THE *FUNCTUS OFFICIO* PROBLEM IN MODERN ARBITRATION AND A PROPOSED SOLUTION

COMMITTEE ON ARBITRATION

SUBCOMMITTEE ON FUNCTUS OFFICIO DOCTRINE

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INTRODUCTION / OVERVIEW

To the surprise of many practitioners, arbitrators lack a clear source of power to correct errors, which may occasionally occur, in their final awards. The situation is complicated by doubts about which awards are final. When rigorously applying the hoary common law doctrine of "*functus officio*" (defined below), courts have barred arbitrators from correcting anything in final awards other than clerical, typographical or computational errors. Equally important, the arbitration rules provided by institutional administrators, modeled on the common law doctrine, state expressly a similar restriction on correction. If a party upon reading an award that arbitration law or rules treats as final, learns that the tribunal has overlooked or misapprehended a key piece of evidence and brings that mistake to the tribunal's attention, the tribunal may well find that it does not have the leeway to rectify the error. If so, the aggrieved party is forced to incur the time and expense of judicial proceedings to attempt to correct the problem – and to succeed the party must surmount the obstacle posed by the limited scope of judicial review of arbitral awards. If the tribunal does make the correction, the party aggrieved by the correction is likely to seek vacatur of the corrected award as exceeding the tribunal's powers.

Although as discussed below the *functus officio* doctrine has its roots in thirteenth century England, the problem addressed here is neither historical nor theoretical: in just the past two years, two courts in our community – a federal court and a state court, both in Manhattan – issued decisions refusing to confirm revised awards that arbitral tribunals had issued (See the discussion below of the *AISLIC* and *Black Diamond* decisions). The recent cases illustrate that a reviewing court, far from inevitably correcting awards that tribunals came to believe were incorrect, may actually prevent a tribunal from correcting its errors.

Functus officio has evolved from ancient doctrine to systemic problem. The *functus officio* problem exposes significant shortcomings in the arbitral process: fundamentally, it may compromise the integrity of arbitral awards by needlessly perpetuating incorrect outcomes to the dismay of the would-be prevailing party; it compels otherwise needless resort to the courts to seek redress, with attendant delays, expense and uncertainty, and thus it injects a time-consuming and cumbersome hurdle into the arbitral process to determine whether the mistake the tribunal sought to correct can fairly be characterized as "clerical" or "computational." Although the doctrine's origins show that it was intended to protect the integrity and finality of awards, in some situations it may have the opposite effect—-prolonging the arbitral process through extensive judicial proceedings.

As discussed below, the courts are not well positioned to modify the common law doctrine of *functus officio* as applied to modern arbitration because the institutional provider rules embodying the doctrine – known as "slip rules" in much of the international arbitration bar, if not in the United States – circumscribe a court's ability to apply or refine the common law doctrine. Consequently, this Report advocates that institutional providers revise their slip rules to permit

motions for substantive corrections affecting the outcome in arbitral proceedings in carefully prescribed and limited circumstances. In particular, as more fully described in the proposal annexed as Exhibit B to this Report, if the parties agree in advance by opting-in, the arbitrator can be requested to "correct any mistake affecting the outcome in the Underlying Award that the party claims arises from oversight, omission or misapprehension of a matter of fact or law presented by one or more of the parties." Such a revised rule could preserve the speed and cost-efficiency of the arbitral process by imposing strict time limits for any such motion (and for any *sua sponte* correction by a tribunal) and by requiring the movant to absorb all expenses of any failed motion. The opt-in must be clear and understandable. In cases with unrepresented parties, the case administrator will have to be available to answer any questions in this regard.

This Report begins with an historical survey of the *functus officio* doctrine. It then addresses the codification of the doctrine found in the rules of multiple institutional providers of arbitration services as well as in both the Federal Arbitration Act and New York State's CPLR. Next, the Report discusses and critiques key cases that have addressed the doctrine or related provider rules in recent years, including the two decisions noted above. Finally, the Report assesses the many challenges for the arbitral process created by the current application of the doctrine and the provider rules embodying it. It concludes by describing the proposal for revised provider rules set out in Appendix B.

I. *Functus Officio* Doctrine – History and Comparative Analysis

The term *functus officio* is translated from Latin as "having performed his or her office".[1] The general meaning of the term has historically been understood to be that an officer or official body once having accomplished its intended task loses its authority or legal competence.[2] This term evolved into a legal doctrine, originally developed to prevent English judges from modification of their judgments after being rendered.[3] In arbitration law, *functus officio* emerged as a common law doctrine giving expression to the finality of arbitral awards by defining when the arbitrators' power to act is exhausted. Considering the contractual and temporary nature of arbitrators' mandate, the common law doctrine of *functus officio* holds that (subject to narrowly defined exceptions) arbitrators are prevented from altering their awards after they are rendered.[4] The following discussion offers an overview of historical development of the *functus officio* doctrine and a brief comparative analysis of similar doctrines in other jurisdictions.

A. Historical Development of *Functus Officio* Doctrine

The history of *functus officio* doctrine in common law may be traced to the reign of Edward I. in the thirteenth century England. [5] According to Blackstone (as cited by Ellmann, *see* n.3 *supra*),

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[1] *Functus Officio*, BLACK'S LAW DICTIONARY (11th ed. 2019), available at Westlaw.

[2] *See id.*

[3] *See* Erwin B. Ellmann, *Functus Officio under the Code of Professional Responsibility: The Ethics of Staying Wrong, Improving Arbitral and Advocacy Skills*, 45 PROC. NAT. ACAD. ARB. 190, 190-191 (1993) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES 409-411 (1765)).

[4] See 2 DOMKE ON COM. ARB. § 26:1.

[5] Ellmann, *supra* note 3, at 190.

judges of these days had developed a habit of modifying their records to hide their shortcomings.[6] At the same time, Edward I. was experiencing a difficult fiscal situation. To solve two issues at once, Edward I. declared that judges who would engage in this illicit practice would be heavily fined.[7] As a result, judges became fearful of any alterations to their records regardless of the reason. Rendered judgments attained untouchable, almost sacred, status which was independent of their quality or correctness. What followed is described by Blackstone as a "great obstruction of justice" because the rule forced judges to adhere to clearly erroneous judgments instead of providing a correction. [8]

In the following centuries England witnessed the rise and fall of various measures to address strict application of *functus officio* doctrine, most of which were not particularly effective.[9] Originally errors in judgments were rectifiable only via a writ of error.[10] Grounds for bringing a writ of error were any errors on the record including the smallest technical mistakes and in most cases the writ could be heard only by King's Bench.[11] Nevertheless, certain errors caused by court clerks or errors concerning factual matters were remediable by courts themselves upon issuance of writ of error *coram vobis* (or *coram nobis* in case of King's Bench).[12] Later on, the most common method of challenging a court judgment became a motion for a new trial.[13] The English litigation procedure was finally reformed and codified in the mid-nineteenth century by the Common Law Procedure Acts, which abolished the outdated system of writs of error and new trials and allowed judges to amend defects and errors in proceedings at their discretion.[14] In the U.S., the development

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[6] *Id.*

[7] *Id.* at 191.

[8] *Id.*

[9] *See* 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 222-226 (3d ed.1922).

[10] *Id.* at 222-223.

[11] *Id.* at 223.

[12] *Id.* at 224.

[13] *Id.* at 225. At that time, English courts had been struggling for centuries with corrupt juries reaching verdicts contrary to evidence. John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J.L. HIST. 201, 210-212 (1988). The quasi-criminal system of attaints, which was meant to investigate and punish juror perjury, proved to be ineffective because the attaint juries were unwilling to convict the original jurors. Mitnick, at 210-11; *see also*, WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 149-156 (James A. Morgan, 2d ed. 1875). In 1655, Chief Justice Glyn held in *Wood v. Gunston* that court may grant a new trial to address "miscarriages of juries". Mitnick, at 212-213 (citations omitted). The power of courts to grant new trials was not completely new as it was used as an extraordinary remedy even before 1655. FORSYTH at 180-181. Nevertheless, after this ruling, it became the primary method of addressing jury verdicts contrary to evidence and in essence replaced the system of attaints. Mitnick, at 211-12.

[14] WILLIAM FRANCIS FINLASON, THE COMMON LAW PROCEDURE ACTS OF 1852, 1854, AND 1860: WITH NOTES AND THE FORMS AND RULES, TO WHICH ARE PREFIXED, OR APPENDED, ALL THE ACTS (OR PORTIONS OF ACTS) RELATING TO COMMON LAW PROCEDURE, OR THE TRIAL OF ISSUES OF FACT, IN THE COURTS OF COMMON LAW CHANCERY, OR PROBATE, WITH THE RULES OF EACH COURT RESPECTIVELY. ADAPTED TO THE USE OF PRACTITIONERS IN ALL THE COURTS; AND ALSO TO THE USE OF STUDENTS 159-160 (1860).

of the modern reconsideration motion dates to the Judiciary Act of 1789 and was refined thereafter with the adoption of Rules 59 and 60 of the Federal Rules of Civil Procedure, starting in 1937.[15]

The history of *functus officio* in arbitration law is almost as long. "As early as 1468 it was decided in the Exchequer Chamber that arbitrators cannot alter their 'arbitrament' after it is once made."[16] In the following centuries, the doctrine had a similar effect as in court proceedings. For example, English arbitrators were prohibited from correcting errors in their awards even if such error was caused by a clerk.[17] The doctrine arrived in the U.S. in the mid-nineteenth century. In one of the earliest cases, the New York Court of Appeals ruled that, "[w]hen arbitrators have once made and delivered their award, their powers are exhausted, and they cannot afterwards make another award, although they may have discovered that in making the first one they exceeded their powers or committed any other error."[18] The rule was later confirmed by the Supreme Court of the United States when it held in an 1863 case that "[t]he power of arbitrators is exhausted when they have once finally determined matters before them. Any second award is void."[19] The strictness of early application of arbitral *functus officio* in the United States, favoring clear finality over the correction of error, was vividly described by the Supreme Court of North Carolina in an 1895 case: "If an arbitrator makes a mistake either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal, and the court has no power to revise the decisions of 'judges who are of the parties' own choosing.'"[20] Nevertheless, towards the end of the nineteenth century there were already some hints that there might be some exceptions to the strict application of the rule. In 1891, the Supreme Court of Pennsylvania noted that "[t] he arbitrator would perhaps be entitled to correct a clerical or other error appearing upon the face of the award."[21] In this observation we find the antecedent of rules of exception now embodied in the arbitration rules of major arbitration providers worldwide, and often referred to, especially in jurisdictions with an English common law heritage, as "slip rules."[22] Generally, however, the doctrine offered at best very limited margin for correction of error.

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[15] Section 17 of the Judiciary Act of 1789 gave courts power to "grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law …."[15] It was superseded by Rule 59 (motion to alter or amend a judgment) and Rule 60 (motion for relief from a judgment) in 1946, when those rules were amended to essentially their current form, after having been promulgated initially in 1937. 11 Fed. Prac. & Proc. Civ. § 2801 (3d Ed.), Westlaw.

[16] R. Glenn Bauer, *Once a Catchy Phrase, Always Immutable Law - The Origins and Destiny of Three Famous Mantras: Functus Officio Once on Demurrage, Always on Demurrage Manifest Disregard of the Law*, 11 J. INT'L ARB. 41, 41 (1994).

[17] *See id.*

[18] *Doke v. James*, 4 N.Y. 568, 568 (1851).

[19] *Bayne v. Morris* 68 U.S. 97 (1863).

[20] *Patton v. Garrett*, 21 S.E. 679, 682 (N.C. 1895).

[21] *Robinson-Rea Manuf'g. Co. v Mellon*, 21 A. 91, 92 (Pa. 1891).

[22] *See* Blog Post, There's many a slip: Obrascon Huarte Lain SA v Qatar Foundation for Education, Science and Community Development (Aug. 10, 2020), http://arbitrationblog.practicallaw.com/theres-many-a-slip-obrascon-huarte-lain-sa-v-qatar-foundation-for-education-science-and-community-development/ (last visited March 19, 2021).

The Federal Arbitration Act (FAA) [23] upon its enactment in 1925 created a mechanism for *judicial* modification or correction of arbitral awards in cases within its reach.[24] Section 11 of the FAA states that an arbitral award may be modified by an order of a U.S. District Court where the award was made if one of the specified grounds is present.[25] These grounds include evident material mistakes or miscalculations, ruling on a non-submitted matter and formal imperfections which do not affect the merits.[26] The FAA's enactment did not directly affect the contours of the *functus officio* doctrine; the notion that an award could be vacated on the basis of the arbitration panel exceeding its powers by acting after it became *functus officio* evolved later in the evolution of the case law. Section 11 of the FAA, in permitting judicial modification of awards having a mistaken description or material miscalculation, provided parties to arbitration with a judicial tool to resolve some of the negative effects caused by strict judicial application of *functus officio* doctrine and strict observance by arbitrators of the common law rule prior to the adoption into provider rules of correction power similar to that granted to federal district courts in FAA Section 11. But as the case law has evolved, and as discussed later in this Report, these judicial powers, filling a gap in arbitral rules, have become an inefficient judicial channel to return cases to arbitrators by remand to cure the deficiencies of their awards.

During the twentieth century, case law departed from strict application of the *functus officio* doctrine and identified a limited number of exceptions to the rule. In 1967, exceptions were explicitly recognized by the U.S. Court of Appeals for the Third Circuit.[27] The court cited Blackstone's criticism of strict application of *functus officio* doctrine[28], and on the basis of previous hints towards exceptions,[29] ruled as follows:

> The principle that an award once rendered is final contains its own limitation, however, and it therefore has been recognized in common law arbitration that the arbitrator can correct a mistake which is apparent on the face of his award (citation omitted). Similarly, where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination. [30]
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> Where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify.[31]

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[23] Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1925).

[24] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3131 (2d ed. 2014).

[25] Federal Arbitration Act, 9 U.S.C. § 11 (1925).

[26] *Id.*

[27] La Vale Plaza, Inc. v. R. S. Noonan, Inc., 378 F.2d 569 (3d Cir. 1967).

[28] *See supra*, p. 1.

[29] *See supra*, p. 2.

[30] *La Vale Plaza*, 378 F.2d at 573.

[31] *Id*.

It follows, according to a leading US arbitration text, that two generally recognized exceptions to the *functus officio* doctrine are: correction of an obvious typographical or computational error, and clarification of ambiguities that might prevent effective enforcement or party compliance.[32] Other exceptions may be upheld under particular circumstances. [33] Prior to developments in the law over approximately the past decade, discussed later in this Report, judicial application of these exceptions tended strongly to the position that they were to be construed narrowly, to the end that corrections or clarifications should not amount to a new ruling.[34]

Another important development has been recognition of parties' agreements on the issue of *functus officio*. The FAA does not address whether parties may agree on a different mode of award correction or clarification.[35] Case law, however, determined that, "[f]unctus officio is merely a default rule, operative if the parties fail to provide otherwise."[36] Therefore, parties are free to agree on different modes of correction of awards, for example by reference to institutional rules that grant arbitrators power to correct at least the technical deficiencies of their awards.[37] As will be seen later in this Report, judicial deference to the power conferred on arbitrators by the parties (through adoption of provider rules) to interpret governing provider rules has led to judicial acceptance of a more expansive arbitral power of revision and correction, taking the slip rules beyond their original role as codifications of common law *functus officio* and in some circumstances into the realm of substantive correction of an oversight, omission or misapprehension of a matter of fact or law.

Criticism from some judges that a principal rationale for common law *functus officio* – that arbitrators could not be trusted to resist outside influence to change their minds — is outdated, and that the doctrine should therefore be abandoned entirely[38] seems not to have led to such a change in any formal way (either in governing law or rules).[39] The contemporary view reflects a tension: between *functus officio* as an efficiency attribute of arbitration as compared to litigation in which the right of substantive correction is explicit but carefully defined, and a growing recognition that with arbitrations having grown in size, complexity, and commercial importance, efficiency gains from a finality of a mistaken award are outweighed by the party costs and systemic costs – including costs to the stature of arbitration itself — of erroneous final arbitral decisions.

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[32] Domke, *supra* note 4, § 26:2.

[33] Michael Cavendish, *Fortress Arbitration: An Exposition of Functus Officio*, 80-FEB FLBJ 20, 20-22 (2006).

[34] *See, e.g., Salt Lake Pressmen & Platemakers, Local Union No. 28 v. Newspaper Agency Corp.*, 485 F. Supp. 511 (D. Utah 1980).

[35] *See* Born, *supra* note 24, at 3132.

[36] *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 848 (7th Cir. 1995).

[37] *See* Born, *supra* note 24, at 3132-3133.

[38] *See Excelsior Foundry*, 56 F.3d at 846-847.

[39] *See* Born, *supra* note 24, at 3121; Cavendish, *supra* note 37, at 22-23.

B. Comparative Analysis

Doctrines concerning finality of arbitral awards comparable to *functus officio* have developed in many jurisdictions across the world. [40]

Of greatest significance as a comparative reference point for U.S. and New York law is the UNCITRAL Model Law.[41] More or less adopted or assimilated in 84 States in a total of 117 jurisdictions, including such major arbitral jurisdictions as Canada (and its provinces), Hong Kong, Singapore, and eight states of the United States, its treatment of the finality of awards offers some clarity and, as it is statute law, consistency of treatment in the courts within a Model Law-adopting jurisdiction can be expected. Thus, in a Model Law jurisdiction, under Article 32:

1. The arbitral proceedings are terminated by the final award …
2. The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33 includes a slip rule, permitting the tribunal upon timely application or on its own initiative "to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature." Within a Model Law jurisdiction, predictable and consistent application of a statutory slip rule can be expected. This was on display recently in a judgment rendered by the Hong Kong Court of First Instance[42], which held that the slip rule of Article 33(1) (assimilated in S. 69(1) of the Hong Kong Arbitration Ordinance) only covers errors that "stem from a mental lapse or a 'slip of the pen', not from an error of judgment… mainly flagrant mathematical errors or typing errors, which would otherwise complicate the execution of the award." As will be seen in the ensuing sections of this Report, provider rules in the U.S. track the Model Law's slip rule language, but U.S. courts applying FAA award enforcement jurisprudence, thus giving deference to arbitral interpretation, have in some circumstances, and not predictably, enabled case-by-case improvisation by arbitrators on the scope of these provider slip rules in service of the correction of substantive and judgmental errors.

Like the FAA and unlike the UNCITRAL Model Law, Switzerland's Federal Statute on Private International Law (the "PIL Statute", formally in its German version the "IPRG")[43] does not include any detailed rules concerning termination of arbitrators' mandate. Instead Article 190 (1) of the PIL Statute merely states that "[t]he award is final from the time when it is communicated."[44] Despite the scarcity of statutory guidance, the Swiss courts have developed a doctrine similar to U.S. *functus officio* addressing both termination of arbitral proceedings and

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[40] *Id*. at 3116-3117.

[41] UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006 (2008), available from www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf ["UNCITRAL Model Law"] (last visited March 19, 2021). the UNCITRAL Model Law's slip rule is also reflected in part in the UNCITRAL Arbitration Rules but without the provision for interpretation authorized by the Model Law.

[42] *SC v OE1*, [2020] HKCFI 2065 (Aug. 24, 2020).

[43] Bundesgesetz uber das Internationale Privatrecht [IPRG], Dec. 18, 1987, AS 1776 (1988). *See* Translation of Legal Texts: Three English Version of the Swiss Federal Statute on Private International Law, 11 (4) MICH. J. INT'L L. 1294 (1990), available at https://repository.law.umich.edu/mjil/vol11/iss4/8 (last visited March 19, 2021)

[44] Born, *supra* note 24, at 3121 (citing the PIL Statute, Article 190 (1)).

correction of errors.[45] Swiss doctrine is consistent that rendering of an award triggers *res judicata* effects, allows enforcement and starts to run a period for filing a motion to set aside the award.[46] A Swiss particularity is emphasis on party autonomy and strong reliance on institutional rules which facilitated the evolution of doctrine for correction of awards.[47] Therefore, Swiss law is in a similar position as U.S. law in lacking a detailed statutory regulation and relying on case law and institutional rules to address issues of finality of arbitral awards.

II. The U.S. Legal Framework of *Functus Officio*

The legal framework for *functus officio* in contemporary arbitration consists mainly of the arbitration rules, most often provider-supplied rules, adopted contractually by parties. To a lesser degree, the FAA and state arbitration statutes are implicated, as they will be found to contain provisions permitting post-award applications to modify awards. A survey of these rules and statutes is a useful starting point for discussion of whether reform is advisable to improve upon the way the arbitration system handles post-award claims of arbitrator error.

A. Arbitration Rules

Rules for administered and non-administered (*ad hoc*) arbitrations, domestic and international, are nearly uniform in providing that within a defined time period after issuance of a final and binding award the arbitrators may correct clerical, typographical or computational errors – and only such errors. Such rules effectively prevent arbitrators from reviewing their awards, whether *sua sponte* or on the application of a party, to correct errors that do not fit within those ministerial or administrative categories. Such rules across providers and statutory regimes have sufficient similarity that, in the common law arbitration community, they are generically known as slip rules.[48]

The first and most widespread rules-embellishment is the fixing of a time limit applicable both to parties' requests for correction and to arbitrators' *sua sponte* fixing of their correction-eligible errors. Such time limits appear to be uncontroversial: they allow a certain number of disputes over proposed corrections to be resolved quickly by administrative or arbitral application of the time bar. The texts of the slip rules of several leading institutional providers as well as the UNCITRAL Arbitration Rules are set out in Appendix A.

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[45] *See id*. at 3121-3122.

[46] *See* Manuel Arroyo, *Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 190 [Finality, challenge: principle]*, in ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE 266, 268-269 (Manuel Arroyo ed. 2d ed. 2018).

[47] See Maurice Courvoisier, *Chapter 3, Part II: Commentary on the Swiss Rules, Article 35 [Interpretation of the award]*, in ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE 790.

[48] "Slip Rule" as the generic term for such rules has not entered the U.S. legal lexicon, but it is common parlance in other common law jurisdictions such as Canada (an example we adopt because of the accessibility of its case law via the Canadian Legal Information Institute database). *See, e.g., Westnav Container Servs. v. Freeport Properties*, 2010 BCCA 33 at paras. 20, 22, 23 (Supreme Court of British Columbia); *1210558 Ontario Inc. v. 1464255 Ontario Ltd.*, 2011 ONSC 5810 at para. 14 (Ontario Superior Court of Justice).

As shown in Appendix A, a widely but not universally adopted slip rule feature is connected phrasing that allows correction also of errors "of a similar nature" to the enumerated correction categories (clerical, typographical, computational). Such language offers arbitrators tempted to make corrections an invitation to consider a number of issues. If such language has *not* been adopted in the slip rule that they are applying, should they find that the slip rule is to be strictly limited to the enumerated categories? Or should arbitrators find that extension of a narrowly drawn slip rule to "similar" errors is implicit, given the purpose of the slip rule to repair accidental damage? What standards should a tribunal apply in deciding whether a non-enumerated species of proposed correction is "similar" to a clerical error? Or does the "errors of a similar nature" language, even if present, make no material difference – as was held by the Hong Kong Court of First Instance in giving a restrictive interpretation of Hong Kong's statutory (UNCITRAL Model Law) version of the slip rule in 2020?[49] What standards should a reviewing court, at the enforcement/vacatur stage, apply to the same question, and, as a corollary question, what deference is due (or not) to the tribunal's assessment of "similarity" to a pure clerical or mathematical error? It should be noted here that the "errors of a similar nature" language appears in Art. 33(1) of the Model Law, and that this language dates from the Model Law's initial promulgation in 1985. As a result, provider versions of the slip rule that post-date the Model Law and omit "errors of a similar nature" may have done so with the intention of avoiding expansion of the slip rule corrective powers of arbitrators. But published drafting histories of provider rules are scarce.

A third category of slip rule adaptations is the creation of a role for the administrator-provider in the correction process. Some rules thus provide that the applicant for a correction shall submit the application to the administrator, and such rules may also provide that the corrections, if made, or decisions not to make them, are to be submitted by the tribunal to the administrator who shall in turn deliver them to the parties. The version of the slip rule in the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC") provides explicitly that the ICC Rules concerning scrutiny of awards by the ICC International Court of Arbitration apply "*mutatis mutandis*"[50] to corrections.[51]

But there are slip rules that provide for submission of the party application to the administrator without having, as does the ICC, an explicit process for internal review. For example, Rule R-50 of the AAA Commercial Arbitration Rules provides that "*any party, upon notice to the other parties, may request the arbitrator, **through the AAA,** to correct any clerical, typographical,*

[49] *SC v. OE1, supra n. 42.*

[50] A Latin expression meaning with the necessary changes having been made or with consideration of the respective differences.

[51] Art. 36(1) of the ICC Rules (version having come into force as of January 1, 2021, with modifications affecting, but not in a substantive way, Article 36) is the ICC version of the slip rule and includes "errors of a similar nature." Art. 36(2) provides that a party's application for a slip rule correction is to be submitted to the ICC Secretariat – *i.e.* not directly to the Tribunal. There is no express provision for the ICC International Court of Arbitration ("ICC Court") or the ICC Secretariat to determine that a Tribunal shall not review the party's application, but this gatekeeper function entails that the ICC may convey to the Tribunal its views about the applicability of the slip rule to the proposed correction, and thus plant doubt or confidence about the ICC Court's ultimate approval of the correction if the Tribunal would be inclined to make it. Art. 36(4) provides: "A decision to correct or to interpret the award shall take the form of an addendum and shall constitute a part of the award. The provisions of Articles 32, 34 and 35 shall apply *mutatis mutandis*." Thus an award correction under the ICC slip rule is subjected to the ICC Court scrutiny process, and may be issued only with the approval of the ICC Court.

or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided…. The arbitrator shall dispose of the request within 20 calendar days ***after transmittal by the AAA to the arbitrator*** *of the request and any response thereto.*" This permutation of the slip rule – with an administrative intermediary in the provider organization, but without any express administrator function beyond handoff to the arbitrator — raises additional questions: Have the parties, by adopting rules that provide for submission of a slip rule correction request to an administrator, delegated to the administrator/provider the power to decide *whether* to transmit the application to the tribunal and thus the power to decide on a *prima facie* basis whether a proposed correction is plausibly within its correction rule? Do administrator/providers in fact exercise such power to screen applications or at least intend to reserve the power to do so, such that a court – when later asked to confirm or vacate a corrected final award made through this process— is justified in concluding that the parties delegated the question of arbitral correction power to the administrator/provider and in turn to the tribunal? Finally, is the decision as to whether a correction power exists a determination of arbitral jurisdiction, in the sense of revival of an otherwise-exhausted jurisdiction, and is this delegation so "clear and unmistakable" that judicial deference to the outcome is mandated by existing law?

The task we undertake in this Report is not to examine each of these questions in depth. We doubt there are clear answers. And the answers may vary not only from one judicial circuit to another, but from one provider's rules to another's. Mainly our objective is to demonstrate that the difficult questions, and the unsatisfactory answers courts have given, suggest the need for revision of provider rules, such as the adoption of rules that explicitly allow substantive correction impacting the outcome by the arbitral tribunal.

Before turning to the statutes and the case law, and then to our proposal for an opt-in provider rule of "rectification" (see Appendix B), we mention here one final category of slip rules: rules that permit a tribunal, upon the application of a party, to clarify or interpret its award.[52] These provisions appear mainly in rules designed to be used in international arbitrations.[53] Such rules implicate the question of what standards a tribunal should apply to decide whether its award is ambiguous and in need of clarification, and where the line is to be drawn between clarification/interpretation and revisiting an aspect of the merits. The proposed rules implicate the delegation question in an acutely important fashion. If broad deference is due to arbitrators' views about whether they have "clarified" rather than "modified" their Awards, finality of arbitral awards occurs only when the arbitrator decides that the end has come. Except under the rules of a provider that strictly controls whether an award or corrected award will be issued or not, notably if not uniquely the ICC, such a rule of deference threatens to make award finality a case-by-case arbitral determination without consistency or predictability.

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[52] *See, e.g.*, ICC Rule 36 (2) (providing in part for application to the tribunal "for the interpretation of an award"); ICDR Rules Art. 33(1) (providing in part for application to the tribunal "to interpret the award"); UNCITRAL Arbitration Rules Art. 37(1) (providing for a "request that the arbitral tribunal give an interpretation of the award"); JAMS International Arbitration Rules Art. 38.1.

[53] The JAMS Comprehensive Rules and AAA Commercial Rules, for example, contain no provisions for interpretation. *But see* CPR 2019 Administered Arbitration Rules at Rule 15.6 (providing that a party "may request the Tribunal to clarify the award….").

B. The Federal Arbitration Act ("FAA") and State Arbitration Statutes

When a corrected, interpreted or clarified award, or an award that the arbitrator has declined to correct, interpret or clarify, reaches a U.S. court for enforcement or vacatur (or both), or for proposed judicial modification, the arbitral finality rules (or occasionally the absence of arbitral finality rules) intersect with the statutes and jurisprudence that the courts must apply. A survey of the statutory landscape is therefore needed to set the stage for our rules proposal.

1. FAA

When parties to a final arbitration award made in the U.S. have jurisdictional access to a U.S. District Court, they may seek to avail themselves of the FAA Chapter 1 version of a slip rule, found in Section 11(a), which authorizes the U.S. District Court for the district where the award was made to "*make an order modifying or correcting the award upon the application of any party to the arbitration - (1) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.*"[54] Section 11(a) has no counterpart in FAA Chapter 2 concerning awards that fall under the New York Convention, and therefore it will be applicable to such awards pursuant to Chapter 1's residual application in Chapter 2 cases involving U.S.-seated arbitrations.[55]

Section 11(a) will come into play where an arbitrator has either refused to make a correction or the party has elected to ask the U.S. District Court to make the correction in the first instance. But if the arbitrator did make a correction, and the aggrieved party contends the arbitrator lacked power to do so under the applicable arbitral finality rule, that party's motion to vacate the award in a U.S. District Court will be based on the tribunal having allegedly exceeded its powers (FAA Section 10(a)(4)). In this setting the applicant for vacatur will often invoke the federal common law version of the slip rule: that the arbitrator "even after rendering an award … retains limited authority to 'correct a mistake which is apparent on the face of [the] award.'"[56] This correction power is said, in the case law, to apply to clerical mistakes or obvious errors in arithmetic computation.[57] This means that even if the governing arbitration rules, contractually adopted, did not include *any* slip rule — the arbitrator's power to correct a mistake clearly appearing on the face of an award will be judicially recognized.

What has become a source of controversy, based on the evolution in the case law, is what role if any does the common law slip rule play in judicial review if the arbitrator made a correction pursuant to the slip rule in the provider rules that governed the arbitration. We will see, when we come to the case law discussion, that courts have respected and deferred to arbitral interpretations of provider slip rules, with the result that from case to case those slip rules might be applied in

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[54] Section 11(b) permits the court to modify or correct the award "[w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted." Section 11(c) permits the court to modify or correct "[w]here the award is imperfect in a matter of form not affecting the merits of the controversy."

[55] 9 U.S.C. § 208.

[56] *Hyle v. Doctor's Assocs.*, 198 F.3d 368, 370 (2d Cir. 1999), *quoting from Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 332 (3d Cir. 1991).

[57] *Id.*

conformity with, or more expansively than, the common law version of the slip rule. This is one of the developments that motivates our proposal for an express, opt-in, rule of arbitral rectification.

Into this mix we must also add the power of the court to return the case to the arbitrator. At the intersection of the Court's statutory correction power under FAA Section 11(a) and the derivative federal common law rule on the arbitrator's inherent correction power, there has emerged an implied judicial power to remand an award to an arbitrator for potential correction.[58] And this implied power has been extended into the realm of ambiguous and unclear arbitration awards, where the purpose of the remand is not necessarily to correct possible clerical or computational errors on the face of the award, but potentially to resolve other more analytically based ambiguities the court considers to be impediments to effective confirmation and enforcement. The statutory basis for such remand is sometimes said to be a derivative of Section 10(a)(4) of the FAA, which provides in pertinent part that a court may vacate an award "where 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."[59] Readers interested in how the courts have applied these principles to particular arbitral awards are encouraged to read the cases cited in the footnotes. Our purpose in briefly surveying these principles of federal arbitration law is twofold: first, to foster an appreciation of how these rules are invoked by parties who are in some respects dissatisfied with the outcome of an arbitration; and second, to assess whether the resulting prolongation of arbitrated disputes is a useful feature of the arbitration process, and if not, how the process of correction might be improved by reform.

Whereas the judicial correction power in FAA Section 11(a) dates from the original enactment of the FAA in 1925[60], one would expect to find that resort by disappointed parties to Section 11(a) has been substantially replaced by resort to the arbitral tribunal directly via rules-based versions of the slip rule that parties have adopted by contract. Many of the reported decisions granting or denying a Section 11(a) application in the past 20 years appear to involve arbitrations that did not occur under institutional rules that included a slip rule, or perhaps were under rules that included a slip rule but the aggrieved party did not seek relief from the arbitrator.[61] The number

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[58] The FAA expressly provides for remand upon vacatur (9 U.S.C. § 10(b)) but is silent regarding remand upon modification or correction. However, where the language of an award is unclear, courts often apply Section 11 and remand the award for clarification as an alternative to vacating it.

[59] *See, e.g., Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 111 (2d Cir. 2019) (directing District Court to remand to arbitrator with instructions to clarify arbitrator's intent, and as necessary to construe contractual provision in the first instance); *General Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544, 548-49 (2d Cir. 2018) ("recognizing an exception to functus officio where an arbitral award 'fails to address a contingency that later arises or when the award is susceptible to more than one interpretation'"); *Hyle v. Doctor's Assocs.*, 198 F.3d 368, 370 (2d Cir. 1999) ("[A] district court can remand an award to the arbitrator for clarification when an award is ambiguous").

[60] This history, including Section 11(a)'s roots in the New York arbitration law, are reviewed in *AIG Baker Sterling Heights LLP v. American Multi-Cinema, Inc.*, 508 F.3d 995, 1000-01 (11th Cir. 2007).

[61] *See, e.g., J&J Sports Prods. v. Toetz Enters.*, 2017 WL 6622548 at * (E.D. Wis. Dec. 28, 2017) (no reference to institutional rules); *Cardinale v. 267 Sixth Street LLC*, 2014 WL 47996911 at *10 (S.D.N.Y. Sept. 26, 2014) (arbitration pursuant to judicial settlement stipulation, no reference to provider rules); *Foster Wheeler Environmental Corp. v. Energx TN, LLC*, 2014 WL 982875 at * (S.D.N.Y. Mar. 13, 2014) (no reference to institutional rules); *Fellus v. Sterne, Agee & Leach, Inc.*, 783 F.Supp.2d 612, 622 (S.D.N.Y. 2011) (FINRA arbitration); *Waddell v. Holiday Isle, Inc.*, 2009 WL 2413668 at *2 (S.D. Ala. Aug. 4, 2009) (ad hoc arbitration before court-appointed arbitrator). *But see*

of reported decisions in which a party sought modification under Section 11(a) after failing to secure the same relief from the arbitrators is small,[62] suggesting that many parties either bypass the procedure established by the arbitration rule, in favor of seeking judicial relief, or invoke the arbitral correction process and accept its outcome - perhaps mindful of the courts' inclination to give deference to the tribunal's construction of the arbitral slip rule and its knowledge of the arbitral record. Judicial exercise of the power to remand to the tribunal for interpretation or clarification of an ambiguity appears to be a more regular occurrence.[63] That judicial power has been deployed, for instance, as a last resort to avoid vacatur for manifest disregard of the law, where the Court believes the arbitrator deserves a final chance to explain an outcome that on its face appears to be clearly prohibited as a matter of controlling law of which the arbitrator was aware.[64]

Further, there has been judicial recognition for decades that arbitrators have inherent power to make clarifying changes to their ambiguous awards —— without any express arbitration rule permitting this, and without awaiting a judicial remand. This was considered to be an aspect of the *functus officio* doctrine in "common law arbitration."[65] But the formal embrace of this doctrine in arbitrations governed by the FAA has been uneven; this was said to be a matter of first impression in the Second Circuit in 2018 when it held that when an arbitrator clarifies an ambiguous award without having been directed to do so by a court, this is not action in excess of the powers of the arbitrator that supports vacatur of the clarified award under FAA Section 10(a)(4).[66]

Whether this dimension of the *functus officio* doctrine as embedded in FAA case law is widely understood by advocates in arbitration practice is uncertain, and we have not attempted any empirical study on the point. In cases under arbitration rules that do not expressly permit interpretation or clarification — such as AAA Commercial Rule R-50 — the absence of a reference to this power in the provider's version of the slip rule could be interpreted to suggest an intention of the rule drafter to implement a stricter version of *functus officio* than existed in the historical common law doctrine. Consequently, parties in cases governed by such provider rules may be inclined instead to treat the imprecision of the award as an "imperfect[ion]" of the award that warrants vacatur (partial or entire) under Section 10(a)(4) rather than an opportunity to seek

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Priority One Servs. v. W& T Travel Servs., 825 F.Supp.2d 43, (D.D.C. 2011) (AAA arbitration but no reference to parties having asked arbitrator to correct error)

[62] *See, e.g., Diverse Enters. v. Beyond Int'l, Inc.*, 2019 WL 5927311 at *3 (W.D. Tex. Nov. 12, 2019); *Earth Science Tech, Inc. v. Impact UA, Inc.*, 2018 WL 6978639 at *6 (S.D. Fla. Nov. 21, 2018); *Barranco v. 3D Systems Corp.*, 2016 WL 4546449 at **2, 4 (W.D.N.C. Aug. 31, 2016).

[63] *See, e.g., Local 1982, Int'l Longshoremen's Ass'n v. Midwest Terminals of Toledo, Int'l, Inc.*, 944 F.3d 607, 610 (6th Cir. 2019); *Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 109-11 (2d Cir. 2019); *Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544, 548-49 (2d Cir. 2018); *Park Ave. Life Ins. Co. v. Allianz Life Ins. Co.*, 2019 WL 4688705 at *2 (S.D.N.Y. Sept. 25, 2019); *Three Bros. Trading, LLC v. Generex Biotech. Corp.*, 2019 WL 3456631 at **4-5 (S.D.N.Y. Jul. 31, 2019); *Local 2110, UAW v. Teachers College, Columbia Univ.*, 2019 WL 689676 (S.D.N.Y. Feb. 19, 2019).

[64] *Weiss v. Sallie Mae, Inc.*, *supra*, 939 F.3d at 109-11.

[65] The reference to "common law arbitration" in the case law apparently refers to arbitration in the era prior to enactment of the FAA. *See, e.g., La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 573 n. 16 (9th Cir. 1967), citing 19th century cases.

[66] *General Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, *supra* n. 59, 909 F.3d at 548-49 (2d Cir. 2018).

clarification of the award from the tribunal.[67] The possibility of remand to the arbitrator for clarification of the ambiguity may only emerge as a solution during the vacatur action. The extent of this behavioral dynamic is unknowable, but the large volume of FAA case law in which remands for clarification have been granted[68] seems to support this observation.

An express rule permitting rectification (as defined herein and in Appendix B), as proposed in this Report, would likely be seen by many parties aggrieved by an ambiguity as a suitable vehicle to seek clarification from the arbitrators. And from the perspective of the arbitrators, deploying a rectification rule in this fashion would relieve otherwise justified anxiety about whether a clarification is indeed a substantive change and would be attacked as such in an action by the other party to vacate the clarified award.

2. State Arbitration Statutes

New York arbitration law provides opportunities for arbitral and judicial modification of awards similar to what has been recognized in FAA case law.

Section 7509 of the New York Civil Practice Law and Rules (CPLR) provides in pertinent part that an arbitrator, upon application made to her within 20 days after issuance of an award, may modify the award "upon the grounds stated in" CPLR 7511(c). The latter is the CPLR section on judicial modification of awards, and its terms are substantially parallel to FAA Section 11(a) (the New York statutory forerunner of CPLR 7511(c) from 1920, which was indeed the model for FAA Section 11(a)).[69]

Section 7511(c)(1) allows modification of an award if "there was a material miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award."[70] New York courts have respected the evidently restrictive scope for modification specified in the statute.[71] New York case law also supports judicial remittal of an ambiguous award to the arbitrator for clarification, where this is deemed necessary for the court, in confirming the award, to more precisely understand its meaning and intent.[72]

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[67] Section 10(a)(4) provides for vacatur not only "where the arbitrators exceeded their powers," but also where the arbitrators "so imperfectly executed [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made."

[68] *See* cases cited at n. 63, *supra*.

[69] *See* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926).

[70] Section 7511(c)(2) in combination with CPLR 7509 permits an arbitrator as well as a court to modify an arbitration award to remove that portion constituting a decision on a matter not submitted to the arbitrator. We view this as a partial vacatur remedy for exceeding the powers of the tribunal. As such it is outside the scope of what we seek to address in this report.

[71] *See, e.g.*, *Wendt v. BondFactor Co.*, 169 A.D.3d 808, 810 (2d Dep't 2019); *Madison Realty Capital, L.P. v. Scarborough-St. James Corp.*, 135 A.D.2d 652, 653 (1st Dep't 2016); *In re David Frueh Contracting, LLC*, 129 A.D.3d 1285, 1286-87 (3d Dep't 2015); *Avamer Assocs. v. 57 St. Assocs.*, 67 A.D.3d 483, 484 (1st Dep't 2009).

[72] *See, e.g.*, *Hamilton Partners v. Singer*, 290 A.D.2d 316 (1st Dep't 2002); *Marfrak Realty Corp. v. Samfred Realty Corp.*, 140 A.D.2d 524, 524 (2d Dep't 1988); *Board of Education v. Farmingdale Federation of Teachers*, 92 A.D.2d 599, 600-01 2d Dep't 1983; *Jolson v. Forest Laboratories Inc.*, 15 A.D.2d 901 (1st Dep't 1962).

The Revised Uniform Arbitration Act ("RUAA"), like the New York CPLR, permits a court to modify and correct an award on the basis that "there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property referred to in the award."[73] The RUAA also gives the arbitrator the power to make such corrections[74] and goes further than the CPLR and many arbitration provider rules designed for domestic arbitration in expressly authorizing the arbitrator to clarify the award[75] The RUAA also provides that the court in the context of a pending application to confirm, vacate or modify/correct the award "may submit the claim to the arbitrator" to correct or clarify the award.[76]

The foregoing account of relevant arbitration law and rules invites a number of observations. First, the statutory framework of *functus officio*, in the FAA and in state law, needs to accommodate many different types of arbitrations and, in particular, awards written at widely variant levels of detail, ranging from the entirely unreasoned award that merely states an outcome, to the highly structured analysis of law and fact that appears for example in international awards under the auspices of international providers like the ICC, or in domestic awards when the parties have stipulated that the tribunal should provide the equivalent of the findings of fact and conclusions of law that a federal court would issue after a bench trial. For arbitration awards to obtain legal force as judgments, and thereby ultimately to benefit from enforcement processes meant to secure compliance, the statutory framework, both federal and state, needs to stand as a backstop for inadequacies in the drafting of awards. Therefore, a statutory framework that permits (i) ministerial corrections, (ii) clarification of ambiguities that threaten enforceability, and (iii) conformance of the scope of the award to the scope of the parties' submission of issues to arbitration, is necessary. At the same time, we have already identified in the above survey of arbitration rules a number of questions those rules raise, for the application by arbitrators and by judges. Whether arbitration rules drafted in a certain fashion are better than others, from the perspective of certainty for parties, arbitrators, and judges, is a question worthy of close examination.

As a basis for such examination, in the next section of this Report we discuss several recent cases in New York federal and state courts. The outcomes in these cases are controversial, reflecting a number of tensions, including the scope of arbitral discretion in applying arbitral provider rules and in fashioning rules when none has been adopted by the parties. Following this case examination, we will turn to our central recommendation for an opt-in rule of rectification to be adopted in arbitration provider rules.

[73] RUAA Section 24 (a)(1).

[74] *Id.* Section 20(a)(1).

[75] *Id.* Section 20(a)(3).

[76] *Id.* Section 20(d).

3. The Recent Relevant Case Law

(a) The *Dempsey Pipe* Case — Who Decides What is a Clerical or Computational Error?

The Second Circuit's decision in *T. Co. Metals v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329 (2d Cir. 2010), is the leading case in the Second Circuit, and perhaps nationally, concerning the interaction between the *functus officio* doctrine and an institutional provider's slip rule. At issue in *Dempsey Pipe* was the decision of a sole arbitrator, acting under the ICDR Rules in a commercial case, to reduce the award of damages to the Claimant in an amended final award. The amended award was based on the sole arbitrator's corrected appreciation of a handwritten notation on an exhibit, the mis-appreciation of the exhibit having been drawn to the arbitrator's attention by the Respondent in an application under the slip rule. The arbitrator's revised interpretation of the evidence brought about reduction in the damages award to the Claimant - not based on an original computation error, but instead on a changed view of an item of evidence that was a judgmental but not computational input affecting how damages were measured.[77]

A judge of the U.S. District Court for the Southern District of New York agreed with the aggrieved Claimant that the arbitrator's correction remedied an error in appreciation of the evidence, and that the ICDR Rule on corrections —— Rule 30.1 as it then was and now Rule 33.1 (not substantively changed) —— did not include a category into which this type of correction could be placed. The district judge was persuaded that the ICDR's slip rule had essentially the same scope as the common law slip rule[78], and that the arbitrator's correction went beyond this scope.[79] The district judge thus held that the corrected award had to be vacated under FAA Section 10(a)(4) and that the original final award should be confirmed. The Second Circuit reversed.

As the arbitrator's modification of the award entailed a liberal application of (what is now) ICDR Rule 33.1 – certainly taking the concept of a "slip" well beyond the concept of nonjudgmental error — the Second Circuit panel first addressed whether the parties had delegated power to make this interpretation to the arbitrator, and the panel concluded, on the basis of the parties having adopted the ICDR Rules, that they had delegated that power clearly and unmistakably. 592 F.3d at 344-45.

Until this year, the deference rationale of *Dempsey Pipe* in the provider slip rule context had not been adopted by any other federal appellate court. But now that the Fifth Circuit has taken a similar approach in the *Communications Workers of America v. Southwestern Bell Telephone Co.* case discussed below, so because this might be said to be a gradually emerging prevailing view, it merits close examination.

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[77] This detail of the underlying factual foundation of *Dempsey Pipe* is not fully developed in the Second Circuit's decision but drawn from the record in the District Court and the Second Circuit.

[78] As noted above at n. 48, the term slip rule is not in the American legal lexicon on this subject, and was not used by the District Court or the Second Circuit in *Dempsey Pipe*. The authors of this Report have adopted it for convenience.

[79] The ICDR Rules' version of the slip rule, now ICDR Rule 33.1, provides in pertinent part: "Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to … correct any clerical, typographical, or computational errors …."

The ICDR's slip rule, like provider and arbitration law-based slip rules generally, might be viewed as addressing an administrative function. On this view, the arbitrator is authorized to correct a clerical error only because she is the drafter of the text and knows what word was intended and how it was intended to be spelled. Thus, the assignment of the correction function to the arbitrator might be seen as a matter of convenience, not as an arbitral function, and not as an exercise of power under a revived arbitral jurisdiction. The task could equally be assigned to an administrator at the provider, who would contact the arbitrator and ask what word was intended and how it was to be spelled. The deference rationale of *Dempsey Pipe* posits that (1) arbitrators' awards are entitled to deference if they can arguably be said to be based upon a construction of the parties' contract, (2) the adopted provider rules are part of that contract, and therefore (3) an arbitrator's interpretation of the slip rule should receive the same judicial deference as her interpretation of any other contract clause. But perhaps this reasoning overstates the relationship between the parties' contract and the selected provider rules – they are not (usually) incorporated into the contract but are a tool the parties mutually agree to be used by the arbitrators in case of a dispute. The principle of judicial deference to the arbitrator's construction of the contract emerged in cases where a losing party sought vacatur of the award on the basis that the merits decision misconstrued the material contract terms that were essential to the outcome. Extension of this deference principle to arbitral interpretation of the provider slip rule takes the principle into territory well beyond its core purpose.

A second question about applying the deference principle is whether the application of a slip rule is an arbitral or post-arbitral function. The ICDR Rules did then and do now provide that an award is "final and binding," and this implies the divestment of arbitral jurisdiction upon issuance of the award, under the settled common law of *functus officio*. Does a party's application for correction of a clerical error revive an expired arbitral jurisdiction? Or is the arbitrator's jurisdiction still intact during the 30-day period when a correction might be sought? These questions are not answered in the Rules. Nothing in those Rules expressly states that arbitral jurisdiction is reinstated by a correction request under the ICDR slip rule, Rule 33.1. ICDR Rule 33 groups the slip rule together with powers to interpret the award and to make an additional award on issues that were submitted but unresolved. The requirement of ICDR Rule 33.2 that a correction, interpretation, or additional award "shall contain reasoning" runs counter to this argument and seems to suggest that correction is an arbitral function done while the arbitrator has jurisdiction. On the other hand, the requirement of reasoning surely is present mainly in regard to interpretation and additional awards and would be unnecessary – at least as a mandatory provision – in regard to clerical, typographical, and most computational errors.

Further, the ICDR Rules did not and do not provide expressly for submission of the correction to the ICDR in draft form as they do for an award (Rule 30.4).[80]

None of these questions was examined in the *Dempsey Pipe* decision. It would appear that the Court started from the premise that an arbitrator ought to have power to fix the kind of oversight error present in that case and found the solution in the deference principle. While the Second Circuit panel agreed with the District Court that the common law slip rule, *i.e.* the common law exception to *functus officio* for clerical/typographical and computational errors, would not have

[80] "The award shall be submitted in draft form to the Administrator. The award shall be communication to the parties by the Administrator."

allowed this modification of the award, the arbitrator's award revision was not within the exception. But even though it is highly probable that the drafters of the ICDR slip rule (and other provider slip rules similarly worded) intended only to adopt the common law slip rule, the deference principle as applied in *Dempsey Pipe* permits the arbitrator to re-configure the slip rule to fit the needs of the mistake in need of correction. The Second Circuit panel's main premise is that the common law exception did not determine the outcome, because the parties had *otherwise agreed* – they had agreed to ICDR Rules, and therefore subsidiarily to the ICDR slip rule, and also to the provision in the ICDR Rules that confers power on the arbitrator to interpret and apply those Rules. 592 F.3d at 342-43. Invoking the Supreme Court's jurisprudence on allocation of power between courts and arbitrators, the panel found it unnecessary to decide whether the scope of the ICDR's slip rule was a "question of arbitrability" presumptively for the court, because in its view the parties had in all events *clearly and unmistakably delegate*d that slip rule scope issue to the arbitral tribunal. They had done so in two ways, per the court. First, each party had applied to the tribunal to issue a correction of a perceived error in the original award that the applicant considered to fall within the ICDR version of the slip rule. Second, the parties had adopted the ICDR Rules to govern the arbitration, and the court viewed this adoption as a "clear and unmistakable" delegation to the tribunal of the interpretation of the slip rule, in the same sense that there is considered under settled law to be a "clear and unmistakable" delegation to the tribunal of power to decide objections to its own jurisdiction. *Id.* at 344-45.

The first delegation premise — the parties' respective applications for correction — seems open to question. By merely following the procedure for correction that ICDR Rule 33.1 specifies, the parties said nothing explicit about the scope of judicial review of the arbitrator's ruling to accept or reject a proposed correction. While parties in a given case might delegate the issue in terms that clearly are intended to require judicial deference to the arbitral determination, *Dempsey Pipe* does not appear from the Second Circuit panel's decision to have been such a case.

The second delegation premise — that an agreement to arbitrate disputes over the scope of the correction rule is clearly evident from the adoption of the ICDR Rules — also seems open to debate. As primary evidence of that clear delegation, the Second Circuit panel relied on what is now Article 39 of the ICDR Rules (at that time Article 36), which provides that the tribunal "*shall interpret these Rules insofar as they relate to [the Tribunal's] powers and duties.*" But Article 39 goes on to state (and Article 36 formerly stated) that "*[t]he Administrator shall interpret and apply all other Rules.*" This Rule, however, evidently was intended to clarify the allocation of powers between the tribunal and the ICDR, not to allocate power between tribunals and courts.

It seems that the root of the analytical difficulties in *Dempsey Pipe* is that the Court was understandably keen to sustain an arbitrator's power to correct a judgmental or observational error, but the Court lacked the right tools. If the case had come up as an "ad hoc" arbitration (*i.e.* conducted without provider rules and specifically without a provider slip rule) the court might have simply adapted the common law *functus officio* exceptions to the needs of modern commercial arbitration by expanding the range of correctible errors. If such a change in common law *functus officio* ever occurred and became widespread, provider rules would likely follow suit. But since such an overwhelming majority of commercial arbitrations in the U.S. are conducted under provider rules that include slip rules, there are precious few cases to which common law *functus officio* doctrine applies. The upshot is that providers need to take the lead, not follow the evolution of the common law, in modernizing their slip rules and taking into account the desire of

their users to have arbitrators "get it right" even if that means giving the arbitrators a chance to second-guess themselves before the case enters the judicial system. This is our view in writing this Report and in recommending the adoption of an opt-in provider rectification rule.

(b) In the Aftermath of *Dempsey Pipe*: Recent Evolution of the slip rule in the Courts

As we continue to see cases decided on the same basis as *Dempsey Pipe*, that is, deference to arbitrators' interpretations of slip rules to justify substantive revision of awards, the case for explicit amendments of provider rules to permit such revisions becomes even more compelling than it has already been (without the attention the issue deserves) for quite some time.

The most prominent recent case we have found is *Communication Workers v Southwestern Bell Tel. Co.*, 953 F.3d 822 (5th Cir. 2020). On the issue of award finality, the case closely resembles *Dempsey Pipe*, although this was a domestic labor arbitration under the AAA Labor Arbitration Rules. The merits issue in the arbitration was whether cable splicing was exclusively to be done by union workers. The arbitrator initially ruled in favor of the union in a final award. The arbitrator stated in the Award that he had relied on a particular union hearing exhibit as evidence of negotiating practice, and that but for the impact of this exhibit, he would have found in favor of the company. The company moved for reconsideration, arguing that this union hearing exhibit was not sufficiently probative to have been relied on. The arbitrator agreed, entered a revised final award, and relied on the slip rule in the AAA Labor Rules. That slip rule permits correction of "technical" - in additional to clerical, typographical and computational - errors. The arbitrator considered that his change of position was correction of a technical error.

A doubtful but deferential Fifth Circuit panel agreed. Allowing the same wide berth for interpretation of the governing arbitration provider rules that federal courts allow for the arbitrator's interpretation of the commercial terms of the contract, the Fifth Circuit held: "In this case, the arbitrator grounded his modification within the rules that governed the parties' agreement. Though his interpretation of his powers is debatable, 'the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all.'" 953 F.2d at 830, *citing Oxford Health Plans v Sutter*, 569 U.S. 564, 573 (2013).

This state of interplay between slip rules and FAA principles threatens not only unpredictability and excessive post-award litigation, but also poses a threat to the perceived integrity of arbitration. Arbitrators who make mistakes of substance naturally wish to correct them. To do so, they will often have to "interpret" slip rules more expansively than the words, or the provenance, of those rules genuinely warrant. A decision like *Southwestern Bell* that more or less disparages the arbitrator's interpretation of the slip rule while defending the arbitrator's right to make that interpretation is a mixed blessing for the reputation of the community of arbitrators. Arbitrators as a group stand to be applauded for their commitment to error-free outcomes, but questioned for their debatable (some might say disingenuous) circumvention of restrictively-worded slip rules to permit those corrections to be lawfully made.

Also, it is not fully convincing that courts applying the FAA should equate, for purposes of deferential judicial review, arbitral slip rules with bespoke substantive commercial contract provisions drafted by parties. While it is true that the rules generally provide that the tribunal will

interpret them, and that parties may be deemed to have bargained for such interpretation when they adopt the rules, that is a rule of convenience more than a description of the real world of making arbitration agreements. The ability of the arbitrator to replace an arguably wrong award with a corrected one is an issue that many parties would deliberate quite seriously were it separately presented to them before it surfaces as a potential obstacle to correction or enforcement of an arguably erroneous award.

Further, while clear drafting histories of institutional rules are hard to find, it is widely understood that the drafters intended to adopt the restrictive exception to *functus officio* that evolved as the slip rule in the common law. Further, it seems very doubtful that the drafters intended that rules giving arbitrators general authority to interpret the rules governing a case before them, would make the slip rules malleable to the point of altering their meaning and purpose. That has occurred as a consequence of cases like *Dempsey Pipe* in 2010 and now *Southwestern Bell* in 2020, where FAA award enforcement/vacatur jurisprudence is held to require essentially the same judicial deference to an arbitrator's interpretation of a slip rule as is given to the arbitrator's interpretation of contract clauses germane to the merits. If a recent first instance case in Hong Kong is a good indicator, these decisions make the U.S. an outlier, as compared to Model Law jurisdictions where the slip rule is codified and therefore has mandatory effect as a limitation on arbitral power to change an award. Thus, in a case called *SC v. OE1*, [2020] HKCFI 2065, the Hong Kong Court of First Instance held that an arbitrator's post-award "addendum" resolving an issue submitted by the parties but not decided in the award could not be justified under the UNCITRAL Model Law version of the slip rule in Art. 33(1) of the Model Law. The court noted: "Inadvertently including something, and inadvertently omitting anything intended to be included, could simply mean that something had gone wrong in the thought process, or there was an inadvertent or accidental slip, but it is not a '"clerical "error."'[81] But that was not the end of the matter: the Model Law did not leave the Hong Kong arbitrator powerless to address the omission. Art. 33(3) specifically authorized issuance, upon timely application by a party, of "an additional award as to claims presented in the arbitral proceedings but omitted from the award."

It is anomalous that in U.S. providers' rules, those rules designed for international arbitration adopt "additional award" provisions resembling Model Law Art. 33(3) — for example ICDR Rules Art. 33, JAMS International Rules Art. 38 — but rules designed mainly for domestic arbitration do not — for example AAA Commercial Rule R-50, JAMS Comprehensive Rule 24(j). Although not the subject of this proposal, we submit that those domestic provider rules lacking such a provision should be modified to include them. The benefits of resolving problems with incomplete arbitration awards, without judicial involvement, and where provider review of draft awards is essentially administrative rather than a peer review by experienced arbitrators, are obvious. This would allow arbitrators to address, promptly after issuance of an award intended to be the final award, and whether upon a party's application or *sua sponte*, the substantive omission of a decision on a clearly submitted claim or issue. Under the current rule, litigants must resort to inefficient but necessary deployment of the judicial vacatur process under the FAA to accomplish

[81] *SC v OE1*, ¶26.

the determination of an undetermined issue, because AAA Commercial Rule R-50 prevents getting that relief directly from the arbitrator.[82]

The best solution in this situation seems obvious: If arbitral institutions intend to prohibit any reconsideration of the merits, they could make this clear by adding to their slip rules language more aggressively prohibiting arbitrators from interpreting those rules to correct any errors of substance, and/or language that makes the provider, not the arbitrator, the decisionmaker on the question of whether a party has properly invoked the slip rule. This might also be done by providers internalizing the slip rule interpretation to an administrative body, as the ICC does in effect because any proposed corrected award would need to pass the ICC Court's scrutiny process.[83] But such a dramatic reorganization is not foreseeable for rules providers such as AAA, ICDR, CPR and JAMS. Our proposal for reform is addressed mainly to them.

(c) The Second Circuit's *General Re* Case – Arbitral Power to Clarify Ambiguity in a Final Award

After an ostensibly final award, a party may ask the arbitrator for a clarification, and the opponent may contend that the clarification request is either not permitted because the award is final, or is not truly a clarification request but is instead a substantive correction request presented as clarification to avoid the objection of *functus officio*. The issue is particularly prominent in arbitration where the parties have submitted a dispute that is to be resolved, if in favor of the Claimant, not by an award of money but by the determination of a formula, as derived from the contract, that would lead to determination jointly by the parties of a sum of money to be paid or received. The absence of a provider rule permitting any substantive corrections has a significant bearing on such disputes. As we have seen, most domestic provider rules, unlike their international counterparts, do not even expressly provide for post-award clarification of ambiguities. The cautious arbitrator may deny the clarification request, preferring to await a judicial mandate to clarify if a court decides to remand based on ambiguity. The arbitrator who knows that common law *functus officio* permits clarification as an exception may proceed with the clarification but bears the burden of explaining in the clarified award that it is not in fact a modified award in violation of *functus officio* and/or an express provider rule barring substantive corrections.

In 2018 the U.S. Second Circuit Court of Appeals held for the first time, in agreement with five other federal judicial circuits, that the federal common law doctrine of *functus officio* includes an exception that permits a tribunal to clarify an ambiguity in its final award.[84] Thus, a modified or substituted award issued by the arbitrator, before any judicial review, for the singular purpose of clarifying an ambiguity, is entitled to be confirmed by a U.S. District Court having subject

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[82] *See Three Bros. Trading LLC v. Generex Biotech. Corp.*, 2020 WL 1974243 at * 10 (S.D.N.Y. Apr. 24, 2020)

[83] It is notable that the relevant American case law does not arise from ICC arbitrations. A central aspect of the scrutiny process is to ensure that the Tribunal in a Final Award has fully resolved all claims submitted. The scrutiny process as applied to a correction of an award, made under the ICC's slip rule, also allows the ICC Court to regulate an arbitrator's temptation to stretch the slip rule to make substantive revisions. But many if not most potential substantive errors may tend to be filtered out in the scrutiny process. It is effectively a peer review by accomplished arbitrators that has no parallel at other provider institutions.

[84] *General Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544 (2d Cir. 2018). The case law in other Circuits is cited in the *General Re* decision at p. 549.

matter jurisdiction, and a motion to vacate that clarified award, on the FAA Section 10(a)(4) ground that the arbitrator exceeded her powers, should not succeed. And yet we may deduce from *General Re* that the decision will not reduce post-award litigation over arbitrator changes. The arbitrator's conclusion that the award was ambiguous, per the Second Circuit panel, is entitled to "due deference" but is "not dispositive."[85] In significant cases where clarifications entail significant consequences, the question of clarification vs. substantive correction can be expected to arise often. But if the provider rules are changed to permit some substantive corrections, the distinction is immaterial, a ground for disputes over vacatur is eliminated, and arbitrators may proceed to fine tune their awards without hesitation that they are fomenting post-award litigation by doing so.

(d) The *Allied Capital* Case – *Functus Officio* in an *Ad Hoc* Setting

The New York Court of Appeals in a recent case had a chance to clarify the role of *functus officio* in the arbitration law of New York, but instead decided the case on its facts without attempting a refinement of New York arbitration law regarding award finality.[86] The decision of the Appellate Division, which had vacated a modified partial final award on liability on the basis that the panel was *functus officio* and could not reconsider and reverse its initial liability decision[87], was an impetus for this Committee to examine the issue of arbitral award finality in this Report. The judicial proceedings in *AISLIC* ensued after an *ad hoc* insurance coverage arbitration. The arbitration was *ad hoc* not in the sense of being non-administered – the parties had agreed to have JAMS administer the arbitration – but rather because there were no governing provider rules. The tribunal established the rules insofar as the parties did not, and no rules concerning substantive correction of an award were adopted before the tribunal issued a partial final award, divided 2-1 on the issue of insurance coverage, that the initially losing party, the putative insured, asked the tribunal to reconsider. The tribunal accepted to do so and reversed itself. It issued a corrected partial final award, again 2-1, finding in favor of the insured on the coverage issue.

The New York Supreme Court at first instance confirmed the corrected partial final award. The Appellate Division reversed – with one Justice dissenting – finding that the tribunal was *functus officio* and lacked power after the initial award to reverse course on the liability issue of insurance coverage. In the Appellate Division, neither the majority opinion nor the dissent devoted attention to the possible consequences resulting from the parties having proceeded with an *ad hoc* arbitration conducted without a set of pre-published arbitration rules. The question of what rules the tribunal may have adopted and what authority the parties conferred on the tribunal to adopt procedural rules for the arbitration, including rules about substantive correction of partial awards, was not addressed in any of the judicial decisions. So, for purposes of judicial review it was as if the parties had not delegated any such authority to the tribunal to adopt rules, but rather that the question of substantive correction of a partial final award was governed by New York arbitration law.

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[85] 909 F.3d at 549.

[86] *American Int'l Specialty Lines Ins. Co. v. Allied Capital Corp*., 35 N.Y.3d 64 (2020) *("AISLIC").*

[87] *American Int'l Specialty Lines Ins. Co. v. Allied Capital Corp.*, 167 A.D.3d 142 (1st Dep't 2018)

The New York Court of Appeals started its analysis with the general rule that judicial review of arbitral awards is extremely limited.[88] The Court of Appeals then referred to federal case law under the FAA – but without finding that the FAA applied or that the same principles are part of New York arbitration law. Those FAA principles hold that if the parties stipulate that the tribunal should decide certain issues in a partial final award that shall be final for purposes of judicial review, and the tribunal adopts this stipulation, then the ensuing partial final award is "final" for purposes of judicial reviewability and termination of the power of the arbitrators with respect to the decided issues.[89] The Court of Appeals assumed without deciding that New York arbitration law would adopt the FAA approach, and turned to the question of whether any such stipulation had been made. Finding the record clear that no such agreement had been made, the court decided the case based on the "default" rule of law that only awards that decide all submitted issues are final.[90]

By deciding the case on this limited fact-based ground that no stipulation for the finality of a partial award had been made, New York's highest court did not decide, or even suggest how it might decide, whether New York arbitration law might ever require arbitrators (or state judges asked to enforce or vacate awards) to treat as irreversible any award other than one that disposes fully of every issue submitted in the case. The common law doctrine of *functus officio* under the prevailing New York arbitration law paradigm of "all-issues" award finality, has little role to play in relation to partial awards. Unless the case is governed by provider rules that establish a different approach to award finality, no partial award is irreversible to the Arbitrator. Except the uncertainty lingers whether New York would adopt the FAA approach to finality and whether New York's courts, in a case to which the FAA clearly applies, would feel bound to apply the FAA approach to finality – that is to say, to respect and enforce a party stipulated/tribunal-accepted determination that a partial award shall be final on the issues agreed to be decided therein.

The *AISLIC* case thus leaves many questions unanswered and sends a disquieting message to the arbitration community. Until the New York Court of Appeals rules definitively on "limited-issues" award finality, parties in arbitration will advocate for the position that suits them, arbitrators may adopt the view that conforms to their desire to correct (or not) an arguably incorrect interlocutory ruling on a merits issue, and New York's first instance and Appellate Division judges will wrestle with the uncertainty of the law. A further negative consequence is that arbitral tribunals will be reluctant to adopt or propose procedures for sequential disposition of merits issues, precisely to avoid the time and cost of resolving finality disputes (that the *AISLIC* case illustrates). Arbitration's promise of more flexible and more efficient dispute resolution, by comparison to what courts can offer, is inhibited by arbitrators' and parties' legitimate concerns about "limited-issue" award finality in a case where provider rules do not clearly resolve that issue.

[88] 35 N.Y.3d at 70.

[89] *Id*. at 72.

[90] *Id*. at 73.

(e) The *Black Diamond Capital* Case – Reprising the Question of Who Defines "Computational Error"?

The principle of deference to the arbitrator in her construction of a provider slip rule, supposedly established for New York's FAA-controlled arbitrations in *Dempsey Pipe*, failed in a recent case to spare a New York-seated tribunal, chaired by a retired judge of the Southern District of New York, from a judicial rebuke for having fixed a mistake in the computation of damages. *Credit Agricole Corporate & Investment Bank v. Black Diamond Capital Management*, 2019 WL 1316012 (S.D.N.Y. Mar. 22, 2019). The litigation that ensued from the amended final award, ultimately concluded by a settlement after full briefing in the Second Circuit, is in our view another exhibit in support of a provider rule allowing substantive correction.

In this case – an intercreditor dispute arbitrated under AAA Commercial Rules in New York — the claimants were a sub-group of a syndicate of lenders, and the respondents were affiliates of a hedge fund that were also members of the same lending syndicate under a credit agreement governed by New York law. The merits of the arbitration, broadly speaking, concerned how much the Respondents owed Claimants for breaches of the credit agreement. The dispute over amendment of the Original Final Award ("OFA") by the tribunal – the OFA found respondents liable for nearly $40 million in damages and pre-award interest — concerned the method by which the tribunal factored into the damages calculation, including pre-award interest, two pre-arbitration payments in 2016 by respondents to claimants totaling about $8.5 million. As there was a period of about two years from the dates of the payments to the date of the award, the way in which the payments were applied in reduction of respondents' liability – whether toward principal, or toward principal and interest – had a significant impact on the final amount awarded. And, importantly, if the payments were applied in reduction of principal plus interest accrued before the payment dates, with interest for the post-payment periods calculated on the remainder, the award included a component of compound interest (*i.e.* interest that accrued further on interest already accrued before the pre-payments).

The tribunal in the OFA declared its intention to award simple interest only. However, in doing its calculations, it applied the 2016 payments to the sum of accrued principal *plus* simple interest as of the payment dates. It then applied simple interest for the post-payment periods to the remainders. The effect of this was to implement a partial compounding of interest. That is to say, the OFA included simple interest for the post-payment periods on the simple interest already accrued for the pre-payment periods. The respondents submitted to the AAA pursuant to the AAA's slip rule (Commercial Rule R-50)[91] an application to correct this outcome as a computational error. The AAA referred the application to the tribunal. The tribunal agreed there was a computational error and issued an Amended Final Award ("AFA"). Just over one month elapsed from the date of the OFA to the date of the AFA.

[91] Rule R-50 states: "Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other party shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after the transmittal by the AAA to the arbitrator of the request and any response thereto."

Complicating matters, Claimants in the arbitration contended, in opposition to the AAA slip rule motion, and again in their motion to vacate the AFA, that applying pre-payments to accrued interest was required by applicable New York law. On this view, the AAA slip rule application sought to have the tribunal change a legal position and not merely correct a mistake in computation, the AFA impermissibly changed a legal premise of the OFA, and the AFA was subject to vacatur not only because the tribunal was *functus officio*, but also for manifest disregard of the law (*i.e.*, ignoring the supposedly governing legal principle concerning applying payments to interest).

The tribunal in its ruling on the AAA slip rule motion concluded that it was correcting a computation error and not redetermining the merits of any claim. The tribunal stated that its original intention had been to apply the payments to principal, that it intended to do so in reliance on the position taken by the damages experts for both parties that simple interest should be awarded and that the principal upon which simple interest should be calculated should be the principal amount less the amounts of the pre-payments. Per the tribunal's ruling, it had simply failed by computational error to compute in accordance with its stated intent.

The District Court vacated the AFA and enforced the OFA, concluding — without discussion of *functus officio* doctrine or *Dempsey Pipe* — that the tribunal made a substantive, not computational, adjustment when it elected in the AFA to apply the pre-payments to principal only. The court rejected as disingenuous the tribunal's statement in the AFA that it had accepted both parties' experts' position that the pre-payments should be applied in reduction of principal only. The basis for this rejection, said the court, was that the tribunal did not clearly state in the AFA its intention to apply the prepayments to principal only. For the court, this omission by the tribunal in the OFA justified the court's inference that the tribunal in the AFA was trying to disguise a merits redetermination as computation error — by insisting that its substantive determination of how to apply the prepayments had not changed.[92]

III. Shortcomings in the Operation of *Functus Officio* and Possible Reform

A few observations about *functus officio* as it now functions under provider slip rules are in order. First, even if governing FAA law prescribes deference, as *Dempsey Pipe* ostensibly does, a District Court may impose a high burden of proof on the proponent of the amended award to demonstrate that the correction was technical, not substantive. Second, that burden as a practical matter falls on the tribunal, and it may force tribunals toward more elaborately reasoned awards even when the parties would prefer a simpler shorter statement of reasons. Third, the specter of a District Court questioning the motives of arbitral tribunals when they make corrections is unseemly and undermines arbitration as an effective dispute resolution system.

Fourth – and most significant in terms of the conclusions and recommendation of this Report — it is apparent that the interplay of provider slip rules and FAA jurisprudence injects a fairly random element into complex arbitrations for the parties: Will the tribunal make a mistake? If the mistake is in our favor will we be able to persuade the tribunal that it cannot correct it (and if against us, that the tribunal can correct it)? Will we be able to persuade a court that the tribunal lacked power to correct it? Can we convince the provider that the mistake is not correctable and

[92] 2019 WL 1316012 at *8.

that the provider should not even send the correction motion to the tribunal? Does the provider have power to so decide? All of these uncertainties arguably contribute more to undermining the finality of arbitration awards than would a straightforward provider rule permitting substantive correction (which in our proposed rule we label, for ease of reference, "rectification," without implying any adoption of the usage of that term in any other legal setting, see Appendix B) that parties could either adopt or reject.

Criticism of the *functus officio* doctrine and suggestions for its demise are not a new development. The dissection of the *functus officio* doctrine by then-Chief Judge Richard Posner of the Seventh Circuit, in a 1995 case[93], still resonates today, and the key points he made in that decision warrant our consideration.[94]

1. Whereas all or nearly all public adjudicative bodies, judicial and administrative, provide some means for revision of rulings to correct substantive errors, it is anomalous that arbitration would provide no such means.

2. The original rationale for the doctrine — that arbitrators, returned to the status of private citizens after episodes of service as private judges, would be subject to inappropriate *ex parte* contacts in efforts by the disappointed litigant to obtain a change in the outcome – is better addressed by (as is indeed addressed by) rules forbidding *ex parte* contact rather than by a rule forbidding substantive correction of awards.

3. To deny arbitrators the power to make corrections of substantive errors limits the efficacy of arbitration and potentially contributes to a resurgence of hostility to arbitration as compared to dispute resolution in the courts.

4. The various exceptions that have become integral to modern *functus officio* doctrine, notably correction, clarification, interpretation, and the slip rules, address the shortcomings of the *functus officio* doctrine in ways that are arguably less efficient than the abolition of the doctrine itself – whether a case does or does not involve interpretation as opposed to a substantive change is an issue bound to foment litigation. Thus, the doctrine with the exceptions that have been engrafted is in substantial ways antithetical to the desired finality of arbitral awards.

A rationale for common law *functus officio* that took hold early in its development in the United States was that arbitrators who had completed their task would be subjected to undue influence, often *ex parte*, to change their decisions. But the doctrine is largely unnecessary to accomplish that mission in contemporary arbitration. During the periods of time provided in institutional rules for ministerial correction or interpretation of awards, the rules barring *ex parte*

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[93] *Glass, Molders & Pottery Workers Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844 (7th Cir. 1995).

[94] Judge Posner's views have been received with sympathy and favor by a number of federal judges over the years. *See, e.g., Eastern Seaboard Const. Co. v. Gray Const., Inc.*, 553 F.3d 1, 4-5 (1st Cir. 2008); *Local 2322 IBEW v. Verizon, Inc.*, 2005 WL 3160696 at *3 (D. Mass. Nov. 23, 2005), *aff'd*, 464 F.3d 93 (1st Cir. 2006); *Pace Union, Local 4-1 v. BP Pipelines (North America)*, 191 F.Supp. 2d 852, 856 (S.D.Tex. 2002). Other federal courts, however, have taken pains to say that they do not share in Judge Posner's or the Seventh Circuit's "hostility" to the *functus officio* doctrine. *See, e.g., Aerojet Rocketdyne, Inc. v. International Union, UAW*, 2017 WL 9500948 at *5 (C.D. Cal. Nov. 27, 2017).

contacts, in provider rules and applicable ethics guidelines, are in force. The arbitrator would be no more exposed to undue influence if, within a 30-day period after issuance of an award, an application could be made for "rectification" (connoting substantive correction, but not connoting the adoption of any law or practice surrounding that term in any other legal context), than she is now in the typical 30-day period in which correction of a typographical error or a mis-calculation of figures may be presented. In essence, the original ethics-based rationale for *functus officio* is overtaken by arbitration's formal integration into law by statutes such as the FAA and by provider rules and ethics rules governing the conduct of arbitrators.

The fact that provider arbitration rules mainly limit correction to ministerial mistakes is one feature that arbitration institutions may cite to promote arbitration as an ostensibly faster, cheaper, better adversarial procedure than litigation in the courts. And for some constituencies that is understandably an attraction. Companies that face large volumes of claims from customers, employees, or suppliers might turn elsewhere for dispute resolution if the provider whose rules they ordinarily use adopted a substantive correction rule in place of the ministerial/technical correction rule that now prevails. But for parties involved in high-value, high-complexity arbitrations, in which a correct result is not only critical but potentially elusive, in which complex damages calculations using finance tools and models are the norm, the absence of a standard mechanism for tribunals to correct their substantive mistakes may make arbitration less attractive than litigation in the courts. If arbitration providers want to remain competitive for the patronage of parties who expect to be involved in such cases, or find themselves so involved, should they not *offer* – but not necessarily *mandate* — rules providing for a substantive correction process before the tribunal prior to finality that make high-stakes arbitration more attractive by making it more reliable?

Under the "ministerial corrections only" *status quo*, we do not in fact have a system where only ministerial corrections are possible, but arguably a system in which substantive errors do often get corrected, but only through inefficient or dysfunctional procedures. There are at least three recurring scenarios, illustrated by some of the cases discussed in the text of this Report.

> Scenario #1: An aggrieved party thinks the tribunal made a mistake and feels constrained to argue (however disingenuously) that the mistake is "clerical" or "computational" in order to bring it within the provider's slip rule. The party benefitting from the mistake has the better of the technical argument that the correction is not clerical or computational, but lacks the moral high ground when seeking to gain from an arbitral mistake and vindicate a system that values "getting it done" over "getting it right" – even if getting it done may have already taken two years and getting it right might only add a month. This makes for a difficult processing of the correction application by the tribunal and for equally difficult litigation in the courts over whether the tribunal exceeded its powers if it opts to make the correction. When a federal court says that deference to the arbitrator's judgment is in order with regard to whether a correction is ministerial or substantive, when in fact most rational observers would view the correction as substantive, aren't the federal courts really saying, in a carefully-coded fashion, that narrowly drawn rules for only ministerial corrections often do not make good sense, and so arbitrators should be free to abrogate them by generous interpretation? Arguably this is a muddy road to a desirable destination.

Scenario #2: The party aggrieved by a perceived substantive error applies to the tribunal for a clarification or interpretation of the award. The initially-prevailing party objects that a change in the merits outcome is being sought impermissibly in the guise of interpretation. The more persuaded the tribunal is that it did indeed make a mistake, the more inclined the tribunal will be to fix it, and in turn the more inclined the tribunal will be to accept the characterization of "interpretation" or "clarification." Arbitrators who wish to be appointed in future disputes are probably disinclined to cast aside such applications by concluding that while they made a substantive error, they are powerless to fix it. Litigation ensues over the award clarification, with the initially-prevailing party now aggrieved by a correction she views as exceeding the powers of the arbitrator. A district court may agree that there was a change rather than an interpretation. An appellate court may then disagree with the district court, and hold that the tribunal enjoyed wide latitude to make the call on whether it was interpreting or modifying, having the greatest familiarity with the arbitral record. Three years of post-award litigation may be consumed in what could have been a clearly defined self-correcting process if the parties had access to a provider-provided rule of substantive correction ("rectification").

Scenario #3: The tribunal issues a "partial" or "interim" "final award" that resolves an important issue of contract interpretation – for example, the scope of a purported limitation on consequential damages in a commercial case. When the losing party wants substantive correction of that contract interpretation, it argues that the award is non-final because there was no liability-damages bifurcation and the matter determined was not a separate and independent claim. Also, the parties have different interpretations of a hearing record, although it is transcribed, at which the determination was made to have this preliminary issue decided in a separate interlocutory award. The tribunal finds an error in its reasoning, issues a corrected interlocutory award, and invokes the existing FAA jurisprudence on finality to justify its position on arbitral power to correct an error in reasoning. At this point, the uncertainty over the tribunal's power may bring the proceedings to a halt pending judicial review, as there may be little point in presenting the costly and complex damages case for consequential loss if the limitations on consequential damage recovery recognized in the corrected award are within the correction powers of the arbitrators.

In none of these scenarios can the provider's version of *functus officio*, included in its rules, be said to have actually contributed to a more streamlined and cost-effective arbitration. One of the challenges that provider organizations face, in a competitive market, is that the arbitration framework they offer should be seen by potential users as streamlined and cost effective. It may be easier for providers to market a perception of efficiency based on their rules and protocols than it is to market actual efficiency based on data gathered about actual outcomes. For this reason, we recognize that advocacy for wholesale institutional reform in provider rules may not attract provider support. But more incremental reform should be considered.

The interruption and interlocutory judicial proceedings at issue in these various scenarios would be avoidable if the parties were arbitrating under a rule permitting substantive correction of an award when sought within a specified time frame. The situation is even more uncertain if judicial review is in a New York State court, where the adoption of federal jurisprudence on finality of partial awards is not established.

Our proposal is to add an opt-in rule that would expressly permit a motion for rectification, to be submitted within 30 days of the Award. The rule would be an opt-in, with the election to be made only at the outset of a proceeding and only if both parties accept it.[95] The proposed text of the rule is found in Appendix B to this Report, phrased as a proposed revision to the AAA's current slip rule, R-50 of its Commercial Arbitration Rules. Appendix B is modeled on R-50 solely for illustrative purposes; any of the existing providers' slip rules could be modified in the same way.

These proposed changes would address several prominent tensions in the arbitral process. First, parties presently are not required to commit as between a process that ensures accuracy in the outcome, and one that ensures an efficient path to finality with more risk of error. It is reasonable for provider rules to require that this decision be made after the dispute arises but before the arbitration proceeds. Second, arbitrators who discover an error in reasoning, judgment, or appreciation of the evidence, after issuing an award, understandably prefer to correct the error. But they recognize the tension between filtering out mistakes and acting within the provider rules that govern and the FAA or state arbitration law that applies. It makes good sense that this choice, between a process likely to filter out errors and a process more prone to permit their occurrence, should belong to the parties.

For example, a provider could adopt a specific opt-in rule expressly providing for rectification of any award that is treated as final under the law and rules governing the arbitration, upon an application made within a defined time frame after delivery of that award to the parties. Annexed as Appendix B to this Report is a proposal for such an opt-in rule.[96]

[95] An alternative formulation of the proposed rule would permit parties to opt-in at any time in the course of the proceeding, but we suggest that an early opt-in deadline, before the tribunal has issued even minor rulings, is likely to maximize opt-ins and minimize unduly tactical decisions.

[96] We recognize that an opt-in rule based on consent of the parties does not entirely eliminate the problems identified in this report. Where one party would opt-in but the other will not, so that the rectification rule is not adopted, a party aggrieved by a perceived substantive error will still have incentives to ask the arbitrators to "stretch" the slip rule to cover the mistake. But in a significant number of cases, especially complex high-value cases involving technical evidence, mutual opt-in can be anticipated. And where both parties are on record as rejecting the rectification rule, tribunals will be justified in adhering to a strict application of the slip rules.

CONCLUSION

This survey and analysis of the pertinent statutes, institutional provider rules and recent cases demonstrates that the continuing application of the *functus officio* doctrine to modern arbitration in the United States is intensely problematic. It challenges the integrity of arbitral awards and incentivizes otherwise needless resort to judicial review with its attendant delays, expense and uncertainty. Recent cases illustrate that the doctrine poses a significant obstacle to the speed, cost-effectiveness and – of utmost importance – reliability of arbitral awards and the arbitration process.

Significantly, the institutional provider rules that embody the doctrine impede the courts' ability to evolve the common law doctrine of *functus officio* to the modern era. As a result, it is highly desirable for institutional providers to revise their respective "slip rules" to improve the way the arbitration system handles post-award claims of arbitrator error. The proposed revised rule that appears at Appendix B is one possible solution that seeks to achieve this goal while maximizing the speed and minimizing the expense of a post-award correction process.

April 2021

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APPENDIX A

Rules of Institutional Providers Embodying the *Functus Officio* Doctrine

AAA (Commercial)	Rule R-50	Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto
ICDR	Article 33	1. Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award. 2. If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties' last submissions respecting the requested

		interpretation, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award. 3. The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award. 4. The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.
ICC	Article 36	1. On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days from notification of the award by the Secretariat pursuant to Article 35(1). 2. Any application of a party for the correction of an error of the kind referred to in Article 36(1), or for the interpretation of an award, must be made to the Secretariat within 30 days from receipt of the award by such party.

		3. Any application of a party for an additional award as to claims made in the arbitral proceedings which the arbitral tribunal has omitted to decide must be made to the Secretariat within 30 days from receipt of the award by such party. 4. After transmission of an application pursuant to Articles 36(2) or 36(3) to the arbitral tribunal, the latter shall grant the other party or parties a short time limit, normally not exceeding 30 days, from receipt of the application by that party or parties, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days from expiry of the time limit for the receipt of any comments from the other party or parties or within such other period as the Court may decide. A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. A decision to grant the application under paragraph 3 shall take the form of an additional award. The provisions of Articles 32, 34 and 35 shall apply *mutatis mutandis*. 5. Where a court remits an award to the arbitral tribunal, the provisions of Articles 32, 34, 35 and this Article 36 shall apply mutatis mutandis to any addendum or award

		made pursuant to the terms of such remission. The Court may take any steps as may be necessary to enable the arbitral tribunal to comply with the terms of such remission and may fix an advance to cover any additional fees and expenses of the arbitral tribunal and any additional ICC administrative expenses.
CPR (Administered)	15.6	Within 15 days after receipt of the award, either party, with notice to the other party and CPR, may request the Tribunal to clarify the award; to correct any clerical, typographical or computational errors, or any errors of a similar nature in the award; or to make an additional award as to claims or counterclaims presented in the arbitration but not determined in the award. The Tribunal shall make any clarification, correction or additional award requested by either party that it deems justified within 30 days after receipt of such request. Within 15 days after delivery of the award to the parties or, if a party requests a clarification, correction or additional award, within 30 days after receipt of such request, the Tribunal may make such corrections and additional awards on its own initiative as it deems appropriate. All clarifications, corrections, and additional awards shall be in writing,

		shall be submitted directly to CPR by the Tribunal for delivery by CPR to the parties, and the provisions of this Administered Rule 15 shall apply to them.
JAMS (Comprehensive)	24 (j)	Within seven (7) calendar days after service of a Partial Final Award or Final Award by JAMS, any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 31(c) or on account of the effect of an offer to allow judgment), or the Arbitrator may *sua sponte* propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file any objection. The Arbitrator may make any necessary and appropriate corrections to the Award within twenty-one (21) calendar days of receiving a request or fourteen (14) calendar days after his or her proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.
LCIA	Article 27	27.1 Within 28 days of receipt of any award, a party may by written notice to the Registrar (copied to all other

		parties) request the Arbitral Tribunal to correct in the award any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature. If, after consulting the parties, the Arbitral Tribunal considers the request to be justified, it shall make the correction by recording it in an addendum to the award within 28 days of receipt of the request. If, after consulting the parties, the Arbitral Tribunal does not consider the request to be justified it may nevertheless issue an addendum to the award dealing with the request, including any Arbitration Costs and Legal Costs related thereto. 27.2 The Arbitral Tribunal may also correct any error (including any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature) upon its own initiative in the form of an addendum to the award within 28 days of the date of the award, after consulting the parties. 27.3 Within 28 days of receipt of the final award, a party may by written notice to the Registrar (copied to all other parties), request the Arbitral Tribunal to make an additional award as to any claim, counterclaim or cross-claim presented in the arbitration but not decided in any award. If, after consulting

		the parties, the Arbitral Tribunal considers the request to be justified, it shall make the additional award within 56 days of receipt of the request. If, after consulting the parties, the Arbitral Tribunal does not consider the request to be justified it may nevertheless issue an addendum to the award dealing with the request, including any Arbitration Costs and Legal Costs related thereto. 27.4 As to any claim, counterclaim or cross-claim presented in the arbitration but not decided in any award, the Arbitral Tribunal may also make an additional award upon its own initiative within 28 days of the date of the award, after consulting the parties. 27.5 The provisions of Article 26.2 to 26.7 shall apply to any addendum to an award or additional award made hereunder. An addendum to an award shall be treated as part of the award.
HKIAC	Article 38	38.1 Within 30 days after receipt of the award, either party, with notice to all other parties, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may set a time limit, normally not exceeding 15 days, for all

		other parties to comment on such request. 38.2 The arbitral tribunal shall make any corrections it considers appropriate within 30 days after receipt of the request but may extend such time limit if necessary. 38.3 The arbitral tribunal may within 30 days after the date of the award make such corrections on its own initiative. 38.4 The arbitral tribunal has the power to make any further correction to the award which is necessitated by or consequential on (a) the interpretation of any point or part of the award under Article 39; or (b) the issue of any additional award under Article 40. 38.5 Such corrections shall be in writing, and the provisions of Articles 35.2 to 35.6 shall apply.
UNCITRAL Arbitration Rules	Article 38	1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request. 2. The arbitral tribunal may within 30 days after the communication of the award

		make such corrections on its own initiative. 3. Such corrections shall be in writing and shall form part of the award. The provisions of article 34, paragraphs 2 to 6, shall apply.

APPENDIX B

Proposed New Opt-In Rule to Modify Scope of *Functus Officio* Doctrine in Arbitration (using the AAA Commercial Rules as an illustrative example). Other providers are encouraged to adopt its theme.

The American Arbitration Association's Commercial Arbitration Rules (2013) codifies the *functus officio* doctrine and a limited exception to it in R-50 as follows:

> Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

The Proposed New Opt-In Rule expands the grounds upon which a request for a correction can be made (or the Tribunal can make a correction on its own) if the Parties timely agree that the scope of the exceptions to the *functus officio* doctrine should be liberalized for their matter. We propose that it be done early in the process because once the Tribunal starts to make rulings or otherwise discuss the merits, parties may be more tactical in making their opt-in decision. The proposed language is as follows:

1. Revision to Rule R-10:

Add the following sentence at the end of current Rule R-10:

> In any matter in which an administrative conference is held pursuant to this Rule, the AAA shall set a reasonable deadline by which the Parties shall communicate to the AAA whether they agree to the application in their case of optional Rule R-50(b).

Make the following changes to Rule R-50:

1. Designate the text of existing Rule R-50 as Rule R-50(a) and insert the phrase "except as provided in Rule R-50(b) if the parties have agreed to apply Rule R-50(b) to their case" at the conclusion of the second sentence of existing Rule R-50.

2. Add the following new section following Rule R-50(a):

(b) The Arbitrator shall have additional authority to correct a mistake in an award as follows:

(i) Whenever the parties, in their contract or by stipulation made within the time provided in this Rule, have provided for the arbitrator to have the authority to correct a mistake in an award affecting the outcome ("Rectification") that exceeds the authority otherwise provided by Rule R-50(a), they shall be deemed to have made this Rule R-50(b), as amended and in effect as of the date of submission of a Rectification Request (defined below), a part of their agreement to arbitrate.

Note: this subparagraph (i) is modeled upon Rule A-1 of the AAA's Optional Appellate Arbitration Rules (2013)

Note: the term "Rectification" is adopted based upon the Merriam-Webster Dictionary meaning of the verb "to rectify", i.e. "to set right : REMEDY" (#1), "to correct by removing errors: ADJUST" (#3). No reference is made to, and no implications should be drawn from, the use of the term rectification in any other legal forum or context.

(ii) Within 20 calendar days after the transmittal of any award, including a partial final award ("Underlying Award"), any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any mistake affecting the outcome in the Underlying Award that the party claims arises from oversight, omission or misapprehension of a matter of fact or law presented by one or more of the parties ("Rectification Request"). A Rectification Request may not present any matter of fact or law not previously presented, other than a change in controlling law that arose after the date of the last permitted submission of law in the arbitration.

(iii) The AAA shall prescribe an administrative fee with respect to the Rectification Request and shall also require the requesting party to advance an amount sufficient to pay the arbitrator's anticipated compensation, based upon the arbitrator's estimate. The arbitrator will estimate the amount promptly following review of the Rectification Request.

(iv) The Arbitrator shall consider the Rectification Request upon notice from the AAA that the requesting party has paid the AAA all applicable administrative fees and deposits. Any party or parties who has or have not made or joined in a Rectification Request shall have no responsibility to contribute to any such fees or deposits.

(v) The Arbitrator shall determine whether the Rectification Request warrants a response from other parties within 7 calendar days; if so, any such parties shall be given 10 calendar days from the Arbitrator's determination to respond to the request. The Arbitrator shall dispose of the Rectification Request within 20 calendar days after the transmittal by the AAA to the arbitrator of the request or, if applicable, any response thereto.

Note: This subparagraph (iv) is modeled after the Individual Practices of SDNY former Chief Judge Colleen McMahon, par. F.5 ("Judge McMahon reviews motions for reconsideration when they arrive, and decides whether a response is required or whether a motion can be denied sua sponte. The opposing party need not serve any responsive papers (including letters) unless specifically directed to do so by Judge McMahon").

(vi) The Arbitrator shall rule on a Rectification Request (i) if and to the extent the Request is granted, in the form of an Addendum that shall become part of the Underlying Award, and if the Underlying Award is a reasoned award, the Addendum shall also be reasoned, and (ii) if and to the extent the Request is denied, in the form of a Decision that shall not add reasoning to or in support of the Underlying Award and shall not become a part of the Underlying Award (nor shall it be a separate award) but shall state in succinct terms why no error requiring rectification is present.

(vii) If the Rectification Request is rejected in whole or material part, then, absent compelling extenuating circumstances, the Arbitrator shall assess any attorneys' fees and expenses incurred by an opposing party, along with the administrative fees, expenses, and arbitrator compensation incurred with respect to the Rectification Request, to be paid by the requesting party. No administrative fees, expenses, arbitrator compensation, or attorneys' fees may be assessed against an opposing party regardless of the outcome of the Rectification Request. The Arbitrator's assessment shall take the form of an Addendum and shall become part of the Underlying Award.

(viii) Unless otherwise agreed by the parties at the time of opting in to this Rule 50(b), the provisions of this Rule 50(b) with respect to advancement and allocation of administrative fees, expenses, arbitrator compensation, and attorneys' fees shall prevail in case of conflict over any provision in the parties' arbitration agreement with respect to allocation of such costs.

(ix) The Arbitrator may *sua sponte* issue an Addendum that rectifies a mistake affecting the outcome arising from the circumstances set out in R-50(b)(ii) provided the Arbitrator has within 5 calendar days of the issuance of the Underlying Award provided notice to the parties of the mistake the Arbitrator plans to rectify. Any such Addendum shall be issued within 10 calendar days of the notice and shall become a part of the Underlying Award.

(x) Upon a determination by the Arbitrator that a Rectification Request warrants a response from one or more other parties, or upon the Arbitrator's notice that an Addendum rectifying the Underlying Award will be issued *sua sponte*, the Underlying Award shall not be considered final for purposes of any court actions to modify, enforce, correct, or vacate the Underlying Award ("judicial enforcement proceedings") until after the issuance of all Addendums ensuing from the proposed or actual rectification, and the time period for commencement of judicial enforcement proceedings shall be tolled until such time. The parties agree to stay any already initiated judicial enforcement proceedings until the conclusion of the arbitral proceedings ensuing from the Rectification Request. If the Rectification Request is withdrawn, the Underlying Award shall be deemed final as of the date of withdrawal.

Note: this subparagraph (viii) is modeled upon Rule A-2(a) of the AAA's Optional Appellate Arbitration Rules (2013)