SOMETHING TO DO OR NOT DO?: REFLECTIONS AND RECOMMENDATIONS ON ARBITRATORS' MAKING AWARDS ON THE BASIS OF GROUNDS NOT ADVANCED BY THE PARTIES

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SOMETHING TO DO OR NOT TO DO?: REFLECTIONS AND RECOMMENDATIONS ON ARBITRATORS' MAKING AWARDS ON THE BASIS OF GROUNDS NOT ADVANCED BY THE PARTIES

In an Internet article regarding arbitration in Great Britain, Tony Bingham, a barrister, arbitrator, and visiting professor of law at the University of Ulster, commented upon the proposal by the then-newly inaugurated honorary chairman of the Chartered Institute of Arbitrators to place novice arbitrators into a formal mentor relationship with experienced arbitrators. Announcing that he viewed arbitration as needing reforms, and focusing on his own area of expertise, construction dispute arbitration, Mr. Bingham made observations that apply not only to the arbitration of other matters but to arbitration on this side of the Atlantic as well:

> *Now, let's be blunt. Arbitration has taken a lot of stick in recent years*. It is the place where building people traditionally go to have their disputes resolved. The disputing parties have their differences of opinion "tried" by a person from their own industry.
>
> *The criticism is that some construction arbitrators are useless. Yet they make decisions that are wholly binding and difficult to overturn; decisions which can destroy companies, destroy jobs, ruin bank accounts. Got the idea? Arbitrators probably have more power than judges. So these folk have to be ever so good at taking on this huge responsibility.*
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> In his address [the new chairman] said that he frequently heard lawyers say that they did not recommend arbitration, "because the quality of arbitrators was inconsistent, varying from excellent to appalling."

"A Chicken and Egg Question," *The Column* (www.tonybingham.com) (updated Aug. 2000) (emphasis added).

Mr. Bingham's commentary highlights two points that serve as the underpinning of our examination today. First, we will focus on an aspect of the enormous powers vested in

arbitrators and the problematic ramifications of those powers from the standpoint of public relations. Simply put, arbitration is getting something of a "bad rap" lately and much of that "bad rap" springs from those powers. Second, we will investigate mechanisms and procedures that can be adopted by both the arbitrating parties and the arbitrators themselves to address these problems and assist in restoring the usefulness and attractiveness of arbitration.

More importantly, both of these points will be discussed in the context of a larger question—whether arbitrators should decide cases on grounds not raised by the parties. As will be seen, that arbitrators can do so is, by and large, a fact of life. Whether they should do so in the interest of arriving at a legally and morally just result in the abstract or not do so in the interest of meeting the parties' perceptions of the issues in dispute and satisfying them that justice is done in a practical way presents a challenging question that implicates the purposes and effectiveness of arbitration as well as its future as a viable means of dispute resolution.

With respect to the powers of the arbitrator, they perhaps are no better appreciated than by considering them in light of the reviewability of the arbitrator's decision. At bottom, arbitrators' decisions are virtually "bullet-proof." The standard of review to which arbitration awards are subjected is or should be familiar to every arbitrator.

Believe it or not, parties to arbitration awards are sometimes dissatisfied with the results of the award. Under the Federal Arbitration Act, a party to the arbitration may move to confirm the award within a year after the rendition of the award. 9 U.S.C. § 9. Usually,

it is at this time that a dissatisfied party will make its dissatisfaction known, although it can do so on its own motion. Under the Act, the court does have the power to consider a party's challenge to the award. Upon a motion to confirm, the court may confirm the award outright, it may vacate the award, or it may modify and correct the award. *Id.* §§ 10, 11. The court can also, on the dissatisfied party's motion, vacate, modify, or correct the award.

At bottom, when an award is confirmed outright, such confirmation, of course, means that the court has implemented the award as a judgment exactly as the award was rendered. Even if a party has been dissatisfied with the award, they must live with it. Thus, for the dissatisfied parties to prevail they must persuade the court to vacate or modify the award. But the court's role in confirming or vacating the award is severely restricted *Oinoussian S.S. Corp. of Panama v. Sabre Shipping Corp.*, 224 F. Supp. 807 (S.D.N.Y. 1963). The courts will not retry matters submitted to arbitration on their merits. *General Construction Co. v. Hering Realty Co.*, 201 F. Supp. 487 (E.D.S.C. 1962), *appeal dismissed*, 312 F. 2d 538 (4th Cir. 1963). As these cases suggest, the bases for vacating, modifying, or correcting an award are very narrow.

An arbitration award may be vacated (1) where the award was procured by corruption, fraud, or undue means, (2) where there was evident partiality or corruption in the arbitrators, (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, despite the existence of sufficient cause to do so, refusing to hear pertinent and material evidence, or of engaging in any other misbehavior which prejudices the rights of a party, or

(4) where the arbitrators exceeded their powers or by so imperfectly executing them that a mutual, final, and definite award upon the submitted matter was not made. 9 U.S.C. § 10 (a).

Apart from complaints about an arbitrator's alleged fraud or related misconduct—a charge that most often is extraordinarily difficult or impossible to prove—a dissatisfied party contends that the arbitrator was mistaken as to the law or mistaken as to the facts. Insofar as the arbitrator's mistakes of law are concerned, arbitration awards will not be vacated merely because the arbitrator misinterpreted the law. *Republic of Korea v. New York Navigation Co.*, 469 F.2d 377 (2d Cir. 1972). Indeed, the award will not be vacated even if the arbitrator erroneously rejects a valid and even dispositive defense. *Flexible Manufacturing Systems Party, Ltd. v. Super Products Corp.*, 86 F.3d 96 (7th Cir. 1996). The dissatisfied party must establish that the arbitrator knew the law and then deliberately disregarded the law. *Id.* Similarly, factual errors, even if they are clear and gross, do not justify the vacation of an award. *Gingiss International, Inc. v. Bormet*, 58 F.3d 328 (7th Cir. 1995). Thus, vacating an award on the grounds usually associated with the appeal of a judicial decision, that is a mistake of fact or law, is almost never possible.

An arbitration award may be modified or corrected (1) where there was an evident miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award, (2) 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, or (3) where the award is imperfect in matter of form not affecting the merits of the controversy. 9 U.S.C. § 11.

The fact that an award is ambiguous affords no basis for modifying or correcting an award. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960). The types of mistakes specified in § 11 are quite precise and narrow. Therefore, it is not enough that a material mistake was made. The mistake must be "evident"—that is, it must appear on the face of the award itself. *Apex Plumbing Supply, Inc. v. United States Supply Co.*, 142 F.3d 188 (4th Cir. 1998). This standard is extremely stringent in and of itself. But when combined with another practical matter, the requirements of § 11 become virtually impossible to satisfy. Specifically, the Arbitration Act does not require that the arbitrator render any findings of fact and conclusions of law. Frequently, awards are made which simply recite in whose favor the award is made and in what amount. *Wall Street Associates, L.P. v. Becker Paribas, Inc.*, 27 F.3d 845 (2d Cir. 1994). It is easy to understand, then, why the first ground for correcting or modifying an award is almost never satisfied.

The third ground for correcting or modifying an award—where the award is imperfect in matter of form not affecting the merits of the controversy—is, by definition, of no real use to a dissatisfied party. In short, the correction of an award as to its form regarding a matter not affecting the merits of the controversy is not likely to be of much consolation to the dissatisfied party.

This leaves for further discussion only one ground for modifying an award—the fact that the arbitrator has made an award on a matter "not submitted" by the parties. This ground bears a connection to a ground for vacating an award, that "the arbitrators exceeded their

powers." Both grounds derive their legitimacy from the extent of the powers granted to the arbitrators by the parties and by the law. Necessarily, however, an arbitrator's powers spring into existence only when a right or duty to arbitrate first exists. An arbitrator can have no power whatsoever unless the dispute must be submitted to arbitration.

The existence of a right or duty to arbitrate, and the extent of the right and duty, are in the first instance, questions of contractual intent. Whether a dispute must be arbitrated is purely a matter of contract; parties cannot be required to arbitrate any matter which they have not agreed to arbitrate in the first instance. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). If the parties have agreed to arbitrate a dispute, how do their intentions limit the powers of the arbitrator? More specifically, should arbitrators decide cases on the basis of analysis not raised by the parties?

Whether arbitrators should decide a case on grounds other than those actually raised by the parties is a question of ethical and practical significance. Ethically speaking, there can be no doubt that arbitrators strive, as they should, to do justice for the parties. If the parties do not properly analyze an issue, can justice be done by ignoring the proper analysis?

In this regard, I am reminded of an actual judicial case on appeal to a state supreme court. The issue involved the meaning of a statute which had never before been construed as to the particular issue before the court. The appellant, represented by a well-respected firm, argued that the trial court had misinterpreted the statute for specified reasons. The appellee, of course, contended that the trial court had interpreted the statute with God-like

wisdom. Unfortunately, the appellant had not investigated the legislative history behind the statute. That history completely supported and vindicated the appellant's argument.

Unlike the appellant, the court's law clerk had located the legislative history and informed the court as to its import. Upon questioning by the court, the clerk informed the court that the appellant had not mentioned in its briefs the legislative history of the statute. The court then affirmed the trial court's decision and made no mention of the legislative history in its opinion. Was justice served? Certainly, the appellant had raised the grounds for deciding the case in its favor, but it had not raised the appropriate evidence or theory. Can the appellate court's decision truly be justified on the basis that parties who do not raise a theory or introduce certain evidence waive their claims on the basis of that theory or evidence?

As will be observed, this example illustrates the opposite of our inquiry here today—whether arbitrators should decide cases on grounds not raised by the parties. In fact, it illustrates the problems existing when a case is decided strictly on the grounds presented. And it illustrates how and why a good argument can be made for deciding cases on grounds not presented by the parties. But if the court was unwilling to go beyond the issues and evidence as presented, should arbitrators be similarly unwilling? Perhaps this question cannot be given a final answer, but it seems clear that the same considerations surrounding the question in a judicial context exist no less in the arbitration context.

But the arbitration context also carries with it a concern not present in the judicial context. That is, arbitration is, as already noted, first and foremost a matter of the parties'

agreement. Parties must first voluntarily choose to arbitrate a dispute. Succinctly stated, arbitration is a matter of choice. It is nowadays a choice that the law encourages. *Santorino v. A.G. Edwards & Sons, Inc.*, 941 F. Supp. 609 (N.D. Tex. 1996). Presumably, professional arbitrators see a value in arbitration that goes far beyond the fees that are paid to them. But since arbitration is a matter of the parties' voluntary choice, what factors affect that choice?

Although arbitration has undoubtedly gotten more expensive over the years, it still generally provides a more prompt and economical resolution of disputes and a resolution that, because of the limited reviewability of arbitration decisions, a resolution that generally carries greater "finality" than the final decision of a trial court, or even of an intermediate appellate court.

The limited reviewability is in some very real senses a benefit of arbitration. But it also can serve as a drawback. Parties who are dissatisfied with an arbitration decision typically have no real recourse by which to test the validity of their dissatisfaction or even to give vent to that dissatisfaction. Furthermore, arbitrators frequently render their awards in an inscrutable fashion—"I find for the claimant in the amount of $500,000.00." Given the limited reviewability of arbitration awards and given that large amounts of money and important business matters are frequently at stake in arbitration cases, would it come as any surprise that businesses might become a little reluctant to entrust a dispute to arbitration? In light of the limited reviewability of arbitration awards, would everyone in this room be completely nonchalant about committing to an arbitration panel a case involving millions of dollars?

Our British colleague in arbitration opines that arbitrators "probably" have more power than judges. In fact, there should be no "probably" to it. Arbitrators have a great deal more power than judges precisely because their awards are reviewable only in very limited fashion. This fact should behoove arbitrators to recognize the full and unique extent of their power and its potential impact of discouraging parties from ever agreeing to arbitration. This recognition should also behoove arbitrators to strive to conduct themselves in the most professional manner possible and to behave in a way that reflects not just credibility but credibility on the whole arbitration process.

Even so, an arbitrator acting in the most professional manner might still ruffle more than just a few feathers by deciding a case on grounds not raised by the parties. Plainly, the interests of justice can be well served by arbitrators who decide cases on grounds not raised by the parties. That arbitration agreements may be corrected or modified on the basis that the arbitrators decided a matter not submitted to them does not preclude the arbitrators from deciding cases on grounds not raised by the parties. The basis for correction or modification only concerns the substantive matters upon which an award is made or denied. *Sociedad Armadora Aristomenis Panama, S.A. v. Tri-Coast S.S. Co.*, 184 F. Supp. 738 (S.D.N.Y. 1960). It does not concern, at least insofar as the reported case law is concerned, the reasons upon which an award is made on a claim that was submitted to arbitration.

Likewise, the fact that an award can be vacated because the arbitrators exceeded their powers does not preclude the arbitrators from deciding a case on grounds not raised by the parties. Arbitrators exceed their powers, for example, by determining the obligation of an

entity which is not a party to the arbitration, *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama,* 312 F.2d 299 (2d Cir.), *cert. denied*, 373 U.S. 949, 83 S. Ct. 1679, 10 L Ed. 2d 705 (1963), deciding issues not being contested by the parties, *Matteson v. Ryder System, Inc.*, 99 F.3d 108 (3d Cir. 1996), or by failing to meet their obligations as specified in the parties' contract, *Western Employers Insurance Co. v. Jefferies & Co.*, 958 F.2d 258 (9th Cir. 1992). As before, insofar as the reported case law is concerned, arbitrators do not exceed their powers by deciding cases on grounds not presented to them by the parties. So long as they are deciding a matter disputed and submitted by the parties and embraced within the agreement to arbitrate, they stay well within the limits of their powers.

Clearly, then, arbitrators can decide cases on grounds not raised by the parties. Whether they should do so seems to be a question best left to the sound discretion of the arbitrator under the circumstances of the particular case. In the end, this is a question best answered not by some inflexible rule but by the interests of justice as they affect that actual dispute being heard. It may well be, though, that the parties might be dissatisfied with an arbitration decision that appears to be coming "out of left field," on completely unexpected bases that have not been addressed by the parties. In this regard, the parties can take steps to insure their complete satisfaction or at least maximize their control over the decisionmaking process to the extent that they are or fear that they might be dissatisfied with such an arbitration award. Moreover, arbitrators can themselves take steps to insure that the parties are satisfied with the award whether or not the arbitrators limit themselves to the grounds actually raised. At the very least, they can minimize the level and legitimacy of any

dissatisfaction with the decision. Not only would either option make any particular arbitration award more acceptable in the parties' eyes, either option would serve the salutary purpose of encouraging parties to arbitrate their cases in the future, confident that the process will be conducted in a manner that they perceive as fair.

As for the parties taking steps to insure their own satisfaction, the salient point to be made is that the arbitration process is a matter of the parties' contractual agreement. Thus, in the initial contract calling for arbitration, the parties could insert an agreement specifically permitting or denying the arbitrator the power to decide the submission on the basis of grounds not actually briefed. If such a power were denied, for example, then the arbitrators would exceed their powers by rendering an award on the basis of matters not briefed to the panel. Because an arbitrator's exceeding the powers granted by contract constitutes a basis for judicial review of the arbitration award, the parties would have good assurance that their analysis of the issues would shape or even dictate the result to be reached. In short, by careful drafting of the initial arbitration agreement the parties can eliminate to some extent the "bullet proof" quality of arbitration awards that might otherwise dissuade the parties from agreeing to arbitrate their disputes in the first instance.

Indeed, expanding the basis of judicial review by contract has received some scholarly and judicial approval. Sasser, *Comment: Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 Cumb. L. Rev. 337-67 (2001); Kenneth M. Curtin, *Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 55 Disp. Resol. J. 56 (No. 4, 2000-01) (part I); Kenneth M. Curtin, *Contractual Expansion and*

Limitation of Judicial Review of Arbitral Awards, 56 Disp. Resol. J. 74 (No. 1, 2001) (part II). One might speculate that courts may ultimately resist too much expansion of the powers of judicial review for the reason that, if arbitration is to be subjected to the full range of appellate-style review, then the disputes might as well be handled by a trial court in the first instance. In any event, the drafting of an arbitration agreement which dictates whether the arbitrators can decide the submission on the basis of issues not raised by the parties would not seem to be the type of agreement that a court would decline to enforce. Presumably, then, by exerting more control over the arbitral process, the parties will make arbitration a more desirable and attractive dispute resolution mechanism. For those who are already party to an arbitration agreement, the same result could be reached by mutually agreeing prior to the submission that the submission should (or should not) be resolved solely on the issues actually raised by the parties.

As for the arbitrators taking steps to insure that the parties are satisfied with the results of any given arbitration, the arbitrators would be well advised to specifically apprise the parties that they are considering disposing of the case on grounds not presented by the parties and inviting a briefing or argumentation on those grounds. Such a notification would prevent the parties from being surprised at the basis for the decision and maximize the chances of the parties' satisfaction with the fairness of the decision and the attractiveness of arbitration as a dispute resolution mechanism. The arbitrators might also issue a thorough written opinion, complete with findings of fact and conclusions of law (the parties might even require such

an opinion by contract). By so doing, the arbitrators will further prevent the parties from feeling "left in the dark" regarding some unexpected basis for an award.

Arbitration is hardly at a crisis point in its usefulness as a mechanism for resolving disputes. Nonetheless, the contractual attempts to provide for increased reviewability of arbitration awards indicates that parties, particularly commercial parties, are becoming less and less satisfied with a "one shot winner takes all" approach to resolving their disputes. Amidst this reality of extant dissatisfaction and calls for change, the bedeviling task of serving the interests of justice and doing justice as between the parties continues. Whether to decide a case solely on the grounds presented by the parties calls for a recognition not only of the ethical and legal standards to which professional arbitrators are bound but for a sensitivity to this reality. This is not to say that the interests of justice are to be sacrificed in order that arbitration persist as a dispute resolution mechanism but, rather, to say that the perceptions of the parties themselves may sometimes be the best guide to satisfying them that justice has been done. When those perceptions are inappropriate, arbitrators will do the parties, themselves, and the arbitration process a favor by insuring that the parties are given (1) an opportunity to address the arbitrator's perceptions of the real issues, and (2) an explanation of the arbitrator's reasoning rather than simply an inscrutable and cryptic award to one party or the other.