CHAPTER 7

SHOULD ARBITRATORS RETAIN JURISDICTION OVER AWARDS?

I. ON RETAINING JURISDICTION

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Should an arbitrator retain jurisdiction sua sponte? My epiphany on that question came late in my career, reminding me of the old proverb, "We get so soon old, and so late smart."[1]

I am here today to tell you the full story. In that respect, I may be like the maiden lady who went to confession and told the priest she had committed a sin of impurity. The priest asked her when this had occurred, and she responded "15 years ago." He said, "but haven't you confessed this before?" "Yes I have," she said, "but I like to talk about it."

My story begins with an arbitration involving the discharge of six operating engineers. They were employees of a subcontractor on a construction site helping to build a desulfurization plant for a refinery. Other crafts of the subcontractors were also in the work force, of course, and at a prejob conference the various parties discussed the work rules. One of them provided that the lunch period should run from 11:30 a.m. to 12 noon. Further, the rules dictated that an employee would not clock out before 11:25 a.m. and must clock back in no later than 12:05 p.m.

There were some 500 construction employees scattered around the work site. One set of time clocks, with four walk-throughs, was available to service them. According to the work rules, the employees were not supposed to leave their work locations any earlier than required to get them over to the area of "clock alley" by 11:25 a.m.

Predictably, the employees kept trying to get a head start on the lunch period by leaving the work site and arriving in clock alley a few minutes early. Then they would stand around waiting for

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[1]*See* Dunsford, *The Case for Retention of Remedial Jurisdiction*, 31 Ga. L. Rev. 201 (1996).

11:25 a.m. so they could check out for lunch. The crowds milling around clock alley did not go unnoticed, particularly by the owner of the refinery, and the general contractor. They complained to the subcontractor about the time being lost while employees waited to scan out. The general superintendent passed the word down to his supervisors, again and again, to tell the employees to stop the early arrivals. But the congestion in clock alley continued and the delays mounted.

With his patience running out, the general superintendent got tough. One December morning, he told his supervisors to go to clock alley about 11:15 a.m. and start picking up the badges of anyone who was there waiting for the clocking out time to arrive. They were *all* to be fired. It developed that perhaps 50–70 employees were there, and as the supervisors moved among them grabbing badges the employees became vocal and agitated. Thirty-two badges were collected from employees of the subcontractor, and six of them were the grievants in the case before me.

Each side was represented by a seasoned attorney. Management appeared to have a plausible case, but there was one flaw yet to be mentioned. Even though it was a construction site, the written work rules called for a progression of discipline. There were three steps: a reprimand, a written warning, and then termination. None of the six had ever been disciplined previously.

A simple case, but the hearing dragged into a second fractious day, with the attorneys skillfully throwing verbal elbows with NBA skill and amiably chewing on each other's ears. The written grievance was introduced into evidence at the beginning of the hearing, but never mentioned at all by the parties.

The decision was a conventional one. The award read as follows:

> The Company did not have proper cause to discharge the six Grievants. They shall be reinstated to their former employment and made whole. The Company may file a reprimand form on each employee to indicate he had a first infraction on Rule 3 on December 16, 1992.

Act II is about to begin. A few months later a letter came from the company attorney, with a copy to his counterpart. The company reported that the parties were in dispute about whether the calculation of back pay should include an offset for any interim earnings by the grievants. The union maintained that there should be no deduction, and the employees should receive back pay from the date of discharge to the date of reinstatement, disregarding any earnings that may have been received elsewhere.

The company attorney asked me for a clarification. However, the parties at hearing had not asked me to retain jurisdiction and I had not done so. To use that ugly phrase from common law, I was functus officio. Since I concluded I no longer had jurisdiction over the case, I volunteered to resolve the uncertainty about the meaning of the award without additional charge, if the parties would authorize it. But the union refused, knowing that it had in its arsenal a strange precedent from the Seventh Circuit stating that even though a make-whole remedy at common law is understood to encompass a duty to mitigate, labor arbitrators use the term to mean that the full amount of back pay is owing.[2]

With matters at a standoff, the company reinstated the employees and paid their lost wages less the estimated interim earnings they would have received. The estimate was based on information the union had provided prior to arbitration. This was unsatisfactory to the union, which filed a petition in federal district court to enforce the arbitration award.

The ensuing circus is described in painful detail by a court of appeals.[3] In response to the union petition, the company—by now aware of the Seventh Circuit precedent that the union was brandishing—answered that the award was ambiguous and should be remanded to the arbitrator. There the matter hung in limbo on the docket of the district court until a year or so later when the company filed a motion to stay the action and compel arbitration of the disputed question of offset for interim earnings.

At this point, Catch-22 came into play. The trial court denied the motion on the ground that the company had waived the issue of offsets by not raising it before the arbitrator. (This despite the fact that the parties had not addressed any aspect of a possible remedy at the hearing.) As an alternative basis for its ruling denying the company's motion, the district court held the motion untimely under the Federal Arbitration Act (FAA)[4] because the motion had not been filed within the 90-day limitation period for vacating or correcting an award. (The catch here is that the company never wanted to vacate the award, or even to correct it, but only to resolve the question of the meaning intended by the arbitrator in the use of the phrase "make-whole.")

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[2]*Machinists Local 701 v. Joe Mitchell Buick, Inc.,* 930 F.2d 576, 137 LRRM 2121 (7th Cir. 1991) (per curiam).

[3]*Operating Eng'rs Local 841 v. Murphy Co.,* 82 F.3d 185, 187, 152 LRRM 2315 (7th Cir. 1996).

[4]9 U.S.C. §§1 et seq.

Gradually realizing the procedural quicksand into which it had been sucked, the company in desperation began thrashing out in all directions before the court of appeals. Since the subject of damages was never raised at the hearing, it argued that the arbitrator was really only deciding the question of whether the six employees were entitled to return to work. At best, the comments about remedy were an advisory opinion. According to the company, therefore, there was no waiver of the offset issue, since there was no reason to address it. The company asked the court to stay the litigation and compel arbitration of the issue of damages.

But the court was having none of it. Perhaps not appreciating that the company argument at this stage was a product of sheer necessity dictated by the timeliness trap, the court responded that it certainly was odd that the arbitrator had actually ruled on the damages issue since no evidence had been produced at the hearing. Pushing the logic a little further, the court allowed that the arbitrator could hardly have specified what his make-whole ruling meant, since he had no evidence at all of lost wages or interim earnings before him. But all of this lascivious speculation about the putative idiocy of the arbitrator was immaterial, anyway, since the appellate court ultimately relied on the fact that the union had sought confirmation and enforcement of the award, and the company had failed within the time allowed by the FAA to seek to vacate, modify, or correct it. (Need we call attention to the fact that in this section 301[5] enforcement action, the terms of the FAA have come to dominate?)

With its back to the wall, the company finally resorted to the claim that the award could not be enforced in court for the obvious reason that it was ambiguous and meaningless as it stood. Unfortunately for the company, the court did not see it as ambiguous at all in respect to the question of an offset. Reading the award in reference to the remedy sought in the grievance (the very grievance that had not been addressed in any serious way by the parties at the hearing), the court took refuge in a Seventh Circuit precedent case that summarily states when an arbitrator uses the phrase "make-whole" in an award and is silent on the question of offsets, he must mean that no offsets are to be made. So much for Ted St. Antoine's crazy notion that the parties want the

[5]Labor Management Relations Act, 29 U.S.C. §185.

arbitrator to be the contract reader.[6] Whatever happened to that guy, anyway?

Like the Ancient Mariner, I have held you with my skinny hand and glittering eye to tell you this frightening and interminable tale. In doing this, I have broken the unspoken rule not to inflict a detailed statement of the facts of one's case on a helpless colleague. But what's a captive audience for? I know you have better things to do here in San Diego (a walk on the beach would be nice). But my boorish behavior has a redeeming purpose, namely, to demonstrate that if a case as pedestrian as the one I have just described can lead to such surrealistic consequences, there must be something terribly wrong with the way the process is working. We move now to the explanation of how I got the albatross off my neck.

Pondering this antic experience after a third martini one night in my study, I had a blinding revelation regarding what had gone wrong in this case. Recalling, however, that this kind of phenomenon had also occurred previously after three martinis, usually on much larger matters of state or of the heart, I waited until the next day to reach any final judgment. The lesson to be learned is obvious, isn't it? It made no sense whatever for me to issue an award in which a remedy was prescribed in general terms without retaining jurisdiction to resolve any dispute over its meaning and application.

Why did it make no sense, and why had I regularly done it in the past?[7]

Much more often than not, as we all know, the parties at an arbitration do not engage the issues of remedy that become crucial only if, and when, a finding of contract violation is

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[6]St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny,* in Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, ed. Dennis & Somers (BNA Books 1978), 29.

[7]And why had I ignored the sound advice on this subject already available in the literature: Ellmann, *Functus Officio Under the Code of Professional Responsibility: The Ethics of Staying Wrong*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 190; Rehmus, *The Code and Postaward Arbitral Discretion*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42d Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), 127;Werner & Holtzman, *Clarification of Arbitration Awards*, 31 Lab. Law. 183 (1987); Seitz, *Remedies in Arbitration: I. Problems of the Finality of Awards, or Functus Officio and All That*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books 1964), 165. And in *The Chronicle* of May 1990, Edgar A. Jones, Jr., came out unequivocally for retaining remedial jurisdiction. He was rude enough to point this out to me recently.

made. Many years ago, Peter Seitz explained the reasons for this phenomenon:

> Should the parties at the hearings address themselves to such matters as the calculation of damages or a canvass of all of the things necessary to make a damaged grievant whole (such as the ascertainment of relative seniority rights to a job, the completion of therapy for a disabled alcoholic or otherwise incapacitated employee, the exertion of efforts by the employer and the union to identify a substitute job in which a long-service employee can function, etc.), several more days of hearing would be required. It is not the arbitrator, but the parties, who, either expressly or implicitly, recognize the fact that this would be an utter waste of time because, if the award should sustain the employer's position, there would be no occasion at all to confront or deal with these matters.[8]

Despite the absence of any evidence regarding remedy in the record, however, the parties usually operate on the presumption that if the arbitrator finds a grievance has merit he or she will be able to crank out a remedy that will be adequate for the purpose. In other words, the parties are quick to assume that the matter in arbitration can be disposed of within the framework of the hearing time that has been scheduled. Indulging this presumption, the arbitrator therefore seeks to bridge the gap between the unspecified particulars of the situation and the general remedial standards that he or she wants to apply. This invites the adoption of formula language, chameleon words that can change coloration to fit a variety of contingencies, or possibly that most commodious and sweeping of all pronouncements: "This grievance is sustained."

Now in most instances, no harm is done. Where the terms of the remedy are not specific, the parties in an established relationship will follow the pattern of their past experience in similar cases. Or they will get together and hammer out a solution to a disagreement over the meaning of the award. If that proves unsuccessful, they can always agree to refer the problem to the arbitrator for clarification. But in those few instances in which none of these solutions work, a burdensome and counterproductive process must be followed. Either the parties take the matter to court, and the judge orders them to go back to the arbitrator to clarify the ambiguity, or the judiciary under one guise or another undertakes to guess what the

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[8]Seitz, *Letter to the Editor: Final Comments on Retaining Jurisdiction,* Study Time, Jan. 1981, pp. 3, 4.

arbitrator meant or to substitute its judgment of what the remedy should be. The obvious way to avoid such an eventuality is for the arbitrator to retain jurisdiction when the award is issued.

Why did I not follow this advice in the case I described? Why throughout my career had I followed the principle that if the parties have not specifically requested that I retain jurisdiction I should not do so?

There are several answers to those questions. The first is that the Code of Professional Responsibility[9] seems to prohibit such action on an arbitrator's part. The second is a fear that I might be exceeding my legal authority if I should do so without the permission of the parties.

Paragraph 1 of section 6.D of the Code states in no uncertain terms that "[n]o clarification or interpretation of an award is permissible without the consent of both parties." One can understand the readiness of arbitrators to accept this statement as a direct repudiation of the right to retain jurisdiction without the agreement of the parties. However, on closer analysis, several points tend to undermine such a conclusion.

1. This section of the Code says nothing at all about whether an arbitrator is entitled to retain jurisdiction, that is, for example, whether an arbitrator could divide a case by ruling on the merits first, and withhold for a further hearing the determination of a remedy. Instead, this section of the Code speaks only to what an arbitrator may do after release of the award.

2. When is an award released for purposes of section 6.D? I would maintain that the presumption behind the provisions of section 6.D is that an award has been released only when it is final and complete. Of course, under those circumstances the doctrine of functus officio surely does prohibit arbitral clarification or interpretation of the decision. The only difficulty, as we have seen above, is that any award that provides for a remedy is almost invariably not final in the sense of being complete.

3. The present Code of Professional Responsibility, unlike its predecessor, no longer requires an award to be final or to dispose of all matters submitted. The current section 6.C.1 simply states that an award must be "definite, certain, and as concise as possible," whereas its predecessor in the former Code of Ethics stated that the award must "reserve no future duties to the arbitrator except by

[9]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (1996, as amended).

agreement of the parties."[10] These were important changes in the language of the Code. While they may not compel, they certainly lend support to the proposition that an arbitrator may retain jurisdiction over the remedy.

The convergence of all these factors suggests to me that the language of section 6.D was intended to apply only when the award is final, complete, coextensive with the terms of the submission, and released by the arbitrator without any reservation of future duties. If this were not the case, the very act of a court in remanding an ambiguous award back to an arbitrator would technically be in violation of the Code, since both parties are not granting their consent in that instance. Accordingly, it makes sense to conclude that the arbitrator does not violate any ethical standard when, in anticipation of uncertainty among the parties about the meaning, interpretation, or application of the award, jurisdiction over the remedy is reserved.

In my opinion, it is not necessary to rewrite the Code of Professional Responsibility to reach an interpretation that it does not prohibit the retention of remedial jurisdiction by an arbitrator. I suggest that the Committee on Professional Responsibility and Grievances address the question with an authoritative opinion under the present Code, before any attempt is made to amend the document.

A second reason for the bashfulness of arbitrators to retain jurisdiction is a belief that under the law they have no right to do so. The source of this belief is a common law doctrine called functus officio, which means that when an arbitrator has performed the task assigned, he or she no longer has power or authority to proceed further. Under the common law this doctrine was sometimes applied woodenly, so that whenever an arbitrator released an award, the jurisdiction was automatically terminated no matter what the award said.

Fortunately, one feature of the common law is its capacity over a period of time, shaped by the hands of succeeding generations of judges, to work itself pure, that it is to say, to refine and modify its principles and rules to render them more responsive to felt needs. To an extent, this is what has happened to the doctrine of functus officio.

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[10]*Appendix B: Code of Ethics and Procedural Standards for Labor-Management Arbitration*, in The Profession of Labor Arbitration, Selected Papers From the First Seven Annual Meetings of the National Academy of Arbitrators, 1948–1954, ed. McKelvey (BNA Books 1957), 151, 158.

Almost simultaneously with its creation, the doctrine was interpreted to make exceptions by allowing an arbitrator, after the release of the award, to correct any clerical mistake, or obvious miscalculation of sums, or typographical errors, and the like. Of greater significance, the common law also gradually began to recognize that if only a portion of a submission has been satisfied by the arbitrator, the award was incomplete. On those occasions, the arbitrator was considered free (even without the permission of the parties) to reconvene the hearing and finish the job. The logic of this approach was expressed by a court near the beginning of the century:

> The arbitrator, through mistake, failed to consider and decide a part of the dispute submitted to him, and the award was invalid because incomplete. But the agreement was still in force, and it was competent for the arbitrator to finish his work by making a full and complete award.[11]

But if functus officio does not bar an arbitrator from resuming a hearing without the permission of the parties when an award is incomplete, what about the situation in which the award is ambiguous and demands clarification. Over time, courts were asked to remand such ambiguous awards to the arbitrator for clarification in order that the judiciary could properly enforce them.[12] And of special relevance to these developments, of course, was the decision at the appellate level in the *Enterprise Wheel* [13] case, which is part of the *Steelworkers Trilogy*.[14]

You will recall that the arbitrator in *Enterprise Wheel* had set aside the discharge of 11 employees who walked off their job in a protest. The arbitrator submitted a 10-day suspension for each of the dischargees, less any monies earned in other employment after the expiration of the 10-day period. However, since the arbitrator had not reduced the award to a specific monetary amount, the company invoked the doctrine of functus officio to argue that the award had to be vacated because it was incomplete and indefinite. The appellate court frankly conceded that under the common law the company was correct in its assertion: the powers of the arbitrator had been exhausted, and hence the award could not be resubmit-

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[11] *Frederick v. Margwarth*, 70 A. 797 (Pa. 1908).
[12] *E.g., La Vale Plaza v. R.S. Noonan, Inc.*, 378 F.2d 569 (3d Cir. 1967).
[13] *Enterprise Wheel & Car Corp. v. Steelworkers*, 269 F.2d 327, 44 LRRM 2349 (4th Cir. 1959).
[14] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

ted for correction or amendment. But the court of appeals consciously rejected that course of action, and declared that the old rule forbidding the resubmission of a final award to the arbitrator should not be applied in the future in the resolution of employer-employee disputes under section 301. Instead, the court sent the award back to the arbitrator to obtain clarification through a specification of the amount of back pay that was owed.

Tracking these developments one can observe that the law, both state and federal, at common law and through statutes, slowly responded to the need to trim the doctrine of functus officio to allow the arbitrator to complete and clarify what his or her award was intended to accomplish, at least when the court itself has directed the arbitrator to do that.

Yet if functus officio no longer bars a court from remanding ambiguous awards to the arbitrator to define the meaning of the remedy, why should the arbitrator in the first instance not provide a more efficient and direct mechanism for achieving that end by routinely retaining jurisdiction? Obviously, it makes more sense for all concerned if the arbitrator remains immediately available to interpret the award in the event of a dispute over its meaning, rather than to force the parties to go to a court in order to obtain an order of remand.

There is reason to believe that the courts themselves have gradually come to accept this conclusion. A review of the relatively few cases dealing directly with an arbitrator's right to retain jurisdiction sua sponte appears to support the exercise of such a power. Decisions in the First and Ninth Circuits take a view consistent with that claim.[15] A number of decisions of federal district courts also reach that result.[16]

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[15]*Sunshine Mining Co. v. Steelworkers,* 823 F.2d 1289, 124 LRRM 3198 (9th Cir. 1987); *Courier-Citizen Co. v. Graphic Communications Local 11,* 702 F.2d 273, 112 LRRM 3122 (1st Cir. 1983). In a Third Circuit case, the court in dicta states that an arbitrator is entitled to clarify an ambiguity where there is doubt that the submission has been fully executed. *Teamsters Local 312 v. Matlack, Inc.,* 118 F.3d 985, 155 LRRM 2738 (3d Cir. 1997) (citing the earlier cases of *Colonial Penn Ins. Co. v. Omaha Indem. Co.,* 943 F.2d 327 (3d Cir. 1991); *La Vale Plaza v. R.S. Noonan, Inc., supra* note 12). However, these cases deal with remands from the court to the arbitrator.

[16]*See, e.g., Dean Foods Co. v. Steelworkers Local 5840,* 911 F. Supp. 1116, 1127–28, 153 LRRM 2234 (N.D. Ind. 1995) (recognizing propriety of arbitrator retaining jurisdiction over remedy portion of award); *Robert E. Derecktor of R.I. v. Steelworkers Local 957,* No. 89-0439B, 1990 U.S. Dist. LEXIS 7116, at *10 (D.R.I. 1990) (concluding that "the arbitrator's retention of jurisdiction over the interpretation and implementation of her award was proper"); *Dreis & Krump Mfg. Co. v. Machinists Dist. 8,* No. 85-C-1250, 1985 WL 3752, at *3 (N.D. Ill. 1985), *aff'd,* 802 F.2d 247, 123 LRRM 2654 (7th Cir. 1986) (rejecting employer's argument that arbitrator improperly retained jurisdiction "for 90 days after the award to resolve unforeseen problems"); *Hilton Int'l Co. v. Union de Trabajadores de la Industria*

Having concluded that there is no legal impediment to the retention of jurisdiction with respect to remedies, and further that such an approach fully serves the interests of the parties, the process, and the judiciary, I have, ever since my experience with the operating engineers, routinely added to any award where there is a violation of the contract something to the following effect:

> The arbitrator shall retain jurisdiction solely for the purpose of resolving any dispute between the parties regarding the meaning, application, or implementation of this award.

Of course, I still endeavor to write a remedy that reflects the limits of my understanding of what is called for. But the retention of remedial jurisdiction allows me to clarify and illuminate the intention behind the language of that remedy if the parties read it in different ways.[17]

With that as the objective, I do not attach any time limitations on the retention. It is open-ended, with either side free at any time to request a remedial clarification. Some arbitrators disapprove of that approach, thinking that a specification of time may encourage the parties to act more expeditiously, and as a practical matter bring the arbitration to a close so the parties can be billed. My justifications for dispensing with the time limits are that the award is not legally enforceable until the task of clarification (which may or may not be required) has been performed, and either side is free

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Gastronomica de P.R. Local 610, 600 F. Supp. 1446, 1451, 119 LRRM 2011 (D.P.R. 1985) (holding that "[a]n arbitrator may properly retain jurisdiction, after ordering reinstatement and back pay, to determine the amount of earnings loss by the discharged employee"); *A.H. Belo Corp. v. Typographical Union No. 173 (Dallas),* 82 LRRM 2574, 2575 (N.D. Tex. 1972), *aff'd,* 471 F.2d 651, 82 LRRM 2633 (5th Cir. 1973) (finding that "[a]fter finding a violation of the collective bargaining agreement the arbitrator in this case was clearly within the scope of his authority in retaining jurisdiction to determine the amount of earnings lost by the grievant"); *see also State v. Connecticut Employees Union Indep.,* No. CV 93-0704214, 1993 WL 512475, at *2 (Conn. Super. Ct. 1993) (defining an arbitrator's retention of jurisdiction for disputes "concerning the proper monies to be paid" as "mere surplusage raising only a possibility not then or now raised by either party"); *San Jose Fed'n of Adult Educ. Teachers Local 957 v. Superior Court of Santa Clara County*, 132 Cal. App. 3d 861, 866–67 (1982) (concluding that the "arbitrator did not exceed his powers when he retained jurisdiction to determine the amount of pay owing to the grievant in the event the parties could not agree"); *cf. Engis Corp. v. Engis Ltd.*, 800 F. Supp. 627, 632 (N.D. Ill. 1992) (holding in nonlabor case that arbitrator can retain jurisdiction "solely for the purpose of ensuring compliance with his award").

[17] In some circumstances, even when a remedy is awarded, the retention of jurisdiction may be gratuitous. An permanent umpire, for example, may be vested with continuing jurisdiction over all the disputes arising between the parties. Hence, any difference over the meaning of a remedy issued in one case might readily be brought back to the umpire in another. Similarly, where a board of arbitration is sitting, the neutral referee may feel that the parties through the partisan board members already understand fully the meaning of the remedy that is ordered. Perhaps there is no need for a retention of jurisdiction there.

to seek the clarification that is needed if the other side's delay becomes vexatious.

Obviously, a retention of jurisdiction is not a panacea. Potentially, such an approach may breed problems of its own. If arbitrators are not careful, they may stumble into more trouble than they avoid. The first and most important caution is to avoid the temptation, when asked to interpret or clarify the remedy, to get back into the merits of the dispute, and determine on a second examination if it was rightly decided. It is imperative the arbitrator recognize that the basic limitations of functus officio still apply to the decision on the merits; only a clarification of the remedy is possible.

Even if the arbitrator discovers that the original decision on the merits was based on inadequate evidence, or a mistake of fact, he or she no longer possesses the authority to change the result absent mutual agreement of the parties. The same conclusion applies when a petitioner seeks to present newly discovered evidence on the merits. Of course, the arbitrator may not simply have a change of mind and decide to reverse the original decision. All of these restrictions on the arbitrator's power are fairly obvious to an arbitrator of any experience.

There are some (including a few judges) who would argue that it is foolish to continue to draw a line between the merits and the remedy, since the doctrine of functus officio is a totally dead letter, and ought to be abolished in its entirety. Presumably they would allow the arbitrator for good cause shown to reopen and reconsider the full decision. As I understand the law, however, that is not within the arbitrator's power. Moreover, I would have the gravest doubts that any such development would be desirable for the integrity of the process, or the long-range interests of the parties.

Perhaps there is some room for courts, on an ad hoc basis, to permit an arbitrator who has not specifically withheld jurisdiction to resolve an ambiguity in the award on his or her own motion, or at the unilateral request of one side. That is what happened in a recent case[18] when an employee, discharged for violation of the attendance policy, was reinstated by the arbitrator with a 3-day suspension without pay. The company, however, took the position that the award as written did not entitle the grievant to any back pay for all the time he was off work before the order of reinstatement

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[18]*Teamsters Local 631 v. Silver State Disposal Serv.*, 109 F.3d 1409, 154 LRRM 2865 (9th Cir. 1997).

was issued. When the arbitrator was notified that the parties were in dispute on this point, she sent a letter stating specifically that she intended the grievant to receive back pay from the date of termination until the date of reinstatement except for the period of the 3-day suspension. The Ninth Circuit held that the arbitrator did not violate the doctrine of functus officio because she was only completing the award. The problem with this approach is not necessarily the result that was reached, but the haunting prospect of uncertainty that inevitably will surround the determination by a court of whether the arbitrator was functus officio (a determination that is not made until months later in the judicial system). The preferable route, it seems to me, is that the arbitrator include a retention of jurisdiction as part of the award.

I tend to share the sentiments of Reginald Alleyne who effectively makes the case for a continuation of the doctrine in its present form:

> I believe that . . . *functus officio* furthers arbitration's objectives. It decreases the chances that grievance disputes will fester. . . . It keeps arbitrators on their toes. Lack of authority to change an award once issued encourages greater diligence and more careful consideration by arbitrators before they issue awards. Arbitrators are also more heavily insulated from undue unilateral pressure to change their awards when they can respond that they are without jurisdiction to do so. When "final and binding" decision-making authority has its basis in contract, the interests of the parties are best served when the terminal point of the authority is defined with a clear, bright, unwavering line.[19]

It must be conceded that the rationale for the doctrine of functus officio is not fully developed in the judicial opinions. Occasionally there is a reference to the court's unwillingness to expose a person who is only serving temporarily as an ad hoc arbitrator to the pressures of the litigants if the arbitrator is forced to reexamine an opinion after it is rendered. The court contrasts the situation of such a person to that of a judge who has continuity of office and the tradition of the bench to sustain him. Such a comparison may be telling in regard to the psychological vulnerability of an arbitrator in the face of heated denunciations by the losing side that he or she is wantonly in error, but a more basic reason for functus officio simply may be the inherently consensual nature of the enterprise. The source of the arbitrator's power to decide a matter is not the power and will of the state to resolve disputes between citizens. In a state-sponsored system of adjudication, rules need to be worked

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[19]*The Law and Arbitration,* The Chronicle, May 1987, p. 5.

out to decide if and when to reconsider a judgment. The private agreement of the parties to designate someone to resolve a dispute is quite different, as we all recognize. Once that grant of power is exercised by the arbitrator, it is exhausted. There is no basis for believing that the parties intended for the person chosen as arbitrator to decide the case on the merits as many times as needed in order to feel satisfied, or at least twice with the second time governing, or two out of three times, or the first three out of five, etc., etc. Of course, the difference between what we are talking about here involving the merits of the dispute, and a retention of jurisdiction for remedial purposes of clarification, is that the parties in the latter case presumably did intend for the arbitrator to provide a complete answer as to how a contract violation should be remedied.

In my judgment, it would be a mistake to scuttle the concept of functus officio entirely. Our dear friend, Peter Seitz, recalls in a witty way, some of its advantages:

> [Functus officio] protects the arbitrator from the late evening telephone calls, importunities, and indignant protects of those who, having inadequately and incompetently presented their cases and having lost them, deservedly, demand reconsideration and rehearing. It puts a dispute to bed. It lets sleeping dogs lie and prevents dead horses from being whipped.
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> Perhaps the best illustration of functus officio is what happens to the stern and imperious arbitrator when, at the end of the hearing which has been conducted with characteristic majesty and authority, he [or she] returns for dinner to the bosom of [an] everloving [mate] and family. If [the arbitrator] has any lingering officio, he [or she] finds it utterly and completely functus.[20]

II. O FUNCTUS OFFICIO: IS IT TIME TO GO?

GEORGE NICOLAU*

Following Jack Dunsford is every bit like following Frank Sinatra or Luciano Pavarotti. By the time you begin, the audience is on its way home. But since all of you are here on a very late Saturday

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[20]Seitz, *supra* note 7, at 165–66. In the interest of modern sensibilities to gender references, I have tampered with Peter's 1964 vintage prose, not I hope to his eternal displeasure.

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