When It's Over Before It's Completed: The Finality of Interim Awards

BY STUART M. WIDMAN

Arbitration awards do not have the immediate force and effect of a court judgment. Compliance with an award can be attained if (1) the losing party voluntarily satisfies the award or (2) the award is turned into a judgment of a court and then enforced. Award confirmation where there is federal jurisdiction is made through Federal Arbitration Act Section 9, 9 U.S.C. § 9.

On the other hand, if the party against whom the arbitration award was entered wants to upset the award, an application to vacate the award must be filed under FAA Section 10. 9 U.S.C. § 10. That must be done within three months of the delivery of the award. 9 U.S.C. § 12. One of the grounds specified in Section 10 is that the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). There is no comparable language regarding finality in FAA § 9.

The majority rule—with one exception discussed below—is that the award must be “final” in order to be confirmed by a federal district court. Where the award clearly resolved all issues and claims presented to the arbitration panel, there should be no dispute about confirmability. But confirmation is less certain where the panel issued an interim or partial award and other matters or claims remain to be resolved at later hearings.

CPR Rule 31.1, from the International Institute for Conflict Prevention & Resolution's Rules for Non-Administered Arbitration, specifically provides for interim awards. It states:

"At the request of a party, the Tribunal may make such interim measures as it deems necessary, including measures for the preservation of assets, the conservation of goods or the sale of perishable goods. The Tribunal may require appropriate security as a condition of ordering such measures."

This provision vests the panel with wide discretionary authority.

Disputes over finality, and thus confirmability, of an interim or partial arbitration award typically arise in two situations:

(1) where the award is clearly an interim award that grants certain equitable relief, such as the posting of security or injunctive relief; and

(2) where the award (i) decides only liability, but not a remedy, (ii) decides only one of many claims, or just the claims but not the counterclaims, and (iii) decides the claims raised in one of two related arbitrations before the same panel.

In any of those situations, the prevailing party may seek to confirm the award, whereas the loser may argue that the interim award is not confirmable under the FAA because (continued on page 106)
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cause it only partially resolved the dispute that was before the arbitration panel.

These two articles discuss key cases under the two prongs of the finality dispute, and show that:

1. interim awards granting equitable relief such as preliminary injunctions and requiring bonds for security are generally "final" awards that can be confirmed, and
2. partial awards also may be final and confirmed if they decided bifurcated issues, decided separate and independent claims, or in fact fully decided all that was before the arbitration panel.

Thus, parties who are successful in getting an interim or partial arbitration award may readily apply to a district court for entry of judgment based upon the above theories. At the same time, a party that has obtained an interim or partial award that is "final" must be alert so it does not lose its judgment if that party fail to timely seek confirmation under FAA Section 9's one-year limitations period.

DEFINING 'FINAL'

In deciphering the finality language of FAA Section 10(a)(4), the Seventh U.S. Circuit Court of Appeals stated: "We take 'mutual' and 'final' to mean that the arbitrators must have resolved the entire dispute (to the extent arbitrable) that had been submitted to them. . . ." IDS Life Insurance Co. v. Royal Alliance Associates Inc., et al., 266 F.3d 645, 650 (7th Cir. 2001). The question is "whether the award itself, in the sense of judgment, order, bottom line, is incomplete in the sense of having left unresolved a portion of the parties' dispute. . . . If this means that the arbitrators severed the plaintiffs' specific claims of wrongful conduct and so failed to resolve the entire dispute that had been referred to arbitration. . . . then they failed to make a mutual, final and definite award. . . ."

The Seventh Circuit affirmed the district court's award confirmation, holding that, even though the award was "incomprehensible," that did not mean it was not complete, final or definite under the FAA. Id. at 651.

As noted above, FAA Section 9 does not contain the word "final." Section 9 states in part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 of this title. 9 U.S.C. § 9.

But another Seventh Circuit decision, Yasuda Fire & Marine Ins. Co. of Europe v. Continental Casualty Co., 37 F.3d 345, 347-48 (7th Cir. 1994), has held that a district court must apply the same test of finality whether reviewing a petition to confirm or a petition to vacate:

As mentioned, Yasuda brings its claim under section 10 as a petition to vacate, not section 9. While the two statutes apply to two different procedural postures (the winner of an award may petition to confirm under section 9, and the loser may petition to vacate under section 10), they are the same as a practi-
AWARDS GRANTING EQUITABLE RELIEF

Case law shows that there are five theories by which an interim award granting equitable relief will be deemed final, and thus con
firmable, by a district court under FAA Section 9:

- Awards requiring the posting of bonds in order to secure the final award’s performance;
- Awards preserving assets or the status quo in order to make the final award meaningful;
- The theory that FAA Section 9 doesn’t require a “final” award for confirmation purposes;
- Where the parties’ contract deems any award to be final and binding; and
- Where an injunction is entered, to make the interim award meaningful.

These theories overlap and complement each other, and the cases often combine and intertwine discussions of more than one theory.

Awards Requiring the Posting of a Bond to Secure the Final Award. An earlier Seventh Circuit decision validated this theory as a basis for district court review. In Yasuda, supra, 37 F.3d at 347–348, the court held that the arbitration panel’s order requiring the defendant to post an interim letter of credit necessary “to protect a possible final award” was a confirmable award under the FAA. Thus, Continental Casualty could move to confirm, and Yasuda al-
ternatively could move to vacate under FAA Section 10(a)(4) if the panel exceeded its authority.


To Preserve Assets in Order to Make The Final Award Meaningful. Closely related to protecting the final award, this slightly different rationale is articulated in Paciﬁc Reinsurance Management Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1023 (9th Cir. 1991). Paciﬁc Reinsurance afﬁrmed the district court’s conclusion that the “Interim Final Order” requiring Ohio Reinsurance to deposit into an escrow account $22 million possibly due to Paciﬁc Reinsurance’s claim “to prevent a potential ﬁnal award from being meaningless.” Id. at 1022. The escrow deposit is akin to the “measures for the preservation of assets” speciﬁed in CPR Rule 13.1.


The Award Need Not Be Final Under FAA Section 9. As discussed above, Section 9 does not expressly refer to a “final” award. In Ace/Clear Defense Inc., supra, 2002 U.S. App. Lexis 19670 at *3, the District of Columbia Circuit specifically noted this as one of its three rationales for concluding that the district court did not err in confirming the award. The circuit court succinctly observed: “Section 9 speaks of an arbitration ‘award,’ not a ‘final award.”

Although not specifically discussing the absence of the word “final” in its decision, by quoting that portion of Section 9, a more recent district court decision also may have construed the statute to not require a final award when confirmation is sought. Manilow & Appoggiauma Music Inc. v. Snorkel Productions Inc., 2004 U.S. Dist. Lexis 7660 (S.D. N.Y. 2004). The Manilow interim award declared that the respondent’s rights to produce a play had terminated under the parties’ contract, and it enjoined respondent from acting as the producer pending final hearing.

This rationale conflicts, however, with the practical reasoning of Yasuda, discussed above, that FAA Section 9 implicitly requires a final award. But in both Ace/Clear Defense and Manilow, there was no petition for vacatur under FAA Section 10(a)(4) contesting the petition to confirm. There was a motion to vacate in Manilow, but it was based upon the judicial doctrine of manifest disregard, not FAA § 10. Id. at *2. And in Ace/Clear Defense, decided long after Yasuda, Ace withdrew its initial motion to vacate and instead filed a motion to dismiss on the basis of non-finality. Ace/Clear Defense Inc., supra, No. 00CV6227/40 at pp. 1-2. Thus, this rationale—based on a technical construction of Section 9—may only apply, if at all, when there is no Section 10(a)(4) challenge of non-finality.

The Parties’ Contract Permits Confirmation. This rationale also arises in both the district and circuit court’s decisions in Ace/Clear Defense Inc., and it was the third basis in that case to satisfy FAA confirmability. 2002 U.S. App. Lexis 19670 at *2. The applicable portion of FAA Section 9 is the opening phrase:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, . . . the

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court must grant such an order. . . . 9 U.S.C. § 9.

The contract in *Ace/Clear Defense* provided: “The decision of the arbitration shall be final and binding upon each party and may be enforced in any court of competent jurisdiction.” Notably, that contract provision did not expressly limit “decision” to just a final award. The circuit court, therefore, agreed that the contractual language “is sufficient to satisfy Section 9’s requirement that the parties ‘have agreed that a judgment of the court shall be entered upon the award.’” Id. at 2. See *Home Insurance Co. v. RHAI/Pennsylvania Nursing Homes Inc.*, 127 F.Supp. 2d 482, 485 (S.D. N.Y. 2001) (the “parties implicitly agreed to the entry of judgment on any arbitration award . . . because the arbitration clause contained a finality clause).

Many arbitration clauses contain “final and binding” phrasing. Thus, present drafting of the arbitration clause—if you later obtained an interim award and want to confirm—could determine the finality of an interim award under this theory.

The CPR rules and comments address the finality issue briefly. First, under CPR Rule 1.1, all CPR rules become part of the parties’ arbitration agreement if the arbitration is being administered under those rules or by CPR. The key CPR rules are 14.1, 14.5 and 14.6. Rule 14.1 states:

The Tribunal may make final, interim, interlocutory and partial awards. With respect to any interim, interlocutory or partial award, the Tribunal may state in its award whether or not it views the award as final for purposes of any judicial proceedings in connection therewith.

Rule 14.5 permits either party, within 15 days after the receipt of an award, to request that the tribunal “clarify the award,” “correct any clerical, typographical or computational errors,” and also “to make an additional award as to claims or counterclaims presented in the arbitration but not determined in the award.” The tribunal must act on that request within 30 days. Additionally, the tribunal may make such corrections and additional awards “on its own initiative as it deems appropriate.”

Also, Rule 14.6 states that the award—apparently also encompassing any interim, interlocutory or partial award under Rule 14.1—“shall be final and binding on the parties. . . .” But where a correction or additional award is requested by a party or made by the tribunal on its own initiative under Rule 14.5, the “final and binding” award is the one containing the clarification, correction or additional award, or is the prior award if no such clarification, correction or additional award is made within the time periods provided in Rule 14.5.

Finally, the Rule 14 commentary states:

The Rules do not deal expressly with confirmation of an award, as the matter is covered by the Federal Arbitration Act, 9 U.S.C. § 9 and its state counterparts. For most users of arbitration, the finality of the award is a significant advantage of arbitration over court litigation.

Thus, the CPR rules, particularly Rule 14.6, expressly provide that an interim or partial award is deemed “final and binding,” regardless of whether the panel says it is under Rule 14.1. That would provide the basis for district court confirmation under this theory because it is part of the parties’ contract.

To Give Meaning to Interim Relief, Including Injunctions. Although similar to the rationale raised above on preserving assets, this rationale was separately developed in *Southern Seas Navigation, Ltd. v. Monrovia v. Petroleos Mexicanos of Mexico City*, 606 F.Supp. 692 (S.D. N.Y. 1985). The arbitrator’s interim order granted equitable relief in Southern’s favor, reducing the defendant’s lien claim against a vessel that was the subject of the dispute by $1.65 million, to $350,000 from $2 million. 606 F.Supp. at 693.

The district court confirmed the interim award, analyzing it to a preliminary injunction reviewable under 28 U.S.C. § 1292(a)(1). Id. at 694, n. 4. The district court also concluded: “If an arbitrable award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made.”

A contrary result appears in *Nolo Plastics Inc. v. Valu Engineering Inc., et al.*, 2004 U.S. Dist. Lexis 20416 at *19 (E.D. Pa. 2004), where the district court held that it did not have jurisdiction to confirm an interim order enjoining the defendants’ waste of a joint venture’s funds. *Nolo* cited *Hart Surgical, Inc. v. Ultracision, Inc.*, 244 F. 3d 231, 233 (1st Cir. 2001).

But, as discussed in Part II next month, *Hart Surgical* deals with bifurcation, not equitable relief. Also, the interim *Nolo* order cannot be easily distinguished from confirmable interim awards that preserved assets such as in *Pacific Reinsurance*. Thus, the *Nolo* jurisdictional bar may be a faulty conclusion. The Seventh Circuit noted in *Smart v. IBEW Local 702*, 315 F.3d 721, 725 (7th Cir. 2003):

It is apparent from the wording of section 10(a)(4) that it is not a jurisdictional provision. Rather, it assumes that the award is properly before the court, and establishes a ground for vacating it.

Although *Smart* recognized that parties should not be permitted to run to a district court “every time the arbitrator sneezes,” the Seventh Circuit did not delineate the jurisdictional limits of FAA Section 10(a)(4). Id. The *Nolo* result, therefore, probably should have been confirmation under this theory.

Accordingly, where the interim award grants some form of equitable relief, there are legal theories by which an interim award winner may seek confirmation.

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*In Part II next month, the legal theories regarding confirmation will be applied to bifurcated or separate, independent claims.*

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Surveying the Split: More Theories on Confirming Awards Where There Are or Appear to Be More Than One Claim or Issue

BY STUART M. WIDMAN

Last month, the author reviewed the legal theories under which courts have deemed interim arbitration awards "final," and subject to confirmation under the Federal Arbitration Act. This month, he examines the basis for confirmation of bifurcated awards and separate claims.

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An interim award also may be confirmed by a district court if the award: (1) was on an issue that was bifurcated, formally or informally, from the rest of the proceedings, (2) if not bifurcated, nevertheless was on a separate and independent claim, or (3) was tantamount to a final award because it addressed the only claim raised in the proceedings.

FORMAL OR INFORMAL BIFURCATION

The First U.S. Circuit Court of Appeals has taken the lead in identifying the bifurcation theory as a means to get district court confirmation.

** PART II OF II **

In Hart Surgical Inc. v. UltraCision Inc., 244 F.3d 231 (1st Cir. 2001), the court held that an interim liability award is to be considered a final partial award reviewable by the district court, where the case has been bifurcated into liability and damage phases.

The appellants had moved to vacate the liability award under Federal Arbitration Act Section 10(a)(4). The First Circuit previously had decided in Bull HIN Information Systems Inc. v. Hutson, 229 F.3d 321 (1st Cir. 2000), that a partial award on the first of two discrete and distinct phases of an arbitration was final and thus reviewable.

Hart Surgical extended Bull and held that a district court may also confirm a partial award of a single claim when that award determines just liability but not damages. Key to the decision was the "definiteness with which the parties have expressed an intent to bifurcate" the proceedings, and that the arbitration panel approved the parties' formal stipulation. 244 F.3d at 232, 235. Also, since the parties submitted, in a discrete proceeding, all of the evidence pertaining to the formal, agreed-to bifurcation, the court held that the parties and the panel understood that the determination of liability would be a final award. Id. at 235.

Hart Surgical was followed soon by the First Circuit's decision in Providence Journal Co. v. Providence Newspaper Guild, 271 F.3d 16, 18 (1st Cir. 2001). Providence extends Hart Surgical to permit review of a partial award on liability where the parties only informally agreed to bifurcate the issues of liability and damages.

In Providence, the parties also agreed to divide the arbitration hearing into two phases, all evidence relating to liability was submitted, and the arbitrator conclusively decided every point in the liability phase. Id. at 19. The First Circuit saw no reason to fashion a different rule where the bifurcation had only been informally agreed upon, because it was still clearly intended.

More recently, Andrea Doreen Ltd., et al. v. Building Material Local Union 282, et al., 250 F.Supp. 2d 107, 112 (E.D. N.Y. 2003), also held that an arbitrator's liability decision would be deemed final and confirmable because of informal agreement upon bifurcation, citing Michaels v. Mariforum Shipping, 624 F.2d 411 (2nd Cir. 1980), and Metallgesellschaft A. G. v. M/W Capitan Constante, 790 F.2d 280 (2nd Cir. 1986).

Notably, a later Doreen decision, at 299 F.Supp. 2d 129 (E.D. N.Y. 2004), also recognized the collateral estoppel effect of factual findings made in the confirmed arbitration award. Thus, Doreen takes the confirmation issue one step further and shows additional benefits or risks of winning or losing a partial award that is confirmed.

The introduction to this article in Part I last month—see "When It's Over Before It's Completed: The Finality of Interim Awards," 24 Alternatives 97 (June 2006)—noted that counsel and parties need to be aware of how this finality concept affects interim awards so they do not miss the FAA limitations bar on confirmation or vacatur. For example, Nationwide Mut. Ins. Co. v. First State Ins. Co., 213 F.Supp. 2d 10 (D. Mass. 2002), recognized the finality principle set forth in Providence Journal but declined to apply it retroactively. That enabled First State to avoid the FAA vacatur time bar—the precise risk noted in Hart Surgical, 244 F.3d at 236.

The limitations bar was imposed, however, in McKinney Restoration Co. Inc. v. Illinois Dist. Council No. 1 of the Intl Union of Bricklayers, 392 F.3d 867 (7th Cir. 2004), discussed in more detail below, affirming the district court's confirmation of the first of two awards because the request to vacate was filed too late under the FAA.

It is this author's view that missing the three-month time bar to vacate in 9 U.S.C. § 12 may not, however, doom the fight to defeat confirmation of the interim award on grounds of non-finality. An inability to vacate for lack of finality under FAA Section 10(a)(4) does not necessarily preclude an argument of non-finality in response to a petition to confirm the interim award. After all, if the interim award is
not final under most of the theories set forth in these articles—the exception is Ace/Clear Defense noted in Part I last month—it should not be confirmed, even if it is not vacated. The confirmation/vacatur battle is then deferred until a final award is entered. See, e.g., Local 13, Int'l Brotherhood of Electrical Workers AFL-CIO v Commonwealth Edison Co., 2004 U.S. Dist. Lexis 12219 (N.D. Ill. 2004), discussed below.

Conversely, even a timely Section 10(a)(4) vacatur petition may not save the day if the interim award is final and confirmable under these theories. Of course, a timely vacatur petition is critical where the grounds are not non-finality.

THE SEPARATE OR INDEPENDENT CLAIM

The confirmability of a separate and independent claim dates back to the Second Circuit's decision in Metallgesellschaft A.G. v. M/V Captains Constanta, et al., 790 F.2d 280 (2nd Cir. 1986). There, the district court confirmed a "partial final award" for a freight claim of almost $800,000 admittedly due and owing by Metallgesellschaft.

The district court entered a judgment in the amount of the award. In the arbitration, Metallgesellschaft, the charterer, had counterclaimed for damages for alleged short delivery and fuel contamination. Nevertheless, the circuit court affirmed, based primarily upon precedent in cases involving a charterer's liability for freight. The Second Circuit noted that, "although the charterer's claims presented triable issues, they were 'legally irrelevant' to the question of the owner's claim for freight." 790 F.2d at 282. Accordingly, it was proper to treat the admitted liability for freight as an independent obligation regardless of any counterclaims for cargo damage or shortage.

Metallgesellschaft was followed by the First Circuit's decision in Bull HIN Information Systems Inc. v. Hutton, 229 F.3d 321 (1st Cir. 2000), which implicitly affirmed the district court's power to review a partial award under where the award was rendered on the first of two discrete and distinct phases and claims. As noted above, Bull was in turn extended by the First Circuit's later decision in Hart Surgical supra.

The Seventh Circuit in Publicis Communication et al. v. True North Communications, Inc., 206 F.3d 725 (7th Cir. 2000), also affirmed the district court's confirmation of an arbitration panel's interim "order" requiring Publicis to provide True North with tax information for three years. Although the arbitration was governed by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is better known as the New York Convention, the Seventh Circuit used FAA cases and logic to guide its decision.

The key to the decision was the fact that the production order was not "just some procedural matter" like a discovery ruling. 206 F.3d at 729. Rather, the relief granted was a specific claim raised by True North in the arbitration. Id. at 728, 729. Accordingly, the Seventh Circuit deemed the interim order a ruling on a "discrete, time-sensitive issue" ("this chunk of the case"). Id. at 729, 731. See, also, Banco de Seguros del Estado v. Mutual Marine Office Inc., 230 F.Supp. 2d 362, 370 (S.D.N.Y. 2002), noting that the request for a letter of credit was pleaded as a separate and independent claim, citing Metallgesellschaft, and Home Insurance Co. v. RHAI/Pennsylvania Nursing Homes Inc., 127 F.Supp. 2d 482, 487-488 (S.D. N.Y. 2001), which confirmed an arbitration award directing the respondent to pay more than $400,000 of premiums admittedly due to Home Insurance—similar to the award on the admitted debt in Metallgesellschaft—because it was on a "sufficiently" separate claim.

It is this author's opinion, however, that Home Insurance stretches the finality rationale of a separate and independent claim beyond its fair limits. That interim order was merely a partial damages award on a single, broader claim for premiums due under the parties' agreements. Indeed, Home Insurance seems to suggest that a separate and independent claim exists whenever it is easily proved with admissions in the debtor's accounts. But it is the uniqueness of the issue or claim, not the uniqueness of the proof of it, that is the test under this theory. Similarly, a grant of partial summary judgment on a piece of a larger claim is not unique even though it was more easily proved. For the same reason, this author is troubled by the district court's confirmataion of a partial damage award in Compania Chilena de Navegacion Interoceânica, S. A. v. Norton, Lilly & Co., 652 F.Supp. 1512, 1515 (S.D.N.Y. 1987), because it also said that an admitted, and thus easily provable, claim covered by a first award was separate and independent from the plaintiff's other claims that would "require the consideration of more extensive evidentiary sources." Yet the Compania plaintiff's remaining damage claims were for the same type of debt covered by the first award, so the first award was an incomplete award on damages.

Compare TIG Insurance Co. v. Security Insurance Co., 2003 Dist. Lexis 17708 at *11-12 (D.C. D.C. 2003), vacating an interim arbitration award requiring the respondent to pay the petitioner more than $38 million, including for unpaid premiums, distinguishing the Metallgesellschaft "traditions," and finding that the payment award was not independent of the rescission counterclaim. See also Local 13, International Brotherhood of Electrical Workers AFL-CIO v. Commonwealth Edison Company, 2004 U.S. Dist. Lexis 12219 (N.D. Ill. 2004), where an interim liability award in a union's favor was found to have lacked any clear direction for a calculation of a dollar remedy, and wasn't sufficiently final. Rather than vacating the award, however, the district court remanded the matter to the arbitrator in order to make a final arbitration award containing damages.

THE ARBITRATOR DECIDED ALL ISSUES

Sometimes an award does not decide both liability and damages, and so it is perceived as an incomplete—and thus not final—decision. But when the award decides the only question presented to the arbitrator, the order is final and ripe for confirmation. In this respect, the district court is not really reviewing a partial award at all. Thus, this rationale falls slightly outside the issues discussed above.

Although some cases predate it, the Seventh Circuit's decision in Smart v. IBEW, 315 F.3d 721 (7th Cir. 2002), captures the essence of this rationale. In Smart, the arbitrators found liability, holding that Smart violated the collective bar-
gaining agreement by failing to make required contributions to the union's welfare fund. The arbitrators did not, however, determine the amount owed by the union, but rather directed the parties to calculate that amount.

The district court confirmed the liability award, and the Seventh Circuit affirmed, because it was clear that the arbitrators had decided all that they were asked to do—if Smart owed money. 315 F.3d at 726. The Seventh Circuit noted that the parties can proceed to arbitration solely on liability and leave damages for another process.

Citing Smart, the Seventh Circuit later decided McKinney Restoration Co. Inc., et al. v. Illinois District Council No. 1 of the Int'l Union of Bricklayers, 392 F.3d 867 (7th Cir. 2004). There had been two arbitration awards entered as a result of the parties' disputes, and the employer filed suit to vacate both of them entered in favor of the union. The union sought confirmation of the awards, claiming in part that the employer's challenge to the first arbitration award was untimely under FAA Section 10. The outcome on the timeliness issue depended, in turn, on whether the first award was a final award, thereby starting the clock on the time period to seek vacatur. The employer argued that the first arbitration was not final, and thus not vacatable, because it left open certain issues that were decided by the second award.

The Seventh Circuit held that the two awards addressed separate claims and issues, and that the first award fully determined liability and imposed a remedy with respect to the issues then before the panel. Since the first award was complete and final, thereby commencing the statute of limitations, the request to vacate it was untimely. Id. at 872.

The Ninth Circuit's decision in Venetian Casino Resort, LLC v. Lebrer McGovern Bosiz, Inc., et al., 2004 WL 42384 (9th Cir. 2004), also affirmed the district court's confirmation of an arbitration award that decided the only question sent to the arbitrator under the arbitration order—"a discrete component of their larger dispute."

Notably, the panel majority rejected the dissent's rationale that "although the arbitrator may have decided the question put to him, that question did not determine a claim, or liability, or damages, or grant or deny some equitable relief." Id. at 2.

The majority got it right, however, because neither FAA Section 9 or 10 refer to the arbitrator's decision of a claim, liability or damages, but only to an award. Similarly, FAA Section 2 refers only to arbitration of "a controversy"; Section 3 refers to arbitration of "any issue"; and Section 4 refers to arbitration "in accordance with the terms of the agreement." 9 U.S.C. §§ 2, 3, 4.

Thus, the scope of the arbitration—and therefore the completeness and finality of the award—may not coincide with traditional notions of liability or damages. It all depends upon what the parties asked the arbitrator to address and decide.

For example, many years ago this author issued a final award where the parties each claimed that the other side breached hospital management agreements. The award only determined whether and by whom there were breaches—but not damages—because the arbitration clause was limited to just "declaring" if breaches had occurred. Careful drafting and reading of the arbitration clause will drive the scope of the arbitrator's award and its finality.

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Confirmation of an interim or partial arbitration award by a district court generally depends upon its finality. Where the interim award grants equitable relief, there are five possible theories of finality upon which a petition for confirmation can be based. Even where the interim award does not grant equitable relief, confirmation may still be sought if the award covers the bifurcated, separate or only claim. Since arbitration awards do not become judgments unless and until a district court says so, finding the right "hook" for finality is key to deriving the full benefits from arbitration.

Conversely, knowing when an award is final protects a party—and its lawyers—from missing limitation bars for confirmation or vacatur. It is critically important to recognize that an arbitration can be over before it is completed.

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