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After the Arbitration Award: Not Always Final and Binding

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AFTER THE ARBITRATION AWARD: NOT ALWAYS FINAL AND BINDING

JAY E. GRENI^{*}

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I. INTRODUCTION

In 1999, fifty-seven of sixty-eight Major League Baseball umpires resigned in protest of the policies the Commissioner of Baseball sought to implement.¹ Although the resigning umpires later attempted to rescind their letters of resignation, the League refused to reinstate twenty-two of the umpires.² The twenty-two umpires filed grievances that were submitted to arbitration for resolution.³ The arbitrator ordered the reinstatement of nine of the twenty-two umpires.⁴

In 1998, the National Basketball Association (NBA) locked out its players during the negotiations of a new collective bargaining agreement.⁵ The National Basketball Players Association filed a grievance claiming that the NBA violated the contracts of more than 200 players whose contracts were fully guaranteed for the 1998–1999 season.⁶ The arbitrator ruled that the NBA was not obligated to make salary payments during a lawful lockout.⁷

An arbitrator ruled in 2014 that the New Orleans Saints' Jimmy Graham was a tight end and not a wide receiver.⁸ Graham filed a grievance alleging that he deserved to be designated as a wide receiver under the franchise tag because he spent more time out wide and in the slot than at the line of scrimmage.⁹

Professional sports leagues are not the only sports organizations using arbitration to resolve disputes. The Bylaws of the United States Olympic Committee provides for arbitration of two general types of disputes: (1) eligibility of an

¹ See *Major League Umpires Ass'n v. The Am. League of Prof. Baseball Clubs*, 357 F.3d 272, 278 (3d Cir. 2004).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *National Basketball Players Association Grievance Denied, Player's Do Not Need to Be Paid During a Lawful Lockout*, YOU MAKE THE CALL (Nat'l Sports Law Inst., Milwaukee, Wis.), Spring 1999, at 1, available at <https://law.marquette.edu/assets/sports-law/pdf/recent-developments/rdislv01n04.pdf>.

⁶ *Id.*

⁷ *Id.*

⁸ Chris Wesseling, *Jimmy Graham Deemed Tight End in System Arbitration*, NFL, <http://www.nfl.com/news/story/0ap2000000363018/article/jimmy-graham-deemed-tight-end-in-system-arbitration> (last updated July 4, 2014).

⁹ *Id.*

athlete to compete¹⁰ and (2) the right of an organization to be declared the National Governing Body for a particular sport.¹¹ The athlete doping decisions involving the International Olympic Committee are resolved through arbitration.¹²

In the last year, the arbitration proceedings (and ancillary litigation) of the suspension appeal of New York Yankees star Alex Rodriguez (commonly known as “A-Rod”) seemed to dominate the sports news. Major League Baseball suspended A-Rod for 211 games.¹³ A-Rod appealed the suspension to arbitration, and the arbitrator reduced the suspension to 162 games.¹⁴

These examples demonstrate that arbitration plays an important role in resolving disputes in professional and amateur sports. (The Ryan Braun arbitral “acquittal” and later admission of drug use is not even included.)¹⁵ While it is frequently said that an arbitration award is “final and binding,”¹⁶ this Article examines what happens after the arbitrator renders an award.¹⁷ It will examine the post-award procedures set forth in the Federal Arbitration Act (FAA).¹⁸

¹⁰ U.S. OLYMPIC COMM., BYLAWS OF THE U.S. OLYMPIC COMMITTEE, § 9.7 (2014), available at <http://www.teamusa.org/~media/TeamUSA/Documents/Legal/Governance/2013%20Q4By-laws%20Revisions%20120613.pdf>.

¹¹ *Id.* at § 10.21.

¹² See AM. ARBITRATION ASS’N, SPORTS ARBITRATION INCLUDING OLYMPIC ATHLETE DISPUTES 4 (2006), available at https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004199.

¹³ See Joseph Ax, *Yankees’ Rodriguez Drops Lawsuits Against MLB*, REUTERS (Feb. 7, 2014), <http://www.reuters.com/article/2014/02/07/us-baseball-yankees-rodriguez-idUSBREA161WE20140207>.

¹⁴ A-Rod’s complaint challenging the award and containing the entire award can be accessed online. Complaint, *Rodriguez v. Major League Baseball*, Office of the Comm’r of Baseball & Major League Baseball Players Ass’n, No. 14-00244 (S.D.N.Y. Jan. 13, 2013) available at <http://online.wsj.com/public/resources/documents/ARODMLB01132014.pdf>. A-Rod later dropped the suit. See Ax, *supra* note 13.

¹⁵ See, e.g., Jeremy R. Abrams, Comment, *Making the Right Call: Why Fairness Requires Independent Appeals in U.S. Professional Sports Leagues*, 97 MARQ. L. REV. 469, 479–80 (2013). Wolfgang S. Weber, Comment, *Preserving Baseball’s Integrity Through Proper Drug Testing: Time for the Major League Baseball Players Association to Let Go of Its Collective Bargaining Reins*, 85 U. COLO. L. REV. 267, 274, 283 (2014).

¹⁶ See JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 6:1 (3d ed. 2005).

¹⁷ Salary arbitration in Major League Baseball is outside the scope of this Article. See, e.g., Bibek Das, *Salary Arbitration and the Effects on Major League Baseball and Baseball Players*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 55, 56–58 (2002); Ed Edmonds, *A Most Interesting Part of Baseball’s Monetary Structure—Salary Arbitration in Its Thirty-Fifth Year*, 20 MARQ. SPORTS L. REV. 1 (2009); Jeff Monait, *Baseball Arbitration: An ADR Success*, 4 HARV. J. SPORTS & ENT. L. 105, 118–22 (2013); Edward Silverman, *Dick Woodson’s Revenge: The Evolution of Salary Arbitration in Major League Baseball*, 2013 PEPP. L. REV. 23, 31–36 (2013).

¹⁸ Federal Arbitration Act, ch. 213, §§ 1–15, 43 Stat. 883–86 (1925) (current version at 9 U.S.C. §§ 1–16 (2013)).

II. DISCUSSION

A. Arbitration

Alternative dispute resolution describes the techniques or processes used in resolving disputes short of trial in the courts.¹⁹ It complements the judicial system by making methods available for the resolution of disputes that may be more economical or efficient than the courts.

Alternative dispute resolution procedures can be adjudicatory or non-adjudicatory. Arbitration is an adjudicatory procedure closely resembling traditional litigation. Arbitration is the method of dispute resolution voluntarily chosen by parties who want a dispute determined by an impartial person or persons of their own mutual selection, whose decision (referred to as an “award”), based on the merits of the case, is agreed to in advance to be accepted as final and binding.²⁰

Arbitration procedures are less formal than the procedures in a trial before a court. Unless the parties agree to the contrary, “the arbitrator is not bound to follow the law, but instead may base the decision on business custom and practice technical insight, or broad principles of equity and justice.”²¹

Because the purpose of arbitration is the settlement of a controversy and avoidance of litigation, the purpose would be defeated if the losing party in arbitration had ready access to the court as though no arbitration award existed.²² Once confirmed by a court, an arbitrator’s award is enforceable in the same

¹⁹ See GRENIG, *supra* note 16, at § 1:1.

²⁰ See, e.g., *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 144 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 155 (2013) (meaning of “arbitration” under the Federal Arbitration Act is governed by federal common law—not state law); *Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc.*, 524 F.3d 1235, 1239 (11th Cir. 2008) (explaining that arbitration within scope of the Federal Arbitration Act must produce some type of award that is meaningfully confirmed, modified, or vacated by court upon proper notice); *Salt Lake Tribune Publ’g Co., LLC v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004) (defining classic arbitration as being characterized by empowering a third party to render a decision to settle the dispute); *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D.N.Y. 1985) (determining that the test for arbitration is whether parties have agreed to submit a dispute to a third party for a decision, regardless of whether decision is binding).

²¹ GRENIG, *supra* note 16, at § 2:36.

²² See, e.g., *Bd. of Trs. of the Univ. of Ill. v. Organon Teknika Corp., LLC*, 614 F.3d 372, 375 (7th Cir. 2010) (holding an arbitrator’s award regarding patent royalty was final where it had resolved the parties’ dispute, it had been accompanied by cover letter calling it the final decision, and the parties had paid their final bills).

manner as a court judgment.²³

B. Federal Arbitration Act (FAA)

1. Generally

Although willing to enforce arbitration awards, United States courts, prior to enactment of the FAA,²⁴ believed “that arbitration was an inappropriate method to resolve disputes because it ‘ousted’ the courts of their jurisdiction.”²⁵ In 1874, the United States Supreme Court determined that “agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.”²⁶

Seeking to overcome the judicial hostility to arbitration, the United States Arbitration Act (now more commonly referred to as the FAA) was introduced in Congress on December 20, 1922. The goal of the FAA was to overcome the existing unwillingness to enforce arbitration clauses by placing them on an equal footing with other contracts.²⁷ When the bill appeared before the Senate in December 1924, Senator Walsh described the bill as providing “for the abolition of the rule that agreements for arbitration will not be specifically enforced.”²⁸ The bill was passed and signed into law on February 12, 1925.²⁹

2. Application

The FAA³⁰ made arbitration clauses “as enforceable as any other contract provision and subject to the same defenses as applied to other contracts.”³¹ Nearly sixty years later, the United States Supreme Court held that the FAA was substantive law preempting state arbitration laws, regardless of whether the

²³ See 9 U.S.C. §§ 9, 13.

²⁴ 9 U.S.C. §§ 1–16 (2013)).

²⁵ Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 464 (1994); see also IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 21–22 (1992).

²⁶ *Ins. Co. v. Morse*, 87 U.S. (20 Wall) 445, 451 (1874).

²⁷ Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 532 (2014) (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002) (“The FAA directs courts to place arbitration agreements on equal footing with other contracts . . .”); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12 (1967) (“[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.”)).

²⁸ S. 1005, 66th Cong. Rec. § 984 (1924).

²⁹ 9 U.S.C. §§ 1–15.

³⁰ *Id.*

³¹ Frankel, *supra* note 27, at 532 (citations omitted).

claim was brought in state or federal court.³²

The courts initially declined to apply the FAA to disputes between employers and employees. In *Bernhardt v. Polygraphic Co. of America, Inc.*,³³ the Supreme Court held that the FAA did not cover employment contracts where performance involved purely intrastate commercial activity.

The United States Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*³⁴ was the impetus for an increase in employment arbitration.³⁵ *Gilmer* signaled "a changed attitude on the part of the new Supreme Court majority as to the propriety of permitting statutory claims of employees to be definitively resolved in arbitration."³⁶ The Court expressly declined to address the scope of the exemption of "contracts of employment" under section 1 of the FAA because the issue had not been argued below and the contract at issue was not an employment contract.³⁷

The Supreme Court was presented with the opportunity to address the effect of the FAA's employment exemption in *Circuit City Stores, Inc. v. Adams*.³⁸ The Supreme Court held that the FAA applied to all contracts of employment, except those in the interstate transportation industries. Using the canon of construction *ejusdem generis*,³⁹ the Court held that the term "other class of workers"

³² *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984); see also *Preston v. Ferrer*, 552 U.S. 346, 346–47 (2008) (holding that the FAA favored arbitration in both federal and state courts, foreclosing state legislative attempts to undercut the enforceability of arbitration agreements and replacing it with statutory administrative procedure). See generally *Marmet Health Care Ctr., Inc., et al. v. Clayton Brown et al.*, 132 S. Ct. 1201 (2012) (*per curiam*) (preventing West Virginia from declining to enforce predispute arbitration agreements applicable to personal injury or wrongful death claims against nursing homes); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 682 (1996) (explaining that although applicable state law contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening the FAA, a court may not invalidate arbitration agreements under state laws applicable only to arbitration provisions).

³³ 350 U.S. 198, 200–02 (1956).

³⁴ See generally 500 U.S. 20 (1991).

³⁵ "The percentage of private employers using employment arbitration grew from 3.6% in 1991 to 19% in 1997. . . . By 1998, 62% of large corporations had used employment arbitration on at least one occasion from 1993 to 1996." Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 779–80 (2003) (citations omitted).

³⁶ See Stephen L. Hayford, *The Changing Character of Labor Arbitration*, PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 69, 79 (1993).

³⁷ *Id.* at 81.

³⁸ 532 U.S. 105, 109 (2001). See generally Claire Kennedy-Wilkins, Note, *Playing Ostrich with the FAA's History: The Scope of Mandatory Arbitration of Employment Contracts*, 54 HASTINGS L. J. 1593, 1593–94 (2003); Kristin McCandless, Comment, *Circuit City Stores, Inc. v. Adams: The Debate Over Arbitration Agreements in the Employment Context Rages on*, 80 DENV. U. L. REV. 225, 225 (2002) (citations omitted).

³⁹ "Where general words follow specific words [in a statutory enumeration,] the general words are construed to [embrace] only objects similar in nature to those objects enumerated" by the preceding

should be controlled and defined by the terms “seamen” and “railroads” that preceded the phrase in the exclusion provision.⁴⁰

Courts continued to adhere to the view that the FAA did not apply to labor arbitration cases—cases in which labor unions are parties—brought under section 301 of the Labor Management Relations Act,⁴¹ which authorizes suits in federal court for violation of collective bargaining agreements.⁴² These courts adhered to the traditional view that suits arising under section 301 and concerning collective bargaining agreements were outside the scope of the FAA.⁴³

Disagreeing with these courts, in 2009, the Supreme Court in *14 Penn Plaza LLC v. Pyett* resolved a labor arbitration case by applying the FAA without referring to section 301 of the Labor Management Relations Act.⁴⁴ The Court held that unions could agree to arbitrate statutory claims of individual workers under the FAA.

C. Arbitrator's Role After the Award

1. Generally

The arbitrator's role in the arbitration process generally ends when the final award is issued.⁴⁵ In legal terms, the arbitrator is said to be *functus officio*.⁴⁶

specific words. JAY E. GRENIG, *Contract Interpretation and Respect for Prior Proceedings*, in *LABOR AND EMPLOYMENT ARBITRATION* § 9.02[3][e] (2d ed. 1997).

⁴⁰ Hayford, *supra* note 36, at 234.

⁴¹ 29 U.S.C. § 185 (2012).

⁴² Int'l Ass'n of Machinists & Aerospace Workers Local Lodge 2121, *AFL-CIO v. Goodrich Corp.*, 410 F.3d 204, 207 n.2 (5th Cir. 2005); *Coca-Cola Bottling Co. of N.Y., Inc. v. Soft Drink & Brewery Workers Union, Local 812*, 242 F.3d 52 (2d Cir. 2001).

⁴³ See, e.g., *Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1097 (8th Cir. 2004) (stating that nothing in *Circuit City* undermines the Supreme Court's holding in *Textile Workers v. Lincoln Mills* that “§ 301 provides an independent basis for federal jurisdiction to enforce labor arbitration [.]”); *Coca-Cola*, 242 F.3d at 53 (“We hold that in cases brought under Section 301, . . . the FAA does not apply.”); *Int'l Chem. Workers Union v. Columbian Chemicals Co.*, 331 F.3d 491, 494 (5th Cir. 2003) (stating that the “district court appropriately relied only on [Section 301, as opposed to the FAA] when it confirmed the arbitration award because this case involves arbitration under a [collective bargaining agreement].”). But see *Briggs & Stratton Corp. v. Local 232, Int'l Union, Allied Indus. Workers of Am. (AFL-CIO)*, 36 F.3d 712, 715 (7th Cir. 1994) (“As it happens, our circuit is among the minority that has limited § 1 [of the FAA] to the transportation industries and therefore applies the Arbitration Act to most collective bargaining agreements.”).

⁴⁴ 556 U.S. 247, 274 (2009).

⁴⁵ See, e.g., *EFC Dev. Corp. v. F.F. Baugh Plumbing & Heating, Inc.*, 540 P.2d 185, 189 (Ariz. Ct. App. 1975); see also *Bosworth v. Whitmore*, 135 Cal. App. 4th 536, 551–52 (2006) (holding that the arbitrator's failure to meet a court-ordered date for an award did not constitute a “failure to act” under the California statute allowing for the removal of an arbitrator).

⁴⁶ *Functus officio* is Latin for “office performed.” This means that once an arbitrator has issued the arbitrator's final award, the arbitrator may not revise it. *Wash.-Balt. Newspaper Guild v. Wash. Post*

The authority of arbitrators is terminated by the completion and delivery of an award; prior to delivery of an award, by their inability to make an award; or by a revocation of the submission.⁴⁷ A valid revocation of the submission also terminates the authority of the arbitrator appointed under the submission.

Under the *functus officio* doctrine, it is improper for an arbitrator to reconsider or modify an award without the consent of both parties. Upon the receipt of a request for reconsideration or modification from one party, the arbitrator will probably respond that he or she is powerless to reconsider the award since the arbitrator's authority ended when the award was issued.

2. Vitality of Functus Officio

The current vitality of the doctrine of *functus officio* has been described as being "riddled with exceptions."⁴⁸ The First Circuit has concluded that a labor arbitrator may clarify, interpret, or amplify the arbitrator's award, *functus officio* notwithstanding.⁴⁹ Courts have recognized exceptions to the doctrine of *functus officio*.⁵⁰

Co. 442 F.2d 1234, 1238 (D.C. Cir. 1971). *See, e.g.*, *Bosack v. Soward*, 586 F.3d 1096, 1103 (9th Cir. 2009) (holding that the American Arbitration Association's commercial arbitration rule providing that "the arbitrator is not empowered to redetermine [sic] merits of any claim already decided, 'essentially codifies the common law doctrine of *functus officio*'"); *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 991 (3d Cir.1997) (*quoting* *Glass Molders v. Excelsior Foundry Co.*, 56 F.3d 844, 846–47 (7th Cir.1995)) (stating *functus officio* conceives of arbitrators as "ad hoc judges—judges for a case; and when the case is over they cease to be judges and go back to being law professors or businessmen or whatever else they are in private life.").

⁴⁷ *See, e.g.*, *McKeeby v. Arthur*, 81 A.2d 1, 3 (N.J. 1951).

⁴⁸ *Glass, Molders, Pottery, Plastics and Allied Workers Int'l Union, AFL-CIO, CLC, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 846–47 (7th Cir. 1995). *Cf.* Arbitrators may not, except for reasons within the applicable arbitration statute or rules, modify or correct an arbitration award. With respect to an arbitrator's power to correct an award, the Commercial Arbitration Rules of the American Arbitration Association provide as follows:

Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine [sic] the merits of any claim already decided. The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal by the AAA to the arbitrator of the request and any response thereto.

AM. ARBITRATION ASS'N LABOR ARBITRATION R. 40 (2013); *accord* AM. ARBITRATION ASS'N EMPLOYMENT ARBITRATION R. 40 (2009).

⁴⁹ *Local 2322, Int'l Bhd. of Elec. Workers v. Verizon New England, Inc.*, 464 F.3d 93, 97–98 (1st Cir. 2006).

⁵⁰ *Matlack, Inc.*, 118 F.3d at 991–92; *Colonial Penn. Ins. Co. v. Omaha Indem. Co. v. Nat'l Risk Underwriters, Inc.*, 943 F.2d 327, 332 (3d Cir. 1991); *Hanford Atomic Metal Trades Council AFL-CIO v. Gen. Elec. Co.*, 353 F.2d 302, 308 (9th Cir.1965). *See also* Office & Prof'l Emps. Int'l Union, Local

- An arbitrator can correct a mistake, such as a clerical mistake or obvious error of arithmetic computation, which is apparent on the face of the award.⁵¹
- Where the award does not adjudicate an issue that has been submitted, then as to such issue the arbitrator has not exhausted his or her function and it remains open to the arbitrator for subsequent determination.⁵²
- Where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, contains an ambiguity.⁵³

3. Retention of Jurisdiction

If the arbitrator has expressly retained jurisdiction over the award in order to resolve disputes with respect to computing the remedy, courts will generally recognize the continuing authority of the arbitrator. For example, where an arbitrator reinstates a discharged employee, directs that the employee to be paid all lost wages, and the parties cannot agree on the amount of back pay due to the employee, the arbitrator would have authority to determine the amount of back pay.⁵⁴

Such an arrangement is a sound one since it allows the arbitration hearing to be devoted to the merits of the discharge dispute and delays the consideration of the back pay issue until a determination is made concerning the discharge. Also, this arrangement gives the parties the opportunity to resolve disputes

No. 471 v. Brownsville Gen. Hosp., 186 F.3d 326, 326, 330 (3d Cir. 1999) (doctrine of *functus officio* does not bar a court from remanding a case to the arbitrator for clarification of an award).

⁵¹ See, e.g., T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 342 (2d Cir. 2010) (“[e]ven after becoming *functus officio*, an arbitrator retains limited authority to correct a mistake which is apparent on the face of the award; this inherent authority applies narrowly to clerical mistakes or obvious errors in arithmetic computation”).

⁵² See New United Motor Mfg., Inc. v. United Auto Workers Local 2244, 617 F. Supp. 2d 948, 949, 962–63 (N.D. Calif. 2008) (Both parties expressed that they wanted to keep the award open and have the arbitrator calculate “time-for-time clock compensation” at a later date. The arbitrator declined jurisdiction and the award was complete without computing compensation because the plaintiff declined to use a substitute arbitrator. Although the court did not condone the arbitrator’s decision to decline jurisdiction, it was well within his power to do so.); accord CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES § 6.E.1 (2007), available at naarb.org/code.html (“[a]n arbitrator may retain remedial jurisdiction in the award to resolve any questions that may arise over application or interpretation of a remedy”).

⁵³ See, e.g., Courier-Citizen Co. v. Bos. Electrotypers Union No. 11702 F.2d 273, 279 (1st Cir.1983) (arbitrator allowed to explain remedy sketched out in award).

⁵⁴ See Steel v. Vacumet Corp., No: 2:09-CV-165, 2011 WL 345810, *1 (E.D. Tenn. Feb. 1, 2011) (holding it is arbitrator’s responsibility to calculate back pay).

themselves.

D. Confirmation of an Award

1. Generally

The function of an arbitration award is to resolve a dispute. The arbitrator, however, has no power or authority to enforce the award. It serves no purpose to complain to an arbitrator if the other party refuses to comply with the award. Until an arbitration award is confirmed or vacated, it has only the effect of a written contract between the parties.

A party may refuse to comply with the arbitration award. If this happens or is likely to happen, the other party may petition a court to have the award confirmed.⁵⁵ The party refusing to comply with the award has the burden of justifying its action and may raise issues similar to those that might be raised in a suit to vacate an arbitration award, provided the time for requesting the court to vacate an award has not expired.⁵⁶

2. Procedure

The procedure for obtaining an enforceable judgment is to petition a court to confirm the award.⁵⁷ A proceeding for confirmation of an arbitration award is not a trial of the issues or a separate proceeding; the court has no authority to hear the case *de novo* or on the merits.⁵⁸ A court must confirm an “arbitration award unless there are significant reasons to the contrary.”⁵⁹

⁵⁵ 9 U.S.C. § 13 (2013).

⁵⁶ *See id.* § 12. *See also* Schreiber v. K-Sea Transp. Corp., 879 N.E.2d 733, 738 (N.Y. 2007) (holding that the burden of proof stays with the party refusing to comply regardless of party’s occupation).

⁵⁷ *See, e.g.*, 9 U.S.C. § 9; Phoenix Aktiengesellschaft v. Ecoplas, Inc., 391 F.3d 433, 436 (2d Cir. 2004) (holding that parties are not required to consent to confirmation before an arbitration award could be confirmed); Toal v. Tardif, 178 Cal. App. 4th 1208, 1208–09 (2009) (holding that under California law, the party seeking to enforce arbitration award must provide by preponderance of the evidence that valid arbitration contract existed).

⁵⁸ *See, e.g.*, Lesser Towers, Inc. v. Roscoe-Ajax Const. Co., 258 F. Supp. 1005, 1012 (S.D. Cal. 1966). *Cf.* Local 2322, Int’l Bhd. of Elec. Workers v. Verizon New England, Inc., 464 F.3d 93, 97 (1st Cir. 2006) (holding that a party who fails to initiate action to vacate or modify arbitration within the applicable time limit is barred from asserting those claims as defenses to a later action to confirm).

⁵⁹ *See, e.g.*, Frazier v. CitiFinancial Corp., LLC, 604 F.3d 1313, 1324 (11th Cir. 2010) (holding that there is a presumption that arbitration awards will be confirmed, and “federal courts should defer to arbitrators’ decisions whenever possible”); Oaktree Capital Mgt., L.P. v. Bernard, 182 Cal. App. 4th 60, 66 (2010) (holding that under California law, when a party petitions the court to confirm an arbitration award, the opposing party may seek vacation of the award by way of response only if he serves and files his response within ten days after the service of the petition. Unless the response is duly served and filed, the allegations of the petition are deemed to be admitted by the opposing party.); Compania Chilena De Navegacion Interocanica, S.A. v. Norton, Lilly & Co., Inc., 652 F. Supp. 1512,

There must be an independent basis of federal jurisdiction before a federal district court can entertain a motion to confirm under the FAA.⁶⁰ The federal nature of the claims submitted to arbitration is not a sufficient basis for jurisdiction under 28 U.S.C. section 1331 since the rights asserted in the petition for confirmation are “based on the contract to arbitrate rather than on the underlying substantive claims.”⁶¹

The FAA provides that at any time within one year after an arbitration award is made any party to the arbitration may apply to the court for an order confirming the award.⁶² Notice of the application must be served upon the adverse party.⁶³ The FAA further provides that,

[I]f the parties have agreed in the arbitration agreement that a judgment of the court must be entered upon the award made pursuant to the arbitration at any time within one year after the award is made, any time within one year after the award is made, any party to the arbitration may apply to the court for an order confirming the award.⁶⁴

This period has been held to be permissive rather than mandatory, allowing judicial confirmation of an award after the one-year period.⁶⁵

Frequently, the losing party files an application to vacate and the prevailing party files a cross-application to confirm. In *National Basketball Ass’n v. National Basketball Players Ass’n*, the NBA Players Association moved to vacate an arbitrator’s award upholding the suspension of four players who brawled with fans at a game in 2004.⁶⁶ The court found that the arbitrator was not precluded from issuing an award in the matter.⁶⁷

In *Lindland v. U.S. Wrestling Ass’n, Inc.*, the Seventh Circuit confirmed an

1517 (S.D.N.Y. 1987).

⁶⁰ See, e.g., *City of Detroit Pension Fund v. Prudential Secs. Inc.*, 91 F.3d 26, 29 (6th Cir. 1996).

⁶¹ See, e.g., *id.*

⁶² 9 U.S.C. § 9.

⁶³ *Id.*

⁶⁴ *Id.* See, e.g., *Idea Nuova, Inc. v. GM Licensing Grp., Inc.*, 617 F.3d 177, 181 (2d Cir. 2010) (citations omitted) (holding that a “contract provision providing for arbitration to be conducted” under American Arbitration Association rules is equivalent to consenting to judicial confirmation of arbitration award pursuant to rules); Matthew R. Kissling, Note, “A Sure and Expedited Resolution of Disputes”: *The Federal Arbitration Act and the One-Year Requirement for Summary Confirmation of Arbitration Awards*, 60 CASE W. RES. L. REV. 889, 890 (2010) (citations omitted).

⁶⁵ *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 1148, 1154 (4th Cir. 1993).

⁶⁶ No. 04 Civ. 9528(GBD), 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005).

⁶⁷ *Id.*

award that rejected an opposing petition to vacate an arbitrator's award and determined which wrestler would go to the Olympics.⁶⁸ The court explained that the arbitration proceeding initiated by an amateur wrestler, in which the wrestler obtained an award ordering a rematch between the wrestler and a second wrestler, who had won the original match for nomination to United States Olympic Committee, was not flawed by the fact that wrestler who had won the original match was not a party because the governing statute provided for arbitration between the aggrieved athlete and the national governing body, not arbitration among athletes.⁶⁹

3. Court Order

If the court finds merit in the petition to enforce the arbitration award, the court will order the resisting party to comply with the award.⁷⁰ When an award is confirmed, the judgment entered has the same force as any other civil judgment and may be enforced accordingly.⁷¹ The prevailing party is entitled to costs, as in other civil proceedings.⁷² The judgment entered on the award is appealable.⁷³

E. Clarification of an Award

1. Generally

After an award is rendered, a party may have a question regarding its meaning or interpretation. If a party believes interpretation or clarification of the award is needed, the party should contact the other party and request that both join in a written request for the interpretation or clarification of the award. The joint request constitutes a new grant of authority to the arbitrator.⁷⁴ By both

⁶⁸ 227 F.3d 1000 (7th Cir. 2000).

⁶⁹ *Id.*

⁷⁰ See 9 U.S.C. § 13 (2013) (the court must grant an order unless the award is vacated, modified, or corrected).

⁷¹ *Id.*; see *Robert Lewis Rosen Assocs., Ltd. v. Webb*, 473 F.3d 498, 504 (2d Cir. 2007) (determining that the district court's order confirming an arbitration award encompassed a provision of the award pertaining to future payments, not just payments already due, even though order did not expressly address part of award relating to contract renewals, where order made no statement that court was only partly confirming arbitration award).

⁷² *Robert Lewis Rosen Assocs., Ltd.*, 473 F.3d at 501.

⁷³ 9 U.S.C. § 16.

⁷⁴ See *Brown v. Witco Corp.*, 340 F.3d 209, 219 (5th Cir. 2003) (holding that if both parties request a clarification, the arbitrator has the power to clarify and interpret, but not modify the award); *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 354 (9th Cir. 1979) (citations omitted) (holding that where the original arbitration decision was ambiguous, it was proper for employer and union to obtain from arbitrator a clarification of his reasoning).

parties joining in the request, the request can be framed and worded in a fair and objective manner. An arbitrator must afford both parties and opportunity to be heard.

2. Procedure

If the other party will not join in a request that the award be clarified, a petition may be filed in court asking that the arbitrator be directed to clarify the award.⁷⁵ A court may order clarification if it concludes the award is unclear and the petitioning party has been unable to obtain the consent of the other party for a request for clarification.⁷⁶

F. Correction or Modification of an Award

1. Generally

There is no authority under the FAA for an arbitrator to correct an award after it has been served on the parties. Under the FAA, only a court may correct an award.⁷⁷ The FAA provides that a court may make an order modifying or correcting an arbitration award upon the application of any party to the arbitration.⁷⁸

2. Grounds for Modification

Any of the following is grounds for modification under the FAA:

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

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

⁷⁵ See 9 U.S.C. § 11; *Tripi v. Prudential Secs., Inc.*, 303 F. Supp. 2d 349, 356 (S.D.N.Y. 2003) (“In light of the highly deferential standard due an arbitral award, however, I will remand to the Panel with instructions that it explain its allocation of damages. After the Panel provides its explanation, either party may return to this Court to confirm, modify, or vacate the Award.”); *Sociedad Armadora Aristomenis Panama, S.A. v. Tri-Coast S.S. Co.*, 184 F. Supp. 738, 741 (S.D.N.Y. 1960).

⁷⁶ Cf. *Tripi*, 303 F. Supp. 2d at 356 (“In light of the highly deferential standard due an arbitral award, however, I will remand to the Panel with instructions that it explain its allocation of damages. After the Panel provides its explanation, either party may return to this Court to confirm, modify, or vacate the Award.”).

⁷⁷ See 9 U.S.C. § 11.

⁷⁸ *Id.*

the decision upon the matter submitted.

(c) Where the award is imperfect in a matter of form not affecting the merits of the controversy.⁷⁹

a. Miscalculation

The provision in the FAA that arbitration awards may be modified or corrected for “evident miscalculation of figures” applies only to mathematical errors committed by the arbitrators that “would be patently clear to the reviewing court.”⁸⁰ This provision is not intended to permit the litigants to persuade the courts “to review the evidence and then reach a different result.”⁸¹ A mere error committed by the arbitrators as to questions of fact or law is not sufficient to establish the type of excess of power necessary to set aside an award.⁸²

In *Ryba v. Benyon Sports Surfaces, Inc.*, the plaintiff sold athletic services and related products on behalf of the defendant.⁸³ When the plaintiff terminated their contract with the defendant in 2006, the plaintiff claimed the defendant owed him over \$100,000.⁸⁴ The parties agreed to submit the dispute to arbitration.⁸⁵ The arbitrator awarded the plaintiff \$90,000 plus attorney’s fees.⁸⁶

The defendant sought to have a New Jersey court vacate the award because of calculation errors.⁸⁷ The court found no merit in the defendant’s claims.⁸⁸ Because the parties had never agreed to attorney’s fees, the court deleted the attorney’s fee portion of the award.⁸⁹

b. Defects in Form

An award may be modified or corrected under the FAA “where the award

⁷⁹ 9 U.S.C. § 11(a)–(c).

⁸⁰ *Carolina Va. Fashion Exhibitors v. Gunter*, 255 S.E.2d 414, 419 (N.C. Ct. App. 1979). *See* 9 U.S.C. § 11(a).

⁸¹ *Carolina Va. Fashion Exhibitors, Inc.*, 255 S.E.2d at 419.

⁸² *Scherrer Constr. Co. v. Burlington Mem’l Hosp.*, 221 N.W.2d 855, 860 (Wis. 1974). *See, e.g., N. Boulevard Plaza v. N. Boulevard Assocs.*, 526 S.E.2d 2013, 2015 (N.C. App. 2000) (applying North Carolina Uniform Arbitration Act and holding that the arbitrator lacked authority to modify award based on incorrect formula, rather than on miscalculation of figures).

⁸³ No. L-6468-06, 2010 WL 4811900 (N.J. Super Ct. App. Div. Nov. 29, 2010).

⁸⁴ *Id.* at *1.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

is imperfect in form, not affecting the merits of the controversy.”⁹⁰ For example, it was held that modifying an arbitrator's award to, in effect, substitute the word “DECLARES” for the word “FINDS” in the first sentence of the arbitration award would not affect the merits of the controversy, but would merely make clear that the findings stated the declaratory relief; whereas, the “AWARD” section stated the monetary relief.⁹¹

3. Procedure

“Notice of a motion to modify or correct [an award] must be served upon the adverse party within three months after the award is filed or delivered.”⁹² An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

Only a party aggrieved by an arbitrator's award may bring an action to modify or correct the award.⁹³ One who is not a party to the arbitration has no standing to challenge the validity of an award.⁹⁴

There is a split of authority as to whether an application to correct an award may properly be filed after the limitations period has run where the application alleges the arbitrators lacked jurisdiction. The majority rule is that failure to file a timely application to correct an arbitration award raises an absolute bar.⁹⁵ The minority view is that a collateral attack on an award issued without jurisdiction is always permissible.⁹⁶

If an application to confirm an arbitration award is filed within the time period for vacating, correcting, or modifying the award, any response seeking to vacate, correct, or modify the award must be filed within the time period for responses generally.⁹⁷ If the application to confirm is filed after the time period

⁹⁰ 9 U.S.C. § 11(c) (2013).

⁹¹ *Fischer v. CGA Computer Assocs., Inc.*, 612 F. Supp. 1038, 1041–42 (S.D.N.Y. 1985).

⁹² 9 U.S.C. § 12.

⁹³ *See, e.g., E.M. Diagnostic Sys., Inc. v. Local 169, Teamsters*, 812 F.2d 91, 97 (3d Cir. 1987).

⁹⁴ *See Eisen v. State Dep't of Pub. Welfare*, 352 N.W.2d 731, 736 (Minn. 1984).

⁹⁵ *See, e.g., Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 (9th Cir. 1986); *Jaffe v. Nocera*, 493 A.2d 1003, 1012 (D.C. App. 1985); *Local 589, Amalgamated Transit Union v. Mass. Bay Transp. Auth.*, 491 N.E.2d 1053, 1057 (Mass. 1986); *Beriker v. Permagrain Prods., Inc.*, 500 A.2d 178, 179 (Pa. Super. Ct. 1985); *Bingham Cnty. Comm'n v. Interstate Elec. Co.*, 665 P.2d 1046, 1049 (Idaho 1983).

⁹⁶ *See, e.g., Austin v. Stovall*, 475 So.2d 1014, 1014–15 (Fla. Dist. Ct. App. 1985).

⁹⁷ *See, e.g., Johnson v. Baumgardt*, 276 N.E.2d 515, 519–20 (Ill. Ct. App. 1991) (holding that a party to arbitration “may properly challenge the arbitration award through a defense to a complaint to confirm” the award as long as challenge is raised within statutory ninety-day limitation).

for vacating, correcting, or modifying the award, the losing party cannot challenge the award.⁹⁸

An application to modify or correct an award may be joined in the alternative with an application to vacate the award. An application to vacate or correct an arbitration award must be filed in a court having jurisdiction over the subject matter and the parties. It must be served on all parties in the same manner as a notice of motion.⁹⁹

The application must set forth the following:

- The substance of the agreement to arbitrate (a copy of the agreement should be attached and incorporated by reference, unless the petitioner denies the existence of the agreement);
- The names of the arbitrator or arbitrators;
- A copy of the award and the arbitrator's written opinion, if any;
- The grounds for relief; and
- The date the award was served on the moving party.¹⁰⁰

Where the application alleges facts not shown on the face of the documents, competent proof (normally in the form of declarations or affidavits) is required to set forth facts establishing the grounds relied upon. An arbitrator's declarations should be inadmissible to explain the reasons for the award or the merits of the controversy.

⁹⁸ See, e.g., *Bd. of Ed. of Charles Cnty. v. Ed. Ass'n of Charles Cnty.*, 408 A.2d 89, 93 (Md. Ct. Spec. App. 1979) (holding that where a school board took no action to vacate an arbitration award within time limit provided by Uniform Arbitration Act, the arbitration award requiring the school board to effect transfer of teacher was properly confirmed); *Cf. Richardson v. Harris*, 818 P.2d 1209, 1210–11 (Nev. 1991) (holding that the trial court should have confirmed arbitration upon construction company's motion because the landowner's motion for modification or correction of award was untimely); *Trs. of Bos. & Maine Corp. v. Mass. Bay Transp. Auth.*, 294 N.E.2d 340, 344 (Mass. 1973) (holding that neither application to arbitrator for modification or correction of award, nor modification or correction by arbitrator extends the period within which party may apply to vacate or modify original award). *But see* *H.E. Sargent, Inc. v. Town of Millinocket*, 478 A.2d 683, 686 (Me. 1984) (holding that where the application to confirm arbitration award is pending, the court has the authority to submit an award to the arbitrators for clarification, notwithstanding that none of parties to the award applied for modification or correction of award within the ninety-day time limit); *Borough of Dunmore v. Dunmore Police Dep't*, 526 A.2d 1250, 1253 (Pa. Commw. Ct. 1987) (holding that the trial court deciding the petition to enforce and confirm the arbitration award had authority to resubmit damages portion of award to arbitrator for clarification even though no petition for modification or correction was filed).

⁹⁹ See 9 U.S.C. § 12 (2013).

¹⁰⁰ See *id.* at § 13.

G. Vacation of an Award

1. Generally

A party who is dissatisfied with an arbitration award may seek to have a court “vacate” or set aside the award.¹⁰¹ Under the FAA, a court may order vacation of an arbitration award “upon the application of any party to the arbitration.”¹⁰² The court must find that a specified ground for vacating the award exists.¹⁰³

When parties agree to arbitrate their disputes, they opt out of the court system.¹⁰⁴ When one of the parties challenges the resulting arbitration award, the party does not do so “on the ground the arbitrator made a mistake, but that [the arbitrator] violated the arbitration agreement by corruption; evident partiality; [or] exceeding [his or her] powers, conduct to which the parties did not consent when they included an arbitration clause in their contract.”¹⁰⁵

In reviewing an arbitration award, a court is precluded from considering the factual or legal issues that were, by voluntary agreement, made the subject of the arbitration.¹⁰⁶ An arbitrator's decision will be upheld, unless it is completely irrational or constitutes a manifest disregard of the law.

“Any reasonable doubt must be resolved in favor of enforcing the award.”¹⁰⁷ According to the U.S. Supreme Court, “‘as long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his [or her] authority,’ the fact that ‘a court is convinced [the arbitrator] committed

¹⁰¹ See *id.* at § 10.

¹⁰² *Id.* at §10(a).

¹⁰³ See *id.* (listing specified grounds for vacation).

¹⁰⁴ See GRENIG, *supra* note 16, at § 24:10.

¹⁰⁵ See *Edstrom Indus., Inc. v. Companion Life Ins. Co.*, 516 F.3d 546, 552 (7th Cir. 2008) (citations omitted).

¹⁰⁶ See *Wackenhut Corp. v. Amalgamated Local 515*, 126 F.3d 29, 32 (2d Cir. 1997) (holding that the reviewing court must affirm an award it views as incorrect, so long as the decision is plausibly grounded in the parties' agreement); *Thompson v. Tega-Rand Int'l*, 740 F.2d 762,763 (9th Cir. 1984) (finding that a court will not review the merits of a dispute where the parties have agreed to arbitration); *Smith v. PSI Servs. II Inc.*, No. CIV. A. 97-6749, 2001 WL 41122, *2 (E.D. Pa. Jan. 12, 2001) (holding that a court cannot vacate an arbitrator's decision because the arbitrator misapplied the law); *City of Richmond v. Serv. Emps. Int'l Union, Local 1021*, 189 Cal. App. 4th 663, 663, 671, 673 (2010) (holding that the arbitrator did not violate public policy against sexual harassment by ordering a city employee accused of sexual harassment be reinstated on the ground that the city did not implement disciplinary action on the sexual harassment claims within the six-month period imposed by the collective bargaining agreement); *Alexander v. Blue Cross of Cal.*, 88 Cal. App. 4th 1082, 1089 (2001) (holding that arbitrators do not exceed their powers merely by rendering an erroneous decision on legal or factual issues, so long as the issue was within scope of the controversy submitted to the arbitrator).

¹⁰⁷ *Ethyl Corp. v. United Steelworkers of Am.*, AFL-CIO-CLC, 768 F.2d 180, 185 (7th Cir. 1985).

serious error does not suffice to overturn [the arbitrator's] decision.”¹⁰⁸

The First Circuit has repeatedly held that “an arbitral award may be challenged on a showing that the award was ‘mistakenly based on a crucial assumption that is concededly a non-fact.’”¹⁰⁹ The term “‘non-fact’ refers to a situation ‘where the central fact underlying an arbitrator's decision is concededly erroneous.’”¹¹⁰ In other words, “there [must be] a ‘gross mistake . . . made out by [the] evidence,’ but for which, according to the arbitrator's rationale, a different result would have been reached.”¹¹¹

2. Grounds

The FAA provides the following 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;
- (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.¹¹²

The grounds stated in the FAA for vacating arbitration awards constitute the exclusive grounds for vacatur of an arbitration award.¹¹³ Parties cannot expand those grounds by contract.¹¹⁴

¹⁰⁸ *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 62 (2000) (citations omitted).

¹⁰⁹ *N. Adams Reg'l Hosp. v. Mass. Nurses Ass'n*, 74 F.3d 346, 348 (1st Cir. 1996) (*quoting* *Elecs. Corp. of Am. v. Int'l Union of Elec. Workers, Local 272*, 492 F.2d 1255, 1256 (1st Cir. 1974)).

¹¹⁰ *Id.*

¹¹¹ *Prudential-Bache Secs., Inc. v. Tanner et al.*, 72 F.3d 234, 237–38 (1st Cir. 1995); *Elecs. Corp. of Am.*, at 1257 (citations omitted).

¹¹² 9 U.S.C. § 10(a) (2013).

¹¹³ *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).

¹¹⁴ *Id.* at 586–87.

a. Corruption, Fraud, or Undue Means

An arbitration award may be vacated “where the award was procured by corruption, fraud, or undue means.”¹¹⁵ Irregularities depriving a party of a fair and impartial hearing, or amounting to an arbitrary disregard of the rights to which a party is entitled constitute such misconduct as will vitiate the award and cause it to be set aside.¹¹⁶

The party seeking to vacate the award on the ground of fraud must establish fraud by clear and convincing evidence.¹¹⁷ “The appearance of impropriety, standing alone, is insufficient to establish [fraud or] bias.”¹¹⁸ A neutral arbitrator's failure to disclose a relationship with a party may constitute fraud.¹¹⁹ While declarations from arbitrators may be received to support or rebut claims of disqualification, an arbitrator's post-decision attempt to show no bias may have just the opposite effect.¹²⁰

“Undue means” is defined as behavior that is “immoral, if not illegal . . . something wrong, according to the standards of morals which the law enforces.”¹²¹ It is “akin to fraud and corruption.”¹²² Undue means do not include a party's offering of evidence for the sole purpose of causing prejudice, at least

¹¹⁵ 9 U.S.C. § 10(a)(1).

¹¹⁶ *Gallus Invs., L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231, 234 (4th Cir. 1998); *Am. Guar. Co. v. Caldwell*, 72 F.2d 209, 212 (9th Cir. 1934). See *Reichman v. Creative Real Estate Consultants, Inc.*, 476 F. Supp. 1276, 1285 (S.D.N.Y. 1974) (holding that the “touchstone in considering claims of arbitrator misconduct is ‘fairness’”); *Medina v. Found. Reserve Ins. Co., Inc.*, 870 P.2d 125, 128 (N.M. 1994) (holding that perjury and concealment of material evidence justified setting aside the arbitration award). See also Jennifer C. Bailey, Note, *The Search to Clarify an Elusive Standard: What Relationships Between Arbitrator and Party Demonstrate Evident Partiality?*, 2000 J. of DISP. RESOL. 153, 155 (2000).

¹¹⁷ See, e.g., *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988).

¹¹⁸ *Ariz. Elec. Power Coop. v. Berkeley*, 59 F.3d 988, 993 (9th Cir. 1995) (citations omitted).

¹¹⁹ See *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 89 S. Ct. 337, 339 (1968). See also *Montez v. Prudential Secs., Inc.*, 260 F.3d 980, 984 (8th Cir. 2001) (holding that a “federal court cannot vacate an arbitration award based on failure to disclose” or possible bias merely because arbitrator failed to comply with National Association of Securities Dealers rules; rather, the standard warranting vacatur of arbitration is evident partiality).

¹²⁰ See, e.g., *Cobler v. Stanley, Barber, Southard, Brown & Assocs.*, 217 Cal. App. 3d 518, 529 (1990).

¹²¹ See, e.g., *MCI Constructors, LLC v. City Of Greensboro*, 610 F.3d 849, 858 (4th Cir. 2010) (citations omitted) (holding that “typically, to prove that an [arbitration] award was procured by undue means, the party seeking vacatur ‘must show that the fraud or corruption was (1) not discoverable upon exercise of due diligence prior to arbitration, (2) materially related to [an] issue in [the] arbitration, and (3) established by clear and convincing evidence’”); *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir. 1992) (holding that to vacate award on grounds of “undue means” it must be shown that the “undue means” was not discoverable before the award was made and that it caused the award to be given).

¹²² See *Seither & Cherry Co. v. Ill. Bank Bldg. Corp.*, 419 N.E.2d 940, 945 (Ill. App. Ct. 1981).

where “the arbitrators decline[] to receive it and state[] that they had not been prejudiced and [acted] only on the evidence before them.”¹²³

Ex parte consultations between an arbitrator and a party on material matters at issue in the arbitration proceeding may result in the award being set aside.¹²⁴ Alleged improper conduct by counsel, however, may not provide a basis for vacating an arbitration award where the alleged impropriety has no impact on the award.¹²⁵

b. Evident Partiality or Corruption

The FAA provides that an arbitration award may be vacated “where there was evident partiality or corruption in the arbitrators, or either of them.”¹²⁶ An arbitrator is under a continuing duty to disclose any interest or bias at any stage of the arbitration proceeding.

Where a party seeks to upset an arbitration award on the ground that the

¹²³ See *Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir. 1978).

¹²⁴ See *Spitzer Elec. Co. v. Fred Girardi Constr. Corp.*, 147 N.Y.S.2d 40, 42–43 (1955).

¹²⁵ See *Bell v. Seabury*, 622 N.W.2d 347, 349 (Mich. App. 2000) (noting that the party’s counsel had served as mediator in earlier proceedings involving dispute).

¹²⁶ See 9 U.S.C. § 10(a)(2) (2013); *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 70, 78–79 (2d Cir. 2012) (holding that the arbitration award in a dispute between insurers need not be vacated even though two of the arbitrators failed to disclose they were simultaneously serving on another panel in a proceeding that had a common witness, similar legal issues, and a related party); *STMicroelectronics, N.V. v. Credit Suisse Secs. (USA) LLC*, 648 F.3d 68, 74 (2d Cir. 2011) (holding that the absence of disclosure regarding arbitrator’s prior testimony as expert witness on legal issues that might arise in arbitration cannot form grounds for vacating an arbitral award); *Johnson v. Gruma Corp.*, 614 F.3d 1062, 1068 (9th Cir. 2010) (holding that the supplemental disclosure provisions of the California Arbitration Act did not require arbitrator to disclose his wife had been partner at law firm, when five years into arbitration, another partner at law firm became counsel for one of parties; arbitrator’s wife’s employment at law firm ended more than two years before partner became involved in arbitration; and there was no evidence that connections between arbitrator’s wife and partner were more significant or substantial than one case in which they were both listed as attorneys, or that her connection with partner colored the arbitrator’s judgment); *Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294, 306 (6th Cir. 2008) (holding that to succeed in having an arbitration award vacated on evident partiality theory, the challenging party must show that a reasonable person would have concluded that the arbitrator was partial to the other party to the arbitration); *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 530 (4th Cir. 2007) (citations omitted) (holding that to establish partiality of an arbitrator, the party seeking to vacate award must “‘demonstrate [that a] reasonable person would have to conclude that an arbitrator was partial to other party to the arbitration’”); *Borst v. Allstate Ins. Co.*, 2006 WI 70, ¶¶ 26, 44, 717 N.W.2d 42, 54 (holding that an arbitrator on an uninsured motorist insurance panel who had an ongoing attorney-client relationship with the insured that selected him for panel was evidently partial and the arbitration award had to be vacated); *Rebmann v. Rohde*, 196 Cal. App. 4th 1283, 1294 (2011) (holding that a Jewish arbitrator did not have duty to disclose his family background and associations prior to the arbitration). *But see* *Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634, 645 (9th Cir. 2010) (holding that the arbitrator’s failure to disclose his and another arbitrator’s roles in an ethics controversy did not require vacatur of the award on the ground of evident partiality or corruption).

award is tainted by partiality, it is necessary to show a direct, definite, and demonstrable interest on the part of the arbitrator in the outcome of the arbitration.¹²⁷ The failure to disclose a substantial interest creates an impression of bias, which, if proved, may be sufficient to vacate an award.¹²⁸

¹²⁷ See *Thomas Kinkade Co. v. White*, 711 F.3d 719, 724 (6th Cir. 2013) (holding that the artist established the purported neutral arbitrator's evident partiality as required to vacate arbitration award in favor of art dealer in dispute arising from contracts in which dealer agreed to be "signature dealer" of artist. Nearly five years into arbitration, and in space of eight weeks, the arbitrator's law firm was hired by an art dealer's arbitrator-advocate and an art dealer for substantial engagements. The arbitrator gave the art dealer a second and third chance to bolster proofs for his claims; allowed art dealer to rely upon 8,800 documents he deliberately and wrongfully withheld from artist for more than four years; denied the artist any relief on straightforward breach of contract claim that was virtually uncontested during hearings; failed to offer any response to serious objections raised by the artist; and awarded art dealer nearly \$500,000 in attorney's fees after plain terms of interim award indicated that request for fees had been denied.); *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 282 (5th Cir. 2007) (holding that an arbitration award may not be vacated on the evident partiality theory, based on arbitrator's failure to disclose a trivial or insubstantial prior relationship between arbitrator and parties to proceeding); *Three S Del., Inc.*, 492 F.3d at 530 (citations omitted) (holding that "to determine if party has established partiality [of an arbitrator in support of motion to vacate award], a court should assess four factors: '(1) the extent and the character of personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party [the arbitrator] is alleged to favor; (3) the connection of that relationship to arbitrator; and (4) the proximity in time between relationship and arbitration proceeding'"); *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 138 (2d Cir. 2007) (holding that evident partiality was found when the arbitrator knew of a potential conflict, but failed to either investigate or disclose the intention not to investigate); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005) (citations omitted) (holding that the "'alleged partiality must be direct, definite, and capable of demonstration'" to vacate arbitration award, and "'the party asserting it . . . must establish specific facts indicat[ing] improper motives on the part of the arbitrator'"); *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 822 (8th Cir. 2001) (holding that a party seeking vacation of arbitration award based on FAA's "undue means" or "misbehavior" provisions must demonstrate that the conduct in question influenced the outcome of arbitration); *Tamari v. Bache Halsey Stuart Inc.*, 619 F.2d 1196, 1200 (7th Cir. 1980); *Transit Cas. Co. v. Trenwick Reinsurance Co., LTD.*, 659 F. Supp. 1346, 1352–53 (S.D.N.Y. 1987) (holding that an arbitration award will not be vacated on grounds of arbitral bias based on arbitrator's nondisclosure of insignificant relationships between arbitrators and parties); *Guseinov v. Burns*, 145 Cal. App. 4th 944, 957 (2006) (citations omitted) (holding that in determining whether an arbitration award is tainted by bias because an arbitrator failed to disclose a particular relationship, the test is objective—"whether the relationship would create an impression of bias in the mind of a reasonable person"); *William B. Lucke, Inc. v. G.B. Spiegel*, 266 N.E.2d 504, 508 (Ill. App. 1970). See generally *STMicronics, N.V.*, 648 F.3d at 77 (finding that the absence of disclosure regarding an arbitrator's prior testimony as an expert witness on legal issues that might arise in arbitration cannot form a ground for vacating an arbitral award); *Leonard E. Gross & Howard L. Wieder, Should Parties' Disclosure Requirements for Arbitrators Be Honored by Courts*; *Positive Software Solutions, Inc. v. New Century Mortgage Corporation*, 33 S. ILL. U. L. J. 71, 83–84 (2008); *Linden Fry, Note, Letting the Fox Guard the Henhouse: Why the Fifth Circuit's Ruling in Positive Software Solutions Sacrifices Procedural Fairness for Speed and Convenience*, 58 CATH. U. L. REV. 599, 615 (2009); *Perry A. Zirkel & Peter B. Winebrake, Legal Boundaries for Partiality and Misconduct of Labor Arbitrators*, 1992 DET. C. L. REV. 679, 684 (1992).

¹²⁸ See *Commw. Coatings Corp. v. Cont'l Cas. Co.*, 89 S. Ct. 337, 338 (1968). See also *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1103 (9th Cir. 2007) (finding that an arbitrator's failure to disclose a nontrivial conflict of interest was evident partiality); *ANR Coal Co.*,

In *Nagel v. ADM Investor Services, Inc.*, the plaintiffs claimed they could not receive an unbiased arbitration from the National Grain & Feed Association because approximately half of the members were involved in the farm contract program in dispute.¹²⁹ The U.S. District Court for the Northern District of Illinois disagreed, stating that the correct question is “whether the arbitrators displayed evident partiality.”¹³⁰ The court held that simply because some of the arbitrators were grain merchants did not equate to partiality.¹³¹ The court concluded that involvement with the contract program equated to expertise—a substantial reason why sophisticated commercial parties chose arbitration over litigation.¹³²

In *Gianelli Money Purchase Plan & Trust v. ADM Investor Services, Inc.*,¹³³ the Eleventh Circuit said that evident partiality under the FAA exists only when “(1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists.”¹³⁴ The Eleventh Circuit said that an arbitration award may be vacated for evident partiality only when either “(1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that potential conflict exists.”¹³⁵ According to

Inc. v. Cogentrix of N.C., Inc., 173 F.3d 493, 500 (4th Cir. 1999) (holding that an arbitrator's failure to reveal trivial facts that might call into question the ability to be impartial during proceedings did not require vacature of award); *Hayden v. Robertson Stephens, Inc.*, 150 Cal. App. 4th 360, 365–66 (2007) (holding that for the purpose of the California statutory disclosure requirements for a neutral arbitrator concerning past or prospective service with party to arbitration, “party” includes a legal affiliate of a named party only if the affiliate is involved in transaction, contract, or facts that gave rise to issues subject to proceeding); *Parks v. Sombke*, 732 A.2d 907, 911 (Md. Ct. Spec. App. 1999) (citations omitted) (holding that the standard for “whether disclosure [of partiality] is required is whether facts ‘might reasonably lead to an impression or appearance of bias’”); *Thomas James Assoc., Inc. v. Owens*, 1 S.W.3d 315, 320–21 (Tex. App. 1999) (holding that an arbitrator's failure to disclose involvement in a prior unrelated arbitration did not create a reasonable impression of evident partiality in mind of an objective observer or constitute “other misconduct”); *Johnston v. Sec. Ins. Co. of Hartford*, 6 Cal. App. 3d 839, 842 (1970) (citations omitted) (holding that an arbitrator should have disclosed he was acquainted with the claimant's counsel and had previously referred cases to the claimant's arbitrator). *But see* *Sheet Metal Workers Int'l Ass'n Local Union# 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 745–46 (9th Cir. 1985) (holding that proof of specific facts indicating improper motives was required); *Borst*, 717 N.W.2d at 50 (holding that evident partiality due to a relationship between an arbitrator and a party cannot be avoided simply by full disclosure at the outset and a declaration of impartiality).

¹²⁹ 65 F. Supp. 2d 740, 745–46 (N.D. Ill. 1999).

¹³⁰ *Id.* at 746.

¹³¹ *Id.*

¹³² *Id.*

¹³³ 146 F.3d 1309, 1312 (11th Cir. 1998).

¹³⁴ *Id.* See also *Univ. Commons–Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002) (citations omitted); *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 896–97 (2d Cir. 1997); *Schmitz v. Zilveti*, 20 F.3d 1043, 1048 (9th Cir. 1994).

¹³⁵ *Gianelli Money Purchase Plan & Trust*, 146 F.3d at 1312.

the Ninth Circuit, in cases involving an arbitrator's nondisclosure of facts creating a reasonable impression of partiality, a showing of actual bias by the arbitrator is not required for vacatur of the arbitration award.¹³⁶

Although the FAA provides that a court can vacate an award “[w]here there was evident partiality or corruption in the arbitrators,” it does not provide for pre-award removal of an arbitrator.¹³⁷ A party may challenge any award ultimately rendered on the grounds of evident partiality.¹³⁸ However, a party to arbitration who knows of an arbitrator's alleged bias before rendition of the award and does not complain until after rendition of the award waives the impropriety.¹³⁹

In some circumstances, an award of damages may be so grossly excessive or inadequate as to indicate partiality.¹⁴⁰ A court will not “set aside an award for mere inadequacy in [the] amount [of damages], unless it is so great as to indicate corruption or partisan bias on the part of the arbitrators.”¹⁴¹

In *National Football League Players Ass’n v. National Football League*, a dispute over discipline imposed on players who tested positive for banned substances was heard by the National Football League’s (NFL) Chief Legal Officer.¹⁴² The court rejected the Players Association’s claim that the decision—treated as an arbitration award—should be vacated because the arbitrator was

¹³⁶ See *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 386 F.3d 1306, 1312–13 (9th Cir. 2004).

¹³⁷ 9 U.S.C. § 10(a)(2) (2013).

¹³⁸ See *Aviall, Inc.*, 110 F.3d at 897.

¹³⁹ See, e.g., *Fid. Fed. Bank, FSB*, 386 F.3d at 1313 (holding that the process by which the parties each selected the arbitrator, the party-selected arbitrators selected the third arbitrator, and the party-selected arbitrators did not promise to be neutral until the hearing, the process should have put losing party on notice that arbitrator chosen by prevailing party could have had some connection with prevailing party. By waiting until award issued, the losing party waived its right to raise a claim of evident partiality.); *JCI Commc’ns, Inc. v. Int’l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 45 (1st Cir. 2003) (holding that the party was put on notice of the risk when it signed the contract and chose not to inquire about the backgrounds of committee members before or during hearing waived right to challenge the decision based on evident partiality); *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 821 (8th Cir. 2001) (holding that the party waived the issue of evident partiality by failing to raise it before arbitration panel); *Kiernan v. Piper Jaffray Cos., Inc.*, 137 F.3d 588, 593 (8th Cir. 1998) (holding that although party “did not have full knowledge of [all] relationships to which they [objected] they did have concerns about [the arbitrator’s] impartiality and yet chose to have her remain on the panel rather than spend[ing] time and money [to investigate] further until losing the arbitration”); *Garfield & Co. v. Wiest*, 308 F. Supp. 1107, 1111 (S.D.N.Y. 1970). But see *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1359 (6th Cir. 1989) (holding that a successful party “may not rely on the failure to object for bias [unless] ‘all the facts now argued as to the alleged bias were known, . . . at the time the joint committee heard their [first] grievances’”); *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1203 (11th Cir. 1982); *HSMV Corp. v. ADI Ltd.*, 72 F. Supp. 2d 1122, 1130 (C.D. Cal. 1999).

¹⁴⁰ *Mork v. Eureka–Sec. Fire & Marine Ins. Co.*, 42 N.W.2d 33, 34, 39 (Minn. 1950).

¹⁴¹ *Firemen’s Fund Ins. Co. v. Flint Hosiery Mills, Inc.*, 74 F.2d 533, 536 (4th Cir. 1935).

¹⁴² See generally 654 F. Supp. 2d 960, 969 (D. Minn. 2009).

partial.¹⁴³

The court pointed out that the Players Association had agreed with the NFL in their collective bargaining agreement that the Commissioner or the Commissioner's designee could hear disciplinary appeals.¹⁴⁴ The arbitrator in question was the NFL's Chief Legal Officer. Although the arbitrator had given the NFL legal advice regarding the matter that he heard, the court concluded that because the Players Association had not objected to the arbitrator before the award it had waived any claim of bias.¹⁴⁵

Poston v. National Football League Players Ass'n involved the Players Association and a licensed "contract advisor."¹⁴⁶ A licensed contract advisor "represent[ed] NFL players in various types of negotiations, including negotiations for employment contracts with particular teams and associated marketing opportunities."¹⁴⁷ Pursuant to their agreements with the Players Association, "the conduct of such advisors was governed by the regulations established" by the Players Association.¹⁴⁸ The Players Association, "through its Disciplinary Committee, ha[d] the power to discipline contract advisors for noncompliance with [these] regulations."¹⁴⁹

One of the advisor's employees improperly purchased airline tickets for four college players in order to attend a party at the advisor's company.¹⁵⁰ One player was suspended one game for impermissible benefits.¹⁵¹ The Players Association disciplined the contract advisor.¹⁵²

In accordance with established procedures, the Players Association's Disciplinary Committee's determination was appealed to arbitration.¹⁵³ The Players Association selected an arbitrator to resolve the matter.¹⁵⁴ The parties stipulated that the following two issues would be presented to the arbitrator: (1) whether the contract advisors engaged in or were engaging in prohibited conduct, as al-

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 968-69.

¹⁴⁵ The court found that the Players Association, knowing the arbitrator had given legal advice to the NFL about the matter, requested that he serve as arbitrator specifically because of his involvement. *Id.*

¹⁴⁶ See generally No. 02 CV 871, 2002 WL 31190142, at *1 (E.D. Va. Aug. 26, 2002).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

leged; and (2) if so, whether the discipline imposed should be affirmed or modified.¹⁵⁵ The arbitrator upheld the discipline.¹⁵⁶

The contract advisor filed a motion to vacate the arbitration award.¹⁵⁷ The court rejected the advisor's claim that the arbitrator was not impartial.¹⁵⁸ The court noted that the contract advisor knew, or should have known, that the arbitrator used in the case was the one regularly used by the Players Association, and, therefore, should have raised any concerns regarding the arbitrator's potential partiality before the arbitration proceeding.¹⁵⁹ The court explained that "arbitration awards should not be vacated 'where the arbitrator has disclosed any circumstance that would show bias,' or where 'an objecting party who is in fact aware of the relationship at the time of the arbitration remains silent.'"¹⁶⁰

c. Refusing to Postpone Hearing or to Hear Pertinent and Material Evidence

An award may be vacated where the rights of the parties were substantially prejudiced by the arbitrator's refusal to postpone the hearing upon sufficient cause being shown for the postponement.¹⁶¹ Courts will examine the circumstances of each case to determine whether the denial of the request for postponement was arbitrary or unreasonable.¹⁶²

A court may vacate an award because of the refusal of the arbitrator to hear

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *4.

¹⁶⁰ *Id.*

¹⁶¹ 9 U.S.C. § 10(a)(3) (2013). *See* *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 21 (2d Cir. 1997) (vacating an award where the arbitrator refused to continue the hearing to permit testimony by company official); *Ebasco Constructors, Inc. v. Ahtna, Inc.*, 932 P.2d 1312, 1316 (Alaska 1997) (explaining that the court would review arbitrator's decision not to allow for postponement of hearing because of withdrawal of party's counsel twenty-five days prior to arbitration with deference, reversing only for gross error). *But see* *Ottawa Office Integration Inc. v. FTF Bus. Sys., Inc.*, 132 F. Supp. 2d 215, 216 (S.D.N.Y. 2001) (deciding that the arbitrator had a reasonable basis to deny request for additional adjournment of hearing in breach of contract case due to the illness of the defendants' primary witness because the defendants failed to substantiate the witness' alleged medical condition); *Fairchild & Co., Inc. v. Richmond, Fredericksburg & Potomac R.R. Co.*, 516 F. Supp. 1305, 1313 (D.D.C. 1981).

¹⁶² *See* *SWAB Fin., LLC v. E*Trade Secs., LLC*, 150 Cal. App. 4th 1181, 1198–99 (2007) (holding that the arbitrators did not abuse their discretion in refusing to grant the plaintiff's request to continue hearing claims against a securities broker where the request for a continuance came more than three years after the customer first initiated the arbitration; more than one year beyond the original arbitration date after the customer had already once refused to appear at the arbitration hearing; and after the customer had twice brought legal actions against the broker, and twice been ordered to arbitrate the dispute); *Johnson Rock Prods., Inc. v. Hanover Bay, Inc.*, 620 P.2d 982, 983 (Or. Ct. App. 1981).

evidence material to the controversy.¹⁶³ Not every failure of the arbitrator to receive relevant evidence constitutes misconduct requiring vacatur of the arbitrator's award.¹⁶⁴

“Vacatur is appropriate only when the exclusion of relevant evidence ‘so affects the rights of a party that it may be said that [the party] was deprived of a fair hearing.’”¹⁶⁵ The refusal to receive offered evidence is not sufficient to warrant the vacating of an award unless the evidence is shown to have been “clearly relevant to the disputed issue.”¹⁶⁶

d. Exceeding Powers

Arbitrators derive their authority solely from the arbitration agreement or the submission to arbitration. Since arbitrators derive their power from the arbitration agreement, they have no power to decide issues not submitted for resolution. An arbitrator exceeds his or her powers by making an award that fails to comply with the terms of the arbitration agreement.¹⁶⁷ The parties' arbitration

¹⁶³ 9 U.S.C. § 10(a)(3). *See* U.S. Life Ins. Co. v. Superior Nat. Ins. Co., 591 F.3d 1167, 1176 (9th Cir. 2010) (holding that the arbitration panel did not refuse to hear pertinent and material evidence in reinsurance contract dispute as would allow for vacatur of arbitration award under the FAA by holding an ex parte meeting with the panel-retained workers' compensation experts; the panel only held the meeting after listening to and considering parties' evidence; the panel advised the parties that it was unable to reach a decision and that it would retain the experts; the parties discussed what review process to use; and the panel allowed parties to review experts' written conclusions, submit briefing, and question the experts about their qualifications and conclusions).

¹⁶⁴ *See* *Rosensweig v. Morgan Stanley & Co., Inc.*, 494 F.3d 1328, 1333 (11th Cir. 2007) (citations omitted) (holding that “in making evidentiary determinations, arbitrators are not required to ‘follow all the niceties observed by the federal courts, but they must give the parties a fundamentally fair hearing’”); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 817 (D.C. Cir. 2007) (citations omitted) (holding that “it is well within arbitrator's authority to refuse to hear evidence that is cumulative”); *Checkrite of San Jose, Inc. v. Checkrite, Ltd.*, 640 F. Supp. 234, 237 (D. Colo. 1986).

¹⁶⁵ *Hoteles Condado Beach, LA Concha & Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 37–38, 40 (1st Cir. 1985) (citations omitted). *See, e.g., Burlage v. Superior Court of Ventura Cnty.*, 178 Cal. App. 4th 524, 534–35 (2009) (holding that the trial court acted within its discretion in finding that real property seller's rights were substantially prejudiced by the arbitrator's refusal to hear evidence material to a controversy over the encroachment of the property's pool and fence into a neighboring property, thus, supporting vacation of the arbitration award where the arbitrator excluded evidence that after the purchase the title company paid \$10,950 for a lot-line adjustment that gave purchasers title to the encroaching land; the seller was not permitted to refute purchasers' expert who opined that the encroachment reduced the value of the property by \$100,000; the purchasers presented expert testimony about the effect of what had become a nonexistent encroachment; and the arbitrator ultimately awarded \$552,750 in compensatory damages).

¹⁶⁶ *John Post Constr. Corp. v. Good Humor Corp.*, 9 Misc. 2d 392, 392–93 (N.Y. 1957).

¹⁶⁷ 9 U.S.C. § 10(a)(4). *See e.g., Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 123 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012) (holding that the arbitrator did not exceed her jurisdiction by ruling the employment arbitration agreement allowed class arbitration of sex discrimination claims against employer); *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 846 (11th Cir. 2011) (holding that issuing an award consisting solely of panels holding satisfied the arbitration agreement's requirement that

agreement sets the conditions, limitations, and restrictions to be observed by the arbitrators in making the award. It is presumed that the arbitrators do not exceed their authority.¹⁶⁸

the panel render a reasoned award); *Boeing Co. v. Int'l Union of United Auto., Aerospace & Agric. Implement Workers of Am. (UAW)*, 600 F.3d 722, 724 (7th Cir. 2010) (holding that the "arbitrators are authorized to order legally enforceable remedies for the violation of contracts that they're called on to enforce"); *Totes Isotoner Corp. v. Int'l Chem. Workers Union Council/UFCW Local 664C*, 532 F.3d 405, 415 (6th Cir. 2008) (holding that "when arbitrator reaches question not committed to him by the parties, he acts outside of his authority such that an order vacating an award is appropriate"); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (holding that the arbitrator acted beyond scope of his authority as matter of California law in resolving dispute over trademark licensing agreement by attempting to bind all of licensee's affiliates, including relatives who were not parties to licensing agreement, as relatives who were not parties to licensing agreement could not be bound by its provisions); *Truck Drivers Local No. 164 v. Allied Waste Sys., Inc.*, 512 F.3d 211, 217 (6th Cir. 2008) (holding that an arbitrator in labor dispute "does not exceed his authority every time he makes an interpretive error"); *Prostyakov v. Masco Corp.*, 513 F.3d 716, 722, 727 (7th Cir. 2008) (holding that an arbitrator did not exceed his powers, even if he erred in applying Indiana's conflict-of-law principles); *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 584 (3d Cir. 2007) (holding that "[a]rbitration is creature of contract, and an arbitration panel has authority to decide only issues that have been submitted for arbitration by the parties"); *Poland Spring Corp. v. United Food & Commercial Workers Int'l Union, AFL-CIO-CLC, Local 1145*, 314 F.3d 29, 37 (1st Cir. 2002) (holding that an arbitrator exceeded the scope of his jurisdiction by reinstating an employee fired for insubordination and awarding back pay, after finding that employee had been insubordinate, but finding that mitigating circumstances called for lesser punishment where collective bargaining agreement provided that insubordination "shall" constitute just cause for immediate termination regardless of mitigating circumstances); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002) (citations omitted) (holding that because "arbitration is a matter of contract, . . . 'the power and authority of arbitrators in an arbitration proceeding is dependent on the provisions under which the arbitrators were appointed'"); *Anheuser-Busch, Inc. v. Teamsters Local No. 744*, 280 F.3d 1133, 1138-39, 1145-46 (7th Cir. 2002) (holding that an arbitrator exceeded the scope of his authority by relying on past practices of the parties where the contract included a zipper clause providing that the agreement superseded all prior agreements); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 299-300 (3d Cir. 2001) (holding that the arbitrator exceeded scope of his authority in making an award in favor of party for breach of contract based on determination that shipper's procedures were "unfair." The intrinsic fairness of shipper's procedures was not before arbitrator, who was empowered to decide only whether termination was within terms of parties' agreement.); *Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 115 (3d Cir. 1996) (holding that an arbitrator exceeded his authority in deciding issues beyond the submitted issue of increase in toll schedule); *W. Emp'rs Ins. Co. v. Jefferies & Co., Inc.*, 958 F.2d 258, 259 (9th Cir. 1992) (holding that the award did not contain findings or conclusions required by agreement); *Cnty. of Hennepin v. Law Enforcement Labor Servs., Inc., Local # 19*, 527 N.W.2d 821, 824 (Minn. 1995) (holding that an arbitrator did not have authority to decide constitutional issues in public sector labor dispute); *Atlantic Painting & Contracting Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 845 (Ky. 1984) (holding that an arbitrator exceeded his authority by making an award beyond the submission of the parties). *See also* *City of Richmond v. Serv. Emps, Int'l Union, Local 1021*, 189 Cal. App. 4th 663, 671, 673 (2010) (holding that an arbitrator exceeds his powers if the arbitrator strays beyond the scope of the parties' agreement by resolving issues the parties did not agree to arbitrate, orders an unauthorized remedy, or resolves nonarbitral issues).

¹⁶⁸ *See* *Greene v. Mari & Sons Flooring Co., Inc.*, 289 N.E.2d 860, 862 (Mass. 1972); *Alexander v. Blue Cross of Cal.*, 88 Cal. App. 4th 1082, 1087, 1092 (2001) (holding that the arbitrator did not exceed his powers by refusing to impose a discovery sanction against insurer so as to warrant vacating arbitration award in favor of insured's even if sanction was mandatory under California discovery statutes).

Arbitrators must clearly exceed their powers before an award will be overturned. “A mere ambiguity in the opinion accompanying an award which permits an inference that the arbitrators may have exceeded their authority is no reason for refusing to enforce the award.”¹⁶⁹ Where an arbitrator's opinion insufficiently explains the arbitrator's decision, the proper remedy is to remand the matter to the same arbitrator for clarification.¹⁷⁰ “Where the arbitrators have exceeded their authority in one respect such as allowance of fees, their decision is unenforceable only to the extent that such authority was exceeded.”¹⁷¹

Where an arbitration award is attacked on the ground that the arbitrators exceeded their powers through the erroneous interpretation of the contract, the reviewing court should determine whether the construction of the contract made by the arbitrators was a reasonably possible one that could seriously be made in the context in which the contract was made.¹⁷²

Although an “arbitrators’ view of the law might be open to serious question, an award [that] is within the terms of the submission, will not be set aside by a court for error either in law or fact, . . . if the award contains the honest decision of the arbitrators, after a full and fair hearing.”¹⁷³ Some courts have vacated

¹⁶⁹ See *Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.*, 713 F.3d 797, 802–04 (5th Cir. 2013) (holding that because an arbitration award granting video game publisher perpetual license in video game's intellectual property drew its essence from contract between video game developer and publisher; the arbitrator did not exceed his powers in awarding perpetual license, so as to permit district court to vacate arbitration award; the developer had committed extraordinary breach of the contract; an equally extraordinary realignment of the parties' original rights was necessary to preserve essence of contract; and the perpetual license furthered contract's general aims and represented attempt by arbitrator to restore to developer and publisher the contract's fundamental goal of mutual access to financial benefits derived from their joint creation and distribution of game); *Hilltop Constr., Inc. v. Lou Park Apartments*, 324 N.W.2d 236, 239 (Minn. 1982).

¹⁷⁰ See *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183, 191 (4th Cir. 2010) (finding that given the evident incoherence of explanation volunteered by securities industry arbitration panel, the district court acted reasonably in remanding award for clarification of bases of award in order to enable court to conduct limited judicial review); *Green v. Ameritech Corp.*, 200 F.3d 967, 970, 977 (6th Cir. 2000).

¹⁷¹ *Saville Int'l, Inc. v. Galanti Grp., Inc.*, 438 N.E.2d 509, 511 (Ill. App. 1982) (citations omitted). Cf. *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 473–74 (5th Cir. 2012) (holding that the arbitrator's reasoned award was valid under the FAA: “[i]n eight pages, the arbitrator laid out the facts, described the contentions of the parties, and decided which of the two proposals [for price formula] should prevail,” and parties “did not request findings of fact and conclusions of law”); *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 846 (11th Cir. 2011) (holding that issuing an award consisting solely of the panel's holding satisfied the arbitration agreement's requirement that the panel render a reasoned award).

¹⁷² *Susquehanna Valley Cent. Sch. Dist. at Conklen v. Susquehanna Valley Teachers' Ass'n*, 338 N.E.2d 132, 133 (N.Y. 1975) (arbitration decision review).

¹⁷³ *Coast Trading Co., Inc. v. Pac. Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982) (citations omitted).

awards that were found to be “arbitrary and capricious” or “completely irrational.”¹⁷⁴ These grounds have been criticized as giving a reviewing court a broad license—much more expansive than that afforded under the “manifest disregard” of the law standard or the “public policy” doctrine—to intrude into the merits of the arbitrator’s resolution of the dispute.¹⁷⁵

“The ‘completely irrational’ award ground for vacatur was first mentioned in . . . *Swift Industries, Inc. v. Botany Industries, Inc.*”¹⁷⁶ The Third Circuit held that “an award of an arbitrator is not subject to judicial revision unless it is ‘completely irrational.’”¹⁷⁷ The court concluded that “an award may not stand if it does not meet the test of fundamental rationality.”¹⁷⁸ In *Ainsworth v. Skurnick*, the Eleventh Circuit held that “an [arbitration] award is arbitrary and capricious only if ‘a ground for the arbitrator’s decision cannot be inferred from the facts of the case.’”¹⁷⁹ “The onus is on the party requesting vacatur to refute every . . . rational basis upon which the arbitrator could have relied.”¹⁸⁰

3. Manifest Disregard of the Law

The doctrine of manifest disregard of the law as an independent basis for reviewing American arbitration awards lies in dicta from the Supreme Court’s decision in *Wilko v. Swan*.¹⁸¹ In *Wilko v. Swan*, the Court, in dicta, considered whether a failure of the arbitrators to decide in accordance with the provisions of the Securities Act might be subject to judicial review.¹⁸² The Court concluded that an arbitrator’s decision would have to have been in “manifest disregard” of

¹⁷⁴ See Stephen L. Hayford & Scott B. Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial Review of Commercial Arbitration Awards*, 51 DISP. RESOL. J. 22, 23 (Oct. 1996) (critical examination of these bases for vacating commercial arbitration awards) [hereinafter *Vacatur*].

¹⁷⁵ *Id.*

¹⁷⁶ 466 F.2d 1125, 1131 (3d Cir. 1972). See *Vacatur*, *supra* note 175, at 22, 28 (critical examination of the “completely irrational” standard).

¹⁷⁷ *Vacatur*, *supra* note 174, at 78. *Accord* French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 907 (9th Cir. 1986).

¹⁷⁸ *Vacatur*, *supra* note 174, at 78.

¹⁷⁹ 960 F.2d 939, 941 (11th Cir. 1992) (citations omitted).

¹⁸⁰ *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 779 (11th Cir. 1993) (citations omitted). See *El Mundo Broad. Corp. v. United Steelworkers of Am., AFL-CIO, CLC*, 116 F.3d 7, 10 (1st Cir. 1997) (holding that an arbitrator who treated the appointment of employee to new position as a continuing violation and heard an untimely grievance exceeded the scope of his authority); *Bonshire v. Thompson*, 52 Cal. App. 4th 803, 806 (1997) (holding that an arbitrator exceeded his powers by relying on extrinsic evidence to reform the parties’ contract contrary to integration clause that expressly prohibited consideration of such evidence).

¹⁸¹ 346 U.S. 427, 436 (2d Cir. 1953), *overruled on other grounds* by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

¹⁸² *Id.*

the law to be vacated.¹⁸³

Manifest disregard of the law is different than an error in interpreting the law.¹⁸⁴ Manifest disregard of the law warranting the setting aside of an arbitration award must go beyond a mere error in the law or failure on the part of the arbitrators to understand or apply the law; it must so affect the rights of a party that it may be said to deprive the party of a fair hearing.¹⁸⁵ The manifest disregard of the law must involve a “well defined, explicit, and clearly applicable” law.¹⁸⁶

The federal courts have applied “slightly different definitions for manifest disregard” of the law.¹⁸⁷ The Second Circuit has held that manifest disregard should be upheld “only when the arbitrator knew of the applicable law, understood the law to apply to the facts, and refused to apply the law.”¹⁸⁸ The Ninth

¹⁸³ *Id.*

¹⁸⁴ See *Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 349–50 (4th Cir. 2008) (citations omitted) (holding that “an arbitrator does not act in manifest disregard of law unless ‘(1) applicable legal principle is clearly defined and not subject to reasonable debate, and (2) the arbitrator refused to heed that legal principle’”); *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007) (citations omitted) (holding that to show “manifest disregard of law, the moving party must show that the arbitrator ‘understood and correctly stated law, but proceeded to disregard’” it); *Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 481 F.3d 813, 816 (D.C. Cir. 2007) (citations omitted) (holding that “in addition to the grounds under Federal Arbitration Act (“FAA”) on which arbitration award may be vacated, an award may be vacated only if it is in ‘manifest disregard of the law’ or is contrary to an ‘explicit public policy’”); *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 381–82 (5th Cir. 2004) (citations omitted) (holding that “manifest disregard of the law” “means more than error or misunderstanding with respect to the law”; rather, “arbitrators must have appreciated existence of a clearly governing principle [of law] but decided to ignore . . . it”). But see *STMicroelectronics, N.V. v. Credit Suisse Secs. (USA) LLC*, 648 F.3d 68, 78 (2d Cir. 2011) (citations omitted) (holding that a court will not vacate arbitral award on ground of “manifest disregard of the law” “because of ‘a simple error in law or a failure by the arbitrators to understand or apply [law.]’ but only when a party clearly demonstrates ‘that the [arbitral] panel intentionally defied the law’”).

¹⁸⁵ See *STMicroelectronics, N.V.*, 648 F.3d at 78 (holding that a court will not vacate arbitral award on ground of manifest disregard of the law because of simple error in law or failure by arbitrators to understand or apply law); *Countrywide Fin. Corp. v. Bundy*, 187 Cal. App. 4th 234, 260–61 (2010) (holding that an arbitrator did not manifest disregard of the law so as to warrant vacatur by ruling that the classes’ claims were not barred by the preclusive effects of previous actions where employees were expressly excluded from settlement in first prior action and the classes in second prior action did not involve same claims or time frames); *Milwaukee Dist. Council 48, Am. Fed. of State, Cnty. & Muni. Emps., AFL-CIO v. Milwaukee Cnty.*, 795 N.W.2d 777, 783 (Wis. Ct. App. 2010) (holding that, unlike reviewing decision by lower court, a court may not overturn arbitration award because the arbitrator made error of law, unless the award shows a manifest disregard of law. “[M]anifest disregard of the law” does not mean wrong, but instead, means the arbitrator or arbitration panel understood and correctly stated law, but ignored it).

¹⁸⁶ *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986).

¹⁸⁷ Weathers P. Bolt, Comment, *Much Ado About Nothing: The Effect of Manifest Disregard on Arbitration Agreement Decisions*, 63 ALA. L. REV. 161, 167 (2011).

¹⁸⁸ *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010) (suggesting that manifest disregard should be thought of as judicially created gloss on 9 U.S.C. § 10(a)(4) and

Circuit has defined manifest disregard as “shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4).”¹⁸⁹

The Seventh Circuit interprets manifest disregard to apply to situations where the arbitrator orders the parties to disobey the law, or the arbitrator’s “order does not adhere to the legal principles specified by the contract.”¹⁹⁰ According to the Seventh Circuit, it has defined manifest disregard narrowly so it fits comfortably under section 10(a)(4).¹⁹¹

In *Hall Street Associates LLC v. Mattel Inc.*,¹⁹² the Supreme Court rejected the argument that the existence of the manifest disregard review standard created in *Wilko v. Swan*¹⁹³ supported expansion of judicial review by the parties to an arbitration agreement. The Court said that manifest disregard was different because the Court created it, while the parties in *Hall Street* attempted to create a nonstatutory standard of review.¹⁹⁴

The First, Fifth, Seventh, Eighth, and Eleventh Circuits have construed *Hall Street* as holding that the common law standards are no longer valid grounds for vacatur because the FAA’s grounds are exclusive.¹⁹⁵

The Sixth Circuit has held that manifest regard survives as an independent ground for vacatur.¹⁹⁶ According to the Sixth Circuit, *Hall Street* merely prohibits private parties from contracting for greater judicial review.¹⁹⁷

The Second and Ninth Circuits have held that, after *Hall Street*, manifest disregard exists as a shorthand or judicial gloss for section 10(a)(4) of the

allowing vacatur when arbitrators exceed their powers). *Accord* *Schwartz v. Merrill Lynch & Co., Inc.*, 665 F.3d 444, 451 (2d Cir. 2011) (citations omitted).

¹⁸⁹ *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009). See generally *Coffee Beanery, Ltd. v. WW, L.L.C.*, No. 07-1830, 2008 WL 3838010 300 Fed. Appx. 415, 419 (6th Cir. Nov. 14, 2008) (unpublished opinion).

¹⁹⁰ *Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011) (citations omitted) (holding that “‘manifest disregard of the law’ is not a ground on which a court may reject an arbitrator’s award under the Federal Arbitration Act,” unless the award directs the parties to violate the legal rights of third persons who did not consent to the arbitration); *Halim v. Great Gatsby’s Auction Gallery, Inc.*, 516 F.3d 557, 563 (7th Cir. 2008) (citations omitted).

¹⁹¹ *Affymax, Inc.*, 660 F.3d at 285; *Halim*, 516 F.3d at 563 (citations omitted).

¹⁹² 552 U.S. 576, 585 (2008).

¹⁹³ 346 U.S. 427, 436-37 (1953).

¹⁹⁴ *Id.*

¹⁹⁵ See, e.g., *Affymax, Inc.*, 660 F.3d at 284 (citations omitted) (stating that manifest disregard applies when an award “directs the parties to violate the legal rights of third persons who did not consent to the arbitration”); *Med. Shoppe Int’l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (citations omitted); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1323–24 (11th Cir. 2010); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (dicta); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).

¹⁹⁶ See generally *Coffee Beanery, Ltd.*, No. 07-1830, 2008 WL 3838010.

¹⁹⁷ See generally *id.*

FAA.¹⁹⁸

In *Wachovia Securities, LLC v. Brand*, the Fourth Circuit held “that manifest disregard continues to exist either ‘as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth in 9 U.S.C. § 10.’”¹⁹⁹

4. Public Policy

An award may be held to be in excess of the arbitrator's power if it violates a well-defined and dominant public policy as “‘ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”²⁰⁰ The public policy exception was first recognized in labor arbitration cases, and is rooted in the common law doctrine of a court's power to refuse to enforce a contract that violates public policy or law.²⁰¹

In considering an employer's claim that considerations of public policy render an arbitration award in a labor arbitration unenforceable, the Supreme Court has held that a court is required to assume that the collective bargaining agreement itself called for the employee's reinstatement, as found by the arbitrator, and the court would treat the arbitrator's award as if it represented an agreement between the employer and the union as to the proper meaning of the contract's words “‘just cause.’”²⁰² The Court explained that both the employer and the union had granted the arbitrator the authority to interpret the meaning of their contract's language, and the employer did not claim that the arbitrator had acted outside his contractually delegated authority.²⁰³

According to the Supreme Court, the relevant question in considering whether an employer's claim that considerations of public policy render an arbitration award that reinstated an alleged drug user was unenforceable was not whether the employee's drug use itself violated public policy, but whether the

¹⁹⁸ *Comedy Club, Inc. v. Improv W. Assoc.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *Stolt-Nielsen, SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 93–94 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. 662 (2010).

¹⁹⁹ *Wachovia Secs., LLC v. Brand*, 673 F.3d 472, 483 n.7 (4th Cir. 2012) (citations omitted).

²⁰⁰ *See United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 30 (1987) (citations omitted). *See also* *Sprewell v. Golden State Warriors*, 266 F.3d 979, 987 (9th Cir. 2001) (citations omitted) (holding that “‘to vacate [a labor] arbitration award on public policy grounds, [the court] must find (1) that ‘an explicit, well defined and dominant policy’ exists . . . and (2) ‘that the policy is one that specifically militates against the relief ordered by the arbitrator’”).

²⁰¹ *See United Paperworkers Int'l Union, AFL-CIO*, 484 U.S. at 30; *W.R. Grace & Co. v. Local Union No. 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 766 (1983).

²⁰² *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000).

²⁰³ *Id.*

decision to reinstate him did so.²⁰⁴ Thus, a court must inquire into whether the contractual agreement to reinstate an employee, with specified conditions, ran “contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests.”²⁰⁵

The Supreme Court stated that a court’s “authority to invoke the public policy exception to enforcement of labor arbitration awards is not limited solely to instances where the arbitration award itself violates positive law;” but, “[n]evertheless, the public policy exception is narrow and must satisfy the principles set forth in governing Supreme Court precedent.”²⁰⁶ When applying the public policy exception to the enforcement of a labor arbitration award, the court cautioned that the “courts should approach with particular caution to divine further public policy in that area.”²⁰⁷

Relying on labor arbitration cases, several courts have vacated commercial arbitration awards on the ground that they violated public policy. The Tenth and Eighth Circuits have held that an award can be vacated when it, or the underlying contract as interpreted in the arbitration award, explicitly conflicts with, violates, or is contrary to a public policy.²⁰⁸ In those circuits, the focus is upon the award itself and the court must examine the merits of the arbitration award in order to ascertain whether the arbitrator’s analysis and application of the disputed contract or relevant law is incorrect and, therefore, violates or conflicts with the public policy.²⁰⁹

The Eleventh, Second, Ninth, and D.C. Circuits apply a different standard in determining whether to vacate awards under the public policy doctrine.²¹⁰ Under the standard used by these circuits, a reviewing court does not evaluate the merits of the arbitration award. Instead of evaluating the correctness of the arbitrator’s interpretation of the disputed contract or relevant law, the court focuses its analysis on determining whether implementation of the award will

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *PaineWebber, Inc. v. Agron*, 49 F.3d 347, 350 (8th Cir. 1995) (citations omitted); *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993).

²⁰⁹ See *Vacatur*, *supra* note 174, at 22, 27 (critically examining these bases for vacating commercial arbitration awards).

²¹⁰ See, e.g., *Ariz. Elec. Power Coop. v. Berkeley*, 59 F.3d 988, 992 (9th Cir. 1995); *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993); *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980) (citations omitted); *Revere Copper & Brass Inc. v. Overseas Private Inv. Corp.*, 628 F.2d 81, 83 (D.C. Cir. 1980) (citations omitted).

compel one of the parties to violate a well-defined and dominant public policy.²¹¹ If implementation of the award will place one or both of the parties to the award in violation of public policy, the award must be vacated.²¹²

5. Procedure

A party seeking relief from an arbitration award bears a heavy burden; it is not enough to show that the arbitrator committed error, or even serious error.²¹³ Courts will vacate an award for misconduct only where the objecting party has demonstrated that the misconduct actually prejudiced the party's rights.²¹⁴

An award may be vacated because of fraud or misconduct on the part of a party when such conduct had a tendency to influence an arbitrator improperly.²¹⁵ There may be sufficient misconduct “to cause the court to set aside an award, even where there is no ground for importing the slightest improper motives to the [arbitrators].”²¹⁶ For example, an arbitrator's visit by himself to the site of a construction job involved in a dispute was held to constitute misconduct warranting setting aside the award.²¹⁷

In *Oxford Health Plans LLC v. Sutter*, the Supreme Court held that under the FAA, a court may vacate an arbitrator's decision only in very unusual circumstances.²¹⁸ According to the Supreme Court, the sole question for a court

²¹¹ See *Schwartz v. Merrill Lynch & Co., Inc.*, 665 F.3d 444, 452 (2d Cir. 2011) (citations omitted) (holding that “to permit the court to refuse enforcement of an arbitrator's award [under the Federal Arbitration Act] on public policy grounds must be “well defined and dominant,” and must be “ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests”). See also *Vacatur*, *supra* note 174, at 22–23 (critically examining these bases for vacating commercial arbitration awards).

²¹² *Vacatur*, *supra* note 174, at 22–23 (critically examining these bases for vacating commercial arbitration awards).

²¹³ *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013).

²¹⁴ See, e.g., *Creative Homes & Millwork, Inc. v. Hinkle*, 426 S.E.2d 480, 483 (N.C. App. 1993).

²¹⁵ See *Smith v. Home Ins. Co.*, 183 S.E. 166, 169 (S.C. 1936) (citations omitted). See also *Hough v. Osswald*, 556 N.E.2d 765, 767 (Ill. App. 1990) (holding that the allegation that a party committed fraud to procure award was not grounds for vacating award in absence of showing of misconduct on the part of the arbitrator).

²¹⁶ See, e.g., *McIntosh v. Hartford Fire Ins. Co.*, 78 P.2d 82, 83 (Mont. 1938) (citations omitted).

²¹⁷ See, e.g., *Fred J. Brotherton, Inc. v. Kreielsheimer*, 83 A.2d 707, 709 (N.J. 1951). But see *PaineWebber Grp. Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 993 (8th Cir. 1999) (holding that the prevailing party's errors in identifying privileged documents during arbitration were discovery mistakes, not intentional misconduct constituting “undue means”); *Stefano Berizzi Co. v. Krausz*, 146 N.E. 436, 438 (N.Y. App. 1925) (finding that the award should not be vacated where independent inspection was minimal and inconsequential).

²¹⁸ 133 S. Ct. 2064, 2068 (2013).

reviewing an arbitration award is whether the arbitrator, even arguably, interpreted the parties' contract, not whether the arbitrator got it right or wrong.²¹⁹ "Because the parties 'bargained for the arbitrator's construction of their agreement,' an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of court's view of its (de)merits."²²⁰ Only if the arbitrator acts outside the scope of his contractually delegated authority—issuing award that simply reflects his own notions of economic justice, rather than drawing its essence from the contract—may court overturn his determination.

Notice of a motion to vacate an arbitration award must be served upon the adverse party within three months after the award is filed and delivered.²²¹ "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrator."²²²

III. CONCLUSION

Although it is frequently said that an arbitration award is final and binding, the award may not signal the end of further proceedings. The FAA provides procedures for confirming, correcting, and vacating arbitration awards.

Review of an arbitration award is limited. A court may vacate an arbitrator's decision only in very unusual circumstances. For those arbitration proceedings governed by the FAA, the grounds for vacatur listed in the FAA cannot be modified by agreement of the parties. Because the purpose of arbitration is the settlement of controversies and the avoidance of litigation, the limitations on review help to achieve that purpose and to bring closure.

²¹⁹ *Id.* See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (holding that a serious error of fact was not enough to warrant overturning an arbitration award).

²²⁰ *Id.* (citation omitted).

²²¹ 9 U.S.C. § 12 (2013).

²²² 9 U.S.C. § 10(b).