

# [Re-Examining the Footprint Of Arbitration](#)

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**Byline:** DAVID B. SAXE AND JEREMY D. WEINSTEIN

### **Body**

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Arbitration is commonly considered to be an efficient and expeditious alternative dispute resolution platform for litigants seeking to avoid the tedious and procedurally complex nature of our state and federal court systems. However, this platform is not without pitfalls. One critical shortcoming of arbitration, as it is generally practiced today, is the freedom arbitrators have to skirt precedent or to fashion unexpected award remedies.

We think a course-correction is called for and suggest that such a correction might take the form of a more critical approach by appellate courts in re-examining and possibly re-fashioning determinations made on appeals from arbitration confirmation proceedings and in addition, the provision of a more robust appellate review process woven into the arbitral process itself as a remedy to address what we, and other practitioners see as a significant problem lurking within the arbitral process.

Arbitration is the subject of the statutory provisions of Article 75 of New York's CPLR. Case law interpreting those provisions have created a powerful body of common law that works in tandem to sanctify arbitral awards as virtually beyond reproach. This is because New York law interpreting Article 75 has effectively foreclosed the opportunity for meaningful judicial review of an arbitration award through holdings that state "judicial review of arbitration awards is extremely limited." [Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y.3d 471, 479-480 \(2006\)](#) (internal citations and quotations omitted).

Under New York law "[a]n arbitration award must be upheld when the arbitrator offer[s] even a barely colorable justification for the outcome reached." *Id.* This is because "an arbitrator is not bound by principles of substantive law or by rules of evidence. He may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and make an award reflecting the spirit rather than the letter of the agreement, even though the award exceeds the remedy requested by the parties." [Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 308 \(1984\)](#).

Between the wide latitude afforded to arbitrators in fashioning a remedy coupled with New York law's de minimis standard for confirmation, litigants seeking to vacate an arbitration award often complain that New York Courts act as a rubber stamp for an arbitrator's decision.

To an aggrieved litigant, that may be the perception, however it is not the rule, and as this article will demonstrate, New York courts undertake a detailed analysis of the record and the law involved when assessing whether to confirm or vacate an arbitration award even where the court is ultimately constrained to confirm the award.

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In the face of this burden, it is appropriate to ask when is an arbitration award subject to being vacated? And is a course correction overdue such that aggrieved litigants have further opportunity to vacate an improper and wrongly determined arbitration award?

At present, CPLR Article 75 provides multiple grounds for vacatur, such as fraud, misconduct, and impartiality of the arbitrator, and, as relevant to this article, provides that an arbitration award "shall be vacated if the court finds that the rights of [a] party were prejudiced by...an arbitrator...[who] exceeded his power ..." ([CPLR 7511\(b\)\(1\)\(iii\)](#)).

An arbitrator exceeds his or her power when the award "violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power." [In re Kowaleski \(NYS Dept. of Corp. Servs\) 16 N.Y.3d 85, 90 \(2010\)](#).

As noted, this statutory avenue for relief has been expanded through case law, carving out yet another avenue to vacatur to find that an arbitrator can also exceed his power when he renders an award that is in manifest disregard of the law. See, e.g., [Wien & Malkin, 6 N.Y.3d at 471](#); [Citigroup Global Markets, Inc. v. Fiorella, 127 A.D.3d 481 \(1st Dept. 2015\)](#).

While there is an effort to codify the judicially created "manifest disregard of the law" standard for vacating an arbitration award as an amendment to CPLR Article 75, to date, that amendment has not been adopted. See 2023 NY Senate-Assembly Bill S3263, A3775. As such, the judicial framework surrounding "manifest disregard of the law" is the present framework for vacatur.

While the "manifest disregard of the law" standard initially evolved under the Federal Arbitration Act, it is equally applicable to arbitrations governed by CPLR Article 75. See [In re Miller Takak & Co. v. Coppedge, 166 A.D.3d 432, 432 \(1st Dept. 2018\)](#); [In re Franco v. Dweck, 165 A.D.3d 551, 553 \(1st Dept. 2018\)](#).

An award may be vacated on grounds that an arbitrator "manifestly disregarded the law" when (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit and clearly applicable to the case. See, e.g., [Citigroup Global Markets v. Fiorilla, 127 A.D.3d 491](#); [Sawtelle v. Waddell & Reed, Inc., 304 A.D.2d 103 \(1st Dept. 2003\)](#); [Stewart Tabori & Chang, Inc. v. Stewart, 282 A.D.2d 385 \(1st Dept. 2001\)](#).

However, "[a]n arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached." [Wien & Malkin, 6 N.Y.3d at 479](#) (internal quotation marks omitted), and "an arbitrator's award will not be vacated for errors of law and fact." [Sprinzen v. Nornberg, 46 N.Y.2d 623, 629 \(1979\)](#). And, critically, as discussed herein, "[a]n arbitrator's award will be confirmed if any plausible basis exists for the award." [Azrielant v. Azrielant, 301 A.D.2d 269, 275 \(1st Dept. 2002\)](#).

We intend to examine certain cases that analyzed detailed factual arbitration records as measured against the foregoing standards. It will come as no surprise to those versed in arbitration practice that courts approach the issue of vacatur gingerly and sparingly, searching for a "barely colorable justification for the outcome reached" to confirm rather than disturb the award.

[The Matter of Rose Castle Redevelopment II, LLC v. Franklin Realty Corp. 184 A.D.3d 230 \(1st Dept. 2020\)](#) is a relatively recent First Department case exemplifying the high hurdle set for litigants seeking to vacate an arbitration award. But, from a more critical perspective, it may provide an opportunity to re-examine this barrier, because the analytics supporting the holding may be fairly read by some to go beyond standards for arbitral award recognition. We let the reader be the judge.

In Rose Castle the First Department affirmed the trial court's confirmation of an arbitration award and denied a cross-motion to vacate the award on the grounds that the award was irrational. The First Department did so despite finding that the arbitrator's express justification for issuing the decision "might constitute reversible error" if the dispute had been tried in a judicial forum, yet, because the remedy fashioned by the arbitrator was both within the

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power afforded to him and because the First Department was able to find a barely colorable justification for the arbitrator's remedy, the First Department affirmed the Supreme Court's refusal to vacate the award.

In Rose Castle, a dispute arose between joint-venture real estate partners over the amount of money the petitioner (Rose Castle Redevelopment II, LLC) ("Rose Castle") was required to contribute to the joint-development project.

At the outset of the parties' relationship, Rose Castle paid approximately \$10,000,000 towards a \$21,000,000 guaranteed minimum contribution (which minimum could be increased if it successfully obtained a favorable rezoning of the subject property). The sole issue before the arbitrator was to determine the amount of the remaining contribution owed based on a formula set forth in the parties' contribution agreement.

The arguably ambiguous provision included a series of formulas that provided that Rose Castle was required to pay \$21 million as a guaranteed minimum, which minimum amount could increase to \$27.5 million if Rose Castle was able to rezone the property to increase the developable residential square footage on the property and was able to do so before a certain loan maturity date. The contribution would decrease on a sliding scale if the rezoning did not occur or if the rezoning negatively impacted the buildable square footage of the subject property. [184 A.D.3d at 231-232](#).

The intent behind the parties' agreement was that a favorable rezoning would increase the value of the development, and thus, the joint-venture, while an unfavorable rezoning would decrease the value of the development. The contribution agreement contemplated different scenarios and provided specific formulas for calculating the additional contribution amounts depending on which sequence of events occurred.

Despite considering multiple scenarios, the agreement failed to provide a formula for the scenario that ultimately occurred, a favorable rezoning that occurred after the date by which the contract contemplated a decision, which increased the total allowable residential square footage on the property to 329,000 square feet but simultaneously restricted market rate residential redevelopment to only 215,092 square feet due to the implementation of a new law that required the development to set aside the remaining square footage for affordable housing.

In review, the arbitrator recognized that the purpose of the parties joint-venture was to "maximize their profit from the development of the project" and limited the favorable zoning increase to the amount available for market rate redevelopment, or 215,092 square feet and accordingly increased petitioner's required contribution to \$25,811,040 under the formula. [184 A.D.3d 230, 233](#). However, because the agreement contained a guaranteed minimum contribution of \$27.5 million under a "favorable rezoning" scenario, the arbitrator increased the contribution total to the guaranteed minimum of \$27.5 million. *Id.*

The respondents in Rose Castle, Franklin Realty Corp., Franklin Realty Owners LLC and I&A Rosenberg Family LLC (the "respondents") who were the owners of the parcels of real property being contributed to the joint venture agreed that the contribution amount should have been set at \$25,811,040 based on the rezoned square footage, but took exception to what the arbitrator decided next.

After increasing the contribution amount from the formula based \$25,811,040 to the guaranteed minimum of \$27.5 million for a favorable rezoning, the arbitrator then deducted \$10,000,000, leaving a balance of \$17,500,000 for the petitioner to pay. The respondents contended that a proper reading of the agreement required petitioner to pay the \$25,811,040 and by reducing the amount to \$17,500,000, shortchanged them by \$8,311,040.

In issuing his decision, the arbitrator "found the...provision to be ambiguous and determined that it should be construed against respondents, as drafter of that clause." In evaluating that ambiguity, the arbitrator determined that "[a]dopting the interpretation advocated by Respondents would result in unreasonable financial consequences that do not make economic sense." [Matter of Rose Castle Redevelopment II, LLC v. Franklin Realty Corp., 184 A.D.3d 230, 233 \(1st Dept. 2021\)](#).

The Supreme Court affirmed the award and on appeal to the First Department, the respondents argued that the award was "irrational because it is based on the arbitrator's incorrect finding that the...provision is ambiguous.

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Compounding this error, according to respondents, is the arbitrator's ruling to construe the ambiguity against them, as drafters of the contribution agreement. That said, they argue that the arbitrator committed a \$10 million error, namely, deducting that amount from the \$27.5 million so that petitioner's contribution would only be \$17.5 million." [Matter of Rose Castle Redevelopment II, LLC v. Franklin Realty Corp., 184 A.D.3d 230, 234 \(1st Dept. 2021\)](#).

The First Department agreed with respondents that the arbitrator's analysis was flawed, finding that contract was not ambiguous; yet despite acknowledging that the arbitrator's reasoning was incorrect, the First Department upheld the award, noting that despite the arbitrator's incorrect assessment, the reasoning behind the arbitrator's decision was "clear." The arbitrator simply based the Award "on the fact that petitioner had "already paid" that amount (i.e., \$10 million), and not in reliance on any of the provisions set forth in the...provision." Id.

The First Department held that despite the imprecise and arguably incorrect language used by the arbitrator in the award and the arbitrator's flawed justification, the arbitrator ultimately reformed the contract and issued an award that reflected the parties' intentions and that such reformation was permissible. Id.

The First Department further noted that while not explicitly cited by the arbitrator in rendering his decision arbitrators are empowered with the authority to reform the parties contract, citing [SCM Corp. v. Fisher Park Lane Co., 40 N.Y.2d 788, 794 \(1976\)](#) ("arbitrator[s]... have the power to grant relief which in the courts would be called reformation by rewriting the provisions of the [agreement]"). An arbitrator has such power, and an award will be affirmed, even where the "record might constitute reversible error." [Matter of Rose Castle Redevelopment II, LLC v. Franklin Realty Corp., 184 A.D.3d 230, 235 \(1st Dept. 2021\)](#).

Despite what could amount to clear error warranting reversal, and the First Department's rejection of the arbitrator's expressed attempt to justify his decision, the First Department upheld the award.

The First Department reasoned that the arbitrator's decision to reduce the award by \$10,000,000.00 was entirely justifiable under a theory of contract reformation where the arbitrator merely sought to fashion equitable relief that fairly met the parties' expectations despite their failure to enumerate such relief in the contract. Under this scenario, the First Department held that "the arbitrator's determination here passes muster, given the extremely limited scope of our review of an arbitration award." [Matter of Rose Castle Redevelopment II, LLC v. Franklin Realty Corp., 184 A.D.3d 230, 235 \(1st Dept. 2021\)](#).

We believe that the foregoing analysis and determination tends to highlight the lengths to which the law of arbitration can bend, permits debate and may encourage re-examination in future cases. Plainly, arbitrators have greater powers than do judges in fashioning their awards and thus have wider latitude to do justice as they see fit. To that end, the award confirmed in Rose Castle is predicated upon the view that arbitrators are entitled to reform a contract along lines of equity that meet the expectations of the contracting parties.

But, under this analysis an arbitral award can be virtually anything the arbitrator wants it to be so long as the arbitrator and a reviewing court can hang their hat on any barely colorable justification for the outcome reached. We find it hard to believe that commercial practitioners and sophisticated litigants agreeing to submit an important dispute to arbitration intend such a result.

Rose Castle is not an outlier as other cases highlight the lengths to which a court will affirm an arbitration award, even under circumstances, like Rose Castle, that could warrant reversible error if decided in a judicial forum. See, for example, [Matter of Nexia Health Tech., Inc. v. Miratech, Inc., 176 A.D.3d 589 \(1st Dept. 2019\)](#) (because an arbitrator had the power to interpret contracts so long as the arbitrator did not expressly contradict the terms of the agreement, the arbitrator's interpretation of the contract and its provisions is justifiable and must be affirmed "[e]ven if the arbitrator's interpretation was erroneous..."); [Matter of Daesang Corp. v. Nutra Sweet Co., 167 AD3d \(1st Dept. 2018\)](#) ("in order to establish that an arbitrator manifestly disregarded the law in issuing an award, stating that, in order to find an arbitrator manifestly disregarded the law, the error must be "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator."); [McLaughlin, Piven, Vogel Sec., Inc. v. Ferrucci, 67 A.D.3d 405, 406 \(1st Dept. 2009\)](#) ("the award of attorneys' fees was not authorized by New York law, because no statute provided for such an award and it was neither authorized by an express provision of the

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arbitration agreement nor requested by both parties... however, we cannot find that the award was in manifest disregard of the law as it does not appear that the arbitrators knew that New York law was controlling on the question of their authority to award attorneys' fees") (internal citations omitted).

Yet, despite this high standard, courts occasionally reject an arbitration award on the grounds of manifest disregard of the law, particularly where, as stated in *Daesang* the error was "obvious." For example, in *Matter of Citigroup Global Mkts., Inc. v. Fiorilla*, the First Department affirmed the trial court's decision to vacate an arbitration award for manifest disregard of the law. *127 A.D.3d 491 (1st Dept. 2015)*.

In that case, the arbitrators refused to recognize and enforce a settlement between the parties that fully resolved the dispute brought before the arbitrators and in so doing, manifestly disregarded the law. *Id at 492*.

The trial court vacated the award and the First Department affirmed, noting that the "petitioners provided the relevant law regarding the enforcement of settlement agreements... but the arbitrators ignored the law and denied the motions without explanation." *Id*.

Likewise, in *Matter of Spear, Leeds & Kellogg v. Bullseye Secs.*, the First Department vacated an arbitration award that was "inherently inconsistent" where the claimants sought to impart liability on a securities firm and its employee, because the firm, through the employee, engaged in unauthorized trades resulting in losses to the investors.

In issuing the award, the arbitrator imposed liability on the securities firm but failed to impart any liability on the employee who executed the trades. The First Department vacated the award, holding "the arbitration award is inherently inconsistent. The gravamen of [the investors] claim against [the securities firm] was predicated upon [the employee's] conduct. However, the arbitrators...without explanation, specifically denied all of [the investors] numerous claims against [the employee]." [\*Matter of Spear, Leeds & Kellogg v. Bullseye Secs\*, 291 A.D.2d 255 \(1st Dept. 2002\)](#)

Further, even though an arbitrator is empowered with the ability to reform a contract, such power is not limitless.

In *Kudler v. Truffelman*, the First Department vacated a portion of an arbitration award on the grounds that the arbitrator exceeded her powers by giving "a completely irrational construction to the provisions of the [subject] agreement, thereby effectively rewriting it in a manner that was unjust and in violation of the spirit of the agreement." [\*Kudler v. Truffelman\*, 93 A.D.3d 549, 549-550 \(1st Dept. 2012\)](#).

Likewise, in *Fishman v. Roxanne Mgt.* the First Department vacated a portion of an arbitration award because "the arbitrator acted outside the scope of his authority by directing Roxanne [Management] to compel another company, [Boshany Associates Ltd.] to hire the grievant..." because while "the arbitration clause set forth in the subject collective bargaining agreement is broadly worded...the record before Supreme Court and the record before the arbitrator are simply devoid of proof of any connection between Roxanne [Management] and nonparty Boshany" the company directed to reinstate aggrieved union employee. [\*Fishman v. Roxanne Mgt\*, 24 A.D.3d 365, 365-367 \(1st Dept. 2005\)](#).

Without such a connection, the First Department held, the arbitrator lacked the authority to render the award compelling the non-party. *Id*.

Thus, while a court reviewing an arbitration award can disregard the award where the arbitrator obviously manifestly disregarded the law, the high hurdle remains, leading to potentially absurd and costly errors by arbitrators being enshrined in law all because New York law constrains the judiciary to do so.

The benefits and failings of arbitration can be summed up in one word finality. The finality and incidentally, expediency of a resolution of a dispute through arbitration is only an advantage if either the arbitrator makes no mistakes, or the stakes are small enough that mistakes are acceptable in the interest of the continuing commercial relationship between the parties. (See generally, Saxe, "An Appellate Mechanism in Arbitration," *New York State Bar Association Journal*, November/December 2013, pg 44).

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An examination of the cases we have reviewed has certainly highlighted the boundaries and firmness of the concept of finality in arbitration. Given the significant efforts expended by participants in arbitrations to seek out and attempt to utilize the judiciary to vacate and appeal arbitration awards on the grounds of manifest disregard of the law the ground of last resort there is indication that the current deference given to arbitrators and the judicial tilt toward respecting the finality of arbitration decisions may be too high.

Indeed, there is a growing sense among practitioners that this is not an insignificant problem. The meteoric increase in alternate dispute resolution platforms, and in particular arbitration, makes this a compelling problem that is likely to arise with increasing frequency given the prevalence of arbitration and the trend towards resolving higher stakes disputes in arbitral forums.

We recommend consideration of a more robust acceptance of some sort of appellate review process within the arbitral process. Some leading ADR providers, such as JAMS and the AAA already have such a procedure available. For example, JAMS established its Optional Arbitration Appeal Procedures in 2003, which aims to adhere to the same standard of review that an appellate court would apply had the award been a trial court order. See <https://www.jamsadr.com/appeal/>.

Likewise, the AAA also maintains its Optional Appellate Arbitration Rules to allow for an arbitration level appellate review of an arbitrator's decision. However, due to the increased cost associated with electing to employ such appellate options, they are seldom utilized. Given the high stakes at issue in arbitrations today, the opportunity for meaningful appellate review of an arbitration award at the arbitration level deserves more attention.

In the meantime, the judiciary, which is all too frequently called upon in the confirmation process to review the record and the findings in an arbitration should continue to keep a careful eye out for those situations that push the boundaries of prevailing law.

DAVID B. SAXE, a partner at Morrison Cohen, served as an Associate Justice of the Appellate Division, First Department for 19 years. JEREMY D. WEINSTEIN is an associate at Morrison Cohen. The views expressed are solely those of the authors.

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