

## **FUNCTUS OFFICIO: THE CLARIFICATION EXCEPTION**

by

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### **I. Introduction**

*Functus officio* is Latin for “a task performed”. In the context of arbitrations, it means that once the panel has issued a final and binding order, it becomes *functus officio* and lacks any further power to make rulings or take other actions. This rule originated at a time before the Federal Arbitration Act when the judiciary was hostile to arbitration and sought to limit it as much as possible. The judicial theory behind the *functus officio* rule was that private arbitrators lack the institutional protection afforded judges and, therefore, were more susceptible to outside pressures to change their rulings.<sup>1</sup>

Regardless of whether or not this theory is accurate, there are a number of exceptions to the *functus officio* rule: (1) correcting a mistake apparent on the face of the award; (2) where the award does not adjudicate an issue submitted to the panel; and (3) where the award, although seemingly complete, contains an ambiguity as whether the submission has been fully dealt with.<sup>2</sup> The purpose of this article is to explore the case law related to the third exception *i.e.* clarifying ambiguities in panel awards.

### **II. Caselaw on the Clarification Exception**

*Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, 943 F.2d 327 (3<sup>rd</sup> Cir. 1991) involved an apparent misunderstanding by the panel as to whether or not the cedent was holding security for reported losses and IBNR. In its initial order the panel ordered the reinsurer to pay the cedent \$10 million for paid losses and to release any claim to the \$9 million for reported losses and IBNR held by the cedent. When the cedent observed that it did not hold any funds for reported losses and IBNR, a majority of the panel issued a clarified award that the reinsurer should pay \$19 million to the cedent for paid and reported losses and IBNR.

The lower court upheld the clarified award on the basis of the exception for mistake on the face of the order. The appellate court rejected this ruling and remanded with a clear indication that the clarification exception was the proper one. The district court was to consider whether an ambiguity in the award was shown by “an extraneous but objectively ascertainable fact.”<sup>3</sup> If the district court determined that compensation to the cedent was in two parts, cash and release of security, but there was no security, then the intent of the arbitrators as to the second remedy would be ambiguous and subject to clarification.

*Arch Development Corp. v. Bioment, Inc.*, 2003 U.S. Dist. Lexis 13118 (N.D. Ill. 2003) involved a dispute over a licensing agreement. The arbitrator's initial order ("September Award") made rulings on royalties and continued the entire licensing agreement in effect but did not grant interest. When one of the parties raised the issue of interest on overdue royalties, the arbitrator noted that the licensing agreement granted interest on overdue royalties and clarified his order ("March Award") accordingly. The court ruled that the March Award properly clarified the September award:

Therefore, it was perfectly appropriate for the Arbitrator to issue the March Award clarifying that the September Award included interest because issuance of the March Award merely resolved a dispute between the parties regarding the proper interpretation of the September Award. Accordingly, the March Award was well within the Arbitrator's authority.<sup>4</sup>

*Massachusetts Cas. Ins. Co. v. North American Reassurance Co.*, 1990 U.S. Dist. Lexis 481 (N.D. Ill 1990) was a claim by the reinsurer that the cedent was ceding losses on excluded business *i.e.* certain police departments. The reinsurer sought a ruling which allowed it to recover claims on improperly ceded business and to take down reserves on outstanding claims related to such business. In its award, the panel stated that: (1) it found for the reinsurer; (2) the cedent would "recapture" the disputed business with no further liability to the reinsurer; (3) the reinsurer would be reimbursed for its negative cash flow with interest.<sup>5</sup> (The reader should note that a number of the problems in these cases are caused by the arcane language used by the panels in their awards.)

The cedent claimed that the "recapture" language in the original order meant that the cedent could keep the reinsurance recoverables on paid claims and collect the reinsurance recoverables on outstanding claims. A majority of the panel attempted to clarify with letters and a further award. The court found the order to be unambiguous even without the clarifying letters and award. It found that the technical meaning that the cedent was placing on "recapture" was manifestly at odds with the remainder of the order which stated clearly that the reinsurer won the dispute.

The arbitration panel in *Continental Cas. Co. v. Scandinavian Reinsurance Co.*, 2005 U.S. Dist. Lexis 18995 (N.D. Ill.) was asked to determine a question of inuring reinsurance but not to make a monetary award. The panel ruled that the reinsurance in question did inure and the cedent requested clarification that its methodology of calculating the amount due as well as that its calculation of the actual sum due were correct. The panel declined to rule on an actual sum due and merely observed in a Final Award that the cedent's calculation methodology was "conceptually consistent" the panel's award. The cedent claimed that the Final Award supported its quantification of the effects of the award on inuring reinsurance.

The court found that the Final Award was a permissible clarification of the initial award in that it did not reconsider or amend the earlier award. However, the court declined to quantify the effect of the panel's awards as the panel had twice declined to do so itself, leaving the parties to work through the methodologies stated in the initial order.

*Global Reinsurance Corp. v. Argonaut Ins. Co.*, 2008 U.S. Dist. Lexis 35135 (S.D.N.Y.) involves a series of five panel orders that are so complex in terms of what they say and infer as to be impossible to summarize in any meaningful way. At the end of the day, however, the panel issued a "Second Order Clarifying and Modifying Provisional and Final Awards" that explained its intent on the item in dispute in the confirmation hearings *i.e.* recovery by the cedent on certain claims. The significant point is that the

court carefully sifted through the panel's rulings to find logic and consistency that supported clarification of the panel's various rulings and not impermissible modification.

### III. Limitations on the Clarification Exception

The generally stated limitation on the ability of a panel to clarify an ambiguity is that a panel cannot modify or reconsider its prior ruling.<sup>6</sup> The case law below demonstrates how courts have applied this limitation.

*La Reunion Francaise v. Martin*, 1995 U.S. Dist. Lexis 7435 (S.D.N.Y.) *aff'd* 1996 U.S. App. Lexis 9578 (2<sup>nd</sup> Cir.) involved an order of a single arbitrator for the payment of "past loss and expenses". Due of ambiguity of this language, the court remanded the award to the arbitrator for clarification. The term in question was defined in a Claims Control Clause which did not play a part in the original proceeding. The arbitrator provided the requested clarification in a Final Award with a reference to the Claims Control Clause. The cedent objected arguing that the arbitrator modified his award rather than clarifying it thus "exceeding his status as *functus officio*."<sup>7</sup> The court disagreed:

The Final Award itself provides no evidence that Arbitrator Fisher violated the doctrine of *functus officio*. The court asked him to clarify what he meant by "past expense," and he answered that question using a formula that both parties agreed was appropriate: . . . Arbitrator Fisher's Final Award reveals neither evidence that he reversed his first Award, nor proof that his decision was influenced by arguments offered by the parties that were not part of the arbitration proceeding. Just because one of the parties may have added new arguments does not mean that the arbitrator retried an issue already decided. . . .

Under these circumstances, it cannot be said that petitioner has met the heavy burden of proof for vacating Arbitrator Fisher's Final Award.<sup>8</sup>

A panel issued an award to the effect that certain sums should be paid by the reinsurers to the cedent and included in the award mechanisms for such payments in *American Centennial Ins. Co. v. Universal Marine Ins. Co.*, 1990 U.S. Dist. Lexis 4209 (S.D.N.Y.). Subsequent to the award, setoff issues arose which had not presented to the panel and the cedent petitioned for a clarification of the award. The panel clarified the award by removing the payment mechanisms but retaining the award to the cedent. The panel was attempting to avoid any implication concerning the ability to set off against debits or credits arising from other contracts not before the panel. The court found the clarification consistent with the original award and that under the relevant circumstances, "the Clarification did not modify the Award but interpreted the Panel's intent not to give any special consideration to the offset claim under the Award."<sup>9</sup>

*Clarendon National Ins. Co. v. TIG Reinsurance Co.*, 1997 U.S. Dist. Lexis 18912 (S.D.N.Y.) involved a remand to the arbitration panel to clarify certain points in its award. On reviewing the briefs on remand, the panel realized that it had overlooked the correction of a sum which was part of the panel's award on a different point. When the panel corrected the award accordingly, the reinsurer argued that the panel was *functus officio* on this point. In upholding the correction, the court admitted that it did not fall within the exception for correction of mistakes evident on the face of the award but went on to question the efficacy of the *functus officio* rule itself:

In a case like this one, the *functus officio* doctrine may simply have outlived its usefulness. . . .

Arbitrators should simply be permitted to correct errors – but only errors – upon remand even if the particular issue was not remanded. This holding in no way gives arbitrators *carte blanche* to alter any decision previously rendered. Given the unusual circumstance – namely, that the arbitrators acknowledge a mathematical error, one that neither party disputes – equitable factors in this case weigh in favor of Clarendon, and the motion to confirm will be granted.<sup>10</sup>

#### IV. Power of the Court to Remand to Arbitrators for Clarification

There is no question that a court can remand an ambiguous arbitration award to the arbitration panel for clarification.<sup>11</sup> For instance, in *M & C Corp. v. Behr*, 326 F.3d 772 (6<sup>th</sup> Cir. 2003) a district court initially confirmed an award and then encountered an ambiguity when trying to enforce it. The court remanded the issue to the arbitrator who resolved the issue. One of the parties challenged the propriety of the remand but the court rejected this challenge:

“A remand is proper, both at common law and under the federal law of arbitration contracts, to clarify an ambiguous award or to require the arbitrator to address an issue submitted to him but not resolved by the award.” The authority to order a remand derives from a recognized exception to the *functus officio* doctrine, which holds that an arbitrator’s duties are generally discharged upon the rendering of a final award, when the arbitral authority is terminated. However, “where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify.”<sup>12</sup>

See also *La Reunion Francaise v. Martin*, 1996 U.S. App. Lexis 9578 (2<sup>nd</sup> Cir.); *Lanier v. Chattawood Ins. Co.*, 936 F.Supp. 839 (M.D.Ala. 1996); *Security Ins. Co. of Hartford v. Trustmark Ins. Co.*, 2006 U.S. Dist. Lexis (D. Ct. 2006).

#### V. Analysis

The case law suggests that the clarification exception to the *functus officio* doctrine is a broad exception which allows arbitration panels to resolve inadvertent ambiguities in the orders themselves or the way in which they are implemented. Indeed, one court attributes a heavy burden of proof to one who challenges a clarification. The “bright line” limitation seems to be that a panel may not change the substance of prior rulings or address new issues. Since arbitration panels seldom desire to reverse themselves or address new issues, the clarification exception is a powerful tool for a panels to correct inadvertent ambiguities in their orders.

#### ENDNOTES

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<sup>1</sup> Thomas A. Allen, Robyn D. Herman, *Clarification, Reconsideration and the Doctrine of Functus Officio*, ARIAS Quarterly, Vol. XI No. 2 at 5 (2004)(hereinafter “Allen and Herman”).

<sup>2</sup> *Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, 943 F.2d 327, 332 (3<sup>rd</sup> Cir. 1991).

<sup>3</sup> 943 F.2d at 334.

<sup>4</sup> 2003 U.S. Dist. Lexis 13118 \*17.

<sup>5</sup> 1990 U.S. Dist. Lexis 481 \*3-4.

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- <sup>6</sup> Allen and Herman at 7. *See also Arch Development Corp. v. Bioment, Inc.*, 2003 U.S. Dist. Lexis 13118 \*16 (N.D. Ill.); *Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, 943 F.2d 327, 334 (3<sup>rd</sup> Cir. 1991).
- <sup>7</sup> 1995 U.S. Dist. Lexis \*6.
- <sup>8</sup> *Id.* at \*10.
- <sup>9</sup> 1990 U.S. Dist. Lexis 4209 \*17.
- <sup>10</sup> 1998 U.S. Dist. Lexis 18912 \*13-4.
- <sup>11</sup> Allen and Herman at 7.
- <sup>12</sup> 326 F.3d 772 at 782. (internal citations omitted).