Expert Insights on Drafting Awards That Will Stick

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AWARD WRITING PROGRAM

Arbitration awards serve two functions: They communicate the decisions reached by the arbitrator and the reasons for those decisions to the parties and their counsel.

Writing an award requires the arbitrator explain his or her reasoning and to evaluate the sufficiency of the evidence. Writing serves as an intellectual discipline that help to ensure that the right result is reached. Unlike a published judicial opinion, it does not articulate the law other arbitrators, lawyers and the interested public generally do not benefit. Unlike a judicial opinion, except for the parties involved, it invokes the lines of the poet Thomas Gray: "The dark unfathom'd caves of ocean bear: Full many a **flower** is born to blush **unseen**, And waste its sweetness on the desert air."

The Award should state the significant facts accurately, clearly and fairly. And the arbitrator should then analyze those facts in the light of the relevant rules of law that demonstrate the result reached. You lose credibility as an arbitrator if you misstate the facts or the law.

Outline:

I. FUNCTIONS OF THE AWARD:
   a. To communicate the Arbitrator's decisions
   b. And the reasons for those decisions.

II. FACTORS TO CONSIDER IN DETERMINING THE SCOPE AND STYLE OF THE AWARD
   a. Complexity of the Facts
   b. Nature of the Legal Issues

III. PREPARING TO WRITE
   a. Marshalling the material facts
   b. Formulating the issues
   c. Identifying applicable rules of law
   d. Determining the appropriate forms of relief

IV. TECHNIQUES
   a. Use of outlines

b. Reaching a conclusion before writing or using the process of writing to reach the conclusion.

V. MATERIALS TO REVIEW
   a. Briefs of counsel
   b. Importance of the transcript when award turns on specific testimony
   c. Examination of crucial exhibits, particularly in contractual disputes the contract itself.

VI. ORGANIZING AND WRITING THE AWARD
   a. Introduction:
      i. Identification of the parties
      ii. Jurisdictional status
      iii. Framing the issues: before or after the statement of facts
      iv. Avoiding repetition of verbose parties' contentions
   b. Statement of Facts
      i. Enough facts at the beginning to make the opinion understandable
      ii. Limiting initial statement to necessary historical background
      iii. Incorporate specific decisional facts in the Analysis
      iv. Avoidance of excessive factual detail
      v. Importance of stating facts significant to the losing side
      vi. Reliance on the record and not the briefs
   c. Discussion of Legal Principles
      i. Organization of the issues by the Opinion itself
      ii. Organzation not necessarily by counsel's but by formulation of the issues
      iii. Case citations: Do they matter ?
      iv. Secondary sources
      v. When to quote relevant language
      vi. Avoiding an adversarial tone
      vii. Distinguishing the Opinion from the Analysis
      viii. Bullet proofing the Award
      ix. Dos and don't's in the Disposition
      x. Writing the Award when reasons aren't required

VII. LANGUAGE, STYLE AND SELF EDITING
   a. CHARACTERISTICS OF BAD WRITING
      i. Wordiness
      ii. Lack of precision and clarity
   b. CHARACTERISTICS OF GOOD WRITING
      i. See bibliography

VIII. DISTINGUISHING WRITING ARBITRAL AWARDS FROM WRITING JUDICAL OPINIONS: The Arbitration Agreement is the source and the limitation of the arbitrator's authority.

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Suggested Reading

ARBITRATION

American Arbitration: Principles and Practice; Robert B. von Mehren, Steven J. Burtyon, and George W. Coombe, Jr.; Practising Law Institute, Litigation Law Library

A Guide to the ICDR International Arbitration Rules; Martin F. Gusy, James M. Hosking, and Franz T. Schwarz; Oxford University Press

Commercial Arbitration at Its Best: Successful Strategies for Business Users; Thomas J. Stipanowich (Editor) and Peter H. Kaskell (Associate Editor); CPR Institute for Dispute Resolution and American Bar Association Section of Business Law Section of Dispute Resolution

Dispute Resolution: Examples and Explanations; Michael L. Moffitt and Andrea Kupfer Schneider; Aspen Publishers, Wolters Kluwer Law & Business

Valuation for Arbitration Compensation Standards Valuation Methods and Expert Evidence; Mark Kantor; International Arbitration Law Library, Wolters Kluwer Law & Business

International Commercial Arbitration in New York; James H. Carter and John Fellas; Oxford

The Secretariat's Guide to ICC Arbitration, A Practical Commentary of the 2012 Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration; James Fry, Simon Greenberg, and Francesca Mazza

Drafting International Contracts: An Analysis of Contract Clauses; Marcel Fontaine and Filip de Ly; Martinus Nijhoff Publishers

International Arbitration 2012, Volumes 1-3; Practising Law Institute (Ord #34489)

The College of Commercial Arbitrators: Guide to Best Practices in Commercial Arbitration; James M Gaitis (Editor in Chief), Curtis E. von Kann and Robert W. Wachsmuth (Editors)

American Arbitration Association's Handbook on International Arbitration & ADR, Thomas E. Carbonneau and Jenette A. Jaeggi (Editors); JurisNet Publishing

New York State Bar Association Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations
https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Guidelines_for_the_Efficient_Conduct_of_the_Pre-hearing_Phase_of_Domestic_Commercial_Arbitrations_and_International_Arbitrations.html

GUIDELINES FOR DOCUMENT EXCHANGE

Debevoise & Plimpton LLP Protocol to Promote Efficiency
https://www.debevoise.com/insights/publications/2010/04/debevoise-issues-protocol-to-promote-efficiency-__

CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration
https://www.cpradr.org/resource-center/protocols-guidelines/protocol-on-disclosure-of-documents-presentation-of-witnesses-in-commercial-arbitration

WRITING GUIDES

Style: The Basics of Clarity and Grace; Joseph M. Williams; Longman

The Elements of Style; William Struck Jr. and E.B. White; Longman

Clear & Effective Legal Writing; Veda R. Charrow and Myra K. Erhardt; Little, Brown, and Company

Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing; Stephen V. Armstrong & Timothy P. Terrell; Practising Law Institute

On Writing Well: An Informal Guide to Writing Nonfiction; William Zinsser; Harper & Row

OTHER

Listen to Win: A Guide to Effective Listening, Curt Bechler Ph.D.

The Art of Persuasion: A National Review Rhetoric for Writers; Linda Bridges and William F. Rickenbacker; National Review Books

The Black Swan: The Impact of Highly Improbably; Nassim Nocholas Taleb; Random House

Intuition: Its Powers and Perils; David G. Myers; Yale University Press

Listening, The Forgotten Skill: A Self-Teaching Guide; Madelyn Burley-Allen; Wiley

The Art of Negotiating; Gerard I. Nierenberg; Barnes & Noble Books

Making Your Case: The Art of Persuading Judges; Antonin Scalia and Bryan A. Garner

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Recommended Reading on Arbitration Awards

"Awards, and Substantive Interlocutory Decisions" by John A. Barrett, Thomas J. Brewer, Thomas J. Brewer, Jay W. Elston, James M. Gaitis, Richard A. Levie, John Barritt McArthur, Michael S. Oberman and Michael S. Wilk, and Michael S. Wilk), Chapter 12 of The College of Commercial Arbitrators, Guide to Best Practices in Commercial Arbitration (Fourth Edition 2017) at pages 291-322).

New Jersey Arbitration Handbook 2018 By William A. Dreier and Robert Bartkus, ALM

Chapter 7: The Arbitration Award: Finality versus Reviewability, Commercial Arbitration at Its Best: Successful Strategies for Business Users, Thomas Stipanowich (Editor) and Peter H. Kaskell (Associate Editor), American Bar Association and CPR Institute for Dispute Resolution, 2001.

"Reasoned Awards: How Extensive Must the Reasoning Be?" by Peter Gillies and Niloufer Selvadurai (pp 125-132), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management; Volume 74, Number 2, May 2008; The Chartered Institute of Arbitrators in association with Thomson Sweet & Maxwell.

"Interpreting the New York Convention: When Should an Interlocutory Arbitral 'Order' Be Treated As an 'Award'?" by Marc J. Goldstein (pp 161-168), American Arbitration Association and International Centre for Dispute Resolution's Handbook on International Arbitration and ADR (Second Edition), JurisNet, LLC, 2010.

"The Arbitral Award," by Bernardo M. Cremades (pp 483-500), The Leading Arbitrators' Guide to International Arbitration (Second Edition), Lawerence W. Newman and Richard D. Hill (Editors), JurisNet LLC, 2008.

Chapter Nine: Arbitral Awards, American Arbitration Association's Handbook on Commercial Arbitration, Thomas E. Carbonneau and Jenette A. Jaeggi (Editors), JurisNet LLC, 2006.

I. "The Art of Communicating Arbitral Judgments," by Charles J. Coleman and Gladys Gershenfeld (pp 337-352)
II. "Another Look at Remedies in Arbitration," by Harvey Berman (pp 353-362)

Resources for Arbitration Award Drafting

Sources of Arbitration Awards:

A list of arbitration award sites by topic of the arbitration:
https://law.duke.edu/lib/researchguides/arbitration/

International only Awards:
https://guides.ll.georgetown.edu/c.php?g=363504&p=2455950

ICDR Awards and Commentaries Vol. I, Grant Hanessian ed. JURIS Publ. 2012 (Vol. II 2018, forthcoming)

Other Resources:

ICC Checklist for What Should be Included in the Final Award
https://iccwbo.org/content/uploads/sites/3/2016/04/ICC-Award-Checklist-English.pdf

International Bar Association: Toolkit for Award Writing
https://www.ibanet.org › Document › Default

Chartered Institute of Arbitrators, International Arbitration Practice Guideline, Drafting Arbitral Awards, Part 1
https://www.ciarb.org/media/4206/guideline-10-drafting-arbitral-awards-part-i-general-2016.pdf

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Article

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DEATH BY DISCOVERY, DELAY, AND DISEMPOWERMENT: LEGAL AUTHORITY FOR ARBITRATORS TO PROVIDE A COST-EFFECTIVE AND EXPEDITOUS PROCESS [d1]

Whether warranted or not, despite statistics to the contrary, [1] arbitration in recent years has become a punching bag for criticism that it has begun to mirror the type of scorched earth discovery practices and delays seen in litigation. Why is this? Is it because parties are not actively participating in the arbitration process and instead have allowed their outside counsels to use the litigation-style discovery and delay tactics with which counsel feel most comfortable? Maybe. Do parties themselves want protracted discovery and a drawn out arbitration process? Some, perhaps. Has arbitration become a victim of its own success, attracting more bet-the company-claims that demand a process reflecting the magnitude of those claims? It's possible. What role, if any, do arbitrators play in ensuring that the arbitration process does not fall victim to death by discovery, delay, and arbitrator disempowerment? A pivotal role. This article outlines why arbitrators should feel empowered to take an active role in managing the arbitration process--be it through refusing to hear unnecessary evidence, denying unwarranted discovery requests, denying excessive adjournment requests, deciding an issue or disposing of a case based on a dispositive motion, or sanctioning parties for failure to comply with a discovery order or lack of good faith in the arbitration process--and it provides guidance ***62** as to how arbitrators can manage the arbitration process without feeling concerned that their award will be in danger of vacatur.

The Federal Arbitration Act ("FAA") lists as grounds for vacatur under Section 10(a)(3) failure to hear pertinent and material evidence, refusal to postpone a hearing, and other arbitrators' misbehavior prejudicing the rights of any party. [2] Arbitrators, however, do not need to live in fear that their awards will be vacated under FAA 10(a)(3). While arbitrators do need to be aware of the limits of their authority, courts around the country generally defer to the arbitrators' discretion in this context. Arbitrators play a critical role in asserting their authority to provide parties with a cost-effective and expeditious arbitration--no informed arbitrator should shy away from their responsibility for fear of jeopardizing the award.

I. ARBITRATORS CAN REFUSE TO HEAR EVIDENCE AND DENY DISCOVERY REQUESTS SO LONG AS PARTIES ARE PROVIDED A FUNDAMENTALLY FAIR HEARING

Judicial review of awards on the ground that arbitrators have refused to hear evidence is limited. Courts have confirmed awards so long as the arbitrators' refusal to hear evidence or deny discovery requests did not deprive the party of a fundamentally fair hearing. The court's analysis is performed on a case-by-case basis with wide discretion given to the arbitrator. The fundamentally fair hearing standard used to determine whether arbitrators have misconducted themselves by refusing to hear pertinent and material evidence under Section 10(a)(3) has been adopted by the Eleventh, Sixth, Fifth, and Second Circuits. The following cases highlight where courts draw the line between a fundamentally fair and not fair hearing. For instance, did the arbitrator exceed her authority pursuant to the parties' ***63** arbitration clause, and if so, did the erroneous determination cause prejudice to a party.

In *Rosenweig v. Morgan Stanley*, the Eleventh Circuit confirmed an arbitral award against Morgan Stanley finding that the arbitrators' refusal to allow Morgan Stanley additional cross-examination of Rosenweig, its former employee, did not amount to misconduct. [3] The arbitrators did not explain their reasons for denying the additional cross-examination. However, the court determined that the evidence from additional cross-examination, concerning a client list contained in disks produced by Rosenweig, would have been cumulative and immaterial, and for this reason, Morgan Stanley was not deprived of a fair hearing. [4]

The Sixth Circuit ruled similarly in *Nationwide Mutual Insurance Co. v. Home Insurance Co.* [5] In *Nationwide Mutual Insurance Co.*, the Court confirmed the arbitral award where the reinsurer argued that the panel was guilty of misconduct because the panel's damages decision was based on spreadsheets prepared by the insurer without allegedly allowing the reinsurer to conduct discovery as to the adequacy of the insurer's cost estimates. The Sixth Circuit stated:

> 'Fundamental fairness requires only notice, an opportunity to present relevant and material evidence and arguments to the arbitrators, and an absence of bias on the part of the arbitrators.' [*Louisiana D. Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, No. 99-3322, 2000 WL 178554, at *6 (6th Cir. Feb. 8, 2000).] Because [the reinsurer] received copies of [the insurer's] submissions on the costs it incurred in defending against rescission, and the arbitration panel gave [the reinsurer] an opportunity to respond to these submissions, it is not clear what purpose discovery or a hearing on this issue would have served. [6]

Thus, the *Nationwide Mutual Insurance Co.* Court held that "the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing" and found that the parties had not been denied a fundamentally fair hearing. [7]

***64** The rationale behind the fundamentally fair hearing standard has been defined by the Fifth Circuit. [8] In *Prestige Ford v. Ford Dealer Computer Services, Inc.*, the Court confirmed the arbitral award when the arbitrators denied motions to compel discovery. [9] In its opinion, the Court explained that "arbitrators are not bound to hear all of the evidence tendered by the parties; however, they must give each of the parties to the disputes an adequate opportunity to present its evidence and arguments." [10] The arbitrators had not denied the parties a fair hearing when they held hearings on motions to compel discovery and denied them. The Court concluded that "submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial; but because the advantages of arbitration are speed and informality, the arbitrator should be expected to act affirmatively to simplify and expedite the proceedings before him." [11]

Courts have also examined arbitral rulings alleged to exclude material and pertinent evidence, which the losing party argues had a prejudicial effect. [12] In *LJL 33rd Street Assoc., LLC v. Pitcairn Property Inc.*, the Second Circuit Court of Appeals confirmed the award in part over the losing party's argument that the arbitrator excluded hearsay documents that should have been considered. [13] The Court explained that the evidence the arbitrator excluded was all hearsay and that while arbitrators are not bound with strict evidentiary rules, they are not prohibited from excluding hearsay documents. [14] Furthermore, the Court stated that the arbitrator gave the party the ***65** opportunity to eliminate the hearsay by bringing in the makers of the documents to the arbitration hearing. There was thus no prejudice to the party. For this reason, and based upon the Court's deference to arbitrators' evidentiary decisions, the Court held that the parties were not denied a fundamentally fair hearing. [15]

District courts have also adopted the fundamentally fair hearing standard. [16] In *A.H. Robins Co., Inc. v. Dalkon Shield*, the Court confirmed the arbitral award, finding that the arbitrator's decision to exclude evidence of defect in the product at issue was not

an abuse of their discretion, and even if it was, the exclusion of evidence did not deprive the claimants of a fundamentally fair hearing. [17] To determine whether Section 10(a)(3) of the FAA had been violated, the court used a two-pronged test. First, the claimant had to show "that the arbitrator's evidentiary ruling was erroneous." [18] Second, the claimant had to show "that the error deprived the movant of a fundamentally fair hearing." [19] The Court determined that the arbitrator's evidentiary rulings were not erroneous and that even if the court found that the arbitrator's evidentiary rulings were erroneous, the movants did not show that they were denied a fundamentally fair hearing. [20] Furthermore, the *Dalkon Shield* Court expressed concern that a court's review of arbitral awards should be limited because "an overly expansive review of such decisions would undermine the efficiencies which arbitration seeks to achieve." [21]

***66** Many district courts have applied a similarly limited review of arbitral awards challenged under Section 10(a)(3). [22] The Southern District of New York held that an arbitrator's refusal to hear or to admit evidence alone does not constitute misconduct; it only constitutes misconduct when it amounts to a denial of fundamental fairness. [23] For instance, in *Areca, Inc. v. Oppenheimer and Palli Hulton Assoc.*, the Court denied the motion to vacate based on petitioner's argument that the arbitrators erroneously refused to allow the petitioner to present the testimony of the brokerage firm's CFO. [24] However, the Court noted that "petitioners presented their direct case over seven full hearing days, in which they called ten witnesses, including four present and former [ ] employees and three experts, and introduced over 148 exhibits into evidence." [25] Therefore, "[t]he scope of inquiry afforded [to] petitioners was certainly sufficient to enable the arbitrators to make an informed decision and to provide petitioners a fundamentally fair hearing." [26] The Court further stated that the arbitrators' broad discretion to decide whether to hear evidence needed to be respected and that arbitrators needed not to compromise their hearing of relevant evidence with arbitration's need for speed and efficiency. [27]

***67** Certain state courts have also confirmed awards despite parties' allegations that arbitrators refused to hear or admit evidence. [28] Similar to their federal counterparts, the courts focused not only on the arbitrators' alleged error, but also on the alleged prejudice suffered by the claimant from this alleged error. For instance, in *Hicks III v. UBS Financial Services, Inc.*, a Utah appellate court reversed the lower court and confirmed an arbitral award in which the movant sought to vacate the arbitration award based on what it contended were erroneous discovery decisions that substantially prejudiced its rights to participate fully in the arbitration. [29] Namely, the movant based its motion to vacate on the arbitrator's alleged denial of its ability to cross-examine a witness and denial of certain deposition requests. [30] While the case focused on FINRA rules, the Court held:

> [A]n arbitrator's discovery decisions can provide grounds for vacatur if those decisions prevent a party from exercising statutorily-guaranteed rights to an extent that 'substantially prejudice[s]' the complaining party .... At a minimum, a discovery decision must be sufficiently egregious that the district court is able to identify specifically what the injustice is and how the injustice can be remedied. [31]

In this case, the movant presented no record of the arbitration proceeding itself and instead sought vacatur of the award based on an insinuation that a piece of evidence presented by the opposing party was false. [32] The Court held that credibility determinations are exclusively within the province of the arbitration panel and nothing movant presented identified any specific information he was denied or precluded from presenting. [33] Therefore, the court held that movant ***68** failed to show that the arbitration panel's discovery decisions substantially prejudiced his rights to present his case fairly. [34]

Not surprisingly, these state courts' views are similar to the federal courts' interpretations of the standard for a violation of Section 10(a)(3). Because evidentiary rulings are procedural in nature, courts rightfully defer to arbitrators' decisions on evidentiary issues so long as these decisions do not rob the parties of a fundamentally fair hearing. While courts will vacate awards at the

extremes, generally arbitrators are generally granted the wide discretion that they need to provide for an expeditious and cost-effective process.

II. COURTS WILL VACATE AN AWARD IF ARBITRATORS' REFUSAL TO HEAR PERTINENT AND MATERIAL EVIDENCE/DENIAL OF DISCOVERY REQUEST DEPRIVES A PARTY OF A FUNDAMENTALLY FAIR HEARING

The Fourth and Second Circuits, applying the fundamentally fair hearing standard, have vacated arbitral awards on the ground that the arbitrators denied the parties a fundamentally fair hearing. [35]

In *International Union, United Mine Workers of America v. Marrowbone Development Co.*, the Fourth Circuit vacated an award because the arbitrator had denied the parties a fair hearing. [36] The arbitrator reached a decision without holding a hearing. [37] First, the Court explained that the arbitrator's making of the award without an evidentiary hearing conflicted with the parties' agreement to arbitrate, which required the arbitrator to hold a hearing. Indeed, the parties' agreement stated that the arbitrator had to "conduct a hearing in order to hear testimony, receive evidence and consider arguments." [38] Second, the Court explained that while "an arbitrator typically retains broad discretion over procedural matters and does not have to hear every piece of evidence that the parties wish to present," the Court ***69** could not condone an arbitrator's decision to both go against the parties' agreement and to deny them a full and fair hearing. [39]

In *Tempo Shain Corp. v. Bertek, Inc.*, the Second Circuit vacated an arbitral award on the ground that the arbitrators' conduct in denying the testimony of one of the parties' officers deprived the party of a fundamentally fair arbitration. [40] The claims in arbitration were based on whether the parties were fraudulently induced to enter into a contract. The witness at issue was Bertek's former president who was intimately involved in the contract negotiations and allegedly was the only person who could testify about certain aspects of the negotiations. The witness became temporarily unavailable to testify after his wife was diagnosed with a reoccurrence of cancer. [41] Bertek asked the arbitrators to keep "the record open until [the witness] could testify." [42] The arbitrators refused Bertek's request on the ground that the testimony would be cumulative. [43] The Second Circuit did not defer to the arbitrators' decision because they had given no reasonable basis for their denial. [44] While the *Tempo Shain Corp.* Court recognized that "undue judicial intervention would inevitably judicialize the arbitration process, thus defeating the objective of providing an alternative to judicial dispute resolution," the Court found that:

> [B]ecause [the witness] as sole negotiator for Bertek was the only person who could have testified in rebuttal of appellees' fraudulent inducement claim, and the documentary evidence did not adequately address such testimony, there was no reasonable basis for the arbitrators to conclude that [the witnesses] testimony would have been cumulative with respect to those issues. [45]

***70** Similarly, district courts in the Second and Ninth Circuits have vacated awards on the grounds that the arbitrators denied the parties a fair hearing when they refused to hear material and pertinent evidence. [46] In *Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO*, the Court vacated the award because the arbitrator refused to consider testimony based on rules of evidence without first notifying the parties and counsel that the rules of evidence would apply. [47] The arbitrator's opinion stated that he disregarded a witness's rebuttal testimony because it should have been presented as part of the principal case and was not timely. [48] However, no evidentiary rules were announced prior to the hearing by the arbitrator and no such rules were included in the parties' arbitration agreement. [49] Thus, the Court found that the arbitrator's decision to ignore the testimony provided by the petitioner's rebuttal witness amounted to a fundamentally unfair hearing. [50] The Court held that the

rules of evidence did not apply to an arbitral proceeding and by denying evidence to be heard on that basis alone without warning the parties as to what rules the arbitrator would be applying, the arbitrator denied the petitioner a fundamentally fair hearing. [51]

State courts have also vacated awards pursuant to Section 10(a)(3) when arbitrators refused to hear evidence that the court found to be material and pertinent. [52] In *Boston Public Health Commission v. Boston Emergency Medical Services-Boston Police Patrolmen's Ass'n, IUPA No. 16807*, after the evidentiary hearing took place, the arbitrator set a date for the parties' post-hearing briefs to be due. [53] Prior to the due date for the post-hearing briefs, the employer filed a motion for leave to file supplementary evidence of warnings given to the employee that justified the employer issuing a five-day ***71** suspension. The arbitrator denied the employer's motion and refused to accept the supplementary evidence. The arbitrator based his denial on the fact that the evidentiary record was closed as of the conclusion of the evidentiary hearing. The arbitrator's award found that the employer was not justified in issuing the five-day suspension. The Massachusetts Court of Appeals vacated the award on the ground that the arbitrator did not have the authority under the American Arbitration Association rules adopted by the parties to declare the evidentiary record closed prior to the due date for the post-hearing briefs. [54] The Court found the following:

> [A]lthough decisions concerning excluding or admitting evidence are generally within an arbitrator's discretion, the arbitrator did not have the authority under the American Arbitration Association rules to declare that the hearing was closed before the briefs were filed, or to exclude evidence on that basis. As a result, the arbitrator's justification for excluding the evidence--that the hearing was closed--was not within his authority to determine, particularly when he never made a determination concerning the materiality or reliability of the evidence. [55]

The Court further found that the evidence excluded was material and the exclusion prejudiced the rights of the employer. [56]

An overarching theme in all of these cases is that courts show deference to arbitrators' evidentiary decisions. However, given that arbitration is a creature of contract, it is important that an arbitrator stay within the confines of the parties' agreement. For example, if the clause provides that each party take two depositions, then the arbitrator should not deny a party two depositions. Beyond that, courts should view evidentiary matters as procedural and thus leave them to the wide discretion of the arbitrator. Courts that substitute their own reasoning and vacate awards simply because they disagree with the arbitrators' evidentiary rulings risk going beyond the confines of 10(a)(3) and being reversed. If arbitration is to live up to ***72** its promise as an efficient and cost-effective alternative to litigation, courts need to continue to provide deference to arbitrators' evidentiary rulings.

III. COURTS DEFER TO ARBITRATORS' DISCRETION IN THEIR DECISION TO GRANT OR DENY ADJOURNMENTS

Even though FAA 10(a)(3) provides that awards may be vacated based on an arbitrator's refusal to postpone the hearing upon sufficient cause shown--as with evidentiary rulings--granting or denying requests for adjournments are generally considered procedural matters and thus courts grant arbitrators broad discretion in such determinations. This makes sense given that the arbitrator, not a reviewing court, is closest to the matter at the time when the request for adjournment is being sought. Requests for adjournments can derail an otherwise efficient arbitration. Unlike in the context of litigation where matters in court are often adjourned without protest, the granting of an adjournment in arbitration should be the exception rather than the rule. Not surprisingly, the Second and the Sixth Circuits, as well as several district courts, have held that arbitrators' refusal to postpone hearings did not negate a fundamentally fair hearing or amount to an abuse of the arbitrator's discretion. [57]

Courts have confirmed the awards submitted to them when arbitrators have denied adjournment requests in the arbitral proceedings. For instance, in *Alexander Julian Inc. v. Mimco, Inc.*, the Second Circuit determined that granting an adjournment falls within the arbitrator's broad discretion. [58] In *Mimco*, the Court held that the arbitrators' denial of an adjournment request

made by a party because his counsel had to be in federal court did not deprive the party of a fundamentally fair hearing. [59] The Court had two bases for ***73** its decision. First, the Court explained that the arbitrators had "at least a barely colorable justification" for denying the adjournment. [60] Second, the Court reiterated the *Tempo Shain* rule and held that "the granting or denying of an adjournment falls within the broad discretion of appointed arbitrators." [61] Thus, this decision illustrates courts' deference to the arbitrators' procedural decisions.

Other courts have held that when arbitrators have a reasonable basis and justification for the adjournment refusal, courts should defer to the arbitrators' decision. [62] For example, in *Bisnoff v. King*, the Southern District of New York deferred to the arbitrators' decision in refusing to postpone a hearing. [63] There, the arbitrators denied a party's request to postpone a hearing, even though the party asked for this postponement on the grounds of sickness. [64] The arbitrators clearly and reasonably justified their denial in a letter to the party explaining that they believed that the party was capable of participating in hearings. [65] The Court deferred to this decision for two reasons. First, the Court held that the arbitrators had clearly and reasonably justified their denial. Second, the Court stated that it was "not empowered to second guess the arbitrators' assessment of credibility." [66] The *Bisnoff* Court distinguished this case from *Tempo Shain*. In *Tempo Shain*, the Second Circuit had not deferred to the arbitrators' decision to refuse to hear a witness's testimony. There, Bertek, a manufacturing company planned on calling a crucial witness for its case. Bertek asked for the arbitrators to keep "the record open until [the witness] could testify." [67] The arbitrators refused Bertek's request on the ground that the testimony would be cumulative. The Second Circuit did not defer to the arbitrators' decision because they had given no reasonable basis for their denial. In *Bisnoff*, the situation was different because the arbitrators provided reasons for their decision. Thus, the standard of review remains deferential to the arbitrators' decision. Courts will defer to arbitrators' procedural ***74** decisions so long as the arbitrators have provided a reasonable basis for their choices. [68]

The Sixth Circuit has shown even greater deference to the arbitrators' procedural decisions, such as granting or refusing an adjournment request. [69] *In re Time Construction, Inc. v. Time Construction Inc.*, the Court confirmed the arbitral award and held that the arbitration panel's refusal to postpone a hearing requested on the ground of the illness of a partner in a partnership was not an abuse of discretion. [70] In this case, the arbitration involved a construction dispute between a construction company and a partnership. The partnership moved to vacate the award entered in favor of the construction company on the ground that the panel abused its discretion in denying the adjournment request asked for because of a partner's sickness. [71] The Sixth Circuit reviewed the case under Michigan Court Rules 3.602(j)(1)(d) (similar to FAA 10(a)(3)) and it stated that "the party seeking to vacate the arbitration award carried the burden of proving by 'clear and convincing evidence' that the arbitrators abused their discretion." [72] Furthermore, the Court stated that, within the arbitration, it was the burden of party seeking the adjournment to provide the information necessary for the arbitrator to grant the adjournment. [73] The Court thus reviewed the procedural facts and observed that the arbitrators had "been generous in granting [the partnership] continuances and ... adjournments throughout the two and a half years of the arbitration." [74] In light of these facts, the Court confirmed the award.

Courts have specified that so long as the parties had a full opportunity to present their case, the arbitrator's denial does not amount to a violation of the fundamentally fair hearing standard. [75] Courts have also relied on the principle that so long as arbitrators ***75** provide the parties an adequate opportunity to present their evidence and argument, they are not bound by formal rules of procedure and evidence. [76]

Finally, courts have decided that arbitrators who act within the authority granted to them by the rules of the arbitration have not denied a fundamentally fair hearing to the parties. [77] For example, in *Verve Communications Pvt. Ltd v. Software International, Inc.*, the New Jersey District Court confirmed the arbitral award and held that an arbitrator had properly refused the party's request for a continuance of discovery as the arbitrator acted within the authority granted to him by the arbitration rules. [78] In this case, the arbitration agreement provided that the dispute be resolved in accordance with the Commercial Arbitration Rules

of the American Arbitration Association. [79] The party against whom the award was entered moved to vacate the award on the ground that the arbitrator wrongfully denied him the right to a subpoena to depose a non-party and submit a transcript of the deposition. The Court disagreed and stated that since the AAA Rules provided that "the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard is given a fair opportunity to present its case" and that the arbitrator "shall manage the exchange of information among the parties in advance of the hearing with a view to maintaining efficiency and economy," the arbitrator had sufficient authority to decide whether or not to extend discovery. [80] Furthermore, the Court observed that the party seeking to vacate the award had the opportunity to present evidence and chose not to during the eight months that the arbitration lasted. [81] For these reasons, the arbitrator's choice not to continue discovery did not amount to misconduct under FAA 10(a)(3). [82]

***76** As evidenced from the cases above, courts generally provide arbitrators with wide discretion when reviewing arbitrators' decisions regarding adjournment requests. However, courts will look to the arbitrator's reasoning to determine whether there was a reasonable basis or justification for denying a request for adjournment. Therefore, best practice dictates that arbitrators provide reasoning for their denial of an adjournment.

IV. COURTS WILL VACATE AN AWARD IF ARBITRATORS' REFUSAL TO GRANT ADJOURNMENT AMOUNTS TO PREJUDICIAL MISCONDUCT

Courts have held that while the decision to grant or to deny adjournment requests is generally within the arbitrator's discretion, when the decision amounts to prejudicial misconduct the award must be vacated. [83]

The appellate division of the Supreme Court of New York has held that an arbitrator's refusal to grant a party's request for adjournment of an arbitration proceeding amounts to misconduct and justifies vacatur of the award when the party requesting the adjournment was not properly notified of the arbitration. [84] In *Wedbush Morgan Securities, Inc. v. Brandman*, a New York Stock Exchange arbitration, the Court granted the vacatur of the award because the arbitrators failed to provide due notice of arbitration to one of the parties. [85] The Court held that New York Civil Practice Law and Rules 7506[b] which mirrored New York Stock Exchange Rule 617 required arbitrators in New York Stock Exchange arbitrations to "notify the parties [of an upcoming arbitration hearing] in writing personally or by registered or certified mail not less than eight days before the hearing." [86] Failure by the arbitrators to do so and denial of an adjournment upon request by the improperly notified party amounted to prejudicial misconduct. [87] In *In re Arbitration between Leblon* ***77** *Consultants Ltd. and Jackson China, Inc.*, the Court also vacated the arbitral award on the ground that the arbitrator denied an adjournment request. [88] The Court remanded the case to the American Arbitration Association. [89] In this case, the respondent in the arbitration sought a hearing adjournment from the arbitrator in order to have the only employee who had knowledge of the dispute fly from England to New York and attend the arbitral hearing. In light of these facts, the Court found that the arbitrator had abused his discretion by refusing the adjournment. [90] Judge Silverman, dissenting in this opinion, stated that he would have confirmed the award. Based on the history of adjournments and delays in this arbitration, Judge Silverman considered that the arbitrator acted within his discretion. [91]

In *Pacilli v. Philips Appel & Walden, Inc.*, the Eastern District of Pennsylvania partially vacated the award on the ground that the arbitrators had refused to adjourn proceedings to allow a party that was rejoined the opportunity to cross-examine a witness concerning the cross claim against the rejoined party. [92] In this case, the Pacillis initiated a New York Stock Exchange arbitration against a brokerage firm for unauthorized transfer of funds, unauthorized securities transactions, and other claims. [93] The claimants named a series of respondents, including Mr. Engelhardt, the Compliance Director of the brokerage firm. A few days into the proceeding, Engelhardt reached a settlement agreement with the Pacillis and the claims against him were dismissed. [94] However, later in the proceeding, the claimant's expert witness testified as to Engelhardt's compliance obligations. [95] At this time, the arbitral panel decided to entertain cross claims from Engelhardt and the other respondents. The panel left a telephone

message with Engelhardt's counsel inviting cross claims from Engelhardt. Within ten minutes of this phone call and before Engelhardt's counsel could respond, the arbitrators proceeded with the cross claims against Engelhardt with other defendants ***78** present.[96] Within forty minutes of the phone call, the arbitrators entertained cross-examination of the claimant's expert witness by another defendant, which was incriminating for Engelhardt.[97] Finally, the arbitrators entered an award against Engelhardt and other defendants.[98] The Court in this case vacated the award against Engelhardt on the ground that the arbitrators denied him his right to a fair hearing.[99] Therefore, the arbitrators' decision not to wait for Engelhardt to appear, respond, and cross examine the expert witness amounted to misconduct on the part of the arbitrators.

These cases show that the while there is a presumption in favor of deferring to the arbitrator's discretion, unreasonable denials of adjournments will justify vacatur. These cases, however, involved situations in which arbitrators denied the parties' basic rights, such as the right to notice, the right to present a crucial witness, and the right to appear in the arbitration and cross-examine a witness. Thus, these cases do not undermine arbitrators' discretion; they only show that this discretion is to be construed within the broad boundaries of a fundamentally fair hearing. Given that the grounds for vacatur under 10(a)(3) are based on an arbitrator's procedural determination, courts rightly grant arbitrators wide discretion in these matters, vacating awards only at the extremes.

V. COURTS HAVE CONFIRMED AWARDS WHEN ARBITRATORS DECIDED THE CASE ON DISPOSITIVE MOTIONS

Federal courts have confirmed awards and deferred to the arbitrators' decision to render either an award on the merits or a motion to dismiss without holding a full evidentiary hearing. These decisions focus on whether the process in which the arbitrator engaged to reach her determination deprived the parties of a fundamentally fair hearing. The matter at issue must be ripe for summary disposition and the parties must be given the opportunity to submit argument on the issue.

***79** In *Intercarbon Bermuda, Ltd. v. Caltex Trading and Transport Corporation*, the Southern District of New York confirmed an award that arbitrators made without holding in-person evidentiary hearings.[100] In this case, after the parties filed submissions and without holding a hearing, the arbitrator made a preliminary award in favor of Caltraport. The arbitrator then rendered his final award in favor of Caltraport, without holding any in-person hearings. InterCarbon, which had initiated the arbitration, moved to vacate the award on the grounds that the arbitrator was guilty of misconduct under FAA 10(a)(3) because he refused to hear evidence pertinent and material to the dispute. The Southern District of New York determined that InterCarbon had received a fundamentally fair hearing even though it was a "paper hearing."[101] To reach this decision, the Court applied the F.R.C.P. 56 standard (summary judgment) to determine whether the documents-only "hearing" was proper.[102] The Court determined that "the extent to which issues of fact were in dispute" determines whether the arbitrator should hold a live hearing.[103] In this arbitration, the circumstances were such that a summary disposition was fair.[104] Therefore, the arbitrator did not deny the parties a fundamentally fair hearing by considering only document submissions.

In *Warren v. Tacher*, the United States District Court for the Western District of Kentucky similarly refused to vacate an award on the ground that an arbitrator had decided to dismiss the case against certain respondents without permitting discovery.[105] In *Warren*, one of the respondents in an arbitration involving a broker-dealer transaction filed a motion to dismiss all claims against it at the outset of the arbitration. Petitioners filed a written response to this motion and the arbitration panel subsequently granted the respondent's motion to dismiss. After an arbitral award was rendered in petitioner's favor against the remaining respondents, petitioners moved to vacate the award in their favor on the ground that the arbitrator had granted one of the respondents' motion to dismiss prior ***80** to discovery and a full evidentiary hearing. The Court confirmed the award and held that petitioners failed to show that the arbitrator's decision denied them a fundamentally fair hearing.[106] Indeed, the Court noted that the arbitration panel entertained written submissions and a hearing on the motion to dismiss prior to granting the motion.

State courts have also deferred to arbitrators' granting dispositive motions and confirmed awards so long as parties were not denied a fundamentally fair hearing. [107] For instance, in *Pegasus Construction Corp. v. Turner Construction. Co.*, the Court of Appeals of Washington confirmed an arbitral award in which the arbitrator had decided that he could not award either party any damages because they did not comply with their contract. [108] In this arbitration, a subcontractor and a contractor on a construction project had a dispute. The subcontractor filed an arbitration demand under the AAA's Construction Industry Arbitration Rules. The contractor then moved to dismiss the claims against him on the ground that the subcontractor had not complied with the dispute resolution provisions agreed to in the prime contract. After reviewing written submissions and holding oral arguments on the motion to dismiss, the arbitrator held that neither party had complied with the contract provisions. [109] Thus, the arbitrator awarded damages to neither party. The Court confirmed the award and held that a full hearing is not required when a dispositive issue makes it unnecessary. [110]

In *Schlessinger v. Rosenfeld, Meyer & Susman*, the California Court of Appeals confirmed an award even though the arbitrator resolved the principal issues presented to him by summary adjudications motions. [111] In this case, a law firm and a former partner in the law firm resorted to arbitration to determine the amount due to the former partner. [112] The parties agreed to arbitrate pursuant to AAA ***81** rules. [113] First, the parties cross-motioned for summary adjudication on the validity of the partnership agreement's penalty for competition. [114] The parties submitted written documents and the arbitrator held a hearing via telephone conference on the motion. The arbitrator then determined that the agreement was valid but that the reasonableness of the penalty would be examined after taking further evidence. [115] After engaging in discovery on that matter, the former partner filed a motion for summary adjudication contending that the penalty ("tolls") was unreasonable. Both parties submitted written submissions as well as declarations and depositions from relevant persons in the dispute (accountant, current law firm partners, former law firm partner). The arbitrator then conducted a telephone hearing on the motion. The arbitrator then ruled that the penalty was reasonable as a matter of law. [116] The arbitral award was then issued after the parties resolved the remaining issues by stipulation. The Court held that the former partner was not deprived of a fundamentally fair hearing because the arbitrator was allowed to rule on summary adjudication motions even if the AAA rules did not explicitly grant that power to the arbitrator. [117] The Court did, however, caution that its holding "should not be taken as an endorsement of motions for summary judgment or summary adjudication in the arbitration context." [118]

These cases indicate that arbitrators' granting dispositive motions will be upheld when the contract or the parties' agreement grants arbitrators such power and when decisions do not deprive the parties of a fundamentally fair hearing. [119] The permissibility of arbitrators to grant dispositive motions is supported by administrative rules such as ***82** the AAA Commercial Arbitration Rules amended and effective October 1, 2013, R-33. "The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case." [120] An arbitrator's authority to grant summary disposition motions is crucial to promoting the time and cost savings available in the arbitration process.

VI. SANCTIONS UNDER FAA 10 (A)(4)

One way for an arbitrator's ruling on discovery issues to have teeth is for the arbitrator to issue sanctions against a non-compliant party. Courts reviewing awards sanctioning a party for lack of good faith in the conduct of the arbitration or faulty document production have confirmed such awards. [121] The arbitrator must have the authority to award sanctions, be it granted by the parties' arbitration clause, applicable statute, or the parties themselves. Once the arbitrator determines that she has authority to award sanctions, one limit to the arbitrator's power is that the party owing sanctions must be a party to the arbitration agreement.

In *Reliastar Life Insurance Company of New York v. EMC National Life Co.*, the Second Circuit confirmed an award in which the arbitrator awarded attorney fees to the prevailing party. [122] In this case, the sanctioned party argued that the arbitrators had

exceeded their powers and that the award should be vacated pursuant to FAA 10(a)(4). [123] The Court determined that it must evaluate whether the arbitrator had the power to award attorney's fees in the parties' agreement to arbitrate. [124] The Court held that the parties' arbitration agreement, which stated that parties should bear their own arbitration ***83** expenses, was sufficiently broad to confer on arbitrators the power to sanction a party that participates in the arbitration in bad faith. [125]

Similarly, in *Interchem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG*, the Second Circuit confirmed in part an award that sanctioned a party for faulty document production and held that "an arbitrator's determination that a party acted in bad faith is subject to limited review." [126] This case involved a commercial arbitration for a breach of a contract to sell and purchase a petrochemical. The purchaser initiated the arbitration against the seller for breach of contract. [127] The arbitration was to be conducted under the Commercial Arbitration Rules of the AAA. [128] In their initial submissions, both parties requested attorney's fees. During the arbitration proceeding, the arbitrator determined that the purchaser's document production was "patently dilatory and evasive," and at the request of the seller, the arbitrator imposed sanctions on the purchaser and its attorney. [129] The Second Circuit confirmed the award with regards to sanctions imposed on the purchaser on the ground that since the parties had both requested attorney's fees in the initial submissions, the arbitrator was authorized to award attorneys' fees. [130] There was thus no violation of FAA 10 (a)(4). However, the Court found that the arbitrator did not have the authority to award sanctions against the attorney herself because she was not a party to the arbitration agreement. [131]

In *First Preservation Capital, Inc. v. Smith Barney, Harris Upham & Co.*, the United States District Court for the Southern District of Florida confirmed an arbitral panel's decision to dismiss with prejudice a case on the ground that the claimant had sent "egregious" letters to clients concerning the respondent. [132] In that case, the Court ***84** held that the arbitrators had not exceeded their power in dismissing this case with prejudice. [133] Indeed, the Court reasoned that, "if arbitrators are not permitted to impose the ultimate sanction of dismissal on plaintiffs who flagrantly disregard rules and procedures put in place to control discovery, arbitrators will not be able to assert the power necessary to properly adjudicate claims." [134]

These cases show that even when they are confronted with a motion to vacate an award based on sanctions allegedly imposed improperly by arbitrators, courts show deference to arbitrators' decisions.

In *MCR of America, Inc. v. Greene*, the Maryland Court of Special Appeals vacated an arbitral award in which the arbitrator had sanctioned the employee and his counsel to pay the employer's attorney's fees in an arbitration between an employee and an employer. [135] The Court held that the arbitrator had exceeded her authority under Maryland's Uniform Arbitration for two reasons. First, the arbitrator exceeded her authority because the parties' agreement did not expressly enable her to award attorney's fees. [136] The Court disregarded the AAA rules applicable to the arbitration that allowed for attorney's fees, and it looked at the Maryland Arbitration Act, which presumed that parties have not agreed to attorney's fees unless expressly stated in the agreement. Second, the Court held that arbitration was a matter of contract and for this reason, since the employee's attorney was not party to the contract, he could not be sanctioned. [137]

While this Maryland decision vacated the award pursuant to FAA 10(a)(4), it does maintain that arbitrators' authority derives from the parties' agreement, and were the parties' agreement clear on the subject of attorney's fees, the award would have been enforced. Informed arbitrators should not shy away from their authority, if it exists in the case, to issue sanctions against a party who is not complying with the arbitrator's orders or who is flagrantly ***85** participating in bad faith. Arbitration is intended to be a cost effective and efficient process, and when a party to an arbitration abuses the process, that abuse should not be tolerated by the arbitrators.

VII. CONCLUSION

Arbitrators play a critical role in asserting their authority to provide parties with a cost-effective and expeditious arbitration. No informed arbitrator should shy away from that responsibility for fear of jeopardizing the award. Be it through refusing to hear unnecessary evidence, denying unwarranted discovery requests, denying excessive adjournment requests, deciding an issue or disposing of a case based on a dispositive motion, or sanctioning parties for failure to comply with a discovery order or lack of good faith in the arbitration process, arbitrators have the tools to manage the arbitration process. These tools coupled with courts' strong support of arbitrators' discretion in this context provide arbitrators with the means to take an active role in controlling the time and cost of arbitration.

Many arbitrators are already using these tools and successfully managing the arbitration process. [138] For those who have been hesitant, fearing that asserting control will create grounds for vacatur, fear not. Inform yourself of the judicially recognized boundaries outlined in this article and step into your rightful role as time and cost controller.

Footnotes

d1 This article originally appeared in 17 CARDOZO J. OF CONFLICT RESOL. 155 (2015).

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1 The median time frame for a civil case to go to trial in Federal Court is 23.2 months based on U.S. Federal Court statistics for civil cases for the 12-month period ending March 31, 2011; but the median timeframe for an AAA commercial arbitration to be awarded is 7.3 months, based on AAA commercial arbitrations awarded in 2011. Statistics on file with author.

2 9 U.S.C. §10(a)(3). Section 10(a) of the Federal Arbitration Act lists four grounds for vacating an arbitration award:
(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

3 Rosenweig v. Morgan Stanley, 494 F.3d 1328 (11th Cir. 2007).

4 *Id.* at 1334.

5 Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621 (6th Cir. 2002).

6 *Id.* at 625.

7 *Id.*

8 *See* Bain Cotton Co. v. Chestnut Cotton Co., 531 F.App'x 500 (5th Cir. 2013). In this case, the circuit court affirmed the district court's denial of motion to vacate award on ground arbitrators denied discovery requests. The court held that "regardless whether the district court or this court--or both--might disagree with the arbitrators' handling of [Plaintiff's] discovery requests, that handling does not rise to the level required for vacating [award] under any of the FAA's narrow and exclusive grounds." *Id.* at 501. *See also* Prestige Ford v. Ford Dealer Comput. Serv., Inc., 324 F.3d 391 (5th Cir. 2003).

9 *Prestige Ford*, 324 F.3d at 391.

10 *Id.* at 395.

11 *Id.* at 394.

12 *See* LJL 33rd St. Assoc., LLC v. Pitcairn Prop. Inc., 725 F.3d 184 (2d Cir. 2013); *see also* Bangor Gas Co., LLC v. H.Q. Energy Serv. (U.S.) Inc., 695 F.3d 181 (1st Cir. 2012) ("So even if we were to assume [doubtfully] that consideration of these two additional documents was 'misconduct' under the FAA, it could not have been prejudicial, a requirement for vacating an award under §10(a)(3)."); *Rosenweig*, 494 F.3d 1328.

13 *LJL 33rd St. Assoc.*, 725 F.3d at 184.

14 *Id.* at 194.

15 *Id.* at 193.

16 *See* Ardalan v. Macy's Inc., No. 5:09-CV-04894 (JW), 2012 WL 2503972, at *1 (N.D. Cal. Jun. 28, 2012) (determining that even if an arbitrator deliberately excludes evidence because of bias, the plaintiff bears the burden of showing that the exclusion resulted in a fundamentally unfair hearing); A.H. Robins Co., Inc. v. Dalkon Shield, 228 B.R. 587 (Bankr. E.D. Va. 1999); *see also* Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 878 F.Supp. 2d 459 (S.D.N.Y. 2012); Sebbag v. Shearson Lehman Bros., Inc., No. 89-CV-5477 (MJL), 1991 WL 12431 (S.D.N.Y. Jan. 8, 1991) (confirming the arbitral award despite the claimant's argument that they did not get access to files on the grounds that the court must look at the proceedings as whole in determining whether a fair hearing has been given and not look at each evidentiary decision and determine whether the court agrees with them).

17 *A.H. Robins Co., Inc.*, 228 B.R. 587.

18 *Id.* at 592.

19 *Id.*

20 *Id.* at 592-93.

21 *Id.* at 592.

22 *See* Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12-CV-283 (GBD), 2013 WL 789642, at *8 (S.D.N.Y. Mar. 4 2013) (confirming the award and determining that an arbitral panel's decision to deny a party's request for two documents out of sixty does not amount to "misconduct" under the FAA); Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 878 F. Supp. 2d 459 (S.D.N.Y. 2012) (confirming the arbitral award and held that arbitrators are afforded great deference and thus hearing only one witness when the issue was one of contractual interpretation did not make the hearing fundamentally unfair); AT&T Corp v. Tyco, 255 F. Supp. 2d 294 (S.D.N.Y. 2003) (confirming the award on the ground that the arbitration did entail a discovery process including depositions and documents exchange as well as briefing of the issues and evidentiary hearings).

23 *See* Robert Lewis v. William Webb, 473 F.3d 498 (2d Cir. 2007) (confirming the award although the arbitrators had restricted discovery because it did not deprive the claimant of a fundamentally fair arbitration process); Areca, Inc. v. Oppenheimer and Palli Hulton Assoc., 960 F.Supp. 52 (S.D.N.Y. 1997) (confirming the award despite the fact that arbitrators refused to allow investors to present testimony of the brokerage's firm CFO).

24 *Areca, Inc.*, 960 F.Supp. 52.

25 *Id.* at 55.

26 *Id.*

27 *Id.*

28 *See* American State Univ. v. Kiemm, No. B242766, 2013 WL 1793931, at *1 (Cal. Ct. App. Apr. 29, 2013) (confirming award and determining that courts "should focus on whether the exclusion was prejudicial, not whether the evidence was material"); Hicks III v. UBS Fin. Serv., Inc., 226 P.3d 762 (Utah Ct. App. 2010); Carson v. Painewebber, Inc., 62 P.3d 996 (Colo. App. 2002) (confirming the arbitral award because the NASD rules, which the arbitration followed, allowed for the arbitrator's conduct but held that "parties

to an arbitration proceeding have an absolute right to be heard and present evidence before the arbitrators, and that a refusal ... is such misconduct as affords a sufficient ground for setting aside the award").

29 *Hicks III*, 226 P.3d at 762.

30 *Id.* at 770.

31 *Id.* at 772.

32 *Id.* at 771.

33 *Id.* at 772.

34 *Id.* at 762.

35 *See* Int'l Union, United Mine Workers of America v. Marrowbone Dev. Co., 232 F.3d 383 (4th Cir. 2000); Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir. 1997); *see also* Teamsters v. E.D. Clapp Co., 551 F.Supp. 570 (N.D.N.Y. 1982); Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO, 263 F.Supp. 488 (C.D. Cal 1967).

36 *Int'l Union, United Mine Workers of America*, 232 F.3d at 383.

37 *Id.* at 389.

38 *Id.* at 388

39 *Id.* at 390. As seen through this case, oftentimes parties will move to vacate based on both 10(a)(3) and 10(a)(4) (FAA 10(a)(4): "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.") grounds arguing that the arbitrator's alleged misdeed under 10(a)(3) resulted in the arbitrator exceeding her powers under 10(a)(4).

40 *Tempo Shain Corp.*, 120 F.3d 16.

41 *Id.* at 17.

42 *Id.* at 18.

43 *Id.*

44 *Id.* at 20.

45 *Tempo Shain Corp.*, 120 F.3d at 21.

46 *See* Teamsters v. E.D. Clapp Co., 551 F. Supp. 570 (N.D.N.Y. 1982); Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO, 263 F. Supp. 488 (C.D. Cal 1967).

47 *Harvey Aluminum (Inc.)*, 263 F. Supp. at 488.

48 *Id.* at 490.

49 *Id.* at 491.

50 *Id.* at 492.

51 *Id.* at 490.

52 *See* Boston Public Health Commission v. Boston Emergency Medical Services-Boston Police Patrolmen's Ass'n, IUPA No. 16807, AFL-CIO, 85 Mass.App.Ct. 1126 (2014); Manchester Twp. Bd. of Educ. v. Carney, Inc., 199 N.J. Super. 266 (1985).

53 *Boston Public Health Comm'n*, 85 Mass. App. Ct. 1126.

54 Rule 31 AAA Labor Arbitration Rules as amended and effective July 1, 2005: "[i]f briefs ... are to be filed ... the hearings shall be declared closed as of the final date set by the arbitrator for filing with the AAA." Id. at *2.

55 Boston Public Health Comm'n v. Boston Emergency Med. Serv.-Boston Police Patrolmen's Ass'n, IUPA No. 16807, AFL-CIO, 85 Mass.App.Ct. 1126, at *2 (2014).

56 *Id.*

57 *See* Alexander Julian Inc. v. Mimco, Inc., 29 F.App'x. 700 (2d Cir. 2002); Metallgesellschaft A.G. v. M/V Captain Constante, 790 F.2d 280 (2d Cir. 1986); In re Time Constr., Inc., 43 F.3d 1041 (6th Cir. 1995); Sunrise Trust v. Morgan Stanley & Co., No. 2:12-CV-944 JCM (PAL), 2012 WL 4963766 (D. Nev. Oct. 16, 2012); HBK Sorce Fin. v. Ameriprise Fin. Serv., No. 4:10-CV-02284 (BYP), 2012 WL 4505993 (N.D. Ohio Sept. 28, 2012); Dealer Comput. Serv. Inc. v. Dale Spradley Motors, Inc., No. 11-CV-11853 (JAC), 2012 WL 72284 (E.D. Mich. Jan. 10, 2012); Verve Commc'n Pvt. Ltd v. Software Int'l, Inc., No. 11-1280 (FLW), 2011 WL 5508636 (D.N.J. Nov. 9, 2011).

58 *See Alexander Julian Inc.*, 29 F.App'x. 700; Berlacher v. Painewebber, 759 F. Supp. 21 (D.D.C. 1991).

59 *Alexander Julian Inc. v. Mimco, Inc.*, 29 F. App'x. at 703.

60 *Id.*

61 *Id.*

62 *See* Bisnoff v. King, 154 F. Supp. 2d 630 (S.D.N.Y. 2001); Gordon Capital Corp. v. Jesup, No. 91-CV-3821 (MBM) 1992 WL 41722 (S.D.N.Y. Feb. 20, 1992).

63 *Bisnoff v. King*, 154 F. Supp. 2d at 630.

64 *Id.* at 634.

65 *Id.* at 638.

66 *Id.* at 635.

67 *Bisnoff*, 154 F. Supp. 2d 630.

68 *Id.* at 637.

69 *See* In re Time Constr., Inc., 43 F.3d 1041 (6th Cir. 1995).

70 *Id.* at 1041.

71 *Id.* at 1044.

72 *Id.* at 1045.

73 *Id.*

74 *In re Time Constr., Inc.*, 43 F.3d at 1045.

75 *See* HBK Sorce Fin. v. Ameriprise Fin. Serv., No. 4:10-CV-02284 (BYP), 2012 WL 4505993 (N.D. Ohio, Sept. 28, 2012). *See also* Gwire v. Roulac Grp., 2008 WL 3907403 (Cal. Sup. Ct. 2008) (confirming an award despite the arbitrator having refused to grant a party's request for a "sur-reply brief").

76 *See Alexander Julian Inc.*, 29 Fed.Appx. 700; *Dealer Comput. Serv. Inc.*, 2012 WL 72284; Roche v. Local 32B-32J, 755 F. Supp. 622 (S.D.N.Y. 1991).

77 *Dealer Comput. Services Inc.*, 2012 WL 72284 (confirming the award and holding that the arbitrator acted within the authority granted to him by the AAA rules when he did not grant the party's request for continuance).

78 Verve Commc'n Pvt. Ltd v. Software Int'l, Inc., No. 11-1280 (FLW), 2011 WL 5508636 (D.N.J. Nov. 9, 2011).

79 *Id.* at *1.

80 *Id* at *1, *7 (citations omitted).

81 *Id.* at *7.

82 *Id.*

83 *See* Wedbush Morgan Sec., Inc. v. Brandman, 192 A.D.2d 497 (1st Dep't 1993); Pacilli v. Philips Appel & Walden, Inc., 1991 WL 193507 (E.D. Pa. Sept. 24, 1991); Leblon Consultants, Ltd. v. Jackson China, Inc., 92 A.D.2d 499 (1st Dep't 1983).

84 *See Wedbush Morgan Securities, Inc.*, 192 A.D.2d 497; *Leblon Consultants, Ltd.*, 92 A.D.2d 499.

85 *Wedbush Morgan Securities, Inc.* 192 A.D.2d 497.

86 *Id.* at 497 (citations omitted).

87 *Id.*

88 *Leblon Consultants, Ltd.*, 92 A.D.2d 499.

89 *Id.* at 499.

90 *Id.*

91 *Id.*

92 *Pacilli*, 1991 WL 193507.

93 *Id.* at *1.

94 *Id.*

95 *Id.* at *2.

96 *Id.*

97 *Id.* at *3.

98 *Pacilli*, 1991 WL 193507 at *3.

99 *Id.* at *6.

100 Intercarbon Bermuda, Ltd. v. Caltex Trading and Transp. Corp., 146 F.R.D. 64 (S.D.N.Y. 1993).

101 *Id.* at 72.

102 *Id.*

103 *Id.*

104 *Id.*

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

106 *Id.* at 602.

107 *See* Altreus Cmty. Grp. of Arizona v. Stardust Dev., Inc., 229 Ariz. 503 (Ct. App. 2012) (confirming the award and holding that arbitrators have an implicit power to award summary judgment based on Rule 45 of the AAA Rules); Pegasus Const. Corp. v. Turner Constr. Co., 84 Wash.App. 744 (Ct. App. 1997); Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal.App.4th 1096 (App. Ct. 1995).

108 *Pegasus Const. Corp.*, 84 Wash. App. 744.

109 *Id.* at 747.

110 *Id.* at 750.

111 *Schlessinger*, 40 Cal. App. 4th 1096.

112 *Id.* at 1100-01.

113 *Id.*

114 *Id.* at 1101.

115 *Id.* at 1101-02.

116 *Id.* at 1103.

117 *Schlessinger*, 40 Cal. App. 4th 1096 at 1111. New AAA rules do expressly allow for dispositive motions.

118 *Id.*

119 However, despite this deferential review of arbitrators' summary adjudications, at least one state court has vacated an arbitration award when an arbitrator granted a motion to dismiss based on a statute of limitations defense. In *Andrew v. Cuna Brokerage Services, Inc.*, the court vacated a National Association of Securities Dealers arbitration award on the ground that the arbitrator should not have dismissed a valid claim on the basis of a statute of limitations as it denied the parties a full and fair hearing. *See* Andrew v. Cuna Brokerage Serv., Inc., 976 A.2d 496 (Pa. Super. Ct. 2009).

120 *See also* JAMS Arbitration Rules, effective July 1, 2014, Rule 18. Summary Disposition of a Claim or Issue: "[t]he Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request."

121 *See* Reliastar Life Ins. Co. v. EMC National Life Co., 564 F.3d 81 (2d Cir. 2009); Interchem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG, 373 F. Supp. 2d 340 (2d Cir. 2005).

122 *Reliastar Life Ins. Co.*, 564 F.3d 81.

123 *Id.* at 85.

124 *Id.*

125 *Id.* at 86.

126 *Interchem Asia 2000 Pte. Ltd.*, 373 F.Supp.2d at 355.

127 *Id.* at 343.

128 *Id.*

129 *Id.* at 344.

130 *Id.* at 354.

131 *Id.* at 359; *see also* Seagate Tech., LLC v. Western Dig. Corp., No. A12-1944, 2014 WL 5012807 (Minn. Sup. Ct. Oct. 8, 2014) (confirming an award and holding that the arbitrator did not exceed his authority by imposing punitive sanctions after the arbitrator determined a party fabricated evidence because sanctions were authorized by the AAA Employment rule).

132 First Preservation Capital, Inc. v. Smith Barney, Harris Upham & Co., 939 F. Supp. 1559 (S.D. Fla. 1996); *see also* Prime Associates Group, LLC. v. Nama Holdings, LLC., 2012 WL 2309055 (Cal. Ct. App. June 19, 2012) (confirming an arbitral award which sanctioned a party for discovery misconduct and holding that arbitrators did not exceed their powers in sanctioning that party).

133 *First Preservation Capital, Inc.*, 939 F. Supp. at 1566-67.

134 *Id.* at 1565.

135 MCR of America, Inc. v. Greene, 148 Md. App. 91 (Md. Ct. Spec. App. 2002).

136 *Id.* at 103.

137 *Id.* at 111.

138 The AAA looked at 4,400 cases administered by the AA concluded in 2009 through 2011, across five important U.S. business sectors and found that some large complex cases (exceeded $500,000 in claims) were awarded in five months of less. On file with author.

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"*Cat Charter* is demonstrably not up to the task required of arbitrators across the country."

"*Will the Second Circuit use* Smarter Tools *to toss* Cat Charter *overboard and float a more supportable doctrine?* Another inadequately reasoned award has just been vacated in the Southern District. Time will tell whether it is fixed on remand, settled, or ends up appealed for its defective form."

THE SECOND CIRCUIT NEEDS TO BREAK PRECEDENT TO PROTECT REASONED ARBITRATION AWARDS

By John Burritt McArthur and Allison Snyder

Reasoned awards, which explain how the arbitrators arrived at the outcome, are the bedrock of modern arbitration. They are *de rigeure* in international arbitration. Domestically, CPR and JAMS make reasoned awards their default form.[1] Most arbitrators operating under AAA rules in domestic commercial arbitrations of any significant size write reasoned awards, even though the AAA's commercial rules make a standard award their default.[2]

Reasoned awards are important to arbitration's legitimacy. They let parties see *why* they won or lost. Studies of satisfaction with civil litigation have found that being heard increases user satisfaction.[3] What better way to know you have been heard than to read an award that shows the arbitrators understood your position, even if they did not accept it?

Although reasoned awards dominate commercial arbitration today, neither our courts nor domestic rules have developed an effective test to evaluate whether an award is "reasoned." The Second Circuit was an early adopter of the majority "*Cat Charter"*

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[1] CPR Admin. Arb. Rule 15.2; CPR Non-Admin. Arb. Rule 15.2; JAMS Comprehensive Arb. Rule 24-h.

[2] AAA Comm. Arb. Rule R-46(b). A number of specialized AAA rules make reasoned awards their default. *E.g.,* AAA Constr. Arb. Rule 47(b)(providing for list award, but in Rule L-5, making reasoned awards the default for cases with claims of a million dollars and up).

[3] Deborah Hensler, *The Findings of Procedural Justice Research*, in AAA, HANDBOOK ON COMMERCIAL ARBITRATION 41, 43 (Thomas Carbonneau et al. eds.; 1st ed. 2006)(studies of procedural justice "consistently found that the degree of satisfaction with the legal process is a function of an individual's perception of the fairness of both the process and the outcome.").

test, which it borrowed from the Eleventh Circuit. The test is a failure. Too often, it guarantees parties will not get the reasoned award they deserve.

This article describes 2011's *Cat Charter L.LC. v. Schurtenberger*[4] award and opinion, the Fifth Circuit's 2012 acceptance of that test, and the Second Circuit's mistaken decision to join the group. It rests in part on research underlying one of the author's forthcoming *The Reasoned Arbitration Award in the United States.*[5]

I. The *Cat Charter* Test: The Eleventh Circuit Veers Off Course, the Fifth Circuit Tacks Over and Joins It.

Cat Charter emerged from the decision by a Massachusetts couple, the Ryans, to retire to Florida and build a catamaran, *The Magic*. Their ship builder, Walter Schurtenberger, allegedly befriended them, promised to build the boat for no more than $1.2 million, but exploited their trust and vastly overran that price. He did not finish the boat.

The dispute went to arbitration. Both parties asked for a reasoned award.[6] The Ryans claimed an elaborate fraud. The arbitrators found for them on two claims, but not on fraud. The award essentially gave them their $2 million back.

The award is two and a half pages long. It contains *no* discussion of the facts, the law, the denied fraud claim, the counterclaims, or the affirmative defenses. It just says the Ryans "have proven their [two winning] claim[s] against Respondents . . . by the greater weight of the evidence."[7] This after a five-day hearing. A Miami federal judge vacated because the award did not "offer[] any reasons for the result." It "merely announced winners and losers."[8]

The Eleventh Circuit, which should have readily affirmed, reversed. It found the award reasoned. It did agree that *if* the arbitrators did not issue a reasoned award, they would exceed their powers.[9] It also embarked on a praiseworthy quest to develop an operational definition of "reasoned."

Unfortunately, this quest made things worse. The court first drew on other cases to announce that a reasoned award is "something short of findings and conclusions but more than a simple result."[10] Almost any award, including *Cat Charter*'s, satisfies that test. The test is vacuous because it gives no indication of what "more" is required to be reasoned. Does adding a handful of words to a standard award transform it into a

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[4] 646 F.3d 836 (11th Cir. 2011).

[5] Mr. McArthur's book, scheduled for publication in the fall, will be available at https://arbitrationlaw.com/books/reasoned-arbitration-award-united-states-its-preparation-virtues-judicial-erosion-and.

[6] *Cat Charter*, 646 F.3d at 839.

[7] *Id.* at 840-41.

[8] Cat Charter L.LC. v. Schurtenberger, 691 F.Supp.2d 1339, 1344 (S.D. Fla. 2010), *rev'd and award confirmed*, 646 F.3d 836 (11th Cir. 2011). The court added that even were it to concede [and it did not] that announcing that a party prevailed by the "greater weight of the evidence" is a "reason," the award still would not be reasoned because "the Panel's denial of all other claims was simply announced as a bare result"; it "merely announced the winners and losers." *Id.*

[9] *Cat Charter*, 646 F.3d at 843 (following W. Employers Inc. v. Jefferies & Co., 958 F.2d 258, 260 (9th Cir. 1992)).

[10] *Id.* at 844.

reasoned one? Even the Eleventh Circuit acknowledged that its "something more" standard was not enough.[11]

The court drew its second test from the dictionary:

> [A] 'reasoned' award [is] an award that is provided with or marked by the detailed listing *or mention of* expressions or statements offered as a justification of an act – the "act" here being, of course, the decision of the Panel.[12]

To illustrate this test's inadequacy, consider the panel's "reason" that the Ryans won by the weight of the evidence. This is a "justification." But so what? The winner prevails by evidentiary weight *in every single arbitration*.

The Eleventh Circuit offered a third reason for confirmation. It declared the arbitrators' greater-weight finding "to mean that, in the swearing match between the Plaintiffs and the Defendants, the Panel found the Plaintiffs' witnesses to be more credible."[13] But only a mind reader could know such a thing. The award does not discuss witnesses or evidence. It does not mention "credible," "credibility," or any similar concept.

The award's failure to address the denied claims was not harmless. Maybe the arbitrators thought they were splitting the baby. But Schurtenberger went into bankruptcy. Lacking a fraud finding, the bankruptcy court discharged the judgment debt.[14] The Ryans recovered nothing.

The Fifth Circuit's *Rain CII Carbon.* The Fifth Circuit followed *Cat Charter* in *Rain CII Carbon, LLC v. ConocoPhillips*.[15] Predictably, it confirmed an unreasoned award.

The question was what price for green anode coke best fit market prices. The arbitrator found for the Buyer, Rain CII Carbon. But all he said was that "[b]ased upon the testimony, exhibits, arguments, and submissions presented to me in this matter," the existing price formula "shall remain in effect."[16]

The *Rain* award was unreasoned in a not uncommon way: It listed each side's contentions and then announced who won. The trial court confirmed because the award had "three and a half pages of background and discussion" followed by a "one sentence conclusion."[17] The court surmised "*one could certainly distill some level of reasoning* between the elements of the parties' proposed formulas discussed in the Award and the arbitrator's brief ruling."[18]

Affirming, the Fifth Circuit pointed to the same contentions-and-outcome sequence. It complained that ConocoPhillips "ignore[d] that the [award's] previous

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[11] *Id.* (calling its spectrum analysis "still insufficient to fully evaluate" award).
[12] *Id.* at 844 (emphasis in original). For the source of these definitions, see WEBSTER'S THIRD INT'L DICTIONARY: UNABRIDGED 1891-92 (1993).
[13] *Cat Charter*, 646 F.3d at 844-45.
[14] In re Schurtenberger, 2014 WL 92828 (S.D. Fla. 2014).
[15] 674 F.3d 469 (5th Cir. 2012).
[16] *Id.* at 471.
[17] *Rain*, 2011 WL 3565345, at *6 (E.D. La. 2011). The *Rain* arbitration was a baseball arbitration, but because the parties required a reasoned award, *id.* at ** 1, 4, just announcing which proposal won did not satisfy the reasoned requirement.
[18] *Id*. (emphasis added).

paragraph thoroughly delineates Rain's contention that Conoco had failed to show that the initial formula failed to yield a market price, ..."[19] The arbitrator "obviously accepted" Rain's contentions.[20]

These arguments have many problems. Most basic is that the arbitrator did not say anything about *why* he found Rain's contentions persuasive. Another problem is that he did not draft the contentions. He took his award almost *verbatim* from ConocoPhillips' draft (the losing party's!).[21] Even worse, the court's idea that the award gives the arbitrator's reasons is comical because the draft the arbitrator appropriated had reasons, but the arbitrator deleted them.[22]

To see that the *Rain* award is not reasoned, read it while asking: "What does this award tell us the arbitrator thought about specific disputed facts?"

II. The Second Circuit Boards the *Cat Charter* Catamaran.

The Second Circuit has adopted the *Cat Charter* standard uncritically. Predictably, it has confirmed unreasoned awards as reasoned.

Leeward Construction. The award-form question reached the Second Circuit in *Leeward Construction Co. v. American University of Antigua – College of Medicine.*[23] Antiguan law applied. The arbitrators wrote an award that has no meaningful fact section, no "rationale," but nonetheless minutely divided the arbitration into 68 "Controvers[ies]" that it answers with 68 "Panel's Decision[s]." All this without the award's saying a thing about what the arbitrators thought about specific evidence or analyzing legal arguments. The circuit and trial courts did not question that a failure to provide reasons would require vacatur.[24] They nonetheless confirmed under the *Cat Charter* standard. Satisfying that test should be no surprise. The award is, after all, 33 pages long. Clearly 33 pages, whatever their content, offer "something more" than a standard award.[25]

The *Leeward* award has substantive problems. Lacking reasons, its authors had no opportunity to benefit from the clearer thinking that sometimes comes with writing out a rationale. One problem concerns work the College contracted to Leeward. It later canceled the contract and rebid the same work under new "Separate Contracts." Leeward won some of the re-bid work, but at lower prices.

The arbitrators repeatedly held they lacked jurisdiction over Separate Contracts.[26] Yet they nonetheless awarded Leeward damages for the rebid work, using a "bad faith" theory Leeward never pled.[27] The trial court found this part of the award "questionable" and admitted that it "leaves much to be desired."[28] Yet it brushed past the problem of arbitrators injecting a liability theory by speculating on how the record might support bad

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[19] *Id.*
[20] *Id.*
[21] Taken from McArthur's forthcoming book, Chapter Five, Section B.
[22] *Id.*
[23] 826 F.3d 634 (2d Cir. 2016).
[24] *E.g., id.* at 638-40.
[25] *Id.* (citing, among other cases, *Rain* and *Cat Charter*).
[26] For the arbitrators' conclusion that the Separate Contracts lay outside their jurisdiction, see McArthur, Chapter Five, Section C.
[27] *Id.*
[28] *Leeward*, 2013 WL 1245549, at *4 n.30 (S.D.N.Y. 2013), *aff'd*, 826 F.3d 634 (2nd Cir. 2016)

faith.[29] Surely arbitrators cannot put their fingers on the scale by imposing their own theories, any more than reviewing courts ought to supply absent reasons.

The trial court speculated that bad faith might be based on "general principles of contract law" [perhaps New York principles?].[30] It noted "no party has argued that Antiguan contract law deviates from these principles."[31] But why should they? Leeward presumably enjoyed the arbitrators' *deus ex machina* construction of a bad-faith theory. And the College had no warning the arbitrators would gift Leeward.

The Second Circuit, like the trial court, blessed the award under *Rain* and *Cat Charter*.

Equally troubling was the award's unreasoned treatment of arguments over missed deadlines. The contract contained notice and other documentation requirements. Yet the arbitrators swept these aside. For example, they neutered a change order requirement by holding that "from the evidence considered by the panel it appears that both parties waived this requirement."[32] This conclusion is the entire detail on point. The panel rewrote the contract by treating contract requirements as ineffective.

Tully Construction 1. Another construction case soon presented the same question about what "reasoned" means. At issue was the alleged failure of Canam Steel, successor to the project's first steel fabricator, to timely supply steel to a construction company, Tully, which held a contract to renovate the Whitestone Bridge. The arbitration took 17 days and involved 800 exhibits.[33] The agreement, a scheduling order, and AAA rules required a reasoned award.[34]

Tully pled nine claims, Canam seven. Damages ran into the millions. Yet all the arbitrator wrote was a list award. It had one line with an amount per claim, nine of them showing "0.00." After getting the award, Canam asked the arbitrator for the reasons. He refused, claiming everybody knows a reasoned award is anything between a standard award and findings and conclusions.[35]

A Southern District court vacated because the award contained "no explanation whatsoever for the arbitrator's rulings."[36] It was not possible "to determine the reason or rationale for the arbitrator's liability and damages determinations."[37] The award did not "set forth the relevant facts, explain the nature of the claims, or offer any reason or rationale for his determinations as to liability and damages."[38] The court remanded for clarification.[39]

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[29] *Id.* at **4-5.
[30] *Id.* at *4.
[31] *Id.* at *4 n.31.
[32] *See* McArthur, Chapter Five, Section D.
[33] *Tully*, 2015 WL 906128, at *2.
[34] *Id.* at *12.
[35] For the arbitrator's dismissive refusal to provide reasons, see McArthur's forthcoming book, Chapter Five, Section D.
[36] Tully Construction Co. v. Canam Steel Corp., 2015 WL 906128, at *15 (S.D.N.Y. 2015), *revised award confirmed*, 2016 WL 8943164 (2016), *aff'd*, 684 Fed. Appx. 24 (2d Cir. 2017)(not for publication); *see also id.* at *17 (same).
[37] *Id.* at *15.
[38] *Id.*
[39] *Id.* at ** 19-20.

Tully Construction 2. The arbitrator replaced his two-page award with an eleven-page award. This was "something more" than the original standard award.[40] But the new award stubbornly did not explain the arbitrator's thinking. What did the arbitrator do? He added a brief introductory discussion, wrote a boilerplate listing of questions he claimed were relevant to each claim,[41] included for each a paragraph on each side's contentions with cites by exhibit number or transcript pages, and announced each outcome. He told the reader clearly who won. But he said nothing about why.

This is the second award's entire discussion of the Tully's first claim:

> **Contract Overpayment**
>
> A review of the relevant, related, or both, information below, justifies the following resolution of this portion of the award sought by Claimant.
>
> Claimant asserted a "Contract Overpayment" claim against Respondent of $4,194,471.00. *See,* **C-478** (formerly **C-459**), Rows 2-11, (also **C-447**, page 16, Ex. 8f), **McPartland Tr. 107-208.**
>
> Respondent opposed the $4,194,471.00 "Contract Overpayment" claim asserting, in essence, that Claimant's calculations were based on unsupported assumptions. *See,* **R-19K** at **CAN 16606, 16627**, and **19947; C-139; C-195; Mazza Tr. 438.**
>
> **Contract Overpayment Conclusion**
>
> Not having established by a preponderance of testimonial or of documentary evidence its entitlement to the $4,194,471.00 "Contract Overpayment" claim from Respondent, it is denied and Claimant awarded:
>
> $ 0.00[42]

Why does this arbitrator think Canam should not recover here? The award does not say. Canam alleged the arbitrator took the record cites from Tully's proposed award, not his own work.[43] Whether he did or not, he certainly does not explain his thinking about the evidence. This time the trial court confirmed. Perhaps it was too much to ask for a second vacatur, given an award "something more" than the first award. The Second Circuit affirmed, citing *Leeward* in less than half a page of text.[44] All this is a predictable result of *Cat Charter*'s shortcomings.

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[40] Because the initial list award did break out damages by claim, a *Cat Charter* fan might argue that it was "something more" than a pure standard award (because it did not just award a single lump sum). That one can make this argument is another sign of *Cat Charter*'s inadequacy.

[41] The arbitrator claimed these opaque questions should determine each claim: "The necessary determination is whether the Claimant's alleged damages are a result of non-concurrency, were not foreseeable, were not anticipated, are excusable, and are compensable."

[42] McArthur, Chapter Five, Section D.

[43] For Canam illustrating the arbitrator's pulling his record cites from Tully's brief, see *id*.

[44] *Tully*, 684 Fed. Appx. at 28.

Will the Second Circuit use* Smarter Tools *to toss* Cat Charter *overboard and float a more supportable doctrine? Another inadequately reasoned award has just been vacated in the Southern District.[45] Time will tell whether it is fixed on remand, settled, or appealed. If the award reaches the Second Circuit, it should seize the chance to fix the law. It is always hard to admit error, doing so within a system of precedent is even harder, but the court should abandon its current test. *Cat Charter* is demonstrably not up to the task of making sure reasoned awards have true reasons.

III. A Short Primer on Forms of Unreasoned Awards.

Parties, lawyers, judges, and arbitral providers trying to spot unreasoned awards masquerading as reasoned should be on the lookout for these characteristic unreasoned awards:

1. Announcement awards. Awards that merely announce outcomes, which is most of what the *Cat Charter* and *Tully 1* awards do.

2. Attestation awards. Awards in which the arbitrators, like *Rain's* arbitrator, attest that they have reviewed all the proper material and considered it, but then merely announce the outcome without explaining their reasons.

3. Burden of proof and credibility awards. Awards that announce that one party met or did not meet its burden, as the *Cat Charter* and *Tully 2* awards announce, or that its evidence or witnesses were more "credible," one of the Eleventh Circuit's three theories on why it should confirm the *Cat Charter* award.

4. Contention and issue-listing awards. Awards that list the parties' contentions, as in the *Rain* and *Tully 2* awards, and then announce an outcome without saying why.

5. Evidentiary list awards. Awards like the second *Tully* award that insert evidentiary cites without discussing what the evidence means.

6. Volumetric awards. Awards whose apparent virtue is that they are long, but that contain no reasons.

IV. A Standard that Would Thwart Unreasoned Awards.

A definition of "reasoned" that would effectively police awards is the following:

> A reasoned award explains who won by stating clearly its reasoning on all necessary dispositive issues: It explains the resolution of disputed gateway and threshold issues necessary to decide the arbitration, including but not limited to disputes over party and claim jurisdiction, adherence to the rule of law, choice of law, and burden of proof; explains the arbitrators' resolution of the issues and arguments of law and of fact that the parties raise on each dispositive claim, counterclaim, and defense; and explains as well the determination of each remedy, including any computations. A reasoned award also explains the disposition of each rejected claim, counterclaim, defense, and remedy that, if

[45] Smarter Tools Inc. v. Chongqing Senci Import & Export Trading Co., Ltd., 2019 WL 1349527 (S.D.N.Y. Mar. 26, 2019).

> granted, would have altered all or part of the outcome. A reasoned award may but is not required to address cumulative alternative claims and defenses.

The test might also specifically reject *Cat Charter*-type approaches and the main forms of unreasoned awards:

> Awards that merely announce winners, that merely attest that the arbitrators reviewed the facts and arguments, that only proclaim who prevailed by the weight of the evidence or whose case was more credible, or that list the parties' contentions and then announce a winner are not reasoned. Awards also are not reasoned just because they are very long and describe a lot of facts, or because they list exhibit numbers or transcript pages or portions of pleadings without explanation.[46]

The Second Circuit can protect the efficiency of arbitration and party expectations about that often favored form of dispute resolution if it throws *Cat Charter* overboard and adopts any reasonable version of this standard.

V. Meaningful Review for Reasons Would Not Sink New York as a leading Arbitration Venue.

If the Second Circuit begins to take reasons seriously as we suggest, would it hurt New York's position as a world center of arbitration? The answer is an unequivocal no.

Reasoned awards are the *sine qua non* of international arbitration, so making awards contain real reasons should not deter those arbitrations. Indeed, none of the awards described here -- *Cat Charter*, *Rain*, *Tully 1 or 2*, *Leeward,* or *Smarter Tools* – would be likely to secure confirmation under the New York Convention in any even half-way skeptical foreign court. Jettisoning *Cat Charter* therefore should strengthen New York's as a leading international arbitration venue.

Domestically, perpetuation of the *Cat Charter* standard jeopardizes arbitration's legitimacy. We propose to remove that flaw in arbitration by having courts make sure that awards contain reasons when they are required. Our recommendations should ensure parties get what they ask for.

New York will benefit if it leads the way in making arbitration more responsive to its users in this way. Given the Second Circuit's prominence, if it revises its test along the lines we suggest, it will persuade other jurisdictions to fix their standard, too, reducing the gap between New York as a first mover and jurisdictions still trying to stay afloat on a leaky *Cat Charter* raft.

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[46] These definitions are taken from Chapter Two in McArthur's forthcoming book.