New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 261—NO. 47
TUESDAY, MARCH 12, 2019

Outside Counsel

Expert Analysis

Interpreting Ambiguous Domestic And Foreign Arbitral Awards

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Occasionally, New York state and federal courts are asked to enforce awards that, upon close inspection, turn out to be ambiguous. The common-law doctrine of "functus officio" limits the power of arbitrators (and courts) to alter an award once the arbitrators have decided the issue. Recently, in *Gen. Re Life Corp.*, the Second Circuit reinforced its well-settled exception to the common law doctrine that, when asked to confirm an ambiguous award, courts retain authority to vacate and may seek clarification from the arbitrator. See *Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544, 549 (2d Cir. 2018). Because there is some difference with regard to how New York federal and state courts treat ambiguous awards, this article will compare the approach in the different court systems. To that end, this article will begin by discussing how New York federal and state courts treat ambiguous domestic awards in the pre-judgment and post-judgment context. Lastly, the article will discuss an issue that has seen very little consideration from New York's courts, which is how they should approach ambiguous foreign awards.

How Do Courts Treat Ambiguous Domestic Awards?

Pre-Judgment Awards in the Second Circuit. When faced with a motion to vacate an ambiguous arbitration award, New York's federal courts applying the FAA have generally opted to confirm or vacate the award in full. The Federal Arbitration Act (FAA) governs the Second Circuit's ability to vacate an ambiguous arbitration award, whereas the CPLR similarly controls state courts. In *General Re Life*, Judge Bolden, writing for the Second Circuit, recently cemented this binary approach. There, the court affirmed the district court's ruling and order denying General Re's petition to confirm an arbitration award and granted the cross-petition of Lincoln National Life Insurance Co. to affirm the award issued after the arbitral panel clarified the original award. 909 F.3d at 546.

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General Re argued that the doctrine of functus officio barred the panel from clarifying how the parties were to calculate the amount of the award. Id. The court noted that its treatment of the ambiguous exception to functus officio furthers the well-settled rule in the Second Circuit that when asked to confirm an ambiguous award, the district court should instead remand to the arbitrators for clarification. 909 F.3d at 546 (collecting cases).

Nonetheless, New York federal courts will not always vacate an ambiguous award. In that respect, they have consistently concluded that, although construing ambiguous provisions of an arbitration award is the proper province of the arbitrator, not the courts, the award may be confirmed and need not be remanded to the arbitrator where the true intent of the arbitrator is apparent from the procedural history of the arbitration and/or the language of the award. See, e.g., *In re Arbitration between Gerlind Glob. Reinsurance Corp.,* No. 98 CIV. 9185 (LAP), 1999 WL 553767, at *2 (S.D.N.Y. July 29, 1999) (Preska, J.) (citations omitted); *BSH Hausgerate GmbH v. Kamhi*, 291 F. Supp. 3d 437, 445 (S.D.N.Y. 2018) (Sweet, J.).

Pre-Judgment Awards in New York State Courts. In contrast to the Second Circuit, New York state courts apply a narrower approach to vacatur, and only vacate the portion of the award that is ambiguous. See, e.g., *Lindenhurst Union Free Sch. Dist. v. Teachers Ass'n of Lindenhurst,* 215 A.D.2d 657, 658 (2d Dep't 1995) (citations omitted); *Wolff & Munier, Inc. v. Diesel Const. Co.*, 41 A.D.2d 618, 618-19 (1st Dep't 1973). "An award which is valid in part will be sustained to the extent that it is proper, provided that the valid and invalid portions are not inextricably intertwined." *Johnston v. Johnston*, 161 A.D.2d 125, 129, order clarified, 162 A.D.2d 282 (1st Dep't 1990). Furthermore, state courts may apply state law grounds for vacatur unless they are inconsistent with the FAA's terms and purposes. See *ACN Digital Phone Serv., LLC v. Universal Microelectronics Co., LTD*, 115 A.D.3d 602, 603 (2014).

Post-Judgment Awards. From the previous section, it is apparent that New York federal versus state courts apply different standards to motions to vacate. The same is true when those courts are faced with rarer challenges to ambiguous awards that have been reduced to judgment.

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While New York federal courts do not appear to treat ambiguous awards that are reduced to judgment differently than pre-judgment awards, New York state courts, by contrast, are more deferential to the finality of commenced awards that have been reduced to judgment. See, e.g., *Bell Aerospace Co. Div. of Textron v. Local 516, Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW),* 500 F.2d 921, 925 (2d Cir. 1974) (reversing the portion of the judgment of the district court which contained an ambiguous arbitration award and affirming the rest of the judgment where the party had previously moved to vacate the award). In the most authoritative recent opinion on the issue, Justice Acosta, writing for the First Department, held that New York state courts do not have authority to grant a non-appealing party relief that it did not seek by vacating a judgment entered against it, and that courts are not empowered to remit the matter to the arbitrator for clarification. See *Pine St. Assocs., L.P. v. Southridge Parners, L.P.,* 107 A.D.3d 95, 100 (1st Dep't 2013) (Acosta, J.).

When a dispute does exist as to the meaning of an arbitration award that has been confirmed in a judgment, the First Department has explained that it becomes the court's function to determine and declare the meaning and intent of the arbitrator. 107 A.D.3d at 100. To that end, a court may review the text of the arbitrator's award in conjunction with whatever findings, if any, the arbitrator has made. In so doing, a court should adopt the most reasonable meaning of the text by avoiding any potential interpretations of the award that would render any part of its language superfluous or lead to an absurd result. Furthermore, the award must be interpreted in the light most favorable to the prevailing party. Id.

How Do Courts Treat Ambiguous Foreign Awards?

The preceding sections have focused entirely on the differing approaches that New York federal and state courts take when faced with an ambiguous arbitral award ensuing from domestic U.S. arbitration. What happens, however, when the award that is ambiguous is one that was issued in a foreign jurisdiction?

Thus far, it appears as though only federal courts have addressed the issue of ambiguous foreign awards. In *BHS Hausgerate*, BHS petitioned, pursuant to 9 U.S.C. §201 et seq. (the "New York Convention"), for an order confirming a foreign arbitration award. Respondent, Kamhi, argued that the Final Award was so ambiguous with regard to the apportionment of costs that it was impossible to enforce. *BSH Hausgerate GmbH*, 291 F. Supp. 3d at 444. Judge Sweet disagreed, finding that whatever ambiguity existed by looking solely at the award section of the Final Award was resolvable by the record and the Arbitral Tribunal's thorough Final Award opinion. Id. at 445.

Moreover, the court emphasized that, even if the award was ambiguous, the court does not have the power to vacate the award. 291 F. Supp. 3d at 445. The court explained that, when a district court sits in a different country or under different applicable law from where the arbitral award was made, that court is said to be sitting in "secondary jurisdiction." Id. When the arbitration neither occurred in New York nor under New York law, secondary jurisdiction is the juridical posture. Judge Sweet asserted that when sitting in secondary jurisdiction, the parameters within which a district court may refuse enforcement are rigidly circumscribed: "[T]he [New York] Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the [New York] Convention. 291 F. Supp. 3d at 445; see 9 U.S.C.A. Convention Art. V(2). Article V of the Convention specifies seven exclusive grounds upon which courts may refuse to recognize an award." Id. at 440. The court concluded that, because ambiguity is not a ground "explicitly set forth" in Article V, it is not a ground for consideration. Id. at 445-46.

In effect, the approach used by the *BHS Hausgerate* court to evaluate a recognition petition is very similar to that of New York state courts dealing with post-judgment requests to vacate awards. Whether other courts will similarly resort to such interpretive presumptions when faced with a truly ambiguous award remains to be seen.

New York appears to be a favorable jurisdiction for the enforcement of ambiguous foreign awards, as the sole New York federal court to have addressed the issue went on to recognize the purportedly ambiguous foreign.

Conclusion

As seen above, New York state courts offer more protection for domestic awards that are ambiguous than their federal counterparts. To the extent that finality is a paramount concern for a party, those negotiating arbitral clauses may want to consider incorporating New York's procedural rules as a means of safeguarding their award because "even though the FAA governs, [the First Department] may apply state grounds for vacatur, where they are consistent with the FAA's terms and purposes." *ACN Digital Phone Serv.*, 115 A.D.3d at 603.

In turn, New York appears to be a favorable jurisdiction for the enforcement of ambiguous foreign awards, as the sole New York federal court to have addressed the issue went on to recognize the purportedly ambiguous foreign award. See, e.g., *BSH Hausgerate GmbH*, 291 F. Supp. 3d 437.

Notwithstanding the different approaches of New York's federal and state courts with respect to the enforcement of ambiguous awards, the cases cited above reflect that New York's federal and state courts have a very deep respect for the finality of domestic and foreign arbitration awards, which extends to even ambiguous arbitration awards. In light of that, domestic and (especially) foreign parties should feel very comfortable selecting New York as a seat for their arbitrations.