



Avoiding Attack: The Arbitrator's Guide to Drafting a Bulletproof Reasoned Award

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I. Introduction

Three types of awards¹ are frequently prepared in commercial and construction arbitration proceedings: standard awards, reasoned awards, and an award containing detailed findings of fact and conclusions of law.² This

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¹This article will be referring to both American Arbitration Association ("AAA") Construction Industry Arbitration Rules and Mediation Procedures ("Construction Rule(s)") as well as the AAA Commercial Arbitration Rules and Mediation Procedures ("Commercial Rule(s)"). It is important to note that the Rule L-5 of the Construction Rules require a reasoned award unless the parties opt out. In addition to the award requirements set forth in the Construction Rule R-47(a) and (b) it provides that "unless the parties agree otherwise the arbitrator shall issue a reasoned award." The Commercial Rules do not contain a similar requirement. In contrast the Commercial Rules state that a reasoned award is not required unless the parties request so in writing prior to the arbitrator's appointment. See Commercial Rule R-46(b).

²A standard award simply announces the result and typically does not provide insight as to how the arbitrator viewed the evidence, arguments, or his or her application of law. In a reasoned award the arbitrator sets forth the basic reasoning on the central issues but need not go through every argument made by the parties. An award including detailed findings of fact and conclusions of law requires a more detailed version of a reasoned award. Kevin R. Casey, *Types of Final Arbitration Awards: Why the Choice Matters*, The ADR Advisor (Feb. 26, 2020), <https://www.stradley.com/-/media/files/publications/2020/02/adr-advisor-february-2020.pdf>; Eugene J. Heady, *What Will the Arbitrator's Final Award Look*

article focuses on drafting reasoned awards which, due to governing standards, can often cause heartburn for arbitrators. Not only are arbitrators³ required to arrive at an equitable result, but they must also draft a sufficiently detailed award that can withstand judicial scrutiny. Preparing a reasoned award can be a treacherous process especially after presiding over weeks of testimony, analyzing a mountain of exhibits, and considering the legal arguments presented by the parties. Arbitrators must be familiar with the legal standards that determine when a reasoned award can be successfully challenged. This article addresses the steps that enable an arbitrator to prepare a “bulletproof” reasoned award.

II. Legal Standard

The standard of review employed by courts when considering confirmation or a challenge to an award is well established.⁴ A national policy favoring arbitration increases the odds of upholding an award.⁵ Courts⁶ have further recognized that judicial review of an arbitration award is extraordinarily

Like?, Smith Currie & Hancock LLP, [https://www.smithcurrie.com/wp-content/uploads/assets/htmldocuments/What Will the Arbitrators Final Award Look Like.pdf](https://www.smithcurrie.com/wp-content/uploads/assets/htmldocuments/What%20Will%20the%20Arbitrators%20Final%20Award%20Look%20Like.pdf). It is important to note that the term “standard award” does not appear in either the Construction Rules or the Commercial Rules. Rather in Construction Rule R-47 (c) the reference is to an “abbreviated opinion,” and a companion reference does not appear in the Commercial Rules. Experience suggests that most practitioners use these terms interchangeably. Likewise, practitioners also use the terms “reasoned opinion” as specifically referenced in Construction Rule R-47 (c) and “reasoned award” as referenced in Rule L-5 of the Construction Rules interchangeably.

³For simplicity, this article references the term “arbitrator,” but the discussion is equally applicable to both a single arbitrator as well as a panel of three arbitrators.

⁴*Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 385, n.9 (5th Cir. 2004). It is noteworthy that “courts are not authorized to review the arbitrator’s decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties’ agreement.” *Major League Baseball Players Association v. Garvey*, 532 U.S. 504, 509 (2001).

⁵See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *Smith v. Am. Gen. Fin.*, No. 3:11-CV-097-RJC-DCK, 2011 WL 1059836, at *1 (W.D.N.C. Mar. 22, 2011) (“[t]he Federal Arbitration Act (“FAA”) establishes a policy favoring the enforcement of written agreements to arbitrate”).

⁶Jurisdiction is invoked through the FAA which provides for judicial facilitation and enforcement of matters that pursued resolution through arbitration.

narrow⁷ and an arbitrator's award will not be disturbed absent a lack of sufficient competent evidence, fraud, partiality or corruption, misconduct, or instances where the authority of the arbitrator has been exceeded.⁸ The burden of proof is on the party seeking to vacate the award and any doubt or uncertainty must be resolved in favor of upholding the award. It is noteworthy that "[a] litigant seeking to vacate an arbitration award based on alleged manifest disregard of the law bears a heavy burden, as awards are vacated on grounds of manifest disregard only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent."⁹

One court recognized that "[a] reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it," but "need not delve into every argument made by the parties."^{footnote}*Leeward Const. Co., Ltd. v. Am. Univ. of Antigua-College of Medicine*, 826 F.3d 634, 640 (2d Cir. 2016). The court continued to explain that "while the arbitrator is not obliged to discuss each piece of evidence presented, she or he must at a minimum provide some rationale for the rejection of arguments for liability."¹⁰ Moreover, reliance on the credibility of a witness alone will

⁷*Rain CII Carbon, L.L.C. v. ConocoPhillips Co.*, 674 F.3d 469, 471-72 (5th Cir. 2012) (quoting *Brook v. Peak Int'l.*, 294 F.3d 668, 672 (5th Cir. 2002)); see *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 839 (11th Cir. 2011).

⁸See 9 U.S.C. § 10(a); *Hall St. Assocs., L.L.C.*, 552 U.S. at 582; *Brook*, 294 F.3d at 672. Accordingly, whenever possible federal courts defer to the arbitrator's resolution and courts must confirm an award as it may only be vacated for the reasons provided in section 10 of the FAA. See also *Citigroup Glob. Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).

⁹*Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 109 (2d Cir. 2019). Accordingly, an arbitration award will be upheld under this exacting standard so long as "the arbitrator has provided even a barely colorable justification for his or her interpretation of the contract." *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011); *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 103-04 (2d Cir. 2013) ("the burden of proof necessary to avoid confirmation of an arbitration award is very high . . .").

¹⁰See S.I. Strong, *What Qualifies as a Reasoned Award?*, ABA Practice Points (July 29, 2019), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2019/what-qualifies-as-a-reasoned-award>. Therefore, the party moving to vacate an award "bears the heavy burden of showing that the award falls within a very narrow set of circumstances delineated by statute and case law." *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004); *Three Bros. Trading, LLC v. Generex Biotechnology Corp.*, No. 18 CIV. 11585 (KPF), 2020 WL 1974243, at *5 (S.D.N.Y. Apr. 24, 2020).

fail to satisfy the criteria for a reasoned award.¹¹ Accordingly, something more than a sentence or two explaining the conclusions must be provided by the arbitrator; otherwise the award runs afoul of the applicable standard for upholding a reasoned award.¹²

III. The Authority of the Arbitrator

Arbitration is a creature of contract and parties may limit or alter the issues to be presented to the arbitrator, including the scope and the form of the award.¹³ Therefore, at the outset of any proceeding it is imperative that the arbitrator reviews the scope of his or her authority.¹⁴ This includes specified deadlines for conducting the proceedings or issuing an award, as well as any

¹¹*Leeward Const. Co., Ltd.*, 826 F.3d at 640; *Smarter Tools, Inc. v. Chongqing SENCI Import & Export Trade Co.*, 2019 U.S. Dist. LEXIS 50633 (S.D.N.Y. Mar. 26, 2019) (determining the arbitral award was insufficiently reasoned and contained no explanation due to the arbitrator stating in a conclusory manner that having heard all testimony and reviewed all exhibits he did not find support for the buyer's counterclaims); see Henry Allen Blair, *What Happens if an Award is not Sufficiently "Reasoned"?*, Arbitration Nation (Apr. 20, 2019), <https://www.arbitrationnation.com/what-happens-if-an-award-is-not-sufficiently-reasoned/> (providing analysis in a matter where "the arbitrator's credibility finding was some reasoning, but it failed to account for each of the counterclaims").

¹²*Id.*

¹³*Bryant v. CFRA Holdings, LLC*, No. 1:17-CV-01469-RWS, 2018 WL 1426363, at *4 (N.D. Ga. Jan. 16, 2018) (citing *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 843 (11th Cir. 2011)).

¹⁴See Construction Rule R-9(a) and Commercial Rule R-7(a) similarly stating: the arbitrator has the power to rule on his or her own jurisdiction including objections with respect to their existence, scope or validity of the arbitration agreement; see also *Cat Charter, LLC*, 646 F.3d at 843 ("arbitration is a creature of contract"). However, *Henry Schein, Inc. v. Archer and White Sales, Inc.*, pending on appeal to the Supreme Court for a second time as of this writing, where the issue is whether an arbitration delegation clause requires a court rather than the arbitrator to determine whether a claim falls within the scope of an arbitration agreement as courts have been split on the issue. Henry Allen Blair, *Cert Granted in a New(ish) Arbitration case—Henry Schein Part II*, Arbitration Nation (June 15, 2020), <https://www.arbitrationnation.com/dispositive-motions-arbitration-just>; *Archer and White Sales, Inc. v. Henry Schein, Inc.*, 2019 WL 3812352 (5th Cir. Aug. 14, 2019); compare *NASDAQ OMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010, 1032 (2d Cir. 2014) (the presence of a carve out provision "delays application of AAA rules until a decision is made as to whether a question does or does not fall within the intended scope of arbitration") with *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1075 (9th Cir. 2013) (rejecting the argument that a carve out provision negated the incorporation of the AAA rules and delegates questions of arbitrability to the arbitrator).

prohibition or limitation on discovery.¹⁵ These limiting provisions should not be disturbed absent an agreement of the parties which should be confirmed in an order. Seeking relief based upon the arbitrator exceeding his or her authority is a heavy burden.¹⁶ This often arises when a party later challenges a delay to the proceedings based upon specified deadlines in an arbitration clause or in those instances when attorneys' fees are awarded but not authorized by the arbitration clause.

IV. Legal Research and Support Provided by the Parties

The arbitrator may not research issues independently but rather must rely upon the parties to provide legal authority and support for their arguments.¹⁷ One commentator noted that an arbitrator who conducts his or her own legal research on an issue that the parties have not raised would be manifestly unfair.¹⁸ In the event an arbitrator relies on law clerks or asso-

¹⁵Some arbitration clauses require the proceedings to be concluded in a specified number of days from appointment of the arbitrator. In that event, the arbitrator should seek consent of the parties to extend the time to avoid running afoul of the arbitration clause and exceeding the specified authority of the arbitrator.

¹⁶*Oxford Health Plans LLC*, held as follows:

[i]t is not enough to show that the arbitrator committed an error—or even a serious error. 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 a court's view of its (de) merits. Only if the arbitrator acts outside the scope of his contractually delegated authority—issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract—may a court overturn his determination. So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.

Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013). “[A]rbitrators ‘do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party.’” *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 843 (11th Cir. 2011) (citing *Nat'l Wrecking Co. v. Int'l Bd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993)).

¹⁷This is especially true after the hearing is closed since this would deprive a party the opportunity to respond to the conclusion reached.

¹⁸Herb Silber, Q.C., *Can an Arbitrator conduct his or her own Research?* (Part 2), Kornfeld LLP, <https://kornfeldllp.com/2016/03/can-an-arbitrator-conduct-his-or-her-own-research-part-2/>.

ciates to assist in preparation of an award, consent of the parties is essential to avoid any later challenge to the proceedings.

V. Personal Notes

One important feature that will influence the preparation of the award is if a court reporter will be transcribing a record of the proceedings and whether the transcript will be furnished to the arbitrator.¹⁹ If the proceedings will not be transcribed, a greater burden rests upon the arbitrator to accurately take notes. In that event, the arbitrator's personal notes will serve as the record and be relied upon weeks or months later in preparing the award. It is imperative to document the testimony and at the same time, the arbitrator must observe the demeanor and assess the credibility of witnesses. This effort coupled with tracking exhibits while presiding over the proceedings can be challenging. To address this dilemma, it may be helpful to have the consent of the parties to allow the arbitrator to appoint a representative to take notes. Further, the arbitrator should designate one of the parties to track the offering and introduction of exhibits into evidence.

VI. Daily Review of Personal Notes

In multi-day hearings, the arbitrator's daily review of personal notes at the conclusion of each day of testimony is critical to the ultimate preparation of the award. This review will remind the arbitrator of his or her impression of the credibility and persuasiveness of witness testimony.²⁰ Moreover, personal notes can serve as an opportunity to clarify points with the witnesses and counsel on factual and legal issues during the proceedings. Additionally, an arbitrator's review may present legal issues that need to be briefed by the parties following the final hearing.

¹⁹Construction Rule R-29(c) and Commercial Rule R-28 (c) are identical and provide that if the transcript or any other recording is agreed upon by the parties or determined by the arbitrator to be an official record of the proceedings, it must be provided to the arbitrator and made available to the parties.

²⁰Personal detailed notes can be helpful once the hearing has concluded and drafting the award commences. These notes can serve as a reminder of any gaps in testimony and any failure in the proof of a claim or defense.

VII. Closing of Testimony and Advisable Post-Hearing Practices

Once the live hearing concludes, the arbitrator should establish deadlines to submit written closing arguments, post hearing briefs, and proposed awards. With regards to written submissions, specific direction should be given to the parties as to the issues to be addressed, page limitations along with spacing, font, and size requirements.²¹

The arbitrator should recommend that each party pursuing a claim for damages submit a “damage matrix” or chart to display the damages requested.²² Proposed awards should be submitted in Microsoft Word format so that the arbitrator may use the suggested language in preparing the award. In addition, the key caselaw and authority relied upon by the parties should be submitted to the arbitrator.

The hearing should be closed only after all submissions have been received. The post-hearing submissions often raise issues that require clarity or reconciliation; therefore, a conference call between the arbitrator and parties may assist in clarifying any remaining issues before the hearing is formally closed. Before closing the hearing, the arbitrator should assess whether the thirty day period will be sufficient to review and consider all evidence.²³ Once the hearing is closed, the thirty day period to issue the

²¹For example, these specific directions may include: ten pages exclusive of exhibits, double-spaced, Times New Roman, twelve-point font.

²²This practice conforms with Construction Rule R-47(b) that requires a concise written financial breakdown of any monetary award.

²³Construction Rule R-46 and Commercial Rule R-45 similarly provide that the thirty day period required to issue the award can be extended by agreement of the parties or as specified by law. In some instances, the arbitrator may request the parties agree to an extension of time beyond thirty days to allow for a thorough review and preparation of the award. *See also* Construction Rule R-43 (similar but not identical language appears in Commercial Rule R-42) which provides “[t]he parties may modify any period of time by mutual agreement, provided that any such modification that adversely affects the efficient resolution of the dispute is subject to review and approval by the arbitrator. The AAA or the arbitrator may for good cause extend any period of time established by these rules except as set forth in Construction Rule R-40 (c)” Both the Construction and Commercial Rules discuss when the time for issuing the award will commence and, in the absence of an agreement by the parties, the AAA can extend this time only in unusual and extreme circumstances. *See* Construction Rule R-40(c) and Commercial Rule R-39(c).

award is triggered.²⁴ Additionally, the thirty day timeline to issue the award should include additional days to provide the AAA to review the award for conformity with applicable rules and requirements. Toward that end, a Microsoft Word version of the award should be provided to the AAA to facilitate any proposed revisions to the award for final consideration by the arbitrator.

VIII. Reopening the Hearing

In the event that the arbitrator requires additional testimony or evidence to support the final award, Construction Rule 41 or Commercial Rule 40 can be employed to reopen the hearing.²⁵ However, this process should be used sparingly so that a timely resolution of the claims occurs in accordance with AAA requirements.

IX. Writing the Award

Preparing a table of contents with the following subheadings proves beneficial when drafting a comprehensive award that can withstand scrutiny during confirmation or on review.

A. The Parties

Describe the parties to the dispute, explain their relationship to one another, and include abbreviations for all involved. This is particularly helpful to avoid confusion when there are similar names of multiple individuals and corporate entities that have potential liability in the matter.

B. Description of the Dispute and Critical Facts

The dispute between the parties should be described with particularity to narrow the scope of the matter. Not all facts are critical but certainly the date(s) of agreements at issue, date(s) of termination, and notices that impact the decision as set forth in the award should be referenced. This will ensure that all essential issues have been addressed in the final award.

²⁴*See id.*

²⁵Construction Rule R-41 and Commercial Rule R-40 similarly permit reopening of the hearing “on the arbitrator’s initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made.”

C. History of the Proceedings

The award should discuss how the matter came before the arbitrator, prior orders entered, and whether any issues remain for resolution by the court after an award is submitted. The award should also recite the applicable rules of the AAA as well as the state law that governs the dispute based upon the arbitration agreement between the parties. All orders issued by the arbitrator should be dated and sequentially numbered to create a clear record of the rulings associated with the proceedings for citation in the award.

For purposes of judicial review, it is important to demonstrate that the parties were afforded ample opportunity to present their respective claims and defenses. The history should recite any limitation upon the proceedings by the governing arbitration agreement as well as any agreement of the parties. The history should also address agreements to bifurcate the award initially as to liability, and then subsequently as to damages, attorneys' fees, interest and costs. In the event that attorneys' fees will be determined by a court, that issue should be stated in the award.

D. Conduct of the Hearing

The award should specify how the hearing was conducted to satisfy due process standards. To this end, the award should describe how the hearing room was set up and emphasize the arbitrator's proximity to the witnesses to assess their credibility. The award should further reflect that the witnesses were sworn under oath prior to providing testimony along with any restrictions on the length or presentation of their testimony. For example, the award should describe whether monitors were made available to the arbitrator for review of exhibits as well as the length of time of the overall hearing. All of these factors set forth in the award will assist a reviewing court in determining whether the parties were afforded a fair opportunity to present their relative claims and defenses.²⁶

²⁶Construction Rule R-33 and Commercial Rule R-32 identically provide that "[t]he arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and given fair opportunity to present its case." It is important to note that both Construction Rule R-33(c) and Commercial Rule

E. List of Witnesses

The award should list all witnesses that provided testimony for each party on direct, cross, and rebuttal. This section will reflect that each party was afforded the opportunity to present their case. If witnesses were not allowed to testify, the reasoning for excluding or limiting testimony should be explained, as this factor could be cause for challenging the award.²⁷ For example, if the parties agreed to limit testimony of fact witnesses to a specified number, then that fact should be included in the award. In addition, agreements to present testimony by affidavit in lieu of live testimony should also be recited.

F. List of Exhibits

The award should list those exhibits relied upon by the arbitrator during the proceedings to support the findings of the final award. It is noteworthy that an arbitrator's evidentiary decisions are regularly affirmed by courts so long as those decisions do not deny a party a fair hearing.²⁸

G. Legal Standards and Choice of Law

Disputes often exist between the parties as to the appropriate standard of care and the applicable choice of law. It is important to reference those standards and the choice of law selected in the final award.²⁹

R-32(c) provide options to present evidence by alternate means such as video conferencing, which has become essential during the Covid-19 pandemic.

²⁷This explanation is important to demonstrate "fair opportunity" of the parties to present their respective claims and defenses as described in Construction Rule R-33 and Commercial Rule R-32.

²⁸See *Doral* holding that the court "cannot vacate an arbitral award based on sheer speculation" of subpoenas that may potentially yield relevant information. *Doral Fin. Corp. v. Garcia-Velez*, 725 F.3d 27, 31-32 (1st Cir. 2013) ("[v]acatur is appropriate only when the exclusion of relevant evidence so affects the rights of a party that it may be said that he was deprived of a fair hearing"); see also Liz Karmer, *Arbitration Awards Cannot Be Vacated Just Because Arbitrator Excluded Evidence*, Arbitration Nation (Aug. 1, 2013), <https://www.arbitrationnation.com/arbitration-awards-cannot-be-vacated-just-because-arbitrator-excluded-evidence/>.

²⁹The FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Sciences v. Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). Since "arbitration is a creature of contract" choice of law provisions will be upheld; see *Bryant v. CFRA Holdings, LLC*, No. 1:17-CV-01469-RWS,

H. Bifurcated Awards

At the outset, it is imperative to establish if the proceedings will be bifurcated. Generally, bifurcation of proceedings is appropriate to first decide liability and thereafter the award of damages, attorneys' fees, costs, and interest. In the event that a partial award is issued, the scope and nature of the award should be clearly specified. For example, the award may indicate that it is "intended to fully address all claims and defenses submitted in these proceedings exclusive of reasonable attorney's fees, costs, expenses and interests."³⁰ Issues to be determined within a subsequent award such as an award of attorneys' fees and the costs of the proceedings should also be specifically listed. This is important to enable a party to confirm a partial award and avoid delay in obtaining the relief provided for under the award.³¹

I. Post-Hearing Procedures

As noted above, a discussion should be devoted to the post-hearing procedures that preceded issuance of the award. This section should further outline the timeframe for presentation of written closing arguments, submission of post-hearing briefs, submission of a proposed award to the arbitrator, damage matrices, attorneys' fees award affidavits, and other information requested by the arbitrator.

J. Address all Claims and Counterclaims; Reasoning for the Award

This section defines the scope of the award and all matters considered by the arbitrator. In commercial, construction and other complex arbitration

2018 WL 1426363, at *4 (N.D. Ga. Jan. 16, 2018); Jessica Thrope, *A Question of Intent: Choice of Law and the International Arbitration Agreement*, 54:4 Disp. Resol. J. 16, 16, 18 (Nov. 1999).

³⁰ *Accordant Comm., LLC, v. Sayers Construction. LLC*, No. A-19-CV-00401-LY, at *10 (W.D. Tex. Sept. 18, 2019) (unequivocally finding that the partial award issued was a final award on liability); see *Local 36, Sheet Metal Workers Int'l Ass'n, AFL-CIO v. Pevely Sheet Metal Co.*, 951 F.2d 947, 949 (8th Cir. 1992).

³¹ *Id.*; *Andrea Doreen, Ltd. v. Bldg. Material Local Union* 282, 250 F. Supp. 2d 107, 112 (E.D.N.Y. 2003).

proceedings, claims and counterclaims are commonplace. It is an arbitrator's duty to address and dispose of all claims, counterclaims, defenses, and arguments raised in the award with a separate subtitle, followed by the reasoned analysis behind the decision.³² Therefore, it is critical to the process to include the provision that "this award is in full settlement of all claims and counterclaims submitted in this arbitration. All claims not expressly granted herein are denied."

Addressing the issues in summary fashion should be avoided and, instead, it is best to recite testimony and refer to exhibits along with authorities as cited by the parties to support the findings on each claim and defense. It is recommended to reference the particular date that the testimony was provided and if it was on direct, cross, or rebuttal. It is also significant to comment on the weight of the testimony based upon the credibility of the witness. In the event a partial award was previously entered, the final award should specify that it encompasses all prior specified awards and now disposes of all matters raised in the proceedings.³³

K. Identify the Prevailing Party

Where applicable the arbitrator should identify the prevailing party in the dispute for purposes of awarding attorneys' fees or costs, or for reference by the court that has jurisdiction to award fees or costs.

L. Damage Summary and Amount Awarded

Damage calculations associated with an award often present fertile grounds for motions for clarification. As noted above, it is recommended that a "dam-

³²See Henry Allen Blair, *What Happens if an Award is not Sufficiently "Reasoned"?*, Arbitration Nation (Apr. 20, 2019), <https://www.arbitrationnation.com/what-happens-if-an-award-is-not-sufficiently-reasoned/> (providing analysis in a matter where "the arbitrator's credibility finding was some reasoning, but it failed to account for each of the counterclaims"); *Smarter Tools, Inc. v. Chongqing SENCI Import & Export Trade Co.*, 2019 U.S. Dist. LEXIS 50633 (S.D.N.Y. Mar. 26, 2019) (stating where there is "no reason given for this finding other than the negative credibility determination as to STI's expert witness" consequently "the award as issued is not a reasoned award").

³³"[A]n arbitration award becomes final if it is intended by the arbitrator to be a 'complete determination of all claims submitted' to it." *Robinson v. Littlefield*, 626 F. App'x 370, 373 (3d Cir. 2015) (including not only liability but also the issue of damages) (citing *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 413 (2d Cir. 1980)).

age matrix” be inserted in the award listing the recoverable damages sought and the amount awarded. If a damage component is denied, then “\$0.00” should be specified for that claim to avoid any alternative interpretation. Attention must be given to the applicable law and appropriate interest rate if not specified in the arbitration agreement between the parties.

M. Award of Interest, Attorneys’ Fees, Costs and Other Relief

In addition to the claim amount, prejudgment interest should be calculated through the date of the award along with certain allowable costs of the proceedings such as costs paid to the AAA and any other monetary relief.³⁴

X. Conclusion

The arbitrator’s greatest nightmare is to draft a final award that is overturned or vacated by a reviewing court. As discussed above, numerous factors must be addressed so that your “bulletproof” award can withstand challenge. Skilled arbitrators must be cognizant of and embrace the legal standard for upholding reasoned awards. Attention to detail during the proceedings is paramount. Accurately recording the process of the hearing along with providing sufficient reasoning for the award is critical. Ultimately, the award must demonstrate that the parties were afforded a fair opportunity to present their respective claims and defenses. There is not a single determinative factor to achieve “bulletproof” status, but following the above recommendations will increase your chance of success.

³⁴Construction Rule R-48(d)(ii) and Commercial Rule R-47(d)(ii) identically provide that an award may include an award of attorneys’ fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.” *See also* Thomas Wagner & Paul Wood, *Recovery of Attorneys’ Fees in Arbitration: A Trap For the Unwary*, JD-Supra (Jan. 19, 2015), <https://www.jdsupra.com/legalnews/recovery-of-attorneys-fees-in-arbitrati-53552/> (accordingly, it is highly unlikely that an arbitrator’s award for attorneys’ fees will be overturned by a reviewing court since “by including boilerplate language requesting an award of attorneys’ fees in an AAA arbitration demand or response conducted under the AAA Commercial or Construction Rules, a lawyer may be creating a right to recover attorneys’ fees, rather than preserving such a right”).