purported to apply." The panel was made aware during the hearing that an individual could not be held derivatively liable for the acts of another employee. The appeals court found no reading of the facts by which Skelly could be held liable on respondeat superior grounds. Since the award stated no other basis for liability, the court felt compelled to order a remand so that the arbitrators could state whether there had been enough evidence to hold Skelly liable, but not on respondeat superior grounds. On remand, the award was confirmed and, thereafter, a federal jury convicted Skelly of securities fraud involving the same securities in the Hardy arbitration.

The Hardy court distinguished the case before it from Westerbeke Corp. v. Diahatsu Motor Co.,90 where it held that an award could not be vacated because the panel did not come up with the "optimal construction" of the contract. The court said it was enough that the facts, as determined by the arbitrators, supported their interpretation. Here, by contrast, there were no facts set forth in the award to support the conclusion that Skelly was liable under respondeat superior.

The Hardy court also distinguished GMS Group v. Benderson,91 where the parties asserted various theories of recovery but the arbitrators issued no written opinion in making the award. In that situation, the 2nd Circuit said that if a ground for the award can be inferred from the facts, the award should be upheld. Thus, if one of the theories that was argued would support the award or could have formed the basis for the award, it did not matter that other theories might not be a basis for liability. In the Hardy case, the appeals court declined to infer an alternate theory of liability where the panel had already supplied one. Even though the award contained no legal reasoning, it stated a legal conclusion, one that the court found contained "a fundamental mistake of law." Since the court was reluctant to invalidate the award, it exercised its authority to remand the case to the arbitration panel to seek a clarification of the panel's intent in making the award.

In another NASD case, an intermediate appeals court in New York vacated an award when it found that the arbitrator refused to consider the law when she said on the record that she would not read relevant cases or statutory authority and placed, in the court's phrase, a "bizarre limitation" on the number of decisions the parties could cite in their post-hearing briefs, without giving any explanation. The court found this conduct outrageous. "The arbitration panel, at a minimum, must have at least considered the law which it erroneously applied. The panel not only acted irrationally, but also exhibited a manifest disregard for well-established public policy.''92

In yet another NASD arbitration, a New York appeals court held that a $25 million punitive damages award was excessive, irrational and in manifest disregard of the rule of proportionality, of which the arbitrators were specifically advised. The court vacated the

award and remanded the case to the arbitrators for reconsideration of the law of proportionality. On remand, the arbitrators again awarded $25 million in punitive damages because the firm and its president "demonstrated reprehensible conduct ... [and] conducted a horrible campaign of deception, defamation and persecution of claimant...." Thereafter, a New York trial court vacated that award and remanded it before a brand new panel.93

What we learn from this exercise in frustration is this: If a court orders arbitrators to reconsider their award and presents them with a standard by which to render their award, arbitrators should adhere to that standard.

Some parties have argued, unsuccessfully, that awards should be vacated because they were in manifest disregard of statutes of limitations. For example, certain former "licensed individuals'' of a defunct brokerage firm sought to nullify an award against them based, in part, on the ground that the investor's claims were time barred under the Securities Exchange Act of 1934 and New York law. The movants argued that the arbitrators acted in manifest disregard of the law in hearing the case. Concluding that the movants had failed to meet "the high standard'' of proof for invalidating an award based on manifest disregard of the law, the Southern District of New York gave the arbitrators the benefit of the doubt (which courts generally do). It stated, "The Panel heard [the licensed individuals'] motion to dismiss the claim on the basis of the statute of limitations, and denied such claim, which indicates to this Court that the claim was fully and fairly considered."94

In another case, the 3rd Circuit held that a $6 million cash bond award was irrational in light of the maximum $1.5 million liability under the agreement between the parties. "An award may not stand if it does not meet the test of fundamental rationality," the court said.95

In a New York case, the arbitrators absolved the primary wrongdoer—the securities trader—but found his employer liable. The intermediate appeals court found that this award was "inherently inconsistent," since the "gravamen of [the investor's] claim against [the employer] was predicated upon [the trader's] conduct." The court said that where there is "no independent basis for finding [the employer brokerage firm] solely liable for over a million dollars in damages .... the award must be set aside as irrational."96

Arbitrators walk a fine line in explaining the basis for their awards. The cases discussed here certainly indicate that great care should be taken when imposing liability on a derivative basis, so be sure that there is a legal basis for the award. However, since it is my belief that parties have a right to know how arbitrators came to their decisions, I encourage my colleagues to have the courage of their convictions and write so-called "reasoned awards," as long as they are sensitive to the possible misinterpretation of their words.

F. Public Policy

1. Standard. Courts may be asked to determine whether an award is contrary to a well-

defined and dominant public policy. When they do, courts hold that the policy must be ascertainable by reference to positive law. General notions of public policy or

considerations of supposed public interest are not sufficient and the violation of public policy must be clearly shown.97

One question a court will ask is this: Would enforcement of the award clearly violate a public policy?98 Like manifest disregard of the law, it is another way of challenging an award a party does not like. For example, public policy has been used to challenge labor awards that reinstate employees in safety sensitive positions when they were discharged for using drugs or drinking in the workplace.99 Because cases on this subject do not address arbitrator management issues, this article will not review specific cases. However, these cases teach us that arbitrators should at least consider public policy arguments in rendering their awards.

G. Lack of Due Process

1. Standard. This ground for vacatur is similar to misconduct that adversely affects the parties' rights to a fair hearing. To afford due process, arbitration hearings have to provide: (1) adequate or reasonable notice; (2) a hearing before an impartial decision maker; (3) the opportunity to present evidence and witnesses who will testify under oath (i.e., a full and fair opportunity to be heard); and, (4) judicial review. In addition, "due process" requires the parties to have representation, whether it is by an attorney or other representative. Because the due process standard is a minimal one, courts rarely find that a "lack of due process" took place in arbitration.

In one NASD case, the award was upheld despite the fact that an NASD representative was not present at the hearing and a recording of the hearing was not made, as required by the NASD Code of Arbitration Procedure. The parties agreed that, at the hearing, they had been able to present all witnesses and introduce all exhibits they deemed appropriate and relevant. They had not requested a continuance to secure the presence of a court reporter or recording equipment. Still, the losing party argued that it had been denied due process because no recording was made of the hearing. However, because that party acquiesced to the lack of a court reporter or recording equipment and proceeded with the hearing, the court ruled that he waived his right to object to this procedural defect.100

2. Examples (Due Process/Awards Upheld). The New York Court of Appeals upheld an award in an NASD arbitration against a broker who never received actual notice of the arbitration proceeding because the notice was sent by certified mail to the broker's former brokerage firm, which he had recently left. The hearing was conducted in the broker's absence and resulted in a substantial award in favor of the customer. New York's highest court held that there was no due process violation. It stated:

[D]ue process does not require actual receipt of notice before a person's liberty or property interests may be adjudicated. It is sufficient that the means selected for providing notice was reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice procedure chosen need not eliminate all risk that notice might not actually reach the affected party. Mailed notice may suffice.101

In another case, a judge in the Southern District of New York held that the broker's failure to amend his Form U-4 [Uniform Employment Application] to provide for a change of permanent address was not a defense to his claim of insufficient notice of the

ongoing arbitration, which was held in his absence. He had provided a relative's address, but that relative, apparently, did not forward his mail or advise him of the hearings.102

3. Examples (Due Process/Awards Vacated). Only a small number of cases have so offended the courts that they vacated awards on this ground. A New York trial court vacated a net $2.1 million award against Anchor Construction based on a due process challenge that the arbitrator precluded Anchor from active participation in two days of hearings after it was unable to pay its half of the arbitrators' fees. In all, 12 witnesses testified during seven days of hearings, and 137 exhibits were presented. Both parties attended the first five days of hearings, but Anchor did not attend the subsequent ones because the arbitrators severely restricted its participation for the balance of the case. For example, it was not permitted to cross-examine the other party's witnesses or present a case of its own. Anchor's attorney quit and no company representative appeared on the remaining hearing days. New York statutory law states that parties in arbitration are entitled to be heard, present evidence and cross-examine witnesses. Thus, the court had no problem concluding that Anchor had been denied its statutory right to participate, as well as its right to counsel. As a result, the court vacated the award.103

Conclusion

Arbitrators should be emboldened by the knowledge that since a losing party's challenge to their award will usually fail, they should promptly establish and thereafter maintain control of the case to its conclusion.

As long as arbitrators (1) provide a fundamentally fair hearing to all parties, (2) don't engage in ex parte communications with a party or party representative, (3) don't refuse to permit a party to cross-examine witnesses, (4) give each party an opportunity to complete his or her presentation of proof (even if only at a hearing on a dispositive motion to dismiss), (5) decide only the issues set forth in the pleadings, (6) decide all of the issues submitted, (7) disclose information about themselves that satisfy their obligation to be impartial, (8) have a reasonable basis for the denial of a request to adjourn or the refusal to hear certain evidence; and as long as the award is (a) not completely irrational, (b) contrary to a well-defined and dominant public policy, or (c) lacking a factual basis, there is little to fear from the courts. So, go ahead, reclaim control of the process.

Endnotes

1 Sunshine Mining Co. v. United Steelworkers of Amer. 823 F.2d 1289 (9th Cir. 1987); Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901, 763 F.2d 34 (1st Cir. 1985).

2 See e.g., American Arbitration Association (AAA) Commercial Arbitration Procedures, Rule R-30(b):

> The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

AAA Rule R-31(b) makes it the arbitrator's province to "determine the admissibility, relevance, and materiality of the evidence offered and exclude evidence deemed by the arbitrator to be cumulative or irrelevant."

3 9 U.S.C. § 10. State statutes usually mirror these grounds.

4 Available at www.NCCUSL.org.

5 Coors Brewing Co. v. Federico Cabo, No. 03CA2452, 2004 WL 2903515 (Colo. Ct. App. Dec. 16, 2004) (use of manifest disregard of the law standard "would weaken the effectiveness and legitimacy of arbitration"); Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 450 (Tenn. 1996). In the latter case, the investor claimed the broker misrepresented a material fact and admitted making a negligent misrepresentation about the riskiness of an investment, which the Tennessee Securities Act mandated recovery for losses. The AAA arbitrators, in a seven-page opinion, dismissed the claim on the ground that there was no material misrepresentation. The Tennessee trial court vacated the award finding it irrational. However, Supreme Court of Tennessee reversed and reinstated the award. It stated that under the Tennessee UAA, judges are limited to the statutory grounds for vacatur of arbitration awards. The court went on to say:

> We do not find that the award was irrational; that is, that the panel failed to follow the law. Even if it were irrational, an arbitration award may be vacated only for the reasons set forth in the statute. Tennessee Code. Ann. § 29-5-313(a) simply does not provide for the vacation of an award because it is irrational.

6 La Farge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1339 (9th Cir. 1986).

7 Foster v. Turley, 808 F.2d 38, 42 (10th Cir. 1986); In re Doreen Goldbronn, 263 B.R. 347 (Bankr. M.D. Fla. 2001). Federal courts do not apply a preponderance of the evidence standard in this situation.

8 Karppinen v. Karl Kiefer Mach. Co., 187 F.2d 32, 35 (2d Cir. 1951).

9 Harre v. A.H. Robins, 750 F.2d 1501, 1503 (11th Cir. 1985); Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978); Newark Stereotypers Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir.), cert. denied, 393 U.S. 954 (1968).

10 Remmey v. Paine Webber, Fed. Sec. L. Rep. (CCH) ¶ 98,366, at 90,504 (4th Cir. Aug. 19, 1994).

11 748 N.E.2d 229 (Ill. Ct. App. 2001).

12 In this case the ex parte contact was initiated by a party to the case.

13 See also Hahn v. A.G. Becker Parabas, Inc., 518 N.E.2d 218 (Ill. Ct. App. 1st Dist. 1987).

14 Rosenthal-Collins, supra n. 13 (manifest weight of evidence standard applies if court heard courtroom testimony).

15 Nagler v. Hartman Group, 2003 WL 21750992 (Cal. Ct. App. 2nd Dist. July 2003). See Luster v. Collins, 15 Cal. App. 4th 1338 (Ct. App. 1993).

16 See the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes (Ethics Code), Canon II C, effective March 1, 2004, available at www.adr.org.

17 Canon II A(2) discusses the types of interests to be disclosed. See also International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators, Local 16 v. Laughon, 14 Cal. Rptr.

3d 341 (Ct. App. April 22, 2004).

18 393 U.S. 145 (1968) (concurring opinion), reh'g denied, 393 U.S. 1112 (1969).

19 See also Betz v. Pankow, No. 902532 (Cal. Super. Ct. Jan. 25, 1994) (duty to investigate prior employer), and Schmitz v. Zivetti, 20 F.3d 1043 (9th Cir. 1994) (duty to investigate current employer).

20 Driniane v. State Farm Mutual Auto. Ins. Co., 606 N.E.2d 1181 (Ill. 1992).

21 Wages v. Smith Barney Harris Upham & Co., 17 937 P.2d 715 (Ariz. Ct. App. 1997).

22 International Alliance, supra n. 17.

23 Betz, supra n. 19.

24 Seligman v. Allstate, 756 N.Y.S.2d 403 (Sup. Ct. Nassau Cty. 2003).

25 Kern v. 303 E. 57th St. Corp., 611 N.Y.S.2d 547 (App. Div. 1st Dept. 1994).

26 Schmitz, supra n, 19

27 Al-Harbi v. Citibank, 85 F.3d 680 (D.D.C. 1996).

28 Arbitration between Lemoine Skinner III v. Donaldson, Lufkin & Jenrette Sec. Corp., No. C 03-2625 VRW, 2003 WL 23174478, (N.D. Cal. Dec. 29, 2003).

29 See text at n. 16 supra.

30 Sphere Drake Ins. v. All Amer. Life Ins. Co., 2002 WL 31255618 (7th Cir. 2002).

31 Apusento Garden (Guam) v. Superior Court of Guam, 94 F.3d 1346 (9th Cir. 1996).

32 Remmey, supra n, 10; Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141 (4th Cir. 1993), and Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253 (7th Cir. 1992).

33 Supra n. 20.

34 Fairchild & Co. v. Richmond, Fredericksburg & Potomac R.R. Co., 516 F. Supp. 1305 (D.D.C. 1981).

35 Maiocco v. Greenway Capital Corp., 1998 U.S. Dist. LEXIS 836 (E.D. Pa. Feb. 2, 1998).

36 Sisti v. Merrill Lynch, Pierce, Fenner & Smith, 1991 U.S. Dist. LEXIS 15817 (E.D. Va. Apr. 22, 1991).

37 Hayne, Miller & Farni, Inc. v. Flume, 888 F. Supp. 949 (E.D. Wis. 1995).

38 Tempo Shain Corp. v. Bertek, 120 F.3d 16 (2d Cir. 1997). See also DaSilva v. First Union Sec. Inc., 249 F. Supp. 2d 286, 290 (S.D.N.Y. 2003).

39 See e.g., Matter of Kaminsky v. Segura, 2004 WL 1945007 (N.Y. Sup. Ct. July 6, 2004).

40 See e.g., Bisnoff, v. King, 154 F. Supp. 2d 630, 637 (S.D.N.Y. 2001).

41 Dean v. Paine Webber, Inc., Fed. Sec. L. Rep. (CCH) ¶ 97,034, at 94,546 (S.D.N.Y. Oct. 13, 1992).

42 Sebbag v. Shearson Lehman, Fed. Sec. L. Rep. (CCH) ¶ 95,775, at 98,729 (S.D.N.Y. Jan. 8, 1991).

43 Matter of Kubarcych (Siegal) (N.Y. Sup. Ct.) reported in 209 N.Y.L.J. 33, p. 31, col. 2., on Feb. 22, 1993).

44 Credit Suisse First Boston Corp. v. Crisanti, 734 N.Y.S. 2d 150, (App. Div. 1st Dept. 2001). See also, Areca v. Oppenheimer & Co., 960 F. Supp. 52 (S.D.

N.Y. 1997).

45 Republic of Croatia v. Trustee of the Marquess of Northhampton 1987 Settlement, 203 A.D. 2d 167, 169 (N.Y. App. Div. 1st Dept. 1994).

46 Pegasus Construction Corp. v. Turner Construction Co., 929 P.2d 1200 (Wash, Ct. App. 1997) (AAA Construction Industry rules "vest discretion in the arbitrator to vary the procedures by which a matter is to be heard, subject to the duty of ensuring that both sides have the opportunity to present material and relevant evidence," which was done in this case, despite the fact that a full hearing did not occur.).

47 Coppola v. Charles Schwab & Co., Fed. Sec. L. Rep. (CCH) ¶ 96,216, at 91,133 (S.D.N.Y. Sept. 4, 1991).

48 No. 03 Civ 2038, 2004 WL 2721072 (S.D.N.Y. Nov. 30, 2004), (quoting the 2d Circuit in Tempo Shain, supra n. 38, 120 F.3d at 20).

49 Supra n. 43.

50 Alexander Julian v. Mimco, No. 01-7621, 2002 WL 243306 (2d Cir. Feb. 19, 2002).

51 Gallus Inv. LP v. Pudgie's Famous Chicken Ltd., 134 F.3d 231 (4th Cir. 1998).

52 Perahia v. Viceroy Int'l Sec. Corp., No. 92 Civ. 1228, 1992 WL 162825, 1992 U.S. Dist. LEXIS 8874 (S.D.N.Y. June 23, 1992).

53 State Farm Mutual Auto. Ins. Co. v. Bermudez, 111 A.D.2d 858 (N.Y. App. Div. 2d Dep't 1985).

54 Bisnoff, supra n. 40.

55 Berlacher v. Paine Webber, Inc., 759 F. Supp. 21 (D.D.C. 1991)

56 PaineWebber v. Barca, 2000 WL 1071836, 2000 U.S.Dist. LEXIS 10873 (N.D. Cal. July 28, 2000).

57 Dean supra n. 41.

58 Pompano Windy City Partners v. Bear Stearns, 794 F. Supp. 1265 (S.D.N.Y. 1992).

59 Hoteles Candado Beach, supra n. 1;. See also Roche v. Local 32B-32J Serv. Employees Int'l Union, 755 F. Supp. 622 (S.D.N.Y. 1991).

60 Wedbush Morgan Sec. Inc. v. Brandman, 597 N.Y.S.2d 39 (App. Div. 1st Dept. 1993); Leblon Consultants Ltd. v. Jackson China Inc., 459 N.Y.S.2d 93 (App. Div. 1st Dept. 1983) (abuse of discretion in denial of adjournment request where unavailable witness was the only employee of respondent with knowledge of underlying dispute); Lehman Millet Inc. v. Parish, 109 Misc. 2d 288, 440 N.Y.S.2d 164 (Sup. Ct., Steuben Cty. 1981) (adjournment denial not unreasonable where problem regarding defendant's presence at the hearing should have been discovered long before the hearing date was scheduled).

61 Pacilli v. Philips Appel & Walden, Inc., 1991 WL 193507 (E.D. Pa. Sept. 1991).

62 Teamsters, Chauffeurs, Warehousemen & Helpers, Local 506 v. E.D. Clapp Corp., 551 F. Supp. 570 (N.D.N.Y. 1982).

63 Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, 910 F.2d 1049 (2d Cir. 1990).

64 47 Cal. Rptr. 2d 650 (Cal. Ct. App. 1995). See also Inter Carbon Bermuda Ltd. v. Caldex Trading Corp., 146 F.R.D. 64 (S.D.N.Y. 1993) (upholding a summary award without holding live hearings).

65 Brown v. Wheat First Sec., 101 F.Supp. 2d 1(D.D.C., Jun 13, 2000).

66 Warren v. Tacher, 114 F. Supp.2d 600 (W.D. Ky 2000).

67 General Cinemas v. CEI Roofing, No. 05-99-00357-CV, 2000 WL 898861 (Tex. Ct. App. 5th Dist. July 7, 2000).

68 For example in Ferrarini v. Fenner Fin. Inc., 641 So.2d 82 (Fla.App. 5th Dist., June 28, 1994), a $50,000 NASD award against a brokerage firm was vacated because the arbitrators based the award "on issues not submitted."

69 Hasbro Inc. v. Catalyst USA, 367 F. 3d 689 (7th Cir 2004).

70 Szuts v. Dean Witter, 931 F.2d 830 (11th Cir. 1991).

71 Western Employers, Inc. v. Jeffries & Co., 958 F.2d 285 (9th Cir. 1992). See also Graniteville Co. v. First Nat'l Trading Co., 578 N.Y.S.2d 183, (App. Div. 1st Dept. Jan. 16, 1992) (where panel's interpretation completely ignored the contract, effectively imposing a new contract on the parties, the panel exceeded its powers).

72 Merrill Lynch, Pierce, Fenner & Smith v. Bobker, 808 F.2d 930 (2d Cir. 1986); Banco de Seguros del Estado v. Mutual Marine Office, 344 F.3d 255, 263 (2d Cir. 2003); Goldman v. Architectural Iron Co., 306 F.3d 1214, 1216 (2d Cir. 2002); DiRussa v. Dean Witter Reynolds, 121 F.3d 818, 821 (2d Cir. 1997), cert denied, 522 U.S. 2049 (1998); Government of India v. Cargill Inc., 867 F.2d 130, 133 (2d Cir. 1989); Hoeft v. MCL Group, 343 F.3d 57 (2d Cir. 2003); N.Y. Tel. Co. v. Communications Workers of Amer. Local 1100, 256 F.3d 89 (2d Cir. 2001); Hardy v. Walsh Manning Sec., L.L.C., 341 F.3d 126 (2d Cir. 2003).

The 7th Circuit departed from this standard in George Watts & Sons v. Tiffany & Co., 2001 Wl 37622 (7th Cir. 2001), where it held that manifest disregard of the law occurs

when the arbitrator's award requires a party to violate the law or doesn't adhere to the legal principles specified in the contract.

73 Prestige Ford v. Ford Dealer Computer Servs., 324 F.3d 391 (5th Cir. 2003). See also cases cited supra n. 72.

74 378 F. 3d 182 (2d Cir. 2004).

75 Tripi v. Prudential Sec., 303 F. Supp.2d 349 (S.D.N.Y. 2003).

76 Hardy, supra n. 72 (citing Duferco International Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389 (2d Cir. 2003)).

77 Raiford v. Merrill Lynch, Pierce, Fenner & Smith 903 F.2d 1410 (11th Cir. 1990). In Brown v. Rauscher Pierce Refsnes, 994 F.2d 775, 779 (11th Cir. 1993), the court applied the "arbitrary and capricious'' standard in affirming an award that was challenged for failure to apply the formula for damages in the Florida statute for failing to register as a stockbroker. The arbitrators did not apply this law even though the broker was unregistered because, in their opinion, the violation was an administrative oversight and not a willful violation. The 11th Circuit upheld the award because at the time of the arbitrators' decision, there was no definitive interpretation of the statute. Accordingly, the award "was not wholly unfounded, arbitrary or capricious."'

78 Peckerman v. D & D Assocs., 567 N.Y.S.2d 416 (App. Div. 1st Dep't 1991)

79 Loveless v. Eastern Airlines, 681 F.2d 1272, 1276 (11th Cir. 1982).

80 Local 1445, United Food & Commercial Workers v. Stop & Shop Cos., 776 F.2d 19 (1st Cir. 1985).

81 In re Goldbronn, supra n. 7.

82 Tripi, supra n. 75.

83 Security Monitoring Servs. v. Koh, (Sup. Ct. 1A Part 2, Queens Cty.) reported in 205 N.Y.L.J. 56, Mar. 25, 1991).

84 Supra n. 72.

85 Supra n. 72.

86 201 F.3d 666 (6th Cir. 2000), cert denied (Oct. 2, 2000);

87 177 F. Supp. 2d 232 (S.D.N.Y. 2001). See also Deiulemar Compania di Navigazione v. Transocean Coal Co., 2004 WL 2721072 (S.D.N.Y. Nov. 30, 2004) (arbitrators did not manifestly disregard the law by failing to deduct amounts earned in mitigation of damages); Cole Publishing Co. v. Wiley & Sons, 1994 U.S.Dist. LEXIS 13786 (S.D.N.Y. 1994).

88 In a discrimination case, the claimant's employment agreement excised attorneys' fees and punitive damages as remedies, although they were requested in arbitration. The court found that since the claimant received an award on the Title VII gender and race discrimination claims, he was also entitled to attorney's fees as a prevailing party. DeGaetano v. Smith Barney, 983 F. Supp. 459 (S.D.N.Y. 1997).

89 Supra n. 72.

90 304 F.3d 200 (2d Cir. 2002).

91 326 F.3d 75 (2d Cir. 2003).

92 In re Arbitration Between UBS Warburg LLC and Auerbach, Pollack & Richardson, 744 N.Y.S.2d 364 (App. Div. 1st Dept. 2002).

93 Sawtelle v. Waddell & Reed, 754 N.Y.S.2d 264 (App. Div. 2003).

94 Decicco v. Columbo, 234 F. Supp. 2d 320 (S.D.N.Y. 2002)

95 Swift Indus. v. Botany Indus., 466 F.2d 1125, 1131 (3d Cir. 1972).

96 Spear Leeds & Kellogg v. Bullseye Sec. 738 N.Y.S.2d 27 (App. Div. 1st Dept. 2002).

97 United Paperworks Int'l Union v. Misco 484 U.S. 29 (1987); W.R. Grace & Co. v. Local Union, 759, 461 U.S. 757 (1983); PaineWebber v. Agron, 49 F.3d 347 (8th Cir. 1995); Exxon Shipping Co. v. Exxon Seamen's Union, 11 F.3d 1189 (3d Cir. 1993); Maul v. Aznavoorian, 1997 U.S. Dist. LEXIS 153, *7 (N.D. Cal. Jan. 9, 1997).

98 Valentino v. Smith, Fed. Sec. L. Rep. (CCH) ¶ 97,256, at 95,150 (W.D. Okla. Sept. 30, 1992). For cases involving public policy, see Sea Dragon, Inc. v. Gebr. Van Weelde Scheepvaartkantoor B.V., 574 F. Supp. 369 (S.D.N.Y. 1983) (award violated public policy inherent in comity between courts); Manhattan & Bronx Surface Transit v. Tran sport Workers Union, 582 N.Y.S.2d 227 (App. Div. 2d Dep't), app. denied, 588 N.Y.S.2d 823 (1992) (award violated public policy in broad statutory mandate to run a safe and efficient transit system).

99 Delta Air Lines v. Airline Pilots Ass'n, 861 F.2d 665 (11th Cir. 1988), cert. denied, 493 U.S. 871 (1989) (award reinstating a pilot who had flown while drunk violated public policy); Coast Indus. Workers Union v. Exxon Co., USA 991 F.2d 244 (5th Cir. 1993) (award reinstating employee to a safety-sensitive position violated public policy where employee repeatedly violated the company's drug abuse policy).

100 Valentino, supra n. 99.

101 Beckman v. Greentree Sec., 663 N.E.2d 886 (N.Y. 1996).

102 Marsillo v. Geniton, 2004 WL 1207925 (S.D.N.Y. June 2004).

103 Coty, Inc. v. Anchor Construction, 776 N.Y.S.2d 795 (App. Div. 1st Dept. 2004).

SIDEBAR

Guide to a Vacatur–Proof Award

If impartial arbitrators provided the parties with an adequate opportunity to present their arguments and evidence to enable the arbitrators to make an informed decision, they have met the benchmark of fundamental fairness, whether a hearing is held or not.

—D.E.R.

Special Disclosure Rules for California Arbitrators

Since July 2002, neutral arbitrators in California must comply with the "Ethical Standards for Neutral Arbitrators in Contractual Arbitration," based on §§ 1281.85, 1281.9 and 1281.91 of the California Code of Civil Procedure. Section 1281.9 provides that a "proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial." Failure to adhere to California's strict disclosure standards could subject an arbitration award to vacatur.

Arbitrators are advised to review the AAA's special procedures for California arbitrations at www.adr.org (go to Rules & Procedures, Ethical Standards for Neutral Arbitrators in Contractual Arbitrations in California Fact Sheet).

—D.E.R

Practice Tip: Rebuttal Evidence

It is quite difficult to establish arbitrator misconduct based on excluded rebuttal testimony, even if it would have been relevant and material, because a party does not have a right to re-litigate issues that could have been covered in its case-in-chief. A party has no right to use rebuttal evidence to fix problems exposed during its direct case regarding subjects covered by its own witnesses, or to use such evidence to bolster its own case.

—D.E.R

Awards Upheld Even Without Hearings

Arbitrators who believe a claim fails to state a cause of action (assuming everything stated in the claim is true), or at the close of the claimant's case, believe the claimant failed to meet her burden of proof, can grant a respondent's motion to dismiss for failure to state a claim or for summary judgment (after the claimant has rested). Arbitrators have the authority to decide motions to dismiss and summary judgment motions and, in almost all instances, their rulings have been upheld. See, for example, Sheldon v. Vermonty. 269 F. 3d 1202 (10th Cir. 2001), where the court stated: "[I]f a party's claims are facially deficient and the party therefore has no relevant or material evidence to present at an evidentiary hearing, the arbitrator has full authority to dismiss the claims without permitting discovery or holding an evidentiary hearing.'' In Intercarbon Bermuda Ltd. v. Caltex Trading & Transport Corp., 146 F.R.D. 64 (S.D.N.Y. 1993), the arbitrator issued a summary award based on documentary evidence, refusing to conduct any oral hearings despite a party's repeated requests. Using Rule 56 of the Federal Rules of Civil Procedure as an analogy, the court held that the arbitrator had not engaged in misconduct and upheld the award. Also see Schlessinger v. Rosenfeld Meyer & Susman, 47 Cal. Rptr. 2d 650 (Cal. Ct. App. 1995). Similarly, in Louis v. Superior Court of San Bernadino County, 970 P.2d 870 (1999), the court said that the word "hearing'' does not necessarily require an opportunity for an oral presentation or the presentation of witnesses in testimony. See

also Gutter v. Merrill Lynch, Pierce, Fenner & Smith, 644 F.2d 1194 (6th Cir. 1981), cert. denied, 455 U.S. 909 (1982); Walck v. American Stock Exch., 687 F.2d 778 (3d Cir. 1982), cert. denied, 461 U.S. 42 (1983).

The allegations in a claim must be construed in the light most favorable to the claimant. Northern Trust Co. v. Peters, 69 F.3d 123, 129 (7th Cir.1995). The burden of proof in a motion to dismiss—before the evidence is presented—is so high that it should seldom be granted. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (dismissal for failure to state a claim will not occur "unless it appears beyond a doubt that the [claimant] can prove no set of facts in support of his claim which would entitle him to relief.").

—David E. Robbins