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The *Functus Officio* Doctrine: Arbitrators' Authority to Reconsider and Modify Awards

The common law doctrine of *functus officio* provides that once arbitrators issue a final award, their authority as arbitrators is exhausted and they no longer have the power to re-examine that award. While the *functus officio* doctrine recognizes the importance of upholding the integrity and finality of arbitration awards, it limits the ability of arbitrators to rectify mistakes in or otherwise modify a final award, even where a serious substantive error has been made. Counsel involved in arbitration should be aware of the parameters of the *functus officio* doctrine and the recognized exceptions to effectively address issues after the tribunal renders an award.

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In arbitration, after the parties submit one or more issues for resolution and the arbitrators issue their award, even a serious legal or factual error by the arbitral tribunal will not alone justify the setting aside of the award by a US court (see *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 US 662, 671-72 (2010)). The question often arises whether and to what extent arbitrators have the authority to reconsider and modify an award. The starting point for this analysis is the common law doctrine of *functus officio*, which provides that once arbitrators have issued a final award, they have exhausted their authority and are without power to reconsider and modify that award. However, this rule is subject to well-recognized, practical exceptions.

This article examines:

- The scope and rationale of the *functus officio* doctrine.
- What constitutes a final award subject to the *functus officio* doctrine.
- Examples of circumstances in which the *functus officio* doctrine does not apply and arbitrators retain their jurisdiction to address claims or issues.
- The recognized common law exceptions to the *functus officio* doctrine.
- The impact of institutional rules adopted by the parties on the arbitrators' authority to reconsider and modify their awards.
- The arbitrators' authority to modify awards following court remand.

SCOPE AND RATIONALE OF THE *FUNCTUS OFFICIO* DOCTRINE

The concept of *functus officio*, Latin for "office performed," means that an officer is "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished" (*Martel v. Ensco Offshore Co.*, 449 F. App'x 351, 354 (5th Cir. 2011) (quoting Black's Law Dictionary 743 (9th ed. 2009))). Commonly formulated, as applied to arbitration, the common law *functus officio* doctrine dictates that once an arbitral tribunal has made and published a final award (see below *What Constitutes a Final Award*), the tribunal's authority is exhausted and the arbitrators have no power to re-examine the merits of the issues they have determined (*Barousse v. Paper, Allied-Indus., Chem. & Energy Workers Int'l Union*, 2001 WL 872844, at *6 n.3 (5th Cir. July 10, 2001); *Trade & Transp., Inc. v. Nat. Petroleum Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991)).

The *functus officio* doctrine recognizes that the contractual powers of arbitrators lapse after they render an award (*Green v. Ameritech Corp.*, 200 F.3d 967, 977 (6th Cir. 2000)). Where arbitrators are *functus officio* regarding the matters addressed in a final award, subject to certain exceptions, any attempt by them to modify that award is null and void (see *Phila. Newspapers, Inc. v. Newspaper Guild of Greater Phila., Local 10*, 1987 WL 38, at *2 (E.D. Pa. Oct. 22, 1987) (finding that where the arbitrator was *functus officio* after issuing the first award, the second award was null and void); *Salt Lake Pressmen & Platemakers, Local Union No. 28 v. Newspaper Agency Corp.*, 485 F. Supp. 511, 515 (D. Utah 1980) (stating that "[w]hen the arbitrator renders his final award, his power under the agreement is exhausted, and, unless his subsequent attempts to act under the agreement and submission fall within a few very narrow categories ... they are null and void")).

Courts routinely apply the *functus officio* doctrine in cases governed by the Federal Arbitration Act (FAA) (*Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 331 (3d Cir. 1991)). The doctrine also applies in cases brought under state arbitration law (*Am. Int'l Specialty Lines Ins. Co. v. Allied Capital Corp.*, 125 N.Y.S.3d 340, 344-45 (2020); *Hartford Steam Boiler Inspection & Ins. Co. v. Underwriters at Lloyd's & Cos. Collective*, 857 A.2d 893, 897, 900 (Conn. 2004); *Ohio Office of Collective Bargaining v. Ohio Civil Serv. Emps. Ass'n, Local 11*, 127 N.E.3d 482, 490 (Ohio Ct. App. 2018)).

Search Understanding the Federal Arbitration Act and Understanding US Arbitration Law for more on the FAA and the interplay between federal and state arbitration law.

The two commonly cited policy rationales for the *functus officio* doctrine are the need:

- **For finality in arbitration.** Arbitrators' repeated reconsideration and revision of their awards would undermine the usefulness of arbitration as a means of efficient and effective dispute resolution (see *Dreis & Krump Mfg. Co. v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 8*, 802 F.2d 247, 249 (7th Cir. 1986); *Teamsters Local 312 v. Matlack, Inc.*, 916 F. Supp. 482, 485 (E.D. Pa. 1996), aff'd, 118 F.3d 985 (3d Cir. 1997)).
- **To avoid the potential for undue influence.** Another important policy concern is the need to "prevent re-examination of an issue by a nonjudicial officer potentially subject to outside communication and unilateral influence." Courts have referred to the "potential evil of outside communication" and ex parte influences that may result in a new conclusion by the arbitrators. (*Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995); *Colonial Penn*, 943 F.2d at 331-32; *LLT Int'l Inc. v. MCI Telecomms. Corp.*, 69 F. Supp. 2d 510, 515 (S.D.N.Y. 1999) (internal quotation marks omitted).)

WHAT CONSTITUTES A FINAL AWARD

The threshold question in determining whether arbitrators have the authority to reconsider and modify an award is whether that award is final (*Colonial*

Penn, 943 F.2d at 331-32). Generally, an award is final when the arbitrators have determined liability and damages (see *McGregor Van De Moere, Inc. v. Paychex, Inc.*, 927 F. Supp. 616, 617 (W.D.N.Y. 1996)).

Moreover, an award may be final regarding the matters it decides even where it does not resolve all of the issues the parties presented in the arbitration (*In re Rollins, Inc. (Black)*, 552 F. Supp. 2d 1318, 1324 (M.D. Fla. 2004), rev'd in part on other grounds sub nom., 167 F. App'x 798 (11th Cir. 2006)). An interim or partial award may be deemed final for purposes of *functus officio* and not subject to reconsideration or modification (see, for example, *Trade & Transp.*, 931 F.2d at 195). An interim award is considered final where either:

- The award finally and conclusively disposes of a separate and independent claim and is not subject to abatement or set-off (*Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283 (2d Cir. 1986)).
- The parties have agreed to submit a severable portion of their dispute to the arbitral tribunal for separate, final disposition (referred to as bifurcation) (see, for example, *Bailey Shipping Ltd. v. Am. Bureau of Shipping*, 2014 WL 1282504, at *4 (S.D.N.Y. Mar. 28, 2014)).

Where the parties agree to bifurcation, they need not expressly agree that the partial award on the issue submitted will be "final" or that the award be labeled as such, if the circumstances are clear that this was the intent of the parties and the arbitrators (see, for example, *Publicis Commc'n v. True N. Commc'ns Inc.*, 206 F.3d 725, 729 (7th Cir. 2000); *Bridgeview Aerosol, LLC v. Black Flag Brands, LLC*, 2009 WL 10678555, at *4 (D. Minn. Sept. 18, 2009)).

The most common example of interim awards that are deemed final are those issued under the parties' agreement to bifurcate liability and damages, intending for the arbitrators to issue a final determination of liability and then later, if necessary, address damages (see, for example, *Hart Surgical, Inc. v. Ultracision, Inc.*, 244 F.3d 231, 235 (1st Cir. 2001)). Where the parties agree to bifurcate liability and damages, the arbitral tribunal is generally without authority to revisit its liability award when later deciding the issue of damages (*Trade & Transp.*, 931 F.2d at 195 (where the parties agreed to bifurcate liability and damages, holding that the arbitral tribunal's partial award as to liability was final and the tribunal lacked authority to revisit liability issues); *Universitas Educ., LLC v. Nova Grp., Inc.*, 2012 WL 2045942, at *1 (S.D.N.Y. June 5, 2012), aff'd, 513 F. App'x 62 (2d Cir. 2013); *Int'l Ass'n of Machinists & Aerospace Workers v. Lockheed Martin Space Sys. Co.*, 2010 WL 11523903, at *3 (C.D. Cal. Jan. 22, 2010) (finding that where the initial award conclusively determined the issue of liability, the arbitrator exceeded his authority by later awarding damages based on a different legal theory)).

Another common situation in which an interim award is deemed final is where the arbitrators decide all of the parties' substantive claims but bifurcate the issue of the prevailing party's attorneys' fees and costs for later resolution (see, for example, *Day & Zimmerman, Inc. v. SOC-SMG, Inc.*, 2012 WL 5232180, at *7 (E.D. Pa. Oct. 22, 2012); *Rollins*, 552 F. Supp. 2d at 1324-25 (holding that after an interim award finally resolved the parties' claims but left the issue of attorneys' fees for later resolution, the arbitrator's subsequent award of attorneys' fees did not violate *functus officio*)).

ARBITRATORS' RETENTION OF JURISDICTION

When determining the applicability of the *functus officio* doctrine, counsel should keep in mind that even after issuance of a final award, arbitrators retain jurisdiction to re-examine claims or issues where the parties have expressly agreed to it. Additionally, case law has clarified other situations in which the doctrine may not apply.

PARTIES' CONSENT

Because arbitration is a creature of contract, an arbitrator's retention of jurisdiction for any purpose agreed to by the parties does not implicate or violate the *functus officio* doctrine (*Eatoni Ergonomics, Inc. v. Research in Motion Corp.*, 2011 WL 2437416, at *8 (S.D.N.Y. June 1, 2011) (stating that "[b]ecause the Arbitrator retained jurisdiction based on an explicit agreement by the parties to subject future disputes to arbitration, the doctrine of *functus officio* does not apply"), aff'd, 486 F. App'x 186 (2d Cir. 2012)).

Parties may empower arbitrators to re-examine an award in either:

- The parties' arbitration agreement. Where the parties agree, the *functus officio* doctrine is displaced and the parties' agreement defines the arbitrators' authority to reconsider or modify their award (*United Bhd. of Carpenters & Joiners of Am. v. Tappan Zee Constructors, LLC*, 804 F.3d 270, 277 (2d Cir. 2015); *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 342-43 (2d Cir. 2010); *Veliz v. Cintas Corp.*, 273 F. App'x., 608, 609 (9th Cir. 2008); see *Int'l Bhd. of Elec. Workers, Local Union 824 v. Verizon Fla. LLC*, 803 F.3d 1241, 1249 (11th Cir. 2015)).
- An after-the-fact submission of a matter for reconsideration (*Brown v. Witco Corp.*, 340 F.3d 209, 219 (5th Cir. 2003); *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999); *Colonial Penn*, 943 F.2d at 333 n.5).

Conversely, where the parties agree that arbitrators cannot revisit decisions in interim or partial awards, even where permitted under the *functus officio* doctrine, the arbitrators lack authority to reconsider those awards (see, for example, *US Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1178 (9th Cir. 2010); *Smith v. Transp. Workers Union of Am. AFL-CIO Air Transp. Local 556*, 374

F.3d 372, 375 (5th Cir. 2004); see also *Am. Int'l Specialty Lines Ins. Co.*, 125 N.Y.S. 3d at 346).

OTHER SITUATIONS

Arbitrators may retain jurisdiction after issuance of a final award to decide previously undetermined matters. For example, where the parties have agreed to the issuance of a partial final award deciding certain issues or claims and subsequent proceedings to determine others, the arbitrators are not *functus officio* to subsequently rule on the undecided issues or claims. (See, for example, *Allstate Ins. Co. v. Amerisure Mut. Ins. Co.*, 2020 WL 1445615, at *5, *7 (N.D. Ill. Mar. 25, 2020).)

Additionally, some courts have held that even absent express party consent, arbitrators may retain jurisdiction to address issues regarding the implementation or enforcement of the awarded remedy (see, for example, *SBC Advanced Sols., Inc. v. Commc'ns Workers of Am., Dist. 6*, 44 F. Supp. 3d 914, 925 (E.D. Mo. 2014) (stating that "arbitrators frequently retain limited jurisdiction to resolve issues related to the implementation of a remedy ordered by the arbitrator, both at the request of the parties and *sua sponte*"), aff'd, 794 F.3d 1020 (8th Cir. 2015)). Prohibiting arbitrators from retaining jurisdiction as needed to enforce their awards "would needlessly undermine the arbitration process by requiring either perpetual judicial intervention or the selection of additional arbitrators to resolve future enforcement disputes" (*Engis Corp. v. Engis Ltd.*, 800 F. Supp. 627, 632 (N.D. Ill. 1992)). However, retention of jurisdiction to oversee the enforcement of an award is generally not a license to resolve additional disputes (*Stone v. Theatrical Inv. Corp.*, 64 F. Supp. 3d 527, 541 (S.D.N.Y. 2014) (upholding an award installing a receiver on a prospective basis but noting that the arbitrator would have violated *functus officio* had she "install[ed] herself as a referee over further claims involving the receiver")).

Notably, one court found that where an arbitral tribunal issued a final award resolving certain disputed claims for reinsurance coverage, but retained jurisdiction over any dispute "arising out of" the final award, the tribunal was not *functus officio* regarding a dispute over subsequent billings made under the award. The court explained that the *functus officio* doctrine "is applicable only once the arbitrator's assigned duties have come to an end." However, due to the tribunal's retention of jurisdiction in the final award, and the party's consent to that retained jurisdiction through its failure to dispute or seek to vacate the final award, "the arbitrators' duties have definitionally not come to an end if the current dispute 'arises out' of the Final Award." (*Chi. Ins. Co. v. Gen. Reinsurance Corp.*, 2019 WL 5387819, at *2 (S.D.N.Y. Oct. 22, 2019).)

By contrast, another court held that the arbitral tribunal's retention of jurisdiction in the final award exceeded its authority where, over one party's objection, the tribunal purported to remain constituted with the authority to decide new claims "until such time as all parties request that we step down." The court vacated that portion of the award retaining jurisdiction because the "specific issues submitted to the Panel define and delineate its powers" and that "by definition, it has no jurisdiction over any potential future disputes." (*KX Reinsurance Co. v. Gen. Reinsurance Corp.*, 2008 WL 4904882, at *2, *5 (S.D.N.Y. Nov. 14, 2008).)

When determining the applicability of the *functus officio* doctrine, counsel should keep in mind that even after issuance of a final award, arbitrators retain jurisdiction to re-examine claims or issues where the parties have expressly agreed to it.

GENERALLY RECOGNIZED COMMON LAW EXCEPTIONS

Even where the *functus officio* doctrine applies (because a final award has been issued and the parties have not agreed otherwise), it is subject to three well-recognized exceptions. Arbitrators have the inherent authority to modify their awards to either:

- Correct a mistake that is apparent on the face of the award.
- Decide an issue that has been submitted but that has not been completely adjudicated by the original award.
- Clarify or construe an award that seems complete but proves to be ambiguous in its scope and implementation.

(*Colonial Penn*, 943 F.2d at 331-32; *Play Star, S.A. de C.V. v. Haschel Exp. Corp.*, 2003 WL 1961625, at *3 nn.5-6 (S.D.N.Y. Apr. 28, 2003); see also *Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544, 548-49 (2d Cir. 2018); *E. Seaboard Constr. Co. v. Gray Constr., Inc.*, 553 F.3d 1, 4-5 (1st Cir. 2008).)

Where one of these exceptions applies, arbitrators may make appropriate modifications to their award without express party consent because "[t]o hold that a joint request is required before an arbitrator may clarify or complete an award would empower a party that would benefit from an error to prevent its correction" (*Int'l Bhd. of Teamsters, Local 631 v. Silver State Disposal Serv., Inc.*, 109 F.3d 1409, 1412 (9th Cir. 1997)). Nevertheless, these

exceptions are narrowly construed "to prevent arbitrators from engaging in practices that might encourage them to change their reasoning about a decision, to redirect a distribution of an award, or to change a party's expectations about its rights and liabilities contained in an award" (*Matlack*, 118 F.3d at 992; see *WMA Sec., Inc. v. Wynn*, 105 F. Supp., 2d 833, 835, 840 (S.D. Ohio 2000), aff'd, 32 F. App'x 726, 729-30 (6th Cir. 2002)).

CORRECTING CLERICAL MISTAKES

Arbitrators may correct "clerical mistakes or obvious errors in arithmetic computation" because corrections do not modify "the spirit and basic effect of the award" and instead interpret the arbitrators' intent (*Matlack*, 118 F.3d at 992; *Waveform Telemedia, Inc. v. Panorama Weather N. Am.*, 2007 WL 678731, at *8 (S.D.N.Y. Mar. 2, 2007); *Clarendon Nat'l Ins. Co. v. TIG Reinsurance Co.*, 183 F.R.D. 112, 116 (S.D.N.Y. 1998)).

DECIDING AN UNADJUDICATED SUBMITTED ISSUE

Arbitrators may decide an issue submitted by the parties but not adjudicated by the award because the arbitrators have not exhausted their function as to the unresolved issue (*Silver State*, 109 F.3d at 1411; *La Vale Plaza, Inc. v. R. S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967)). For example, in *Silver State*, the arbitrator had the authority to issue a second award ordering back pay where his initial award reinstated a wrongfully terminated employee and provided for a three-day suspension without pay for the employee's misconduct but did not address the employee's entitlement to back pay for the remainder of the period the employee was terminated. In addressing pay only for the three-day suspension period, it was clear that the award was incomplete because it did not indicate whether the employee was entitled to compensation for the rest of the time that elapsed before the employee's reinstatement. (*Silver State*, 109 F.3d at 1411-12.)

CLARIFYING AMBIGUITY

Arbitrators may clarify an award that seems complete but is ambiguous (see, for example, *Gen. Re*, 909 F.3d at 548-49; *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local No., 24*, 357 F.3d 546, 554 (6th Cir. 2004)). Permitting arbitrators to clarify ambiguous awards does not undermine the policy behind the *functus officio* doctrine because "there is no opportunity for redetermination on the merits of what has already been decided" (*Local 825 of Int'l Union of Operating Eng'rs v. Tuckahoe Sand & Gravel*, 2007 WL 1797657, at *8 (D.N.J. June 20, 2007)).

A later award may clarify a prior award without violating the *functus officio* doctrine only where:

- The prior final award is ambiguous.
- The clarification merely clarifies the award instead of substantively modifying it.
- The clarification comports with the parties' intent as set out in the agreement that gave rise to arbitration.

(*Gen. Re*, 909 F.3d at 549.)

In *General Re*, the Second Circuit held that this exception applied where the original award required the parties to refund premium and claim payments made after the "recapture" date under a reinsurance agreement. The arbitrators' subsequent award clarified that the reinsurer could retain the premiums the insurer paid to it before the recapture date, but the reinsurer remained liable for all claims concerning the pre-recapture risks for which it retained premiums. (*Gen. Re*, 909 F.3d at 547-50; for more information, search In Exception to Functus Officio, Arbitrators Retain Authority to Clarify Ambiguous Award: Second Circuit on Practical Law.)

On the other hand, in *Wynn*, where the arbitrator issued an award providing for the payment of compensatory damages in connection with a securities fraud claim, his subsequent clarification ordering that the sale also be rescinded and the securities at issue be returned exceeded his authority and violated the *functus officio* doctrine because there was no ambiguity in the initial award that required clarification (*Wynn*, 105 F. Supp. 2d at 840-41).

AUTHORITY TO MODIFY AWARDS UNDER ARBITRATION RULES

Parties often adopt a set of institutional rules to govern their arbitration. This includes, for example, the rules of:

- The American Arbitration Association (AAA) and its International Centre for Dispute Resolution (ICDR) (for more information, search AAA Arbitration Toolkit and ICDR Arbitration Toolkit on Practical Law).
- The International Chamber of Commerce (ICC) (for more information, search ICC Arbitration Toolkit on Practical Law).
- The International Institute for Conflict Prevention & Resolution (CPR) (for more information, search CPR Arbitration Toolkit on Practical Law).
- JAMS (for more information, search JAMS Arbitration Toolkit on Practical Law).

These rules address arbitrators' authority to reconsider and modify their awards (see AAA Commercial Arbitration Rules, R-50; ICDR International Dispute Resolution Procedures, Article 36; ICC Arbitration Rules, Article 36(1); CPR Administered Arbitration Rules, Rule 15.6; JAMS Comprehensive Arbitration Rules & Procedures, Rule 24(j)).

Parties may also proceed ad hoc, often under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, which has similar provisions (UNCITRAL Arbitration Rules, Articles 37 and 38; for more information, search Ad Hoc Arbitrations Without Institutional Support on Practical Law).

Where adopted by the parties, these rules, and not the common law *functus officio* doctrine, define the arbitrators' authority to reconsider and modify their awards (see, for example, *T.Co Metals*, 592 F.3d at 344-45). Nevertheless, these rules generally proceed from the same premise as the *functus officio* doctrine, permitting arbitrators to correct errors but not allowing them to reconsider the merits of their decisions. Accordingly, in many cases, courts find that the applicable institutional rules adopted by the parties merely codify the common law doctrine (including the recognized exceptions) and refer to *functus officio* precedent to inform the interpretation of the rules (see, for example, *Bosack v. Soward*, 586 F.3d 1096, 1103 (9th Cir. 2009)).

In examining whether arbitrators have the authority to modify an award under a particular set of institutional rules, courts generally defer to the arbitrators' interpretation of those rules. The parties' adoption of institutional rules providing arbitrators with the authority to determine their own jurisdiction constitutes "clear and unmistakable" agreement to delegate issues of arbitrability to the arbitrators. (See, for example, *T.Co Metals*, 592 F.3d at 344-45; for more information, search Arbitrability Issues in US Arbitration: Determination by a Court or Arbitrator on Practical Law.)

Therefore, where the parties adopt institutional rules that give arbitrators authority to both modify their awards and interpret the rules, the parties have delegated to the arbitrators the authority to determine whether the rules authorize them to modify an award. As stated in *T.Co Metals*, "given that the FAA permits parties to authorize an arbitrator to determine the scope of his own jurisdiction," there is "no justification for [a] court [to] interfer[e] with the power granted to an arbitrator to interpret his powers of reconsideration under the applicable arbitral rules of procedure" (*T.Co Metals*, 592 F.3d at 345; see also *US Life Ins. Co.*, 591 F.3d at 1178 (stating that the "panel's understanding of its scope of authority is entitled to the 'same level of [great] deference as [its] determination on the merits'") (quoting *Schoenduve Corp. v. Lucent Techs., Inc.*, 442 F.3d 727, 733 (9th Cir. 2006))). However, not all courts have afforded the same degree of deference to the arbitrators' interpretation of their authority to reconsider an award under institutional rules. The following examples highlight the distinction:

- ***Communications Workers of America v. Southwestern Bell Telephone Co.*** The Fifth Circuit held that the arbitrator's conclusion that his amendment to his original award corrected a "technical" error, as permitted by AAA Labor Rule 40, was conclusive. The court reasoned that "the arbitrator's determination that he had committed a 'technical' error was an arguable interpretation of the contract." (953 F.3d 822, 828 (5th Cir. 2020).)
- ***Crédit Agricole Corporate & Investment Bank v. Black Diamond Capital Management, LLC.*** The district court held that AAA arbitrators did not have the power to correct an award where they determined they had erred in applying pre-payments to principal rather than accrued interest. The court concluded that the arbitrators' order modifying the award did not involve correcting a computational error and involved a substantive issue of law concerning the method of calculation. (2019 WL 1316012, at *6-8 (S.D.N.Y. Mar. 22, 2019).)

Notably, the New York City Bar Association's Arbitration Committee recently published a report in which the Committee proposes that arbitral institutions modify their rules to allow arbitrators greater authority to correct substantive errors, if the parties so desire at the outset (New York City Bar, *The Functus Officio Problem in Modern Arbitration and a Proposed Solution* (Apr. 2021), available at *nycbar.org*).

Search Introduction to US Arbitral Institutions and Their Rules for more on US arbitral institutions and the key features of and differences between their rules.

AUTHORITY TO MODIFY AWARDS FOLLOWING COURT-ORDERED REMAND

In addition to their inherent authority to modify an award to correct an error, complete their assignment, or clarify an ambiguous award, arbitrators may also clarify an award on remand from a court. Although the FAA does not address remand explicitly, courts remand ambiguous awards to arbitrators. Remand is appropriate because "[i]t is not the court's place to determine the intent of an arbitrator when the award fails to make the arbitrator's intent clear" as doing so would "undermine the authority of arbitrators" (*Barousse*, 2001 WL 872844, at *7).

On remand, the arbitrators' review is limited to the specific matter remanded for clarification (*Swenson v. Bushman Inv. Props., Ltd.*, 2013 WL 3811825, at *12 (D. Idaho July 22, 2013)), consistent with the limitations of the *functus officio* doctrine (see *Sodexo Mgmt. Inc. v. Detroit Pub. Sch.*, 200 F. Supp. 3d 679, 696 (E.D. Mich. 2016); see also *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 326 F.3d 772, 782 (6th Cir. 2003); *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 371-72 (2d Cir. 1999)).

Search Correction, Modification, and Remand of Arbitral Awards in the US for more on the procedure and scope of review following a court's remand to the arbitrators.