article

Judicial Review of Arbitration Decisions

By Timothy Russell and Daryn Rush

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Most reinsurance contracts provide for arbitration rather than litigation to resolve contractual disputes between the parties. As in many other commercial contexts, the benefits generally claimed for reinsurance arbitration – expedition and relative efficiency, relaxation of procedural formalities, a decision maker familiar with the pertinent subject matter, and confidentiality – go hand in hand with the recognition that judicial intervention in the arbitral process, if any, should be extremely limited. Thus, once the arbitrability of a dispute is established by the parties' consent or, if necessary, by judicial action under Section 3 or 4 of the Federal Arbitration Act ("FAA"),[1] further judicial involvement is, for the most part, restricted to proceedings under Sections 9 or 10 of the FAA to confirm or vacate an arbitration award.[2] In keeping with the goals thought to be served by resort to arbitration rather than litigation, review under these sections is strictly confined to the handful of "narrow grounds" set forth expressly in Section 10, and ordinarily even an arbitrator's serious error of law or fact will not warrant vacation of an award or forestall its confirmation. *See, e.g.*, *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064, 2068 (2013). These substantial restrictions on the scope of judicial intervention help to assure that the goals of economy, expedition and expert decision making are served, and that arbitration does not become "merely a prelude to a more cumbersome and time-consuming judicial review process." Id. (internal quotations omitted).

Courts have generally acknowledged that restrictions on the timing of judicial involvement in the arbitral process – the point or points at which confirmation or vacatur of an arbitrator's rulings may properly be sought – is equally critical in preserving the benefits of arbitration. The language of the FAA itself is largely silent on the issue: Sections 9 and 10 provide for judicial scrutiny of "awards," but the statutory language offers little or no guidance as to the meaning of that term, or on the question whether and when review of interim or partial awards or other arbitral rulings or orders may be had. The lack of clarity in the language of the statute has, unfortunately, spawned a body of judicial decisions that is itself less than clear, that at points appears internally divergent or inconsistent, and that tends to raise as many questions as it answers concerning the proper timing of judicial review.

Review of "Final" Decisions

One line of cases, possibly on the basis of an unspoken analogy to the statutory limitation on appellate jurisdiction to review "final" decisions of the federal district courts,[3] has concluded that the limitation on judicial scrutiny in Sections 9 and 10 to "awards" connotes that review under those sections is authorized only with respect to awards that can aptly be characterized as "final." Under this view, review of an arbitration proceeding "comes at the beginning [in a motion to compel or enjoin arbitration] or the end [on a motion to confirm or vacate a final award under Section 9 or 10], but not in the middle." *Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.*, 671 F.3d 635, 638 (7th Cir. 2011); *accord*, *Smith v. American Arbitration Ass'n*, 233 F.3d 502, 506 (7th Cir. 2000) ("The time to challenge an arbitration, on whatever grounds . . . is when the arbitration is completed and an award rendered."). While the word "final" does not appear in Sections 9 or 10 as a modifier of the term "award" and a finality limitation is not otherwise expressly set forth in the FAA, a number of courts have purported to find the finality principle to be implicit in the purpose and structure of the statute. For example, some have found that the absence of statutory language expressly permitting interlocutory judicial review of non-final rulings necessarily connotes a lack of any statutory authority to conduct such review. *See Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 486-87 (5th Cir. 2002). Others have reasoned that a rule of finality is effectively dictated by the purposes underlying the FAA. As the U.S. Court of Appeals for the Second Circuit has put it in this regard, "a district court

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should not hold itself open as an appellate tribunal during an ongoing arbitration proceeding, since applications for interlocutory relief result only in a waste of time, the interruption of the arbitration proceeding, and delaying tactics in a proceeding that is supposed to produce a speedy decision." *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980) (internal quotations omitted).

Whatever particular rationale is offered to support the finality principle, the principle itself appears simple and straightforward: once an arbitration proceeding has begun, judicial intervention to confirm or vacate any of the arbitrators' rulings is not available until the arbitration is finally, and completely, concluded, and nothing remains for arbitral resolution. The principle is thus sometimes referred to as the "complete arbitration rule," under which judicial confirmation or vacatur of arbitrators' rulings, orders, or partial or interim awards may only be had when the arbitrators have issued what they "intended" as "their complete determination of all claims submitted to them." *Michaels*, 624 F.2d at 413. Accordingly, a partial award or other interim ruling is not final and reviewable if an arbitrator retains jurisdiction to decide any unresolved issues, or if "the arbitrator does not believe the assignment is completed . . . ." *McKinney Restoration Co. v. Illinois Dist. Council No. 1, Intern. Union of Bricklayers and Allied Craftworkers*, 392 F.3d 867, 872 (7th Cir. 2004).[4] The complete arbitration rule thus appears to have the virtue of ease in application: if anything at all remains for arbitral decision, none of the arbitrators' procedural or substantive rulings, orders, or partial or interim awards is yet a proper subject of review for purposes of confirmation or vacatur. Strict application of the completeness rule, and its foundational principle of true finality, thus would seem to comport well with the ostensible purposes of arbitration. Moreover, in many circumstances, application of the completeness/finality principle to preclude interlocutory judicial review seems salutary and reasonable, if not entirely noncontroversial. Thus, for example, it is widely acknowledged that an arbitrator's procedural rulings are not final and subject to interlocutory review under Section 9 or 10 because, by their nature, they contemplate further proceedings before the arbitrator, and procedural flexibility is generally held up as a desirable characteristic of arbitration. *See Accenture LLP v. Spreng*, 647 F.3d 72, 77 (2d Cir. 2011) (holding court lacked jurisdiction to review arbitrator's decision denying motion to add fraud claim because decision was "an interim procedural ruling, not an arbitration award."); *Bailey Shipping Ltd. v. American Bureau of Shipping*, 12 Civ. 5959, 2014 WL 1282504, *8 (S.D.N.Y. Sept. 13, 2013) (dismissing motion to vacate arbitrators' interim ruling denying party's attempt to withdraw claim, finding that it lacked jurisdiction to review a "nonfinal procedural order.") Even claims of arbitrator partiality, an express ground for vacatur under Section 10(a)(2) of the FAA, have been held to be non-final and thus not subject to interlocutory review. *See Sussex*, 2015 WL 1379852, at *4-7; *Marc Rich & Co., A.G. v. Transmarine Seaways Corp. of Monrovia*, 443 F. Supp. 386, 387-88 (S.D.N.Y. 1978). Similarly, an arbitral decision as to the appropriate venue for an arbitration has been held to be non-final. *See Aeroject-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1973).

It may be argued, of course, that interlocutory judicial review and confirmation or vacation of at least some non-final arbitrator decisions in these categories would, in certain circumstances, be conducive to efficiency and, in the longer run at least, to expeditious completion of the arbitration. For example, interlocutory review of an arbitrator's ruling refusing to recuse herself for evident partiality, were the challenge meritorious, might obviate the expense and delay of a lengthy hearing that inevitably would result in vacatur of a final award and the necessity of starting the arbitration over.[5] The same is true of any number of challenges that might be made to interim, non-final rulings or orders. Strict application of the principle of finality and the complete arbitration rule, however, appears to foreclose any weighing of relative advantages that, in particular circumstances, might flow from interlocutory review under Sections 9 or 10. Thus, where reviewability turns on finality, any "delays and expenses" that might result from deferral of judicial review are said to be "manifestly inadequate to justify a mid-arbitration intervention by a court, regardless of the size and early stage of the arbitration." *Sussex*, 2015 WL 1379852, at *7.[6]

There is no real question that adherence to the finality principle and the complete arbitration rule has the virtue of relative

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ease of application and, at least in many cases, will serve to expedite arbitration and assure that parties cannot rely on piecemeal invocation of Sections 9 or 10 to inject delay or for other purely tactical reasons. At the same time, application of the finality principle – a strict insistence that judicial involvement in the arbitration process is permissible only after the arbitrators have entered a "complete determination of all claims submitted to them" – would foreclose access to a court in certain instances, hopefully few in number, where midstream review might be called for by practical or policy considerations. And, in contexts where the stakes of arbitrated disputes and the expense of resolving those disputes are often extremely high – reinsurance is often one such context, but certainly not the only one – a more flexible limitation on the timing of judicial review seems desirable. This may be especially so in light of the growing tendency of parties to request, and arbitrators to issue, "partial" awards that, by their very nature, do not effect complete resolution of a dispute, but interlocutory review of which may nonetheless bring about the benefits arbitration is thought to provide. And, indeed, the opportunity to secure review of such less-than-final rulings, orders and awards may serve to make arbitration a more attractive method of dispute resolution, by affording contracting parties a hand in structuring a method of dispute resolution that best serves their particularized needs.

Review of Non-Final Rulings

A significant number of courts have permitted review of what were, plainly, non-final arbitration rulings or awards, although some of the opinions suggest a reluctance to concede non-finality. The Seventh Circuit's decision in *Yasuda Fire & Marine Ins. Co. of Europe, Ltd. v. Continental Cas. Co.*, 37 F.3d 345 (7th Cir. 1994) is illustrative. There, a cedent, CNA, initiated an arbitration against its reinsurer for an alleged failure to pay a reinsured loss. At a preliminary hearing, the panel ordered the reinsurer to post a letter of credit as security for a partial award in CNA's favor. Despite its characterization of the panel's order as "interim relief pending final arbitration" – in other words, as distinctly non-final and incomplete – the Seventh Circuit found the interim order to be reviewable by the district court under Section 10(a)(4) of the FAA. Id. at 351. The Seventh Circuit offered no discussion of the finality principle at all, but held the order subject to confirmation for purely practical reasons: it "protect[ed] a possible final award in favor of CNA," and resolved certain of the parties' current rights and obligations. Id. at 348. Accordingly, a flexible approach that permitted interlocutory review under Section 10 made good sense, even if that approach could not be squared with the finality principle or the "complete arbitration rule."

Other decisions, including at least one from the same federal circuit as *Yasuda*, appear less willing than *Yasuda* to let go of the completeness/finality concept as a necessary precondition of reviewability, while nonetheless exhibiting a readiness to abandon finality in practice. Six years after *Yasuda*, in *Publicis Communication v. True North Communications Inc.*, 206 F.3d 725, 729 (7th Cir. 2000), the Seventh Circuit held a plainly non-final, partial award to be final and reviewable because it resolved a "time-sensitive" issue that was largely "unrelated" to other issues that remained subject to arbitral decision. In so doing, the court characterized *Yasuda* as somehow involving a "final" order, although the opinion in that case had not used the word in connection with the Section 10 reviewability issue, and the order at issue had been undeniably non-final.[7]

Other cases reflect similar ad hoc approaches to reviewability, and a similar willingness to relax or eliminate any rigid insistence on true finality, in favor of a more pragmatic, case-by-case approach to judicial review. *See, e.g., Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991) (award of temporary, interim equitable relief requiring reinsurers to contribute to escrow pending final decision subject to interlocutory review under Section 10 in order to preserve opportunity for "meaningful" final award); *Island Creek Coal Sales Co. v. Gainesville*, 729 F.2d 1046 (6th Cir. 1984) (arbitrators' interim order requiring continuing contractual performance pending final award characterized as "final" disposition of "separate independent claim"); *Sperry Int'l Trade, Inc. v. Israel,* 689 F.2d 301, 304 at n.3 (2d Cir. 1982) (interim arbitral decision requiring posting of letter of credit subject to review because it was "a final decision as to the severable issues regarding the letter of credit").

Review in Bifurcated Cases

Another line of cases that has substantially relaxed or abandoned strict insistence on finality as a predicate of reviewability – and a line that may be particularly suited to application in the reinsurance context – involves the increasingly common practice of bifurcating arbitrated disputes into liability and damages phases. The federal court of appeals for the First Circuit appears particularly hospitable to interlocutory review of partial awards treating bifurcated issues. In *Hart Surgical Inc. v. Ultracision, Inc.*, 244 F.3d 231, 233-34 (1st Cir. 2001), the First Circuit, while first purporting to acknowledge the continuing vitality of the finality principle, noted that "exceptions" to finality had been recognized. One such exception, that court stated, includes cases in which "the parties have asked the arbitrators to make a final partial award as to a particular issue and the arbitrators have done so;" the court suggested that the arbitrators would be at least temporarily functus officio in such a circumstance, thereby rendering their partial award "final" and reviewable. Id. at 234 (internal quotations omitted). Affording substantial weight to the notion that a "primary policy" behind the FAA is "to resolve issues in the manner intended by the parties," the First Circuit went on to hold that partial awards resolving bifurcated issues were reviewable, at least where bifurcation came at the parties' request. Id. at 235 n.3. The *Hart* court explicitly reserved judgment on whether judicial review of partial awards would be available where the parties had not agreed to bifurcation.[8]

Approaches to reviewability similar to the First Circuit's have gained acceptance in other federal circuits. *See, e.g., Metallgesellschaft, A.G. v. M/V Capitan Constante*, 790 F.2d 280 (2d Cir. 1986) (interlocutory review permitted "independent and separate" counterclaim as to which counterclaimant would have been entitled to summary judgment in litigation proceeding); *Smart v. Int'l Brotherhood of Electrical Workers*, Local 702, 315 F.3d 721, 726 (7th Cir. 2002) (partial award in bifurcated case serves the principle that "it is good to allow parties to . . . design the method of dispute resolution that is best for them"). Questions remain, however, over whether and to what extent review of partial awards on discrete issues may be permitted where such review is not agreed to by the parties, or where the issue resolved in a partial award involves something less than a complete liability determination or the resolution of a complete claim. And, certainly, the reviewability of partial awards in bifurcated cases has not gained anything like universal acceptance, and some courts that continue to insist on finality as the touchstone of review have rejected the Hart approach. *See, e.g.*, *Savers Prop. & Cas. Co. v. National Union Fire Ins. Co.*, 748 F.3d 708 (6th Cir. 2014) (partial award resolving liability issues not final or reviewable).

"Ripeness" as the Guiding Principle

As a review of decided cases on the timing of judicial review under Sections 9 or 10 tends to confirm, it is difficult, maybe impossible, to distill out and articulate a single unitary principle to guide a reviewability determination in particular cases. As Judge Posner has put it, "generalization [regarding the rules on the timing of judicial review] is difficult," beyond the recognition that "the courts are naturally reluctant to invite a judicial proceeding every time the arbitrator sneezes." *Smart*, 315 F.3d at 725. The bifurcation and "separable issue" cases may suggest a trend in the direction of permitting more latitude in interlocutory review. Indeed, such a trend, if there is one, may have been endorsed quietly by the Supreme Court itself, in S*tolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 670 at n.2 (2010), in which the Court appeared to accept that even during an ongoing arbitration, Section 10 provides a vehicle to challenge certain interlocutory procedural orders (in that case, an interlocutory award as to the availability of class arbitration).

Relaxation of the completeness/finality rule calls for the fashioning of a guiding principle that permits analytically consistent treatment over a range of cases and does not simply leave the door open to ad hoc, case-by-case determinations whether particular non-final or partial rulings are reviewable under Sections 9 or 10. Such a principle may be evident in the preference, demonstrated in *Stolt-Nielsen* and some circuit court decisions, for the application of the "ripeness" doctrine borrowed from other federal jurisdictional contexts, rather than for the relative inflexibility of the "complete arbitration rule" and finality doctrine or, on the other hand, for the abandonment of substantial limitations on the timing of review under Sections 9 or 10. *See e.g., Dealer Computer Services, Inc. v. Dub Herring Ford*, 547 F.3d 558 (6th Cir. 2008) (ripeness is a jurisdictional prerequisite to all cases; arbitrators' partial award ruling that agreement did not preclude classwide arbitration was unripe and thus unreviewable on interlocutory basis).[9] While "ripeness" is always a precondition to federal jurisdiction, a ruling that is ripe need not always be "final." Ripeness turns instead on such factors as whether the harm allegedly threatened by the arbitrators' ruling is likely to occur; the potential hardship to a party if interlocutory review is not allowed; and the adequacy of the record to permit review. *Id*. at 561. Applied with caution, the ripeness factors may provide an appropriate standard for review of non-final arbitral rulings, without opening the doors to federal court "every time the arbitrator sneezes."

Conclusion

While most courts have adopted the complete arbitration rule or a similar restrictive approach limiting the circumstances in which judicial review of interlocutory arbitration rulings will be permitted, some have recognized exceptions and applied a more flexible approach. The completeness/finality approach provides clarity and significantly reduces the use of judicial intervention as a tactic to interrupt or stall arbitration proceedings. A flexible approach, on the other hand, allows judges to intervene in limited circumstances where judicial review advances expedition and efficiency or perhaps is even necessary for the arbitration to be meaningful (*e.g.*, in the context of an interim award of

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pre-hearing security). By focusing on the doctrine of ripeness rather than the traditional completeness/finality rule or an ad hoc approach creating exceptions to that rule, courts, exercising caution and appropriate deference to established notions of limited involvement under the FAA, may find a principled approach that strikes the right balance.

END NOTES

1. A "front-end" dispute over arbitrability is an issue for a resolution by a court, since a party may not be compelled to submit to arbitration at all absent its agreement to do so. Judicial action in that context is typically on a motion under Section 4 to compel arbitration or in an action to enjoin arbitration, and is strictly confined to the issues whether "a valid arbitration agreement [exists]," and "whether the current dispute is within its scope." *In re Sussex*, 14-70158, 2015 WL 1379852, *4 (9th Cir. Mar. 27, 2015)

2. Other sections of the FAA provide for very limited judicial involvement for specific purposes. Section 5 authorizes a court to appoint an arbitrator where a party fails to do so; Section 7 provides for the court to compel the attendance of witnesses and the production of documents; and Section 11 authorizes judicial correction of certain clerical or formal mistakes in an award.

3. The limitation on federal appellate jurisdiction is stated explicitly in 28 U.S.C. § 1291, and is subject to a relatively small handful of exceptions. At least one court has stated that Section 10 of the FAA "should not be interpreted to incorporate the final judgment rule of 28 U.S.C. § 1291." *Smart v. International Brotherhood of Electrical Workers, Local 702*, 315 F.3d 721, 726 (7th Cir. 2008) (emphasis in the original).

4. Of course, an erroneous determination that the arbitrator's assignment is completed may be grounds for vacatur under Section 10(a)(4) of the FAA.

5. Of course, withholding the availability of midstream review in such circumstances might prove more expeditious and inexpensive: the party objecting to the arbitrator's partiality might prevail on the merits of the case after a hearing, and choose not to press the partiality objection in a proceeding under Section 10 after a final award.

6. One federal circuit court judge, dissenting from a decision allowing interlocutory review of a partial award that left several claims and issues unresolved, suggested that any departure from the finality rule based on the facts of a particular case would be the first step down a slippery slope, which "in the long run" would "make arbitration more complicated, time consuming and expensive" by increasingly encouraging parties to urge arbitrators to issue interim or partial awards resolving arguably separable claims and issues. *See Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 285 (2d Cir. 1986) (Feinberg, C.J., dissenting). *See also Public Serv. Elec. & Gas Co. v. Systems Council U-2*, 703 F.2d 68, 70 (3d Cir. 1983)

7. In *Yasuda*, the Seventh Circuit rested its Section 10 reviewability holding on its conclusion that an order requiring the posting of security before a final award was itself an "award," and thus, somehow, ipso facto reviewable. 37 F.3d at 348.

8. The *Hart* court also noted that allowing review of partial awards as if they were final might result in a party forfeiting its right to review by waiting "until all arbitration proceedings are complete" before seeking confirmation or vacatur. 244 F.3d at 236.

9. Of course, a failure to honor the ripeness doctrine itself might run afoul of Article III limitations on federal court jurisdiction. *See Dealer Computer Services*, 547 F.3d at 560. ▼

editor's comments

continued

introduces the membership to the Arbitrators' Committee, the purpose of which is to promote discussion of issues that are important to the arbitrator community and to provide a forum for debate, education and discussion of a variety of issues, which is no laughing matter.

Speaking of arbitrators, reinsurance disputes involve at least two parties but at least one of them will inevitably be disappointed by the arbitrators' handiwork. Narrow as it is under the FAA, the losing party is not wholly without remedy but most courts apply the "finality principle," which limits judicial intervention to the conclusion of the arbitration. Daryn Rush explores the state of the law on the timing of judicial review, particularly those cases which have been more flexible in allowing review before all issues have been resolved.

Twenty five years after the court in *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.,* 903 F.2d 910 (2d Cir. 1990), held that reinsurers may cap their losses under facultative certificates at the stated amount on the face of a certificate, recent decisions have hinted that courts may be increasingly receptive to arguments that soften the inflexible application of the decision. Amy Kline, Amy Piccola, and Jamie Scrimgeour explain how Bellefonte has been applied and the reasoning of the cases which have departed from it.

Offering his view from the "middle seat," Chuck Ehrlich offers a pocket guide on how to win friends and influence people in an arbitration proceeding. With practical suggestions to parties, counsel, and party-appointed arbitrators, Chuck presents do's and don'ts for achieving success.

How do arbitrators stay up to date on developing law? asks Rob Kole of the ARIAS Law Committee. For those who wish to stay current on the latest legal developments, Rob commends them to the case summaries found in the "Law Committee Reports" on the ARIAS website. In this issue of the *Quarterly*, Rob reviews two recent cases dealing with subjects that commonly come before arbitrators.

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