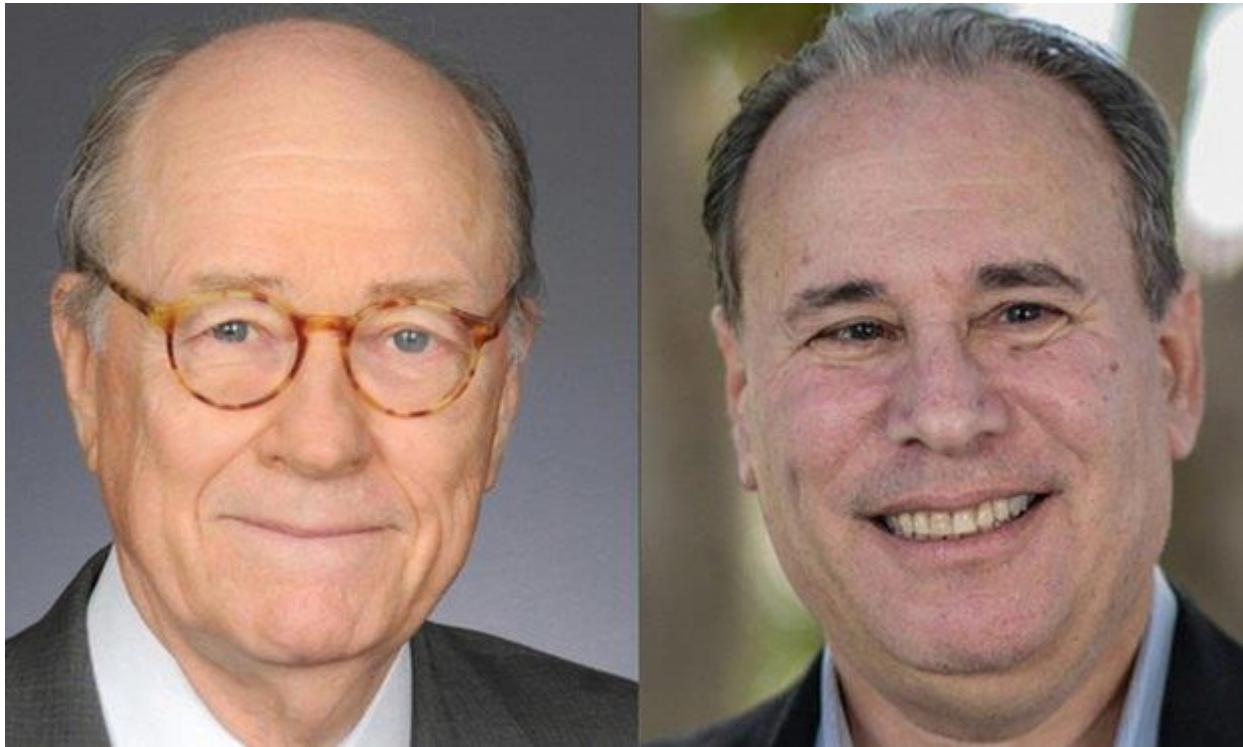


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Your Officio Might Not Be as Functus as You Were Led to Believe

In most instances, functus officio prevents further action by the tribunal, meaning that the parties—to their dismay, or delight, depending on their position in the case—are stuck with the award, even when the arbitrators have acknowledged the award contained an error and would like to correct it. A recent Second Circuit decision, however, shows that this doctrine is not necessarily as limited as many may believe.

By **Lawrence W. Newman and David Zaslow** | May 24, 2023 at 11:42 AM



Arbitrators, as adjudicators of commercial disputes, have circumscribed authority. They are retained by the parties to resolve their disputes and for no other purpose. The doctrine of functus officio (that is, having performed the office) holds that once an arbitrator renders a decision regarding the issues submitted, in the form of an award, he or she lacks any power to reexamine that decision. In most instances, functus officio prevents further action by the tribunal, meaning that the parties—to their dismay, or delight, depending on their position in the case—are stuck with the award, even when the arbitrators have acknowledged the award contained an error and would like to correct it. A recent Second Circuit decision, however, shows that this doctrine is not necessarily as limited as many may believe. See *Smarter Tools v. Chongqing SENCI Import & Export Trade*, 57 F. 4th 372 (2d Cir. 2023).

The first source for allowable changes to arbitral awards is institutional rules. The rules of most major arbitral institutions allow for “computational, clerical or typographical” errors to be corrected by the arbitrators on their own initiative, or at the request of the parties (always within stated time limits). See, for example, International Chamber of Commerce (ICC), Article 36; ICDR Article 36. The rules of many institutions also permit arbitrators to make additional awards—sometimes on their own initiative and sometimes only at the request of a party—as to any claim, counterclaim or cross-claim presented in the arbitration but not decided in the award. See, for example, LCIA Article 27; SIAC Rule 33.

Some rules go even further and allow arbitrators to “interpret” their awards. For example, ICDR Article 36 provides that “within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award.” Arbitrators may not do this sua sponte, as they can with clerical errors. And, interestingly, while the American Arbitration Association’s Commercial Rules (used in domestic cases) allow for arbitrators to correct clerical, typographical, or computational errors in the award, they do not allow for “interpretation.” Article 36 of the ICC Rules is like the ICDR Rules in that it allows a party to make an application “for the interpretation of an award.” It is not difficult to imagine how an arbitrator might, under the guise of “interpreting,” actually correct certain errors in an award. If, however, a specific change is not authorized by the arbitration rules, then resort must be had to the courts. As the Second Circuit has explained, the reason traditionally relied on for the *functus officio* doctrine is that it is necessary “to prevent reexamination of an issue by a nonjudicial officer potentially subject to outside communication and unilateral influence.” *Smarter Tools*, 57 F. 4th at 379. There are, however, exceptions to the *functus officio* doctrine. Under Second Circuit jurisprudence, when an award is ambiguous, a district court may remand to the arbitrators for clarification. *New York Bus Tours v. Kheel*, 864 F.2d 9, 12 (2d Cir. 1988). The rationale is that, without such guidance, the district court has no clear instructions on how to enforce the award. Another exception is where an arbitral award fails to address a contingency that later arises. *General Re Life Corp. v. Lincoln National Life Insurance*, 909 F.3d 544, 548 (2d Cir. 2018).

In *Smarter Tools*, the losing party in the arbitration, Smarter Tools, brought an action to set aside the award on the grounds that the arbitrator had not complied with the parties’ requirement that he render a reasoned award. The district court agreed and ordered the arbitrator to issue such an award. The arbitrator then issued an award with more reasoning, relying in part on his assessment of witness credibility. The district court confirmed the award as amended. On appeal, among other arguments, Smarter Tools argued that, upon the district court’s initial finding that the award was not a reasoned award, the doctrine of *functus officio* barred the district court from ordering a remand for a reasoned award.

The Second Circuit noted that, although the issue of whether a court may remand for an arbitrator to produce a reasoned award was new for it, both the Sixth and Eleventh circuits had held that remand is proper under such circumstances. It also explained that a remand under these circumstances does not undermine the *functus officio* doctrine’s purpose of preventing arbitrators from changing their rulings after issuance due to outside influence by an interested party. Presumably, this was because the arbitrator was not being permitted to change his ruling, but only to provide the reasoning behind the ruling. In addition, the court said that the rationale for remanding to provide a reasoned award was consistent with the exception for remanding to clarify an ambiguous award. Thus, the Second Circuit held that, where a district court determines that an arbitrator failed to produce an award in the form agreed to by the parties, remand for a properly conformed order is a permissible choice.

The Second Circuit explained that this holding was also consistent with the Federal Arbitration Act (FAA). Smarter Tools had argued that the arbitrator’s failure to provide a reasoned award meant that, in the words of Section 10(a)(4) of the FAA, he had exceeded his power, the remedy for which is vacatur of the award. But the Second Circuit disagreed, saying that there was no question that the arbitrator had the power to reach the issues he did address. The court said the failure to provide a reasoned award fitted best under Section 11(a) of the FAA, which allows a court to “make an order modifying or correcting the award ... where the award is imperfect in matter of form not affecting the merits of the controversy.”

Although the rules of arbitral institutions and case law—such as that discussed above—can provide some relief from the *functus officio* doctrine, they only go so far. They do not answer the question of what can or should be done to prevent or otherwise deal efficiently with arbitral awards that are miscarriages of justice, especially those based on mistakes by arbitrators but which, because the arbitrators do not discover them until after the award was issued, they are powerless to correct because of their *functus officio* status.

A lesson that can be drawn from consideration of the remedies that have been proposed to deal with mistakenly decided awards is that the most effective way is for such awards not to be issued at all. One way of avoiding the issuance of such awards was contained in the proposal we made in our column titled “The Case for Distributing Draft Arbitration Awards.” See New York Law Journal, Jan. 28, 2021. There, we suggested that arbitral institutions consider permitting arbitrators to distribute draft awards to the parties so that, before the final award is issued, errors of law or fact may be corrected in response to comments from the parties, thereby eliminating the *functus officio* problem and expanding the field of correctible error.

Another way to help achieve this objective is for arbitral institutions to permit awards to be issued to the parties only after they have been reviewed by persons or committees within the institution. The ICC engages in such scrutiny. Nominally, this review is limited to the extent of assuring that all issues raised in the proceedings have been addressed in the award. Thus, this process does not involve changing, or requiring the arbitrators to change, the reasoning leading to outcomes in their awards. Anecdotally, however, the review is not always so limited and therefore might actually identify errors.

Another way of dealing with erroneous awards was proposed by a subcommittee of the Arbitration Committee of the New York City Bar Association in a detailed and thoughtful report issued in 2021 titled, “The *Functus Officio* Problem in Modern Arbitration and a Proposed Solution” (Report). The bar committee proposed that provider institutions, such as the American Arbitration Association, consider modifying their rules concerning arbitrators’ reconsideration of awards on the basis of mistakes that go beyond the ministerial.

The report described the current arbitration situation as “arguably a system in which substantive errors do often get corrected, but only through inefficient or dysfunctional procedures” in which arbitrators may be making substantive corrections to awards under the guise of clerical or computational corrections and courts are deferring to the arbitrators rather than nullifying their corrections. The report observed that a similar problem may arise when a tribunal clarifies or interprets its award at the request of a party and does so in a way that corrects a substantive error because arbitrators “who wish to be appointed in future disputes are probably disinclined to cast aside” applications where they conclude that they made a substantive error, with the alternative being to say that “they are powerless to fix it” because of *functus officio*. The result in the latter case may be, the report says, “Three years of post-award litigation may be consumed” The report sees similar problems of extensive litigation with respect to corrections in what may be disputed as interim or final awards, Report, p. 28.

In the bar committee’s solution, provider institutions would add a provision to their rules permitting a wider scope of corrections by arbitrators of substantive errors in awards when sought “within a specified time frame.” The correctible errors would be mistakes affecting the outcome of the underlying award that a party claims, arise “from oversight, omission, or misapprehension of a matter of fact or law presented by one of the parties,” but not matters of fact or law not previously presented (other than changes in controlling law). The parties would have to choose, in advance, on a case-by-case basis, whether to have such a regime. We are not aware that this suggestion has been as yet taken up by any institution.

The fundamental point is that arbitrators need to be careful in their rulings, avoiding failures to decide all issues and making sure their awards are delivered in clearly understood language. Of course, even awards that are set out in clear and unmistakable language may constitute rulings that some parties may consider to be wrong, but this potential is understood to be inherent in arbitration—no appeals on the merits—and has not detracted from the appeal of arbitration, particularly for the resolution of major international disputes. Fortunately, the level of professionalism in international arbitration tribunals is generally high, especially where, in significant cases, the involvement of three arbitrators gives greater assurance of well-considered—and correct—reasoned awards.

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