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Award Rectification: Proposal on Solving the Functus Officio Problem

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The Arbitration Committee of the New York City Bar Association has recently published a report titled: "The *Functus Officio* Problem in Modern Arbitration and a Proposed Solution" (the "Report"). In United States arbitration, the *functus officio* doctrine instructs that once an arbitrator finishes performance of her office, *i.e.*, renders an award, her authority as an arbitrator is exhausted. The doctrine effectively establishes finality of arbitral awards by stipulating that arbitrators do not have the authority to alter an award after it was rendered (save for very narrow circumstances). The titular problem in the Report is that the contemporary application of the *functus officio* doctrine is surprisingly chaotic, which as a result undermines the finality of awards it was meant to protect. The proposal in the Report is to offer parties an opt-in rule, which would authorize arbitrators to rectify their award (i.e., make substantive corrections) within a strictly short timeframe after an award is rendered. The intended effect of the Report's proposal is to allow parties to expressly decide on the scope of post-award review at the outset of proceedings to limit the risk of costly post-arbitration litigation.

The historical development of the *functus officio* doctrine follows a clash between finality and accuracy, in which the former slowly succumbs to the latter. At its inception in thirteenth century England, the doctrine was meant to serve as a deterrent for judges who would engage in a habit of altering their records. At that time, the doctrine was at its strictest and did not allow for any subsequent modification of judgments whatsoever. This, according to William Blackstone, led to a "great obstruction of justice" as judges were forced to follow even clearly erroneous judgments. (3 WILLIAM BLACKSTONE, COMMENTARIES 409-411 (1765).) When this doctrine reached United States arbitration in the nineteenth century, it was applied in a similar fashion. According to one early ruling, "If an arbitrator makes a mistake either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal, and the court has no power to revise the decisions of judges who are of the parties' own choosing." (*Patton v. Garrett*, 21 S.E. 679, 682 (N.C. 1895).)

At the turn of the twentieth century, the case law reflected some development towards allowing correction of at least some obvious clerical errors in awards. The Federal Arbitration Act (FAA) of 1925 provided a procedure for judicial correction of some evident mistakes. In 1967, the U.S. Court of Appeals for the Third Circuit explicitly recognized that arbitrators may correct apparent mistakes and clarify ambiguities. (*La Vale Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569 (3d Cir. 1967).) Further practice specified that two generally recognized exceptions are (i) correction of an obvious typographical or computational error, and (ii) clarification of ambiguities that might

prevent effective enforcement or party compliance. (2 DOMKE ON COM. ARB. § 26:2.) The latest development in the settled case law was recognition that the *functus officio* doctrine is merely a default rule which applies only if the parties do not agree otherwise. (*Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 848 (7th Cir. 1995).)

Further evolution of the common law doctrine was halted by the rise of institutional providers of arbitration rules, which included their own provisions on correction and interpretation of awards, the so-called 'slip rules'. The current practice is dominated by these slip rules, and the default *functus officio* doctrine is applied only on relatively rare occasions in which no slip rules are agreed between the parties. The content of the slip rules shares a common basis with the *functus officio* doctrine (as described in Domke above) by generally permitting the arbitrators to correct clerical, typographical or computational errors. A minority of these rules do not go beyond these three categories (*e.g.*, R-50 of the AAA Commercial Arbitration Rules). The majority provides some additional maneuvering space for arbitrators by including an 'other' category of errors which may be corrected (*e.g.*, Art. 36 of the ICC Arbitration Rules). Other relatively frequent features are possibilities for parties to request interpretation of an award or an additional ruling on matters which were omitted in the original award. Nevertheless, none of the rules provide much guidance on correction of more substantive errors, such as overlooking an important piece of evidence or misunderstanding of a key legal rule. The question arises: what should an arbitrator do in case such substantive error occurs?

Inspection of the applicable statutory rules does not provide clear guidance as regards correction of substantive errors either. The FAA provisions only offer the above-mentioned judicial correction of awards, which does not extend beyond clerical and computational errors and situations where arbitrators awarded upon a matter not submitted to them. The New York Civil Practice Law and Rules (CPLR) mirror this rule. More interesting is the case law interpreting the statutory provisions (particularly in vacatur cases), in which courts displayed a range of views on addressing ambiguous and erroneous awards. In a number of rulings, the courts recognized arbitrators' power to interpret their awards (see more on this topic also here) and, in some vacatur cases, even remanded awards to arbitrators for clarification of ambiguities. (*E.g.*, *Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 111 (2d Cir. 2019).)

Another series of rulings, which took a liberal approach towards arbitrators' powers to modify awards, concerned interpretation of the institutional slip rules. In the *Dempsey Pipe* case (*T. Co. Metals v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329 (2d Cir. 2010)), the Second Circuit considered a case in which the arbitrator reduced an award of damages upon re-appreciation of certain evidence during award interpretation under the ICDR's slip rule. Although this 'interpretation' included a substantive modification of the award and re-consideration of evidence, the court held that the parties delegated power to interpret the slip rule to the arbitrator by adopting the ICDR rules. Therefore, the arbitrator's interpretation of the slip rule was not subject to judicial review. This approach was followed by the Fifth Circuit in the *Southwestern Bell* case (*Communication Workers v Southwestern Bell Tel. Co.*, 953 F.3d 822 (5th Cir. 2020)) but not by the U.S. District Court for the Southern District of New York in the *Black Diamond Capital* case (*Credit Agricole Corporate & Investment Bank v. Black Diamond Capital Management*, 2019 WL 1316012 (S.D.N.Y. Mar. 22, 2019)), in which the judge did not discuss the *Dempsey Pipe* case and simply vacated the amended award on the basis of manifest disregard of the law. Furthermore, when considering comparable circumstances under default rules of New York arbitration law, the New York Court of Appeals held in favor of restrictive application of the slip rule. (*American Int'l*

Specialty Lines Ins. Co. v. Allied Capital Corp., 35 N.Y.3d 64 (2020); see more on this topic here.)

The above overview shows that there is a significant lack of clarity as regards the extent of arbitrators' powers to correct and interpret their awards after an award has been rendered. When an arbitrator identifies an error in her award that does not fall in the clerical, typographical or computational category, there is little to no clear guidance in the applicable slip rules or relevant jurisprudence. Such arbitrator can refuse to correct the error relying on the finality of the award and lack of rules that would allow the correction, which will result in the party aggrieved by the error attempting to request a judicial correction. Alternatively, the arbitrator can correct the error relying on circumvention of the restrictive wording of the applicable slip rule and the *Dempsey Pipe* case, which will likely result in the party aggrieved by the correction applying for vacatur. Either way, the finality of the award is compromised, and the parties are likely to engage in costly litigation that they tried to avoid in the first place by choosing arbitration to resolve their disputes. This shows that the *status quo* is unsatisfactory and requires further attention.

The Report proposes a solution to the above-described problem. Since the common law *functus officio* doctrine is unlikely to evolve further in a world of slip rules, the Report opines that the institutional rule providers should take the lead. Their slip rules should be amended to include a mechanism that would allow arbitrators to "correct any mistake affecting the outcome in the Underlying Award that the party claims arises from oversight, omission or misapprehension of a matter of fact or law presented by one or more of the parties" (the Report, p. 42) in a strictly limited timeframe after rendering of an award (the proposal works with 20 days). The mechanism, named award rectification, should be available on an opt-in basis to allow parties to decide whether this mechanism is useful for the particularities of their dispute. The opt-in would occur at the outset of the proceedings and would require both parties to agree. The Report does not discuss a specific mechanism of how the parties would engage in the opt-in, instead leaving this to be determined by the rule providers. At the earliest, the parties could be required to express their position on the opt-in the request for arbitration and the answer to the request, respectively. At the latest, this issue could be discussed at the case management conference and memorialized in a procedural agreement such the ICC's Terms of Reference. Rejection of the opt-in may be interpreted as emphasizing that the arbitrators should follow the restrictive language of the standing slip rules. Therefore, either response would provide needed clarity on how an arbitrator should address substantive errors in awards and help parties to avoid post-award litigation.

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