

Anatomy of A Construction Arbitration Award & Enforcement

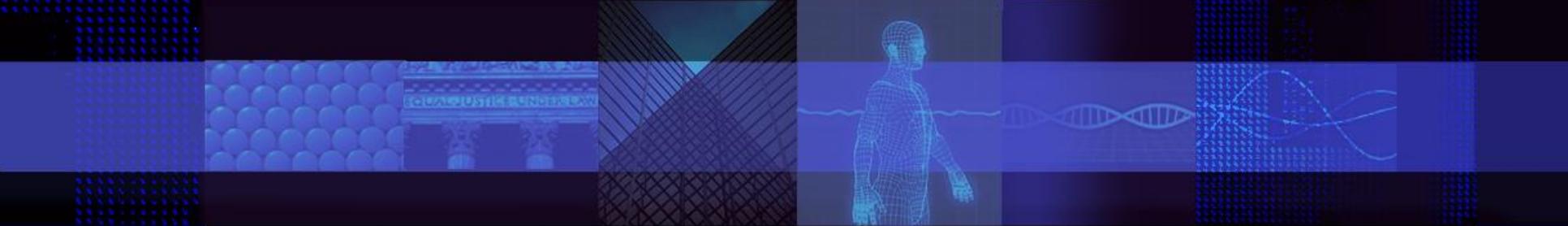


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Anatomy of a Construction Arbitration
September 12, 2016 | New Jersey

The footer features a dark blue background with a faint world map on the left and a classical statue of Lady Justice holding scales on the right.



Award & Enforcement – Issues for Discussion

- Issuance – Interim & Final Awards
- Confirmation and Enforcement
- Modification and Vacation
- Defenses – “Manifest Disregard of the Law”
- Appeal



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Issuance – Interim & Final Awards

Arbitrator’s Scope of Authority

The Agreement to Arbitrate

AIA Form

- A201 – 2007 (Art. 15.4)
- Award shall be final and binding
- Administered by American Arbitration Association (“AAA”)
- In accord with Construction Industry Arbitration Rules



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Issuance – Interim & Final Awards

The AAA Rules (Construction Industry Arbitration Rules)

R8 (Interpretation and Application of the Rules)

- Arbitrator shall interpret and apply these Rules

R9 (Jurisdiction)

- Arbitrator has the power to rule on his or her jurisdiction and the validity and scope of the agreement
- Objection to jurisdiction or arbitrability must be made no later than at the time of filing the answer
- Arbitrator has the power to determine the existence or validity of the contract or grant any remedy or relief that is just and equitable within the scope of agreement



Issuance – Interim & Final Awards

The AAA Rules (Construction Industry Arbitration Rules) - continued

R25 (Enforcement Powers)

- confidentiality orders
- discovery orders
- exclude evidence/issue sanctions
- order allowing a drawing of an adverse inference
- dispositive motions (after discovery)
- allocating costs



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Issuance – Interim & Final Awards

R35 (Evidence)

- determine admissibility, relevance, and materiality of evidence
- subpoena witnesses

R38 (Interim Measures)

- issue interim orders or awards
- issue interim measures as necessary, including injunctive relief



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Issuance – Interim & Final Awards

R46 (Time of Award)

- 30 days

R47 (Form of Award)

- Reasoned Opinion
- Abbreviated Opinion
- Findings of Fact
- Conclusions of Law



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R48 (Scope of Award)

- Grant remedy or relief that is just and equitable within scope of agreement, including equitable relief and specific performance

R51 (Modification of Award)

- To clarify or correct award for clerical errors only

R60 (Sanctions)

- Arbitrator can order appropriate sanctions



Issuance – Interim & Final Awards

Tips

Protect the Process

Setup a preliminary conference

- set a time and process for filing motions
- set a date before the hearings begin for dispositive motions to be heard
- provide parties with the opportunity to object to any motion



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Tips (continued)

Motions

To avoid the risk of having an award vacated for refusing to hear evidence, an arbitrator should only grant dispositive motions when the party opposing the motion has had a reasonable opportunity to gather and present evidence on the pertinent issues and the arbitrator is confident that, on the undisputed facts, the movant is clearly entitled to an award in its favor (College of Commercial Arbitrators, Guide to Best Practices in Commercial Arbitration)



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Tips (continued)

Reasoned Opinion

- standard (not the exception) but more likely to be challenged
- ask the parties to stipulate to the issues for decision or put on the record
- identify evidence heard and considered even if discounted later
- consider using alternate findings
- make express credibility findings for key witnesses
- approach sanction issues with caution



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Courts Regarding Scope of Orders & Awards

Seagate v. Western Digital Corp. 834 N.W.2d 555 (Minn. Ct. App. 2013) (discovery sanctions imposed for fabricating evidence which precluded a party from submitting any evidence disputing the merits of a claim, resulting in a \$630 million arbitration award)



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First Option Mortgage v. S&S Financial Services, 743S.E.2d 574 (Ga. Ct. App. 2013) (interim relief award requiring one party to make monthly payments confirmed. Arbitrators have broad authority to fashion relief as long as it draws its essence from the contract or statute)

NW National Ins. Co. v. Insko, Ltd., 2011 W.L. 4552997 (S.D.N.Y. 2011) (attorney disqualified where attorney obtained confidential communications discussing panel deliberation even though the purpose of obtaining the communications was to prove arbitrator bias)



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Issuance – Interim & Final Awards

The New Jersey Arbitration Act (N.J.S.A. 2A:23B-1 et. seq.) (“NJAA”)*

Sec. 8 – Provisional Remedies

- to protect the proceeding
- to promote a fair resolution
- as if the controversy was the subject of a civil action

* NJAA is based largely on the Uniform Arbitration Act of 2000 for agreements to arbitrate made after January 1, 2003 (NJ Assembly Judiciary Committee Statement on Senate Bill No. 514)



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Sec. 18 – Pre-award Rulings

Sec. 19 – Award

See *Atalese v. Legal Services Group*, 219 N.J. 430 (2014) (in a consumer contract, parties may chose arbitration provided they understand that they are waiving their right to seek relief in a court and waiving statutory right to a trial by jury)



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Issuance – Interim & Final Awards

The Federal Arbitration Act (9 U.S.C. §1 et. seq.)

Sec. 9 – Award

- In accordance with the agreement
- See American Express v. Italian Colors, 133 S.Ct. 2304 (2013) (court upheld waiver of class action in agreement. Under the FAA, an arbitrator cannot exceed contractual authority to arbitrate)



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Confirmation and Enforcement

NJAA

Confirmation of Award (§22)

- Reduce the award to a judgment

Procedure

- File a summary action in Superior Court (in the county where the arbitration was conducted) seeking an order to confirm the award and to enter final judgment in conformance with the award
- Court “shall issue” a confirming order unless the award is modified or corrected (§§ 20 or 24) or vacated (§23)



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Confirmation and Enforcement

FAA

Confirmation of Award (§9)

- Reduce the award to a judgment via a summary proceeding

Procedure

- Application to confirm an award and for entry of final judgment must be made to the District Court (via a miscellaneous action)
- Diversity jurisdiction required (FAA does not confer subject matter jurisdiction on the federal courts)

Timing

- 1 year after the award



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Confirmation and Enforcement

FAA (§13) – Papers filed for Enforcement

- The party applying to the court for conformation of the award must file with the clerk:
 - (1) the arbitration agreement;
 - (2) the award; and
 - (3) supporting papers
- The clerk will docket the judgment similar to any other civil judgment



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Confirmation and Enforcement

FAA (§13) (continued)

Tips

- Put the amount awarded on the face of the Order
- Request a supersedeas bond (assets could be dissipated)
- Obtain a copy of the certified judgment immediately after issuance and register it in every district where the debtor has assets
 - Complete Form AO-451 (“Clerk’s Certification of a Judgment to be Registered in Another District”)
 - Good cause must be shown to file the certification before the appeal gets filed
 - However, FRCP 62(a) provides for a 14 day stay on executions of a judgment



Modification and Vacation

AAA Rules - R51 (Modification of Award)

- Application (to the arbitrator) to modify or correct the award for clerical or computational errors (not to re-determine the merits)
- Within 20 days of date of award



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Modification and Vacation

Tips

- State and federal rules have different time limits
- File and serve the court papers within the time limits



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Modification and Vacation

NJAA - Change of Award (§20)

Procedure

- Application to arbitrator

Timing

- 20 days from receipt of award

Grounds

- Math miscalculations
- Imperfect form
- Award not final upon claims submitted
- To clarify the award



Modification and Vacation

NJAA - Modification of Award (§24)

Procedure

- Commence a summary action in Superior Court

Timing

- 120 days after aggrieved party receives notice of award

Grounds

- Math miscalculations
- Imperfect form
- Award not final upon claims submitted
- To clarify the award



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Modification and Vacation

NJAA - Vacation of Award (§23)

Procedure

- Commence a summary action in Superior Court

Timing

- 120 days after aggrieved party receives notice of award
- Court can order a rehearing before the arbitrators, except on grounds 1&2 below



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Modification and Vacation

NJAA - Vacation of Award (§23) (continued)

Grounds

- Award procured by fraud or corruption
- Arbitrator bias
- Arbitrator refused to postpone the hearings or to introduce evidence despite sufficient cause
- Arbitrator exceeded its powers
- No agreement to arbitrate
- No proper notice and prejudice



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Modification and Vacation

Courts Regarding Challenging Award – AAA

- Merion Construction v. Kemron, 2014 N.J. Super. Unpub. LEXIS 514 (App. Div. Mar. 13, 2014)
 - Court set aside arbitrator's modified award wherein he added retainage damages and a shortage amount on an invoice. He exceeded his powers, since these two items were not computational errors.



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Modification and Vacation

Courts Regarding Challenging Award – FAA

- Hall Street Associates, LLC v. Mattel, Inc., 128 S. Ct. 1396 (2008) (dealing with FAA)
 - “Under the terms of § 9, a court ‘must’ confirm an arbitration award ‘unless’ it is vacated, modified, or corrected ‘as prescribed’ in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one.”
 - “We now hold that §§ 10 and 11 respectively provide the FAA’s exclusive grounds for expedited vacatur and modification.”



Modification and Vacation

FAA - Vacation of Award (§10)

Timing

- 3 months after award is filed or delivered (§12)
- Strictly enforced

Grounds

- Award procured by corruption, fraud or undue means;
- Arbitrator bias or corruption;
- Arbitrators refused to postpone hearing, hear pertinent evidence without sufficient cause, or any other misbehavior which prejudiced any party; or
- Arbitrators exceeded or imperfectly exercised their powers such that a final and definite award upon the subject matter was not made



Modification and Vacation

FAA - Modification of Award (§11)

Procedure

- Motion made via a miscellaneous action (file and serve)

Timing

- 3 months after award is filed or delivered (§12)

Grounds

- Evident material miscalculation;
- Arbitrators awarded upon a matter not submitted to them; or
- Award is imperfect in matter of form not affecting the merits of the controversy



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Modification and Vacation

Courts - FAA

- Goldman v. Citigroup Global Mkts., Inc., 2016 U.S. App. LEXIS 15335 (3d Cir. Pa. Aug. 22, 2016) (motion to vacate dismissed for lack of subject matter jurisdiction as parties were non-diverse and had failed to raise a substantial and broad based federal question)



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Defenses – Manifest Disregard of Law

- Frumkin v. P&S Const. N.Y., Inc., 985 N.Y.S.2d 7 (1st Dep’t 2014) (affirming lower-court decision confirming construction arbitration award and denying cross-motion to vacate award)
 - Because the construction project at issue involved sale of units to many out-of-state persons, a national brokerage firm was used to market the units, and a nationally chartered bank provided funding, the project sufficiently “affected commerce” to be within the ambit of the Federal Arbitration Act. After finding FAA applicable, state appellate court rejected appellant’s claims that the arbitrators acted in “manifest disregard” or were “irrational” in resolving claims under the parties’ agreements



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Defenses – Manifest Disregard of Law

- Bankers Life & Cas. Co. v. CBRE, Inc., __ F.3d __, 2016 WL 4056400 (7th Cir. July 29, 2016)
 - In a 2-1 decision with majority opinion written by Judge Posner, the Seventh Circuit reversed and remanded a district court's order refusing to set aside an arbitration award. Appeals court held that the arbitrators, by erroneously interpreting the parties' agreement, had exceeded their powers under the Illinois Arbitration Act. Majority opinion includes no discussion of Federal Arbitration Act.



Defenses – Manifest Disregard of Law

Key FAA standards – construction arbitration agreements

- § 10 (vacatur): “where the arbitrators exceeded their powers”
- § 11 (modification/correction): “where the arbitrators have awarded upon a matter not submitted to them”



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Defenses – Manifest Disregard of Law

Possible language for construction arbitration agreements:

- “Nothing in this arbitration agreement shall authorize the arbitrator(s) to make an award of damages resulting from _____, and the arbitrator(s) are expressly prohibited from doing so. No matter calling for such award shall be deemed submitted to the arbitrator(s) under the terms of this arbitration agreement.”
- “Nothing in this arbitration agreement shall preclude the arbitrator(s) from making an award of damages resulting from _____, and the arbitrator(s) are expressly authorized to do so.”



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Appeal

NJAA – Appeal (§28)

An appeal maybe taken from:

- An order denying a summary action to compel arbitration
- An order granting a summary action to compel arbitration
- An order confirming or denying a confirmation of award
- An order modifying or correcting an award
- An order vacating an award without directing a rehearing
- A final judgment

Timing

- 45 days from entry of order or judgment



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Appeal

FAA - Appeal (§16)

An appeal can be taken from an order:

- Refusing a stay of any action
- Denying a petition to order arbitration to proceed
- Damaging a petition to compel arbitration
- Confirming or denying confirmation of an award
- Modifying, correcting or vacating an award



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Appeal

FAA - Appeal (§16) (continued)

No appeal may be taken from an interlocutory order:

- Granting a stay of an action
- Directing an arbitration to proceed
- Compelling arbitration
- Refusing to enjoin an arbitration

Timing

- 30 days after entry of judgment or order



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Issues for Discussion

- 1. Is arbitration just, speedy and inexpensive?**
- 2. Do the parties get the result they want?**
 - A dispute resolution system that allows for (i) errors of law and (ii) findings of fact without a substantial evidentiary basis that is final and non-appealable
 - Awards cannot be vacated for being wrong but can be reversed for not considering evidence. So everything goes in, adding more cost
- 3. Can the parties fashion their own scope of judicial review?**
 - New Jersey allows parties to contract for expanded judicial review

Issues for Discussion

4. How to carve out the FAA?

- Add a clause that the contract will be governed by a certain state's arbitration act.

5. Should the appellate process be part of the arbitration and adopt a standard for appellate procedure, i.e. review the initial decision for legal error or lack of substantial evidence?



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