FATAL FLAWS IN AWARD WRITING

**12:00 Noon; April 28, 2023 (by Zoom)**

**Presented by Richard Chernick**

**Managing Director, JAMS Arbitration Practice**

1. **Setting Yourself Up for Success**
	* **Is this an arbitration?**
		+ **Enforceability of non-binding arbitration clauses (*Wolsey; AMF/Brunswick[[1]](#footnote-1)*)**
		+ **Missing essential elements of arbitration (*e.g.,* *Cheng-Candinin v. Renaissance; Graham v. Scissor-Tail*)**
		+ **Improperly mixed processes (*Old Republic Ins. Co*.; *Sy First Family*))**
		+ **Wrong decision-maker (*Elliott & Ten Eyck*)**
		+ **Mediated Settlement Agreement – wrong enforcement provisions (*Weddington v. Flick*)**
			- **Need for disclosure (preventing later DQ of mediator-arbitrator)**
			- **Clear power to decide contractual issues arising out of settlement terms**
	* **Are you qualified to be appointed?**
		+ **Requirements in clause**
			- **Personal to arbitrator (*e.g*., former judge)**
			- **Mode of selection of arbitrator(s) (*Brook v. Peak, Parker v. McCaw*)**
		+ **Disclosures and risk of *vacatur***
			- **CCP § 1281.9; Cal. Standards of Ethics**
			- ***E.g., Ovitz v. Schulman, Mt. Holyoke Homes*)**
		+ **Continuing duty to disclose**
			- **Note special Cal. Rules in employment and consumer cases**
		+ **Risk of resumé puffing/misrepresentations**
		+ **Other limitations**
	* **Party appointed arbitrators (Code of Ethics for Arbitrators in Commercial Disputes and Canon X)**
		+ **Ascertaining and documenting your status**
		+ **Risk of failing to clarify this issue**
		+ ***Delta Mines* and *Sphere Drake***
	* **Initial review of file**
		+ **Demand/Complaint**
		+ **Response/Counterclaims**
		+ **Court order?**
		+ **Submission agreement**
		+ **Note JAMS Rule 5**
		+ **Spotting jurisdictional issues**
		+ **Risk of failing to assess/determine arbitrability**
	* **Preliminary hearing prep**
		+ **Applicable provider rule**
			- **JAMS Rule 16, 16.1, 16.2**
			- **AAA Rule R-21 and P-1, P-2[[2]](#footnote-2)**
		+ **Checklist v. agenda v. draft order**
		+ **Conducting the preliminary hearing**
		+ **Defining the scope of arbitration**
			- **Clause**
			- **Pleadings/amended pleadings**
			- **Submission**
			- **Motion process where appropriate (*e.g*., JAMS Rule 11(b) and AAA Rule R-7(a)**
			- **Order determining arbitrability**
			- **Circumstances where early resolution of arbitrability may be inappropriate**
		+ **Ultimate output – Procedural Order No. 1 (template on Institute web site)**
2. **The Clause**
	* **Enforceable agreement**
		+ **Contractual elements**
		+ **Waiver (CAA v. FAA) (prejudice element)**
			- ***Compare St. Agnes with Morgan v. Sundance***
		+ **Unconscionability (*OTO*)**
		+ **Illegality (*Moncharsh*)**
		+ **Other defenses (FAA § 2 – “savings clause”)**
	* **Scope of arbitration**
		+ **Contractual (*Rice v. Downs*)**
		+ **Effect of prior court order**
		+ **Interpreting opaque court orders**
	* **Proper parties**
		+ **Non-signatories**
	* **Delegation**
		+ **Clause v. rules-based delegation (*First Options*) (JAMS Rule 11(b); AAA Rule R-7(a))**
		+ **Limits on arbitrator’s power in the case of non-signatories (*Benaroya/Willis*)**
	* **Authority only over pleaded claims (*E.g*., JAMS Rule 9(a))**
	* **Other arbitrability issues**
		+ **Waiver of right to challenge (JAMS Rule 9(f))**
		+ **Who decides?**
		+ **When decide?**
		+ **Preserving objections to arbitrability**
		+ **Special appearances?**
	* **Limitations on remedies**
		+ **Clause-based provisions**
			- ***E.g*., no consequential damages, no equitable relief, no punitive damages**
			- ***E*.*g*. express remedial limitation (*O’Flaherty v. Belgum*)**
			- ***E*.*g*., limitation on evidence permitted (*Bonshire v. Thompson*)**
		+ **Court-based principles**
			- ***AMD-Intel***
			- **Anti-*AMD/Intel* clauses**
		+ **Status of *Broughton and Cruz***
			- **FAA preemption**
			- ***McGill***
			- **Ninth Circuit (*Ferguson*)**
		+ **Other remedial limitations (*Viking River Cruises*?)**
		+ **Unconscionability and unenforceability of remedial limitations in employment and consumer cases**
			- **Case law**
			- **Provider rules and policies**
				* **JAMS (*e.g*., Employment Minimum Standards)**
				* **AAA (Employment D/P Protocol)**
		+ **CCP §§ 1281.97, 1281.98 (sanctions)**
		+ **Fees and costs[[3]](#footnote-3)**
			- **Contractual provisions**
			- **Rules-based provisions (AAA Rules R-53 -- R-55; JAMS Rules 24 (f), (g))**
			- **Provisions of law (*e.g*., Title VII)**
			- **The role of the CCP, if any (*e.g*., CCP § 1032 *et seq*.**
			- **Bifurcation of fee and cost issues**
				* **When is prevailing party determined?**
				* **Interim-Final Award sequence**
		+ **Sanctions**
			- **Rules-based (JAMS Rule 29, AAA Rule R-58))**
			- **Statutory**
				* **Intended only for courts (*e.g*., Rule 11, CCP § 128.7)?**
				* **Intended for use in arbitration?**
				* **Effect of incorporation of California or Federal discovery rules/sanctions provisions**
				* **Effect of incorporation of FRCP/CCP in clause**
			- **Inherent power (*Reliastar; David v. Abergel*)**
3. **The Pleadings and Use of Submissions**
	* **Does the Demand clearly define issues submitted to arbitration?**
	* **Does the Response/Counterclaim clearly define affirmative defenses/counterclaims?**
	* **Effect of no response on affirmative defenses (JAMS Rule 9(e); AAA Rule R-5(a))**
	* **Effect of non-payment by Respondent (inadmissibility of affirmative claims under JAMS Rule 31(b))**
	* **Is there a need to amend the pleadings (Preliminary Hearing issue)?**
	* **Later amendments (JAMS Rule 10, AAA Rule R-6)**
		+ **arbitrator’s exercise of discretion**
		+ **risk of denial of motion to amend**
		+ **Take care that amendment allows fair notice and sufficient time to oppose (*Emerald Aero, LLC*)**
	* **Withdrawing a claim**
		+ **JAMS Rule 13**
		+ **Dismissal with or without prejudice (is with prejudice dismissal a violation of the right of a party to a hearing?)**
4. **Risks of *Vacatur***
	* **CAA – Cal Code Civ. Proc. § 1286.2(a) (text below)**
	* **FAA § 10(a)(2) (text below)**
	* **Define the scope of arbitration**
		+ **Clause/pleadings submissions**
		+ **Role of Procedural Order No. 1/arbitrability rulings**
		+ **Include appropriate discussion in Award**
		+ **Award exceeding arbitrator’s power (deciding issues not submitted for decision) will be vacated (*Pacific Crown Distributors*)**
		+ **Award exceeding scope of arbitration agreement will be vacated (*Western Employers*)**
	* **Rulings limiting admissibility of evidence**
		+ **During discovery (*Prestige*) – low risk**
		+ **Motions *in limine* (*Burlage*) – high risk**
		+ **Dispositive motions and tension with parties’ right to a hearing (*Schlessinger*)**
		+ **During the hearing**
			- **Refusal to hear material evidence**
		+ **Documenting your determinations for the reviewing court**
		+ **Limited right of the arbitrator to submit declaration in *vacatur* proceeding (say it in the Award)**
	* **Denial of continuance**
	* **Right of parties to be present at hearing**
		+ ***Hoso Foods***
	* **Remedial power**
		+ **Contractual limitations**
		+ **Case law (*e.g., Broughton/Cruz)***
		+ **Remedies available only in court**
			- **Receiver (*Marsch*)**
			- **Attachment (*Outdoor Services*)**
			- ***But see* *AMD-Intel (*issues within the scope of parties’ agreement)**
		+ **Defining this issue in the Award**
	* **Form of award**
		+ **Compliance with the clause**
		+ **Reasoned award (*see* McArthur treatise)[[4]](#footnote-4)**
		+ **Bare award**
		+ **Findings and conclusions**
		+ **Specify applicable standard in Procedural Order No. 1 and repeat in Award**
	* **Timely awards**
		+ **Clause provisions**
		+ **Rules (JAMS Rule 24(a), AAA Rule R-40)**
		+ **Agreed extensions (document agreements)**
		+ **Arbitrator-directed reopening of hearing (JAMS Rule 22(i) (not proper to reopen just to get more time to issue award)**
	* **No review for legal error (*Moncharsh*)**
		+ **But statutory rights issues (*Pearson Dental*)**
		+ **Public policy exception to deferential review (*e.g., Jordan v. California DMV*)**
	* **Appeals v. enhanced court review**
		+ ***E.g., Cable Connection***
		+ **Note different Federal rule (*Hall Street/Mattel)***
		+ **Why is this issue relevant at the preliminary hearing stage?**
	* **Recent/interesting *vacatur* cases**
		+ ***Grabowski v. Kaiser* (impermissible *ex parte* communications between arbitrator/party during hearing)**
		+ ***Alper v. Rotella* (arbitrator’s use of strong medication during hearing – failure of party to timely object)**
5. **Getting Assistance from Counsel**
	* **Chronologies**
	* **Org. charts**
	* **Timelines**
	* **Factual stipulations**
	* **Agreed submission of issues**
	* **Transcript**
	* **Clear record of exhibits in evidence**
	* **Are expert reports in evidence?**
	* **Are demonstratives in evidence?**
	* **Post-hearing briefs/arguments**
		+ **Focus counsel with questions/directions pre-argument**
		+ **Assessing adequacy of counsel’s theories/case law**
		+ **Identifying issues that have not been addressed or have been abandoned**
6. **Interim Awards (JAMS Rule 24(d), AAA Rule R-47(b))[[5]](#footnote-5)**
	* **Basis of arbitral power**
	* **Identify claims in dispute – not exceeding power**
		+ **Concept of a “submission”**
		+ **Rule 9(a) limitation/pleadings**
	* **Procedural history (explain/describe key rulings)**
		+ **Arbitrability determinations**
		+ **Discovery rulings of significance**
		+ **Dispositive motions (granted or not)**
		+ **Account for all parties/claims**
	* **Facts (and dealing with credibility issues)**
	* **Analysis**
		+ **Departing from the parties’ legal theories or reasoning**
		+ **Relying on different/better theories of recovery/cases**
	* **Conclusion**
	* **Remedies and damages**
	* **Fees and costs (determine prevailing party, entitlement to fee award)**
	* **Directions for procedures setting up final hearing/final award**
	* **Making it clear award is interim and not subject to court review**
	* **Permitted corrections**
		+ **AAA Rule R-50**
		+ **JAMS Rule 24(j) (inapplicable to Interim Awards)**
7. **Partial Final Awards:**
	* **When appropriate**
		+ **Bifurcation of liability and damages**
		+ **Fee and cost issues**
		+ **Class-action certification process (AAA and JAMS rules)**
		+ ***Hightower v. Superior Court,* 86 Cal. App. 4th 1415 (2001)(authority)**
		+ ***Judge v. Nijjar Realty, Inc.,* 232 Cal. App. 4th 619 (2014)(limitations)**
	* **Risks**
		+ ***Roehl v. Ritchie,* 147 Cal. App. 4th 338 (2007) (no modification permitted)**
		+ **Non-enforcement/non-review (above)**
8. **The Final Award**
	* **Pre-issuance scrutiny by provider?**
		+ **AAA review of “financial paragraph”**
		+ **No JAMS equivalent for domestic awards**
	* **Timing of issuance**
		+ **30-day Rule (JAMS Rule 24(a); AAA Rule R-45**
		+ **Applies to Final Awards and PFA (JAMS)**
			- **AAA – applies to Interim Awards as well**
		+ **Concept of *functus officio* and exceptions (below)**
		+ **Close of hearing**
			- **Order Closing Hearing – JAMS Rule 22(h), AAA Rule R-39**
			- **Best practice**
			- **Extensions of time by agreement – best practice**
			- **Arbitrator’s right to extend – JAMS Rule 22(i), AAA Rule R-40**
		+ **Case law re reopening – exceptions to *functus officio***
			- **Omission of fee/cost award**
			- **Omission of § 998 determination**
			- **Inadvertent omission other than above**
			- **California practice may be more liberal than Federal**
	* **Essential attributes – *see* Checklist (attached)**
	* **Clarity of analysis; clarity of actual award provisions**
		+ **Take care when offsetting awards (insurance issues)**
	* **Self-contained (no cross-references; no attachments)**
	* **Note principle that courts defer to arbitrator’s interpretation of applicable rules (*Greenspan v. LADT*)**
		+ **If decision depends on interpretation/application of applicable rules be sure to clearly base your decision on your interpretation of that rule’s meaning/effect**
	* **Fees and costs – key rules**
		+ **Rule 24 (f) -- allocate JAMS fees and arbitrator compensation**
		+ **Rule 24 (g) -- allocate attorneys’ fees and expenses per agreement or applicable law**
		+ **AAA – Rules R-47 (interest and attorneys’ fees and expenses per agreement or applicable law; R-53 (administrative fees); R-54 (expenses); R-55 neutral arbitrator comp.**
	* **Hearing and determining fees**
		+ **Obligation to award fees (“the arbitrator shall . . .”)**
		+ ***Compare DiMarco v. Chaney with Cohen v. TNP***
	* **Correction – JAMS Rule 24(j); AAA Rule R-50**
		+ **Dealing with CCP § 998 issues**
	* **“Resolves all issues submitted . . .”**
		+ **CCP § 1283.4**
		+ ***Herman Feil, Inc*.**
	* **“Reserving jurisdiction” and *functus officio***
9. **Post-Award Process**
	* **Motions to correct (after Interim Award; after Final Award); scope of arbitral power (JAMS Rule 24(j), AAA Rule R-50)**
	* **File preservation and destruction**
		+ **Arbitrator’s practice**
		+ **Provider policies**
		+ **Best practice**

1. **Award writing in tripartite cases**
	* **Majority? (most provider rules)**
	* **Chair decides? (ICC)**
	* **Need for more time – address in Order Closing Hearing**
	* **Use/relevance of dissents**
		+ **Value of unanimous decision**
		+ **Negotiating to avoid a dissent?**

**Vacatur Standards**

**CAA – Cal Code Civ. Proc. § 1286.2:**

§ 1286.2. Grounds for Vacating Award

(a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following:

(1) The award was procured by corruption, fraud or other undue means.

(2) There was corruption in any of the arbitrators.

(3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.

(4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

(5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefore or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

(6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.

**FAA – § 10:**

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

**(1)**

where the award was procured by corruption, fraud, or undue means;

**(2)**

where there was evident partiality or corruption in the arbitrators, or either of them;

**(3)**

where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

**(4)**

where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Annex A

Award Writing Checklist

1. Not 28 lined paper (for court references only)
2. Identify institutional provider
3. Include Case Number
4. Parties names in full
5. No “Does”; no “*et al*.”
6. “Claimant,” not Plaintiff
7. “Respondent,” not Defendant
8. Other parties: Counterclaimant; Respondent by Counterclaim
9. “Counterclaim,” not Cross-Claim or anything else
10. Identify counsel (practice varies)
11. Identify arbitrator (practice varies)
12. Identify place of arbitration
13. State date of award
14. Identify source(s) of arbitral authority – Clause, court order, submission agreement, stipulation, etc.
15. Identify pleadings or other documents (*e.g*., submission) that define scope of proceeding
16. Procedural history (best practice)
17. Rulings on pre-hearing issues
	1. Important discovery disputes particularly where evidence is excluded or where sanctions are awarded
	2. Arbitrability determinations
	3. Dispositive motions (reference only if denied, details if granted)
	4. Motions *in limine*
18. What happened in Interim Award (substantially full text)
19. What happened in Partial Final Award (refer/do not restate)
20. Factual statement
	1. Not “blow-by-blow,” witness-by-witness
	2. Not “you know what happened because you were there”
	3. Reasonably concise
	4. Essentially factual findings
	5. Must support analysis of issues (below)
	6. Introductory paragraph
	7. OK to intersperse supplemental facts in legal analysis (below)
21. Analysis
	1. Who has burden of proof (if not obvious)
	2. What substantive law governs (if it makes a difference)
	3. Separate liability and damages sections (usually)
	4. Be sure to lay out all material issues which support award
	5. Mention (in footnote) legal issues not addressed (for whatever reason)
	6. What is a “reasoned” award? (McArthur treatise)
22. Damages
	1. Equitable relief spelled out in detail (with discussion of arbitral authority if necessary)
	2. Reasonable basis for determination of amount of compensatory damages
23. Preaward interest
	1. Source of power (rules, clause, statute) (*e.g., Britz v. Alfa-Laval*)
	2. Reasonable detail as to calculation of amount
24. Fees and costs
	1. Source of power (rules, clause, statute)
	2. Reasonable detail as to basis of award, calculation of amount
	3. Do not omit discussion, even if “the parties have agreed that they shall each bear their own costs and fees, including attorneys’ fees”
25. Interim Awards
	1. Spell out what is subject of Interim Award, what remains
		1. Cite/quote applicable Procedural Order
	2. Statement at end that this award is not subject to court review
	3. Self-contained (no attachments, no cross-references)
26. Separate “award” section in Final and Partial Final Awards
	1. In Interim Awards this is omitted
	2. Clear statement of who pays and who is entitled to payment
	3. Clear statement of each award and specific amount (leave nothing to later calculation)
	4. No reference to “reservation of jurisdiction”
	5. No reference to what happens later (i.e., post-award interest)
	6. Dealing with last fee deposit in Final Award
27. Final Awards
	1. State that “this award resolves all issues submitted for decision in this proceeding”
	2. Self-contained (no attachments, no cross-references)
28. Manual signature (no signature stamps)
	1. May be fax copy
	2. May be .pdf/emailed
	3. Requirement of certified mail (CAA?)
29. Timing of issuance
	1. 30-day Rule (JAMS Rule 24(a))
	2. Runs from “close of hearing” per JAMS Rule 22(h)
	3. Limited right to extend time (JAMS Rule 24(a)
	4. This date is usually regarded as jurisdictional
	5. Provider practice
		1. Award is “issued” by delivery to Case Manager (JAMS Rule 24(a), (i); fees must be paid for award to be served on parties (JAMS Rules 31, 6(c))
		2. AAA?

**Annex B**

**Case Cites**

*Advanced Micro Devices, Inc. v. Intel Corp*., 9 Cal. 4th 362 (1994) (arbitral power derived from parties’ agreement)

*Affymax, Inc. v. Otho-McNeil-Janssen Pharmaceuticals Inc.,* 660 F.3d281 (7th Cir. October 3, 2011) (FAA Section 10(a) sets forth the exclusive grounds for vacating an arbitration award; Manifest disregard of law doctrine no longer viable after *Hall Street;* only ground to vacate would be in the very limited circumstance where an award directed parties to violate a rule of positive law designed for the protection of third parties)

*A.M. Classic Construction, Inc. v. Tri-Build Dev’t Co,* 70 Cal. App. 4th 1470 (1999) (remand to arbitrator to determine attorneys’ fees inadvertently omitted from final awards)

*AMF v. Brunswick Corp.,* 621 F.Supp. 456 (E.D.N.Y. 1985)

*Benaroya v. Willis,* 23 Cal. App. 5th 462 (2017) (court must decide arbitrability as to non-signatory in spite of otherwise valid delegation clause because delegation provision is not effective as to non-signatory)

*Bonshire v. Thompson*, 52 Cal. App. 4th 803 (1997) (arbitrator must comply with parties’ agreement not to allow parol evidence)

*Britz, Inc. v. Alfa-Laval Food & Dairy Co*., 34 Cal. App. 4th 1085 (1995) (arbitrator’s inherent power to award interest)

*Broughton v. CIGNA HealthPlans of California*, 21 Cal. 4th 1066 (1999) (injunction under CLRA cannot be adjudicated in arbitration)

*Burlage v. Sup.Ct. (Spencer)*, 178 Cal. App. 4th 524 (2009) (exclusion of evidence on motion *in limine* exceeded arbitrator’s power – award vacated) [NB. This holding was questioned in *Heimlich v. Shivji, supra*)]

*Cable Connection, Inc. v. DIRECTV, Inc.,* 44 Cal. 4th 1334 (2008) (enhanced review of arbitration award by agreement under California law)

*Century City Medical Plaza v. Sperling, Isaacs & Eisenberg*, 86 Cal. App. 4th 865 (2001) (arbitrator may correct award to add attorneys’ fees)

*Cheng-Candinin v. Renaissance Hotel Assoc.,* 50 Cal. App. 4th 676 (1996)

*Cohen v. TNP 2008 Participating Notes Program, LLC,* 31 Cal. App. 5th 840 (2019)

*Cooper v. Lavely & Singer,* 230 Cal. App. 4th 1 (2014) (arbitrator may not correct final award to change decision on issue previously addressed but may do so in certain circumstances where issue was inadvertently omitted, citing *Century City Medical Plaza)*

*Cruz v. PacifiCare*, 30 Cal. 4th 303 (2003) (injunction under unfair competition law cannot be adjudicated in arbitration)

*David v. Abergel*, 46 Cal. App. 4th 1281 (1996) (arbitrator’s power to sanction)

*Delta Mines Holding Co. v. Coal Properties, Inc.*, 280 F.3d 815 (8th Cir. 2002) (party-appointed arbitrator failed to disclose his substantial and ongoing relationship with the party that appointed him. Court held that non-neutral arbitrator’s partiality did not warrant vacatur of award)

*DiMarco v. Chaney,* 31 Cal. App. 4th 1809 (1995)

*Elliott & Ten Eyck Partnership v. City of Long Beach,* 57 Cal. App. 4th 495 (1997) (designating judge as arbitrator does not create an arbitration)

*Emerald Aero, LLC v. Kaplan,* 9 Cal. App. 5th 1125 (2017)

*Ferguson v. Corinthian Colleges, Inc.,* 733 F.3d 928 (9th Cir.2013)

*First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (arbitrators may decide questions of arbitrability only when parties “clear[ly] and unmistakabl[y]” manifest an intention for the arbitrators to so decide)

*Grabowski v. Kaiser Fdn. Health Plan,* 64 Cal. App. 5th 67 (2021)

*Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807 (1981)

*Gray v. Chiu,* 212 Cal. App. 4th 1355 (2013) (failure to disclose status of lawyer for a party as a panelist on provider panel requires *vacatur* of award)

*Greenspan v. LADT, LLC,* 185 Cal. App. 4th 1413 (2010); 191 Cal. App. 4th 486 (2011) (court will defer to arbitrator’s interpretation of applicable institutional rules)

*Hall, Goodhue, etc. v. Marconi Conf. Center Bd.*, 41 Cal. App. 4th 1551 (1995) (non-signatory alter ego)

*Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008) (parties may not expand statutory grounds for vacating an award under the FAA by private agreement; case *dictum* questioned the continued viability of “manifest disregard of law” as an independent ground to vacate)

*Heimlich v. Shivji,* 7 Cal. 5th 350 (2019) (arbitrator may amend final award to take into account § 998 penalty where that issue was not presented prior to issuance of award; but arbitrator’s failure to apply § 998 correctly or at all is legal error not subject to *vacatur*)

*Herman Feil, Inc. v. Design Center of Los Angeles,* 204 Cal. App. 3d 1406 (1988)

*Hightower v. Superior Court,* 86 Cal. App. 4th 1415 (2001) (partial final award may be issued by arbitrator in his discretion)

*HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) (clause called for mediation request as condition for arbitration; arbitration could not be compelled without compliance with the condition)

*Hoso Foods, Inc. v. Columbus Club, Inc.,* 190 Cal. App. 4th 881 (2010)

*IATSE Local 16 v. Laughon,* 118 Cal. App. 4th 1380 (2004) (hearing day disclosures inadequate)

*Judge v. Nijjar Realty Co.,* 232 Cal. App. 4th 619 (2014) (clause construction PFA not subject to confirmation because not properly a determination of a complete claim)

*Kemiron Atlantic, Inc. v. Aguachem Int’l., Inc.*, 290 F.3d 1287 (11th Cir. 2002) (Same as *HIM Portland*; failure to request mediation, which was condition precedent to arbitration under the arbitration agreement, precluded enforcement of the agreement to arbitrate)

*Luce Forward Hamilton & Scripps, LLP v. Koch,* 162 Cal. App. 4th 720 (2008) (no DQ where arbitrator associated in inn of court with counsel for a party)

*McGill v. Citibank, N.A.,* 2 Cal. 5th 945 (2017) (arbitration provision purporting to waive right to seek injunctive relief on behalf of the public invalid because it purports to waive statutory rights to such relief; Ninth Circuit has held that *McGill* is not preempted by FAA)

*Marsch v. Williams*, 23 Cal. App. 4th 238 (1994) (arbitrator has no power to order appointment of receiver)

*Malone v. Superior Court,* 226 Cal. App. 4th 1551 (2014) (delegation clause in employment contract, giving arbitrator authority to determine defense of unconscionability, is enforceable – consideration of arbitrator’s self-interest in determining arbitrability is preempted by FAA)

*Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (award of punitive damages rendered by NSAD panel in New York affirmed under the FAA where NASD rules permitted arbitrators to award such damages, notwithstanding New York state rule prohibiting arbitrators from awarding punitive damages. FAA pre-empts state law purporting to limit arbitral authority)

*Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992) (arbitration awards not reviewable as to legal error)

*Monster Energy Co. v. City Beverages, LLC,* 940 F.3d 1130 (9th Cir. 2019) (JAMS arbitrator who is an owner must disclose that status and prior cases involving same parties/counsel administered by JAMS)

*Morgan v. Sundance,* \_\_ U.S. \_\_ (2022) (waiver of right to arbitrate does not require prejudice under FAA)

*Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell LLP,* 219 Cal. App. 4th 1299 (2013) (arbitrator’s failure to disclose listing of one of lawyers for a party in arbitration as a reference requires vacatur of award)

*New Regency Prod., Inc. v. Nippon Herald Films, Inc.,* 501 F.3d 1101(9th Cir. 2007) (vacatur of arbitration award for non-disclosure of arbitrator’s former employment by a party)

*O’Flaherty v. Belgum,* 115 Cal. App. 4th 1044 (2014)

*Old Republic Ins. Co. v. St. Paul Fire Ins. Co.,* 45 Cal. App. 4th 631 (1996)

*OTO, L.L.C. v. Kho,* 8 Cal. 5th 111 (2019) (comprehensive assessment of unconscionability and holding that substantive unconscionability may be found where defined process is excessively “legalistic”)

*Outdoor Services, Inc. v. Pabagold, Inc*., 185 Cal. App. 3d 676 (1986) (arbitrator has no power to order attachment)

*Ovitz v. Schulman,* 133 Cal. App. 4th 830 (2005) (failure to make “continuing disclosure” requires vacatur of award)

*Pacific Crown Distributors v. Brotherhood of Teamsters,* 183 Cal. App. 3d 1138 (1986)

*PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003) (RICO claims found arbitrable, even though parties’ arbitration agreement precluded arbitrators from granting punitive or exemplary damages; such damages could be construed as remedial and not punitive, and, therefore, entire dispute goes to the arbitrators for determination)

*Parker v. McCaw,* 125 Cal. App. 4th 1494 (2003) (sole arbitrator v. tripartite panel)

*Pearson Dental Supplies, Inc. v. Superior Court,* 48 Cal. 4th 665 (2010)

*Positive Software Solutions, Inc., v. New Century Mort. Corp.*, 476 F.3d 278 (5th Cir. 2007) (arbitrator’s failure to disclose that he and counsel for one of the parties had been 2 of 34 of-counsel in unrelated litigation at least 7 years earlier was not “evident partiality”)

*Prestige Ford v. Ford Dealer Computer Services, Inc.,* 324 F.3d 391 (5th Cir. 2003) (arbitrator’s order denying discovery did not deprive a party of the right to offer material evidence)

*Reliastar Life Ins. Co. of New York v. EMC National Life Co.*, 564 F.3d 81 (2d Cir. 2009) (broad arbitration clause conferred on arbitrator the power to award counsel fees as a sanction for party’s bad faith conduct notwithstanding clause calling for each party to bear its own fees)

*Rent-a-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010) (under the FAA, where an arbitration agreement includes a clause specifically delegating power to the arbitrator to determine the enforceability of the overall agreement, a party claiming that the agreement is unenforceable must attack the delegation clause – not simply the arbitration clause as a whole-- in order to compel consideration by the court, and not an arbitrator)

*Rice v. Downs,* 248 Cal. App. 4th 175 (2016) (arbitration clause stating claims “arising out of, under or in connection with” were arbitrable was a narrow clause that precluded assertion of tort claims)

*Roehl v. Ritchie,* 147 Cal. App. 4th 338 (2007) (partial final award may not be changed in later phase of arbitration)

*Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096 (1995) (dispositive motion standard)

*Shaw Group v. Triplefine Int’l Corp.*, 322 F.3d 115 (2d Cir. 2003) (parties’ selection of provider rules calling for the arbitrator to determine issues of arbitrability constitutes the “clear and unmistakable intention” required under *First Options of Chicago*)

*Simula, Inc. v. Autoliv, Inc*., 175 F.3d 716 (9th Cir. 1999) (“all disputes arising in connection with the agreement” interpreted as a broad-form clause)

*Sphere Drake Ins. Co. Ltd. v. All American Life Ins. Co.*, 307 F.3d 617 (7th Cir. 2002) (party appointed arbitrator's alleged failure to fully disclose his prior relationship with reinsurer did not require vacatur of award under “evident partiality” under FAA; “evident partiality” does not apply where an agreement entitles parties to select interested arbitrators)

*St Agnes Medical Center v. PacifiCare of California*, 31 Cal. 4th 1187 (2003) (waiver of right to arbitrate under California (CAA) law; *see Morgan v. Sundance*, *supra*, for contrary FAA rule)

*Sy First Family Ltd. v. Cheung,* 70 Cal. App. 4th 1334 (1999)

 *Tiri v. Lucky Chances, Inc.,* 226 Cal. App. 4th 231 (2014) (delegation of arbitrability to arbitrator not unconscionable under FAA preemption analysis)

*Titan/Valve Equities Group, Inc. v. Superior Court,* 29 Cal. App. 4th 482 (1994) (court may not intervene in pending arbitration)

*United Paperworkers, Int’l Union v. Misca,* 484 U.S. 29 (1987)

*Viking River Cruises, Inc. v. Moriana*, \_\_ U.S. \_\_ (2022) (FAA preempts *Iskanian v. CLS Transport of Los Angeles, LLC,* 59 Cal. 4th 358 (2014) (PAGA claim waiver unenforceable)

*Weddington v. Flick*, 60 Cal. App. 4th 793 (1998)

*Western Employers Ins. Co. v. Jefferies & Co.,* 958 F.2d 258 (9th Cir. 1992)

*Wolsey Ltd. v. Foodmakers, Inc*. 144 F.3d 1205 (9th Cir. 1998)

**Annex C**

**Primer on Fee and Cost Awards**

1. All Cases will Require Consideration of Fees and Costs. In virtually every case, one or both parties will seek an award of attorney fees, arbitration fees and/or costs. It is common to bifurcate this issue in the Scheduling Order so that it will be taken up after decision on the merits. The Scheduling Order might recite:

Bifurcation of Issues. The issue of the amount of attorneys’ fees and costs to which any party may be entitled shall be bifurcated and determined subsequent to the Hearing. The entitlement, if any, to an award of fees and costs shall be determined as part of the Hearing.

 2. Determining Fees and Costs is a Two-Step Process. In the Interim Award, the Arbitrator usually determines the entitlement to fees and/or costs based on a reading of the applicable clause, statute or rule in the context of what was determined on the merits in the evidentiary hearing. If there is a prevailing party attorney fee provision, the arbitrator would determine who, if anyone, is the prevailing party for purposes of directing the filing of fee application and opposition evidence and argument:

 For example:

\* \* \*

Section 20 of the EAA provides that “the prevailing party in any . . . arbitration proceeding . . . to enforce the terms of this agreement shall be awarded costs of suit, including reasonable attorneys’ fees, in addition to any other relief to which the prevailing party may be entitled.” Ex. 10. Claimant is the prevailing party and is entitled to be reimbursed its reasonable attorneys’ fees, costs of suit and arbitration fees and expenses. Claimant may file an application for fees, costs and expenses by March 20, 2006, together with supporting evidence and argument. Respondents may file opposition evidence and argument by April 3, 2006, and Claimant may reply by April 10, 2006. The matter shall be submitted for final decision at that time unless any party requests an oral hearing, in writing, by April 10, 2006. If requested, the oral hearing shall be conducted by telephone conference on April 17, 2006 at 8:00 a.m. (PT) or at another time as agreed by counsel and the Arbitrators.

 3. Fee and Cost Awards are Always “Reasoned.” The determination of the issue of fees and costs warrants the same level of analysis and reasoning as other issues in dispute. It is not appropriate to “conclude” that a party is entitled to an award of $xx,xxx in fees and costs without providing a reasoned analysis of pertinent facts and applicable law. We attach a portion of a Final Award where fees were claimed in a substantial amount and the Arbitrators determined that some but not all of the claimed fees and costs were warranted.

 4. Fee and Cost Awards in Small Cases.  As with all issues, we must be sensitive to the nature of the dispute and particularly the amount at issue. Contracts in smaller cases also routinely contain prevailing party fee shifting clauses. Smaller cases, as well, may contain claims based upon a state or federal statute that grants attorneys’ fees to the prevailing party. In non-statutory smaller cases, it would not be inappropriate for you to arrive at a conclusory figure representing a reasonable attorney's fee provided that you go through at least some analysis of the factual bases for your fee award and, in addition, you recite the legal basis (for example, "In accordance with Paragraph X of the Contract, the prevailing party is entitled to his reasonable attorney's fees. I find that Mr. Y is the prevailing party and, as such, is entitled to the benefit of that clause. Accordingly, I find that $ZZZZ is a reasonable counsel fee for the work performed taking into account the effort required, the need to defend against Mr. W's counterclaim and the amount in controversy.") You may do this provided you are comfortable doing so. Thus, you should have had enough experience either in your practice or on the bench to be comfortable with your fee decision. Otherwise, it is the better practice-- even in small cases-- to ask for affidavits of costs. You might, for example, take the affidavits and dispense with a hearing. In a case where a state or federal statute provides for fees to the winner, you should go through the lengthier exercise. Many of these statutes provide for the reimbursement of actual fees or fees based on the result achieved, so deciding the issue in an abbreviated fashion would be inappropriate.

 5. JAMS Rules Provide Authority for an Award of Fees and/or Costs. Where there is no contractual provision relating to fees or costs, but the parties are proceeding under the JAMS Rules, usually Rule 24(f) will give the arbitrator authority to award arbitration fees and arbitrator compensation. (Rule 24(g) deals with attorneys’ fees.)

(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses unless such an allocation is expressly prohibited by the Parties’ agreement. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)

(g) The Award of the Arbitrator may allocate attorneys’ fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties’ agreement or allowed by applicable law.

The only case where there would be no allocation under these rules is if the clause states that the parties shall bear their own fees and costs (regardless of the outcome of the proceeding) or if it is determined that because of the outcome of the case each side shall bear its own fees and costs. The allocation under rule 24(f) may result in a 50-50 sharing, but whether it does or not, your award should state what is supposed to happen, what you decided and the basis for your determination.

 Attorneys’ fees ordinarily may only be awarded if there is a provision in the clause or if there is an applicable statute (*e.g*., Title VII). E.g., JAMS Rule 24(g), *supra*. There is case law that holds that it to be error for an arbitrator not to award counsel fees to the prevailing party where fees are authorized by statute. You must satisfy yourself that your decision in this regard is supported by the applicable law.

AAA Commercial Rules have similar provisions regarding arbitration fees and arbitrator compensation; AAA Rules also provide that if each side requests an award of attorneys’ fees in the demand/response, the Arbitrator has the discretion to award such fees even if there is no provision in the clause and no statutory basis for such an award. AAA Rule R-43(d)(ii). There is no comparable provision in our Comprehensive Rules. Other Rules (CPR, ICDR, and our own International Rules) and some statutes (*e.g*., Cal. Int. Arb. Act) provide for discretionary awards of attorneys’ fees in all cases.

 6. Court Rules Do Not Usually Provide Authority for an Award of Fees and/or Costs. It is unlikely that a clause would call for application of a court-based rule on cost allocation (such as Cal. Code Civ. Proc. § 1033 *et seq*.). Case law governing cost awards in court are inapplicable to an arbitration (even where arbitration was ordered by a court) unless the clause expressly so states.

 7. A Final Award May Not “Reserve” the Issue of Fees and Costs to Later Determination. Fees and costs must be awarded in the Final Award or the power to do so is relinquished by the Arbitrator. It is not a “final” award if jurisdiction is “reserved” to award fees or costs at a later time. If that is your intention, it is an Interim Award and should so state.

1. *See* Case List for case citations at Annex B. [↑](#footnote-ref-1)
2. 2013 version of AAA Commercial Rules [↑](#footnote-ref-2)
3. *See* Primer on Award of Fees and Costs, Annex C. [↑](#footnote-ref-3)
4. John McArthur, *The Reasoned Arbitration Award in the United States* (Juris) [↑](#footnote-ref-4)
5. See Award Writing Checklist, Annex A. [↑](#footnote-ref-5)