

## **The Muscular Arbitrator and Vacatur**

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### **What the Muscular Arbitrator Does**

- **Controlling discovery:** The Muscular Arbitrator controls discovery to assure that each side gets the discovery it reasonably needs to prosecute or defend its case, without imposing the costs and delays of unnecessary discovery.
- **Limiting motion practice:** The Muscular Arbitrator does not permit parties to make substantive motions unless the motions appear likely to foster the economical, expeditious, and fair administration of the case, but is not afraid to grant meritorious substantive motions when that appears likely to foster those objectives.
- **Conducting an expeditious hearing:** The Muscular Arbitrator conducts a hearing that avoids duplicative, cumulative, and irrelevant testimony, while according each party a reasonable opportunity to prosecute or defend the case.

### **Applicable Canons, Rules, and Law**

- **Canon 1.F of the Code of Ethics for Arbitrators in Commercial Disputes:** “An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.”
- **Canon IV:** Arbitrators are required to “conduct the proceedings fairly and diligently” (Canon IV), “conduct the proceedings in an even-handed manner” (Canon IV.A), “afford all parties the right to be heard” (Canon IV.B), and “allow each party a fair opportunity to present its evidence and arguments” (Canon IV.B).
- **Rule L-4(a) of the AAA’s Commercial Arbitration Rules:** “Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases.”
- **Rule L-4(b):** “Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be *consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.*” (emphasis added).
- **Federal Arbitration Act §10(a)(3):** Grounds for vacatur under the FAA include, the situations “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...”
- **Requirement of a fundamentally fair process:** By case law, parties in arbitrations are entitled to a fundamentally fair proceeding.

### **No Jeopardy to the Muscular Arbitrator**

- **Role of muscularity:** The Muscular Arbitrator, in reasonably controlling discovery, limiting motion practice, and conducting an expeditious hearing does not run a significant risk of vacatur either under the FAA or the requirement of a fundamentally fair proceeding. Arbitrators have substantial discretion. Courts understand that arbitration is supposed to be faster and more economical than litigation.

- The greater risk: The alternative – extended, expensive, litigation-like arbitrations – pose a far greater risk to the effectiveness of arbitration.