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

I. Introduction

Three types of awards¹ are frequently prepared in commercial and construction arbitration proceedings: standard awards, reasoned awards, and awards containing detailed findings of fact and conclusions of law.² This article focuses on drafting reasoned awards which, due to governing standards frequently cause heartburn for arbitrators. Not only are arbitrators³ required to arrive at an equitable result, 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 narrow.⁷ 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.”¹⁰ 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.”¹¹ Moreover, reliance on the credibility of a witness alone will fail to satisfy the criteria for a reasoned award.¹² 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.¹³

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.¹⁴ Therefore, at the outset of any proceeding it is imperative that the arbitrator reviews the scope of his or her authority.¹⁵ This includes identifying deadlines for conducting the proceedings, issuing the award, or any prohibitions or

limitations on discovery.¹⁶ 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.¹⁷ The limits of such review are tested when a party later challenges a delay in 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.¹⁸ 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.¹⁹ In the event an arbitrator relies on law clerks or associates 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.²⁰ If the proceedings will not be transcribed, a greater burden rests upon the arbitrator to take accurate 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 or develop some other agreed procedure.

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.²¹ 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.

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.²²

The arbitrator should recommend that each party pursuing a claim for damages submit a "damage matrix" or chart to display the damages requested.²³ 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.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, many arbitrators request the parties to provide a proposed award as part of the post hearing submission. Typically, the proposed award is submitted in "Word" version to enable the arbitrator to incorporate all or part of the proposed award in the final award. Most importantly, the proposed award can be used to remind the arbitrator of any overlooked issues that should ultimately be addressed in the award. In addition, the key caselaw and authority relied upon by the parties should be submitted to the arbitrator. Once the hearing is closed, the thirty day period to issue the award is triggered.²⁵

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.²⁶ However, this process should be used sparingly so that a timely resolution of the claims occur 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, 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 dates 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.

C. History of the Proceedings

The award should discuss the history of 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. 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. 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.

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 specify 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.²⁷

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.²⁸ 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, any agreements to present testimony by affidavit in lieu of live testimony should 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.²⁹

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.³⁰

H. Bifurcated Awards

Before the hearing begins, 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."³¹ 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.³²

I. Post Hearing Procedures

A portion of the award should be devoted to a description of the post hearing procedures that preceded issuance of the award. This section should further outline the time frame 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 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.³³ 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.³⁴

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 "damage matrix" be inserted in the award listing the recoverable damages sought and the amount awarded. If a damage component is denied, then a "0" 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.³⁵

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.

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Footnotes

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1 This 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).

2 A 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 Like?*, SMITH CURRIE & HANCOCK LLP, <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.

3 For 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 as is common for larger disputes. *See* Construction Rule R-18; Commercial Rule L-3.

4  *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 385 n.9, 64 Fed. R. Evid. Serv. 982 (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.”

5  *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509, 532 U.S. 1015, 121 S. Ct. 1724, 149 L. Ed. 2d 740, 167 L.R.R.M. (BNA) 2134 (2001).

6 *See*  *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581, 128 S. Ct. 1396, 170 L. Ed. 2d 254, 2008 A.M.C. 1058 (2008); *Smith v. American General Finance*, 2011 WL 1059836, *1 (W.D. N.C. 2011) (“[t]he Federal Arbitration Act (“FAA”) establishes a policy favoring the enforcement of written agreements to arbitrate”).

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

8  *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 471–72 (5th Cir. 2012) (quoting  *Brook v. Peak Intern., Ltd.*, 294 F.3d 668, 672, 18 I.E.R. Cas. (BNA) 1373, 146 Lab. Cas. (CCH) P 59559 (5th Cir. 2002), opinion modified on reh'g, (July 9, 2002)); *see*  *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 839 (11th Cir. 2011).

9 *See* 9 U.S.C.A. § 10(a);  *Hall St. Assocs., L.L.C. v. Mattel Inc.*, 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 Global Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).

10 *Weiss v. Sallie Mae, Incorporated*, 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., Inc.*, 665 F.3d 444, 452, 113 Fair Empl. Prac. Cas. (BNA) 1479, 95 Empl. Prac. Dec. (CCH) P 44364 (2d Cir. 2011); *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 103–04 (2d Cir. 2013) (“the burden of proof necessary to avoid confirmation of an arbitration award is very high”).

11  *Leeward Construction Company, Ltd. v. American University of Antigua-College of Medicine*, 826 F.3d 634, 640, 333 Ed. Law Rep. 531 (2d Cir. 2016).

12 *See* S.I. Strong, What Qualifies as a Reasoned Award?, ABA, July 29, 2019, <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2019/what-qualifies-as-a-reasoned-award/#:~:text=According%20to%20the%20court%2C%20Second,the%20panel.%E2%80%9D%20Leeward%20Const.> 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 Brothers Trading, LLC v. GenereX Biotechnology Corp.*, 2020 WL 1974243, *5 (S.D. N.Y. 2020).

13  *Leeward Const. Co., Ltd.*, 826 F.3d at 640;  *Smarter Tools Inc. v. Chongqing SENCi Import & Export Trade Co., Ltd.*, 2019 WL 1349527 (S.D. N.Y. 2019), appeal dismissed, 2019 WL 8403145 (2d Cir. 2019) (determining the arbitral award was insufficiently reasoned and contained no explanation due to the arbitrator conclusory stating 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”).

14 *Id.*

15 *Bryant v. CFRA Holdings, LLC*, 2018 WL 1426363, *4 (N.D. Ga. 2018) (citing  *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 843 (11th Cir. 2011)).

See 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.*, currently pending on appeal to the Supreme Court for a second time, 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, June 15, 2020, ARBITRATION NATION, <https://www.arbitrationnation.com/dispositive-motions-arbitration-just>; [Archer and White Sales, Incorporated v. Henry Schein, Incorporated](#), 935 F.3d 274, 2019-2 Trade Cas. (CCH) ¶ 80882 (5th Cir. 2019), cert. denied, 141 S. Ct. 113, 207 L. Ed. 2d 1053 (2020); compare [NASDAQ OMX Group, Inc. v. UBS Securities, 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 America, Inc. v. Myriad Group 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).

16 Some 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.
 17 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, 133 S. Ct. 2064,
 186 L. Ed. 2d 113, 163 Lab. Cas. (CCH) P 10604 (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 [National Wrecking Co. v. International
 Broth. of Teamsters, Local 731](#), 990 F.2d 957, 960, 143 L.R.R.M. (BNA) 2046, 125 Lab. Cas. (CCH)
 P 10679 (7th Cir. 1993)).

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

19 Herb Silber, Q.C., Can an Arbitrator conduct his or her own Research? (Part 2), KORNFEELD LLP [https://
 kornfeldllp.com/2016/03/can-an-arbitrator-conduct-his-or-her-own-research-part-2/](https://kornfeldllp.com/2016/03/can-an-arbitrator-conduct-his-or-her-own-research-part-2/).

20 Construction 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.

21 Personal 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.

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

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

24 Construction 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).


25 *See supra* n.24.


26 Construction 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.”


27 Construction 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 R-32(c) provide options to present evidence by alternate
 means such as video conferencing which has become essential during the COVID-19 Pandemic.

28 This 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.


29 See *Doral* holding that the court “cannot vacate an arbitral award based on sheer speculation” of
 subpoenas that may potentially yield relevant information. *Doral Financial Corp. v. Garcia-Velez*, 725
 F.3d 27, 31–32, 36 I.E.R. Cas. (BNA) 470 (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/](https://www.arbitrationnation.com/arbitration-awards-cannot-be-vacated-just-because-arbitrator-excluded-evidence/).

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

31 *Accordant Communications, LLC v. Sayers Construction, LLC*, 2020 WL 7496657, *10 (W.D. Tex.
 2020) (unequivocally finding that the partial award issued was a final award on liability); see  *Local
 36, Sheet Metal Workers Intern. Ass'n, AFL-CIO v. Pevely Sheet Metal Co., Inc.*, 951 F.2d 947, 949, 139
 L.R.R.M. (BNA) 2302, 120 Lab. Cas. (CCH) P 11068 (8th Cir. 1992).

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

33 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/](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., Ltd.*, 2019 WL 1349527 (S.D. N.Y. 2019), appeal
 dismissed, 2019 WL 8403145 (2d Cir. 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”).

34 “[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 Fed. Appx. 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, 1980 A.M.C. 1901 (2d Cir. 1980)).

35 Construction 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, JDSUPRA POLSINELLI, Jan. 19, 2015, [https://www.jdsupra.com/
 legalnews/recovery-of-attorneys-fees-in-arbitrati-53552/](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”).