Kramer Levin

NYSBA Commercial Arbitration Training Program:

Benjamin N. Cardozo School of Law

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Commercial Arbitration Training

VACATUR/CONFIRMATION – June 19, 2019

By Michael S. Oberman

I. Introduction

a. We all know that awards are often challenged, but few challenges succeed

--*See, e.g., In the Matter of Daesang Corp. v. Nutrasweet Co.*, 85 N.Y.S. 3d 6 (1st Dep't 2018), *leave to appeal den.*, 32 N.Y.3d 915 (2019); *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60 (2d Cir. 2012), where the appellate courts reversed trial court vacaturs.

--Among the rare appellate opinions vacating or upholding a vacatur, *see Thomas Kincade Co. v. White*, 711 F.3d 719 (6th Cir. 2013) (evident partiality); *U.S. Soccer Federation, Inc. v. U.S. National Soccer Team Players Ass'n*, 838 F.3d 826 (7th Cir. 2016) (exceeding authority).

b. And yet, a second take-away: even if a challenge to an award is ultimately unsuccessful, the challenge takes time and expense – especially if pursued on appeal.

1. While there is a short period in which to commence a challenge to an award at the trial court level, there is no expedition for decision or appeal.

2. A recent study of 200 cases decided by the Southern District of New York since 2005 found that the average time from petition to district court judgment was 42 weeks and for international cases 35 weeks; most of the cases were employment disputes, with only 27 domestic commercial awards reviewed by the SDNY in that time period. *See* Tim McCarthy, David Hoffman and Ryham

Ragab, "Review of New York Federal Petitions for Confirmation of Arbitral Awards Shows Swift Resolutions and Certainty of Awards," 6 New York Dispute Resolution Lawyer, No. 1 at 47 (Spring 2013).

3. Some courts see frivolous challenges to an arbitration award as a basis for sanctions. *See Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1028 (7th Cir. 2013) (cautioning that frivolous challenges present a "high risk of sanctions"); *DigiTelCom, Ltd. v. Tele2 Sverige AB,* 2012 WL 3065345, at *7-8 (S.D.N.Y. 2012) (imposing attorneys' fees as a sanction under 28 U.S.C. § 1927); *see also Kailuan (Hong Kong) Int'l Co., v. Sino East Minerals, Ltd.*, 2016 WL 7187631, at *7 (S.D.N.Y. 2016) (denying sanctions where arguments were "unpersuasive" and "unmeritorious but not frivolous or vexatious").

II. Choice of Law

a. In the review of an award, there is the threshold issue of whether the case is governed by the FAA or by state law.

b. It is not the courthouse that determines whether the FAA or state law controls; it is the wording of the arbitration agreement along with the nature of the underlying dispute (i.e., interstate commerce).

c. *See Cusimano v. Schnurr*, 26 N.Y.3d 391, 399-400 (2015)(describing "undeniably broad" "interpretation" to be applied is assessing interstate commerce for purposes of the FAA); *Krantz & Berman LLP v. Dalal*, 472 F. App'x 76, 77 (2d Cir. 2012) ("But the record reflects that, pursuant to the retainer agreement, K&B (a New York law firm) provided services to Dalal (then a resident of Washington, D.C.) related to litigation involving a New Jersey corporation. We need go no further") (citing *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) as holding "involving commerce" in the FAA signifies the "broadest permissible exercise of Congress' Commerce clause power"), *cert. denied*, 133 S. Ct. 1584 (2013)).

d. *See also N.J.R. Assoc. v. Tausend,* 19 N.Y.3d 597, 601-02 (2012) ("We have explained that a contract specifying that 'New York law shall govern both "the agreement and *its* enforcement[]" adopts' the New York rule that the threshold statute of limitations issues are resolved by the courts and not arbitrators. . . ."; *County of Nassau v. Chase*, 402 F. App'x 540, 541 (2d Cir. 2010) (where contract specifies "that any appeal from an arbitration award is to be governed exclusively by New York state law, the designation must be honored by the courts unless the state law conflicts with federal law").

e. Scope of Review Under FAA or State Law

i. Law applied can matter—among other reasons—because of *SCOTUS* decision in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 576-77 (2008): held that the FAA grounds for review are exclusive (i.e., the parties cannot by contract provide that an award will be reviewed for mere error of law), but the Court specifically mentioned the possibility that broader review of awards may be had under state or common law.

ii. Three states have concluded that Sections 9-11 of the FAA do not preempt state law and that their state law provides for broader review (Alabama, California, and Texas); four have held otherwise (Maine, Georgia, Tennessee, and Massachusetts). *See* Michael S. Oberman, "The *Hall Street* Parade: State Courts Step Out and Consider Expanded Review of Arbitration Awards," 4 New York Dispute Resolution Lawyer, No. 3 at 23 (Fall 2011); *Katz, Nannis & Solomon, P.C. v. Levine*, 46 N.E.3d 541 (Mass. 2016).

iii. Going in the other direction, state and federal courts are exploring whether parties may, by agreement, narrow or even eliminate all—or certain—steps of judicial review.

1. See Michael S. Oberman, "The Other Shoe: Are Agreements *Narrowing* Judicial Review Enforceable," 31 Alternatives at 65 (May 2013).

III. Statute of Limitations

a. One of the ways the governing statute matters is in the applicable deadlines.

b. The time to seek confirmation is one year under either the FAA or the CPLR, but the rules are different for a petition to vacate.

1. Under the FAA, a petitioner has only three months to petition to vacate, and that period ends with the last day of the third month even if the other party subsequently moves to confirm within the year allowed. *See Stevens v. Jiffy Lube Int'l, Inc.*, 911 F.3d 1249, 1252 (9th Cir. 2018) (calculating three months); *Martin v. Deutsche Bank Sec. Inc.*, 676 F. App'x 27 (2d Cir. 2017) (enforcing three month requirement).

2. Under the CPLR, a petitioner has 90 days to petition to vacate, but if the 90 days goes by and a petition to confirm is therefore timely made, the losing party may cross-move to vacate.

c. *See also Thompson v. Lithia ND Acquisition Corp.*, 896 N.W.2d 230 (N.D. 2017) (noting split among federal circuits on whether one-year period is mandatory under FAA, holds later confirmation allowed under state statute).

IV. Mechanics: Proceedings

a. Even if review is under FAA, an independent basis is required for subject matter jurisdiction in federal court. However, a district court may look through a petition to vacate or confirm to determine jurisdiction based on the underlying dispute. *See Landau v. Eisenberg*, __ F. 3d __, 2019 WL 1924224 (2d Cir. May 1, 2019).

b. Most often, the proceeding consists of written submissions and oral argument; occasionally, there can be an evidentiary hearing and/or discovery.

c. Burden of Proof

i. Second Circuit has held that the showing required to avoid summary confirmation of an arbitration award under FAA is very high. *See Scandanavian Reinsurance,* 668 F.3d at 71-72.

ii. For CPLR cases, courts have applied a clear and convincing standard (*see, e.g., Allstate Ins. Co. v. Geico,* 100 A.D.3d 878, 879 (2d Dep't 2012)).

V. Substantive Grounds for Review: Manifest Disregard

a. There is conflict and confusion over the role of the doctrine of "manifest disregard of the law."

i. Again, *Hall Street* held that the FAA grounds are exclusive and cannot be expanded by private agreement.

ii. Had Justice Souter stopped there, an issue would have been resolved, and clarity would prevail.

iii. But he went a step further, observing how lower courts had extracted from the Supreme Court's own *Wilko v. Swan* opinion in 1953 language suggesting manifest disregard as a separate ground, and he appeared to suggest it is not a separate ground under the FAA.

iv. Following *Hall Street*, both the circuits and state highest courts have divided on whether the SCOTUS really meant to extinguish "manifest disregard" or merely to curtail its role (e.g., can be a gloss on statutory grounds); courts also split on whether violation of public policy is a cognizable non-statutory ground.

v. *See Bangor Gas Co., LLC v. H.Q. Energy Servs. (U.S.) Inc.,* 695 F.3d 181, 187 n.3 (1st Cir. 2012) (finding Second, Fourth, Sixth and Ninth applying manifest disregard; Fifth, Eighth and Eleventh not; First Circuit, in dicta, saying no).

vi. In 2010, the SCOTUS had an easy opportunity to erase the confusion it created when it decided *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010),

which is the case where the Second Circuit found manifest disregard to still have a role.

vii. Instead, Justice Alito noted the growing conflict but stated the Court would reserve on the issue of whether *Hall Street* eradicated manifest disregard.

viii. SCOTUS continues to deny cert. in cases re-presenting the "manifest disregard" issue.

ix. New York state courts apply manifest disregard in FAA cases, *see, e.g., In the Matter of Daesang Corp. v. Nutrasweet, supra* (finding no manifest disregard shown); and under CPLR, *see, e.g., Schiferle v. Capital Fence Co.,* 155 A.D.3d 122 (4th Dep't 2017).

VI. FAA Statutory Grounds

a. Section 10 of the FAA has four sub-sections (see below) —two of which appear most frequently in recent cases of note.

i. Section 10(a)(2): "where there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2).

1. As applied by the circuits, nondisclosure by itself does not equal evident partiality.

a. SCOTUS last addressed evident partiality in 1968, a case called *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), and split 4-2-3, leaving circuits and state courts to debate the effect of the plurality decision and to find their own way.

b. *See generally*, Michael S. Oberman, "Clarifying the Standard for Determining Arbitrator Bias," New York Law Journal, Apr. 2, 2012.

c. Second Circuit standard: whether a reasonable person, considering all of the

circumstances, would *have* to conclude that an arbitrator was partial to one side

i Most circuits are aligned with at least this level of review; two apply a lower standard of "reasonable impression of partiality."

ii *See generally,* Brief for Respondent-Respondent, *U.S. Electronics, Inc. v. Sirius Satellite Radio Inc.*, 2011 WL 6986868 (N.Y. 2011) (compiling case law); *see also Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 252-53 (3d Cir. 2013) (adopting Second Circuit standard).

d. N.Y. Court of Appeals adopted Second Circuit standard in *U.S. Electronics Inc. v. Sirius Satellite Radio Inc.*, 17 N.Y.3d 912, 913 (2011) (argued by Michael Oberman)

e. *Scandanavian Reinsurance:* Really good opinion that explains evident partiality; the Court stated:

"The evident-partiality standard is, at its core, directed to the question of bias.... It follows that where an undisclosed matter is not suggestive of bias, vacatur based upon that nondisclosure cannot be warranted under an evident-partiality theory...." 668 F.3d at 73.

[I]in ascertaining whether a relationship is "material"... we think that a court must focus on the question of how strongly that relationship tends to indicate the possibility of bias in favor of or against one party, and not on how closely that relationship appears

to relate to the facts of the arbitration... *Id.* at 75.

[W]e do not think it appropriate to vacate an award solely because an arbitrator fails to consistently live up to his or her announced standards for disclosure, or to conform in every instance to the parties' respective expectations regarding disclosure. The nondisclosure does not by itself constitute evident partiality.... *Id.* at 76-77.

Even where an arbitrator fails to abide by arbitral or ethical rules concerning disclosure, such a failure does not, in itself, entitle a losing party to vacatur. . . ." *Id.* at 77 n.22.

f. A challenge for evident partiality may be waived if the challenging party sat on the information on which the challenge was based and perhaps if that information was as easily available *before* the award as *after* the award. *See Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 249-50 (3d Cir. 2013) (surveying case law on waiver).

b. Dealer Computer Servs. v. Michael Motor Co.

i. DCS offers computer hardware and software for automobile dealerships; Michael Motor was one dealership which contracted with DCS.

ii. The dispute turned on an interpretation of a provision of DCS's standard contract.

iii. DCS appointed Carol Butner as its party-appointed neutral arbitrator.

iv. Butner disclosed: "I served on panel [sic] of three arbitrators that considered a dispute between Dealer Computer Services, Inc. and another party." 485 F.

App'x at 728. On her questionnaire, she answered "Yes" to question on parties and counsel appearing before her in the past, and put a question mark in response to question on whether she served as an arbitrator in which listed witnesses or individual parties gave testimony.

v. After panel ruled for DSC, Michael Motor learned that Butner had served on the panel in the arbitration between DSC and Venus Ford. That panel issued an 8 page award in favor of DSC, which required application of the very same contract provision.

vi. The same law firm represented DSC in both arbitrations; the same damages expert testified for DSC in both arbitrations (which the Venus Ford panel credited); and the Venus Ford panel heard two additional witnessed for DSC who did not testify in *Michael Motor*.

vii. The district court held that Butner's conduct created a "reasonable impression of bias" and rose to the level of evident partiality—a connection to DSC that significantly compromised her ability to act impartially, 485 F. App'x at 726.

viii. The briefs on appeal focused more on whether Michael Motor waived the challenge—and the Fifth Circuit accepted this argument in a summary order reversing district court:

"Even without the specific information of the *Venus Ford* arbitration, Butner's disclosures were sufficient to put MMC on notice of a potential conflict. Accordingly, the [district] court's conclusion that the arbitrator completely failed to disclose a potential conflict is incorrect. Particularly, in light of MMC's duty to reasonably investigate, Butner's disclosures were sufficient to put MMC on notice. The information was available on the AAA online Webfile system, which was the agreed upon method of disclosure." 485 F. App'x at 728.

ix. The fourth ground is "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made." 485 F. App'x at 727.

1. There is a chance that this ground might provide a way to challenge an error of law.

a. If a clause says that an arbitrator may only issue an award consistent with governing case law, and the arbitrator is seen as mis-applying that law, can a challenge be raised for exceeding power—recognizing that the parties could not provide for an award to be reviewed for errors of law? The Texas Supreme Court has said this can be done under the Texas statute and consistent with FAA in *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex.), *cert. denied*, 565 U.S. 963 (2011).

2. But many other courts have held that a questioning of the arbitrator's authority should not be an indirect way of getting judicial review of the merits of an award.

3. "The Second Circuit has 'consistently accorded the narrowest of reading to the FAA's authorization to vacate awards pursuant to § 10(a)(4) . . . focus[ing] on whether the arbitrators had the power based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *DigiTelCom*, 2012 WL 3065345, at * 2 (citations omitted).

4. *See Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.*, 713 F.3d 797 (5th Cir. 2013) (holding that an arbitrator did not exceed his powers by amending the parties' agreement to

grant a perpetual license to the prevailing party in the intellectual property of the losing party.)

VII. CPLR Statutory Grounds

a. Quite similar to the federal grounds (the FAA was based on New York's arbitration statute at the time).

b. But CPLR 7511(b)(1) has the following set-up language: "if the court finds the rights of that party were prejudiced"; this is not expressed in the FAA.

i. First: "corruption, fraud or misconduct in procuring the award."

1. Leading case is *Goldfinger v. Lisker*, (68 N.Y.2d 225(1986)), where the arbitrator met with a party-litigant privately without the knowledge of the other party—seen as "misconduct" or "undue means."

2. The Court stated: "Precisely because arbitration awards are subject to such judicial deference, it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded...Our general reluctance to disturb arbitration awards must yield in this case to the clear necessity of safeguarding the integrity of the arbitration process." 68 N.Y.2d at 231, 232-33.

ii. Second: "partiality of an arbitrator appointed as a neutral."

1. *See Weinrott v. Carp.*, 32 N.Y.2d 190, 201 (1973): "We believe it is incumbent upon an arbitrator to disclose any relationship which raises even a suggestion of possible bias. This case, however, involves no direct relationships between arbitrator and client....Thus, we have only a weak link of indirect relationships purporting to tie an arbitrator to a claimant through a third party who is known

only very casually by both parties. The decision of the arbitrators was unanimous, and there is no evidence of any bias. It would have been preferable if Vogel had disclosed the relationship, however distant, but in the modern world of sprawling corporations and rapid travel, it would be most difficult to find a large number of potential well-qualified arbitrators who did not have some indirect relationship with one of the parties to the litigation. After the protracted hearings consumed by this case, we think the asserted relationship too remote and speculative to provide a basis for reversal."

2. A petitioner's subjective belief that the arbitrator's rulings favored respondent does not create an actual or perceived conflict of interest between the arbitrator and respondent that prejudiced petitioner's rights.

3. A failure to pursue a possible ground for challenge known *before* the award can result in a waiver *after* the award. *See Goldstein v. 12 Broadway Realty LLC*, 105 A.D.3d 506, 506-07 (1st Dep't 2013).

iii. Third: "an arbitrator...exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter was not made."

1. Exceeding power—at variance with a limitation in the arbitration clause (versus contract itself).

2. It is important to know that New York has recognized that an arbitrator "may do justice as he sees it, applying his own sense of the law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement." *Matter of Silverman*, 61 N.Y.2d 299, 308 (1984).

3. In applying this section, the New York Court of Appeals has recognized "'three narrow grounds that may form the basis for vacating an arbitrators award–that it violates public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *Shenendehowa Cent. Sch. Dist. Bd. of Educ. v. Civil Serv. Employees Assoc., Inc.,* 20 N.Y.3d 1026, 1027 (2013) (citation omitted).

iv. Fourth: "failure to follow the procedure of this article"—like notice.

VIII. Enforcing Awards

a. Most post-award proceedings are brought to confirm or vacate an award, but occasionally a dispute over the meaning of an award leads to a court proceeding to interpret and enforce the award.

b. In *Pine Street Assocs., L.P. v. Southridge Partners, L.P.*, 107 A.D.3d 95, 100 (1st Dep't 2013), the court addressed its role when a dispute exists over the meaning of a confirmed award. "'[T]he Court's function [is] to determine and declare the meaning and intent of the arbitrator," adopting the "most reasonable meaning of the text by avoding any potential interpretations of the award that would render any part of its language superfluous or lead to an absurd result." In addition, the "award must be interpreted in the light most favorable to the prevailing party" (citing a U.S. Court of Appeals for the Sixth Circuit decision for this last principle).

c. In *Tricon Energy v. Vinmar Int'l. Ltd.*, 718 F.3d 448, 456, 460 (5th Cir. 2013), the court held: "If an arbitration panel has been granted authority by the parties to award a non-statutory rate of postjudgment interest, and if it wishes to do so, it must expressly award 'postjudgment interest.' This panel did not." The court found that the parties had authorized the panel to award post-judgment interest, but the award did not state that post-judgment interest was being award at a non-statutory rate. The award spoke of post-award interest: "the arbitrators in this

case did not award postjudgment interest, but post-award interest, and that distinction makes a difference."

d. *See Herll v. Auto-Owners Ins. Co.,* 879 F.3d 293 (8th Cir. 2018) (applying Minnesota Arbitration Act, which expressly provides for a court to submit a claim that an award is ambiguous back to the arbitrators); *Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544 (2d Cir. 2018) (holding that the doctrine of *functus officio* does not prevent a court from submitting to the arbitrator 1n ambiguous award for clarification). *See also American Int'l Specialty Lines Ins. Co. v. Allied Capital Corp.*, 167 A.D.3d 142 (1st Dep't 2018), *leave to review granted* (2019) (vacating award under doctrine of *functus officio*).

e. For international awards, *see generally CBF Industria DeGusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir.) (discussing the procedure for confirmation/vacatur in contrast to enforcement) *cert. denied*, 133 S. Ct. 557 (2017).

FEDERAL ARBITRATION ACT

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in [§§] 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

a. In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration

1. [W]here the award was procured by corruption, fraud, or undue means;

2. [W]here there was evident partiality or corruption in the arbitrators, or either of them;

3. [W]here 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; or

4. [W]here 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.

b. If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

c. The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration.

a. Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

b. Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

c. Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

CPLR 7511
Vacating or modifying award

(a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:

(i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or

(ii) a valid agreement to arbitrate was not made; or

(iii) the agreement to arbitrate had not been complied with; or

(iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

(c) Grounds for modifying. The court shall modify the award if:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

(d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

JUNE 2019 SELECTED CASES ON VACATUR

Selected and complied by Michael S. Oberman

Case	Description
Adviser Dealer Services, Inc. v. Icon Advisers, Inc., 557 F. App'x 714 (10th Cir. 2014)	Reversing vacatur of award, and directing confirmation of award that awarded attorney's fees in a FINRA arbitration, where the parties' submissions each requested attorney's fees which—under FINRA rules—constituted a request by all parties for an award of fees.
Aerotel, Ltd. v. IDT Corp., 568 F. App'x 51, 53 (2d Cir. 2014)	Affirmed a judgment denying a petition for vacatur on the grounds of manifest disregard and exceeding powers. This order does not discuss the substantive law at issue but rather observed how the district court had found that the arbitration panel had looked at the applicable law. The court added: "The District Court properly concluded that while another panel might have reached a different conclusion, the panel in this case, whether correctly or not, was unquestionably applying the governing law." The District Court also noted that "New York law gives arbitrators substantial power to fashion remedies"...and, accordingly, the decision to deny specific performance and instead grant lost profit damages was not in excess of its powers under the FAA. We agree." (citation omitted).
A&G Coal Corp. v. Integrity Coal Sales, Inc., 565 F. App'x 41, 43-44 (2d Cir.), *cert. denied*, 135 S. Ct. 368 (2014)	Affirmed a judgment rejecting a petition to vacate an award of $21,074,300.30 premised on manifest disregard of the law and of the parties' contract. Petitioner A&G—while conceding "that the arbitrator's fact-finding in calculating market price is essentially unreviewable"—nonetheless contended that (a) the award granted more than Integrity had sought in the arbitration and was therefore "punitive rather than compensatory" and (b) the arbitrator "disregarded New York law in calculating damages." The Second Circuit held that the fact that an arbitrator "reached a greater figure than the one calculated by [the claimant] does not transform a compensatory award into a punitive one."
Agility Public Warehousing Co. K.S.C. v. Supreme Foodservice GMBH, 495 F. App'x 149, 150, 151, 153 (2d Cir. 2012)	Confirmed a $41 million award in favor of Agility. The court first held that the New York Convention plainly applies, since Supreme is a Swiss company. The court rejected Supreme's argument that the award was contrary to New York public policy, in that certain Agility witnesses refused to testify in the face of an indictment of Agility and yet Agility sought and obtained affirmative relief in the arbitration. The court held that the Convention's public policy ground pertains to "national" policies and not the

Case	Description
	policies of particular states within a country. The court declined to rule if any "basic, fundamental United States public policy" was implicated, because the "situation that Supreme complains of was largely, if not entirely, of Supreme's own making"—specifically, it declined to adjourn the arbitration until after the criminal proceeding was concluded and it invited the arbitrators to draw adverse inferences from the refusal of the Agility executives to testify. "Under such circumstances, the arbitrators' decision to draw adverse inferences from the executives' absence" instead of dismissing Agility's claims "did not violate 'basic notions of morality and justice.'" Nor did the refusal to dismiss the claims of Agility violate due process. The court further rejected a challenge under §10(a)(3) since "misconduct" requires violation of "fundamental fairness," which was not shown. The court additionally rejected a challenge of exceeding power under § 10(a)(4), where Supreme argued the panel improperly awarded post-termination airlift fees; there was no issue about the arbitrators' authority to award such fees, only a contention of an erroneous legal ruling. The court finally rejected a manifest disregard challenge relating to the adverse inferences (rather than dismissal of the claim) in light of New York public policy; at most, there would be " a mere error in the application in the application of state law." Note: the court framed manifest disregard as a "gloss" on the statutory grounds, in contrast to some other recent cases which simply apply manifest disregard as if a separate ground.
Am. Postal Workers Union, AFLCIO v .U.S. Postal Serv., 754 F.3d 109, 113-14 (2d Cir. 2014)	Rejected an "exceeded powers" challenge. The court relied on the *Oxford Health* opinion from the Supreme Court for the proposition that "an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits." The Second Circuit also reaffirmed that "arbitrators possess authority to apply collateral estoppel based on prior judicial or administrative decisions" under "a broad arbitration agreement."
American Brokerage Network v. American General Life Ins. Co., 744 F. App'x 388, 388-89 (9th Cir. 2018)	In reversing vacatur of an award relating to a relationship of which the arbitrator "was not actually aware," the court of appeals stated: Given the arbitrator's disclosure that AIG was a former client of her firm, ABN [that is, one of the

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	parties] had some duty to inquire about the nature of that relationship. *See* Fid. Fed. Bank, FSB v. Durga Ma Corp., 386 F.3d 1306, 1313 (9th Cir. 2004); Lucent Techs. Inc. v. Tatung Co., 379 F.3d 24, 28 (2d Cir. 2004). But ABN asked no questions and proceeded with the hearing. Further, the laborious efforts required to discover the undisclosed relationships give credence to the reasonableness of the arbitrator's investigation. *See* New Regency, 501 F.3d at 1110 (arbitrators have a duty to "make a reasonable effort to inform themselves of any interests or relationships" subject to disclosure) (citation omitted). Lastly, the undisclosed relationships, considered in light of those the arbitrator did disclose, are insufficient to create a "[r]easonable impression of partiality." Schmitz v. Zilveti, 20 F.3d 1043, 1047 (9th Cir. 1994) (citation omitted).
American International Specialty Lines Ins. Co. v. Allied Capital Corp., 167 A.D.3d 142, 146-48 (1st Dep't 2018), *leave to review granted* (2019)	The First Department vacated an award under the functus officio doctrine, where a panel—asked to determine first on summary disposition the threshold liability issue—issued a partial final award that determined that issue but then, on request of the party that was unsuccessful in the partial fund award, reconsidered the partial fund award and issued a "Corrected" partial final award. The court (4-1) stated: The corrected PFA and final award should be vacated and the PFA should be confirmed on the ground that the panel exceeded its authority when it reconsidered the PFA. "Vacatur of an arbitrator's award is statutorily limited to occasions involving fraud, corruption or bias ... or occasions when the arbitrator exceeded his or her power, or so imperfectly executed it so that a final and definite award was not made" (*Matter of Curley [State Farm Ins. Co.]*, 269 A.D.2d 240, 241–242, 702 N.Y.S.2d 305 [1st Dept. 2000]; ***see also*** CPLR 7511[b]). Here, when the panel reconsidered the PFA, it exceeded its authority based on the common law doctrine of functus officio. The doctrine of functus officio provides that absent an agreement to the contrary, after an arbitrator renders a final award,

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	the arbitrator may not entertain an application to change the award, "except ... to correct a deficiency of form or a miscalculation of figures or to eliminate matter not submitted" (*Matter of Wolff & Munier [Diesel Constr. Co.]*, 41 A.D.2d 618, 618, 340 N.Y.S.2d 455 [1st Dept. 1973]; *see also Levine v. Klein,* 70 A.D.2d 532, 416 N.Y.S.2d 28 [1st Dept. 1979]; CPLR 7509; CPLR 7511[c]). "In order to be 'final,' an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them" (*Michaels v. Mariforum Shipping, S.A.,* 624 F.2d 411, 413 [2d Cir.1980]). "Generally, in order for a claim to be completely determined, the arbitrators must have decided not only the issue of liability of a party on the claim, but also the issue of damages" (*id.* at 414). However, "the submission by the parties determines the scope of the arbitrators' authority" (*Trade & Transport, Inc. v. Natural Petroleum Charterers Inc.,* 931 F.2d 191, 195 [2d Cir.1991]). Thus, "if the parties agree that the [arbitration] panel is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so ... [and] once [the] arbitrators have finally decided the submitted issues, they are, in common-law parlance, 'functus officio,' meaning that their authority over those questions is ended" (*id.* at 195).. . . In this case, the panel was functus officio with respect to the PFA and thus, the panel's reconsideration of the PFA on substantive grounds was improper and exceeded its authority. During the arbitration proceeding, AISLIC and Allied agreed that the panel was to make an immediate, final determination as to the issue of AISLIC's liability under the policies, including whether Allied had suffered an insurable "Loss" and whether Allied was entitled to defense costs, and that the issue of the amount of defense costs would be determined at a separate evidentiary hearing if it was found that the claims made in the other litigation were covered under the policies. Indeed, Allied stated in its brief in opposition to AISLIC's motion that "the quantum

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	of attorneys' fees need not be decided on this motion, but could be subject to a separate evidentiary process in the event coverage is found." At the dispositive motion hearing, Allied's counsel stated that the amount awarded as defense costs "would be the topic for a separate proceeding ... like an inquest to prove up what was done and how much was done." Counsel for AISLIC did not disagree. Thus, the panel had the authority and responsibility to determine the issue of AISLIC's liability under the policies and once the panel made such determination, the panel was functus officio, meaning that its authority over such issue was ended.
Americo Life, Inc. v. Myer, 440 S.W.3d 18 (Tex. 2014)	Applying the FAA, the Texas Supreme Court vacated an award for exceeding authority where the parties' agreement allowed each party to appoint a party-appointed arbitrator, one party's designation of an arbitrator was challenged by the other side and the AAA upheld the challenge; the court held that the composition of the panel did not comply with the agreement and therefore that panel exceeded its power in rendering the award.
Aspic Engineering and Construction Co. v. ECC Centcom Constructors LLC, 913 F.3d 1162, 1168-69 (9th Cir. 2019)	Affirming a district court's vacatur of an award, the circuit first reiterated that, in reviewing a district court vacatur, the court of appeals reviews legal rulings de novo and findings of fact for clear error. The court next reiterated that arbitrators exceed their powers when the award is "completely irrational" or exhibits a "manifest disregard of the law." In reviewing a contract dispute, the arbitrator found that a subcontractor need not comply with requirements of the Federal Acquisitions Regulations that were incorporated into the contract; the district court and court of appeals ruled that the arbitrator failed to draw the essence of the award from the subcontract but rather improperly disregarded contract provisions "to achieve a desired result." The court closed with the following two observations, the first about the importance of the government regulations and the second about the role of courts where arbitration has become more common: To allow contractors and subcontractors, foreign or domestic, to evade the FAR provisions because a subcontractor was too unsophisticated or

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	inexperienced to fully understand them would potentially cripple the government's ability to contract with private entities, and would violate controlling federal law. . . . We have become an arbitration nation. An increasing number of private disputes are resolved not by courts, but by arbitrators. Although courts play a limited role in reviewing arbitral awards, our duty remains an important one. When an arbitrator disregards the plain text of a contract without legal justification simply to reach a result that he believes is just, we must intervene. The Arbitrator's Award in this case was "irrational" because it directly conflicted with the Subcontracts' FAR-related provisions, without evidence of the parties' past practices deviating from them, in order to achieve a desired outcome. We therefore affirm the district court's vacatur of the Award.
Bamberger Rosenheim, Ltd. v. OA Development, Inc., 862 F.3d 1284, 1288 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 654 (2018)	Declining to vacate an award under the New York Convention, where petitioner argued that the arbitrator had improperly interpreted the arbitral venue provision in the arbitration clause. The court did not separately analyze whether to vacate under the New York Convention and the FAA, finding that the scope of review was covered by the clause that "the arbitral procedure was not in accordance with the agreement of the parties," New York Convention, Art. V(1)(d), and the prong that "the arbitrator[] exceeded [his] powers" under § 10(a)(4) of the FAA. The court determined (even in an international dispute) that the issue of the proper venue under an arbitration clause is a procedural issue for the arbitrator to determine, where the parties agree that there is a valid arbitration clause in a binding agreement. And the court concluded that the arbitrator at least arguably interpreted the venue provision, ending the court's review. (The clause provided that any proceedings "shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex." Profimex commenced arbitration in Atlanta; OAD submitted a counterclaim; Profimex argued OAD's counterclaim must be brought in Tel Aviv. The arbitrator found the counterclaim was part of the dispute initiated by

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	Profimex.)
Benihana, Inc. v. Benihana of Tokyo, LLC, 784 F.3d 887, 891, 893, 900 (2d Cir. 2015)	The case arises from a license agreement to operate Benihana restaurants in the United States (among other places) and to use the Benihana trademark. The license agreement had a broad arbitration clause, including a provision covering disputes over the "right of termination, or the reasonableness thereof" as well as "any other dispute" that arose between the parties with respect to the agreement. A dispute arose, and in advance of an arbitration commenced by Benihana of Tokyo (the licensor), Benihana America (the licensee) sought an injunction enjoining Benihana of Tokyo from selling certain hamburgers in Hawaii (the alleged breach of the license agreement) and from "arguing to the arbitration panel that it be permitted to cure any defaults if the arbitrators rule that [Benihana of Tokyo] breached the License Agreement." The district court granted the requested injunction. The Second Circuit affirmed those portions of the injunction that preserved the status quo pending arbitration. However, it vacated that portion of the injunction that would have prevented Benihana of Tokyo from arguing that an extended cure period could be found under the license agreement. The court saw the issue as being asked to determine whether arbitrators would exceed their power by deciding this issue under the agreement, a question normally reserved for review of an award. The court stated: "Tellingly, Benihana America has not cited, and we have not found, any precedent for a court holding that a particular remedy may not be awarded by an arbitrator *before* the arbitrator has actually awarded that remedy. On the contrary, courts that have determined that a remedy exceeded the scope of an arbitrator's power have done so exclusively after the arbitrator's ruling." Given the broad arbitration clause, the court held that it was for the arbitrators in the first instance to rule on whether an extended cure period could be found under the agreement.
BNSF Railway Co. v. Alstom Trans., Inc., 777 F.3d 785, 788 (5th Cir. 2015)	Reversed district court and reinstated arbitration award which had been vacated for exceeding powers. The Court of Appeals held that a court's role is limited to determining whether the arbitrator attempted to interpret an agreement and apply the controlling law, even if the court would reach

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	a different conclusion. "In determining whether the arbitrator exceeded her authority, district courts should consult the arbitrator's award itself. The award will often suggest on its face that the arbitrator was arguably interpreting the contract. Several pieces of relevant evidence can be gleaned from the award's text, including but not limited to: (1) whether the arbitrator identifies her task as interpreting the contract; (2) whether she cites and analyzes the text of the contract; and (3) whether her conclusions are framed in terms of the contract's meaning."
Burton v. Class Counsel & Party to Arbitration, 737 F.3d 1262 (9th Cir. 2013)	The Ninth Circuit, as a question of first impression, held that the FAA does not permit parties to contractually eliminate all judicial review of an arbitration award. Section 10 of the FAA reflects the intent of Congress "to preserve due process while still promoting the ultimate goal of speedy dispute resolution…If parties could contract around this section of the FAA, the balance Congress intended would be disrupted, and parties would be left without any safeguards against arbitral abuse." The clause in question provided for "binding, non-appealable arbitration." The court did not resolve the ambiguity of whether this language simply waived an appeal on the merits (but still permitted review under Section 10) or whether the language divested both the district court and the circuit court of jurisdiction to review the award at all; instead, the court found that the latter reading is unenforceable.
CAA Sports LLC v. Dogra, 2019 WL 1001041 (E.D. Mo. 2019)	District court dismisses without prejudice a motion to vacate a fourth supplemental award in arbitration on the basis that there was no final award since the arbitrator had left some issues to be determined. The court reasoned that its dismissal was not premised on a lack of subject matter jurisdiction but rather a prudential "complete arbitration rule" intended to avoid piecemeal determinations.
Campbell Harrison & Dagley, L.L.P. v. Hill, 782 F.3d 240, 245 (5th Cir. 2015) (internal quotes and citations omitted)	The court reversed a district court's vacatur of an arbitration award that awarded contingency fees to a law firm on public policy grounds. The court of appeals, applying Texas arbitration law, held: "Vacating an award on public-policy grounds requires an extraordinary case in which the award clearly violates carefully articulated, fundamental policy. For satisfying that standard, the policy must be well defined and dominant and not derived from

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	general considerations of supposed interests."
CEEG (Shanghai) Solar Sciences & Tech. Co., Ltd. v. LUMOS, LLC, 829 F.3d 1201, 1206 (10th Cir. 2016)	Affirmed denial of motion to confirm an award under the New York Convention, where the notice of arbitration had been sent in Chinese whereas the parties' business dealings had been conducted in English. The court found that this met the Convention's provision allowing vacatur where "[t]he party against whom the award is invoked did not receive proper notice…of the arbitration proceedings." In addition, the court found that "the composition of the arbitral authority . . .was not in accordance with the agreement of the parties," since LUMOS missed the opportunity to participate in the selection of the arbitrators due to late notice of the arbitration (i.e., when it finally became aware that the Chinese language document gave notice of an arbitration).
Certain Underwriting Members at Lloyds of London v. State of Florida, 892 F.3d 501, 503-04 (2d. Cir. 2018)	The Second Circuit reversed the vacatur of an award on the ground of evident partiality, framing a different standard to be applied to a party-appointed arbitrator who was expected to serve as a *de facto* advocate. Here is the syllabus from the opinion: Insurance Company of the Americas ("ICA") appeals the order vacating the arbitral award (the "Award") issued in a reinsurance dispute between ICA and Certain Underwriting Members of Lloyds of London including those members subscribing to Treaty No. 02072/04 (the "Underwriters"). The issue on appeal is whether the Award is void for evident partiality under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a)(2), by reason of the failure by ICA's party-appointed arbitrator to disclose close relationships with former and current directors and employees of ICA. The district court concluded under our reasonable person standard that the ICA-appointed arbitrator was impermissibly partial to ICA. We hold that a party seeking to vacate an award under Section 10(a)(2) must sustain a higher burden to prove evident partiality on the part of an arbitrator who is appointed by a party and who is expected to espouse the view or perspective of the appointing party. See Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire and Marine

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	Ins. Co., 668 F.3d 60, 76 n.21 (2d Cir. 2012). The district court weighed the conduct of ICA's party-appointed arbitrator under the standard governing neutral arbitrators. We therefore vacate and remand for the district court to reconsider under the proper standard. An undisclosed relationship between a party and its party-appointed arbitrator constitutes evident partiality, such that vacatur of the award is appropriate if: (1) the relationship violates the contractual requirement of disinterestedness (see Sphere Drake Ins. v. All American Life Ins., 307 F.3d 617, 620 (7th Cir. 2002)); or (2) it prejudicially affects the award (see Delta Mine Holding Co. v. AFC Coal Properties, Inc., 280 F.3d 815, 821-22 (8th Cir. 2001)).
CBF Industria De Gusa S/A v. AMCI Holdings Inc., 850 F.3d 58, 72, 75 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 55 (2017)	Reversed a district court decision that had refused to enforce a foreign arbitration award issued in an ICC arbitration seated in Paris that had not previously been confirmed. The Second Circuit held that, under the New York Convention, a district court should enforce a foreign award, even if not confirmed by a court in a primary or secondary jurisdiction, subject only to the limited New York Convention/FAA grounds for denying enforcement. The court observed that confusion has arisen because Section 207 of the FAA, intended to implement the New York Convention, uses the word "confirming" in providing that "[w]ithin three years after an arbitral award....is made..[any party may] apply to any court having jurisdiction under this chapter for an order confirming the award." The court further observed that Chapter 2 of the FAA also refers to confirmation of the award. The court reasoned that, since the FAA was intended to implement the New York Convention, the word "confirm" for these purposes is "the equivalent of 'recognition and enforcement' as used in the New York Convention for the purposes of foreign arbitral awards." The court also stated that this reading was consistent with the objective of having a single proceeding to enforce an award. In reaching this decision, the Court pointed to the amicus brief for the United States, which was entitled to great weight since the United States is a party to the New York Convention, a treaty. The court remanded this portion of the case for

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	proceedings consistent with its opinion. The court in concluding its discussion of this issue of enforcement stated: "In order to avoid such confusion in the future, we encourage litigants and district courts alike to take care to specify explicitly the type of arbitral award the district court is evaluating (domestic, nondomestic or foreign), whether the district court is sitting in primary or secondary jurisdiction, and, accordingly, whether the action seeks confirmation of a domestic or nondomestic arbitral award under the district court's primary jurisdiction or enforcement of a foreign arbitral award under its secondary jurisdiction." When the district court denied enforcement for lack of a confirmed award, the award-creditor commenced a separate confirmation action. The district court dismissed the confirmation action, finding that the non-party sued as an alleged alter-ego of the award-debtor was immune from suit under Federal Rule of Civil Procedure 17(b)(lack of capacity to be sued), because the entity had been removed as a legal entity from the Swiss Commercial Register. The Second Circuit remanded with instructions for the district court to determine under "the law of the enforcing jurisdiction, here the Southern District of New York." The court next turned to the district court's dismissal of fraud claims, where the district court applied issue preclusion based on determinations in the arbitration. The Second Circuit found that allegations of fraud on the part of the award-creditor made application of the equitable doctrine of issue preclusion inappropriate without discovery on the allegations of fraud. Finally, the Second Circuit declined to affirm the dismissal of the enforcement action on the alternative ground of forum non conveniens, instead providing for the district court to revisit that issue on the remand. For further discussion of the terms "confirmation," "recognition" and "enforcement," *see Mobil Cerro Negro, Ltd. v. Bolivian Republic of Venezuela*, 863 F.3d 96, 119 n. 18, 121-22 (2d Cir. 2017) (holding that the Convention on the Settlement of Investment Disputes Act of 1966 does not confer subject matter over foreign sovereigns and that the ICSID requires a district court to "'enforce' ICSID awards and accord them 'the same full faith and credit as if [they] were [] final judgment[s] of a court of general jurisdiction

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	of one of the several states.'") (citation omitted).
Citizen Potawatomi Nation v. Oklahoma, 881 F.3d 1226 (10th Cir 2018), *cert. denied*, 139 S. Ct. 375 (2018)	Vacating an award where the arbitration clause between the tribe and the state provided for de novo review of the arbitral award. The court found that such expanded review was precluded by Supreme Court precedent and that the specified standard of review was a material term of the parties' agreement. The court accordingly ruled that the arbitration clause was unenforceable and should have been severed from the parties' compact, such that the award had to be vacated.
Corporacion Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion, 832 F.3d 92, 97 (2d Cir. 2016), *cert. dismissed,* 137 S. Ct. 1622 (2017)	Affirming district court's confirmation of an arbitral award rendered in Mexico, where (a) COMMISA initially sought confirmation in the Southern District of New York, which was granted; (b) PEP simultaneously appealed from that confirmation and also sought nullification in Mexican courts; (c) the Mexican court nullified the award on the ground that PEP was an entity deemed part of the Mexican government that could not be ordered to arbitrate; (d) the Second Circuit initially vacated the district court's judgment and remanded in light of the Mexican court order; (e) the district court adhered to its confirmation; and (f) the Second Circuit held that the district court properly exercised its discretion because giving effect to the subsequent nullification would "run counter to United States public policy and would…be 'repugnant to fundamental notions of what is decent and just in this country.'" In addition, the court stated that confirmation is mandatory when a convention ground for vacatur or modification has not been established.
In the Matter of Daesang Corp. v. NutraSweet Co., 167 A.D.3d 1, 4, 25 (1st Dep't 2018); *lv. to appeal denied*, 32 N.Y.3d 915 (2019)	The Appellate Division reversed the vacatur of an award issued by the Commercial Division Justice assigned to review all commercial international awards presented to the court. The Appellate Division began by emphasizing that the vacatur could not be justified under the '"emphatic federal policy in favor of arbitral dispute resolution' embodied in the FAA, a policy that 'applies with special force in the field of international commerce'" (citation omitted), and by confirming that the enforcement of the award in this case was governed by the New York Convention and by the FAA; because the award was rendered in the U.S., the FAA governed whether the award could be set aside within the U.S. while the New York

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	Convention and the FAA mandate that an award shall be confirmed unless a court finds that one of the Convention grounds in 9 U.S.C. § 207 for non-recognition or non-enforcement applies. The court then reviewed each ground on which Supreme Court had relied to find that the arbitrators either exceeded their powers or acted in manifest disregard of the law and found each to be in error. The court recited the high standard for manifest disregard without mention of the question of whether manifest disregard should remain a separate basis for reviewing an award. The court lastly rejected a challenge to the award as violating public policy, finding that this Convention ground applies only '"where enforcement would violate our most basic notions of morality and justice.'" (citation omitted).
Dealer Computer Servs., Inc. v. Michael Motor Co, 485 F. App'x 724, 726, 728 (5th Cir. 2012), *cert. denied,* 133 S. Ct. 945 (2013)	MMC asserted that arbitrator Butner failed to disclose that she was an arbitrator on the Venus Ford arbitration panel, which considered similar contract language and heard from the same damages experts as in the MMC proceeding. District Court found evident partiality holding, where arbitrator Butner had disclosed only that she had served on a previous arbitration involving one of the parties, that "Butner's prior exposure to the legal issues and witnesses involved in the Michael Motor arbitration creates a reasonable impression that she had prejudged at least some of the issues in the arbitration. It would be unreasonable to expect an arbitrator who had already signed an eight-page opinion ruling for a party as to how a contractual provision should be interpreted to change her mind in a subsequent arbitration and rule against that party on the exact same contractual provision. Likewise, it would be unreasonable to expect an arbitrator who had fully adopted the damages theories of an expert witness to then reject the damages theories of that same witness on similar issues in a subsequent arbitration. It is also reasonable to believe that Butner may have considered [witness] testimony from the Venus Ford Arbitration in evaluating evidence in the Michael Motor Arbitration. . . . Butner's participation in the Venus Ford Arbitration is 'a significant compromising connection' to DCS, and her failure to disclose that participation constitutes 'evident partiality.'" District Court found that the arbitrator's "minimal acknowledgement" was not sufficient to put Michael Motor on notice of a potential conflict such that it had waived its nondisclosure objections under either "actual knowledge" or "on notice"

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	standard. 761 F.Supp. 459, 465, 468 (S.D. Tex. 2010). Fifth Circuit reversed on ground of waiver, where Butner had disclosed that she served on a panel that "considered a dispute between Dealer Computer Services, Inc. and another party." Court held: "Butner's disclosures were sufficient to put MMC on notice of a potential conflict. . . . The information was available on the AAA online Webfile system, which was the agreed upon method of disclosure." Court does not reach issue of whether – absent waiver – there was evident partiality.
Dewan v. Walia, 544 F. App'x 240 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1788 (2014)	Vacated award for manifest disregard of law where the arbitrator ruled that a release signed by Walia was valid and enforceable but nonetheless arbitrated Walia's counterclaims.
Doscher v. Sea Port Group Securities, LLC, 832 F.3d 373, 388-89 (2d Cir. 2016)	In determining subject matter jurisdiction, a district court may look through a petition to vacate an award and determine jurisdiction based on the underlying disputes as defined by *Vaden v. Discover Bank,* 556 U.S. 49 (2009). The court extended *Doscher* to a petition to confirm an award in *Landau v. Eisenberg*, __ F.3d__, 2019 WL 1924224, at *2 (2d Cir. 2019).
Eddystone Rail Co., LLC v. Jamex Transfer Services, LLC., 289 F. Supp. 3d 582, 588, 590 (S.D.N.Y. 2018)	This case addresses whether a non-party to an arbitration may intervene in the proceeding to confirm/vacate an award. Noting that § 10(a) of the FAA provides that "any party to the arbitration" may petition to vacate, the court finds that the statutory language on its face appears to preclude intervention. The court, however, further discussed a line of cases that have allowed intervention in limited circumstances, where a proposed intervenor could satisfy the threshold requirement of an "injury in fact" arising from the award, if confirmed, in order to participate in the proceeding; that requirement was not met in this case.
Finn v. Ballentine Partners, LLC, 143 A.3d 859 (N.H. 2016)	Held that Sections 9, 10 and 11 of the FAA apply only to review of awards in federal district courts and do not pre-empt New Hampshire's statute for review of awards where, as here, a court finds that the parties' contract specified that New Hampshire law would control. The court then vacates the award under the state statute, which allows vacatur for "plain error" of fact or law.

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Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 255-56 (3d Cir. 2013)	Reiterated its adoption of the Second Circuit's reasonable person standard for evident partiality, and affirmed the denial of a petition to vacate. Freeman, the losing party in the arbitration, first argued that the arbitrator was partial because the 40% owner of the prevailing party had contributed $4,500 to the arbitrator's unsuccessful campaign for a seat on the Pennsylvania Supreme Court—which the court saw as a small amount in relation to the $1.7 million raised for the campaign. The court sternly noted that the petition to vacate had failed to reveal that the law firm representing Freeman had contributed $26,000 to the same campaign. The court, as an issue of first impression, held that this undisclosed campaign donation did not amount to evident partiality and "the reasons are many," including the facts that the donations were a matter of public record, the amount donated was small by comparison, the donating entity was only a minority owner of the party to the arbitration, and Freeman's law firm donated five times as much. A reasonable person could not conclude that the arbitrator was partial to Pittsburgh Glass. The court added that "campaign contributions are a way of life in many state judicial systems," and a mere nondisclosure of a relatively small donation does not, by itself, show evident partiality. The court also rejected a challenge based on the fact that the arbitrator had taught a seminar with a senior employment attorney at the entity owning 40% of the prevailing party: "a professional relationship with a party's minority owner is not 'powerfully suggestive of bias'"; the FAA requires "more than suppositions based on mutual familiarity."
General Re Life Corp. v. Lincoln National Life Ins. Co., 909 F.3d 544, 548-49 (2d Cir. 2018), *aff'g*, 273 F. Supp. 3d 307 (D. Conn. 2017)	The Second Circuit recognized an exception to the doctrine of functus officio where arbitrators were called upon to clarify an ambiguous award. After the final award was issued, the parties disagreed over how to implement it, and one side sought clarification while the other objected. The panel (with one dissent) issued a "clarification." The party seeking that clarification moved to confirm the award as clarified; the other side moved to confirm the original award. The district court confirmed the clarified award (in a decision that thoroughly explored the functus officio doctrine). The Second Circuit affirmed, largely based on precedent from other circuits: We join the Third, Fifth, Sixth, Seventh, and Ninth

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	Circuits in recognizing an exception to functus officio where an arbitral award "fails to address a contingency that later arises or when the award is susceptible to more than one interpretation." Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local No. 24, 357 F.3d 546, 554 (6th Cir. 2004) (internal quotation marks omitted); Brown v. Witco Corp., 340 F.3d 209, 219 (5th Cir. 2003) ("An arbitrator can . . . clarify or construe an arbitration award that seems complete but proves to be ambiguous in its scope and implementation."); Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union v. Excelsior Foundry Co., 56 F.3d 844, 847 (7th Cir. 1995) (same); Colonial Penn. Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 334 (3d Cir. 1991) ("[W]hen the remedy awarded by the arbitrators is ambiguous, a remand for clarification of the intended meaning of an arbitration award is appropriate."); McClatchy Newspapers v. Central Valley Typographical Union No. 46, 686 F.2d 731, 734 n.1 (9th Cir. 1982) (same). Adopting this exception to functus officio furthers the well-settled rule in this Circuit that when asked to confirm an ambiguous award, the district court should instead remand to the arbitrators for clarification.
Great American Ins. Co. v. Russell, 914 F.3d 1147, 1150 (8th Cir. 2019)	The court of appeals reversed the vacatur of an award against an insurer for crop damages. The insurer argued that the panel "so imperfectly executed" its powers such that it rendered no "mutual, final, and definite award" (citing Section 10(a)(4)) because it did not break down by county and units how the damages were calculated; the court of appeals found the panel was required "to break down its award only by claim, not by unit."
Harshad & Nasir Corp. v. Global Sign Systems, 14 Cal. App. 5th 523, 530-31(2d Dist., Div. 1, 2017)	Vacating an award for error of law, where parties had agreed to submit to arbitration under the California Code of Civil Procedure and agreed that the arbitrator's "findings of fact and conclusions of law shall be reviewed on appeal to the trial court and thereafter to the appellate courts upon the same grounds and standards of review as if said decision and supporting findings of fact and conclusions of law were entered by a court with subject matter and present jurisdiction." On de novo review, the court found no substantial evidence to support a finding that an agreement

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	to perform the work at issue was formed or a writing sufficient to satisfy the statute of frauds.
Hoskins v. Hoskins, 497 S.W.3d 490, 498 (Tex. 2016)	Applying the Texas arbitration statute, the court held that the statutory grounds for vacatur are exclusive and that manifest disregard of the law is not a valid ground for vacatur.
Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC, 876 F.3d 900, 902, 903 (7th Cir. 2017)	Affirming confirmation of an award, the court first held that the phrase "refusing to hear evidence" in § 10(a)(3) refers to the conduct of the hearing; nothing in the FAA requires an arbitrator to allow any discovery. The court further noted that the requested discovery was not relevant to the particular dispute. The court next found that the arbitrator's refusal to disqualify respondent's counsel did not constitute "misbehavior" under § 10(a)(3), because at most the ruling was an error and an error is not "misbehavior." (The court did not address whether an arbitrator has the power to disqualify counsel for a party.) The court also rejected a challenge under § 10(a)(4) (exceeding powers) for supposedly failing to comply with federal and state franchise laws; once more, the court said that legal error is not a ground for vacation of an award. "An arbitrator is not like a magistrate judge whose recommendations are subject to plenary judicial review." The court went on to say that an arbitrator "acts as the parties' joint agent and may do anything they parties themselves may do"; that is, if the parties may reach a compromise of a legal dispute without being accused of violating some law, "then the arbitrator may do so on their behalf." As one last ground, the court rejected an argument that the award violated public policy, because public policy is typically invoked to protect persons who have not agreed to arbitrate; where the outcome of the award is something the parties could agree to themselves under the law, public policy is not implicated. Finally, the court ruled that petitioner must bear the costs of the district court and appellate proceedings based on the contract and circuit precedent; while the American rule requires each side ordinarily to bear its own costs and fess "in an initial round, but an entity that insists on multiplying the litigation must make the other side whole for rounds after the first."
In re Citigroup Global Markets, Inc. v. Fiorilla, 127 A.D.3d 491, 492 (1st Dep't 2015)	The court held: The motion court properly vacated the arbitration award based on a prior settlement agreement. The arbitrators

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	manifestly disregarded the law by failing to enforce the settlement that respondent and petitioner Citigroup Global Markets, Inc. entered into on April 29, 2012. Notably, petitioners provided the relevant law regarding the enforcement of settlement agreements (*see Kowalchuk v Stroup*, 61 AD3d 118 , 873 N.Y.S.2d 43 [1st Dept 2009]) in their motions to enforce the agreement, but the arbitrators ignored the law and denied the motions without explanation (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471 , 481 , 846 N.E.2d 1201 , 813 N.Y.S.2d 691 [2006], *cert dismissed*548 U.S. 940 , 127 S. Ct. 34 , 165 L. Ed. 2d 1012 [2006]). "Although arbitrators have no obligation to explain their awards, when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account" (*Matter of Spear, Leeds & Kellogg v Bullseye Secs., Inc.*, 291 AD2d 255 , 256 , 738 N.Y.S.2d 27 [1st Dept 2002] [internal quotation marks omitted])
Int'l Brotherhood of Elec. Workers, Local Union 824 v. Verizon Fla., 803 F.3d 1241, 1248 (11th Cir. 2016)	Vacated award when the arbitrator, having ruled, was later persuaded he made an error and issued a superseding award; without determining the bounds of functus officio, the court held that the AAA rule specifying that an arbitrator "is not empowered to redetermine the merits of any claim already decided" controlled and defined the powers of the arbitrator.
Inversiones y Procesadora Tropical INPROSTA, S.A. v. Del Monte Int'l GMBH, __F.3d __, 2019 WL 1768911, at *7, *9, (11th Cir. 2019)	The court of appeals ruled that the district court had subject matter jurisdiction under §§ 203 and 205 of the FAA implementing the New York Convention to rule on a petition to vacate an international award seated in Miami, even though the FAA provisions for the Convention do not expressly provide subject matter jurisdiction for a petition to vacate an award. In the particular case, the petition had originally been filed in Florida state court and was removed to federal court under FAA § 205; the court reasoned that an action properly removed under § 205 should be seen as falling under the Convention for purposes of § 203. The court "express[ed] no opinion on whether the Convention Act implicitly permits a petition to vacate an international arbitral award filed directly in the district court." The court found no merit in the "exceeding powers" challenge, finding that the arbitrators "at least arguably interpreted the contract"; that any mistake as to the correct measure of damages would not warrant a vacatur; and that the

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	arbitrators reasonably construed the ICC rules. Finally, the court rejected the argument that confirmation should have been denied on public policy grounds. The petition claimed that the agreement was fraudulently induced; assuming (without deciding) that this fraud defense could rise to a public policy defense, the court ruled that the arbitration had determined the fraudulent inducement claim and the supposed fraud was known at the time of the arbitration, such that it could not provide a ground for overturning the award.
IQ Products Co. v. WD-40 Co., 871 F.3d 344, 352 (5th Cir. 2017)	Rejecting challenge for "exceeding…powers" where "the parties clearly and unmistakably delegated the gateway issue of arbitrability to arbitration, and the assertion of arbitrability was not wholly groundless. Thus, the arbitrators acted within their authority in deciding that the dispute was arbitrable."
Katz, Nannis & Solomon, P.C. v. Levine, 46 N.E.3d 541, 546 (Mass. 2016)	The Supreme Judicial Court of Massachusetts, applying Massachusetts' arbitration statute, followed *Hall St. Assocs., L.L.C. v. Mattel, Inc*, 552 U.S. 576 (2008), and held that the parties may not alter the grounds of judicial review of an award because the statutory grounds control. The parties' agreement provided a standard for vacatur if there was a "material, gross and flagrant error" and the challenge to the award alleged that the arbitrator fundamentally misinterpreted a contract provision; the court ruled that this standard could not be applied by a court.
Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 729 F.3d 99 (2d Cir. 2013)	The Second Circuit addressed the "corruption" prong of 10(a)(2) of the FAA (the seldom invoked part of the clause that includes evident partiality). The opinion largely turns on the sufficiency of the evidence offered to prove corruption, in a case where there was no transcript of the proceedings (a fact the court repeated several times). The court ultimately found corruption was not established to the level required to vacate an award. This arbitration was conducted by a rabbinical arbitration panel, where each side (in a dispute over ownership of life insurance policies) appointed a rabbi, and those two selected the chair, Rabbi Kaufman. The principal contention was that Rabbi Kaufman acted in a corrupt

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	manner, based on evidence that he told a non-party in advance of the award to "'[t]ell [the president of Kolel] that he has to give me another week and he will receive a [ruling] in his favor.'" It was further alleged that Rabbi Kaufman purposely excluded the arbitrator selected by the losing party from the arbitration and abruptly cut off the testimony of a witness called by that party in order to rush to a premature decision. The award was only signed by Rabbi Kaufman and the rabbi chosen by the prevailing party. The main point of law expressed in the opinion is the meaning of "corruption" in 10(a)(2) along with the high burden of proof. The court first recited its reasonable person standard for evident partiality, and said it was applicable to this case. However, the court at the same time quoted a case that held that "the award here must stand unless it is made abundantly clear that it was obtained through corruption, fraud or undue means." (citations omitted). This appears to refer to the 10(a)(1) ground for vacatur, which was also invoked by petitioner. The court then stated: "Evidence of corruption must be abundantly clear in order to vacate an award under Sec. 10(a)(2)." The emphasis used by the court in deciding the case, is on that high level of proof—"abundantly clear." And the court held petitioner did not meet this standard. Notably, the court mentioned that Rabbi Kaufman "denies that the conversation took place" and "states he was in another part of the state" that day. In other words, in this proceeding there was testimony from the arbitrator. The Court then rejected the 10(a)(3) misconduct challenge, finding that petitioner has not shown a denial of "fundamental fairness," given the latitude arbitrators have to conduct a proceeding.
Leeward Construction Co., v. American University of Antigua. 826 F.3d 634, 640 (2d Cir. 2016)	The Court adopted the following standard for a reasoned award: > We agree with our sister Circuits, and hold today that a reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel. A reasoned award sets forth the basic reasoning of the arbitral

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	panel on the central issue or issues raised before it. It need not delve into every argument made by the parties. The award here satisfies that standard: while it does not provide a detailed rationale for each and every line of damages awarded, it does set forth the relevant facts, as well as the key factual findings supporting its conclusions. The summary nature of its analytical discussion reflects only that, as the district court found, '[t]he parties had ample opportunity to contest Leeward's entitlement to compensation for change order work, and the summary nature of the discussion in the decision shows that the panel simply accepted Leeward's arguments on this particular point.' *Leeward Constr.*, 2013 WL 1245549, at *3. No more is needed."
Martin v. Deutsche Bank Securities Litigation, 676 F. App'x 27 (2d Cir. 2017)	Reiterated that a petition to vacate an award must be served within three months after the award is filed or delivered (quoting and citing Sec. 12 of the FAA). In this case, Martin's counsel within the time period emailed counsel for Deutsche Bank attaching a copy of the petition to vacate asking whether counsel would accept service on behalf of the bank. Deutsche Bank's counsel responded, offering to accept service if given 90 days to respond to the petition; Martin's counsel did not accept that offer. Martin's counsel then effected personal service beyond the three month period. The Second Circuit affirmed the district court's dismissal of the petition as untimely. Under Section 12 of the FAA, local law controlled effective service and Fed. R. Civ. P 5 makes email service effective only if the party to be served consents in writing. On this record, the courts found no written consent to accept email service, such that the emailing of the petition did not achieve service within the three month period and the three month period ran without effective service. This decision bears of course on petitions under the FAA, but the decision hinges as much on the application of the requirements of Fed. R. Civ. P. 5.
Matter of Andrews v. County of Rockland, 120 A.D.3d 1227, 1228-29 (2d Dep't 2014) (citations omitted)	Affirmed the vacatur of an award under this New York statutory ground: that the award was "so imperfectly executed…that a final and definite award upon the subject matter submitted was not made." CPLR 7511(b)(1)(iii).

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	Here is the central part of the order: The parties agreed to arbitrate the issue of negligence and agreed to a "high-low" limit to the amount of damages, the sums of which were not disclosed to the arbitrator. The arbitrator was asked to decide the issue of liability, to wit, the negligence of each of the parties in connection with the incident, and, if established, to render a determination as to damages. After a hearing, the arbitrator determined that the petitioner was barred from any recovery irrespective of any negligence of the County because she was not wearing her seatbelt. Nonetheless, the arbitrator awarded the petitioner "the low" sum of damages in light of the parties' private agreement as to damages. . . . Although judicial review of arbitration awards is limited . . ., an award will be vacated when the arbitrator making the award "so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511[b][1][iii]. An award will be vacated as indefinite or nonfinal for purposes of CPLR 7511 if it does not "dispose of a particular issue raised by the parties" . . . "if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy'". . . . Here, the arbitrator's award was neither definite nor final, as it failed to resolve the controversy submitted, to wit, the negligence of each party and the amount of damages, if any. The arbitrator did not make any specific findings of fact or credibility or dispose of the issues raised by the parties. Instead, the arbitrator pointed to a fact not in dispute—that the petitioner was not wearing a seatbelt—and determined that he did not need to decide whether the County was negligent. In doing so, the arbitrator failed to dispose of the controversy with which he had been charged.

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	Moreover, the arbitrator also failed to determine damages and instead referred to the parties' agreement, to which he was not privy, and awarded the petitioner "the low" sum of damages, despite finding that the petitioner was barred from recovering any damages. . . . In so doing, the arbitrator did not perform the job he was required to do pursuant to the parties' arbitration agreement.
Matter of New York City Tr. Auth. v. Phillips, 2018 WL 1719789, at *4 (1st Dep't 2018)	Reverses confirmation of award in a sexual harassment case, finding that the arbitrator's award was irrational and violated public policy by failing to find a dischargeable offense where the arbitrator's findings (similar to the EEO investigation) showed harassment; the "arbitrator's decision belies the realities of workplace sexual harassment."
Matter of Pinkesz v. Wertzberger, 139 A.D.3d 1071, 1072 (2d Dep't 2016)	A rabbinical arbitration court issued an award in 2011 and then, based on new information, issued a modified award in 2013. The court vacated the 2013 award, finding that the "rabbinical court exceeded its authority in modifying the original award by rendering the new arbitration award."
McCormick v. America Online, Inc., 909 F.3d 677, 679 (4th Cir. 2018)	Addressing subject matter jurisdiction for a motion to vacate or modify under Sections 10 and 11 of the FAA, the court held: We conclude that the better reasoned approach for determining subject-matter jurisdiction over § 10 and § 11 motions is to look to the nature of the underlying claim in dispute, just as is done with respect to § 4 petitions to compel arbitration. Thus, if the underlying claim is one that otherwise could be litigated in federal court, the § 10 or § 11 motion can likewise be resolved in federal court.
McKool Smith, P.C. v. Curtis Int'l, Ltd., 650 F. App'x 208, 212 (5th Cir. 2016)	The court noted that it has already held that non-statutory grounds such as manifest disregard of the law and violation of public policy can no longer be a basis for vacating awards. However, the court declined to rule on whether such grounds are part of "exceeded [his] powers."
Move, Inc. v. Citigroup Global Markets, Inc., 840 F.3d 1152,	Vacated an award where a FINRA arbitrator had lied on his Arbitrator Disclosure Report; most particularly, the

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1157-59 (9th Cir. 2016)	arbitrator stated he was an experienced attorney when in fact he was not an attorney. The court vacated the award under § 10(a)(3), providing for vacatur upon finding that "the arbitrators were guilty of...any . . . misbehavior by which the rights of any party have been prejudiced." The court found that Move was prejudiced, because it had expressly sought an experienced attorney who could address sophisticated securities law issues. The court ruled that, although the award was unanimous, "there is simply no way to determine" if the other panel members were influenced by the challenged arbitrator. In any event, the court found that Move was deprived of a fundamentally fair hearing because it "received a hearing chaired by an imposter." The court, as an issue of first impression, also found that equitable tolling permitted this challenge to the award, where Move learned of the arbitrator's misconduct four years after the award when a legal newspaper revealed the arbitrator's falsification of his background. The court found that the three month deadline for seeking vacatur of an award could be overcome by equitable tolling, because the FAA's structure is not "incompatible with equitable tolling," "equitable tolling would not undermine the basic purpose of the FAA," and the FAA's time deadline is "neither unusually generous" nor "unusually emphatic" (the latter being factors considered when applying equitable tolling to a statutory limitations period).
NAPPA Constr. Mgm't, LLC v. Flynn, 152 A.3d 1128, 1134 (2017)	Under Rhode Island statute, the court vacated an award for exceeding power, where the arbitrator's interpretation of the contract "is in direct contravention of the contractual language."
Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 544, 548-49 (2d Cir. 2016) (citations omitted)	Reversed district court's vacatur of NFL Commissioner's award suspending Tom Brady, the Second Circuit (in a 2-1) decision held, under the Labor Management Relations Act, that the Commissioner had not improperly rendered "his own brand of industrial justice" (the standard under the LMRA). Addressing a claim that the Commissioner had improperly excluded key evidence, the court stated that the test under Section 10(a)(3) of the FAA is whether "fundamental fairness is violated" and held that "the Commissioner's decision to exclude the testimony fit comfortably within his broad discretion to admit or exclude evidence and raises no questions of fundamental fairness." The court also rejected a claim of evident partiality, finding

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	that "the parties contracted" in their collective bargaining agreement "to specifically allow the Commissioner to sit as arbitrator" and that—because arbitration is a matter of contract—the parties can ask for "no more impartiality than inheres in the method they have chosen."
Nat'l Indemnity Co. v. IRB Brasil Reseguros S.A., 675 F. App'x 89, 90-91 (2d Cir. 2017)	Addressed evident partiality in the context of a neutral chair who accepted appointment as a party-appointed arbitrator in two other cases supposedly for the party that won the arbitration awards that are the subject of this appeal. IRB sought vacatur of related awards in favor of NICO. The tribunal was composed of two party selected arbitrators and a neutral umpire-arbitrator (Daniel Schmidt). IRB based its challenge on evident partiality, arguing that Schmidt refused to withdraw from the case after IRB objected to his service as a party-appointed arbitrator on behalf of Equitas, which IRB alleged "is effectively identical to NICO." (Order at 2). The court noted that Schmidt accepted his first appointment as Equitas's party-arbitrator from NICO's counsel; he was appointed a second time as a party arbitrator by Equitas but that appointment did not involve NICO's counsel. IRB also argued it was improper for Schmidt to accept appointment in 2015 as Equitas's party-appointed arbitrator while the arbitrations between NICO and IRB were already in progress. The Second Circuit affirmed confirmation and denial of vacatur, reasoning as follows: > As the District Court explained in its March 10, 2016 Memorandum and Order, Schmidt's work as a party-arbitrator on behalf of Equitas does not amount to "evident partiality" under § 10(a)(2). Notwithstanding NICO's arguments to modify the standard, our case law states that evident partiality is found when "a reasonable person, considering all the circumstances, would *have* to conclude that an arbitrator was partial to one side." *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (emphasis added) (internal quotation marks omitted). Here, even assuming that Equitas is an affiliate of NICO, the District Court correctly noted that IRB does not allege that Schmidt had any familial, business, or employment relationship with

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	NICO or Equitas, or that he had any financial interest in the outcome of his arbitrations. Schmidt's relationships with NICO and Equitas, including his role as a party-arbitrator for Equitas, are professional. Furthermore, Schmidt ultimately voted against Equitas in his party-arbitrator role, and has accepted party-arbitrator appointments "against" other NICO-reinsured parties. Accordingly, considering all of these circumstances, a reasonable person would not have to conclude that Schmidt was partial to NICO. Note that the Second Circuit, in applying the "reasonable person" standard, pointed out that Schmidt voted against Equtias in his party-arbitrator role and has served as a party-arbitrator in other cases "against" NICO-reinsured parties. The court included these facts within "all of these circumstances," in concluding a reasonable person would not find evident partiality. The timeline of each of these facts is not clear from the Summary Order, but it appears that IRB might have raised its original challenge to Schmidt within the arbitration before Schmidt voted against Equitas in the other arbitration. The court rejected an additional challenge to the awards for misbehavior, because that ground was not asserted in the district court (and, for that reason, the Circuit did not provide the details of this ground). In addition, the court denied NICO's request for attorney's fees and costs because "IRB's arguments are not 'frivolous' under Rule 38."
Norfolk Southern Railway Co. v. Sprint Communications Co. L.P., 883 F.3d 417, 422-23 (4th Cir. 2018)	Vacates an award as non-final, where the agreement provided for each party to designate an appraiser and—if they did not reach agreement for a payment amount—the two would pick a third appraiser who was to seek a compromise with the two other appraisers or at least one of them (and, failing that, to conduct his own appraiser). The third appraiser, Argianas, reached a compromise with one of the party appointed appraisers, with whom he issued a Majority Decision. Subsequently, a separate AAA case was brought to re-determine the payment owed; the AAA panel ruled that the Majority Decision was an enforceable final award subject to review under the FAA. The court ruled that the Majority Decision was not final, and therefore could not be confirmed, because Argianas (the third appraiser) '"reserve[d] his assent" to the award 'subject to'

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	two 'extraordinarily appraisal assumptions,'" "without prejudice or time limitation' if either of these two 'assumptions' ever proved to be incorrect. That is, Argianas made clear that he might withdraw his assent—thus dissolving the compromise and the arbitration award itself—at some point in the future." In these circumstances, the court found that the award was not final.
NGC Network Asia, LLC v. PAC Pacific Group Int'l, Inc., 511 F. App'x 86, 88 (2d Cir. 2013), *aff'g*, 2012 WL 377995, at *5 (S.D.N.Y. Feb. 3, 2012), *cert. denied*, 134 S. Ct. 265 (2013)	Affirmed denial of a petition alleging evident partiality, where the arbitrator—a Los Angeles-based partner of Arent Fox—disclosed that the Washington, D.C. office of his firm had done work for the National Geographic Society, which was a parent company of National Geographic Television. The arbitrator thought National Geographic Television might be a witness, since it sold programming to NGC Network International, LLC, which in turn provided the programming to the NCG Network Asia, LLC (NGC), one of the two parties to the arbitration. The other party, PAC Pacific, challenged the arbitrator, which the AAA overruled. The arbitrator issued an award in favor of PAC Pacific and against NGC, and NGC moved to vacate. The district court had pointed to an evidentiary record before her that established that the National Geographic Society had no role in the arbitration and was an indirect, minority owner of the party, NGC. The district court stated: "Given the facts, there was no requirement that [the arbitrator] disclose the Society/Arent Fox relationship—it is tangential, at best, to the dispute underlying the arbitration. But he did." The Second Circuit held: "Because the arbitrator properly complied with his disclosure obligations, "[t]he concern . . . that nondisclosure might create an appearance of bias or even be evidence of bias is simply not present in this case." The circuit also found that the findings by the district court were not "clearly erroneous." The circuit further upheld the denial of vacatur based on the AAA's rejection of the challenge to the arbitrator; it was not "undue means" for the AAA to apply its rules.
Odeon Capital Group LLC v. Ackerman, 864 F.3d 191, 196 (2d Cir. 2017)	Affirming denial of petition to vacate based on § 10(a)(1)("where the award was procured by corruption, fraud, or undue means"). Odeon argued that Ackerman had committed perjury in the arbitration. The court stated: A petitioner seeking to vacate an award on the

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	ground of fraud must adequately plead that (1) respondent engaged in fraudulent activity; (2) even with the exercise of due diligence, petitioner could not have discovered the fraud prior to the award issuing; and (3) the fraud materially related to an issue in the arbitration. . . . For fraud to be material within the meaning of Section 10(a)(1) of the FAA, petitioner must demonstrate a nexus between the alleged fraud and the decision made by the arbitrators, although petitioner need not demonstrate that the arbitrators would have reached a different result. Agreeing with the district court, the court of appeals noted that Ackerman had brought a number of claims, including a claim for unpaid wages. The perjured testimony related to the other claims, and therefore did not warrant a vacator. In addition, the court reversed the district court on denying fees to Odeon for prevailing in the district court proceedings, finding that a New York statute provided for attorneys' fees; the court of appeals read the word "proceedings" in the applicable New York statute to include a proceeding to confirm or vacate an arbitration award dealing with unpaid wages.
Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013)	This case primarily dealt with the determination of whether there was an agreement on class arbitration, but it is now cited as the leading case on exceeding power. The Court stated: "[T]he sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."(internal quotes and citations omitted). A petitioner must show that the arbitrator acted "outside the scope of his contractually delegated authority – issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract."
PDV Sweeny, Inc. v. Conocophillips Co., 670 F. App'x 23, 24-25 (2d Cir. 2016)	Reviewed an international award under the Inter-American Convention on International Arbitration, which provides for refusal to recognize an award if the court finds "recognition or execution of the decision would be contrary to public policy." The court first stated the applicable

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	standard: [A] court's task in reviewing an arbitral award for possible violations of public policy is limited to determining whether the award itself, as contrasted with the reasoning that underlies the award, 'creates an explicit conflict with other laws and legal precedents' and thus clearly violates an identifiable public policy." *International Bhd. Of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 716 (2d Cir.1998) (alterations omitted) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987)). The public policy exception to enforcement of arbitral awards is "construed very narrowly," requiring a showing that "enforcement [of the challenged award] would violate our most basic notions of morality and justice." *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 411 (2d Cir. 2009) (internal quotation marks omitted).... The court then addressed petitioners' challenge that the award ran afoul of public policy against penalty provisions in contracts. The court noted that, although New York had such a policy, it was not clear that the policy was one embodied in "our most basic notions of morality and justice." The court found that it need not decide if this policy was applicable, because a court's role is only to "consider whether the award itself violates public policy." Here, the arbitrators considered and addressed the issue of public policy against contract penalties, but concluded that the amount to be paid fell under a termination provision and not a liquidated damages provision. The Second Circuit made clear that "we cannot revisit or question the fact-finding or legal reasoning that produced a challenged arbitration award." The court concluded: Here, petitioners point to no laws [or] legal precedents indicating that termination provisions setting the terms for ending a joint venture are contrary to 'well defined and dominant' public policy, *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983) (internal quotation marks omitted), much

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	less are violative of our most basic notions of morality and justice. Thus, like the district court, we conclude that petitioners failed to show that public policy precluded confirmation of the arbitration award. *See generally Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005)(stating that party opposing arbitral award bears 'heavy' burden to prove that exception applies)."
PoolRe Ins. Corp. v. Organizational Strategies, Inc., 783 3d 256 (5th Cir. 2015)	The court affirmed the vacatur of an award for exceeding powers, where related parties had entered into separate agreements, with one agreement providing for AAA arbitration and another agreement providing for ICC arbitration. The arbitrator appointed in the AAA case ruled that he had the power to decide the disputes arising under the agreement with the ICC arbitration provision. The court reasoned that the ICC provision constituted a forum selection clause integral to the agreement in which it appeared. The arbitrator's actions were found to be contrary to an` express contractual provision—a provision providing for the forum and for an ICC arbitrator to resolve disputes under that agreement. In dicta, the court noted that a court may affirm in part and vacate in part on review of an arbitration award.
Republic of Argentina v. AWG Group Ltd., 894 F. 3d 327, 335-38 (D.C. Cir. 2018)	Drawing on Justice White's concurrence in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 152 (1968), the D.C. Circuit finds disclosure required "[w]here the arbitrator has a substantial interest in a firm which has done more than trivial business with a party." In addition, a petitioner must present "specific facts that indicate improper motives on the part of an arbitrator." (Citation omitted). During the course of an arbitration that went on for twelve years, arbitrator Kaufman-Kohler was appointed to the board of UBS. At the time, she was unaware that UBS held investments for its clients and for itself of some $ 2 billion (out of $3.6 trillion of invested assets) in two consortium members that were part of a party to the arbitration. When she learned of UBS' passive investment, she resigned from the board and remained on the arbitral panel. The court held: "Because UBS's interest in Suez and Vivendi were trivial, and therefore Kaufman-

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	Kohler's interests in these parties were insignificant, they could not have created evident partiality." The court added: "If the interest presented here could disqualify an arbitrator who did not disclose it, parties would hesitate to select arbitrators associated with financial companies that invest broadly." In addition, the court rejected a challenge for exceeding the arbitrators' power by failing to consider one of its defenses (as displayed by lack of discussion of it); the court said: "We have never required of an arbitration award the sort of extended explanation Argentina urges. In fact, we have determined that a panel's decision may be upheld even if it offered no explanation at all because the alternative, requiring a particular level of detail for every response to each party's theories, would 'unjustifiably undermine the speed an thrift sought' from arbitration proceedings." (Citation omitted). The court lastly denied a request to vacate under the New York Convention, finding that the grounds to vacate under the FAA are broader, not narrower, than under the Convention.
Rogers v. Ausdal Fin. Partners, Inc., 168 F. Supp. 3d 378, 389 (D. Mass. 2016)	In this FINRA case, the federal district court rejected vacatur based on the contention that the arbitrators failed to order third-party discovery that they themselves stated was relevant: Here, the panel may well have acted unfairly. It appears that the chair denied respondents the right to obtain the Verizon information, then concluded that the same information "seems to be important." Presumably, the panel could not and did not take that information into account, as it was not part of the record. However, the panel was acting within its legal authority when it reviewed and denied respondents' requests for subpoenas and this Court is without the power to vacate the award on that basis.
Salus Capital Partners, LLC v Moser, 289 F. Supp. 3d 468, 481-82 (S.D.N.Y. 2018)	Noting that § 12 of the FAA does not define "filed or delivered" in setting the three months deadline for petitioning to vacate an award, the court looked to the applicable rules the parties had agreed to for the conduct of the arbitration, which provided for mail, personal service or the filing of the award. Even though petitioner had received the final award by email ten days longer than the three month period, the court calculated the trigger date from when petitioner received by mail and personal service the

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	petition to confirm the award—making the petition to vacate timely. The court confirmed the award, including an award of attorneys' fees as a sanction for Moser's actions in the arbitration; the court held that a broad arbitration clause confers discretion to award whatever remedies the arbitrators deem appropriate (including the power to sanction a party for participate in the arbitration in bad faith). The court rejected a challenge to an award of "punitive damages," finding that such damages were for pre-award interest and disgorgement of compensation under the faithless servant doctrine—which, by law, are compensatory. The court finally awarded pre-judgment interest, on top of the pre-award interest in the award, at the 9% rate specified in the CPLR, which the court cited as the common practice within the Second Circuit.
Sanchez v. Elizondo, 878 F.3d 1216, 1221-22 (9th Cir. 2018)	The court first holds that it has appellate jurisdiction under § 16(a) of the FAA to review an award that both vacated an award and remanded for a new arbitration, thereby joining the First, Second, Third, Fifth and Seventh Circuits on this point. The court then reversed the district court and confirmed the underlying award, finding that the arbitrator had neither exceeded powers nor exhibited manifest disregard of the law in interpreting a FINRA rule as permitting arbitration of the dispute before a single arbitrator. For "exceeding powers," the court applied a standard that the award must be "completely irrational."
Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 748 F.3d 708 (6th Cir. 2014)	Reversed a district court injunction that had enjoined any further proceedings in a pending arbitration. The case reached the district court after the panel had issued a partial award on liability but had retained jurisdiction to complete the damage phase. Petitioner argued improper conduct on the part of a party appointed arbitrator. The district court—recognizing limits on judicial review before a final award—had recast the action as one for breach of contract concerning the rules under which the arbitration was to be conducted (in particular, the way party-appointed arbitrators were supposed to act). The Sixth Circuit rejected this approach, and instead applied the familiar principle that a court interacts with arbitration only at two stages—a proceeding to enforce an arbitration agreement and then the limited review of a final

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	award. It is notable that the circuit panel chose to discuss a number of issues along the way. While finding no difference between Michigan arbitration law and the FAA, the court held that this case was governed by Michigan law, because the contract provided that the arbitration shall be "subject to the laws of the State of Michigan." The court also distinguished judicial review of interim awards regarding class actions, noting that the controlling rules in that context contemplated judicial review of stages of the class determination process. Finally, the court noted that in the district court it had been argued that Section 2 of the FAA might permit judicial review during an arbitration, and the court (even though the issue was not pressed on appeal) found that this section did not relate at all to the timing of judicial review.
Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60 (2d Cir. 2012)	Reversed district court, finding no evident partiality where two members of the panel in the St. Paul arbitration did not disclose that they were selected to serve together on a panel in a contemporaneous arbitration (the Platinum case); St. Paul's business had some connections to Platinum's, and a former employee of both Scandinavian and Platinum testified in both arbitrations. The court found that these facts did not show that the arbitrators would be partial to one side in the St. Paul case. The court did not suggest an alternative ground for challenging a nondisclosure related to the arbitrators unrelated to a relationship with a party or its counsel. The court did not invoke its prior opinion in *STMicroelectronics, N.V. v. Credit Suisse Securities (USA) LLC*, 648 F. 3d 68 (2d Cir. 2011), which had considered and rejected a challenge under § 10(a)(3)("other misbehavior by which the rights of any party have been prejudiced"), where an arbitrator allegedly had not fully disclosed his background as an expert witness suggesting a "predisposition" against financial institutions.
Schneider v. Kingdom of Thailand, 688 F.3d 68 (2d Cir. 2012)	The Kingdom of Thailand appealed from a judgment of the SDNY confirming an arbitration award in favor of appellee Schneider, the insolvency administrator of Walter Bau AG. The Second Circuit held that the district court, before performing a deferential review of the arbitration award, should have determined whether there was clear and unmistakable evidence that the parties agreed that the scope

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	of the arbitration agreement would be decided by the arbitrators. Nevertheless, the circuit concluded that such clear and unmistakable evidence exists in the record.
Singh v. Raymond James Fin. Servs., 633 F. App'x 548, 551 (2d Cir. 2015)	Upheld a judgment confirming an award and rejected a manifest disregard challenge. In particular, the court rejected challenges to the award of damages. The court stated in pertinent part: "[i]t is settled law in this circuit that arbitrators may render a lump sum award without disclosing their rationale for it, and that when they do, courts will not inquire into the basis of the award unless they believe that the arbitrators rendered it in 'manifest disregard' of the law or unless the facts of the case fail to support it." *Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551, 554 (2d Cir. 1985).
Smarter Tools Inc. v. Chongqing Senci Import & Export Trade Co., Ltd., 2019 WL 1349527 , at *3-5 (S.D.N.Y. 2019), *appeal filed* (2d Cir. Apr. 11, 2019)	The district court first found that an arbitrator exceeded her authority in failing to provide a reasoned award; the court stated: The Court concludes that the award at issue here does not meet the standard for a reasoned award because it contains no rationale for rejecting STI's claims. *Cf. Am. Centennial Ins. Co.*, 2012 U.S. Dist. LEXIS 94754, at *25 (holding that an award was reasoned where it contained "the panel's rationale"); *see also* Fulbrook Capital Mgmt. LLC v. Batson, 14-CV-7564 (JPO), 2015 WL 321889, at *5, 2015 U.S. Dist. LEXIS 8204, at *13 (S.D.N.Y. Jan. 23, 2015) (holding that an award was reasoned where it set out "the arbitrator's key findings and, where necessary, the reasons for those findings"). In dismissing STI's arguments, the arbitrator conclusorily states that "[h]aving heard all of the testimony, reviewed all of the documentary proofs and exhibits, [he does] not find support for STI's claims...." Dkt. No. 6, Ex. C at 5. There is no reason given for this finding other than the negative credibility determination as to STI's expert witness, Zukerman. *See id.* at 5–6. While this credibility determination does provide a rationale for rejecting STI's calculations of its lost profits and goodwill, it does not provide a basis for a dismissal of STI's claims in their totality. *See id.* at 5 (describing Zukerman's changing testimony concerning STI's

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	"loss of future profit and loss of goodwill"). Notably, STI did not rely on Zukerman's testimony in support of its argument that SENCI promised to deliver CARB-compliant generators—an argument that the award does not address at all. Although the arbitrator was not obliged to discuss each piece of evidence presented by STI, he must at least provide some rationale for the rejection of STI's overall argument for STECI's liability. *Cf. Fulbrook Capital Mgmt. LLC*, 2015 U.S. Dist. LEXIS 8204 at *14 (determining that an award was reasoned in part because the award "explain[ed] in full its rejection of what was perhaps Petitioner's most important argument"). The Court therefore concludes that the award as issued is not a reasoned award. Courts in this district have held that "an arbitrator exceeds his or her powers when the arbitrator renders a form of award that does not satisfy the requirements the parties stipulated to in their arbitration agreement." *Tully Constr. Co.*, 2015 U.S. Dist. LEXIS 25690 at *47; *see also id.* at 46–47 (collecting cases); Leeward Const. Co., 826 F.3d at 638–640 (2d Cir. 2016)(assessing the merits of whether an arbitral award was "reasoned"). Because the parties here agreed that the award should be "reasoned," the arbitrator exceeded his authority in issuing an award that does not meet the standard of a reasoned opinion. The Court next held that a remand would be the proper remedy, rather than vacatur: STI maintains that this Court can vacate the award on the sole basis that it is not reasoned. *See* Dkt. No. 36 at 11. However, the Court is cognizant that that the remedy of vacatur must be strictly limited "in order to facilitate the purpose underlying arbitration: to provide parties with efficient dispute resolution, thereby obviating the need for protracted litigation." *T.Co Metals, LLC*, 592 F.3d at 342 (quoting *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009)). The Court therefore determines that the proper remedy is to remand to the arbitrator for clarification of his

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	findings. *See Tully Const. Co.*, 2015 U.S. Dist. LEXIS at *49–52 (concluding that remand is the proper remedy for an award that was issued in an improper form); *see also Cannelton Industries, Inc. v. District 17, United Mine Workers*, 951 F.2d 591, 594 (4th Cir. 1991) ("A court's power to vacate an award because of an arbitrator's failure to address a crucial issue necessarily includes a lesser power to remand the case to the same arbitrator for a determination of that issue."); *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 894 (2d Cir. 1985) ("[C]ourts on occasion may remand awards to arbitrators to clarify the meaning or effect of an award ... or to determine whether the arbitrator has in some way exceeded his powers.") (internal citations omitted).
Sotheby's Int'l Realty, Inc. v. Relocation Grp., LLC, 588 F. App'x 64, 65-66 (2d Cir. 2015)(internal quotations, punctuation and citations omitted)	Reversed a district court vacatur and rejects a manifest disregard of the law challenge. The court states that a "court reviewing an arbitral award cannot presume that the arbitrator is capable of understanding and applying legal principles with the sophistication of a highly skilled attorney….For this reason, and because of the 'great deference' that courts must grant an arbitration panel's decision, this Court has imposed the following three requirements in order to find that an award was issued in manifest disregard of the law. First, we must consider whether the law that was allegedly ignored was clear, as an arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable. Second, we must find that the arbitrators did in fact err in their application of the law, and that the outcome reached was erroneous. Even where explanation for an award is non-existent, we can confirm it if a justifiable ground for the decision can be inferred from the facts of the case. Third, we must find that the arbitrators knew of the law's existence and its applicability to the problem before them."
Stevens v. Jiffy Lube Int'l, Inc., 911 F.3d 1249, 1252 (9th Cir. 2018)	The Ninth Circuit affirmed the dismissal of a petition to vacate an award filed on December 15, 2016 seeking to vacate an award delivered on September 14, 2016 as untimely by one day to satisfy the three-month requirement under the FAA to challenge the award. The court explained that under Fed. R. Civ. P. 81(a)(6)(B), the Federal Rules apply to FAA proceedings unless the FAA provides other

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	procedures, so that the calculation of time was controlled by Fed. R. Civ. P. 6(a)(1). Applying that rule, the court provides the calculation requiring that the petition be dismissed: Applying this three-step process, the Stevenses filed their petition one day late. At step one, we exclude the first day, September 14, 2016, when the arbitrator delivered the final award. At step two, we calculate three months from September 15, 2016. The first month began September 15 and concluded October 14; the second month began October 15 and concluded November 14; and the third month began November 15 and concluded December 14. Step three requires no adjustment because December 14, 2016, was a Wednesday and not a legal holiday. The Stevenses dispute only the calculation at step two, arguing that three months from September 15, 2016, was December 15, 2016. Not so. "[C]ount[ing] every day," Fed. R. Civ. P. 6(a)(1)(B), a month beginning on the fifteenth concludes on the fourteenth of the following month—just as the month beginning January 1 concludes on January 31, not February 1; and just as the week beginning on Monday concludes on Sunday, not the following Monday
Stone v. Bear, Stearns & Co., 872 F. Supp. 2d 435, 447-48, 451-52, 456 (E.D. Pa. 2012), *aff'd*, 538 F. App'x 169 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2292 (2014)	Confirmed award and denied petition to vacate, where Stone claimed that FINRA public arbitrator failed to disclose her husband's connection to the securities industry; in fact, the arbitrator had disclosed to FINRA in general terms her husband's connections to the securities industry, but that information was not included in the disclosure form sent by FINRA to the parties. The court does a full analysis of the law on evident partiality, and applies the Third Circuit standard requiring "proof of circumstances powerfully suggestive of bias." Emphasizing that nondisclosure or failure to follow FINRA disclosure rules by themselves would not constitute evident partiality, the court found that the fact that the arbitrator made disclosure (even though not provided to Stone) meant that bias could not be inferred from the disclosure conduct of

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	the arbitrator. The court also found that the arbitrator's husband's connections to the securities industry were too tenuous to infer bias (he taught a course years before for J.P. Morgan and gave a keynote speech at a J.P. Morgan conference). The court also rejected Stone's argument that the nondisclosure constituted misbehavior under § 10(a)(3); that ground has never been applied to a nondisclosure and Stone failed to show misconduct so severe that he was deprived of a fundamentally fair hearing. The court further rejected Stone's argument that the arbitrator exceeded her powers, where she was supposed to be the FINRA public arbitrator but where her husband's connections supposedly disqualified her for this role; while finding that the argument had some "logical appeal," the court found that Stone failed to show that the arbitrator did not make a good faith attempt to comply with her mandate. Finally, the court held Stone waived his challenged, because he "should have known" the basis of his challenge before the award; his investigation could have yielded the same information had it been done earlier.
Strausser Enters., Inc. v. Segal & Morel, Inc., 2016 WL 4905677 (Pa. Super. Ct., 2016) (non-precedential), *appeal denied*, 169 A.3d 1020 (Pa. 2016)	Under the common law of arbitration conducted in Pennsylvania, ordinarily a unanimous decision by a panel of arbitrators is required for confirmation of an award; in this non-precedential decision (which the Pennsylvania Supreme Court declined to review), the court found that the parties by contract and conduct intended to be bound by a majority decision and therefore declined to vacate the 2-1 award.
Szczepanek v. Dabek, 465 F. App'x 74, 75 (2d Cir. 2012)	Affirmed a district court order that found "manifest error" in the backup documentation for calculation of an award of attorney's fees imposed as a sanction and that reduced the fees to a "reasonable amount." The Second Circuit rejected an argument that the district court failed to give substantial deference to the award because the district court found "manifest error on the record before it." And the court rejected an argument that the district court acted without a statutory or judicial ground for departing from the award: "On the contrary, upon correcting the manifest error in the fee calculation, the district court enforced the terms of the arbitration award without any modification or vacatur." The court also rejected the challenge to the district court's recalculation of the fee amount, finding "no clear error." In essence, the district court reviewed the record of the

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	attorneys' billing and then applied the percentage of the fees (30%) that the arbitration award granted as a sanction. The petitioner had sought $944,604 based on allegedly incurred fees of $3,148,680, but the district court found that the proffered fees were overstated and allowed $283,381.21.
TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC, 153 A.D.3d 140, 149, 152, 162 (1st Dep't 2017), *appeal dismissed*, 30 N.Y.3d 1005 (2017)	The First Department affirmed the vacatur of an arbitration award issued in an arbitration initiated before the Revenue Sharing Definitions Committee ("RSDC") of Major League Baseball (MLB") and further affirmed an order directing that the new arbitration be conducted by the RSDC; the vacatur was based on evident partiality. The dispute arose over the division of telecast rights fees among TCR Sports Broadcasting d/b/a The Mid-Atlantic Sports Network ("MASN"), the Baltimore Orioles and the Washington Nationals. In the arbitration, Proskauer represented the Nationals; the Orioles objected to Proskauer's participation on the basis that Proskauer had regularly represented MLB as well as at least one baseball team participating on the RSDC (where the clubs appointed to the RSDC effectively determined the dispute). The RSDC issued an award favoring the Nationals. "Although MLB cautioned all parties that they should not challenge the award," MASN on behalf of itself and the Orioles commenced the proceeding to vacate the award. In upholding the vacatur, the First Department wrote: > The evidence that the same lawyers in the same firm were representing interests of the arbitrators and MLB at the same time as they represented the Nationals in the arbitration is an objective fact inconsistent with impartiality. The arbitrators had a duty to, but did not, investigate or disclose their relationships with Proskauer, and MLB failed to exercise what power it had to ensure confidence in the fairness of the proceedings in light of MASN's stated concerns. Nonetheless, a majority of the Court held that the new arbitration should be conducted before the RSDC since that was the forum selected by the parties in their agreements, and the FAA directs courts to enforce arbitration agreements in accordance with their terms.

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	In a dissent on the issue of sending the case back to the RSDC (instead of a neutral body like the AAA), Judge Acosta offered this analogy: Part of what makes baseball such a beloved sport is its rules, which preserve the integrity and popularity of the game. . . . Players take the field with the expectation that the umpires are not predisposed to apply those rules in favor of one team over the other. The players win or lose each game based on their own skills and the fair application of the rules—not the influence of some outside force, such as partial umpires or illegal betting. In short, the game is fundamentally fair, a concept that is equally important in arbitrations. An arbitration, like most sports, requires that adversaries begin on a level playing field, with ground rules that are applied fairly to both sides, and without decision-makers who will prejudge the matter. Otherwise, there would be no integrity or trust in the process. Unfortunately, in this case, we are confronted with a fundamentally unfair arbitration that was conducted by Major League Baseball and involved a dispute between two baseball clubs.
Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC, 437 S.W.3d 518, 519-20 (Tex. 2014)	Supreme Court of Texas vacated an award for evident partiality (applying the FAA, although the same ground is found in the Texas stature). The court summarized its opinion as follows: Evident partiality of an arbitrator is a ground for vacating an arbitration award under both the Federal Arbitration Act and the Texas Arbitration Act. Adhering to United States Supreme Court precedent, we held almost two decades ago that a neutral arbitrator is evidently partial if she fails to disclose facts that might, to an objective observer, create a reasonable impression of her partiality. And we have held that a party does not waive an evident partiality challenge if it proceeds to arbitrate without knowledge of the undisclosed facts. Today, we are asked to evaluate these standards in light of a partial disclosure. Here, the neutral

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	arbitrator in question disclosed that the law firm representing one party to the arbitration had recommended him as an arbitrator in three other arbitrations. He also disclosed that he was a director of a litigation services company and attended a meeting at the law firm, but there was no indication the firm and company would ever do business. The trial court found the arbitrator failed to disclose that all of his contacts at the 700-lawyer firm were with the two lawyers that represented the party to the arbitration at issue; he owned stock in the litigation services company that was pursuing business opportunities with the firm; he served as the president of the company's United States subsidiary; he conducted significant marketing in the United States for the company; he had additional meetings or contacts with the two lawyers in question to solicit business from the firm for the company; and he allowed one of the two lawyers to edit his disclosures to minimize the contact. The trial court vacated the arbitration award, but the court of appeals reversed, concluding the party waived its evident partiality claim by failing to object or inquire further when the disclosures occurred. We hold the failure to disclose this additional information might yield a reasonable impression of the arbitrator's partiality to an objective observer. We further hold that because the party making the evident partiality challenge was unaware of the undisclosed information, it did not waive the claim. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's order vacating the award and requiring a new arbitration.
Thomas Kinkade Co. v. White, 711 F.3d 719, 720, 724 (6th Cir. 2013)	Upholding a judgment vacating an award in an arbitration that took over five years; the circuit observed the "arbitration itself was a model of how not to conduct one." Well into the arbitration, the "neutral" arbitrator, Mark Kowalsky, announced to the parties that the respondent, White, and his party-appointed arbitrator on the panel, had entered into engagements with Kowalsky's firm. First, White (a party to the arbitration) had hired one of the arbitrator's law firm partners to represent White in an unrelated arbitration. Second, White's party-appointed arbitrator hired a different one of the arbitrator's partners as

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	a defense expert in a malpractice claim against that party-appointed arbitrator. On top of this, White's counsel was the one to advise Kowalsky that he had been "re-confirmed" as an arbitrator after the AAA denied Kinkade's challenge. The award gave White all the relief he requested. The Sixth Circuit held: "Here, Kinkade established a convergence of undisputed facts that considered together, show a motive for Kowalsky to favor the Whites and multiple, concrete actions in which he appeared actually to favor them." The court, noting that Kowalsky made disclosure of the engagements, added: "Five years into an arbitration, those disclosures were little better than no disclosures at all."
Tully Constr. Co, v. Canam Steel Corp., 684 F. App'x 24, 26 (2d Cir. 2017)	Affirmed the denial of a vacatur petition that was based on manifest disregard of the law. The court stated the standard for vacatur as follows: Under Section 10 of the FAA, an arbitration award may be vacated if, *inter alia*, it was procured by corruption or fraud, or the arbitrators "exceeded their powers." 9 U.S.C. § 10(a). The Second Circuit recognizes two additional bases for vacatur: if the award "was rendered 'in manifest disregard of the law,'" *Schwartz v. Merrill Lynch & Co., Inc.*, 665 F.3d 444, 451 (2d Cir. 2011) (quoting *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010)), or "the terms of the [parties' relevant] agreement[s]," id. at 452 (second alteration added) (quoting *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997)). However, only "a barely colorable justification for the outcome reached" by the arbitrator is necessary to confirm the award. *Landy Michaels Realty Corp. v. Local 32B-32J, Service Employees Int'l Union*, 954 F.2d 794, 797 (2d Cir. 1992) (quoting *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978)). The Court agreed with the district court's rulings that the three alleged instances of manifest disregard urged by petitioners were without merit.
United Brotherhood of Carpenters and Joiners of America v. Tappan	A governing arbitration agreement empowered an arbitrator to issue an initial bottom line decision (stating who won)

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Zee Constructors, LLC., 804 F.3d 270, 276 (2d Cir. 2015)	and then to reverse the outcome in the final award contemplated under the agreement. The opinion turns on language of the National Plan for the Settlement of Jurisdictional Disputes in the Construction Industry that sets out a process for unions to resolve jurisdictional issues—in this context, the allocation of work in a project. The arbitrator is given factors to apply and is directed to issue a short form decision within 5 days of the hearing stating the outcome, with a reasoned award to follow within 30 days of the hearing. In this case, the arbitrator's short form decision ruled in favor of the Dockworkers, but his reasoned award ruled in favor of the Carpenters, saying that his original analysis was incorrect and further saying that the arbitration provision gives the arbitrator continued power to resolve the dispute through issuance of the final award. The court of appeals ruled that a court must defer to the arbitrator's interpretation of the language of the agreement concerning the sequence of awards. The court found that its holding was consistent with previous opinions deferring to an arbitrator's interpretation of contract language (whether the court agreed with the interpretation or not). The court observed: "While the ultimate result was perhaps a bit unusual, it was not a declaration of the arbitrator's 'own brand of justice in contradiction of the clearly expressed language of the contract'" (citation omitted). The court rejected appellant's argument that the parties had not submitted the issue of what an arbitrator was permitted to do in the short form award and final award, and also rejected the argument that the issue of the scope of the awards was a gateway issue for a court to decide. Rather, the court held that the dispute over allocation of work was submitted to arbitration and that the arbitrator's construction of what he could do in the two awards was a matter of contract interpretation as part of his resolution of the dispute. And the court found that the arbitrator did not lose power under the doctrine of functus officio because until the final award he had not fully exercised his authority to determine the submitted issues.
U.S. Elec., Inc. v. Sirius Satellite Radio Inc., 17 N.Y.3d 912, 915 (2011) (Argued by Michael S. Oberman)	Held that New York courts applying the FAA will follow the Second Circuit's standard for evident partiality.

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U.S. Soccer Federation, Inc. v. U.S. National Soccer Team Players Association, 838 F.3d 826, 835, 837 (7th Cir. 2016)	Vacated an arbitration award, where the arbitrator had found the contract language to be ambiguous; the court agreed with the district court that the arbitrator invoked the terms "silence" and "ambiguity" "far too cavalierly." Construing the agreement, the court found that the language was clear and express on the point in issue. The court held that the arbitrator had exceeded his authority by not applying the clear and unambiguous contract language. In so holding, the court found that the award ran "contrary to this court's well-established holding that 'the arbitrator cannot dress his policy desires up in contract interpretation clothing." (citation omitted). The court concluded that the goal of arbitration of providing "swift, inexpensive and final decisions" "does not vitiate judicial review of an arbitrator's decision." (citation omitted). The court found its ruling consistent with the parties' agreement since the arbitral award was a decision that "stray[ed] beyond [the arbitrator's] delegated authority" and "is barred by the negotiated contract."
Wells Fargo Advisors, LLC, v. Mercer, 735 F. App'x 23, 24 (2d Cir. 2018)	Court reiterates that under Section 12 of the FAA, a party must petition to vacate within three months after the award is "filed or delivered," and that such relief may not later be sought even if raised as a defense to a motion to confirm (when a petition to confirm may be commenced within a year after the award is delivered)(quoting statute; citation omitted). The three-months deadline is absolute.
Zurich Am. Ins. Co. v. Team Tankers A.S., 811 F.3d 584, 589, 591 (2d Cir. 2016)	Affirmed the confirmation of an award, finding no manifest disregard of the law; the court stated: "It is arguable that the shipper's evidence could have supported a contrary conclusion, but that does not show that the panel majority manifestly disregarded the law." The court further found no "corruption" or "misbehavior" where the panel chairman did not disclose that he had a brain tumor with which he had been diagnosed during the arbitration; the petitioner contended that the parties' shipping rules required disclosure of such an illness. The court treated the argument as an attempt to expand the FAA grounds for vacatur, and held that the parties' rules could not alter the statutory grounds. The Second Circuit additionally held that the district court erred in awarding attorneys' fees and costs incurred in the proceeding to confirm or vacate the award. The court found that the parties' agreement (relied on by the district court) only allowed fees and costs for

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	breach of contract, and in this case no breach was shown. The court reasoned that seeking confirmation or vacatur was part of the contract, not a breach of it. And the court ruled that, if the contract did require a shipper to forbear from resisting confirmation, that would be unenforceable under the FAA, stating: "We have held that '[p]arties seeking to enforce arbitration awards through federal-court confirmation judgments may not divest the courts of their statutory and common-law authority to review both the substance of the awards and the arbitral process for compliance with § 10(a) and the manifest disregard standard." Lastly, the court found that the record did not warrant fees for bad faith conduct. (citation omitted).