A Practical Guide to Arbitration in Connecticut

February 26, 2019

6:00 p.m. – 8:00 p.m.

CBA Law Center

New Britain, CT

CT Bar Institute Inc.

CT: 2.0 CLE Credits (General)
NY: 2.0 CLE Credits (AOP)

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

A Practical Guide to Arbitration in Connecticut (EYL190219)

Agenda

Time	Topic	Speaker
6:00 p.m. – 6:10 p.m.	Introductions and Opening Remarks	Zarella
6:10 p.m. – 6:20 p.m.	Relevant law governing arbitration and the interplay between state law and the FAA	All
6:20 p.m. – 6:40 p.m.	Drafting and understanding the arbitration agreement	All
6:40 p.m. – 6:50 p.m.	Choosing your arbitrator	All
6:50 p.m. – 7:00 p.m.	Compelling arbitration	All
7:00 p.m. – 7:20 p.m.	Pre-hearing procedures and issues	All
7:20 p.m. – 7:50 p.m.	The arbitration hearing and strategies	All
7:50 p.m. – 8:00 p.m.	Confirming or vacating the award	All

Faculty Biographies

Roy L. DeBarbieri

Attorney Roy L. DeBarbieri of New Haven, Connecticut is Of Counsel to the Firm of Zangari Cohn Cuthbertson Duhl & Grello PC with offices in New Haven, Hartford, and Providence.

Roy is a distinguished dispute resolution neutral, and continues to perform his independent services as an arbitrator and mediator throughout Connecticut and across the country. He has distinguished himself as a Fellow of the College of Commercial Arbitrators, where he also served as the Chair of the Law Firm CLE Education Committee, and a Director. He is a member of the Executive Committee of the Dispute Resolution Section of the Connecticut Bar Association, and a Past Chair. Roy has 25 years of experience as an arbitrator and mediator of domestic and international commercial disputes. He has served as presiding arbitrator, co-arbitrator and sole arbitrator in approximately 450 arbitrations, and has authored dozens of reasoned awards. He has also mediated approximately 100 domestic and international commercial disputes.

He is a Member of the American Arbitration Association Large Complex Case Panel of Arbitrators, the American Arbitration Association Mediation Panel, and Chartered Institute of Arbitrators. He has served as an ADR Center instructor for many programs on arbitration best practices and mediation advocacy. He testifies as an expert on dispute resolution and lectures to Bar Associations and law firms on the topic of dispute resolution theory and practice. Roy also conducts ad hoc mediations and arbitrations.

Steven B. Kaplan

Steven Kaplan is a partner at Michelson Kane Royster & Barger PC in Hartford, CT. His practice is dedicated to Construction & Surety Law, and he also has served as a longtime arbitrator and mediator on the Construction and Commercial Panels for the American Arbitration Association and ADR, Inc. He is one of only two Master Mediators on the AAA Construction Mediation Panel for Connecticut, and has mediated approximately forty construction cases. Mr. Kaplan has served as a single arbitrator or as a panelist on over 50 construction and commercial cases, ranging from fast-track to multimillion-dollar complex cases. He also is a founding member and past Chairman of the Connecticut Bar Association Construction Law Section.

From 1987-2002, Attorney Kaplan taught Public Construction Contracts at the University of Connecticut School of Law. Since 2004, he has been an Adjunct Professor in the Graduate Program for Construction Management at Central Connecticut State University, teaching Construction Law and Construction Financial Management on an annual basis. Attorney Kaplan is also a prolific writer on case law and current legal issues, and has authored numerous articles and conducted scores of seminars on construction law and related topics. From 1981 to 1982, he was Editor-in-Chief of the Connecticut Law Review. From 1995-2010, he co-edited the annual Connecticut Bar Association Construction Case Law Summary and Legislative Review.

Gary Sheldon

Attorney Sheldon is a partner at McElroy Deutsch Mulvaney & Carpenter LLP. His practice primarily consists of complex construction matters and alternate dispute resolution of a broad range of disputes as attorney, mediator, and arbitrator. Prior to his legal career, he received a bachelors degree in Mechanical

Engineering and worked as an engineer in multiple technical areas. As an attorney, he has arbitrated many complex disputes in several forums over the past twenty-five years.

Attorney Sheldon has served as a mediator and arbitrator on the Construction Panel of the American Arbitration Association for several years. He has served as mediator and arbitrator on several matters through the Connecticut Bar Association Attorney Fee Disputes Program.

Attorney Sheldon is a member of the CBA ADR Section Executive Committee and its past Chair. He is a long time member of the CBA Construction Section Executive Committee.

Eric W. Weichmann

Eric Watt Wiechmann is a partner at McCarter & English whose practice involves both Alternate Dispute Resolution and several areas of sophisticated civil litigation, including energy, antitrust, securities, environmental, toxic tort, and professional liability cases. Mr. Wiechmann was past Managing Partner of the firm. Eric has been involved in numerous arbitrations both as an advocate and as a neutral. He has handled as an arbitrator a wide range of large complex cases involving energy, environmental, product liability, professional liability, corporate disputes, securities, and breach of contract. He has also mediated cases throughout the Northeast for Federal and State courts, AAA, CPR and private parties. He was the Dalkon Shield Claims Administrator's Arbitrator and Mediator for Connecticut. He is a member of the American Arbitration Association's National commercial, energy, large and complex disputes and M&A arbitration panels and National mediation panel, and is a CPR distinguished neutral. He is also an arbitrator for the CBA Attorney Fee Dispute Panel a Fellow of the Chartered Institute of Arbitrator, a member of the National Association of Distinguished Neutrals and a neutral for the Commercial Division-Supreme Court, New York, County.

In addition to his experience in alternative dispute resolution, Attorney Wiechmann is very active with the Connecticut bench and bar. He sits as both a State Attorney Trial Referee and Arbitrator and Federal Special Settlement Master. He has been appointed by the Judges of the Superior Court of Connecticut to sit on their Civil Task Force, Docket Control Committee, and Standard Jury Instruction Committee. He also sat on the Connecticut Law Revision Commission panel which drafted the Connecticut Code of Evidence and presently sits on the Connecticut Supreme Court's Evidence Code Oversight Committee. Eric has been selected as a Life Fellow of the Connecticut Bar Foundation and a Fellow of the American Bar Foundation. He serves on the Connecticut Bar Association ADR, Antitrust and Federal Practices Sections' Executive Boards and was past chair of its Energy and Court Rules Advisory Committee. He is a member of the Southern District of New York's Mediator Advisory Panel, which assists in supervising the mediation program for that Federal Court. He is also a member of the Hartford County, New York and District of Columbia Bar Associations and was a Trustee of the Connecticut Rivers Boy Scout Council. He also served on the Board of Directors of the International Association of Defense Counsel and was President of its Foundation.

Peter J. Zarella (Moderator)

Attorney Zarella is an associate at McElroy Deutsch Mulvaney & Carpenter LLP. He focuses his practice on complex commercial litigation and arbitration, and he has arbitrated a variety of matters before the American Arbitration Association, JAMS, and independent arbitrators. He has extensive experience in compelling arbitration and seeking the confirmation and vacating of arbitration awards in federal and state jurisdictions. He is the co-author of two of Westlaw's Practical Law™ articles on arbitration: "Compelling and Staying Arbitration in Connecticut" and "Enforcing Arbitration Awards in Connecticut." Attorney Zarella's arbitration clients have included general contractors in international construction projects, partners and key

employees in hedge funds, partners in professional corporations attempting to separate, a widow seeking to recover her husband's share of a manufacturing company, and spouses seeking to confirm an award rendered in a marriage dissolution arbitration. He has also argued arbitration issues at the Connecticut Appellate Court.

Attorney Zarella serves on the Executive Committee of the Connecticut Bar Association's Young Lawyer's Section as Chair of the ADR Committee. He also serves on the Connecticut Bar Association's Pro Bono and Membership Committees.

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Materials Prepared and Event Moderated by:
Peter J. Zarella

Speakers:
Roy L. De Barbieri
Steven B. Kaplan
Gary F. Sheldon
Eric Wiechmann

Table of Contents

I. Relevant Law Governing Arbitration in Connecticut

A. Federal Arbitration Act ("FAA")

i. Summary of Key Provisions

- Written agreements in maritime or interstate commerce transactions are valid, irrevocable, and enforceable, except upon grounds permitting the avoidance of contracts in general, 9 U.S.C. § 2;

- If an action is commenced in a court for a dispute that should be arbitrated, a court may stay and refer the matter for arbitration in accordance with the agreement, *id., §* 3;

- If a party refuses to arbitrate under an agreement, a party may apply for and a court may enter an order compelling the refusing party to arbitrate, *id.*, § 4;

- If the arbitrationn agreement does not provide a method for appointing an arbitrator, a party may apply for and a court may enter an order appointing an arbitrator, *id.*, § 5;

- Any applications to a court under the FAA are heard as a motion, *id.*, § 6;

- Arbitrators may issue subpoenas to compel witnesses to testify, and courts may enter orders and sanctions compelling such witnesses to testify, *id.*, § 7;

- Upon application of a party within one year of the rendering of an award, a court must enter a judgment confirming an arbitration award unless the award is modified, corrected, or vacated under the FAA, *id.*, § 9;

- Upon application of a party within three months of the award, the court may vacate an award under specified grounds (*see* Confirming, Vacating, and Modifying an Arbitration Award, *infra*), and, if the time for rendering an award has not expired, order a rehearing by the arbitrator, *id.*, § 10;

- Upon application of a party within three months of the award, the court may modify or correct the award (*see* Confirming, Vacating, and Modifying an Arbitration Award, *infra*), *id.*, § 11.

ii. Subject Matter Jurisdiction

The FAA is "'something of an anomaly in the field of federal-court jurisdiction' in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis." *Hall St. Assocs., L.L.C., v. Mattel, Inc.,* 552 U.S. 576, 581–82 (2008); *see also Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 388 (2d Cir. 2016). Accordingly, even where the FAA applies, parties must remain in state court unless there is a separate basis for diversity or federal question jurisdiction.

B. Revised Uniform Arbitration Act ("RUAA")

i. Summary of Key Provisions

The key provisions of the RUAA:

- The RUAA applies to all arbitration agreements entered on or after October 1, 2018. *See* Conn. Gen. Stat. § 52-407cc;
- Arbitration agreements are enforceable and favored, *id.*, § 52-407dd;
- Courts can compel arbitration under an arbitration agreement, *id.*, § 52-407gg;
- Arbitrators have the authority to enter provisional remedies, issue subpoenas, and issue awards, *id.*, §§ 52-407hh, 52-407qq, 52-407ss;
- Upon application of a party within one year of the rendering of an award, a court must enter a judgment confirming an arbitration award unless the award is modified, corrected, or vacated under the RUAA, *id.*, § 52-407vv;
- Upon application of a party within three months of the award, the court may vacate an award under specified grounds (*see* Confirming, Vacating, and Modifying an Arbitration Award, *infra*), and, if the time for rendering an award has not expired, order a rehearing by the arbitrator, *id.*, § 52-407ww;
- Upon application of a party within three months of the award, the court may modify or correct the award (*see* Confirming, Vacating, and Modifying an Arbitration Award, *infra*), *id.*, § 52-407xx.
- Sets default procedural rules for initiating and conducting an arbitration.

Before a controversy arises, parties may not waive provisions of the RUAA providing:

- Applications for judicial relief shall be made by motion and heard in a manner provided by law or rule, *id.*, § 52-407ee(a);

- Arbitration agreements in a "record" are valid, enforceable, and irrevocable, except under principles of law and equity, *id.*, § 52-407ff(a);

- The court has authority to enter provisional remedies prior to appointment of an arbitration, the arbitrator can also order provisional remedies, and a party can seek a provisional remedy from the court in an emergency situation, *id.*, § 52-407hh;

- The arbitrator may issue subpoenas for the attendance of witnesses and the production of evidence at hearings, and an arbitrator may permit testimonial depositions, *id.*, § 52-407qq(a) and (b);

- A Connecticut court with jurisdiction over the controversy and parties may enforce an arbitration agreement, *id.*, § 52-507zz(a);

- A provision providing for arbitration in Connecticut confers exclusive jurisdiction upon Connecticut courts to enter judgment on an arbitration award, *id.*, § 52-407zz(b);

- Reasonable rights of initiating an arbitration proceeding by notice may not be unreasonably restricted, *id.*, § 52-407ii;

- Reasonable rights of having an arbitrator disclose facts concerning potential impartiality may not be unreasonably restricted, *id.*, § 52-407ll;

At no time may parties waive provisions of the RUAA providing:

- The applicability of arbitration statutes, *id.*, § 52-407cc;

- The procedures for a motion to compel arbitration, *id.*, § 52-407gg;

- The immunity of arbitrators, *id.*, § 52-407nn;

- The judicial enforcement of a preaward ruling, *id.*, § 52-407rr;

- The ability for the court to refer certain motions to modify or correct an award to the arbitrator, *id.*, § 52-470tt(d);

- The procedures for confirming or vacating an award, *id.*, §§ 52-407vv to 52-407yy;

- The rules of construction of the RUAA and its relationship to other statutes, *id.*, §§ 52-407ccc to 52-407eee;

- The rate of interest allowable as damages in an award, *id.*, § 37-3a.

See id., § 52-407dd.

ii. ***Significant Changes from Prior Act***

The RUAA defines the start of arbitration as the notice of the arbitration and sets a standard for notice under the RUAA, which is satisfied either by taking "reasonably necessary" actions to inform a person "in ordinary course" or by delivering notice to a person's residence or place of business. *See id.*, §§ 52-407bb and 52-407ii.

The RUAA specifically provides for whether the arbitrator or the court decides arbitrability (discussed *infra* at Compelling Arbitration). *See id.*, § 52-407ff. Previously, the courts determined arbitrability unless parties "clearly and unmistakably" intended the arbitrator to decide such issues. But, the RUAA does not modify common law standards for arbitrability.

The RUAA provides a specific procedure for staying an arbitration. *See id.*, § 52-407ff(b).

The RUAA specifically provides that where a claim is stayed pending arbitration, the court may allow other "severable" claims to proceed. *See id.*, § 52-407ff(g).

The RUAA more specifically sets forth the procedures on a motion to compel or stay arbitration. *See id.*, § 52-407gg.

The RUAA expands the court's authority to enter provisional remedies and specifies a procedure for the enforcement of interim awards. *See id.*, §§ 52-407hh and 52-407rr.

The RUAA expressly permits a court to consolidate arbitration proceedings under certain conditions. *See id.*, § 52-407jj.

The RUAA expressly requires disclosure of an arbitrator's conflict of interests. *See id.*, § 52-407ll.

The RUAA sets forth strong immunity protections for arbitrators. *See id.*, § 52-407nn.

The RUAA expressly provides more flexible powers for the arbitrator, such as summary disposition of issues and calling conferences and rescheduling hearings. *See id.*, § 52-407oo.

The RUAA gives the court authority to extend the time period for the arbitrator to render an award, even after that time period has expired. *See id.*, § 52-407ss.

The RUAA does not specify a procedure for the arbitrator to seek advice of the courts. *See id.*, § 52-415.

The RUAA allows for parties to directly apply to the arbitrator for modification or correction of an award. *See id.*, § 52-407tt.

The RUAA now expressly provides that the absence of an agreement to arbitrate is a ground for vacatur, which differs from the prior Act, which considered such a ground separately. *Compare id.* § 52-407ww(a)(1) *with id.*, § 52-408.

iii. ***Impact on Existing Caselaw***

Other than the discrete procedural changes discussed above, much of the case law under the prior act should continue to be relevant and applicable to disputes under the RUAA.

C. Interplay Between State and Federal Law

An arbitration agreement falls under the FAA if the agreement:

- Is in writing;
- Relates to interstate commerce or a maritime matter; and
- States the parties' agreement to arbitrate a dispute.

9 U.S.C. § 2.

"Relates to interstate commerce" has been interpreted to exercise Congress' interstate commerce powers to their fullest extent. *See, e.g.*, *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995); *Hottle v. BDO Seidman, LLP*, 846 A.2d 862, 868 (2004).

If the FAA applies, state courts will apply it "to the extent that [state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" to ensure that courts enforce arbitration agreements. *Volt Info. Scis., Inc. v. Bd. Of Trs. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 476-77 (1989); *see Hottle v. BDO Seidman, LLP, supra*, 846 A.2d at 868-69.

But, even when the FAA applies, "the [FAA] has not been held to supersede state procedural laws . . . ." *Hartford Steam Boiler Inspection & Ins. Co. v. Underwriters at Lloyd's & Cos. Collective*, 271 Conn. 474, 494 (2004). Therefore, where a proceeding regarding "an arbitration is heard in a Connecticut court, Connecticut procedural arbitration laws" as found in the Connecticut General Statutes are applied. *Ungerland v. Morgan Stanley & Co.*, 52 Conn. Supp. 164, 172 (2010).

On substantive issues, the FAA and Connecticut law is practically interchangeable. There are two major substantive areas of arbitration law: (1) arbitrability, and (2) standards for vacating,

confirming, or modifying an arbitration award (see *Levine v. Advest, Inc.*, 714 A.2d 649, 657 (1998) ("The FAA "creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [a]ct. . . . As federal substantive law . . . the [FAA] is to be applied by state courts as well as by federal courts."); Conn. Gen. Stat. § 52-418; 9 U.S.C. § 10). Generally, courts have noted the similarity between the FAA and CAA and, even under the CAA, often turn to federal law for guidance (*C.R. Klewin Northeast, LLC v. City of Bridgeport*, 282 Conn. 54, 73 (Conn. 2007); *Bell v. Cendant Corp.*, 293 F.3d 563, 567 (2d Cir. 2002) (comparing Connecticut and federal law)). Thus, for practical purposes, since the FAA is applied only to the extent it contradicts Connecticut law (see *Circuit City Stores v. Adams*, 532 U.S. 105, 112 (2001)), in Connecticut courts state and federal substantive law is to a great extent interchangeable.

II. Drafting the Arbitration Agreement

- **Who do you want to serve as arbitrator?**

Parties can leave this issue open, can choose an association (such as AAA) that will appoint an arbitrator, or can preselect an individual to serve as an arbitrator. *See* Selecting Arbitrators, *infra*.

- **What issues do you want the arbitrator to decide?**

This is the most basic question to answer in the arbitration agreement.

Where the arbitration agreement is part of a larger agreement, parties may choose to arbitrate "any and all disputes" arising under or related to that agreement or the parties' relationship. This is the broadest type of agreement and will include all claims under the larger agreement, including related torts and equitable claims. Parties may also elect to carve out issues related to the agreement. For instance, parties could limit the types of remedies the arbitrator can award, restrict the arbitration to contractual claims, determine the law the arbitrator will apply, etc.

Where the arbitration agreement is entered after a dispute arises, parties must be careful to appropriately tailor the agreement to the present dispute. For instance, if the parties want to remove a case from the Superior Court to arbitration, they can simply refer to the pending action. But, they must consider whether they should agree to limit the arbitration to the claims already asserted and, if so, waive any other claims that could have been asserted.

- **What type of hearing do you want?**

Parties are free to tailor the type of hearing they want. Proceedings can range from paper submissions to a full trial. Parties should consider the extent to which the rules of evidence will apply, the type and extent of witness testimony, upper limits on the length of the hearings, whether hearings will be in person or over electronic means, etc.

- **What level of confidentiality is required?**

Many parties prefer arbitration because of a belief in its confidentiality. While arbitration is not a public proceeding, it is important to make sure the arbitration and your client's expectations align. There are two important steps to achieve this. First, an arbitration agreement likely should contain a provision providing that the arbitration hearing and documents and information exchanged in the arbitration are confidential. Second, parties should be advised that any arbitration, even confidential ones, likely require some court involvement to confirm the award as a judgment. Moreover, it is not guaranteed that parties will be able to file documents with the court under seal. Nonetheless, parties can anticipate the types of post-award filings necessary to

confirm an award and provide for redaction and/or taking maximum advantage of any right to file documents under seal.

- **What level of review do you want to preserve for the court?**

The level of substantive review a court applies to an arbitration award depends on the terms of the arbitration agreement and whether the award is governed by the FAA or Connecticut law. *See* Confirming, Modifying, Correcting, and Vacating Arbitration Awards, *infra*. Parties must think carefully about the balance between having a right to "appeal" a bad award by an arbitrator and the cost and expense of defending a favorable award from collateral attacks by the other party. Expanding the scope of the court's review typically diminishes the primary value of arbitration: Cost-effective resolution of disputes. Perhaps a better option is to include an attorney's fees provision for any challenges to the arbitration award.

- **What happens if a party refuses to pay the arbitrator?**

A party can be put in a difficult position if an opposing party simply refuses to pay the arbitrator. An arbitrator will be unlikely to take further action without payment, as the arbitrator will understandably not want to issue an award and then chase payment (especially if the non-payor loses). While a party always has the option of paying the opposing party's arbitration fees, the best solution is to anticipate this problem in the arbitration agreement and agreement with the arbitrator.

Incorporation of default rules provides some protection. For instance, Rule 57 of the AAA Commercial Rules provides that an arbitrator may make orders to remedy nonpayment, including preclusion of the nonpaying party from pursuing their claim. But, the arbitrator may not preclude the nonpaying party from defending against a claim. The arbitrator also has an absolute right to suspend proceedings during nonpayment of the claim.

Parties could possibly gain more protection by specifying that failure to timely pay the arbitrator is a breach of the arbitration agreement and a default on the paying party's claims. In specifying nonpayment as a breach, parties could design specific remedies that could be enforced the court, such as specific performance, attorney's fees, etc. In specifying nonpayment as a default, parties could potentially restrain nonpaying parties from contesting liability (as parties in a civil action always have a right to contest damages, it is not recommended to attempt to restrain this right in arbitration). Parties can further strengthen these provisions by incorporating them into the agreement with the arbitrator.

III. Selecting Arbitrators

- **What does the arbitration agreement require?**

Of course, if the arbitration agreement provides procedures for selecting arbitrators, each party to the agreement has a vested right in those procedures being followed. Nonetheless, parties are always free to modify an arbitration agreement, even after a dispute has arisen. Accordingly, parties should carefully consider whether there is any benefit to modifying the agreement to avoid costs or select a more suitable arbitrator.

- **Is the arbitration proceeding through an arbitration organization?**

Many arbitration agreements preselect arbitration organizations to administer the arbitration. Professional administration formalizes billing, deadlines, scheduling, and appointment of arbitrators. If the parties have not selected an arbitrator, then the administrator will distribute rosters to the parties, who may strike certain arbitrators and rank the remaining. *See* AAA Commercial Rules, R-12; JAMS Comprehensive Arbitration Rules, Rule 15.

- **A single arbitrator or a panel?**

Given the limited standard of review for arbitration awards, the parties must have confidence in the arbitrator as an attentive and discerning finder of fact. Panels can add value in disputes with complex factual histories. Moreover, where there are close issues, differing opinions of panel members may result in a more moderate and balanced award. But, panels obviously are more expensive for the parties, and therefore many disputes will utilize a single arbitrator. To help mitigate expense issues, parties may elect to have only the chairperson on all pre-hearing matters, while involving the full panel at the hearing.

Panels can be appointed in three ways: (1) administrators can appoint all panel members; (2) parties can agree to all three panel members; or (3) parties can each appoint an arbitrator who then select the third panel member (who typically will serve as the chairperson).

- **Is industry expertise preferred?**

Industry experience of arbitrators is typically desirable in complex disputes involving construction, securities, and other complex industries. A critical question is whether both parties have the same level of industrial expertise. If so, it is likely preferable to have an experienced arbitrator. But, where a party is the more experienced party in a particular industry, they may be able to gain an advantage by not having an experienced arbitrator, as that party may be able to position itself as an educator for the arbitrator on industry matters. Likewise, a less-experienced party may want to have a deeply experienced arbitrator who will be able to evaluate factual issues more independently.

- **What style of arbitration is preferred?**

Choice of arbitrator also impacts the style and format of the arbitration hearing. While many parties may want many of the procedural formalities of a trial at arbitration, others may want a significantly streamlined proceeding that does not get bogged down in formal evidentiary presentations. Typically, panel arbitrations will remain relatively formal proceedings. Many solo arbitrations will as well, although parties may have more flexibility to shape the proceedings through agreement and discussion with the arbitrator.

- **What type of award is preferred?**

Parties can specify in their agreement whether an arbitrator should issue a simple award, a reasoned or explained award, or comprehensive findings of fact and conclusions of law. There may be a variety of personal and business reasons that a party may want more than a simple award. But, parties should be wary that the more information in an award, the greater the chance it can inadvertently provide a ground for vacatur.

IV. Compelling Arbitration

A. Arbitrability

Arbitrability is the issue of whether a dispute falls within the scope of an enforceable arbitration agreement. The first question is who determines arbitrability. The RUAA specifically answers this question:

> (b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
>
> (c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

Conn. Gen. Stat. § 52-407ff.

Under the FAA and the prior Act, courts determine the validity of an arbitration provision, while arbitrators determine the validity of the contract containing the arbitration provision. *See Buckeye Check Cashing, supra,* 546 U.S. at 449; *C.R. Klewin Northeast, LLC v. Bridgeport*, 282 Conn. 54, 76-77 (2007). This reflects the fact that arbitration provisions are considered severable contracts. The issues the court consider include:

- Voluntary offer, acceptance, and mutual consideration, *Stewart v. Cendant Mobility Servs. Corp.*, 267 Conn. 96, 104-05 (2003); *Geary v. Wentworth Labs., Inc.*, 60 Conn. App. 622, 627 (2000);

- Common law contract defenses such as fraud, duress, unconscionability, and waiver, *Hottle v. BDO Seidman, LLP,* 268 Conn. 694, 704 (2004); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996);

- Whether an agreement violates public policy, *Van Voorhies v. Land/Home Fin. Servs.*, 2010 WL 3961297, at *7 (Conn. Super. Ct. Sep. 3, 2010);

- Whether the particular dispute is governed by the arbitration agreement. Conn. Gen. Stat. § 52-407ff(b).

Absent an express statement, waiver of an arbitration agreement typically only occurs where a party has engaged in significant delay or litigation conduct that results in a prejudice to the other conduct that prejudices the other party. *See MSO, LLC v. DeSimone*, 94 A.3d 1189, 1197-98 & n.14 (Conn. 2014); *see also Mattie & O'Brien Contracting Co. v. Rizzo Const. Pool Co.*, 17 A.3d 1083, 1087 (Conn. App. Ct. 2011).

The arbitrator decides other issues, such as whether parties have satisfied conditions precedent of arbitration or otherwise initiated the arbitration appropriately.

Under the prior Act and the FAA, unless there is a specific agreement otherwise, courts presume that the court determines matters of "substantive" arbitrability, while an arbitrator determines matters of "procedural" arbitrability. *See Buckeye Check Cashing, Inc. v. Cardenga*, 546 U.S. 440, 444-46 (2006); *Alliance Bernstein Inv. Research & Mgmt., Inc. v. Schaffran*, 445 F.3d 121, 125 (2d Cir. 2006); *Levine*, 714 A.2d at 749-50; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–404 (1967). The parties can authorize the arbitrator to determine any or all of the above issues if they "clearly and unmistakably" evidence their agreement to do so. *City of New Britain v. AFSCME, Council 4, Local 1186*, 43 A.3d 143, 150-51 (Conn. 2012); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995). This can be done by:

- Including broad language in their arbitration agreement providing that the arbitrator resolves "any" or "all" disputes (see *Emcon Corp. v. Pegnataro*, 562 A.2d 521, 523-24 (Conn. 1989); *Gary Excavating, Inc. v. Town of N. Haven*, 318 A.2d 84, 86 (Conn. 1972)).

- Incorporating in their agreement arbitration rules that empower the arbitrator to determine arbitrability, such as the rules of the American Arbitration Association (see *Contec Corp. v. Remote Solution, Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005); *Considine v. Brookdale Senior Living, Inc.*, 124 F. Supp. 3d 83, 90-91 (D. Conn. 2015)).

Because Conn. Gen. Stat. § 52-407ff can be modified by the parties, these precedents are likely valid under the RUAA as well.

In deciding whether a specific dispute falls within an arbitration agreement, both federal and state courts apply the "positive assurance" test:

> [I]t has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986); *White v. Kampner*, 229 Conn. 465, 472 (1994).

B. Procedures

If no lawsuit is pending, a party should compel arbitration by commencing an arbitration in accordance with the arbitration agreement and applicable law. The FAA does not specify requirements for commencing an arbitration. Under the RUAA, a party commences arbitration

by giving a "notice" (as defined under the RUAA) via certified or registered mail or as set forth in the arbitration agreement. Conn. Gen. Stat. § 52-407ii(a). Under AAA and JAMS rules, a party must file a demand, filing fee, and a copy of the arbitration agreement. AAA Commercial Rules, R-4(a); JAMS Comprehensive Arbitration Rules, Rule 5.

If a party refuses or fails to participate in an arbitration, both AAA and JAMS rules expressly provide that the arbitration may proceed in their absence. AAA Commercial Rules, R-31; JAMS Comprehensive Arbitration Rules, Rule 22(j). Nonetheless, a party should consider whether to obtain a court order compelling arbitration in the face of a refusal by a party to proceed. If the refusing party claims there is no enforceable arbitration agreement, typically a party should seek a court order compelling arbitration to avoid having to litigate this issue after the conclusion of the arbitration.

Under the FAA and RUAA, a party may file a motion for an order compelling arbitration, which motion should be summarily decided. 9 U.S.C. § 4; Conn. Gen. Stat. § 52-407gg(a). The central issue is whether there is an enforceable arbitration agreement.

Finally, in some instances a party may have commenced a lawsuit involving claims that are subject to an arbitration agreement. Both the FAA and RUAA provide a procedure for staying a lawsuit where a claim should be brought in arbitration. 9 U.S.C. § 3; Conn. Gen. Stat. § 52-407gg(e) and (f). The RUAA now specifically provides that courts may allow severable claims to proceed during the stay. Conn. Gen. Stat. § 52-407gg(g).

V. Pre-Hearing Issues

A. Pre-Hearing Conference

Whether in an administered or independent arbitration, the parties should typically participate in an initial conference with the arbitrator. Depending on the amount at stake, conferences can be conducted telephonically, by videoconference, or in-person. While dependent on the arbitrator, parties will likely be asked directly about various issues concerning the arbitration. These issues may include:

- The need for any preliminary remedies;
- Other possible dispute resolution;
- Whether all necessary parties have been joined to the arbitration or whether the arbitration should be consolidated with another proceeding;
- Whether either party intends to amend or desires a more particular statement of claims or defenses;
- What procedural and substantive law governs the arbitration, including the applicability of the rules of evidence;
- Whether there are any threshold or dispositive issues that should be considered first or separately;
- Whether and how confidential information should be protected;
- The scope and terms of discovery;
- The use of expert evidence;
- Deadlines for pre-hearing disclosures;
- The date, duration, and procedure for the hearing;
- The form of the award.

See AAA Commercial Rules, P-2. Parties should be prepared to raise and discuss any of the above or additional issues, and should not assume the arbitrator will raise them at the conference. Arbitrators may be required to, and it is recommended that they do, enter a written order arising from the preliminary conference. If the arbitrator varies any requirement or exceeds any restriction in the parties' arbitration agreement over the objection of a party, that party should

object in writing and take additional steps to preserve said objection throughout the remainder of the arbitration. If the parties agree with such a modification, they should ensure that both parties confirm the same in writing so that it is an enforceable.

B. Discovery and Subpoenas

Unless the arbitration agreement provides otherwise, discovery is typically controlled by the discretion of the arbitrator. *See* Conn. Gen. Stat. § 52-407qq(c); AAA Commercial Rules, R-22; JAMS Comprehensive Arbitration Rules, Rule 17. The leading considerations for an arbitrator in determining what discovery should be allowed is what will allow for a fair hearing and what is an economical limit on the scope of discovery. Accordingly, parties should be prepared to discuss the necessary proofs for any claim or defense and the practical issues involved in complying with any particular discovery request.

Discovery tools are typically more limited than in litigation. Interrogatories and requests for admission are not commonly used or permitted in arbitration. Depositions are often only allowed by motion of the parties, although expert depositions are typically used for purposes of reducing the need for extensive examination at the hearing. Arbitrators may also choose to phase discovery. Arbitrators have broad powers to fashion remedies for purposes of enforcing discovery between parties to the arbitration. *See* AAA Commercial Rules, R-23.

Generally speaking, the FAA only allows the use of subpoenas for compelling third-parties to testify and produce documents at a hearing before the arbitrator, *see* 9 U.S.C. § 7, whereas the RUAA allows for subpoenas in support of discovery proceedings. Conn. Gen. Stat. § 52-407qq(d). Under the FAA, arbitrators may be willing to assist parties by convening limited "hearings" to allow testimony and document production for discovery purposes.

C. Dispositive Motions

While the FAA does not address the use of dispositive motions, the RUAA specifically authorizes the use of dispositive motions in an arbitration. Conn. Gen. Stat. § 52-407oo(b). Likewise, AAA and JAMS rules allow for the use of dispositive motions. AAA Commercial Rules, R-33; JAMS Comprehensive Arbitration Rules, Rule 18. Typically such motions mimic a motion for summary judgment, but the arbitrator is free provide a procedure for determining limited factual disputes relevant to the motion.

D. Pre-Hearing Exchanges and Briefings

Typically, parties will exchange witness lists, exhibits, and prehearing briefs (which may address only or both legal or factual issues). Arbitrators are vested with broad authority to manage

required disclosures to further the interests in having an orderly, fair, and efficient hearing. Parties should discuss and set the procedures for resolving any disputes about the admissibility of evidence after it is disclosed. Ideally, there will be preset deadlines for filing motions to exclude evidence and a date for a prehearing conference for the arbitrator to determine the same.

Confirming, Modifying, Correcting, and Vacating Arbitration Awards

A. Confirming Awards and General Procedures

A court must confirm an arbitration award unless it modifies, corrects, or vacates the award in accordance with the FAA or RUAA. Parties have a year to file an application to confirm, but only thirty days (under the RUAA) or three months (under the FAA) to file an application to modify, correct, or vacate an award. Consequently, a party seeking to do the same should not wait for an opposing party to file an application to confirm the award—an objection to an application to confirm will not allow them to raise untimely arguments that the award should be modified, corrected, or vacated. Previously, a party could raise the absence of an agreement to arbitrate outside of the statutory deadlines and procedures for vacating an award. *See* Conn. Gen. Stat. § 52-408; *Bennett v. Meader,* 208 Conn. 352, 364 (1988); *MBNA America Bank, N.A. v. Boata*, 283 Conn. 381 (2007); *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local 145 v. Shapiro*, 138 Conn. 57, 63 (Conn. 1951). But, with the revisions in the RUAA, that ground is specifically mentioned in the procedures for vacating an award, and thus should be raised within the statutory time period.

B. Modifying and Correcting Awards Under the FAA

The FAA authorizes a court to modify or correct an award in the following circumstances:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11. These grounds are largely self-explanatory. Some parties occasionally attempt to aggressively use subsection (a) to subvert an arbitration award. But, courts have been clear that corrections and modifications for a "mistake" or "miscalculation" are not aimed at errors in the arbitrator's factual findings and legal conclusions, but rather are meant to clarify and correct errors consistent with the obvious intent of the arbitrator's award. *See, e.g., Scinto v. Life Ins. Co. of N. Am.*, 20 F. App'x 45, 47 (2d Cir. 2001) ("An arbitrator's error in fact finding does not provide a grounds for reversal.").

C. Modifying and Correcting Awards Under the RUAA

Unlike the FAA or the prior Act, parties can first ask the arbitrator to modify or correct an award (except on grounds that the arbitrator decided an issue not submitted to it). *See* Conn. Gen. Stat. § 52-407tt(a)(1). Parties have twenty days to file such a motion with the arbitrator. *Id.* at § 52-407tt(b). Moreover, if there is a motion to confirm, vacate, modify, or correct an award pending with a court, the court may refer the matter to the arbitration to modify, correct, or clarify the award. *Id.* at § 52-407tt(d).

Otherwise, the grounds for modifying or correcting an award are identical to the FAA and prior Act:

> (1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award;
>
> (2) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or
>
> (3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

Conn. Gen. Stat. § 52-407xx(a); *compare* 9 U.S.C. § 11(a); Conn. Gen. Stat. § 52-419.

Like the federal courts, Connecticut courts view the purpose of modifying and correcting awards narrowly. *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., Local 133 U.A.W., AFL-CIO v. Fafnir Bearing Co.*, 151 Conn. 650, 654 (Conn. 1964) ("We conclude that the modification was proper. It was simply the addition of clarifying language to state expressly what was already obvious. The addition was merely technical and formal in nature.").

D. Vacating Awards Under the FAA

The FAA provides four grounds for vacating an award:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10. These grounds cannot be expanded by the parties. In *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, the Supreme Court specifically addressed whether the statutory grounds for review of an arbitration award "are exclusive" or whether they are "mere threshold provisions open to expansion by agreement," and determined that the grounds for vacatur in the FAA were the exclusive and non-modifiable grounds for vacatur. 552 U.S. 576, 583 (2008); *McQueen-Starling v. UnitedHealth Grp., Inc.*, 654 F. Supp. 2d 154, 163 (S.D.N.Y. 2009) ("[I]t is difficult to see how a contractual agreement by the parties to apply a state law standard of review could change the analysis, because contracting around the FAA is precisely the maneuver prohibited by *Hall Street* and the cases in this Circuit interpreting it."); *CRC Inc. v. Computer Scis. Corp.*, No. 10 CV 4981 (HB), 2010 WL 4058152, at *2 (S.D.N.Y. Oct. 14, 2010) (choice of law provision did not serve to supplant FAA with state law); *Hartford Fire Ins. Co. v. Evergreen Org., Inc.*, No. 07CIV7977(RJS), 2008 WL 4185731, at *7 (S.D.N.Y. Sept. 2, 2008) ("For cases that fall within its reach, the FAA . . . pre-empts inconsistent state law . . . when the parties have selected a particular state's law by contract.").

Generally, "[a] district court's authority to vacate an award is strictly limited in order to facilitate the purpose underlying arbitration: to provide parties with efficient dispute resolution, thereby obviating the need for protracted litigation. . . . 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." *Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544, 548 (2d Cir. 2018) (citations omitted; internal quotation marks omitted).

i. Corruption, fraud, or undue means

> A petitioner seeking to vacate an award on the ground of fraud must adequately plead that (1) respondent engaged in fraudulent activity; (2) even with the exercise of due diligence, petitioner could not have discovered the fraud prior to the award issuing; and (3) the fraud materially related to an issue in the arbitration. . . .[W]e will assume . . . that an arbitration award may be set aside in a case of material perjured evidence furnished [to] the arbitrators by a prevailing party.
>
> . . . . For fraud to be material within the meaning of Section 10(a)(1) of the FAA, petitioner must demonstrate a nexus between the alleged fraud and the decision made by the arbitrators, although petitioner need not demonstrate that the arbitrators would have reached a different result.

Odeon Capital Grp. LLC v. Ackerman, 864 F.3d 191, 196 (2d Cir. 2017).

ii. Evident partiality or corruption of the arbitrator

> [E]vident partiality within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. . . . The party challenging the award must prove the existence of evident partiality by clear and convincing evidence. . . .
>
> The Supreme Court established in *Commonwealth Coatings* that an arbitrator's failure to disclose a material relationship with one of the parties can constitute 'evident partiality' requiring vacatur of the award. . . .). But *Commonwealth Coatings* does not establish a *per se* rule requiring vacatur of an award whenever an undisclosed relationship is discovered. . . . It is the materiality of the undisclosed conflict [that] drives a finding of evident partiality, not the failure to disclose or investigate *per se*. . . .
>
> A neutral arbitrator's relationship with a party is material if it goes so far as to include the rendering of services on the very projects involved in th[e] lawsuit . . . or contemporaneous investments that create a vested financial stake in that party. . . . A reasonable person could also conclude that the arbitrator is unduly partial to the side of a close family relation.
>
> But even with respect to neutral arbitrators, we have not been quick to set aside the results of an arbitration because of an arbitrator's alleged failure to disclose information. . . . [W]e have declined to vacate awards because of undisclosed relationships where the complaining party should have known of the relationship, or could have learned of the relationship 'just as easily before or during the arbitration rather than after it lost its case. . . . We have concluded in various factual settings that the evident-partiality standard was not satisfied because the undisclosed relationship at issue was too insubstantial to warrant vacating the award. . . .
>
> For example, past contacts do not amount to material bias. When an arbitrator's relationship with [a party] materially end[s] before [the party] appointed him as an arbitrator, one cannot say that a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. . . . Thus an arbitrator is not disqualified from selection as the neutral umpire by having received compensation from one of the parties for past service as a party-appointed arbitrator. . . .
>
> In broader strokes, the FAA does not proscribe all personal or business relationships between arbitrators and the parties. . . . [T]he balance of case law in the Second Circuit supports the

> proposition that when a purported financial interest or financial relationship between an arbitrator and a party to arbitration is indirect, general[,] or tangential, courts should not vacate arbitration awards. . . .
>
> We therefore requir[e] a showing of something more than the mere "appearance of bias" to vacate an arbitration award . . . and will not vacate arbitration awards for evident partiality when the party opposing the award identifies no direct connection between [the arbitrator] and the outcome of the arbitration. . . .
>
> Judicial tolerance of relationships between arbitrators and party representatives reflects competing goals in partiality decisions. Complete candor and transparency help root out bias and fraud. But [many parties] affirmatively seek arbitral panels with expertise. [T]he best informed and most capable potential arbitrators are repeat players with deep industry connections . . . who will understand the trade's norms of doing business and the consequences of proposed lines of decision . . . . Familiarity with a discipline often comes at the expense of complete impartiality,and specific areas tend to breed tightly knit professional communities.

Certain Underwriting Members of Lloyds of London v. Fla., Dep't of Fin. Servs., 892 F.3d 501, 505-08 (2d Cir. 2018) (citing *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968) (citations omitted; internal quotations omitted).

> The principles and circumstances that counsel tolerance of certain undisclosed relationships between arbitrator and litigant are even more indulgent of party-appointed arbitrators, who are expected to serve as *de facto* advocates. "[I]n the main party-appointed arbitrators are supposed to be advocates. . . . The ethos of neutrality that informs the selection of a neutral arbitrator to a tripartite panel does not animate the selection and qualification of arbitrators appointed by the parties. . . .
>
> Of equal importance, arbitration is a creature of contract, and courts must hold parties to their bargain. . . . . [P]arties are free to choose for themselves to what lengths they will go in quest of impartiality, including the various degrees of partiality that inhere in the party-appointment feature. . . .
>
> ***
>
> We . . . join the circuits that distinguish between party-appointed and neutral arbitrators in considering evident partiality. This distinction is salient in [an[industry . . . where an arbitrator's professional acuity is valued over stringent impartiality. It also meshes with our case law and takes into account the FAA, which

> restricts "*evident* partiality" as opposed to "partiality" or "appearance of bias." . . . Expecting of party-appointed arbitrators the same level of institutional impartiality applicable to neutrals would impair the process of self-governing dispute resolution.
>
> That said, a party-appointed arbitrator is still subject to some baseline limits to partiality. We decline to catalogue all "material relationship[s]" that may bear upon the service of a party-appointed arbitrator. . . . But it can be said that an undisclosed relationship is material if it violates the arbitration agreement. . . .
>
> An undisclosed fact is also material, and therefore warrants vacatur, if the party opposing the award can show that the party-appointed arbitrator's partiality had a prejudicial effect on the award. . . . In the absence of a clear showing that an undisclosed relationship (or the non-disclosure itself) influenced the arbitral proceedings or infected an otherwise-valid award, that award should not be set aside even if a reasonable person (or court) could speculate or infer bias. . . .

Id. at 508–10 (citations omitted; internal quotation marks omitted).

iii. Arbitrator misconduct

> Courts may also vacate an arbitration award when "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." 9 U.S.C. § 10(a)(3). We have held that misconduct occurs under this provision only where there is a denial of "fundamental fairness." . . . . Thus, under our narrow construction, when a party seeks to vacate an arbitration award based on evidence that is "too remote" an arbitration decision may not be opened up to evidentiary review.

Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 104 (2d Cir. 2013).

> In making evidentiary determinations, an arbitrator need not follow all the niceties observed by the federal courts. . . . However, although not required to hear all the evidence proffered by a party, an arbitrator must give each of the parties to the dispute an adequate opportunity to present its evidence and argument.

Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997).

iv. Exceeding authority

Perhaps the most common ground parties seek to vacate an award is that the arbitrator "exceeded their powers" or "so imperfectly executed them" under 9 U.S.C. § 10(a)(4).

> [Section] 10(a)(4) of the Act . . . authorizes a federal court to set aside an arbitral award "where the arbitrator[] exceeded [his] powers." A party seeking relief under that provision bears a heavy burden. It 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 act[s] outside the scope of his contractually delegated authority—issuing an award that simply reflect[s] [his] own notions of [economic] justice rather than draw[ing] its essence from the contract—may a court overturn his determination. . . . So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.

Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013) (citations omitted; internal quotation marks omitted).

Additionally, a court may vacate an award for a "manifest disregard of law," which was originally described as a judicially-created ground for vacatur, but is now described as "judicial gloss" on the fourth statutory ground. *See Tully Constr. Co. v. Canam Steel Corp.*, 684 F. App'x 24, 26 (2d Cir. 2017); *Sutherland Glob. Servs., Inc. v. Adam Techs. Int'l SA de C.V.*, 639 F. App'x 697, 699 (2d Cir. 2016). An award can be vacated where the challenging party shows that "the arbitrators knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it . . . ." *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011). "The two part showing requires the court to consider, first, whether the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable, and, second, whether the arbitrator knew about the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it." *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 122 (2d Cir. 2011). No review, even under manifest disregard, is allowed for findings of fact. *See, e.g., Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 213 n. 9 (2d Cir. 2002).

"Explicit rejection of governing law provides the strongest evidentiary basis for a finding that the arbitrator acted with the requisite intent." *Westerbeke Corp., supra,* at 217-218. But, "explicit acknowledgment of wrongful conduct" is not required, and "[a] court may find intentional disregard if the reasoning supporting the arbitrator's judgment 'strains credulity' . . . or does not rise to the standard of 'barely colorable' . . . ." *Id.* This is, however, extremely rare, given the

"strong presumption that an arbitration tribunal has not manifestly disregarded the law" and the rule that where an award is open to multiple interpretations, it will be confirmed as long as at least one of those interpretations provides an award that "rests upon a colorable interpretation of law." *Id.* at 212 n. 8.

Additionally, arbitrators generally lose authority after they have completed their responsibilities. "The functus officio doctrine dictates that, once arbitrators have fully exercised their authority to adjudicate the issues submitted to them, their authority over those questions is ended, and the arbitrators have no further authority, absent agreement by the parties, to redetermine those issues." *Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544, 548 (2d Cir. 2018). But, "[a]n arbitrator does not become functus officio when it issues a clarification of an ambiguous final award as long as three conditions are satisfied: (1) the final award is ambiguous; (2) the clarification merely clarifies the award rather than substantively modifying it; and (3) the clarification comports with the parties' intent as set forth in the agreement that gave rise to arbitration." *Id.* at 549.

E. Vacating Awards Under the RUAA

Connecticut courts have recognized three grounds for vacating an arbitration award: "[W]e have . . . recognized three grounds for vacating an [arbitrator's] award: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . or (3) the award contravenes one or more of the statutory proscriptions of § 52–418." *Garrity v. McCaskey*, 223 Conn. 1, 6 (1992) (citations omitted). The RUAA in turn provides six grounds for vacating an arbitration award:

> (1) The award was procured by corruption, fraud or other undue means;
>
> (2) There was: (A) Evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
>
> (3) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy or otherwise conducted the hearing contrary to section 52-407oo so as to prejudice substantially the rights of a party to the arbitration proceeding;
>
> (4) An arbitrator exceeded the arbitrator's powers;
>
> (5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the

> objection under subsection (c) of section 52-407oo not later than the beginning of the arbitration hearing; or
>
> (6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 52-407ii so as to prejudice substantially the rights of a party to the arbitration proceeding.

Conn. Gen. Stat. § 52-407ww. These grounds are largely identical to those in the FAA (and the prior Act), and Connecticut courts have often followed the precedents set by federal courts under the FAA. But, contrary to federal courts, Connecticut precedent arguably allows parties to modify the statutory grounds of review for arbitration awards. The first case to mention it appears to be *United Illuminating Co. v. Wisvest-Connecticut, LLC*, 259 Conn. 665, 673, 791 A.2d 546, 551 (2002). In that case, the Court applied *de novo* review to legal issues where the arbitration agreement provided that "[a]ny conclusions of law made by the arbitrators shall be subject to review in any court of competent jurisdiction within the State of Connecticut. . . ." *Id.* at 670 n. 1. In another case, the Court applied the parties' agreement that an award of expenses could be vacated if "clearly erroneous." *See Stutz v. Shepard*, 279 Conn. 115, 124, 901 A.2d 33, 39 (2006). There was no substantive discussion of (or apparent challenge by either party to) the Court doing so. The Supreme Court later cited to *Stutz* in *dicta* for the proposition that "[p]arties to agreements remain, however, free to contract for expanded judicial review of an arbitrator's findings." *HH E. Parcel, LLC v. Handy & Harman, Inc.*, 287 Conn. 189, 204 n. 16, 947 A.2d 916, 926 (2008). That case, however, was only dealing with findings of fact, not issues of law. *Id.* at 204. Nonetheless, Connecticut courts have apparently not addressed this issue since Supreme Court's decision in *Hall Associates.*

i. Corruption, fraud, or undue means

The ground in Conn. Gen. Stat. § 52-407ww(a)(1) is identical to 9 U.S.C. § 10(a)(1) and the prior Act, Conn. Gen. Stat. § 52-418(a)(1). Accordingly, case law under both statutes will likely be applicable to the RUAA. Even under the prior Act, there is very little case law on this ground for vacatur. But, the Appellate Court, leaning heavily on federal jurisprudence has set forth the relevant inquiries as follows:

> Section 52–418(a)(1) has not been the subject of substantial judicial discussion, nor have its terms been defined by our legislature . . . and the specific term "undue means" does not have a clear or obvious plain language meaning. . . . When a state statute is in need of construction and Connecticut authority is sparse, we frequently have looked to analogous federal statutes for guidance in the interpretation of our state legislation. . . . This repeatedly has been the case in construing § 52–418. . . .

> For purposes of the present case, the relevant portion of the Federal Arbitration Act, 9 U.S.C. § 10(a) . . . virtually is identical to § 52–418(a)(1) of our General Statutes.
>
> Under 9 U.S.C. § 10(a)(1), [t]he term undue means has generally been interpreted to mean something like fraud or corruption. . . .
>
> The term "undue means" [in 9 U.S.C. § 10(a)(1)] must be read in conjunction with the words 'fraud' and 'corruption' that precede it in the statute. . . . Consistent with the plain meaning of fraud and corruption, and with the limited scope of judicial review of arbitration awards, other circuits have uniformly construed the term undue means as requiring proof of intentional misconduct. . .
>
> . . . Section 10(a)(1) permits vacatur "[w]here the award was procured by corruption, fraud, or undue means." . . . The phrase "undue means" in the statute follows the terms "corruption" and "fraud." It is a familiar principle of statutory construction that a word should be known by the company it keeps. . . . The best reading of the term "undue means" under the maxim *noscitur a sociis* is that it describes underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either. . . . "[I]ntentional malfeasance" is required to justif[y] vacatur under the statute. . . . We are persuaded that the interpretation of the phrase "undue means" by the federal Circuit Courts of Appeals cited previously is applicable to § 52–418.

Doctor's Assocs., Inc. v. Windham, 146 Conn. App. 768, 776–78 (2013).

ii. Arbitrator corruption, partiality, and misconduct

The ground in Conn. Gen. Stat. § 52-407(a)(2) differs from the FAA and the prior Act in that under those acts arbitrator "misconduct" was grouped with evidentiary issues, not partiality or corruption. *See* 9 U.S.C. § 10; Conn. Gen. Stat. § 52-418(a)(3). Accordingly, courts may have some room to consider what constitutes "misconduct" under the RUAA.

Connecticut law on partiality largely tracks that of the federal rule.

> A party seeking to vacate an arbitration award on the ground of evident partiality has the burden of producing sufficient evidence in support of the claim. An allegation that an arbitrator was biased, if supported by sufficient evidence, may warrant the vacation of the arbitration award. . . . The burden of proving bias or evident partiality pursuant to § 52–418(a)(2) rests on the party making such a claim, and requires more than a showing of an appearance of bias.

> . . . In construing § 52–418(a)(2), [our Supreme Court] concluded that evident partiality will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. To put it in the vernacular, evident partiality exists where it reasonably looks as though a given arbitrator would tend to favor one of the parties.

Town of Stratford v. Int'l Fed'n of Prof'l & Tech. Engineers, Local 134, 155 Conn. App. 246, 257 (2015) (citations omitted; internal quotation marks omitted).

iii. Refusal to postpone hearing or consider material evidence

The ground in Conn. Gen. Stat. § 52-407ww(a)(3) largely tracks the FAA and prior Act, but further specifies that the arbitration must be conducted in accordance with § 52-407oo. *See* 9 U.S.C. § 10(a)(3); Conn. Gen. Stat. § 52-418(a)(3). That difference aside, Connecticut courts have turned to and followed federal guidance on the issue:

> [T]his court has stated that § 52–418(a)(3) does not mandate that every failure or refusal to receive evidence, even relevant evidence, constitutes misconduct. . . . To establish that an evidentiary ruling, or lack thereof, rises to the level of misconduct prohibited by § 52–418(a) (3) requires more than a showing that an arbitrator committed an error of law. . . . Rather, a party challenging an arbitration award on the ground that the arbitrator refused to receive material evidence must prove that, by virtue of an evidentiary ruling, he was in fact deprived of a full and fair hearing before the arbitration panel. . . . The federal courts, in construing the nearly identical grounds for vacating an arbitration award under 9 U.S.C. § 10(a)(3), have held that an arbitration hearing is fair if the arbitrator gives each of the parties to the dispute an adequate opportunity to present its evidence and argument. . . . If the evidence at issue is merely cumulative or irrelevant, the arbitrator's refusal to consider it does not deprive the proffering party of a full and fair hearing. . . . Additionally, to vacate an arbitrator's award on the ground of misconduct under § 52–418(a)(3), the moving party must establish that it was substantially prejudiced by the improper ruling. . . . This requirement that the moving party establish substantial prejudice is consistent with the showing that this court requires to order a new trial when a trial court makes an improper evidentiary ruling in a civil trial. . . .

> Federal case law considering whether an arbitrator's evidentiary ruling deprived a party of a fair hearing is consistent with requiring the moving party to demonstrate substantial prejudice to vacate an award on this ground. One federal court analogized to the standard of review accorded trial courts' evidentiary rulings and declined to vacate an arbitrator's award because it cannot be said as a matter of law that [the excluded evidence] was decisive or that its exclusion was seriously harmful in the light of the other evidence in the case. . . . Indeed, in the few instances in which federal courts have vacated an arbitrator's award on this ground, the arbitrator's evidentiary ruling had precluded the moving party from presenting evidence that was decisive and central to a disputed claim or defense. . . .
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> ***
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> Requiring the moving party to establish substantial prejudice by demonstrating that the decision excluded evidence that was decisive or likely to have altered the outcome of a claim is consistent with the principles underlying arbitration. A party's choice to accept arbitration entails a trade-off. A party can gain a quicker, less structured way of resolving disputes; and it may also gain the benefit of submitting its quarrels to a specialized arbiter . . . . Parties lose something, too: the right to seek redress from the courts for all but the most exceptional errors at arbitration.

City of Bridgeport v. The Kasper Grp., Inc., 278 Conn. 466, 475–79, 899 A.2d 523, 529–31 (2006).

iv. Exceeding authority

> The standard for reviewing a claim that the award does not conform to the submission requires what we have termed in effect, de novo judicial review. . . .
>
> Although we have not explained precisely what "in effect, de novo judicial review" entails as applied to a claim that the award does not conform with the submission, that standard best can be understood when viewed in the context of what the court is permitted to consider when making this determination and the exact nature of the inquiry presented. Our review is limited to a comparison of the award to the submission. Our inquiry generally is limited to a determination as to whether the parties have vested the arbitrators with the authority to decide the issue presented or to award the relief conferred. With respect to the latter, we have explained that, as long as the arbitrator's remedies were consistent with the agreement they were within the scope of the submission. .

> . . In making this determination, the court may not engage in fact-finding by providing an independent interpretation of the contract, but simply is charged with determining if the arbitrators have ignored their obligation to interpret and to apply the contract as written. . . .

Harty v. Cantor Fitzgerald & Co., 275 Conn. 72, 84–87 (2005).

Like the federal courts, Connecticut recognizes the manifest disregard of law ground for vacating an arbitration award. "[Our Supreme Court] has acknowledged that [t]he exceptionally high burden for proving a claim of manifest disregard of the law under § 52–418(a)(4) is demonstrated by the fact that, since the test was first outlined in *Garrity* [*v. McCaskey,* 223 Conn. 1, 9, 612 A.2d 742 (1992), the court had] yet to conclude that an arbitrator manifestly disregarded the law." *Design Tech, LLC v. Moriniere*, 146 Conn. App. 60, 68 (2013). Summarizing that exceedingly narrow ground for review:

> [A]n award that manifests an egregious or patently irrational application of the law is an award that should be set aside . . . because the arbitrator has exceeded [his] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. . . . [T]he manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles. . . . Even if the [arbitrator] were to have misapplied the law . . . such a misconstruction of the law would not demonstrate the [arbitrator's] egregious or patently irrational rejection of clearly controlling legal principles.

Design Tech, LLC v. Moriniere, supra, 146 Conn. App. at 67-68. (citations omitted; emphasis added; internal quotation marks omitted). The courts have elaborated upon this standard:

> Under this highly deferential standard, the defendant has the burden of proving three elements, all of which must be satisfied in order for a court to vacate an arbitration award on the ground that the arbitration panel manifestly disregarded the law: (1) the error was obvious and capable of being ***readily and instantly perceived*** by the average person qualified to serve as an arbitrator; (2) the arbitration panel ***appreciated the existence of a clearly governing legal principle but decided to ignore it***; and (3) the governing law alleged to have been ignored by the arbitration panel is well defined, explicit, and clearly applicable.

Harty v. Cantor Fitzgerald & Co., 275 Conn. 72, 102 (2005) (citations omitted; emphasis added; internal quotation marks omitted); *see Design Tech*, supra, 146 Conn. App. at 77.

v. Improper notice of arbitration

This ground is new and only found in the RUAA. It is a rather straightforward procedural ground, and requires little further explanation by case law.

vi. Public policy and constitutionality grounds

As previously noted, there are two additional common law grounds for vacating an arbitration award that are likely to persist even after the passage of the RUAA.

The public policy ground has been summarized as follows:

> A court's refusal to enforce an arbitrator's award . . . because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. . . . This rule is an exception to the general rule restricting judicial review of arbitral awards. . . . The exception, however, is narrowly construed and . . . is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . . To be vacated under the narrow public policy exception, the award must be clearly illegal or clearly violative of a strong public policy. . . . Furthermore, [t]he party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated. . . .
>
> The seminal case with respect to the nature of the judicial review given to a claim that an arbitration award violates public policy is *Schoonmaker v. Cummings & Lockwood of Connecticut, P.C.*, ... In that case, . . . we concluded that, "where a party challenges a consensual arbitral award on the ground that it violates public policy, and where that challenge has a legitimate, colorable basis, de novo review of the award is appropriate in order to determine whether the award does in fact violate public policy." . . . We emphasized, however, our "adhere[nce] to the longstanding principle that findings of fact are ordinarily left undisturbed upon judicial review," and "defer[red] to the arbitrator's interpretation of the agreements regarding the scope of the forfeiture upon competition provision, as well as the terms upon which postemployment benefits are offered to former employees. We conclude only that as a reviewing court, we must determine, pursuant to our plenary authority and giving appropriate deference to the arbitrator's factual conclusions, whether the forfeiture

> provision in question violates those policies." . . . [W]e noted that "in undertaking de novo review of the plaintiff's public policy claim, we defer to the arbitrator's interpretation of the agreements . . . . We therefore do not substitute our own reading of the contract terms for that of the arbitrator, but intervene only to the extent that those terms, as interpreted, violate a clearly established public policy." . . .
>
> Our case law following *Schoonmaker* has emphasized that a reviewing court is bound by the arbitrator's factual findings in reviewing a claim that an award rendered in a consensual arbitration violates this state's public policy. . . .

HH E. Parcel, LLC v. Handy & Harman, Inc., 287 Conn. 189, 197–200 (2008) (citations omitted; internal quotation marks omitted).

The constitutional ground is simply stated: "The exception for issues of constitutionality is limited to setting aside an arbitrator's award that explicitly rules on the constitutionality of a statute." *Garrity v. McCaskey*, 223 Conn. 1, 7 (1992). Despite often being recited, there are few cases in which this ground has actually been argued or applied. The purpose of the exception is to preserve the judicial courts' exclusive jurisdiction to rule upon the constitutionality of statutes.