CHAPTER 5

DETERMINING JURISDICTION AND ARBITRABILITY

Arbitrators should understand the legal principles governing the extent of their authority to resolve challenges to jurisdiction and arbitrability and when possessed of such authority, should resolve such issues at a time and in a manner that best ensures efficiency and protects the interests of the parties.

I. INTRODUCTION

Arbitrators should be aware that the question whether challenges to jurisdiction and arbitrability are to be decided by courts or arbitrators is a subject of complex and evolving case law.

Arbitrators generally have authority over only those parties who have agreed to arbitrate and those disputes that fall within the terms of the parties' written arbitration agreement. The scope of the arbitrators' authority, however, is not always obvious from a simple reading of the arbitration agreement. For example, instances arise (1) in which parties who are not signatories to a contract are compelled, or have the right, to arbitrate claims under that contract; and (2) in which claims arising under one contract are subject to arbitration pursuant to an arbitration clause contained in a different contract.

Technically, arbitral authority over persons should properly be referred to as *jurisdiction*, whereas *arbitrability* should refer to whether the subject matter of the parties' dispute is within the scope of the arbitration agreement or whether public policy bars arbitration of certain kinds of disputes, for example, claims for violation of statutory rights. (Although the United States Supreme Court frequently has held that disputes that arise from federal statutes, such as antitrust, securities, racketeering, and employment disputes, are arbitrable, there always remains the possibility that Congress will exempt some statute-based claims or, indeed, other claims from being arbitrated.) Unfortunately, the terms *jurisdiction* and

arbitrability are often used interchangeably in case law and literature, and such usage unavoidably carries over to this chapter. The term *arbitrability* has been used to cover three distinct issues: (1) whether parties have agreed to an arbitration clause, (2) whether the arbitration clause is enforceable legally, and (3) whether a particular dispute is within the scope of the arbitration clause.

When one or more parties assert that the arbitrator lacks authority over the parties or the subject matter, the question thus arises whether arbitration is the proper forum in which to decide that threshold issue. Generally speaking, questions of arbitrability are for a court to decide. Such issues, however, may be delegated to arbitrators through a clear and unmistakable contractual provision granting the arbitrators decision-making authority over jurisdiction or arbitrability issues. There is a significant body of complex and rapidly evolving case law in this area. The trend nonetheless is toward increasing the authority of arbitrators to decide questions concerning their own jurisdiction and the arbitrability of claims.

Given the trend toward increasing arbitral power, arbitrators usually should decide all jurisdiction and arbitrability issues that are presented by one or all of the parties, absent a court order staying the arbitration or directing the resolution of a particular gateway issue in a specific manner. Nevertheless, instances will arise in which the arbitrators conclude they do not have such authority, in which case the arbitrators' conclusion at some point should be memorialized in an award. *See* Chapter 11, *infra*.

II. LEGAL BACKGROUND

A. *Prima Paint* and Its Progeny: The Separability Doctrine

Resolution of the question whether arbitrators have the authority to adjudicate contract avoidance defenses relating to the enforceability of a contract depends substantially on whether those allegations relate to the contract as a whole, to only the arbitration agreement, or in some instances to only a subprovision of the arbitration agreement.

These distinctions derive, in part, from a 1967 decision of the United States Supreme Court holding that an arbitration clause is to be severed from the underlying contract in which it is embedded and treated as a separate agreement independent of the underlying contract. *See Prima Paint*

Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 402-06 (1967). This principle is now known as the separability doctrine. Specifically, *Prima Paint* involved a claim that the parties' contract was void because it had been fraudulently induced. In holding that the claim of fraudulent inducement was for the arbitrators to decide, the Court relied on the following language found in Section 4 of the FAA: "The court . . . upon being satisfied that the making of the agreement for arbitration . . . is not in issue . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* at 403-04 n.11. The Court held that the claim of fraudulent inducement of the entire contract did not implicate the making of the agreement for arbitration and that the FAA's language therefore did not permit courts to consider such claims.

The separability doctrine (sometimes called the severability doctrine or *kompetenz-kompetenz* in the context of international arbitration) is designed to ensure that questions regarding the validity of the underlying contract do not call into doubt the parties' intent to arbitrate their disputes. AAA Rule R-7(a), JAMS Rule 11(c), and Rule 8.2 of the CPR Ad Hoc and Administered Rules all embody the separability doctrine by providing that an arbitration clause shall be treated as an agreement separate and independent from the remainder of the contract containing it.

Under this doctrine, when the validity of the entire contract is called into question, the arbitration provision should be deemed severable such that the parties' dispute is arbitrable even though the validity or enforceability of the contract containing the pertinent arbitration clause is in question. In contrast, when the validity of the arbitration provision itself is challenged (e.g., by an allegation that a party was fraudulently induced to enter into an arbitration provision), that question normally should be decided by the courts. In *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), the Supreme Court arguably modified this rule when it held, under what might be considered to be fairly unusual circumstances, that when the separate arbitration agreement itself contains a separate provision stating that the arbitrator will resolve disputes regarding the enforceability or voidability of the arbitration agreement, the separability doctrine applies to that subagreement. The consequence of the Court's ruling in *Rent-A-Center* is that in order for a court to have jurisdiction to adjudicate a claim that such an arbitration agreement, itself, is unenforceable, the party contesting the enforceability of the agreement as a whole also must specifically and separately challenge the enforceability of the subagreement granting the arbitrator the authority to decide those issues. *See id.* at 2779.

B. Illegality and Other Defenses Arguably Going to the Making of the Contract

Uncertainty still exists as to whether courts or arbitrators determine the validity of some defenses going to the making of the contract.

As discussed in Section A above, *Prima Paint* involved a claim of fraudulent inducement of the contract generally (as opposed to the arbitration clause) and established that such a claim did not implicate the making of an agreement for arbitration under Section 4 of the FAA. *See Prima Paint*, 388 U.S. at 404. After *Prima Paint*, numerous courts struggled with the question whether the making of the agreement for arbitration is implicated by other defenses to the overall contract, such as illegality, that arguably render the entire contract void. In 2006, the United States Supreme Court decided *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), in which the Court addressed whether it is for the arbitrator or a court to decide if a contract containing an arbitration provision is void because of illegality. The Florida Supreme Court had upheld the trial court's denial of a motion to compel arbitration of a claim that the underlying contract was allegedly usurious and therefore void under Florida state law. In so ruling, the Florida Supreme Court reasoned that "an arbitration provision contained in a contract which is void under Florida law cannot be separately enforced while there is a claim pending in a Florida trial court to the effect that the contract containing the arbitration provision is itself illegal and void *ab initio*." *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 861 (Fla. 2005).

In reversing the order of the Florida court, the United States Supreme Court reasoned that Section 2 of the FAA created a substantive federal law of arbitrability that included the separability doctrine of *Prima Paint*. Because the plaintiffs in *Buckeye* challenged the enforceability of the underlying loan agreements on the grounds they were usurious and therefore void under state law, and yet did not separately challenge the validity of the arbitration clauses in those allegedly void agreements, the doctrine of *Prima Paint* controlled. According to the Court, this fact compelled the conclusion that allegations that the agreements were usurious and, thus, illegal and void were claims for the arbitrators to decide, not the Florida Supreme Court. *Buckeye*, 546 U.S. at 446. Despite the Court's holding, however, a footnote in *Buckeye* made it clear that the Supreme Court was not granting arbitrators

blanket authority to decide all claims that challenge the very making or formation of an agreement containing an arbitration clause. Instead, the Court noted that "the issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded." *See id.* at 444 n.1.

The Court thus emphasized that its holding in *Buckeye* did not address the questions whether "it is for courts to decide whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent." *Id.* (citations omitted). The Court had held previously that issues of contract formation were presumptively for courts to decide. *See First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995).

The separability doctrine was further extended in *Preston v. Ferrer*, 552 U.S. 346 (2008), in which the Supreme Court held that under the FAA, the legality of a contract in which an arbitration clause was embedded was for the arbitrator to decide even though a state administrative agency otherwise had exclusive jurisdiction to rule on the legality of such a contract. In *Granite Rock v. International Brotherhood of Teamsters*, 130 S. Ct. 2847, 2853 (2010), the Supreme Court subsequently held that the question of when and therefore whether a contract containing an arbitration provision had been formed was a matter to be decided by the courts. *Id.* at 2853.

The result of this line of Supreme Court cases is that some courts, in struggling to resolve the question whether issues that arguably concern contract formation are for the courts or the arbitrator to decide, ultimately resolve that question by relying in close cases on a presumption of arbitrability. *See, e.g., Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l*, 655 F.3d 96, 105 (4th Cir. 2012) (finding that the question whether a contract continued to exist posed "ambiguous" arbitrability questions and holding that a presumption of arbitrability weighed in favor of deciding that the arbitrator was authorized to decide that issue). In contrast, other courts simply read *Granite Rock* as "reconfirm[ing] well-established precedent that where a party challenges the very existence of the contract containing an arbitration clause, a court cannot compel arbitration without first resolving the issue of the contract's existence." *See Dedon GmbH v. Janus et Cie*, 411 F. App'x 361, *1 (2d Cir. 2011). Until these ambiguities are resolved, when arbitrators are confronted with challenges to their authority based on a particular interpretation of *Granite Rock*, they must exercise their own judgment regarding the scope of their authority.

In sum, when faced with a defense going to the making of the agreement for arbitration or rendering the entire contract void *ab initio*, arbitrators must be aware that the question of who decides such claims is the subject of evolving law. Accordingly, before undertaking to determine such a claim or defense, arbitrators should consider requesting briefing or argument on their authority to decide the matter and, when they determine they do have such authority, should determine that issue at such time as they deem appropriate.

C. The *First Options* Clear and Unmistakable Evidence Standard

Under the Supreme Court's decision in *First Options*, questions of arbitrability are presumptively for the courts. However, such questions are for the arbitrators to decide if the parties clearly and unmistakably have submitted them to the arbitrators.

In *First Options*, the United States Supreme Court held that questions of arbitrability were presumptively for courts to decide. 514 U.S. 938. However, the Court also held that if an arbitration agreement shows clear and unmistakable evidence of the parties' contractual intent that arbitrators and not courts have the power to determine questions of arbitrability, then that contractual agreement will be enforced. *See id.* at 944-45. In *Rent-A-Center*, Justice Scalia wrote that the requirement for clear and unmistakable evidence was an "interpretive rule" limited to the issue of whether parties had manifested their intent to agree that the arbitrator was authorized to decide arbitrability issues. 130 S. Ct. at 2777 n.1.

In response to *First Options*, the rules of most major domestic arbitral institutions now provide explicitly that arbitrators have the power to rule on any challenges to jurisdiction and any objections with respect to the existence, scope, or validity of the arbitration agreement or the contract of which the arbitration agreement forms a part. The various rules, however, do differ in the manner in which they grant to arbitrators the authority to decide both jurisdiction and arbitrability issues. *Compare* CPR Ad Hoc and Administered Rule 8.1 (granting the arbitrator the authority to "determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement"), *with* JAMS Rule 11(c) (providing that the arbitrator shall rule upon "[j]urisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation, or

scope of the Agreement under which Arbitration is sought, and who are proper Parties to the Arbitration") *and* AAA Rule R-7(a) (authorizing the arbitrator to rule on "his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim"). Despite those variations, all of these rules reflect a clear intent to empower the arbitrator to decide both jurisdiction and arbitrability questions. It thus is not surprising that in cases in which the parties agree to institutional rules that expressly provide for the arbitrators to rule on issues regarding the scope of the arbitration agreement, courts now usually hold that the parties have manifested their clear and unmistakable intention to have the arbitrators determine arbitrability issues. *See, e.g., Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 787 F.3d 671, 675 (5th Cir. 2012) (holding that when the parties adopted the AAA Rules, they "unmistakably" granted to the arbitrator the authority under AAA Rule R-7 to decide whether a party's claim was arbitrable); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (same); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372-73 (Fed. Cir. 2006) (same). *But see China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 287-88 (3d Cir. 2003) (holding (1) that incorporation of international arbitral rules was insufficient to manifest intent to have arbitrators decide arbitrability issues when the party argued that the arbitration agreement was forged and (2) that under those limited circumstances, a determination by an arbitrator that a claim is arbitrable is subject to *de novo* review by a district court in subsequent vacatur proceedings).

Thus, when institutional rules apply, it is likely, but not certain, that the *First Options* presumption will have been rebutted, as the parties will be deemed to have clearly and unmistakably submitted questions of jurisdiction and arbitrability to the arbitrator. Even when the contract does not provide for applicable institutional rules, it may provide, for example, that any issues arising out of or relating to the contract, including issues of arbitrability and jurisdiction, will be arbitrated. In instances in which neither institutional rules nor other contract provisions apply in this regard, or when they are unclear, some arbitrators ask the parties in the course of the preliminary hearing whether the parties will stipulate that all issues that arise in the arbitration will be deemed arbitrable in the proceeding. *See generally* AAA Rule P-2(a)(vi)(b)(providing that that at the preliminary hearing the arbitrator normally should ascertain whether issues exist regarding "whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable"). *See generally id.* Rule P-2(b). Any such stipulation

should be documented in the scheduling or case management order. Because parties sometimes are hesitant at the inception of the proceeding to enter into such a broad stipulation, a similar or narrower stipulation may be solicited later in the proceeding if and when a particular arbitrability issue arises. Faced with the choice either of adjourning the arbitration so parties can seek a judicial determination or of proceeding with the arbitration and incurring the risk of vacatur should a court subsequently find an arbitrated issue was not arbitrable, counsel may be willing to so stipulate. That can be especially true when the parties are present and are made aware of the risks, costs, and delays presented by the other alternatives.

One narrow question that *Rent-A-Center* did not resolve is whether a party can successfully challenge an institutional rule granting arbitrators the authority to determine arbitrability issues when the party specifically alleges that the rule or a similar arbitration provision itself is unconscionable or otherwise legally unenforceable. *See Rent-A-Center*, 130 S. Ct. at 2780 (holding that by failing to challenge the specific delegation provision, Jackson had failed to preserve the issue on appeal and noting that if the issue had been properly raised and preserved, "[i]t may be that . . . the challenge should have been considered by the court"). In this regard, it is worth noting that the recently revised AAA Rules now provide that if a respondent contends that "a different arbitration provision is controlling," the AAA will administer the arbitration "in accordance with the arbitration provision submitted by the initiating party," with the caveat that the arbitrator will make the final determination regarding which arbitration provision is controlling. *See* AAA Rule R-5(c).

Rule R-5(c) apparently is intended to expressly address the situation that arose in *Central West Virginia Energy, Inc. v. Bayer Cropscience LP*, 645 F.3d 267 (4th Cir. 2011). In that case, the competing parties filed separate AAA arbitrations regarding the same dispute, with each party contending that a different version of the parties' arbitration agreement applied. In effect, a "race to the courthouse" ensued. When the first tribunal decided that the arbitration agreement relied upon by the claimant in that case was controlling, the second tribunal stayed its arbitration pending a judicial review of the first tribunal's ruling. The court of appeals affirmed that ruling, largely in deference to what it characterized as the first tribunal's "procedural" decision." *Id.* at 271-73. At present, however, it is unclear what the force and effect of Rule R-5(c) would be in a case in which the arbitration agreement proffered by the noninitiating party provided for arbitration under a different set of institutional rules.

D. Nonsignatory Issues

Issues regarding the arbitrability of claims by or against nonsignatories to the contract are normally decided by the courts.

Parties who are signatory to an arbitration provision sometimes want to join nonsignatories in a pending arbitration or compel nonsignatories to arbitrate. Other times, a nonsignatory wants to compel arbitration and a signatory insists that only signatories can participate in the proceeding. Theories most often relied upon to justify the joinder or involvement of a nonsignatory in an arbitration proceeding include agency, alter ego, assumption, estoppel, and incorporation by reference. However, courts may consider other theories and subsets of these theories depending on the facts.

Although the pertinent arbitration provision or institutional rules may give an arbitrator the authority to rule on arbitrability issues relating to those who signed a contract, the same usually cannot be said regarding nonsignatories who signed nothing and never expressly agreed in writing to arbitrate anything. Courts almost universally hold that questions regarding whether nonsignatories have a right to arbitrate, or should be compelled to arbitrate, are for the courts to decide. *See, e.g., Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126-27 (9th Cir. 2013). An exception to this view is found in *Contec Corporation v. Remote Solution Co., Ltd.*, 398 F.3d 205 (2d Cir. 2005), in which the court decided that "arbitration of the issue of arbitrability" was proper. Factors relevant to the court's decision included the existence of a direct corporate interrelationship between the nonsignatory and one of the signatories, the parties' conduct reflecting that they considered those entities to be one and the same, and the applicability of AAA Rule R-7(a). *Id.* at 209. Exceptions to the general rule also have been found when all defendants in litigation agreed to arbitrate issues raised in an amended complaint and one of those issues was an alter ego allegation. *See Comerica Bank v. Howsam*, 208 Cal. App. 4th 790, 828-29 (2012). *See also Hotels Nevada, LLC v. L.A. Pac. Ctr., Inc.*, 203 Cal. App. 4th 336, 355-56 (2012) (deciding under Nevada law that when a nonsignatory stipulated that issues in litigation pleadings would be arbitrated and thereafter actively participated in the arbitration, the nonsignatory could not then object to the arbitrator's exercise of authority over the nonsignatory).

Arbitrators also will occasionally encounter a party who seems to take lightly the arbitrators' orders to produce information during the discovery process. One effective tool in dealing with such a situation is to emphasize that in managing and deciding the case, arbitrators are entitled to draw negative inferences from a failure to properly participate in discovery. *See* AAA Rule R-23(d). *See also Nat'l Cas. Co. v. First State Ins. Grp.*, 430 F.3d 492, 495 (1st Cir. 2005) ("This is a routine remedy, well within the arbitrator's powers."). Attorneys' fees and costs—and in abusive cases, monetary sanctions—may be imposed against an obstructive party. *See Hamstein Cumberland Music Group v. Williams,* Nos. 05-51666, 2013 U.S. App. LEXIS 9528, **12-13 (5th Cir. May 10, 2013) (affirming sanctions in the amount of $500,000 for discovery abuses and holding that under the FAA arbitrators have the inherent authority to police the arbitration process and that, even if the FAA did not grant that authority, the fact that both parties sought sanctions nonetheless showed that the parties had so authorized the arbitrator); *Superadio Ltd. P'ship v. Winstar Radio Prods.*, 844 N.E.2d 246, 250-55 (Mass. 2006) (citing AAA Rules and affirming $1,000 per day sanction for failure to comply with discovery requests, for a total of $287,000); JAMS Rule 29; CPR Ad Hoc Rule 16; CPR Administered Rule 16; AAA Rule 23(d) and 58. For a further discussion of sanctions, see Chapter 7, *supra*, and Chapter 9, *infra.*

CHAPTER 9

eDISCOVERY

Arbitrators' goals in managing eDiscovery are to (1) ensure an efficient and fundamentally fair hearing and (2) provide creative solutions that best ensure efficiency and economy, proportionality, and fairness in the production of relevant electronically stored information.

I. INTRODUCTION

Most business documents and information now are created and stored electronically. The existence and proliferation of such electronically stored information (ESI) poses a variety of unique discovery issues with which arbitrators must be familiar in order to efficiently and effectively manage the prehearing process and ensure a fundamentally fair hearing. Indeed, during the past decade, the proper management of eDiscovery—the commonly used phrase for the discovery of ESI—has become a frequent topic for discussion among commentators, arbitral institutions, and the arbitration community as a whole. As with traditional discovery, the arbitrator's general role in the management of eDiscovery is to (1) ensure retention and preservation of data; (2) establish, with as much party agreement as possible, the narrowest reasonable scope of discovery required to satisfy the parties' needs; and (3) implement procedures that establish the manner and format in which ESI will be produced.

II. OVERVIEW OF DIFFERENCES BETWEEN THE SEARCH AND RETRIEVAL OF ESI AND TRADITIONAL PAPER FILES

Arbitrators should understand the principal differences between the manner in which ESI and traditional business documents are stored and retrieved.

Unlike paper documents, which normally are stored in physical files, ESI can be stored in many ways and in many forms. The information itself might be located in a variety of storage media, such as personal computers, smartphones, company servers, clouds, social media, and so forth. It also can be stored in differing formats, some of which might not be in a condition that is human readable. Moreover, because such information can be stored in so many different media and in such different formats, there are diverse information technology mechanisms that can or must be used to search for, locate, retrieve, and present the information in a human-readable form.

Information sought in a commercial arbitration increasingly is kept only in electronic form. In newer and smaller organizations, the information may never have been kept on paper. In other organizations, the information may once have been on paper but then was scanned into a computer, with the paper copies subsequently discarded. The development of increasingly powerful software to create and manage electronic data means that older software and documents may no longer be on the producing party's system by the time ESI must be produced. Even if the producing party still has the older software, the requesting party may not be able to utilize the ESI if the party cannot access or use the software used to create it.

Arbitrators must be sufficiently versed in the methodologies for the storage, manipulation, search, and retrieval of ESI so they can manage the process of eDiscovery in an efficient, fair, and cost-effective manner. Otherwise, the costs of discovery may escalate unreasonably and consume great amounts of arbitrator, counsel, and party time in the process of resolving avoidable disputes.

Costs of uncontrolled eDiscovery can be very substantial, in large part because of the redundancies that can result when every potential source of documents is searched. When there are numerous custodians, various storage devices may contain duplicates of entire or partial electronic documents, as well as different revision levels of such documents. Automatic backup systems also may cache ESI off-site or in the cloud. Production of ESI is not accomplished as readily from some storage devices as compared to others, and it may be more costly to retrieve data from some devices than from others. Moreover, not all electronic storage is kept in the same language or format. Although a U.S. domestic company is likely to have all of its paper material in English, the native formats of various computerized file locations within the company nonetheless may differ widely. This is particularly true when materials are requested across different divisions or parts of merged companies.

III. TERMINOLOGY

Every pursuit has its own vocabulary, and information technology is no exception.

Any discussion of ESI must start with an understanding of the more important terms that are commonly used in connection with that subject. Some of the more commonly used terms relevant to eDiscovery issues include the following:

1. **Intimate Devices**—these are the personal smartphones and similar devices that people tend to always keep with them. Some organizations now permit people to bring their own device to work, and some require that employees and consultants use only company devices for company business.

2. **Metadata**—these are data that provide information about other data, that is, they tell the history of a document, including changes to it and accesses (connections or inquiries) to or about it. Counsel often find that the number of times a document has been changed or accessed is as informative as the text of the document. As a result, eDiscovery requests frequently will seek production of both the document and the related metadata.

3. **Native Format**—this is the format in which the material was originally created and stored. The native format may not be readily readable and understood by others who have not used and been exposed to that type of format. For example, an accounting report produced in a company's legacy software format might be unreadable on a computer that does not have access to that software. In that circumstance, the party requesting discovery will be at a disadvantage in not being readily able to sort and otherwise manipulate the data in order to analyze the stored information, which might contain, for example, the producing party's damage calculations. Parties who are asked to produce data generally will prefer to do so in native format. The requesting party will press for the data to be provided in a format more convenient for them to use. Advanced software capabilities now permit the manipulation of a number of unrelated databases contained in a variety of native formats such that they may be provided in a common form, such as Excel or Word, albeit at a cost.

4. **Predictive Coding**—this is the term for the most current and sophisticated form of search-and-retrieval technique. Predictive coding is designed to reduce the number of individually searched documents in the universe of potential documents by using artificial intelligence software to train the computer to refine the search algorithms and, thus, narrow the search terms to those that produce the most useful results without requiring human review of each document. As in all statistical searching, the key is to agree on a statistical methodology that is truly reliable and not just "garbage in garbage out." Predictive coding was one of the topics at the 2013 Sedona Conference (see below).

There are many relevant terms and phrases in use with respect to the topics of ESI and eDiscovery. One well-regarded glossary that helps make sense of the arcane terminology often employed in the context of information technology may be found on the EDRM Web site (http://www.edrm.net/resources/glossaries).

IV. A GUIDE FOR THE ARBITRATOR IN MANAGING THE eDISCOVERY PROCESS

A. Preparation for the First Prehearing Conference

The importance of the arbitrator's role in maintaining control over eDiscovery from the outset of the arbitration cannot be overemphasized.

Because eDiscovery yields much more data than paper discovery, including copies and versions of data and metadata, careful management of the process is imperative beginning at the first prehearing conference. Too much discovery can impose enormous burdens on the economic and organizational resources of the producing party.

Shortly after being appointed, an arbitrator should highlight ESI in preparing the agenda for the first prehearing or case management conference. The preliminary hearing agenda should require the parties, in advance of the prehearing conference, to (1) ascertain what relevant information in their possession or control is electronically stored; (2) determine what document preservation policies, if any, are in place with respect to ESI and be prepared to provide written proof of preservation as

required by the arbitrator; and (3) confer with the opposing party about any ESI issues before the first prehearing conference with the arbitrator. One relatively simple example of an ordering paragraph that can be used to accomplish these objectives is as follows:

> Counsel should meet and confer to discuss discovery before the prehearing conference. Counsel must learn now whether there is electronically stored information (ESI) likely to be relevant to the issues in the case. In order to prepare for their conference with each other, counsel for each party should first meet with the client to determine the nature and extent of the information (and particularly ESI) reasonably likely to be used in the hearings or to be requested in connection with the hearings. Counsel should determine with the client the following information: the types of ESI the client has, the location of the ESI and the identity of its custodian, the format in which the ESI is kept, and what steps are being taken for its preservation during the case. Counsel and the parties also should discuss the scope of the production of the ESI to which the parties are willing to agree, as well as the form of production, and how privilege and privacy concerns will be addressed in the production.

In the course of counsel's initial discussions in preparation for the preliminary hearing, counsel sometimes realize they are unable to comprehend the full scope and nature of technical considerations regarding the storage and retrieval of ESI. When that is the case, counsel should insist that their clients' information technology personnel or service provider be made available for the purpose of providing counsel with whatever information is necessary to allow counsel and the arbitrator to assess eDiscovery issues.

Of course, when appropriate, arbitrators should exploit any authority implicitly or explicitly granted to them under the controlling rules. For example, the AAA Rules now expressly authorize the arbitrator to (1) raise issues at the preliminary conference regarding whether the parties will exchange ESI, (2) determine how the costs of ESI searches will be allocated, (3) order that ESI be made available to the opposing party "in the form most convenient and economical for the party in possession of the documents," and (4) impose "reasonable search parameters" when the parties are unable to agree. *See* AAA Rules R-21, 22(b)(iv), P-2(a)(vii) and

(ix), and R-23(b). Arbitrators presumably have the power to take such actions even in the absence of an express rule. *See also* 2010 JAMS Recommended Discovery Protocols for Domestic cases ("Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award), www.jamsadr.org (Search Rules/Clauses).

B. Arbitration Holds

Arbitrators should ensure, either by soliciting the agreement of the parties or through the issuance of an order, that relevant and material ESI is preserved through an effective prohibition on the destruction of such information.

Because many businesses and other entities have processes in place that periodically and automatically delete ESI or save it to less accessible media, it is important that arbitrators ensure that arbitrating parties institute a hold on the destruction or transfer of ESI that may be relevant to the dispute. This process actually must commence immediately upon learning there is a dispute or claim; otherwise, relevant evidence may be lost before the arbitrators are appointed, thereby increasing the likelihood of the assertion of claims for sanctions for spoliation of evidence.

Cooperation among the parties with respect to preservation of ESI is most likely to produce results with which all can live. However, if the parties cannot agree, or if there is any uncertainty that preservation will occur throughout the client company, the arbitrator should issue a preservation order. A useful resource reflecting many of the relevant considerations that might be taken into account in drafting such an order is the sample Interim Order Regarding Preservation found in Section 40.25 of the Federal Judicial Center's Manual for Complex Litigation (Fourth). *See* http://www.fjc.gov (search for "Manual for Complex Litigation"). The sample order highlights the benefits of requiring the parties to meet and confer for the purpose of devising and agreeing to their own document preservation plan. In addition to including a meet-and-confer requirement, the order contains two highly substantive sections relating, respectively, to

subjects to be considered in drafting such a preservation order and the parties' duty to preserve records and information.

The material in the sample order provides a useful road map to the eDiscovery issues that arbitrators must be prepared to resolve. Whether by party agreement or arbitral orders, the sample order suggests that determinations must be made regarding such matters as the following:

(a) the scope of the obligation to preserve, including the types of material to be preserved, the subject matter(s), time frame, the authors, and key words to be used in identifying responsive materials;

(b) whether preservation of pertinent materials will require the suspension or modification of routine business processes or procedures, such as document management, retention, or destruction policies and the recycling of computer data storage media;

(c) whether methods are in place to preserve any volatile but potentially discoverable material, such as voicemail, active data in databases, or electronic messages; and

(d) the anticipated costs of preservation and ways to reduce or share these costs.

The sample order also highlights the duty of parties and counsel to preserve all evidence that may be relevant to the action. The array of materials to be preserved is vast. The sample order states,

> "Documents, data, and tangible things" is to be interpreted broadly to include writings; records; files; correspondence; reports; memoranda; calendars; diaries; minutes; electronic messages; voicemail; E-mail; telephone message records or logs; computer and network activity logs; hard drives; backup data; removable computer storage media such as tapes, disks, and cards; printouts; document image files; Web pages; databases; spreadsheets; software; books; ledgers; journals; orders; invoices; bills; vouchers; checks; statements; worksheets; summaries; compilations; computations; charts; diagrams; graphic presentations; drawings; films; charts; digital or chemical process photographs; video, phonographic, tape, or digital recordings or transcripts thereof; drafts; jottings; and notes. Information that serves to identify, locate, or link such

material, such as file inventories, file folders, indices, and metadata, is also included in this definition.

Moreover, the duty to preserve extends not only to parties but also to "any employees, agents, contractors, carriers, bailees, or other nonparties who possess materials reasonably anticipated to be subject to discovery in this action." The sample order also points out that "counsel is under an obligation to exercise reasonable efforts to identify and notify such nonparties, including employees of corporate or institutional parties."

In most commercial arbitrations, it is unlikely that the arbitrator would utilize such an elaborate order, although in some complex arbitrations involving substantial ESI, there is no doubt that such an order can prove to be highly cost effective given its purpose of eliminating subsequent eDiscovery disputes. The sample order also is highly informative in illustrating the diverse types of ESI that exist in the commercial sphere and the many ways ESI can be stored. The order serves to underscore the myriad issues that can arise regarding the preservation of ESI. The sample order thus can serve as an important tool for arbitrators, who will be benefited by being aware of the content of the order and its several purposes.

On occasion, a party will contend that an opposing party has negligently failed to preserve, or has intentionally destroyed, relevant ESI. When arbitrators are unable to verify whether such an allegation is correct and yet find that the complaining party's showing in this regard is sufficiently persuasive, the arbitrators should consider implementing appropriate processes designed to ascertain whether the ESI in fact was destroyed or deleted and whether that information nonetheless might remain retrievable. One approach to this issue is to permit the complaining party to employ an expert (including the party's in-house information technology personnel) to attempt to confirm whether the pertinent information is missing and whether it can be retrieved. An alternative is for the arbitrators to appoint their own expert for that purpose and to further provide that the costs of that expert will be allocated based on the expert's findings.

C. Establishing Ground Rules for ESI Production Requests and the Actual Production of ESI

The arbitrator must guide discussions regarding the production of ESI and when necessary and appropriate, impose a framework for eDiscovery.

At the first prehearing conference, the arbitrator should encourage counsel, in conjunction with their clients' senior information technology personnel and outside eDiscovery consultants, to agree (if they have not already done so) upon (1) preliminary search terms (relevant words, names, phrases, and topics), (2) software tools and methodology for data sampling (the retrieval and review of a small selection of ESI), and (3) test runs of the preliminary search terms on subbatches of ESI to assess whether, in light of the quality of the data received, the benefits of further production justify its costs and burdens. This process should be repeated until search terms are found that produce a manageable number of relevant documents when run on the universe of data.

It is important that the parties also agree at an early stage on issues concerning the format and manner of production of ESI, including whether the produced data should be searchable by the requesting party, how to identify each document produced, and whether the requesting party is able to view the metadata on the produced documents. Although the production of much metadata might be considered overkill in the standard commercial arbitration, some metadata, such as the formulae utilized to create an Excel spreadsheet, may be critical to understanding the assumptions used and the conclusions reached by the author. One complication in this regard is that the mere act of opening electronically stored documents changes their metadata (e.g., the data history of the ESI, such as when it was created, last modified, and other properties). Although costly, it thus may be necessary in an appropriate case for the producing party to create a forensic or mirror image of the hard drive(s) to be examined prior to beginning a search for ESI.

The following are other approaches for the arbitrator to consider in managing eDiscovery. These approaches can be utilized alone, in combination with other suggestions, or serially. They must be tailored to the specifics of the issues presented in a given arbitration, such as the amount in controversy, the resources of the parties, and the factors arguing for and against in-depth eDiscovery:

- Limit the number and type of storage devices to be searched. The bulk of relevant ESI often resides on the hard drive(s) most frequently used by the key witnesses. Multiple copies of the same electronic document also may be found in redundant storage locations, such as laptops, tablets, Blackberries, personal digital assistants, smartphones, thumbdrives, and home computers. One management tool is to eliminate some storage devices from the search.
- Limit discovery to electronic documents that are relevant and material to issues in the case and not merely likely to lead to relevant evidence.
- Limit discovery to particular custodians of data.
- Limit discovery to the electronic documents on which each side intends to rely at the hearing.
- Limit the number of requests or search terms.
- Limit the date range of documents that must be searched.
- Limit the number of custodians whose storage devices must be searched.
- In appropriate cases, shift all or some of the cost of furnishing ESI to the requesting party.

The advisory committee notes to the 2006 amendments to Rule 34 of the Federal Rules of Civil Procedure suggest a number of factors that may be relevant in determining whether to grant requests for extensive and invasive searches:

- Whether the responding party can make a persuasive showing of undue burden and cost;
- Whether a showing of undue burden can be overcome by a showing of good cause consistent with Section 26(b)(2)(C) of the Federal Rules of Civil Procedure;
- The specificity of the discovery request (the general idea being that the requesting party should be required to narrow and tailor a specific set of discovery requests);

- The amount of information available from more easily accessed sources (in other words, the parties should examine readily available information first);
- Whether the responding party has failed to produce relevant information that is likely to have existed but is no longer available on more easily accessed sources, or at all;
- The likelihood of finding relevant, responsive information that cannot be obtained from more easily accessed sources. (The parties can conduct sampling to determine the costs and burdens of production and the likelihood of finding responsive, highly useful information.);
- Predictions as to the importance and usefulness of further information considered in light of the amount in controversy; and
- Importance to the issues at stake in the litigation.

In addition to being sensitive to the need to avoid unnecessary incursions into a party's electronically stored business records, arbitrators must be alert to the possibility that extensive ESI searches can result in the production of information that is both irrelevant and personal in nature. For example, if the arbitrators permit searches of individual employees' laptop computers, there is a heightened risk that personal information will be inadvertently produced. Privacy considerations thus provide another reason why arbitrators and counsel should seek to limit both the scope of eDiscovery requests and the sources from which ESI must be produced.

Another area in which the parties should be encouraged to reach agreement concerns the foundation for the admissibility of ESI. Otherwise, a party might insist on the need to authenticate the computer and the processes and chain of custody used to enter, retrieve, and produce the data—a process that can prove to be exceedingly expensive. *See generally Lorraine v. Market Am. Ins. Co.*, 241 F.R.D. 534, 585 (D. Md. 2007); *Metro-Goldwyn Mayer Studios Inc. v. Grokster Ltd.*, 454 F. Supp. 2d 966, 972 (C.D. Cal. 2006).

However, it may embolden a losing party to seek vacatur. Thus, dissents should be written only in extreme cases. Dissents should be carefully written to avoid the appearance of bias and protect the confidentiality of arbitrators' communications and deliberations. The dissent should be concise, polite, and restrained.

A dissenting opinion is not part of the final award, which should be signed only by those arbitrators who agree to the reasoning and findings contained in the award. *See* CPR Ad Hoc Rule 15.3; CPR Administered Rule 15.3. When an arbitrator does not agree with all the reasoning of the majority, or does not agree with some part of the award, one alternative is for the body of the award to contain a statement reflecting those portions of the award in which the dissenting arbitrator does not join (e.g., "Arbitrator X does not join the foregoing statement") such that all arbitrators can nevertheless sign the final award and avoid the issuance of a separate dissenting opinion.

CHAPTER 12

POSTAWARD MATTERS

In addressing postaward matters, arbitrators' goals are to act promptly and appropriately while avoiding (1) alteration of the award, except on the limited grounds permitted by applicable law and rules; and (2) conduct that might give rise to allegations of partiality or bias.

I. LIMITED GROUNDS FOR POSTAWARD RELIEF

A. Doctrine of *Functus Officio*

An arbitration has a finite life. The common-law doctrine of *functus officio* holds that once arbitrators render a final decision, they cease to have jurisdiction over the dispute or the authority to alter their decisions. This doctrine was originally based on an "unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion." *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967). The doctrine remains relevant in contemporary case law and arbitration practice largely because courts consistently recognize that an arbitrator's authority terminates, and the arbitrator thus is deemed *functus officio*, simultaneously with the time at which an award becomes enforceable by a court. *See, e.g., Bosack v. Soward*, 586 F.3d 1096, 1103 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 522 (2010).

Nonetheless, some courts are reluctant to apply the *functus officio* doctrine. Indeed, courts occasionally ignore the doctrine altogether and remand cases to an arbitration panel without even mentioning the doctrine, perhaps because they view the doctrine as "antiquated" and a relic of "the bad old days when judges were hostile to arbitration and ingenious in hamstringing it." *See Glass Molders, Pottery, Plastics & Allied Workers Int'l Union v. Excelsior Foundry Co.*, 56 F.3d 844, 846 (7th Cir. 1995) (quoting *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 278 (1st

Cir. 1983)). The *functus officio* doctrine is described by some courts as "riddled with exceptions" and "hanging on by its fingernails." *See E. Seaboard Constr. Co. v. Gray Constr., Inc.*, 553 F. 3d 1, 4 (1st Cir. 2008) (quoting *Glass Molders*, 56 F.3d at 846).

Until such time as *functus officio* is fully repudiated by the courts and readdressed in institutional rules, however, arbitrators should faithfully observe the doctrine's tenets, which generally preclude them from revising their decision on the merits of an issue once they have issued an award or decision that is intended to adjudicate that issue with finality. Despite this principle, recognized exceptions to the doctrine do permit an arbitrator to correct, modify, or clarify an award in certain limited respects. Many of these judicially created exceptions to the *functus officio* doctrine are discussed below.

1. *Arbitrators' Lack of Authority to Alter Determinations on the Merits after Issuance of a Final Award*

In the absence of a contractual provision to the contrary, arbitrators are prohibited from modifying a final award for the purpose of correcting legal or substantive factual errors that affect the arbitrators' determination on the merits.

As is true of many aspects of arbitration, the relevance of the *functus officio* doctrine depends, in the first instance, on whether the parties' arbitration agreement has provided for arbitration procedures that render the doctrine moot. Because there is no legal prohibition against parties agreeing that arbitrators may reconsider the merits of their awards, parties are free to provide that *functus officio* principles do not apply or apply only after the passage of a stated time period. *See, e.g., Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989); *UHC Mgmt. Co. Inc. v. Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) ("Parties may choose to be governed by whatever rules they wish regarding how an arbitration itself will be conducted."). Thus, the parties' arbitration agreement, or a stipulation of the parties in a case management order, could expressly permit the parties to request the arbitrator to reconsider a decision on the merits; in that circumstance, the arbitrator would not be constrained by *functus officio* principles. Absent an agreement or applicable rule that provides otherwise, however, the principles of *functus officio* strictly apply.

The application of the *functus officio* doctrine to an arbitrator's attempt to correct a legal error is generally illustrated by *Landis v. Pinkertons, Inc.*, 122 Cal. App. 4th 985 (2004), in which the arbitrator issued an award that erroneously applied the controlling law on damages for a claim for emotional distress. In granting a postaward motion filed by the respondent, the arbitrator corrected the award by striking that portion of the award that granted damages on the emotional distress claim. In affirming the district court's order confirming the original award, the court of appeal observed—without expressly referencing the *functus officio* doctrine—that the arbitrator's alteration of the original award was not in accordance with the limited statutory grounds upon which an arbitrator may correct or clarify an award. *Id.* at 992-93.

Under the doctrine, arbitrators are similarly prohibited from correcting substantive errors in the application of evidence or in the determination of factual matters in a final award. Thus, in *WMA Securities, Inc. v. Wynn*, 105 F. Supp. 2d 833 (S.D. Ohio 2000), *aff'd*, 32 F. App'x 726 (6th Cir. 2002), the court applied the *functus officio* doctrine in a rescission case when the arbitrators, after realizing they had in effect granted a double recovery, purported to correct an award in an effort to eliminate duplicative monetary and equitable relief. *See id.* at 840.

Because the doctrine of *functus officio* is inextricably related to finality, arbitrators must be mindful that they also can be held to be *functus officio* with respect to issues or claims finally determined in interim or partial awards. *See Trade & Transp., Inc. v. Natural Petroleum Charterers, Inc.*, 931 F.2d 191, 195 (2d Cir. 1991). In some jurisdictions, interim and partial awards may be deemed to be final for *functus officio* purposes only if the award states that it is final. *See, e.g., Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999); *Bosack*, 586 F.3d at 1103. It is therefore a good practice for arbitrators, when issuing interim or partial awards, to state specifically whether the award is or is not final.

As is discussed in depth in Chapter 11, *supra,* arbitrators must be aware that applying an incorrect title to an award can have the effect of terminating the arbitrators' authority before that result is intended by the arbitrators. For that reason, when arbitrators render a decision on the merits of the parties' claims but still need to resolve attorneys' fees and costs issues, arbitrators should label their decision on the merits as a "partial final award" or "nonfinal interim award" or with some other label that makes it clear that the case has not been adjudicated in its entirety. Of course, the text of the decision also should specify the full extent of any

reservation of jurisdiction. In addition, when arbitrators issue an interim award that finally resolves the merits of the case but reserves jurisdiction to subsequently determine attorneys' fees and costs issues, the award should make clear whether the sole outstanding issue is the amount of awardable fees and costs or, alternatively, whether a party is entitled to recover fees and costs and, if so, the quantum of fees and costs to be awarded. *See generally Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, Civil Action 11-6008, 2012 WL 5232180, at *7 (E.D. Pa. 2012) (involving a situation in which the award was sufficiently ambiguous in this regard to result in a dispute between the parties in postaward confirmation and vacatur proceedings).

2. *Exceptions to Functus Officio*

Despite the court's comment in *Eastern Seaboard* that *functus officio* is "riddled with exceptions," only three are generally recognized.

a. Clerical, Computational, and Similar Errors

Arbitrators generally retain authority to correct clerical, computational, or similar errors in a final award.

Despite having rendered an otherwise final award, arbitrators usually have the ability to correct miscalculations, mistakes in descriptions, and typographical, clerical, technical, and similar errors. *See* AAA Rule R-50 (giving parties twenty days from transmittal of the award to request a correction); JAMS Rule 24(j) (giving parties seven days from service of the award to request a correction); CPR Ad Hoc Rule 15.5 and CPR Administered Rule 15.6 (giving parties fifteen days from delivery/receipt of the award to request a correction). Errors of this nature tend to involve mistranscriptions of data, transpositions of numbers, mathematical errors, or misdescriptions of persons, places, or things. Their very nature usually demonstrates that the correction will not be inconsistent with the arbitrators' intent as reflected in the final award.

Although the FAA refers to "evident" mistakes and miscalculations (9 U.S.C. § 11), cases illustrate that courts have become less concerned with the threshold question of whether the alleged mistake is evident on the face of the award. For example, in *Eastern Seaboard*, a construction case, the arbitrator's final award did not provide a setoff to which the losing party claimed it was entitled. 553 F. 3d 1. The arbitrator *sua sponte* amended the award to reflect the setoff. In reversing the district court's vacatur of the

amended award, the court of appeals held that the arbitrator did not exceed his authority when he amended the award even though (1) it was sufficiently unclear from the face of the award that a mistake had been made that the court felt compelled to observe that "seemingly complete awards may omit information or overlook contingencies" and (2) the court was forced to rely on the arbitrator's own postaward characterization of the parties' claims. *Id.* at 4-6. In further explaining why the correction by the arbitrator of a "latent ambiguity" in an award was permissible, the court of appeals emphasized that the arbitrator's interpretation of the applicable institutional rule—AAA Construction Industry Rule R-48, which empowered the arbitrator to correct and modify the final award based on the traditional exceptions to *functus officio*—was entitled to considerable deference. *Id.* at 6.

T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329 (2d Cir. 2010) provides an even more dramatic illustration of the degree of deference courts are willing to grant to arbitrators' determinations of the scope of their authority to correct mistakes in awards. In *T.Co Metals*, the arbitrator admitted to having made several errors in interpreting and understanding the evidence. After issuance of the final award, the arbitrator corrected each of those errors by amending the award and, in so doing, was forced to estimate the additional monetary sums required to rectify those errors. In concluding that the arbitrator did not exceed his powers or violate *functus officio* principles by so amending the award, the court did not merely defer to the arbitrator's interpretation of the applicable rules—in this case, the rules of the ICDR—authorizing corrections and modifications of awards. Instead, the court explained that the degree of deference to be granted to an arbitrator's interpretation of such rules is so high that the resulting amended award could not be vacated even if the court concluded that the arbitrator's interpretation of those rules was erroneous. *Id.* at 346.

Of course, arbitrators should not rely on court decisions such as *Eastern Seaboard* and *T.Co Metals* as a basis for exceeding their authority to grant a motion to modify or correct awards under institutional rules. Nonetheless, those decisions do show that when arbitrators do amend or correct a final award, the arbitrators should explain in writing why they interpret the applicable rules as permitting such a correction or modification.

b. Submitted but Unadjudicated Issues

Arbitrators generally retain the authority to correct or supplement an award to determine an issue submitted for determination but unresolved in the award.

Another exception to *functus officio* permits arbitrators to decide a submitted claim after they have rendered a final award that fails to adjudicate that claim. *See La Vale*, 378 F.2d at 573; CPR Ad Hoc Rule 15.5; CPR Administered Rule 15.6. The exception does not jeopardize the finality of the original award because the award is silent on the omitted issue. *See also A.M. Classic Constr., Inc. v. Tri-Build Dev. Co.*, 70 Cal. App. 4th 1470, 1476-77 (1999) (arbitrator amended award to resolve a neglected stop notice issue).

c. Clarifications regarding the Intent of the Award

Arbitrators generally retain the authority to issue a clarification of the intent of the original award.

Arbitrators also may clarify an award when there is demonstrable ambiguity regarding the intention of the award or concerning whether the parties' claims and defenses have been fully determined. *See Official & Prof'l Emps. Int'l Union v. Brownsville Gen. Hosp.*, 186 F.3d 326, 332-33 (3d Cir. 1999) (clarification permitted because of latent ambiguity in award); *La Vale*, 378 F.2d at 573. In clarifying an award, arbitrators must ensure that the clarification does not alter the intent of the original award. On occasion, the attempt to clarify an award reveals erroneous reasoning in the original award. In such a circumstance, arbitrators must avoid the impulse to correct the substantive error in the original award and, instead, must recognize the finality of their original determination, which they are without power to correct.

3. Other Allowed Postaward Arbitral Authority

Federal courts occasionally have recognized that arbitrators can retain jurisdiction to determine future disputes without violating the principles of *functus officio*.

In the circumstance in which a long-term contract might require serial arbitrations for ongoing dispute resolution, some courts have permitted arbitrators to render decisions on initial disputes and retain jurisdiction to resolve future disputes. *See, e.g., Proodos Marine Carriers Co. v. Overseas Shipping & Logistics Co.*, 578 F. Supp. 207, 212 (S.D.N.Y. 1984) ("[W]here a long-term contract contains a broad arbitration clause, and early-arising disputes are submitted to and resolved by an arbitration panel selected in accordance with the contract, that panel remains in office for the purpose of resolution of later-arising disputes during the course of the contract."); *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1220 (5th Cir. 1991) (holding that continuing jurisdiction of panel to determine "future price adjustments" under a natural gas sales contract was not barred by the doctrine of *functus officio* because the panel did not attempt to alter a decision it had rendered but simply retained authority for the limited purpose of deciding future price adjustments). *Cf. Hightower v. Superior Court*, 86 Cal. App. 4th 1415 (2001) (arbitrator retained jurisdiction to issue "incremental award" to determine "additional issues as may arise" while parties were complying with the initial award).

In contrast, other courts hold that when arbitrators retain jurisdiction to decide future disputes, they improperly purport to expand their jurisdiction in violation of the public policy underlying the FAA—the freedom to choose one's arbitrator. *See KX Reinsurance Co. v. Gen. Reinsurance Co.*, No. 08 Civ. 7807 (SAS), 2008 WL 4904882, at *5 (S.D.N.Y. 2008).

B. Interrelationship between the *Functus Officio* Doctrine, Institutional Rules, and Arbitration Law

In determining the scope of their postaward authority, arbitrators should consider the interrelationship between any applicable institutional rules, the relevant arbitration law, and the doctrine of *functus officio*.

Most of the major domestic institutional arbitration rules have expressly adopted the *functus officio* doctrine together with the recognized exceptions. When parties agree to conduct their arbitration under these rules, they contractually incorporate the application of the doctrine in their arbitration. In incorporating such rules, the parties also agree (1) that the arbitrators may correct, modify, and clarify final awards only when the parties seek such relief within the time periods stated in the rules; and (2) that when such relief is timely sought, the arbitrator generally is obligated to resolve the submitted issues within a specified period of time, which only some of the rules explicitly state may be extended. *See, e.g.*, JAMS Rule 24(j); AAA

Rule R-50; AAA Construction Industry Rule R-48; CPR Ad Hoc Rule 15.5; CPR Administered Rule 15.6.

Most court decisions that interpret institutional rules relating to arbitrators' limited postaward authority recognize that those rules are patterned after the common-law exceptions to *functus officio*. Those court decisions, therefore, typically apply a traditional common-law *functus officio* analysis in determining whether the arbitrators, in granting or refusing postaward relief, exceeded their authority under the rules and applicable law.

Some institutional rules contemplate that governing arbitration law will supplement rules pertaining to arbitrators' authority to grant postaward relief. Thus, the AAA's Guide for Commercial Arbitrators, which is intended to assist arbitrators in applying the AAA Rules, suggests (1) arbitrators may respond to a joint request for clarification, even though the AAA Rules do not expressly provide that arbitrators may clarify an award; and (2) the governing arbitration law might be relevant in defining the scope of the arbitrators' authority to modify or correct an award. *See* A Guide for Commercial Arbitrators, https://apps.adr.org/ecenter/neutralResources/A%20Guide%20for%20Commercial%20Arbitrators.pdf.

Although the FAA does not expressly codify the *functus officio* doctrine, it is well settled that the doctrine applies to arbitrations governed by the FAA. In applying the FAA, courts routinely acknowledge the tenets of the doctrine and hold that in the absence of an applicable rule or contractual provision to the contrary, arbitrators have the limited authority to grant only those types of postaward relief contemplated by the exceptions to *functus officio*.

The doctrine is even more firmly established in the UAA and RUAA, both of which expressly recognize arbitrators' authority to grant only those forms of postaward relief permitted by the traditional exceptions to *functus officio*. *See* UAA § 9; RUAA § 20 & cmts. 2, 3 (acknowledging the application of the *functus officio* doctrine to arbitrations conducted under the uniform acts). As a result of the general incorporation of the common-law doctrine of *functus officio* into domestic institutional arbitration rules, the case law under the UAA, the RUAA, and the FAA applies the principles underlying *functus officio* to virtually all commercial domestic arbitrations unless the parties contractually agree otherwise.

C. *Sua Sponte* Clarification of Awards and Corrections of Clerical and Similar Errors

Depending on the applicable law and institutional rules, arbitrators may be authorized to act independently to correct clerical or similar errors or to clarify the intent of an award.

In some instances, arbitrators can act on their own initiative to alter a final award. For example, in *Cadillac Uniform & Linen Supply, Inc. v. Union de Tronquistas Local 901*, 920 F. Supp. 19 (D.P.R. 1996), the reasoning in the original award expressed the view that the claimant, whose employment had been terminated for fighting with a fellow employee, should receive the same punishment as his antagonist—a two-week suspension. Despite this determination, the arbitrator ordered that the claimant should be reinstated without pay even though the claimant's employment had been wrongfully terminated more than a year prior to the issuance of the arbitration award. Subsequent to the issuance of the final award, the arbitrator changed the award *sua sponte* such that the altered award provided that the claimant would be reinstated with pay, save for the two-week suspension period. Even though the amended award greatly increased the amount of money that the claimant was to receive, the court ruled that "the arbitrator was not reconsidering his award but just clarifying his intention" and, thus, confirmed the corrected award. *See id.* at 22-23.

Some institutional rules expressly allow arbitrators to act on their own initiative for the purpose of correcting clerical or mathematical errors and/or clarifying ambiguities in an award. *See, e.g.*, AAA Construction Industry Rule R-48(a); CPR Ad Hoc Rule 15.5; JAMS Rule 24(j); CPR Administered Rule 15.6. To ensure early finality, those rules provide short periods of time within which any corrections must be made. When arbitrators realize subsequent to the issuance of a final award that the award contains a significant error not related to any determination on the merits, they should examine the applicable rules and arbitration statutes and determine whether they are empowered to correct the error. Whenever possible, *sua sponte* corrections should be made before the parties are forced to request a clarification.

D. The Effect of Motions to Modify on Statutory Deadlines for Seeking Vacatur and Confirmation of Awards

Arbitrators do not normally assist parties who are determined to seek vacatur of the arbitrators' final award. Arbitrators nonetheless should be aware of the fact that when a party files a motion with the arbitrators seeking a modification, correction, or clarification of an award, the filing of such a motion will not necessarily toll the deadline by which a party must seek vacatur or confirmation in a district court proceeding. *See, e.g., Fradella v. Petricca*, 183 F.3d 17, 20 (1st Cir. 1999) (holding that the filing of a request with an arbitral tribunal to correct ministerial errors in an award does not toll the three-month limitation for filing a motion to vacate under the FAA). Although some institutional rules provide that an award is not final for purposes of appeal until the parties have exhausted their right to seek modifications from an arbitrator, others do not. *Compare* JAMS Rule 24(j) and (k), CPR Ad Hoc Rule 15.6, *and* CPR Administered Rule 15.7 *with* AAA Rule R-50. Moreover, other institutional rules that are similar to JAMS Rule 24(k)—in the sense that they purport to define when an award is final for purposes of judicial review—have been determined by some courts to have no influence on the court's determination regarding whether it has jurisdiction to review the award. *See, e.g., Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 563 (6th Cir. 2008).

Although it seems likely that courts will defer to a rule such as JAMS Rule 24(k), parties cannot rely safely on that assumption. More poignant, arbitrating parties are unlikely to be aware of court decisions such as those mentioned above and, thus, might unknowingly place themselves at risk when they file a motion with the arbitrator seeking a correction or clarification of an award and wrongly assume that by filing such a motion, the deadlines for seeking vacatur or confirmation of the award have been tolled. For these reasons, and as a courtesy to the parties, arbitrators thus should promptly resolve issues presented by motions seeking modifications, corrections, and clarifications such that delays in the resolution of those issues will not work to the prejudice of one or both of the parties.

E. Checklist for Arbitrators to Consider before Modifying an Award

Arbitrators who have received a request to modify or clarify an award or are considering an award modification or clarification on their own initiative should consider the following:

1. Whether the arbitration agreement, the applicable rules, and applicable law address the arbitrators' authority to modify, correct, or clarify awards either in response to a motion by one of the parties or on the arbitrators' own volition;
2. Whether any such request has been timely filed pursuant to applicable rule or whether the deadline for *sua sponte* modifications or clarifications has expired;
3. The nature of the statement in the award that requires modification, correction, or clarification; and
4. Whether, in the case of a tripartite panel, a majority of the panel members agree that the award should be modified, corrected, or clarified.

Generally, a modification, correction, or clarification is permissible if it falls within any of the exceptions to *functus officio*, is timely made, and does not violate the arbitration agreement, applicable statutes, and governing institutional rules.

When arbitrators do correct or modify an award, it probably is best for that award to be labeled as a "modified award" or a "corrected award." Nevertheless, other labels, such as "amended award," also presumably are acceptable as long as the arbitrator does not purport to alter previous findings on the merits. Thus, in *A.M. Classic Construction*, the court explained that under the CAA, an arbitrator could issue an "amended" award (1) to resolve an issue omitted from the original award; (2) through mistake, inadvertence, or excusable neglect of the arbitrator; (3) if the amended award is made before the original award is confirmed; (4) if the amended award is not inconsistent with other findings on the merits; and (5) if the amended award does not cause demonstrable prejudice to the legitimate interests of a party. 70 Cal. App. 4th at 1476-77.