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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> . . .
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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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afternoon, my assumption is that you are diehard fans and will listen to just about anything. So, here goes.

Before today, many of you were undoubtedly familiar with Professor Dunsford's paper[1] on retaining remedial jurisdiction as published in the *Georgia Law Review* and some of you may have been aware of the paper on functus officio that I gave in January 1997 at the midwinter meeting of the ABA's Committee on ADR in Labor & Employment Law. Interestingly, Jack and I were working independently of each other, completely unaware of each other's views or product until we exchanged papers after they were written. As it was, we approached the question from different perspectives. Jack was urging retention of jurisdiction and I, aware that many colleagues were chary of retaining jurisdiction when not asked to do so, was urging abolition of the Code[2] provision that stood in the way of interpretations or clarifications of our awards.

I do not disagree with his conclusion that we should retain remedial jurisdiction. All of us know that concentration on the remedy during an arbitration of the merits of a dispute, particularly a discharge, is virtually nonexistent. But my take on the matter approaches the problem from a somewhat different angle.

Some of what you will hear from me has echoes of what Jack said. Some of the cited cases and the Code provisions are the same, but I look at some matters that go beyond retention and I end up with a somewhat different solution.

Let me begin by treating in depth one of the cases that was, in effect, the beginning of my search for that solution: *Glass & Pottery Workers Local 182B v. Excelsior Foundry Co.*,[3] which I will refer to as *Excelsior*.

It was a 1995 decision of the Seventh Circuit, written by Chief Judge Posner. In his usual provocative way, Judge Posner raised an intriguing question that should be of some interest to all of us, we arbitrators and the entire alternative dispute resolution community. Simply put, what he propounded was whether the doctrine of functus officio, with which we have lived so long, should end; whether that governing rule in arbitration—"that once an arbitrator has issued his final award he may not revise it"[4]—being a judge-made rule, should now be judge-unmade. I would like to explore

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[1]Dunsford, *The Case for Retention of Remedial Jurisdiction*, 31 Ga. L. Rev. 201 (1996).
[2]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (1996, as amended), §6.D.
[3]56 F.3d 844, 149 LRRM 2538 (7th Cir. 1995).
[4]*Id.* at 845.

that a bit today and broaden it, if I may, to ask, whatever judges may think, whether it is time for someone or some entity to unmake the rule.

The facts of *Excelsior* are these. An employee failed a drug test and then failed to complete a rehabilitation program. At that point he was fired. The arbitrator ordered the company to reinstate him, and I quote:

> without backpay or fringe benefits, if he completes a company medically approved rehabilitation program within 60 days from the rendition of this award.[5]

The award, which did not specify who would pay for the $3,000 program cost, was issued on May 6, 1993, with the 60th day falling on July 5. As is usually the case, the period of treatment in such a program was 28–30 days. So the union had only a short time to find out who would pay for treatment before the grievant had to enroll in the program in order to meet the 60-day deadline. On May 24, the union, after what turned out to be fruitless negotiations with the company, asked the arbitrator to clarify his award. On June 2, the arbitrator advised that he had not intended that the company pay for treatment. Thereafter, the grievant worked out an installment payment plan and finally enrolled in the program. However, because of the delay, he did not complete the program until July 27, some 3 weeks after the July 5 deadline.

A few days before our grievant had completed the program, his union representative telephoned the arbitrator—an ex parte contact—and asked when the 60-day time limit had begun. On July 30, the arbitrator wrote the parties and advised that it had begun on June 2, the day he clarified his award, rather than May 6, the date of the original award. This meant that the grievant had "completed the program within the deadline after all."[6]

When, despite that letter, the company refused to reinstate the grievant, the union brought an action to enforce the award. The District Court for the Southern District of Illinois granted summary judgment for the employer, saying that the arbitrator's extension of the deadline was "forbidden by the doctrine of functus officio."[7]

The question on appeal was whether that ruling was correct. Judge Posner disposed of the ex parte issue rather quickly. He acknowledged the ex parte contact, but said it appeared to have

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[5] *Id.*
[6] *Id.* at 846.
[7] *Id.*

been condoned or even invited. He also said that even if it were not condoned or invited, "an improper, uncondoned ex parte contact" would not "in itself" warrant vacateur. Labeling the issue a "red herring," he said that the lower court's ruling would have to stand or fall on the applicability of the functus officio doctrine.[8]

Judge Posner said that the doctrine had originated in the "bad old days" of judicial hostility toward arbitration, but now "riddled with exceptions" was "hanging on by its fingernails," with its very existence in labor arbitration open to question.[9]

He went on to say that the doctrine was based on the analogy of a judge who resigns his office being incapable, because of that resignation, from ruling on a subsequent request to reconsider or amend a decision. Since arbitrators are considered ad hoc judges, that is, judges for a case, they too, in effect, resign once the award is made. The flaw in the analogy, according to Judge Posner, was that a judge's resignation does not deprive litigants of the ability to seek reconsideration of a ruling. They simply direct their motion to another judge. However, if the arbitrator is thought to "resign," there is no one left to whom the parties can turn. Thus, there is what Judge Posner called a "gap" in the arbitral system that, in his view, makes very little sense.

Even though the functus officio doctrine might shield arbitrators from ex parte bombardments after the issuance of an award, the imposition of a bar against reconsideration or modification of an award would, as he put it, "clothe arbitrators with an ill-fitting mantle of infallibility." Moreover, denying arbitrators the "ordinary powers of judges," that is, the "inherent power to reconsider . . . decisions within a reasonable time" "reduces the utility of arbitration" and is really consistent with hostility to the arbitration process rather than acceptance.[10]

As it turned out, Judge Posner, as he well understood, need not have engaged in this discussion, for he ultimately decided that the case before him involved an exception to the rule. The uncertainty as to who would pay for the treatment that justified an extension of the original deadline could, he said, "fairly be characterized as 'interpretive,' allowing the union and [the grievant] to crawl through the loophole in the doctrine of functus officio for clarification or completion, as distinct from alteration, of the arbitral

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[8] *Id.*
[9] *Id.*
[10] *Id.* at 847.

award." "An award," he went on, "that fails to address a contingency that has arisen after the award was made is incomplete; alternatively, it is unclear; either way, it is within an exception to the doctrine."[11] He then found, by successfully navigating what he called a "perilous, fog-bound" choice of law voyage, that the request for clarification was made within a reasonable time and that the district court was wrong in holding that the arbitrator could not do what he had done.

Even though he too was able to "crawl through the loophole," Judge Posner was unable to resist putting the retention of the functus officio doctrine in question. He said that the existence of loopholes, including the one he used, "undermines the rationale for the doctrine" because "much alteration can be achieved in the name of interpretation." And, "[s]ince the case for the exceptions seems stronger than the case for the rule, perhaps the time has come to discard" the rule altogether.[12]

Yet, he decided not to attempt that abrogation. First, because no one had asked him to. He also went on to suggest that there just might be some utility in the doctrine after all. Otherwise, he said, the arbitration services or the parties themselves might have authorized arbitral reconsideration long ago. Perhaps not doing so was, as he put it, "sheer inertia," or the "capriciousness of the exceptions for clarification and completion," or it might be that the "people who are paying for arbitration believe it unwise to give arbitrators as brought a right to reconsider awards as might seem appropriate to us."[13] Since "arbitration," Judge Posner said, "is a service sold in a competitive market[, t]he rules adopted by the sellers are presumptively efficient."[14] I am sure Judge Posner meant buyers rather than sellers, since it is the parties, the buyers of the services, who essentially set the rules. Be that as it may, the judge took pains to remind those in the labor relations community that there was no legal bar to arbitral reconsideration; that functus officio was "merely a default rule, operative if the parties fail to provide otherwise."[15]

Judge Posner, of course, is not the first to have raised this issue, nor will he be the last. The National Academy of Arbitrators and

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[11] *Id.*
[12] *Id.*
[13] *Id.* at 848.
[14] *Id.*
[15] *Id.*

the American Arbitration Association discussed it many years ago. The original Code, then called the Code of Ethics,[16] was adopted by those two organizations in 1951, just 4 years after the Academy's founding. Part II of that Code dealt with this question. Incidentally, Part III, entitled "Conduct and Behavior of Parties," established ethical and behavioral guidelines for advocates. For some unaccountable reason, that particular part, probably because we could not deploy a sufficient number of enforcement police, was dropped in 1974. To get back to the subject at hand, section 5(a) of Part II read:

> The arbitrator should render his [sic] award promptly and must render his award within the time prescribed, if any. The award should be definite, certain and final, and should dispose of all matters submitted. It should reserve no further duties to the arbitrator except by agreement of the parties.

Those last two sentences would seem to have done it. The award had to be "certain and final"; it had to dispose of "all matters submitted" and "no further duties" were to be reserved. Yet, in the same section, the following subsection (f) appears:

> After the award has been rendered, the arbitrator should not issue any clarification or interpretation thereof, or comments thereon, except at the request of both parties, unless the agreement provides therefor.

At the 1964 annual meeting, the last time, I'm saddened to say, that the Academy met in New York, my good friend and mentor, the late Peter Seitz, confessed that he had great difficulty with section 5(a), the "certain and final" and "no further duties" provision, and suggested a way around it. In his presentation,[17] he agreed that if the doctrine had not been so firmly embedded in the common law, we—the arbitrators—would have had to invent it, if only to protect ourselves from late night phone calls and indignant protests demanding reconsideration. In Seitz's view, the doctrine was useful because it put disputes to bed. Yet, because of the nature and characteristics of particular disputes, functus officio, Seitz said, could hinder rather than promote the objectives of labor-management arbitration.

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[16]*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, 159.

[17]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.

Seitz went beyond the obvious issues of back pay and salary offsets, which, as I said, are rarely discussed in any detail during the presentation of a case and therefore cry out for the retention of jurisdiction. Seitz gave several other examples where he thought the device of an interim or interlocutory award would be useful. One example was the introduction of new machinery that warranted, in the employer's view, a reduction in crew size while the union was charging "safety hazard" and "speed up," with the presented evidence justifying neither position. Seitz's solution was to allow the use of the new machinery in an interim award pending further experience or an engineering study.[18] Another example was the immediate injunction against the runaway shop or the wildcat strike, with the damage from such actions to be decided later.[19]

Seitz recognized that what he was proposing was not the same as reopening for further litigation what had already been decided, but, in his words, was simply "taking one bite of an apple and then, when the occasion is appropriate, taking another bite on the other side of the apple."[20] Seitz advised that arbitrators, including ad hoc arbitrators, "should not hesitate to retain jurisdiction, delay the closing of hearings, and, if necessary, reopen hearings if they are of the opinion that their adjudicatory function cannot be responsibly discharged on the kind of presentation made. . . ."[21] He also advised that "[i]f the logic of the circumstances" called for an interim, rather than a final, ruling, then that's what the arbitrator should do.[22]

For saying such things, Peter was mightily taken to task by Jesse Freidin,[23] a well-known management attorney. While recognizing that arbitration, with its supposedly unreviewable authority, was a difficult task, Freidin came down hard against interim awards, saying that the arbitrator's function was to be fulfilled "on the basis of the facts available to the parties which *they* believe provide an adequate support for their positions, although the arbitrator may not believe that it supplies an adequate support for *his*."[24] The arbitrator's duty, he said, is to decide the case before him because,

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[18]*Id.* at 166–67.
[19]*Id.* at 168–69.
[20]*Id.* at 170.
[21]*Id.* at 174.
[22]*Id.*
[23]Freidin, *Remedies in Arbitration: Discussion*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books 1964), 201.
[24]*Id.* at 202–03.

"if the parties believe the facts *can* yield decision, it is not his place to say the facts *cannot*."[25]

In saying that the arbitrator was limited to dealing with what the parties presented, Freidin forgot the clear statement in the American Arbitration Association's (AAA) Labor Arbitration Rules and in the Code. What is now numbered section 28 in the AAA's Rules says:

> 28. Evidence
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> The parties may offer such evidence as is relevant and material to the dispute, and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute.

Part II, section 4(b) of the Academy's old Code read in relevant part:

> b) The arbitrator may participate in the examination of parties or witnesses in order to clarify the issues and bring to light all relevant facts necessary to a fair and informed decision of the issues submitted to him.

Section 5(A)(1)(b) of the new Code, adopted in 1974, put it this way:

> b. An arbitrator may: . . . question the parties' representatives or witnesses, when necessary or advisable, to obtain additional pertinent information; and request that the parties submit additional evidence, either at the hearing or by subsequent filing.

Of course, both the old and the new Code remind us that the arbitrator should not take over the case or prevent a party from fairly and adequately presenting its case. The main message of both Codes is clear, however: the process belongs to the parties, but the arbitrator is entitled to whatever evidence is believed necessary for an informed decision.

In any event, interim awards can be useful where circumstances require them. Irrespective of what Jesse Freidin said, it is up to the arbitrator to decide when they should be employed. Arbitrators must remember, however, that to *remain employed* they would be well advised to use interim awards judiciously.

To return to functus officio, I mentioned that the Code was revised in 1974. During the 2 years prior to that revision, a joint

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[25]*Id.* at 204. In 1972, Louis Crane, an Academy colleague, more politely but with the same firmness, argued against interim awards. *See* Crane, *The Use and Abuse of Arbitral Power*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, ed. Dennis & Somers (BNA Books 1973), 66.

Academy, AAA, and Federal Mediation and Conciliation Service committee prepared eight different drafts of a revised Code, each one containing the "no further duties . . . except by agreement of the parties" restriction. The eighth draft was hotly debated by the Academy members at an annual meeting, with many members saying both before and after the discussion that they had quite often retained jurisdiction in one kind of case or the other without ever asking the parties' permission to do so.

As it turned out, the "no further duties" phrase simply disappeared without a trace in the ninth and final draft. What remained was a variant of the old section 5(f), to wit:

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> Post Hearing Conduct
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> D. Clarification or Interpretation of Awards
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> 1. No clarification or interpretation of an award is permissible without the consent of both parties.
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> 2. Under agreements which permit or require clarification or interpretation of an award, an arbitrator must afford both parties an opportunity to be heard.

Chuck Rehmus, another eminent member of the Academy, asked in a 1990 presentation at the 42d annual meeting, just what this change meant.[26] The legislative history of the change I spoke of was virtually nonexistent. Were we now free to retain jurisdiction without asking anyone whether we could do so, as long as it was not for the purpose of clarifying or interpreting our award? Rehmus's "haphazard survey," as he put it, found that many of us interpreted the change in just that fashion. He noted that courts had ruled on more than one occasion that arbitrators had not exceeded their authority by retaining jurisdiction on their own. He also pointed out that in *Enterprise Wheel*,[27] the Fourth Circuit had no hesitancy in resubmitting back-pay determinations to the arbitrator, saying, as it did so, that the functus officio doctrine "should not be applied today in the settlement of employer-employee disputes."[28] The Supreme Court, you will recall, agreed that the matter should be

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[26]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.

[27]*Enterprise Wheel & Car Corp. v. Steelworkers*, 269 F.2d 327, 44 LRRM 2349 (4th Cir. 1959).

[28]*Id.* at 332.

remanded to the arbitrator for a determination of the amounts due.

Because *Enterprise Wheel* is so important for other reasons, most readers of that opinion miss this aspect of the case. The arbitrator had not retained jurisdiction when he rendered his award. Yet, the Supreme Court had no hesitancy in sending it back to him so that back pay could be determined with precision.

Rehmus also noted that functus officio has little place in federal sector arbitrations and that various statutes, such as the Uniform Arbitration Act and a number of state provisions, allow arbitrators to correct awards as long as those corrections do not affect the merits of the decision.

Rehmus concluded that it was appropriate to retain jurisdiction when matters remained to be decided in that it (1) allowed the parties to work things out before returning to the arbitrator, and (2) forestalled litigation that might have occurred if jurisdiction had not been retained. He cautioned, however, that we should eliminate the appearance of a "boarding house reach for further business" by retaining jurisdiction for a specific purpose and only for a limited time. He also advocated, and this did not meet with universal acceptance—indeed, quite the contrary—that the arbitrator "accept no further remuneration following a preliminary or incomplete award"[29] unless the parties asked for additional hearing days.

Rehmus did not deal with what Professor Dennis Nolan, in discussing Rehmus's paper, termed the "hard core" of functus officio: "the request by a single party, often disguised as a plea for clarification or correction, to re-examine the merits of the dispute."[30] It is one thing to retain jurisdiction, Nolan said, or to accept a direct remand from a supervening authority, such as a court, the Federal Labor Relations Authority, or the Office of Personnel Management. It is quite another to accede to the request of a single party for clarification beyond the correction of evident errors. This, the previously cited section 6.D.1 prohibits.

It was in 1992, 3 years before Judge Posner's decision in *Excelsior,* that another attorney-arbitrator[31] strenuously advanced the propo-

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[29]Rehmus, *supra* note 26, at 136–37.

[30]Nolan, *The Code and Postaward Arbitral Discretion: Discussion*, 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), 137.

[31]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

sition that section 6.D.1 be deleted from the Code. Erwin B. Ellmann reminded us that functus officio originated during the "gamy days" of the 13th century, when Edward I promulgated the doctrine to prevent judges from altering records to mask their own wrongdoing and that the king's decree, accompanied as it was with heavy fines for its violation, ultimately led to the judiciary's refusal to correct anything, including palpable errors and misentries. It is this "medieval pathology," Ellmann said, that is reflected in section 6.D.1, while the courts have been liberated from such "talismanic ritualism." Motions for rehearing or reconsideration are "commonplace," with Rule 60(b) of the Federal Rules of Civil Procedure authorizing a court, "on motion of a party made within a reasonable time and not more than one year, to undo a judgment made by mistake, inadvertence," excusable neglect, or "any other reason justifying relief from . . . the judgment," including newly discovered evidence.

Ellmann went on to enumerate the instances in which courts had remanded matters to arbitrators where the award was ambiguous, contained a mistake, or did not dispose completely of the issue or issues submitted. If courts can do this and arbitrators now accept such remands even when one party objects, why should not arbitrators be permitted to rectify matters on their own?

He gave as an example a matter in which he had been involved. The contract provided that four unexcused absences within 12 months would automatically result in termination. On March 9, 1991, he issued an award holding that the discharge of an employee was justified because of her four absences. On the following day, March 10, 1991, another arbitrator, Harry Casselman, found that the grievant's suspension for the third absence was not for just cause. As strange as it may seem, Ellmann had never been informed of the existence of that proceeding. Even though the predicate suspension had been wiped out, when the employer insisted that the employee remain discharged, the union, believing that Ellmann could do nothing because of section 6.D.1, went to court to set aside his award. More than a year later, the Sixth Circuit decided that this "post-award development," that is, the Casselman award, made the "grievant's fate . . . ambiguous" and ordered a hearing before the two arbitrators. Six months later they decided that she should be returned to her job with, as Ellmann said, considerable

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45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 190.

back pay. The point, of course, is that without section 6.D.1's requirement of joint consent, Ellmann, after hearing both parties, could have clarified his award, advising that it was predicated on the three previous absences being for just cause.

Before going further, let me mention a fascinating award issued by Academy member Marlin Volz in 1987. In *Peabody Coal*,[32] Volz was asked whether a particular issue had been submitted to another arbitrator; whether, if it had been submitted, the arbitrator had decided the issue, and if not, what remedy should be directed. The company in the previous case had laid off one shooter from each of the mine's five drilling and shooting crews. Those five shooters—I have talked to Marlin and now know what a shooter is—were reassigned to other jobs and, as it turned out, it was five other employees who were actually laid off, that is, who had lost their jobs. However, the opinion in the prior case dealt exclusively with the shooters, with the arbitrator holding that the company had violated the agreement by "laying off 1 shooter per drilling crew" and ordering that they be reinstated and be made whole. The company put each shooter back on his respective crew and paid each of them the difference in salary, but refused to reinstate those who had actually been laid off.

The union then wrote that arbitrator. After noting that its grievance, in addition to naming the shooters, had listed those who had lost their jobs, the union asked the arbitrator whether he had intended that these five employees also be made whole. The arbitrator's response was that he could not answer the inquiry without the company's consent. The union then filed a new grievance on behalf of what I have dubbed the "forgotten five." The union argued before Volz that the previous arbitrator had not decided their fate, while the company argued that their fate, as evidenced by their inclusion in the grievance, had been before that arbitrator and that they were bound by his decision—one that provided no remedy for them.

Arbitrator Volz found that the previous arbitrator did have the matter of the forgotten five before him, but had not decided it. Volz could not tell from the previous opinion's silence on the issue whether the arbitrator had meant to deny the five a remedy or had not dealt with them through inadvertence or mistake. Only the previous arbitrator, Volz said, could answer that question. After noting that courts had not hesitated in remanding matters for

[32]90 LA 201 (Volz 1987).

"resolution of [an] unanswered question" and some ruminations over the reach of his authority—after all he was an arbitrator, not a court—Volz directed the company "to join the union in requesting [of the previous arbitrator] clarification or completion" of his previous decision. So Volz did what a court would have done, but in much less time.[33]

Arbitrator Ellmann proposed the elimination of section 6.D.1, which constrained him and the first arbitrator in the *Peabody Coal* case. All it does, he said, is "spare arbitrators from the indignity of being directly confronted with their own deficiencies or from tailoring their ultimate judgments to facts and law which may have eluded them or the parties the first time around."[34] He also suggested that no "elaborate substitute provisions" or guidelines be fashioned.[35] Arbitrators, Ellmann said, are perfectly competent to determine whether further hearings are necessary when postaward motions come before them.

Management attorney Michael Campbell took issue with Ellmann, suggesting that the process of reconsideration would seriously undermine finality and erode the sense of "how the system works."[36] It is only the exceptional case that is remanded and that process, he said, should be left to the courts. But if section 6.D.1 were to go, something should be put in its place. Without standards, guidelines, or time limits, each arbitrator would be left to establish them case by case. One guideline Campbell mentioned was section 9 of the Uniform Arbitration Act. That section, you will recall, permits modification or correction of an award at the request of "a party" where there has been an "evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award" or where the award is "imperfect in a matter of form." Section 9 also permits modification or correction "for the purpose of clarifying the award."

Advisory Opinion No. 20,[37] issued by the Academy's Committee on Professional Responsibility and Grievances in October 1989, advises that evident miscalculations or misidentifications may be corrected on an arbitrator's own initiative or at the request of one

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[33]*Id.* at 203.
[34]Ellmann, *supra* note 29, at 204.
[35]*Id.* at 203.
[36]Campbell, *Functus Officio Under the Code of Professional Responsibility: The Ethics of Staying Wrong: Management Perspective*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 204, 206.
[37]"Correction of Evident Errors in an Arbitrator Award," Oct. 27, 1989.

party, so long as both parties are given an opportunity to express their views. The opinion went on to say that such corrections are not "really clarification or interpretation" within the meaning of section 6.D.1. However, Advisory Opinion No. 20 does not permit the other correction permissible under the Uniform Arbitration Act—that of modifying an award in order to clarify it. And obviously, neither does Advisory Opinion No. 20 permit modification of an award based on considerations enumerated in Rule 60(b) of the Federal Rules, such as newly discovered evidence, excusable neglect, or any other reason justifying relief.

So where does this little journey leave us? Should section 6.D.1 be deleted? Should the functus officio doctrine be abolished? Actually, these are two different questions, for section 6.D.1 is only a small part of the functus officio doctrine. It is one thing to be asked to clarify an award; it is quite another to be asked to reconsider a decision.

To clear away some of the underbrush, it is not a violation of the Code to render an interim award or to render what Professor Dunsford calls an "unspecified" award and to remand to the parties certain matters such as the calculation of back pay, the identification of individuals entitled to overtime or other benefits or damages suffered as the result of subcontracting or the violation of a no-strike clause, and to retain jurisdiction to resolve those matters in the event the parties are unable to do so. If, contrary to Jack's advice, jurisdiction is retained for only a limited rather than an unlimited time, it is also not a Code violation, as I see it, to make provision for an extension of that limited period if circumstances warrant. The use of interim or unspecified awards makes an arbitrator's determination incomplete, hence not final and therefore subject to completion.

As to Jack's advice that jurisdiction be retained for an unlimited time, though the giver of that advice is a learned and admired colleague and friend, I do not want to walk down that road with him. A time limit, as he says, is a shot in the dark, but it is a shot. It sets a deadline. Parties tend to concentrate with deadlines. It is better to make them operate under deadlines rather than leave them opportunities for procrastination or concentration on the next problem rather than the one yet unresolved.

Why, however, should we not permit arbitrators to reconsider their awards? This is the heart of the matter, the hard core of functus officio. If judges can reconsider their decisions based on certain, specified grounds, why should not arbitrators have the same authority?

Obviously, there are competing policy considerations at work here. Posner tells us that the inability to reconsider decisions reduces the utility of arbitration. And Ellmann says that the inability to reconsider keeps us from tailoring our ultimate judgments to facts and law that may have eluded us or the parties the first time around.

All of this may be so, but what do these views do to finality? In those cases where arbitral decisions are appealed and either vacated, modified, or remanded, finality is delayed. I believe there are far too many appeals, but they are still only a handful compared with the many arbitration decisions that are accepted, even if reluctantly. Posner misses the point. Giving arbitrators more authority and the courts fewer cases would postpone and sacrifice finality in far more instances than now occurs. Similarly, Arbitrator Ellmann's thesis would encourage parties and arbitrators to relax; if a party or an arbitrator did not get it right the first time, there is always a second chance. What I have called the corridor counsel would not even have to meet his client in the corridor at 9:45 a.m. of the hearing day the first time around; he could wait until reconsideration time.

Seriously, the value of arbitration is that it is designed to be your *only* chance. The virtue of such a system is that it concentrates the mind. The ability of an arbitrator, at the unilateral request of a party, to reconsider what had been litigated and decided, would erode the concept of finality and inevitably change the process. As it is now, a party seeking to vacate or modify an award must consider the expense and time involved in going to court. Those factors regularly lead parties to accept that with which they are unhappy. Besides, adverse decisions are grist for the mill of future collective bargaining negotiations. Rather than making reconsideration easier, it is far better that parties diligently prepare and present their cases for a first and only chance, and that arbitrators, before issuing decisions, do their best to think through the possibilities and contingencies and tailor their awards accordingly.

But what of clarification or interpretation? Would the earth move if a party were permitted to ask if the arbitrator meant to adjudicate the fate of the *Peabody Coal* [38] forgotten five? Would it move if Arbitrator Ellmann were asked if his decision was dependent on three, rather than two, previous unexcused absences? After all, divisions of the National Railroad Adjustment Board are permitted to clarify their awards on request of a single party.

[38] *Supra* note 32.

Moreover, under section 9 of the Uniform Arbitration Act, arbitrators may clarify their awards and arbitrators or a court may correct awards under the previously enumerated grounds, if the purpose is to "effect [the award's] intent." That provision is certain to remain in the revised Act now being considered and it is entirely possible that a similar provision will soon be added to the Federal Arbitration Act.[39] So, if the purpose of a motion by a single party is to clarify, rather than change, why should that not be permissible?

Some parties, taking advantage of section 6.D in its present form have made provision for just that. Consider, for example, the rules of the U.S. Steel Board. Though it is somewhat uncertain, I like to think that the provision allowing for consideration of implementation and compliance questions at the request of one party was due to the foresight of Sylvester Garrett, who served as Steel Chairman for many years. In any event, those rules as well as the rules of the Iron Ore Industry Board provide:

> B. *Finality of Award*
>
> The decision of the Board on any issue properly before it shall be final and binding upon the Company, the Union and all employees concerned.
>
> The Board will not entertain any petition for reconsideration of the merits of an Award.
>
> C. *Compliance with Board Awards*
>
> Occasionally issues may arise concerning implementation of, or compliance with, an Award. Any such problem must be fully reviewed and discussed by the Fourth Step representatives. Every effort should be made to settle such issues before the problem is referred to the Board. Where the parties prove unable to settle any such problem in this manner, it then may be considered by the Board, on appeal by either of the Parties.
>
> Such appeal shall:
>
> 1. State the specific problem which has arisen under the Award;
>
> 2. Specify the remedy requested of the Board;
>
> 3. Include all written material (including minutes) jointly considered by the Parties before referring the problem to the Board.

The claim of those opposing application of a procedure such as this to ad hoc cases as well as to those heard by impartial chairs, is that it would open the floodgates; that under the guise of a request

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[39] 9 U.S.C. §§1 et seq.

for clarification or correction, a party would ask the arbitrator to reexamine the merits of a dispute. But what if some parties did that? Are not arbitrators sufficiently astute to recognize the difference? Perhaps I should not ask that question.

Let me put it this way—section 6.D.1's prohibition against single-party requests does not really end the matter when only interpretation or clarification of intent is involved. Rather, it shifts the issue to the judicial forum for a year or two with an odds on remand to the arbitrator as the person most likely to know what the arbitrator had in mind.

Why not save time and expense and let the arbitrator do it by amending the Code so that there is no question of the arbitrator's authority? Last year the Ninth Circuit said in *Teamsters Local 631 v. Silver State Disposal Service*,[40] that the Code notwithstanding, a joint request was not necessary for an "arbitrator to complete an award, clarify an ambiguity, or correct a clear mistake."[41] In that case, an arbitrator converted a discharge to a 3-day suspension without pay, but said nothing about back pay for the remaining time that the grievant was out of work. The employer reinstated the employee but gave him no back pay. The union asked for clarification, but the employer resisted, saying it was beyond the arbitrator's authority. The arbitrator's response was to issue an amended award, making it clear that, except for the 3-day suspension, she had intended to award the employee back pay and benefits. When the employer refused to comply, the union moved to confirm and the employer, specifically relying on section 6.D.1, countered with a motion to confirm the original award. The court confirmed the amended award, holding that a joint request was unnecessary when an arbitrator's amendment falls within the exceptions to the doctrine of *functus officio*,"[42] one of which was clarifying an ambiguity.

Think of that for a moment, my friends. Section 6.D.1 says that "no clarification . . . is permissible without the consent of both parties." Yet, the Ninth Circuit tells us that under the law joint consent is simply unnecessary when all that is sought is clarification. Why then should this ethical constraint be retained? The only justification must be the policy considerations I have already mentioned. In my judgment, however, they are insufficient to overcome the delays inherent in the retention of the present rule.

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[40]109 F.3d 1409, 154 LRRM 2865 (9th Cir. 1997).
[41]*Id.* at 1412.
[42]*Id.*

I therefore suggest that postaward activity generally should be permissible if strictly limited to clarification in order to effect an award's intent. Of course, there is a difficulty here: no one has a crystal ball. There have been many predictions of what might happen, but what would actually occur if the rule were changed is really unknown. There are dangers. In late 1996, the issue during oral argument of a Fourth Amendment case before the Supreme Court[43] was the standard under which it would be permissible for a police officer to order persons other than the driver out of a car. When the Attorney General of Maryland suggested that this should be left to a police officer's discretion, the response from the bench was that everyone knew from experience that police officers would take the court's words (whatever they might be) to the furthest possible extent. Parties or their counsel might do the same. Thus, the safest course may be to leave section 6.D.1 alone and let parties, if they so choose, provide for clarification and interpretation in their collectively bargained agreements as the present rule allows and as some parties have done.

I suggest that we should bear that risk of overreaching and recognize the value of going further. I therefore offered to the Academy's Committee on Professional Responsibility and Grievances (CPRG) the following revised section 6.D.1. I asked that it be seriously considered as an improvement of the process, a means of increasing its efficiency, and, if you will, its cost-effectiveness. Though my suggested revision will not allow arbitrators to alter their ultimate judgments, it may permit them to correct any deficiencies while preserving what I see as the central utility of arbitration. That is to say, it will allow arbitrators to rectify inadvertent errors without wasting a court's time or incurring the inevitable judicial delay.

That the problem is still with us is reflected in cases like *Silver State*[44] and a case such as *Cadillac Uniform*.[45] There, it was clear from the arbitrator's opinion that he meant to place the discharged participant in a fight on a par with the participant who received a two-week suspension. He substituted a 2-week suspension for the discharge, but mistakenly ordered "reinstatement without pay." Ten days after issuing the award, the arbitrator corrected it, but the employer refused to accept the correction. Eighteen months later,

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[43]*Maryland v. Wilson*, 519 U.S. 408 (1997).
[44]*Teamsters Local 631 v. Silver State Disposal Serv., supra* note 38.
[45]*Cadillac Uniform & Linen Supply v. Union de Tronquistas de P.R. Local 901*, 920 F. Supp. 19, 152 LRRM 2416 (D.P.R. 1996).

the district court in Puerto Rico held that the arbitrator, in his corrected award, was not changing his award but simply clarifying his intention, and that he had authority to do so. Under what I propose for further discussion and debate that could have been done—as they say—in a New York minute. The revision would read:

> D. Clarification or Interpretation of Awards
>
> 1. Unless directed to do so by appropriate authority, an arbitrator may not reconsider the merits of a final award or accept a motion for such reconsideration.
>
> If, however, a party considers an award or a portion thereof unclear, that party, within 10 days of the issuance of the award, may request the arbitrator to clarify or explain the award. Said request must be on notice to the other party, must specify that portion of the award considered unclear or in need of explanation or interpretation and state the reasons for that assertion.
>
> After affording both parties an opportunity to be heard, the arbitrator shall promptly dispose of the request.

When this paper was first written, the CPRG was yet to meet. I am pleased to report that it has since met and agreed in principle that section 6.D.1 should be changed to permit single-party requests for clarification. The CPRG is now considering the proposed language and will likely recommend a specific change to the Academy's Board of Governors at its 1998 fall meeting in Kansas City.