

PROTECTING THE AWARD

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CHAPTER #

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BIOGRAPHICAL INFORMATION

EDUCATION

A.A. Freed-Hardeman College
B.S. in History. Tennessee Tech University
M.A. in History. Tennessee Tech University
J.D. University of Texas School of Law

PROFESSIONAL ACTIVITIES

Equity Member, Whitaker Chalk Swindle & Schwartz PLLC – Member of Executive Committee
Member, Texas Bar Association
Member, District of Columbia Bar Association
Fellow, College of Commercial Arbitrators
Fellow and Chartered Arbitrator, Chartered Institute of Arbitrators
Member, Neutrals Panels, American Arbitration Association
Member, Neutrals Panel, International Center for Dispute Resolution
Member, Neutrals Panel, International Institute for Conflict Prevention and Resolution (CPR)
Member, Neutrals Panel, American Health Lawyers Association ADR Service
Member, Neutrals Panel, Chartered Institute of Arbitrators
Credentialed Distinguished, Texas Mediator Credentialing Association
Fellow, Texas Bar College
Former Chair, SBOT Alternative Dispute Resolution Section
Former President, Master Emeritus, Mahon Inn of Court (American Inns of Court)
Member, Honorary Serjeant's Inn of Dallas-Fort Worth Inn of Court
Former President, Tarrant County Bar Association
Member, American Law Institute
Sustaining Life Fellow, American Bar Foundation
Sustaining Life Fellow, Texas Bar Foundation
Sustaining Charter Fellow, Tarrant County Bar Foundation

PUBLICATIONS, ACADEMIC APPOINTMENTS, HONORS

Blackstone Award, Tarrant County Bar Association
Justice Frank Evans Award, SBOT Alternative Dispute Resolution Section
Adjunct Professor, Pepperdine University School of Law (2011, 2013, 2015, 2017, 2019)
Editor, *The Arbitration Newsletter*
“Mock Arbitration Panel,” SBOT ADR Seminar, Austin, Texas (January 27, 2017)
“Advocacy in Negotiation, Mediation, and Arbitration,” Texas A&M University School of Law (2016, 2017)
“Pleadings and Conduct Can Widen Arbitrator’s Scope of Issues to Resolve,” *Alternative Resolutions*, Vol. 26, No. 1, SBOT ADR Section (Winter 2017)
“Arbitration Has Benefits,” Texas Bar Journal, March 2017, Vo. 80, No. 3, page 153
“Arbitration Update and Techniques,” SBOT Litigation Update Seminar” (2016)
“Practical Insights for Enhancing AAA Arbitrator Practices and Opportunities,” 2016 AAA/ICDR/Mediation.Org Panel Conference
“Arbitration,” Chapter in SBOT ADR Section *ADR Handbook*
Facilitator, AAA Arbitrator Continuing Education Courses, ACE13 (2017); ACE14 (2017); ACE12 (2015, 2016); ACE8 (2014); ACE9 (2014); ACE6 (2012, 2013)
“The Final Hearing: Now What,” SBOT ADR Seminar, Austin, Texas (November 3, 2017)
“Arbitration,” Vol. 4 SMU Annual Texas Survey 2018, Southern Methodist University Dedman School of Law

PROTECTING THE AWARD

By
John Allen Chalk, Sr.

As a fair and diligent arbitration process manager and as a just, independent, and deliberate decision maker, the arbitrator has a duty to draft and issue the final arbitration award so that it is confirmed by a court of competent jurisdiction. One of the Arbitrator's most crucial roles is drafting the award. The award must be clearly written and include all the requirements provided in the arbitration agreement. The award must comply with relevant statutory requirements, namely § 10(a)(4) of the Federal Arbitration Act (the "FAA") or Texas Civil Practice and Remedies Code § 171.053 (the "TAA"). According to the FAA, the court can vacate an award "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."¹ By writing a "mutual, final, and definite award" that complies with the parties' arbitration agreement and the guidelines described below, an arbitrator can ensure that the parties will understand the decision and the court can confirm the award without the delay and expense caused by unnecessary appeals.

1. **Disclose! Disclose! Disclose!** Start with making all possible disclosures at time of notice of pending appointment² and throughout the entire arbitration process.³
2. **No Industrial Justice.** Examine all the possible sources (e.g., parties' arbitration contract, applicable arbitration law, applicable arbitration rules, relevant governing law) for the arbitrator's powers, authority, and jurisdiction.⁴ Know your arbitrator boundaries. Stay within your arbitrator boundaries.⁵
3. **Respect the Parties' Arbitration Agreement.** Begin with a careful reading and interpretation of the parties arbitration agreement. It is the arbitrator's roadmap and guiding compass throughout the entire arbitration process. Arbitration is a creature of contract.⁶

¹ 9 U.S.C.S. § 10(a)(4) (emphasis added).

² Canon I, G, The Code of Ethics for Arbitrators in Commercial Disputes (2004).

³ Canon II, The Code of Ethics for Arbitrators in Commercial Disputes (2004); R-17, AAA Commercial Arbitration Rules (October 1, 2013); Burlington N. R.R. v. TUCO, 960 S.W.2d 629, 630 (Tex. 1997) ("We hold that a neutral arbitrator ... exhibits evident partiality ... if the arbitrator does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality.").

⁴ 9 U.S.C. §10(a)(4); Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 671 (2010); United Steelworkers of America v. Enterprise Wheel & Car Corp, 363 U.S. 593, 597 (1960).

⁵ Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2069 (2013) ("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 [the court] is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.'").

⁶ Bristow v. Jameson, 1996 Tex. App. LEXIS 2140, *11 (Tex.App. – Houston [1st Dist.], no pet.) (1996); Hall Street Assoc. LLC v. Mattel, Inc., 128 S. Ct. 1396, 1402 (2008) ("Congress enacted the FAA to replace judicial indisposition to arbitration with a national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.").

4. **Give it Up!** The arbitrator should end her involvement in the arbitration once the arbitrator has performed the functions required by the applicable arbitration rules.⁷
 - a. This is the common law doctrine of *functus officio*.⁸
 - b. There are exceptions to the application of *functus officio* but the arbitrator should not become one.⁹
 - c. Declare by written order the closing of the final hearing.¹⁰
 - d. Confirm the arbitrator’s authority to reopen the final hearing or modify the final award.¹¹
 - e. Always determine the arbitrator’s authority to take any action after issuance of the final award.¹²
 - f. Do not retain jurisdiction of future or potential disputes between the parties.

5. **Final or Non-Final.** Maintain clear distinctions between interim, non-final orders or awards and final awards.¹³
 - a. Not all interim, non-final orders or awards are so viewed by courts.¹⁴
 - b. Not all awards label “final” are so viewed by courts.¹⁵

6. **Manage the Process.** The arbitrator is also the “process” manager. Texas courts focus on “the integrity of the process, not the propriety of the result.”¹⁶ The AAA Commercial Rules (2013) repeatedly point to and describe the arbitrator process

⁷ Canon I, C, The Code of Ethics for Arbitrators in Commercial Disputes (2004).

⁸ See Ch. 13 (“Postaward Matters”), pages 323-330, The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (4th Ed.).

⁹ “[T]he doctrine of *functus officio* (‘a task performed’) [is] a common law rule that bars an arbitrator from revisiting the merits of an award once the award has been issued.” *Brown v. Witco Corp.*, 340 F.3d 209, 218 (5th Cir. 2003). “[T]here are a number of well-recognized exceptions to the *functus officio* rule. An arbitrator can (1) correct a mistake which is apparent on the face of his award; (2) decide an issue which has been submitted but which has not been completely adjudicated by the original award; or (3) clarify or construe an arbitration award that seems complete but proves to be ambiguous in its scope and implementation.” *Id.* at 219; See also *Martel v. Ensco Offshore Co.*, 449 Fed. Appx. 351 (5th Cir. 2011) (*Functus officio* doctrine does not apply here because it does not come into effect until a court of competent jurisdiction has confirmed that an arbitration decision is unambiguous and binding on the parties.); See also *Bosack v. Soward*, 586 F.3d 1096, 1103 (9th Cir. 2009) (adopting the rule that “an interim award may be deemed final for *functus officio* purposes if the award states that it is final, and if the arbitrator intended the award to be final”); See also *Muskegon Cen. Dispatch 911 v. Tiburon*, 462 Fed. Appx. 517 (6th Cir. 2012) (Once an arbitrator has made and published a final award his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration. This means that where a vacated arbitration award is remanded and requires reopening of the merits of a claim, remand to a new arbitrator is appropriate).

¹⁰ R-39, AAA Commercial Arbitration Rules (October 1, 2013).

¹¹ R-40 and R-50, AAA Commercial Arbitration Rules (October 1, 2013); R-15.6, CPR Administered Arbitration Rules (July 1, 2013).

¹² Canon III, The Code of Ethics for Arbitrators in Commercial Disputes (2004).

¹³ 9 U.S.C. §10(a)(4) (“... a mutual, final, and definite award upon the subject matter submitted ...”).

¹⁴ *Ecopetrol S.A. v. Offshore Exploration & Prod. LLC*, 46 F.Supp. 327, 337 (S.D.N.Y. 2014) (Interim Awards in this arbitration are final and appealable.).

¹⁵ *Savers Prop. & Cas. Ins. Co. v. National Union Fire Ins. Co.*, 748 F.3d 708, 722 (6th Cir. 2014) (Interim Final Award was not a final award.).

¹⁶ *TUCO Inc. v. Burlington N.R.R. Co.*, 912 S.W.2d 311, 315 (Tex. App. – Amarillo 1995), modified on other grounds, 960 S.W.3d 629 (Tex. 1997) (“Because of the deference given to arbitration awards, judicial scrutiny focuses on the integrity of the process, not the propriety of the result.”).

management duties: R-21(b) (“discuss and establish a procedure”); R-22(a) (“shall manage ... with a view to achieving an efficient and economical resolution of the dispute”); R-32(a) (“the discretion to vary this procedure”); R-32(b) (“shall conduct the proceedings with a view to expediting the resolution of the dispute”); R-37(a) (“take whatever interim measures he or she deems necessary”); and R-40 (“The hearing may be reopened on the arbitrator’s initiative....”). The arbitrator’s initial scheduling order sets the tone and establishes the arbitrator as the process manager.

7. **Use Authorized Form of Award.** Issue the form of award chosen by the parties, or authorized by the parties’ arbitration agreement, or required by the applicable arbitration rules.¹⁷
8. **The “Reasoned” Award Challenge.** “Reasoned” awards now require more than “reasons.”¹⁸ All claims, counterclaims, and contentions should be mentioned and disposition of each clearly stated. All applicable burdens of proof should be stated and applied to all claims, counterclaims, and contentions. Decide only what is submitted and within the arbitrator’s authority.¹⁹
9. **Respect Award Deadlines.** Comply with the applicable arbitration rule on deadline for issuance of the final award.²⁰ Some arbitration rules may be interpreted to terminate automatically the arbitrator’s powers with the deadline for award issuance.²¹

¹⁷ R-46, AAA Commercial Arbitration Rules (October 1, 2013); R-15.2, CPR Administered Arbitration Rules (July 1, 2013); *see also* John Allen Chalk, “Award Writing: Clear, Concise, and Complete,” SBOT Arbitration Strategies 2019 Course (March 27, 2019).

¹⁸ *See* Justice Brown’s Concurrence, *Stage Stores v. Gunnerson*, 477 S.W.3d 848 (Tex.App. – Houston [1st Dist.] 2015, no pet.); *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 474 (5th Cir. 2012); *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011); JAMS Comprehensive Arbitration Rules R.24(h); R-7.8, AHLA Rules of Procedure for Commercial Arbitration (April 30, 2017).

¹⁹ Based on the analysis in the *Gunnerson* concurrence (477 S.W.3d at 864-873), a reasoned award:

1. Reveals the arbitrator’s mode of decision;
2. Considers the parties’ reasons for wanting a “reasoned award”;
 - a. Provides the parties guidance for future conduct;
 - b. Creates trust in the arbitration proceedings;
3. Examines the parties’ arguments critically, crystalizing the arbitrator’s thinking during drafting;
4. Demonstrates an examination of the unique circumstances of the case;
5. Deals with the parties’ key written and oral contentions;
6. Contains a “pragmatic, totality of the circumstances review” of the case;
7. Provides “a cursory explanation of how the arbitrator reached her decision”;
8. Addresses “expressions or statements offered as a justification” by the parties;
 - a. However, “in some circumstances, a reasoned award requires not only the mention of a justification but also some further elaboration”;
9. Shows that the arbitrator has considered the losing parties’ key arguments and “has a reasoned basis for” rejecting them;
 - a. However, “an arbitrator need not address contentions that are not clearly presented, conceptually straightforward, or frivolous on their face no matter how much time a party spends on the issue.”

²⁰ R-45, AAA Commercial Arbitration Rules (October 1, 2013).

²¹ R-7.1, AHLA Rules of Procedure for Commercial Arbitration (April 30, 2017).

10. **Know the Vacatur Grounds.** The Federal Arbitration Act grounds²² and the Texas General Arbitration Act²³ grounds are materially similar and substantially identical. They limit how the award was “obtained.”²⁴ They specify ways in which “the rights of a party were prejudiced.”²⁵ They describe arbitrator “misconduct or willful misbehavior.”²⁶ They focus on the arbitrator’s “powers.”²⁷ They address the arbitrator’s limited power to refuse requests for postponement and offers of evidence.²⁸
11. **Obey the Judge.** Comply fully and timely with a court remand of an award.

²² 9 U.S.C. §10(a)(1)-(4); Texas Civ. Prac. & Remedies Code §171.088(a)(1)-(4).

²³ Texas Civ. Prac. & Remedies Code §171.088(a)(1)-(4).

²⁴ 9 U.S.C. §10(a)(1); TCPRC §171.088(a)(1).

²⁵ 9 U.S.C. §10(a)(3); TCPRC §171.088(a)(2).

²⁶ 9 U.S.C. §10(a)(3); TCPRC §171.088(a)(2)(C).

²⁷ 9 U.S.C. §10(a)(4); TCPRC §171.088(a)(3)(A).

²⁸ 9 U.S.C. §10(a)(3); TCPRC §171.088(a)(3)(B) and (C).