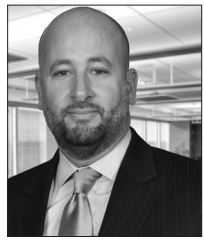
Must Arbitrators Follow the Law?

*Thomas A. Telesca, Elizabeth S. Sy & Briana Enck**

I. Introduction



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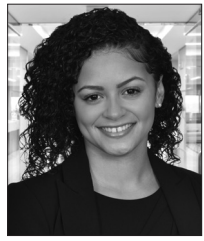

Ms. Enck

Arbitration is a widely used alternative to traditional court litigation for franchise-related disputes. Many franchise agreements require parties to arbitrate their disputes based on certain (mis)perceptions. For instance, arbitration is touted as private, faster, and cheaper than court litigation. Arbitration normally allows a franchisor to retain the litigation counsel of its choice unconstrained by the admission requirements to the bar of a particular court.[1] Arbitration is also perceived as a deterrent to franchisees from bringing claims against franchisors because of the added cost of the initial filing fees or because a franchisee has to likely share in the cost of the "judge," absent a prevailing party provision. Leaving aside whether those (mis)perceptions match reality, which is not the subject of this article,[2] before inserting or negotiating an arbitration provision in a franchise agreement, one other important factor to consider is whether arbitrators are required to follow the law and what a franchisor or franchisee can do if the arbitrator does not.

This consideration may be more significant in a franchise context than in some others where the

1. Certain states, such as Connecticut, require attorneys to be admitted to practice law in the state in which the arbitration proceeding is taking place as it would constitute practicing law, even though attorney representation was not required in the arbitration proceedings. *Doctor's Assocs., Inc. v. Jamieson*, 2006 WL 2348849 (Conn. Super. Ct. July 19, 2006) (granting pro hac vice admission for out-of-state counsel to practice law in arbitration proceeding).

2. *See, e.g.*, Michael Garner, *Dispute Resolution in the Twenty-First Century: The Challenge to Get ADR Right*, 40 Franchise L.J. 1 (2020) (explaining that "[o]n the one hand, ADR provisions may indeed be a productive way to resolve disputes" and, on the other hand, "they may be tools to delay, frustrate, and ultimately defeat legitimate claims of one of the parties").

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well-developed body of law designed to protect both franchisors and franchisees differs at the federal and state levels as well as from state to state. Franchise lawyers expect that the decision-maker, whether judge or arbitrator, will appreciate those differences and be bound by the applicable law so that they can better advise clients on reasonably predictable outcomes. If, for example, a party is arbitrating a case over the alleged failure to make proper disclosures in a franchise disclosure document or perhaps more specifically, whether New Jersey's notice requirement for termination, cancellation, or the intent not to renew to the franchisee applies, the party may ask: Must the arbitrator follow the law, and what can I do if the arbitrator does not?

The answer depends on a number of factors: what the franchise agreement says; what the arbitration clause in the franchise agreement says; what the arbitrator thinks; whether a party moves to confirm or vacate the arbitration award in state or federal court, which state or federal circuit has jurisdiction over the arbitration; and, finally, what claims and arguments were presented to the arbitrator. This article provides a brief overview of arbitration and arbitrators generally with respect to their obligation to follow the law; offers ways to lessen the likelihood that an arbitrator will not follow the law; discusses various standards to vacate an unfavorable arbitration award which does not follow the law; and examines the circuit split regarding the elusive manifest disregard of the law doctrine.

II. Arbitration and Arbitrators

It is well known that arbitration is a private process by which the parties give a neutral third party the authority to resolve their dispute. Although the process is similar to court litigation, discovery is usually limited, the rules of evidence are relaxed, and the award is final. Appellate review does not normally exist. As such, in theory, the arbitration process should be quicker and less expensive than traditional litigation.

The arbitrator's award can be enforced by a court, but only vacated on *very* narrow grounds. Although, at least in the authors' experience, most arbitrators are guided by the applicable law and address the issues at hand, if an arbitrator chooses to ignore the law, the relief available may be limited at best. Only in the most egregious of circumstances is a court likely to insert itself into a private arbitral proceeding and vacate an arbitrator's award.

A. *Who Are Arbitrators?*

Because arbitration awards are rarely vacated, as more fully discussed later, it is important to select the right arbitrator. Arbitrators may come from a wide range of professional and educational backgrounds and are not necessarily attorneys or judges. Although many have experience in the legal field, others have experience in, for example, the finance, information technology, and construction fields. As a result, some arbitrators may not be well-versed or familiar with the nuances of the law that should apply in a particular case.

This circumstance could be especially problematic in the franchise context where the rules may vary from state to state and between state and federal law, which could wreak havoc on a franchise lawyer's well-thought-out litigation strategy and his or her client's expectations.

To guard against an arbitrator ignoring or misapplying relevant law, parties normally select well-experienced lawyers or retired judges as arbitrators. Often, those arbitrators work through nationally recognized alternative dispute resolution (ADR) organizations, such as JAMS or the American Arbitration Association (AAA). The AAA lists the following seven qualifications for its arbitrators on its website:

a. Minimum of 15 years of senior level legal, business or professional experience;
b. Educational degree(s) and/or professional license(s) appropriate to your field of expertise;
c. Knowledgeable regarding cybersecurity and the benefits and risks associated with relevant technology;
d. Training or experience in arbitration and/or other forms of dispute resolution;
e. Honors, awards and citations indicating leadership in your field;
f. Training or experience in arbitration and/or other forms;
g. Membership in a professional association(s); and
h. Other relevant experience or accomplishments (e.g., published articles).[3]

AAA arbitrators must also attend and successfully complete a two-day Arbitration Fundamentals and Best Practices for New AAA Arbitrators program and an online Award Writing course.[4] In its Statement of Ethical Principles, the AAA represents that its rules, administrative procedures, and due process protocols follow the law.[5]

One of the benefits of using an established ADR organization is that it should allow for the selection of a trained arbitrator with franchise experience. JAMS, for example, maintains a list of neutrals that have franchise experience, and the International Institute for Conflict Prevention & Resolution offers a franchise panel.[6] The parties are able to research and review a potential arbitrator's background to see if he or she is a good fit for their particular dispute.

B. *An Arbitrator's Perspective May Impact the Outcome*

Anecdotally, and as supported by two more formal surveys, arbitrators understand that they have certain flexibility when it comes to following the law. Arbitration is generally perceived as providing a forum in which to

3. *Application Process for Admittance to the AAA National Roster of Arbitrators*, Am. Arb. Ass'n, https://www.adr.org/sites/default/files/document_repository/AAA_Application_Process_NationalRoster.pdf (last visited June 28, 2021).

4. *Id.*

5. *AAA Statement of Ethical Principles*, Am. Arb. Ass'n, https://www.adr.org/StatementofEthicalPrinciples (last visited Aug. 2, 2021).

6. *See, e.g.*, *All Neutrals*, JAMS, https://www.jamsadr.com/neutrals (last visited Nov. 28, 2021); *Franchise Panel*, Int'l Centre for Conflict Prevention & Resol., https://www.cpradr.org/neutrals/specialty-panels/franchise-panel (last visited Nov. 28, 2021).

resolve disputes in an equitable rather than strictly legal manner. Indeed, sixty years ago, in a 1961 *Columbia Law Review* survey regarding the attitudes of arbitrators in relation to following the law, eighty percent of the arbitrators surveyed "thought that they ought to reach their decisions within the context of the principles of substantive rules of law," but almost ninety percent "believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing."[7] This perceived flexibility to be "fair" may benefit or harm a client depending on the outcome and what is at stake.

Thirty years later, in a 1994 survey, AAA construction arbitrators were asked whether they "always follow the law in formulating [their] awards."[8] Only seventy-two percent (149 of 207) responded "yes," while twenty percent (42 of 207) responded "no" (although eight percent did not respond to the question).[9] The arbitrators surveyed were given the option to explain their responses. Out of the thirty-three who explained their "no" response, eleven "stated they did not know the law and therefore could not follow it."[10] Out of the fifty-eight who explained their "yes" answer, nineteen stated that

> they attempted to follow the law as they were able to understand it. Seventeen believed it was essential or their duty to follow the law. Four attempted to follow the law, but said it was not always clear or agreed upon. Four said they followed the law but tempered it with a concept of "equity." Three followed the law to avoid a challenge to the award.[11]

These surveys largely mirror the authors' experience with arbitration. Arbitrators use the law as a guide to achieving a fair result, but, in certain circumstances, an arbitrator's own sense of "equity" comes to play a role in the arbitrator's award. This reality may be more of a reason to specify in the arbitration clause of the franchise agreement that the arbitrator must have franchise experience so that he or she understands the contours and nuances of the varied franchise laws that may have already taken into account a sense of what is equitable. For example, a franchisor may want to include the following in its franchise agreement's arbitration clause: "The arbitrator(s) shall be independent, impartial and qualified by education, experience and training in the franchise industry to decide upon disputes under this agreement."[12]

Even courts have acknowledged the result of the two surveys, noting that opting for arbitration might be a sacrifice of legal precision where, inter alia, arbitrators are under no duty to apply the law. For example, in *Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co.*, the Tenth Circuit noted that "[a]rbitration provides neither the procedural protections nor the assurance

7. Soia Mentschikoff, *Commercial Arbitration*, 61 Colum. L. Rev. 846, 861 (1961).

8. Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 Hofstra L. Rev. 137, 154 (1994).

9. *Id.*

10. *Id.* at 155.

11. *Id.*

12. *See Clause Builder Tool*, Am. Arb. Ass'n, https://www.clausebuilder.org/cb/faces/index (last visited Dec. 1, 2021).

of the proper application of substantive law offered by the judicial system."[13] In *Fagan v. Village of Harriman*, a New York appellate court stated that "[a]n arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be."[14] Without the right to appeal an arbitration award that does not follow the law, using arbitration may be risky, despite its other perceived benefits.

C. *Ways to Ensure an Arbitrator Follows the Law*

Regardless of an arbitrator's view of his or her obligation to follow the law, to ensure adherence to applicable law and its ensuing predictability, there are ways to lessen the likelihood that an arbitrator does not follow the law. JAMS and AAA, for example, provide rules addressing which substantive and procedural law the arbitrator should follow. Rule 24(c) of the JAMS Comprehensive Arbitration Rules & Procedures provides:

> In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator shall be guided by the rules of law and equity that he or she deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' Agreement, including, but not limited to, specific performance of a contract or any other equitable or legal remedy.[15]

The JAMS rule can be read to give the arbitrator extensive flexibility in crafting what he or she believes is an appropriate award only "guided by" and not bound by the law. Similarly, the AAA's Preliminary Hearing Procedures require that the arbitration rules, substantive law, and procedural law governing the proceeding be addressed at the preliminary hearing.[16] As such, even if the parties' agreement does not have a choice of law provision, they may be able to attempt to agree on applicable law at the preliminary hearing.

Because an arbitrator may base his or her decisions on an individual perception of what is "right" or "fair," the outcome might run contrary to precedent.[17] This result may be beneficial or detrimental, depending on a party's particular position and goals in a particular case. To minimize the risk of an arbitrator's ruling going awry, the parties should agree on the applicable law in advance of

13. Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co., 22 F.3d 1010, 1011 (10th Cir. 1994).

14. Fagan v. Village of Harriman, 140 A.D.3d 868, 868 (N.Y. App. Div. 2016) (internal quotations and citations omitted); *see also* Allstate Ins. Co. v. GEICO, 100 A.D.3d 878 (N.Y. App. Div. 2012).

15. *JAMS Comprehensive Arbitration Rules & Procedures*, Jams (June 1, 2021), https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-24.

16. *Arbitration Rules and Mediation Procedures*, Am. Arb. Ass'n 32 (2013), https://www.imsif.com/files/Commercial_Rules.pdf (last visited June 28, 2021).

17. *See, e.g.*, *Arbitration vs. Litigation: The Choice Matters*, Warner Norcross + Judd (Feb. 8, 2018), https://www.wnj.com/Publications/Arbitration-vs-Litigation-The-Choice-Matters ("In litigation, judges are constrained by the rules of evidence and, of course, by precedent based on prior cases. This helps to ensure that judges do not substitute their opinions of what is fair and just in place of what the law allows or requires and promotes relatively consistent (and predictable) outcomes of similar issues. . . Arbitrators are not placed under the same restrictions as judges, which means that arbitrators are not bound to follow precedent or to exclude evidence.).

any arbitration. The franchise agreement is the obvious place to memorialize this agreement. To further avoid any doubt, the arbitration clause itself should address the applicable substantive law the arbitrator must follow, specifying which state or federal law(s) governs, as well as the applicable procedural law for enforcing the clause itself or confirming and/or vacating an award.

In the absence of an agreement on applicable law between the parties, the arbitrator will decide, which may lead to the application of unfavorable or inapt law. Additionally, although it may increase the cost because the parties must pay for the arbitrator's time, requiring the arbitrator to issue a reasoned award is another way to ensure that the arbitrator follows the applicable law. It should be noted that the rules of some ADR organizations permit appeals within the ADR organization if the parties agree, or the arbitration clause itself may permit appeals within the designated arbitral body.[18] This mechanism is another way to ensure that the arbitrator follows applicable law. Lastly, while negotiating or drafting the arbitration clause, a lawyer should consider whether federal or state law governs the enforcement of the arbitration award. This choice may be critical once the arbitration proceeding is complete, as seen in part III.A., below.

III. Can an Unfavorable Award Be Vacated?

Once an arbitration hearing is complete and the arbitrator issues an award, the case may still be far from over. Depending on the outcome, a party may have to confirm or, on the other hand, seek to vacate that award if, for instance, the arbitrator ignored the applicable law. In this regard, Rule 25 of JAMS Rules states:

> Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec[.] 1, *et seq*., or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.[19]

Although JAMS Rule 25 addresses enforcing, confirming, modifying, or vacating an arbitration award, it is very broadly drafted and allows parties to seek relief in any court with jurisdiction. The court selected could lead to varying results.

As stated in the JAMS rules, applications to confirm or vacate an award may be made in federal court under the Federal Arbitration Act (FAA)[20] or applicable state law. The U.S. Supreme Court has interpreted the scope of the FAA to apply to arbitrations in which the subject matter affects interstate

18. *See*, *e.g.*, *Arbitration Appeal Procedure*, Jams (June 2003), https://www.jamsadr.com/appeal; *Optional Appellate Arbitration Rules*, Am. Arb. Ass'n (Nov. 1, 2013), https://www.adr.org/sites/default/files/AAA-ICDR_Optional_Appellate_Arbitration_Rules.pdf.

19. *JAMS Comprehensive Arbitration Rules & Procedures*, Jams (June 1, 2021), https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-25.

20. 9 U.S.C. § 1 et seq.

commerce.[21] Therefore, for a wholly intrastate arbitration that does not affect interstate commerce, the process for confirming, or the grounds for vacating, an arbitration award is determined by state law, unless the parties designate the FAA to apply to the dispute.

It is important to note that there may be differences between the FAA and state law governed arbitrations, such as whether an arbitrator may award attorneys' fees to the prevailing party or how much time a party has to file a motion or application to vacate an award. For example, under the FAA, unless prohibited by the arbitration agreement, arbitrators may award attorneys' fees.[22] However, in New York, "attorneys' fees may not be recovered in an arbitration proceeding unless they are expressly provided for in the arbitration agreement. If the parties' agreement does not provide for an award of attorneys' fees, then an arbitrator who awards an attorneys' fee has exceeded the scope of his or her powers."[23] Additionally, under the FAA, a notice of motion to vacate must be served upon the adverse party within three months once the award is filed or delivered.[24] In New York, an application to vacate an award must be made within ninety days after its delivery.[25] Whereas, in Connecticut, an application to vacate an award must be made within thirty days from the notice of the award to the party to the arbitration who makes the motion.[26] There are also distinctions between and among the FAA and state laws as to whether the arbitrator or court decides certain issues.[27]

The procedure concerning applications to vacate an award when a party believes the arbitrator did not follow the law is beyond the scope of this article. This article focuses next on the various legal standards to vacate an award if such an application to a court is made when an arbitrator does not follow the law.

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21. *See* Citizens Bank v. Alafabco, 539 U.S. 52, 56 (2003).

22. *See* PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1202 (2d Cir. 1996).

23. N.Y. Merchants Protective Co. v. RW Adart Poly, 108 A.D.3d 554, 556–57 (N.Y. App. Div. 2013) (internal citations omitted).

24. 9 U.S.C.A. § 12.

25. N.Y. CPLR § 7511(a).

26. Conn. Gen. Stat. § 52-420(b); *see also* A Better Way Wholesale Autos, Inc. v. Saint Paul, 217 A.3d 996, 1005 (Conn. App. Ct. 2019) (holding thirty-day time limit pursuant to Connecticut General Statute § 52-420(b) applied, even though the arbitration agreement included a choice-of-law provision stating that the agreement was governed by the FAA, which contains a three-month time limitation for filing appeals).

27. For example, in New York, "the courts have inherent power to disqualify an arbitrator before an award has been rendered." Bronx-Lebanon Hosp. Ctr. v. Signature Med. Mgmt. Grp., L.L.C., 6 A.D.3d 261, 261, 775 N.Y.S.2d 279, 280 (1st Dep't 2004) (citing Astoria Med. Grp. v. Health Ins. Plan of Greater New York, 11 N.Y.2d 128 (1962)). Under the FAA, a court may not disqualify an arbitrator during arbitration proceedings. Marc Rich & Co., A. G. v. Transmarine Seaways Corp. of Monrovia, 443 F. Supp. 386, 387 (S.D.N.Y. 1978) (holding that the arbitrator is subject to judicial review after the award has been made). Additionally, in New York, the court has the authority to decide, upon application by a party, whether a claim is timely filed under the relevant statute of limitations. *See* N.Y. C.P.L.R. § 7502(b). Under the FAA, the arbitrator decides whether the claim was timely filed under the relevant statute of limitations. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002) (holding that absent an agreement to the contrary, the applicability of the time limit rule under the FAA "is a matter presumptively for the arbitrator, not for the judge").

A. *Standards for Vacating an Arbitrator's Award*

The grounds for reviewing an arbitrator's award are very limited.[28] In *Tullett Prebon v. BGC Financial*, the Appellate Division of New York noted that arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, to wit, settling disputes efficiently and avoiding long and expensive litigation.[29] If a party to an arbitration proceeding *does* want to challenge an award, a court application must be made, with the rare exception that the parties' agreement provided for an appellate proceeding within the arbitration.[30]

1. The Federal Arbitration Act and State Law

The outcome of any such court application to vacate an award may depend on what law applies and which court is selected for the application. Section 10(a) of the FAA (assuming federal law applies) sets forth four statutory grounds for vacating an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject was not made.[31]

Each statutory ground seeks to ensure an arbitral proceeding's overall fairness and impartiality.[32]

The following cases are illustrative of each of the four grounds under Section 10(a) of the FAA. First, in *Sorghum Investment Holdings Ltd. v. China Commercial Credit, Inc.*, a New York state court applying the FAA determined that an arbitrator's award was procured by fraud or undue means, pursuant to Section 10(a)(1), where the arbitrator explicitly relied on the respondent's attorney's false and misleading statements in his declaration.[33] Next, in *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, the Second Circuit vacated an award on the grounds of evident partiality under Section 10(a)(2) where the arbitrator knew of a potential conflict of interest,

28. *Arbitration Award Vacated*, FindLaw, https://corporate.findlaw.com/litigation-disputes/arbitration-award-vacated.html (last visited July 30, 2021).

29. Tullett Prebon v. BGC Fin., 111 A.D.3d 480, 482 (1st Dept. 2013); *see also* Folkways Music Publishers v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993).

30. *Challenges to an Arbitration Award*, Am. Arb. Ass'n, https://www.adr.org/sites/default/files/document_repository/challenges-to-an-arbitration-award.pdf (last visited July 30, 2021).

31. 9 U.S.C. §10.

32. *See* Stephen L Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 Geo. Wash. L. Rev. 443, 453 (1998).

33. Sorghum Inv. Holdings Ltd. v. China Com. Credit, Inc., 2019 WL 1992275 (N.Y. Sup. Ct. 2019).

but failed to investigate or disclose an intention not to investigate the conflict.[34] The Second Circuit stated that the standard for vacating an award pursuant to Section 10(a)(2) is whether a reasonable person, considering all of the circumstances, would conclude that an arbitrator was partial to one side.[35] In *Monster Energy Co. v. City Beverages*, a beverage distributor moved to vacate an arbitration award in favor of a beverage supplier who terminated the parties' distribution agreement without good cause, after finding out that the arbitrator had an ownership interest in JAMS and JAMS had a substantial business relationship with the supplier.[36] The Ninth Circuit vacated the award under Section 10(a)(2) and explained that, to support vacatur of an award pursuant to evident partiality, "the arbitrator's undisclosed interest in an entity must be substantial, and that entity's business dealings with a party to the arbitration must be nontrivial."[37] Third, for an award to be vacated pursuant to Section 10(a)(3), the misconduct must amount to a denial of fundamental fairness.[38] In *In re A.H. Robins Co.*, the United States District Court for the Eastern District of Virginia held that the arbitrator's denial of claimant making a closing argument constituted such misconduct because it prejudiced the claimant's case.[39] Fourth, in *Aspic Engineering & Construction Co. v. ECC Centcom Constructors LLC*, the Ninth Circuit held that the arbitrator exceeded his power pursuant to Section 10(a)(4) by issuing an award that was in direct conflict with the provisions of the relevant contracts on the basis that enforcing such provisions would be unjust.[40] By contrast, in *Walker v. Ameriprise Financial Services, Inc.*, the Fifth Circuit refused to vacate an award pursuant to Section 10(a)(4) where the arbitration panel dismissed an employee's claims against a franchisor as being fully adjudicated by a prior arbitration panel.[41] The plaintiff in *Walker* argued that the later arbitration panel erred in determining that the defendant met the elements of FINRA's Rule 13504(a)(6),[42] which essentially applies a res judicata standard to claims.[43] The Fifth Circuit explained that, even if it were true that the panel

34. *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007).

35. *Id.*

36. Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1136 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 164, 207 L. Ed. 2d 1100 (2020).

37. *Id.* at 1135–36.

38. *See* GFI Sec. LLC v. Labandeira, 2002 WL 460059, at *6 (S.D.N.Y. Mar. 26, 2002) (refusing to vacate an award where an arbitrator failed to follow the Federal Rules of Evidence, declined to allow the cross-examination of a witness and forced another witness to testify).

39. *In re* A.H. Robins Co., Inc., 238 B.R. 300, 315 (E.D. Va. 1999).

40. Aspic Eng' & Constr. Co. v. ECC Centcom Constructors LLC, 913 F.3d 1162, 1168 (9th Cir. 2019).

41. Walker v. Ameriprise Fin. Servs., Inc., 787 F. App'x 211, 214 (5th Cir. 2019).

42. Rule 13504(a)(6) provides that "dismissal may be granted when the arbitrators find the 'non-moving party previously brought a claim regarding the same dispute against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision.'" *Walker*, 787 F. App'x at 212.

43. *Id.* at 214.

incorrectly applied the rule, such alleged "legal errors lie far outside the category of conduct embraced by §10(a)(4)."[44]

A review of the relevant case law demonstrates that vacating an arbitration award under the four grounds of Section 10(a) of the FAA is difficult, leading to results which are similar to *Walker*.[45] Many states follow the FAA. Thirteen states[46] have adopted the Uniform Arbitration Act (1956) (UAA), which was patterned after the FAA; twenty-two states and the District of Columbia[47] have adopted the Revised Uniform Arbitration Act (2000) (RUAA), which broadens statutory vacatur standards; and some states have adopted portions of the RUAA.[48] Other states, such as New York, New Jersey, and California, while not adopting the UAA or RUAA, have adopted similar statutes enforcing agreements to arbitrate controversies and provide similar grounds for vacatur.[49]

Under the UAA, upon application of a party, a court shall vacate an award where:

> (1) The award was procured by corruption, fraud or other undue means;
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

44. *Id.* (citing Cooper v. WestEnd Cap. Mgmt., L.L.C., 832 F.3d 534, 547 (5th Cir. 2016)).

45. *See*, *e.g.*, Hoolahan v. IBC Advanced Alloys Corp., 947 F.3d 101 (1st Cir. 2020) (holding, inter alia, that the court of appeals will not disturb an award as long as the award draws its essence from the agreement that underlies the arbitration proceeding and the arbitrator arguably construed or applied the agreement within the scope of his authority); CM S. E. Texas Houston, LLC v. CareMinders Home Care, Inc., 662 F. App'x 701 (11th Cir. 2016) (holding that arbitrator's refusal to grant postponement of arbitration hearing when parties mutually agreed to one was not per se unreasonable, and thus did not mandate vacatur of arbitration award under the FAA); Mesa Power Grp., LLC v. Gov't of Canada, 255 F. Supp. 3d 175 (D.D.C. 2017) (explaining that arbitrator's interpretation of the word "procurement" in the North American Free Trade Agreement did not warrant vacatur of award finding that government of Canada did not violate the Agreement in awarding renewable energy contracts because the arbitrator's interpretation was based on an analysis of the text, context, and structure of treaty, other relevant treaties, and relevant precedent); Frid v. First Republic Bank, No. 12-CV-00806-JST, 2014 WL 1365933, at *4 (N.D. Cal. Apr. 7, 2014) ("Because the arbitrator was not required to make findings of fact and conclusions of law in his award, any failure to do so cannot be a basis for vacating the award."); Stone v. Bear, Stearns & Co., 872 F. Supp. 2d 435, 443 (E.D. Pa. 2012) (refusing to vacate arbitration award and explaining that the court "must afford the arbitrators' decision extreme deference" and "a petitioner seeking to vacate an arbitration award must clear a 'high hurdle'"), *judgment entered*, No. 2:11-CV-5118, 2012 WL 1946970 (E.D. Pa. May 29, 2012), *and aff'd*, 538 F. App'x 169 (3d Cir. 2013).

46. Nebraska, Virginia, Montana, Kentucky, Iowa, Missouri, Georgia, South Carolina, Delaware, Idaho, South Dakota, Indiana, and Maine. *See* Arbitration Act (1956), Uniform Law Comm'n, https://www.uniformlaws.org/committees/community-home?CommunityKey=f60b379c-6378-4d9d-b271-97522fad6f89 (last visited Aug. 3, 2021).

47. Vermont, Pennsylvania, Kansas, Connecticut, West Virginia, Florida, Michigan , Arkansas, Arizona, Minnesota, Washington, Oklahoma, Alaska, Colorado, Oregon, North Dakota, New Jersey, North Carolina, Utah, Hawaii, New Mexico, Nevada, and District of Columbia. *See* Arbitration Act (2000), Uniform Law Comm'n, https://www.uniformlaws.org/committees/community-home?CommunityKey=a0ad71d6-085f-4648-857a-e9e893ae2736 (last visited Aug. 3, 2021).

48. *See* Prefatory Note, Revised Uniform Arbitration Act, 7 U.L.A. 1 (2000); *see*, *e.g.*, Fla. Stat. Ann. § 682.01.

49. *See*, *e.g.*, Cal. Civ. Proc. Code § 1280 et seq.; N.J. Stat. Ann. § 2A:24-1 et seq.; N.Y. C.P.L.R. § 7501 et seq.

> (3) The arbitrators exceeded their powers;
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or
> (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection . . . .[50]

The RUAA adds two additional statutory vacatur standards: (1) "misconduct by an arbitration prejudicing the rights of a party to the arbitration proceeding;"[51] and (2) "the arbitration was conducted without proper notice of the initiation of an arbitration . . . so as to prejudice substantially the rights of a party to the arbitration proceeding."[52] Unlike the UAA, the RUAA also acknowledges that "courts have developed nonstatutory grounds of manifest disregard of the law and public policy that will void an arbitration award."[53]

2. The Doctrine of Manifest Disregard of the Law

"Manifest disregard of the law" is a separate judicially created doctrine under which an unsuccessful party may seek to vacate an unfavorable arbitration award in certain courts.[54] Although at first it may appear that this doctrine will provide relief outside the federal and state statutory schemes if an arbitrator does not follow the law, it is not as fruitful as its name implies. It has been described as a "doctrine of last resort."[55] Its application has been limited only to exceedingly rare instances where the arbitrator knew the law, but ignored it.[56]

Such a narrow review of arbitration awards is nothing new. More than three hundred years ago under the Arbitration Act of 1698, England gave courts the power to confirm awards and also to vacate them, but only on limited grounds, such as when an award "was procured by corruption or other undue means."[57] As is the case today, English and American courts in the nineteenth century rarely vacated arbitration awards. One such English court that did vacate an award in 1846 found that "the arbitrator has clearly and palpably mistaken a firmly-settled rule of law . . . ."[58] Nearly thirty years later, the U.S. Supreme Court first used the term "manifest mistake of law" in *United States v. Farragut*.[59]

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50. Uniform Arbitration Act, § 12, 7 U.L.A. 4 (1956).
51. Revised Uniform Arbitration Act, § 23(a)(2)(C), 7 U.L.A. 74 (2000).
52. *Id.* § 23(a)(6).
53. *Id.* § 4, cmt 5(e).
54. *See* Wilko v. Swan, 346 U.S. 427, 436–37 (1953).
55. *See* Wien & Malkin LLP v. Helmsley-Spear, Inc., 846 N.E.2d 1201, 1206 (N.Y. 2006).
56. *See* Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389 (2d Cir. 2003); Willemijn Houdestermaatschappij, BV v. Standard Microsystems, 103 F.3d 9, 12 (2d Cir. 1997); Stempien v. Marnie Prop., LLC, 2017 WL 6016568 (Del. Ch. Nov. 3, 2017).
57. *Historic English Arbitration Act 1698*, Trans-Lex.Org, https://www.trans-lex.org/803000/_/historic-english-arbitration-act-1698 (last visited June 28, 2021).
58. Fuller v. Fenwick [1846)] 136 Eng. Rep. 282 (L.R.C.P.) 285.
59. United States v. Farragut, 89 U.S. 406, 420 (1874).

When Congress enacted the FAA in 1925, it did not mention "manifest mistake of law" or "manifest disregard of the law." Although "manifest disregard of the law" has not found its way into statutory law, it abounds in case law and has evolved over time. The U.S. Supreme Court discussed the manifest disregard standard in *Wilko v. Swan*,[60] but the Court did not adopt it. Nevertheless, over time, both federal and state appellate courts adopted the standard.

Then in 2008, the U.S. Supreme Court seemingly eliminated "manifest disregard of the law" in its landmark decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). The Court held that the grounds for vacating an arbitration award under the FAA are only the four grounds enumerated in Section 10, which does not include manifest disregard. However, the Court did not decide the validity of the manifest disregard standard, but suggested that the manifest disregard of the law standard expressed in *Wilko* may have referred to the four grounds in Section 10 collectively, rather than adding to them as an independent judicially created ground, or as shorthand for the subsections authorizing vacatur when arbitrators were guilty of misconduct or exceeded their powers.[61] Because the Court in *Hall Street* did not decide the validity of the manifest disregard of the law standard[62] and later refused to decide its validity again in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[63] the U.S. Circuit Courts of Appeals are split on whether the doctrine still exists.

a) Circuits Where Manifest Disregard Remains a Valid Ground to Vacate

The First, Second, Fourth, Sixth, Seventh, and Tenth Circuits have held that manifest disregard remains a valid ground for vacatur.[64] However, successfully demonstrating manifest disregard is another story. For example, in *Ebbe v. Concorde Investment Services, LLC*,[65] a plaintiff investor decided to invest money with a financial advisor named Richard Cody who was an employee of defendant Westminster Financial.[66] Unbeknownst to plaintiff, FINRA's Appeals Panel subsequently suspended Richard Cody for a year for recommending unsuitable investments and trading.[67] When the suspension began, Cody transferred plaintiff's account to his wife, Jill Cody, as plaintiff's new

60. Wilko v. Swan, 346 U.S. 427, 436–37 (1953).
61. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 585 (2008).
62. *Id.* at 584–85.
63. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670 (2010).
64. *See* Ebbe v. Concorde Inv. Servs., LLC, 953 F.3d 172 (1st Cir. 2019) (holding that manifest disregard of the law is a ground for vacatur); Frye v. Wild Bird Ctrs. Of Am., Inc., 714 F. Appx. 211, 213 (4th Cir. 2017) (holding the common law ground for vacating is where the award evidences a manifest disregard of the law); A. Kershaw, PC v. Shannon L. Spangler, PC, 703 F. Appx. 635, 639–40 (10th Cir. 2017) (holding the manifest disregard ground remains available); Marshall v. SSC Nashville Operating Co., LLC, 686 F. Appx. 348, 353 (6th Cir. 2017) (holding despite the Supreme Court's language in Hall Street, the manifest disregard doctrine remains a viable ground); Tully Constr. Co., Inc. v. Canam Steel Corp., 684 F. App'x 24, 26 (2d Cir. 2017) (same).
65. Ebbe v. Concorde Inv. Servs., LLC, 953 F.3d 172 (1st Cir. 2019).
66. *Id.* at 175.
67. *Id.*

investment advisor, who was an employee of defendant Concorde.[68] After noticing unusual account activity, plaintiff brought an arbitration proceeding against Richard Cody, Westminster Financial, Jill Cody, and Concorde for $800,000 in damages.[69] The arbitrator determined that Richard Cody and Jill Cody were jointly and severally liable in the sum of $286,096, but not Concorde or Westminster.[70] Plaintiff sought to vacate the award on the ground that Concorde should have been liable too under the doctrine of respondeat superior.[71]

The First Circuit explained the difficulties of satisfying the "exacting criteria" for invocation of the manifest disregard doctrine where arbitrators do not explain their awards, as they are permitted to do.[72] The court further noted that "[o]n a manifest disregard review, even a court's conviction that the arbitrator made a serious mistake or committed grievous error will not furnish a satisfactory basis for undoing the decision."[73] There must be a showing that "the arbitrator recognized the applicable law, but ignored it."[74] The First Circuit finally concluded that the arbitrator's finding was reasonable because (1) neither of the Codys appeared for the arbitration and the finding of liability against them could reasonably have been nothing more than entry of a default judgment; (2) plaintiff produced no evidence that Jill Cody violated any of Concorde's company rules; and (3) the arbitrators could have concluded that Jill Cody's torts were not committed within the scope of her employment.[75]

Even in cases where there is a reasoned award, it may not help. In *Tully Construction Co. v. Canam Steel Corp.*,[76] the Second Circuit explained that an arbitrator does not need to "delve into every argument made by the parties" and that a reasoned award is simply

> something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel. A reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties.[77]

In *Tully Construction. Co.*, a contractor on a state construction project petitioned to confirm an arbitration award against a subcontractor over a dispute regarding timeliness of deliveries.[78] The subcontractor seeking to vacate the award alleged, inter alia, that the arbitrator failed to consider an order issued

68. *Id.*
69. *Id.*
70. *Id.* at 176.
71. *Id.* at 177.
72. *Id.* at 176 (citations omitted).
73. *Id.* at 176–77 (citations omitted).
74. *Id.* at 176 (citations omitted).
75. *Id.* at 177.
76. Tully Constr. Co., Inc. v. Canam Steel Corp., 684 F. App'x 24 (2d Cir. 2017).
77. *Id.* at 28 (citing Leeward Constr. Co., Ltd. v. Am. U. of Antigua–Coll. of Med., 826 F.3d 634, 640 (2d Cir. 2016)).
78. *Tully Constr.*, 684 F. App'x at 28.

by a New Hampshire court that included language about the parties' delivery agreement as well as a letter agreement between the parties.[79] The Second Circuit agreed with the lower court that vacatur was not warranted and that there was ample support for the arbitrator's ruling.[80]

In *Golden Krust Franchising, Inc. v. Actus Restaurant Group Inc.*,[81] the United States District Court for the Southern District of New York applied the manifest disregard for the law standard, but did not vacate the award. In that case, the franchisor filed a petition to vacate an arbitration award that granted two of its franchisees lost past profits, attorneys' fees and costs.[82] The arbitrator found that, inter alia, the franchisor violated the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) for charging its family-owned stores lower royalties, food prices, and advertising fees than the other franchisees.[83] Citing to a case within the Eleventh Circuit, the franchisor argued that the arbitration award for lost past profits should be vacated on grounds of manifest disregard of the law because lost past profits are not recoverable under FDUTPA.[84] In refusing to vacate the award, the district court relied on the fact that courts in the Eleventh Circuit are split as to whether past lost profits are permissible under FDUTPA and explained that "where the arbitrator picked one side to resolve the conflicting precedent, the arbitral decision cannot be said to have exhibited manifest disregard of the law."[85]

In *Frye v. Wild Bird Centers of America, Inc.*,[86] the Fourth Circuit found that manifest disregard is established where an arbitrator "understands and correctly states the law, but proceeds to disregard the same."[87] In that case, a non-compete clause ambiguously stated that it applied "after termination" in one section of a franchise agreement and "in the event of termination or expiration of this Agreement for any reason" in a later section.[88] The court held that the arbitrator's application of the non-compete clause upon expiration, rather than termination, did not amount to the disregard or modification of unambiguous contract provisions.[89]

The Sixth Circuit held in *Marshall v. SSC Nashville Operating Co., LLC*[90] that an arbitrator did not manifestly disregard the law where he chose to weigh testimony of one witness more heavily than the vague answers of another witness in concluding that a valid non-discriminatory reason existed

79. *Id.* at 26–27.
80. *Id.* at 27.
81. Golden Krust Franchising, Inc. v. Actus Rest. Grp., Inc., No. 20-CV-7321 (KMK), 2021 WL 4974808 (S.D.N.Y. Oct. 26, 2021).
82. *Id.* at *2.
83. *Id.*
84. *Id.*
85. *Id.* (internal quotations and citations omitted).
86. Frye v. Wild Bird Ctrs. Of Am., Inc., 714 F. App'x 213 (4th Cir. 2017).
87. *Id.*
88. *Id.*
89. *See id.*
90. Marshall v. SSC Nashville Operating Co., LLC, 686 F. App'x 348 (6th Cir. 2017).

for plaintiff employee's lesser pay.[91] The court explained that manifest disregard "is not an easy standard to meet. A mere error in the interpretation or application of the law is insufficient. Rather, the decision must fly in the face of clearly established legal precedent."[92] Similarly, in the Tenth Circuit, a demonstration of "willful inattentiveness to the governing law" is required.[93] In the Seventh Circuit, the application of manifest disregard of the law is limited to two possibilities: an arbitral order requiring the parties to violate the law or an arbitral order that does not adhere to the legal principles specified by contract.[94]

Even where the doctrine of manifest disregard of the law is still recognized, vacating an award on that ground is an uphill battle. To aid in the application of the manifest disregard of the law doctrine, consider having the arbitrator confirm in a pre-hearing order which substantive law applies and then require a reasoned decision. This way, a party can later demonstrate that the arbitrator knew the law and disregarded it.

b) Circuits Where Manifest Disregard Is Not a Valid Ground to Vacate

The Ninth Circuit has held that manifest disregard does not constitute an independent ground, but rather an *extension* of the ground pursuant to FAA §10(a)(4) where an arbitrator exceeds his or her powers.[95] The Fifth, Eighth, and Eleventh Circuits similarly have abandoned the concept entirely since the Supreme Court's decision in *Hall Street*.[96]

c) Circuits Where Manifest Disregard Is Still Not Decided

The question of the validity of the manifest disregard of the law standard remains open in the District of Columbia Circuit and Third Circuit. For example, in *Crsytallex International Corp. v. Bolivarian Republic of Venez.*[97] and *Anouruo v. Tenet HealthSystem Hahnemann*[98] the courts did not take a position on whether a court may still vacate an award on the ground for a manifest disregard of the law after *Hall Street*. Instead, they gave deference to the arbitrator's award because there was no indication that the arbitrator disregarded the applicable law.[99]

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91. *Id.*
92. *Id.* at 353 (internal quotations and citations omitted).
93. A. Kershaw, PC v. Shannon L. Spangler, PC, 703 F. App'x 635, 639 (10th Cir. 2017).
94. George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577 (7th Cir. 2001).
95. Sanchez v. Elizondo, 878 F.3d 1216, 1221–22 (9th Cir. 2018).
96. McKool Smith, P.C. v. Curtis Int'l, Ltd., 650 F. Appx 208, 211–12 (5th Cir. 2016) (holding manifest disregard is no longer a basis for vacating awards under the FAA); Medicine Shoppe Int'l, Inc. v. Tuner Invs., Inc., 614 F.3d 485, 489 (8th Cir. 2010) (holding an arbitration award may be vacated only for the reasons enumerated in the FAA); Campbell's Foliage, Inc. v. Fed. Crop Ins. Corp., 562 F. App'x 828, 831 (11th Cir. 2014) (holding in view of *Hall Street*, the judicially created bases for vacatur for manifest disregard of the law, in the Eleventh Circuit had formerly recognized is no longer valid).
97. Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, 244 F. Supp. 3d 100, 121 n.31 (D.D.C. 2017).
98. Anouruo v. Tenet HealthSystem Hahnemann, 697 F. App'x 110, 111 n.1 (3d Cir. 2017).
99. *See id.* at 111 n.1; *Crystallex Int'l Corp.*, 244 F. Supp. 3d at 121 n.31.

(4) Application of the Manifest Disregard Doctrine

In courts which still apply the manifest disregard of the law standard, there is either a two- or three-part test. The First, Fourth, Sixth, and Tenth Circuits follow a two-part test and generally look at whether the applicable legal principle was (1) clearly defined; and (2) ignored or disregarded by the arbitrator.[100] For example, in *Arabian Motors Group, W.L.L. v. Ford Motor Co.*,[101] a foreign automobile dealer who was a party to a resale agreement with a domestic automobile manufacturer, brought a declaratory judgment action, arguing that it was not bound to arbitrate a dispute arising from the termination of the agreement. Following arbitration, the district court denied the dealer's motion to vacate on the grounds of manifest disregard of the law and granted the manufacturer's motion to confirm.[102] The Sixth Circuit affirmed, explaining that (1) the arbitrator was faced with an issue of national first impression; and (2) the arbitrator applied traditional tools of statutory interpretation without the aid of precedent that directly addressed the question.[103] Under these circumstances, "the arbitrator, at most, could have made an 'error in interpretation or application of the law,' and that is 'insufficient' to constitute a manifest disregard for the law."[104]

Coffee Beanery, Ltd. v. WW, L.L.C.105 is also illustrative. There, the Sixth Circuit applied the two-part test and held that an arbitration award finding that the franchisor was not required to disclose to a prospective franchisee that an officer had a prior felony conviction for grand larceny showed a manifest disregard of the law.[106] The Sixth Circuit explained that the applicable provision of the Maryland Franchise Act was clear in its requirement that all persons identified in the offering prospectus must disclose any prior felony that involves some misappropriation of property, and the arbitrator ignored this statute's requirement.[107]

The Second Circuit follows a three-part test, analyzing whether (1) the governing law that was allegedly ignored was "clear, and in fact explicitly applicable to the matter before the arbitrators";[108] (2) the "law was in fact improperly applied, leading to an erroneous outcome";[109] and (3) the arbitrator knew of the law's existence and its applicability to the problem

100. *See generally* Arabian Motors Grp., W.L.L. v. Ford Motor Co., 775 F. App'x 216, 219 (6th Cir. 2019); Wachovia Sec., LLC v. Brand, 671 F.3d 472, 483 (4th Cir. 2012); Legacy Trading Co. v. Hoffman, 363 F. App'x 633, 635 (10th Cir. 2010); Kashner Davidson Sec. Corp. v. Mscisz, 531 F.3d 68, 75 (1st Cir. 2008).

101. *Arabian Motors Grp.*, 775 F. App'x at 220.

102. *Id.*

103. *Id.*

104. *Id.* (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995)).

105. Coffee Beanery, Ltd. v. WW, L.L.C., 300 F. App'x 415, 420 (6th Cir. 2008).

106. *Id.*

107. *Id.*

108. T. Co Metals v. Dempsey Pipe & Supply, 592 F.3d 329, 339 (2d Cir. 2010).

109. *Id.*

before him or her.[110] The first prong of this standard is often described as an "objective component," which requires a finding that the arbitrator has ignored well-defined and clearly applicable law, instead of merely erring.[111] This standard means that an award will not be vacated if the applicable law is ambiguous or if the resolution of the issue at hand required the application of an unclear rule of law to the factual situation.[112] The second prong is more straightforward because it recognizes that vacatur is not proper where an erroneous or proper application of the law would yield the same result.[113] The Second Circuit in *Duferco International Steel Trading v. T. Klaveness Shipping A/S*[114] referred to the third prong as a "subjective element," examining the actual knowledge of the arbitrator, and requires that, to intentionally disregard the law, an arbitrator must have known of the law's existence and its applicability to the problem presented. In *Duferco*, the court refused to vacate the underlying arbitration award and explained that, absent an arbitrator's intentional disregard of the law, it takes a "lenient subjective inquiry in recognition of the reality that arbitrators often are chosen for reasons other than their knowledge of applicable law, and that is often more important to the parties to have trustworthy arbitrators with expertise . . . ."[115]

Finally, a court would likely not second-guess an arbitrator's decision where it is possible for the arbitrator to have reached a decision based on the evidence presented. This circumstance was the case in *Renard v. Ameriprise Financial Services, Inc.*,[116] where a plaintiff financial advisor sought to vacate an arbitration award in favor of a brokerage firm that, inter alia, rejected plaintiff's tort counterclaims in the underlying arbitration proceeding. Plaintiff argued that the arbitration panel manifestly disregarded Minnesota law regarding tortious interference with business relations and the Wisconsin Fair Dealership Law.[117] The Seventh Circuit explained that, even though the panel did not issue a written decision and may have been incorrect in determining that federal laws preempted the state laws, a "[s]imple mistake of law is not enough" and "such an error falls short of a manifest disregard of the law."[118] The court further explained that the arbitrators did what the parties contracted for by resolving the issue on the laws and arguments presented to them and noted that "[i]t is not manifest disregard of a law to consider that

110. *Id.*

111. *The "Manifest Disregard of Law" Doctrine and International Arbitration in New York*, N.Y. City Bar, https://www2.nycbar.org/pdf/report/uploads/20072344-ManifestDisregardofLaw--DoctrineandInternationalArbitrationinNewYork.pdf (last visited July 30, 2021).

112. Bear, Stearns & Co. v. 1109580 Ontario, Inc., 409 F.3d 87, 92 (2d Cir. 2005).

113. Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 390 (2d Cir. 2003).

114. *Id.*

115. *Id.* at 390

116. Renard v. Ameriprise Fin. Servs., Inc., 778 F.3d 563, 568 (7th Cir. 2015).

117. *Id.* at 565.

118. *Id.* at 568.

law and its relation to other laws and then conclude that the law does not apply in the specific factual situation at issue."[119]

With a dearth of case law concerning vacating arbitration awards in the franchise context, it is more difficult to predict how courts with varying standards will approach a franchisor's or franchisee's application to vacate an unfavorable award. If, for example, in an award, an arbitrator ignored Item 4's requirement[120] that senior management disclose any personal bankruptcy filed during the past ten years, or disregarded as inconsequential a written "break even" analysis given to prospective franchisees that was not set forth in Item 19, would a court vacate that award? If the arbitrator was made aware of the Federal Trade Commission's disclosure rules[121] at the outset of the proceeding, the claimant presented evidence that the respondent violated those rules, and the arbitrator wrote a reasoned award disregarding those rules, then there is a stronger probability that courts recognizing the manifest disregard of the law doctrine would find that the award should be vacated compared to courts that do not.

IV. Conclusion

Although arbitration is often heralded as a private, faster, and cheaper alternative to court litigation, it is imperative to keep in mind that arbitrators are not necessarily obligated to follow the law. That said, choosing the right arbitrator at the outset, having choice of law provisions, both substantive and procedural, in the franchise agreement's arbitration clause, and requiring a reasoned award should militate against an arbitration award in which the law is ignored.

In particular, when drafting or reviewing an arbitration clause in a franchise agreement, consider (i) whether to expressly require that the arbitrator has franchise experience; and (ii) in addition to the substantive choice of law provision in the franchise agreement, whether there is a more beneficial choice of law to apply procedurally if an arbitration award needs to be vacated, such as the FAA—and whether to consider if the federal circuit court of appeals having jurisdiction over your dispute will apply the manifest disregard of the law standard; and (iii) whether to select a specific ADR organization, such as AAA or JAMS, to administer the arbitration, including the use and application of such organization's rules. This option will include whether the arbitrator must issue a reasoned award that should include the law relied upon in the arbitrator's decision, or if there is a right to an appeal. When conducting the arbitration it is crucial that the arbitrator be made aware of the applicable law, so if it is ignored a party may have grounds to vacate the award.

119. *Id.*
120. 16 C.F.R. § 436.5(d).
121. 16 C.F.R. pt. 436.

The arbitration clause in the franchise agreement may seem relatively unimportant until after a dispute is resolved in an unfavorable award. It is important to know long before that point what options a client may have so that steps may be taken before, during, and after the arbitration hearing to vacate the award if the arbitrator does not follow the law.