

# Does Final Mean Final? Arbitrators Can “Clarify” Award, Second Circuit Holds

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One of the main benefits of arbitrating a dispute is obtaining a *final* binding award. A number of principles work to promote this fundamental building block of the arbitration ecosystem. For example, 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. But there are exceptions to that doctrine. In *Gen. Re Life Corp. v. Lincoln Nat’l Life Ins. Co.*, No. 17-2496-CV, 2018 WL 6186078 (2d Cir. Nov. 28, 2018), the Second Circuit Court of Appeals<sup>[1]</sup> recognized “an exception to *functus officio*: where an arbitration award is ambiguous, . . . the arbitrators retain their authority to clarify that award.” What constitutes ambiguity and clarification, of course, is open to interpretation.

## **Factual Background**

The case involved a dispute between an insurance company and its reinsurer over premium increases. The insurance company elected to arbitrate the rate increase as provided under the parties’ agreement. The arbitration panel held a multi-day hearing in June 2015, and then issued its award on July 1, 2015 (“Award”). The Award directed the parties to work together in calculating the amount of monies owed, and stipulated that “[a]ny disagreement over the calculations shall promptly be submitted to the [arbitral panel] for resolution.” The arbitration panel also explicitly retained “jurisdiction over this matter to the extent necessary to resolve any dispute over the calculation and payment of the amounts awarded herein.”

The parties subsequently failed to reach agreement on how to calculate some of the premiums. The insurance company wrote to the arbitral panel, set forth the parties’ dispute regarding the language of the Award and what that meant regarding the calculation of premiums, and requested that the panel settle the issue. The reinsurer objected to that request, arguing that it was beyond the authority of the arbitrators because it sought reconsideration of, and a fundamental change to, the calculation methodology unambiguously ordered in the Award.

On November 19, 2015, over a dissent, the arbitral panel issued a clarification (“Clarification”). The panel stated that the Award contained “ambiguities requiring clarification,” and that both parties were reading the Award in a manner inconsistent with the language of the reinsurance agreement. The panel then ordered the reinsurer to make certain payments under the agreement. This prompted the reinsurer to petition a U.S. federal district court to confirm the original, unclarified Award, and the insurance company filed a cross-petition to confirm the Clarification. The district court denied the reinsurer’s petition to confirm the original Award and granted the insurance company’s petition to confirm the Clarification. The reinsurer subsequently appealed that decision.

### **The Second Circuit’s Decision**

On November 28, 2018, the Second Circuit upheld the district court’s decision. In recognizing the principle of *functus officio*, the court noted that “[t]he *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.” The court explained that the rationale for the principle was that “it is necessary to prevent re-examination of an issue by a nonjudicial officer potentially subject to outside communication and unilateral influence.” As the Seventh Circuit Court of Appeals<sup>[2]</sup> in another case noted,

“The doctrine is based on the analogy of a judge who resigns his office and, having done so, naturally cannot rule on a request to reconsider or amend his decision. Arbitrators are ad hoc judges—judges for a case; and when the case is over they cease to be judges and go back to being law professors or businessmen or whatever else they are in private life, like Cincinnatus returning to his plow. [But] [o]nce they return to private life, arbitrators are less sheltered than sitting judges, and it is feared that disappointed parties will bombard them with ex parte communications . . .”<sup>[3]</sup>

The practical consequence of *functus officio* is that an arbitrator cannot revisit its decision, thus providing finality to the arbitration process. However, in affirming the district court’s decision, the Second Circuit recognized that *functus officio* carries an exception where the award “fails to address a contingency that later arises or when the award is susceptible to more than one interpretation.” The court further found that the exception is consistent with the well-established rule that when asked to confirm an ambiguous award, the district court should instead remand to the arbitrators for clarification.

In seeking to provide some guidance to stakeholders, the Second Circuit held that an 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. In doing so, the court noted that the exception is necessary to further “the twin objectives of arbitration: settling disputes efficiently and avoiding long and expensive litigation.”

In confirming the Award, the Second Circuit joined five other circuit courts that have also recognized an exception to *functus officio*. For example, in *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local No. 24*, 357 F.3d 546 (6th Cir. 2004) the Sixth Circuit Court of Appeals<sup>[4]</sup> held that the arbitrator retained the authority to clarify an award requiring an employer to compensate workers for work previously performed at a higher base rate than other workers received. Clarification was necessary because the award was ambiguous as to exact definition of what constituted a higher base rate, and thus the arbitrator retained jurisdiction in the award to resolve disputes between employer and union with respect to implementation of an appropriate remedy.<sup>[5]</sup> Similarly, in *Brown v. Witco Corp.*, 340 F.3d 209 (5th Cir. 2003), the Fifth Circuit<sup>[6]</sup> held that an arbitrator was allowed to clarify how the parties should calculate an employee's back pay award.

### **Keep Calm and Clarify: Where Do We Go From Here?**

What constitutes ambiguity in an award is of course unclear and subject to interpretation. The same could be said of what constitutes a "clarification". These issues will need to continue to be litigated and clarified, acting as a further reminder of the ongoing conversation and symbiotic relationship between arbitration and litigation.. But the decision highlights the importance of understanding how the applicable law of the arbitration may affect an arbitrator's authority to take a second look at the award where necessary.

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[1] The United States Court of Appeals for the Second Circuit is the U.S. federal court of appeals overseeing the states of Connecticut, New York, and Vermont.

[2] The United States Court of Appeals for the Seventh Circuit is the U.S. federal court of appeals overseeing the states of Illinois, Indiana, and Wisconsin.

[3] *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 846-47 (7th Cir. 1995).

[4] The United States Court of Appeals for the Sixth Circuit is the U.S. federal court of appeals overseeing the states of Kentucky, Michigan, Ohio, and Tennessee.

[5] See also *Brown v. Witco Corp.*, 340 F.3d 209, 219 (5th Cir. 2003) ("An arbitrator can ... clarify or construe an arbitration award that seems complete but proves to be ambiguous in its scope and

implementation.”); Glass, Molders, Pottery, Plastics & Allied Workers Int’l Union v. Excelsior Foundry Co., 56 F.3d 844, 847 (7th Cir. 1995) (same); Colonial Penn. Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 334 (3d Cir. 1991) (“[W]hen the remedy awarded by the arbitrators is ambiguous, a remand for clarification of the intended meaning of an arbitration award is appropriate.”); McClatchy Newspapers v. Central Valley Typographical Union No. 46, 686 F.2d 731, 734 n.1 (9th Cir. 1982) (same).

[6] The United States Court of Appeals for the Fifth Circuit is the U.S. federal court of appeals overseeing the states of Louisiana, Mississippi, and Texas.