FUNCTUS OFFICIO: THE FINALITY REQUIREMENT

by

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I. Introduction

Functus offico is Latin for "a task performed". In the context of arbitrations, this doctrine limits the ability of a panel to revisit issues once it has ruled. This doctrine originated at a time before the Federal Arbitration Act when the judiciary was hostile to arbitration and sought to limit it as much as possible. The judicial theory behind the *functus officio* rule was that private arbitrators lack the institutional protection afforded judges and, therefore, were more susceptible to outside pressures to change their rulings.[1]

The United States Supreme Court[2] provided the following definition of the doctrine:

> Arbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end.[3]

The purpose of this article is to explore case law defining the "final determination" that makes an arbitration panel *functus officio.*

II. Finality in the Context of the Federal Arbitration Act

In *Michaels v. Mariforum Shipping*, 624 F.2d 411, 414 (2nd Cir. 1980), the court ruled that judicial review under the Federal Arbitration Act is unavailable for an interim panel ruling which does not finally resolve the issues submitted to the panel. In practical terms, this means:

> 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 the claim, but also the issue of damages.[4]

III. Case Law Finding Finality

Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280 (2nd Cir. 1986) involved a contract for delivery of fuel oil which called for payment without discount or setoff upon delivery. The purchaser of the fuel oil did not pay on delivery but sought damages for alleged short delivery and contamination.

An arbitration panel considering the claims of both parties first reached a decision on the delivery of the fuel oil and ordered the purchaser to pay for the fuel. The deliverer of the fuel asked the district court to confirm this award and it did so. The purchaser appealed on the basis of finality. The appellate court upheld the district court:

> We think it better to hold, as did the arbitrators and the district court, that Metallgesellschaft'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. . . .
> 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.[5]

Legion Ins. Co. v. VCW, Inc. 198 F.3d 718 (8th Cir. 1999) involved a dispute between Legion and an MGA. The arbitration panel issued an order to the effect that VCW should pay premiums to Legion and that Legion's affiliate reinsurer should reduce VCW's letter of credit. Upon a motion to vacate, the district court confirmed on the premium issue but ruled that the panel exceed its powers with respect to the letter of credit issue. The parties returned to the panel and asked it to rescind its ruling on premiums and the panel did so on the basis that its original award of premiums was indivisible from the award of a reduction of the letter of credit. Legion asked the district court to vacate this award and it did so on the basis of *functus* officio. However, the appellate court found that the second panel order was final and, moreover:

> In this case, the arbitration panel clarified its award *after* the district court acted on the award. VSW has not cited any case in which the *functus officio* doctrine was not applied *after* the district court vacated or confirmed the final award. VCW's failure to cite such a case is not surprising because such a result would effectively grant an arbitration panel power to conduct appellate review of a federal district court decision. This would be absurd.[6]

Clarendon National Ins. Co. v. TIG Reinsurance Co., 990 F.Supp. 304 (S.D.N.Y. 1998) dealt with a three part award concerning various disputes relating to a portfolio transfer transaction. The court remanded two of the three parts back to the panel due to lack of finality relating to interest and damages. The court confirmed the other part stating: "It appears to be permissible for a district court [to] affirm an arbitration award in part where the section affirmed represents a separate and independent claim, and the claim is finally and definitely resolved."[7]

IV. Case Law Finding No Finality

A variety of claims and counterclaims between the charterer of a vessel and the owner provided the factual backdrop for *Michaels v. Mariforum Shipping*, 624 F.2d 411 (2nd Cir. 1980). The arbitration panel issued an interim order which: (a) found for the owner on 4 of 6 of the owner's counterclaims; (b) did not award damages on these counterclaims; and (d) did not determine any of the charterer's claims. The district court denied a motion to vacate this award and the appellate court reversed on the basis that the interim order was "merely a first step in deciding all claims submitted to arbitration."[8] The court further noted that the advantages of arbitration as a dispute resolution mechanism "are dissipated by interlocutory appeals to a district court."[9]

Employers Surplus Lines Ins. Co. v. Global Reinsurance Corp., 2008 U.S. Dist. Lexis 8253 (S.D.N.Y.) involved a dispute over aggregated losses and defense costs under a facultative certificate. The arbitrator issued a Partial Final Award finding the reinsurer liable for aggregated losses but that the reinsurer was not liable for defenses costs when no liability payment was made by the cedent to its insured. On the second point, the arbitrator did not quantify damages but asked the parties to provide documentation from which the damages could be quantified.

The cedent moved for confirmation of the first part of the award but to vacate the second. Due to concerns about finality and interference with disputes that the parties agreed to arbitrate, the court declined to make a ruling and instructed the parties to continue the arbitration proceedings. Upon continuance of the arbitration, the arbitrator reversed himself in a Final Award and decided that defense costs should be paid regards of whether a liability payment was made by the cedent to its insured. Apparently, the arbitrator quantified the defenses costs due in this award. The reinsurer moved to vacate the Final Award on the basis of *functus officio*. The court confirmed the Final Award:

> Here the Partial Final Award required further arbitration on damages to finalize the parties' obligations. The materials on damages submitted by [the cedent], as ordered, led the Arbitrator to find that determining [the reinsurer's] damages for defense costs as instructed by the Partial Final Award was impossible. This, in turn, caused the Arbitrator to realize that his second liability finding was based on an incorrect interpretation of the Certificate. The issues of liability and damages were so intertwined that the evidence for damages bore on the scope of liability. The interrelated nature of these issues, therefore, made them inseparable, and the Arbitrator's initial liability finding on defense costs was not a final resolution of a separate and independent claim.[10]

The construction of a power plant in Saudi Arabia provided the factual context for *Fluor Daniel Intercontinental, Inc. v. General Electric Co.*, 2007 U.S Dist. Lexis 17588 (S.D.N.Y.). A dispute between the parties proceeded to arbitration and the panel issued a Corrected Partial Award dealing with a number of the issues in dispute but retained jurisdiction over many claims. GE moved to confirm the award and Fluor contended that the award was not final and complete. The court confirmed with respect to the matters on which liability and damages were resolved by the award but not other matters:

> The Partial Award determined entitlement, but not damages, on a variety of claims asserted by Fluor, and both entitlement and damages as to GE's counterclaims. While the financial awards, findings of liability, and dismissals of claims contained in the Partial Final Award are not made conditionally, or based on any further findings that may arise in the future, the actual calculation of damages has not been completed in regards to some of these claims, and will be further addressed by the Tribunal. . . .
> The claims that are dismissed and the claims on which damages are awarded, would seem to be finally determined, the Partial Award cannot be confirmed.[11]

V. Bifurcation Exception

It is not unusual for an arbitration panel to consider a bifurcation of the issues of liability and damages. Liability may be determined by a very limited number of individuals and documents. Damages may require extensive review and analysis of underwriting and/or claim files and a sophisticated

presentation of the damages related to the deficiencies demonstrated in such files. Sometimes the bifurcation takes place at the behest or agreement of the parties. Sometimes the panel bifurcates on its own. The case law below explores the finality implications of bifurcation *i.e*. whether the lack of a damages ruling renders a bifurcated liability ruling non-final.

Trade and Transport, Inc. v. Natural Petroleum Charters, Inc., 931 F.2d 191 (2nd Cir. 1991) was a dispute between a ship charter company and a transport company concerning dates for chartering a vessel. When arbitrators were empanelled , and, at the urging of a court dealing with collateral litigation, the parties asked the arbitrators to make an immediate decision about cancellation of an impending voyage and to determine damages at a later date. The panel did so and issued a December 1981 Award on liability. In 1982, one of the parties asked the panel to revisit the liability ruling but the panel declined to do so on the basis of functus officio.

The lower court confirmed the bifurcated liability award, even without a finding of damages. The appellate court affirmed:

> [I]f the parties have asked the arbitrators to make a final partial award as to a particular issue and the arbitrators have done so, the arbitrators have no further authority, absent agreement of the parties, to redetermine that issue. . . .
> In December 1981, the 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 judicial proceeding. The panel understood that this was to be a final decision as to liability. Thus, its announcement of the December 1981 Award stated that the award was a "partial final award." Neither party disputed this characterization when the decision was rendered. . . .
> Accordingly, . . . the December 1981 Award did conclusively decide every point required by and included in the first part of the parties' modified submission, that award was final . . . .[12]

Andrea Doreen, Ltd. v. Building Material Local, 250 F.Supp. 107 (E.D.N.Y. 2003) dealt with the arbitration of a labor dispute. The parties agreed to bifurcate liability from the remedy. The panel found the employer liable and the union moved for confirmation. The court confirmed the bifurcated award on liability:

> Normally, for an arbitration award to be deemed final, the arbitrator must have determined damages in addition to liability. . . .
> Here, however, the parties agreed during an arbitration hearing to bifurcate liability from remedy. . . .
> Therefore, like any other interim award, [the award] in this case can be confirmed if it finally disposes of a separate independent claim.[13]

See also Employers Surplus Lines Ins. Co. v. Global Reinsurance Corp., 2008 U.S. Dist. Lexis (S.D.N.Y.) *17.

VI. Analysis

For the *functus officio* doctrine to apply, a panel order must be "final" meaning a complete resolution of the issue posed to the panel. However, an order may be final as to some issues and not to others.

Ordinarily, to be final, the order must resolve both liability and damages. If, however, the parties agree to bifurcate liability and damages, then a panel award as to liability may be a complete resolution of the issued posed and, therefore, qualify for *functus official* status.

ENDNOTES

[1] Thomas A. Allen, Robyn D. Herman, *Clarification, Reconsideration and the Doctrine of Functus Officio*, ARIAS Quarterly, Vol. XI No. 2 at 5 (2004).

[2] *Bayne v. Morris*, 68 U.S. (1Wall.) 97, 99 (1863) which was also quoted in *Office & Professional Employees International Union v. Brownsville General Hospital*, 186 F.3d 326, 331 (3rd Cir. 1999).

[3] *Id.*

[4] 624 F.2d at 413-4 (internal citations omitted). *See also Employers Surplus Lines Ins. Co. v. Global Reinsurance Corp.*, 2008 U.S. Dist. Lexis 8253 (S.D.N.Y.) *18; *Fluor Daniel v. General Electric*, 2007 U.S. Dist Lexis 17588 (S.D.N.Y.) *4-5; *Andrea Doreen Ltd. v. Building Material Local*, 250 F.Supp.2d 107, 111 (E.D.N.Y. 2003).

[5] 790 F.2d at 282-3.

[6] 198 F.3d at 720 (emphasis in the original).

[7] 990 F.Supp. at 309.

[8] 624 F.2d at 413.

[9] *Id.* at 414.

[10] 2008 U.S. Dist. Lexis 8253 *21.

[11] 2007 U.S. Dist. Lexis 15588 *9-10.

[12] 931 F.2d at 195.

[13] 250 F.Supp. 2d at 112.