ARBITRATION AWARDS: BIFURCATION AND FINALITY

By

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I. Introduction

It is relatively common for an arbitration panel to bifurcate its awards. In some cases, a party is seeking immediate equitable relief, such as an injunction, in advance of other rulings. In other cases, it may be logical to make rulings in stages, addressing threshold issues first. One common example is bifurcation of liability and damages. Damages may be a very complicated calculation which need not be addressed if there is no liability. The purpose of this article is to examine selected case law on the finality (*i.e.* enforceability) of the initial ruling when issues are bifurcated.

II. Bifurcation of Liability and Damages

There is a line of cases suggesting that the standard rule (subject to exceptions noted below) is that a finding of liability, without a ruling on damages, is not final and cannot be confirmed or vacated by a district court. One example is *Hyman-Michaels v. M/V Leslie,* 624 F.2d 411 (2nd Cir. 1980) which involved a two-year charter of a ship. The ship suffered a series of breakdowns and the charterer sought restitution from the ship owner. When none was forthcoming, arbitration was initiated with each side making six claims against the other. After extended hearings, the arbitration panel ruled on 5 of 6 of the owner's liability claims, none of the charterer's liability claims and none of the damage claims. After the five liability decisions were issued, the charterer asked the district court to vacate the awards and appoint a new panel to consider the issues *de novo.*

The district court dismissed the action and the appellate court agreed but on a different basis *i.e.* that lack of finality deprived the district court of jurisdiction:

> In order to be "final," an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them. Generally, in order for a claim to be completely determined, the

> arbitrators must have decided not only the issue of liability of a party on a claim, but also the issue of damages. Since the interim award here did not decide any of Charterer's claims, it obviously was not a final determination of all issues submitted. Moreover, with the exception of the one Owner counterclaim decided in Charterer's favor, . . . the award did not finally dispose of any of the claims submitted, since it left open the question of damages on the four counterclaims of Owner that it sustained and reserved decision of the fifth.[1]

Savers Prop. & Cas. Ins. Co. v. National Union Fire Ins. Co., 748 F.3d 708 (6th Cir. 2014) involved a reinsurance arbitration in which the panel issued an "Interim Final Award" finding liability and certain damages then capable of calculation with further proceedings to finalize damages. The losing party moved to vacate the order and for injunctive relief on the basis of panel misconduct and the district courts accepted jurisdiction and granted an injunction. On appeal, this decision was reversed on the basis that the interim award was not final:

> Here, the arbitration panel issued an interim award resolving only the matter of liability; the panel retained jurisdiction to compute National Union's damages. Under these circumstances, the arbitration was not complete because there was no "final" award.[2]

A similar conclusion was reached in a labor dispute in *Millmen's Local 550 v. Wells Exterior Trim*, 828 F.2 1373 (9th Cir. 1987). The arbitration involved the alleged violation of a collective bargaining agreement and if a violation occurred, what remedy was appropriate. The arbitrator found a violation and remanded the issue back to the parties to negotiate a remedy with the arbitrator retaining jurisdiction. The union filed a motion n the district court to confirm the award on breach of the collective bargaining agreement. After surveying case law from other jurisdictions, the court found that arbitration order was not final:

> Each of these cases supports a role that requires the issue of damages be resolved in order for an award to be considered final. Moreover, the fact that the arbitrator here specifically retained jurisdiction to decide the remedy if the parties could not agree indicates that the arbitrator did not intend the award to be final.[3]

III. First Circuit – Agreement to Bifurcate

A recent example of a bifurcation principle that appears to be unique to the First Circuit is *First State Ins. Co. and New England Reins. Corp. v. Nationwide Mutual Ins.*

Co., 2014 U.S. Dist. Lexis 149649 (D. Mass.) In this case, the cedent asked the arbitration panel to make a ruling on contract interpretation initially rather than rule on the coverage of certain contested claims. Over the reinsurer's objection, the panel issued the order requested by the cedent. The cedent sought to confirm the resulting order which the panel characterized as a final order on contract interpretation. The reinsurer objected that the panel's decision was not final.

The district court observed that to be final, an arbitration award must address all the issues submitted to the panel. However, a claim that does not address all issues may be final if the parties both agreed to bifurcate the claims. Since the reinsurer did not do so here, the district court was without jurisdiction to confirm the award.

The seminal case on point in the First Circuit is *Hart Surgical, Inc. v. Ultracision, Inc.*, 244 F.3d 231 (1st Cir. 2001). With the agreement of the parties, the arbitration panel bifurcated the proceeding into liability and damages determinations and the prevailing party on liability attempted to confirm the order. The court noted that ordinarily an order of liability without a finding on damages would not be final and therefore not within the jurisdiction of the district court to confirm. However, the agreement of the parties to bifurcate rendered the liability order final. The court cautioned:

> Though we hold that the district court can review the partial award in this case, we think it best to limit our holding to the situation in which there is a formal, agreed-to bifurcation at the arbitration stage. We reserve judgment on what would happen if, for example, in the absence of bifurcation the arbitrator issued an initial decision on liability and one party then sought district review.[4]

Providence Journal Co. v. Providence Newspaper Guild, 271 F.3d 16 (1st Cir. 2001) responded to one of the reservations above in *Hart*, namely whether or not the bifurcation has to be formal in nature. The issue in *Providence Journal* was employee parking under a collective bargaining agreement and at the arbitration hearing, the parties informally agreed to bifurcate liability and damages. The arbitrator found that the employer had violated the collective bargaining agreement and urged the parties to agree on a remedy. When the parties were unable to agree on a remedy, the employer sought to vacate the order on liability. The court extended the *Hart* ruling to this fact situation and held:

> It is evident from the November arbitration hearing that the parties intended, though never formally stated, to bifurcate the proceedings. They divided the arbitration into separate phases and requested that the arbitrator retain jurisdiction over the remedy issue. . . . Clearly then, both

> the parties and the arbitrator agreed to bifurcate the arbitral proceeding and understood the determination of liability to be a final award.[5]

As will be seen below, the agreement of both parties to bifurcate has not a significant issue in other circuits.

IV. Finality due to Exigent Circumstances

Notwithstanding the "standard" rule described in § II above, there are a quite a number of cases that treat an initial panel order related to liability as final for purposes of confirming or vacating an order due to exigent circumstances. These are somewhat hard to categorize except in terms the factual circumstances involved.

A. Equitable Relief

One such circumstance is where the panel has ordered equitable relief. In *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991), the panel issued an Interim Final Order ("IFO") requiring the reinsurer to post security for the benefit of the cedents. The district court confirmed the IFO and the reinsurer appealed challenging the finality of the order. The Ninth Circuit upheld the finality of the IFO and the district court ruling:

> Temporary equitable relief in arbitration may be essential to preserve assets or enforce performance which, if not preserved or enforced, may render a final award meaningless. However, if temporary equitable relief is to have any meaning the relief must be enforceable at the time it is granted, not after an arbitrator's final decision on the merits.
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> Therefore, we hold that temporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful, such as the IFO in this case, are final orders that can be reviewed for confirmation and enforcement by district courts under the FAA.[6]

See also, Companion Property and Cas. Ins. Co. v. Allied Provident Ins. Co., 2014 U.S. Dist. Lexis 136473 (S.D.N.Y) and cases cited therein.

In *Island Creek Coal v. City of Gainsville,* 729 F.2d 1046 (6th Cir. 1984) the city was obligated to purchase coal from a vendor but sought to terminate the contract in order to purchase coal elsewhere at a lower price. After the arbitration hearing but before the panel issued its orders on the merits, the panel ordered the city to continue to

purchase coal from the vendor as a means of preserving the status quo. The coal company sought to confirm this order and the city opposed on the basis of lack of finality. The appellate court ruled that: "an 'interim' award that finally and definitively disposes of a separate and independent claim may be confirmed 'notwithstanding the absence of an award that finally disposes of all the claims that were submitted to the arbitration.'[7]

Western Technology Inc. v. Caucho Industrsiales S.A., 2010 U.S. Dist. Lexis 3279 (N.D. Tx) involved an arbitration over three contracts with the panel issuing an initial order in the form of a preliminary injunction for non-competition. The court found that the preliminary injunction was final determination of the moving party's claim for temporary injunctive relief and that the parties intended for it to be reviewable by the court i.e. that it was final and capable of being confirmed or vacated.

Arrowhead Global Solutions Inc. v. PSI Systems, Inc., 2006 U.S. App. Lexis 2786 (4th Cir.) also involved equitable relief. This was a dispute between a contractor and subcontractor in which prior to a decision on the merits, the arbitration panel enjoined the contractor from performing certain work that had been assigned to the subcontractor under the contract at issue. The district court confirmed the injunction and the contractor appealed. The appellate court affirmed:

> [W]e conclude that the district court did have authority to confirm the Award. While [the contractor] correctly notes that piecemeal litigation is generally disfavored, the law in this area indicates that district courts do have the authority to confirm discrete time-sensitive issues such as [the injunction].[8]

B. Time-Sensitive Issues

As indicated in the decision summarized above, the time-sensitivity of interim rulings seems to impact on their finality. For instance, a dispute over a joint venture between advertising agencies provided the backdrop for *Publicis Communication, v. True North Communications, Inc.*, 206 F.3d 725 (7th Cir. 2000). In an initial award, the arbitration panel ordered Publicis to turn over to True North certain tax information by a date certain. When True North did not do so, Publicis petitioned the district court to confirm and order, which it did. On appeal, the court affirmed stating:

> Producing the documents wasn't just some procedural matter – it was the very issue True North wanted arbitrated. The finality of the tribunal's ruling is demonstrated by the deadline. The tribunal explicitly carved out the tax records issue for immediate action from the bulk of the matters still pending stating that "delivery of the documents should not wait final

> conformation in the Final Award." Requiring unrelated issues to be arbitrated to finality before allowing True North to enforce a decision the tribunal called urgent would defeat the purpose of the tribunal's order. A ruling on a discrete, time-sensitive issue may be final and ripe for confirmation even though other claims remain to be addressed by arbitrators.[9]

C. Threshold Issues

A variation on the time-sensitive argument is that certain threshold issues need to be finalized as a basis for the remaining decisions of the arbitration panel. One such case is *Sportswear Garment Workers' Union v. Evans Manufacturing Co.,* 318 F.2d 528 (3rd Cir. 1963) that was a dispute over a collective bargaining agreement. In his interim order, the arbitrator ordered the employer to make available its wage records for examination by the union in order to finalize the calculation of damages. Without much discussion of its reasoning, the court upheld the interim order as necessary to develop the information to resolve damages.

Trade & Transport, Inc. v. Natural Petroleum Charters Inc., 931 F.2d 191 (2nd Cir. 1991) was a dispute over the scheduling of the fourth of five scheduled voyages of a petroleum freighter. It is evident that there was a parallel litigation to the arbitration wherein the issues appear to overlap. It is also evident, however, that there was a need for the arbitration panel to make a decision about the cancellation of the fourth voyage for the litigation to go forward. The panel issued such an interim order, holding aside for later consideration of appropriate damages. When the interim order was challenged as not final, the court upheld the order:

> [T]he parties modified their original submission to the arbitrators in order to cause a bifurcated decision. They asked the panel to decide the issue of liability immediately, a decision that was expressly intended to have immediate collateral effects in the proceeding. The panel understood that this was to be a final decision as to liability. Thus, its announcement of [the award on the fourth voyage] stated that the award was a "partial final award." Neither party disputed this characterization when the decision was rendered.[10]

A shipment of fuel provided the context for the dispute in *Metallgesellschaft A.G. v. M/V Capitan Constane,* 790 F.2d 280 (2nd. Cir. 1986). The relevant contract stated that payment should be made immediately based on the amount of oil taken on by the ship without discount. Nonetheless, the purchaser claimed a shortage of oil and that it was contaminated. The arbitration panel made a partial final award of full amount called for by the contract with any counterclaims to be addressed in a later decision. The district

court confirmed the order. The appellate court noted that the arbitrators' decision was in conformity with custom and practice as well as the relevant contact. As to the finality issue, the court held:

> We think it better to hold, as did the arbitrators and the district court, that [the purchaser's] liability for freight was independent and separate from the remaining issues before the arbitrators and could be finally determined without reference to those legally irrelevant issues.
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> Because the award in the instant case finally and conclusively disposed of a separate and independent claim and was subject to neither abatement nor set-off, the district court did not err in confirming it.[11]

V. Comments

The "standard" rule that an arbitration ruling on liability without damages is not final for purposes of confirmation or vacation by a district court appears to be honored mostly in the breach. In the First Circuit, it appears that a district court will have jurisdiction over any confirmation motion that results from a bifurcation agreed to by both parties. In other circuits, it appears that a district court will have jurisdiction to the extent that a compelling argument can be made as to why a preliminary ruling is logical and appropriate to be confirmed or vacated.

ENDNOTES

1 624 F.2d 411 at 413 – 4 (internal citations omitted).
2 748 F.3d 708 at 719.
3 828 F.2d 1373 at 1376 – 7.
4 244 F.3d 231 at 235 – 6.
5 271 F.3d 16 at 20.
6 935 F.2d 1019 at 1022-3.
7 729 F.2d 1046 at 1049 (citations omitted).
8 2006 U.S. Lexis 2786 *7 – 8.
9 206 F.3d 725 at 729.
10 931 F.2d 191 at 195.
11 790 F.2d 280 at 282 – 3.