Hon. Jackson Lucky (Ret.)
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Review, reconsideration, and correction of an arbitration award by the arbitrator

THE LIMITED CIRCUMSTANCES UNDER WHICH ARBITRATORS CAN CORRECT THEIR OWN AWARDS

In many ways, arbitrations feel like court trials. There are legal disputes, lawyers, witnesses, court reporters (sometimes), and triers of fact (frequently retired judges).

Understandably, some litigants might believe that arbitrators can reconsider awards the same way judges can reconsider orders. But that's not true. An arbitrator's jurisdiction to modify an award is extremely limited. The arbitration agreement, the nature of the award, the timing of the request, and the applicable rules and law, may leave little, if anything, for an arbitrator to correct or modify.

The *functus officio* doctrine

A rule called the *functus officio* doctrine says that an arbitrator has no power "to redetermine the merits of any claim already decided." (*Bosack v. Soward* (9th Cir. 2009) 586 F.3d 1096, 1103 (*Bosack*).) The rule is the same under federal and state law. (*Heimlich v. Shivji* (2019) 7 Cal.5th 350, 362-363 (*Heimlich*).) After arbitrators issue awards, *functus officio* renders them powerless because they have completed their duties and functions under the original commission.

Functus officio protects non-judges (arbitrators) who act "informally and sporadically" against the "potential evil of outside communication and unilateral influence" and prevents them from reexamining their final decisions and revising their conclusions. (*International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Local 631 v. Silver State Disposal Service, Inc.* (9th Cir. 1997) 109 F.3d 1409 (*Teamsters*).)

Although one could see the wisdom of this rule when arbitrators worked "informally and sporadically," we don't live in that world now. Many arbitrators are full-time ADR professionals. Litigants and lawyers have their pick among arbitrators with decades of experience and retired judges. Moreover, both the law and established arbitration rules require arbitrators to follow the same or similar ethical standards that judges follow. One might question whether the evils *functus officio* seeks to prevent still exist. But that's an academic question because *functus officio* is the current state of the law.

Common-law exception and California rule

Under federal law, there is a narrow common-law exception to the *functus officio* doctrine:

> It has been recognized in common law arbitration that an arbitrator can correct a mistake which is apparent on the face of his award, complete an arbitration if the award is not complete, and clarify an ambiguity in the award.

(*Teamsters*, *supra*, 109 F.3d at 1411 (internal citations omitted).)

The California Arbitration Act (CAA) codifies this exception in Code of Civil Procedure section 1284. Under the CAA, an arbitrator may correct an "evident miscalculation in figures" or "evident mistake in the description of any person, thing or property" in the award. (Code Civ. Proc., § 1284.) In other words, the CAA allows an arbitrator to correct formal errors that do not affect the *merits* of the case.

Nuances

The law seems clear that *functus officio* applies when an arbitrator issues a final award, but there are nuances. To see whether a case is locked in *functus officio* jail, ask four questions and examine each:

1. Is the award final? *Functus officio* applies to final awards, but arbitrators frequently issue "final" awards, "partial final" awards, and "interim awards." What effect does the title have? The law says that titles are strong evidence of the nature of awards, but it's not dispositive.

Both federal and state courts will look to arbitrator intent. Did the arbitrator intend the award to be final? (See, e.g., (*Bosack*, *supra*, 586 F.3d 1096, 1103 (US rule); *Cooper v. Lavely & Singer Professional Corp.* (2014) 230 Cal.App.4th 1, 18 (CA rule) (*Cooper*).) Courts will examine the title of the award, whether the arbitrator determined all submitted issues, and whether the arbitrator retained jurisdiction over any issues.

Frequently, partial final awards express final decisions on some issues but retain or reserve jurisdiction over others. With express reservations, *functus officio* doctrine prevents reconsideration of the final decisions, but does not prevent decisions on reserved issues.

Remember that *functus officio* distinguishes between clarification, which is allowed, and reconsideration, which isn't. Sometimes, an arbitrator's awards are unclear as to their finality. Arbitrators might fail to address certain issues raised in arbitration. Requests to clarify the author's intent do not violate *functus officio*. And when arbitrators clarify that they intend to reserve jurisdiction, the doctrine should honor that intent.

But the arbitrator's intent may not be dispositive, depending on the arbitration clause. Even when arbitrators intend final awards, arbitration agreements may provide relief where the law does not.

2. Does the arbitration agreement provide for review? In a sense, reconsideration is an arbitrability issue. *Functus officio* prevents reconsideration because arbitration agreements give arbitrators the power to decide issues, not re-decide the same issues. Courts look to the intent of the parties when deciding

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arbitrability, including whether reconsideration is arbitrable. (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 945.) Consequently, arbitration agreements can grant arbitrators the power to reconsider their rulings.

For instance, contracting parties could create a reconsideration remedy by adding a section titled "Reconsideration and Review" that expressly allows the parties to seek reconsideration and gives the arbitrator the jurisdiction to reconsider. Other contracts may allow an appellate arbitration panel to review de novo. Lastly, contracts may incorporate a provider's optional arbitration appeal procedures. (See, e.g., AAA Optional Appellate Arbitration Rules; JAMS Optional Arbitration Appeal Procedure.)

What about agreements that specify *court* review or appeal of the arbitrator's award? Such agreements are enforceable under the CAA, but not the Federal Arbitration Act (FAA).

Both the FAA and the CAA limit a court's ability to review an arbitration award. Under both federal and California law, a court can confirm, vacate, or correct an award. (See 9 U.S.C. §§ 9, 10, 11 (US rule); see also Code Civ. Proc., §§ 1286.2, 1268.4, 1268.6, 1286.8 (CA rule).) Federal and state courts *must* confirm arbitration awards unless there is corruption, fraud, prejudicial misconduct, or an extra-jurisdictional act by the arbitrator.

The interesting question is whether parties can expand court review beyond fraud, misconduct, and extra-jurisdictional acts. The Ninth Circuit examined this kind of expansion in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.* (9th Cir. 2003) 341 F.3d 987 (*Kyocera*). In *Kyocera*, the parties' agreement allowed the United States District Court to confirm, vacate, or modify the award (1) on any grounds the FAA authorized, (2) where substantial evidence did not support the arbitrators' findings, and (3) where the arbitrator's conclusions of law were erroneous. (*Id.* at 991.)

The Ninth Circuit rejected the parties' request for federal courts to review the arbitration award. The *Kyocera* court observed that the FAA set forth the exclusive grounds for judicial review. "Private parties have no power to alter or expand those grounds, and any contractual provision purporting to do so is, accordingly, legally unenforceable." (*Ibid.*) The United States Supreme Court later adopted the same reasoning but held that state courts might decide differently under state law. (See *Hall Street Associates, L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576, 590 [128 S.Ct. 1396, 1406, 170 L.Ed.2d 254].)

The California Supreme Court found that California law allowed parties to specify judicial review of awards in *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334 (*Cable Connection*). In *Cable Connection*, the arbitration agreement said that a court could vacate an arbitration award if the arbitrator committed "errors of law or legal reasoning." (*Id.* at 1340.) The California high court held that this expansion of a California court's jurisdiction was permissible under state law.

The lesson here is clear. Know which arbitration act applies. No matter what the agreement provides, the application of FAA or CAA can be fatal to the parties' desire to have a judicial backstop.

The law works both ways when it comes to judicial review. Parties can sometimes expand judicial review in arbitration agreements. They can also narrow it. Or even get rid of it altogether if the waiver is unambiguous. "Although parties may waive their rights to judicial review of an arbitration award, any such waiver must be 'clear and express.'" (*Cooper*, *supra*, 230 Cal.App.4th at 19, internal citations omitted.)

Let's recap our three takeaways on contractual modification of arbitral review and reconsideration: *first*, the parties may agree to grant arbitral reconsideration and review of awards; *second*, the parties may agree to expand judicial review of awards under the CAA, but not the FAA; and *third*, the parties may waive judicial review altogether.

We've examined when arbitrators can reexamine what they've done. Let's look at what they can fix.

3. Is there a correctable mistake? If the arbitration agreement doesn't allow expanded review, then *functus officio* controls the arbitrators' scope of review. Under *functus officio*, legal and factual errors are not reviewable. (*Heimlich*, *supra*, 7 Cal.5th 350, 367.) Parties who choose arbitration assume the risk of uncorrectable legal and factual errors. (*Ibid.*) However, the California Supreme Court held that arbitrators retain *implicit* authority under the CAA to address omitted issues because Code of Civil Procedure section 1284.3 requires arbitrators to decide all issues necessary to determine the controversy. (*Heimlich*, 7 Cal.5th at 363.)

Heimlich demonstrates that the scope of review and reconsideration under California law is substantially like the federal standard. The CAA allows arbitrators to correct evident miscalculations or mistakes in description, formal defects that don't affect the merits, and address omissions. (Code Civ. Proc., §§ 1284, 1286.6.) The federal common law allows arbitrators to correct facially apparent mistakes, clarify ambiguities, and complete incomplete awards. (*Teamsters*, *supra*, 109 F.3d at 1411.) The import of both sets of rules is identical.

So, what is an "evident miscalculation" or "mistake which is apparent on its face" that an arbitrator can correct? Remember, think typos, not legal errors. California has explained what an evident miscalculation is.

> The miscalculation, to be evident, must appear on the face of the award or be so readily apparent from the documentation in the case that explanation by proofs is not necessary.

(*Severtson v. Williams Construction Co.* (1985) 173 Cal.App.3d 86, 94.)

The Ninth Circuit has not defined what a facially apparent mistake is. (See, e.g., *International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Local 631 v. Silver State Disposal Service, Inc.* (9th Cir. 1997) 109

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F.3d 1409.) However, federal trial courts take an approach like the California Courts of Appeal.

> The Arbitrator … possessed the authority to reconsider a calculation that he had made on the basis of an erroneous application of the evidence presented. The Arbitrator did not attempt to reconsider … liability, but sought to correct a computational error that was apparent on the face of the … Award.

(*BridgeLux, Inc. v. Ensure Enterprise, Inc.* (N.D. Cal., Mar. 6, 2009, No. C 08-04576 JW) 2009 WL 10709801, at *5.)

Arbitration providers have created rules that are consistent with federal and state law standards. For instance, AAA Employment Arbitration Rules provide that parties may apply "to correct any clerical, typographical, or computational errors in the award," but arbitrators cannot "redetermine the merits of any claim already decided." (See AAA Empl. Arb. Rules and Med. Procs., Rule 40.) Similarly, JAMS Employment Arbitration Rules and Procedures allow parties to request a correction of "any computational, typographical or other similar error" in an award. (See JAMS Empl. Arb. Rules & Procs., Rule 24(j).)

The takeaway here is clear: the scope of review is narrow. As we will see, so are the time limits.

4. What time limits apply? Just like the three topics discussed earlier, the applicable law and rules vary the time limits to seek correction. The FAA has no statutory correction procedures, so there are no statutory timelines. In FAA cases, look to the arbitration agreement and the applicable arbitration rules. For cases where the CAA applies, the statutory scheme sets out the deadlines for arbitral reconsideration.

Under most arbitration rules and the CAA, deadlines are short. The CAA gives a party 10 days to ask arbitrators for correction. (Code Civ. Proc., § 1284.) AAA Rule 40 also gives 10. JAMS Rule 24(j) allows only seven days. Don't blink; you might miss it.

However, when parties miss the deadline for *arbitrator* correction, all is not lost. For obvious errors (think typos), both the FAA and CAA allow the *court* to make corrections.

Under the FAA, district courts may modify or correct evident miscalculations, unrelated matters that do not affect the merits of the case, and formal defects that do not affect the merits. The CAA rule is substantially similar. Thus, no matter which arbitration act applies, aggrieved parties may ask the court to correct errors after arbitrators lose the power to.

> The scope of judicial review and correction is consistent with arbitral review and correction, but the timelines are more generous. Under the FAA, a party has *three months* to serve such a request. (9 U.S.C. § 12.) Under the CAA, things get complicated. It depends on whether parties seeking correction are playing offense or defense.

Under the CAA, parties seeking correction of an arbitration award must petition the superior court no earlier than 10 days and no later than 100 days after the service of the award. (Code Civ. Proc. §§ 1288, 1288.4; see also *Oaktree Capital Management, L.P. v. Bernard* (2010) 182 Cal.App.4th 60, 66-76 (*Oaktree*).) But if parties seeking correction are *responding* to a petition to confirm the award in superior court, those parties have only 10 days. (*Ibid.*) That bears repeating. Parties seeking correction have *10 days* to make that request in response to a petition to confirm in court. (Code Civ. Proc. §§ 1288 and 1290.6) For a recent California case on the 10-day rule, see *Law Finance Group, LLC v. Key* 2023 WL4168752.

The scope of correction is limited. So is the time window. Move fast.

Conclusion

Arbitration is streamlined, and the review rules reflect arbitration's focus on efficiency, rather than perfection. As early as possible, scrutinize the arbitration agreement and plan for an adverse result. Remember the four critical questions to ask once the arbitrator serves the award.

First: Is the award final?

Second: If so, does the arbitration agreement provide for review?

Third: If not, is there a correctable mistake? and

Fourth: What time limits do the agreement, the rules, or the law impose?

To paraphrase Ferris Bueller, arbitration moves pretty fast. If you don't stop and look around once in a while, you might miss your opportunity for review.

Hon. Jackson Lucky (Ret.) is an arbitrator, mediator, and private judge at JAMS, *where he handles employment, malpractice, tort, matrimonial, and commercial cases. He served on the Superior Court, Riverside, from 2008 to 2021. Judge Lucky supervised the family law and criminal law divisions. He finished his career handling unlimited civil cases. Judge Jackson has received "judicial officer of the year" awards from APALIE, the Leo A. Deegan Inn of Court, and the Riverside Barristers.*