

## Seeking Clarification of an Ambiguous Arbitration Award

**Judge Abraham J. Gafni (Ret.)**

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Parties often favor arbitration because it usually brings an immediate end to the litigation as the arbitrator lacks the authority to reconsider the award by reason of the "*functus officio*" doctrine.

But if the meaning or intent of the award is disputed by the parties, what must be considered in determining whether and how the award may be modified?

These issues were faced recently by a federal district court in Connecticut in a complex dispute between insurance companies involving the proper methodology for calculating recapture payments under the final award in *General Re Life v. Lincoln National Life Insurance*, No. 15-cv-1860, (VAB), 2017 U.S. Dist. Lexis 48860, 2017 WL 1230844 (March 31, 2017).

As a result, *Lincoln National* asked the arbitrators to reconsider and resolve how the recapture payments should be calculated. *General Re* objected that this was beyond the arbitrators' authority as reconsideration would fundamentally change the unambiguous recapture methodology set forth in the final award.

A majority of the arbitration panel concluded that the interpretations of the final award by both parties were incorrect, and that a "clarification award" was necessary to explain how payments were to be made. *General Re and Lincoln National* filed cross-petitions, one seeking confirmation of the original final award and the other confirmation of the final award as clarified. The court held that clarification was warranted and confirmed the final award as clarified.

Although the court's ruling is currently subject to a petition for reconsideration, its extensive opinion highlights the following principles which counsel must understand in challenging an "ambiguous" arbitration award.

1. Arbitrators, generally, may not reconsider their earlier adjudication of an issue by reason of the *functus officio* doctrine. This limitation is based upon a concern relating to possible subsequent outside communication and unilateral influence involving arbitrators who are not judicial officers and act only informally and sporadically.
2. However, recognized exceptions to the *functus officio* doctrine include:
  - a. A mistake on the face of the award.
  - b. The failure of the arbitrator to rule on a submitted issue.
  - c. An ambiguity in a seemingly complete award.

(Cf. Section 10 of the Federal Arbitration Act (FAA) and the Pennsylvania Uniform Arbitration Act (PUAA), 42P.S. Section 7311, which provide limited bases upon which awards may be corrected or modified.)

3. Therefore, if an award is "indefinite, incomplete or ambiguous," it should be remanded to the arbitrators so that they will have the opportunity to clarify their award, "rather than forcing the court to interpolate its own estimate of the arbitrators' intent."
4. There are, however, limitations upon arbitrators who are reconsidering an award. Principal among these is that in issuing a clarification, arbitrators may not alter or modify the original award. Clarification of the award under the *functus officio* doctrine must be consistent with the original award in either spirit or basic effect. For example, changing the dollar amount of an award due to a mathematical error, while significant, would not change the spirit or effect of an award. As courts have noted, "clarification of an ambiguity closely resembles the correction of a mistake apparent on the face of an award and the determination of an issue which the arbitrators failed to decide."
5. If during the arbitration hearing, proposed language for an award is presented by one party, the opponent may not for strategic reasons wait until the final award has been issued before claiming ambiguity or other problem, but should do so during the hearing itself. Otherwise, such delay may result in a finding that the right to oppose confirmation of the award has been waived. In the instant case, there was no such waiver as the opposing party had objected to the proposed methodology prior to the arbitration hearing and the final award as well as before the clarification award.
6. The application for reconsideration as well as the arbitrators' clarification award itself should be timely. Although the FAA contains no specific time limitation within which a motion for clarification must be filed, the PUAA, Section 7311 (b), does provide that an application to the arbitrators to clarify an award "shall be made within 10 days after delivery of the award to the applicant." The federal court further emphasized that the arbitrators' corresponding power "to clarify an award already made must be exercised within a reasonable period of time."

In this case, the final award was issued on July 1, 2015, and the clarification award on Nov. 19, 2015, more than four and a half months later.

In considering whether there was delay by the parties or the arbitrators, the court noted that it was not until Sept. 18, 2015, that the parties started discussing recapture methodology; and, it was not until Sept. 28, 2015, almost three months after the issuance of the final award, that *Lincoln National* formally notified *General Re* that it would, in fact, invoke a right of recapture. This was followed by an ongoing exchange of communications between the parties. Eventually, on Oct. 26, 2015, *Lincoln National* sent a letter to the arbitrators asking them to resolve the dispute about recapture methodology.

In light of this timeline, which reflected that the parties were discussing their disagreement about the recapture method until Oct. 13, 2015, the court found that the request for clarification only 13 days later, on Oct. 26, 2015, was within a reasonable amount of time. Moreover, although unstated in the opinion, it was apparent that the issuance of the clarified award within less than one month of the request, on Nov. 19, 2015, was similarly timely.

7. Clarifications have been more readily allowed as an exception to the *functus officio* doctrine where they "generally concerned relief that was awarded rather than the substance of the underlying dispute that led the parties to seek arbitration."
8. Finally, and most critically, what may impel a court to decide that the final award was ambiguous so that it should be resubmitted to the arbitrators for clarification? Some factors suggested by the court were:
  - a. An incomplete award (e.g. not indicating whether back pay was owed).
  - b. No clear instruction as to how enforcement of the award should proceed.
  - c. Failure to deal explicitly with an unexpected contingency.
  - d. In a case involving multiple defendants, failure to identify the party against whom relief was ordered.
  - e. Failure to make clear the scope of the relief that was awarded (e.g., does a - "reinstated" bus driver get back his prior route?).
  - f. Mathematical error.
  - g. Terms that are susceptible to several interpretations (e.g., does an award of "costs" include attorney fees?).
  - h. An apparent potential contradiction between the award and the provisions in the underlying contract or other objectively ascertainable facts.
  - i. The inability of the parties themselves to agree on the meaning of the arbitration award.
  - j. Finally, if the arbitrators themselves disagree, "the court finds that it is particularly important to defer to the arbitrators' conclusions that there was an ambiguity in the final award that required the clarification."

The extensive discussion by the court reflects that counsel must consider multiple issues relating to both the right and attendant limitations on arbitrator authority to clarify an award.

As should be apparent, however, to forestall applications for modification or clarification, parties should be particularly careful to propose award language for the arbitrators that fully and clearly sets forth all of the issues they are to decide. Moreover, special attention should be given to an adversary's proposals. If that language is ambiguous or incomplete, this should be immediately pointed out so that a subsequent right to request modification or clarification is not deemed to have been waived. •

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