



So, There is an Award; Now What?

Failing to address details in timely manner could be costly

By Robert E. Bartkus

The tribunal in your arbitration has sent copies of an award to the attorneys for the parties. The parties may voluntarily comply, but (if they do not) as a general matter arbitration awards are not self-enforcing. Thus, the lawyers for the parties face a number of choices—some technical—that may affect their clients' rights.

Those choices may depend on several factors, *e.g.*, the stage of the arbitration; whether the arbitration was administered by an established arbitration forum (such as the American Arbitration Association, JAMS, or CPR), was conducted by an independent arbitrator (such as an experienced lawyer or retired judge) on a non-administered basis, was in connection with a labor contract (such as a collective bargaining agreement or state analog), or was part of a statutory or court-administered system (such as fee arbitration or *R. 1:40-1, et seq.*, CDR); the law applicable to the arbitration (*e.g.*, NJRUAA or FAA);¹ and the nature of the award. We address those factors in connection with domestic, contract-based arbitration in New Jersey.

Types of Awards

The type of award may vary with the circumstances, or the nomenclature given by the arbitrator (which will not always control in court). An award is not merely an order; it must be the final decision with respect to the issues presented to the arbitrator such that the parties may apply to a court for enforcement (or other relief) and the arbitrator is discharged pursuant to the common law doctrine of *functus officio* ("a task performed").² One way for a drafter to signal that the award is final is to include language such as, "This award is in full settlement of all claims and counterclaims submitted to this arbitration; all claims not expressly granted herein are denied." However, just as the doctrine of *functus officio* has developed a number of exceptions, so an enforceable award may be issued prior to the final decision of the arbitrator. Enforcement of or challenge to the award may depend on what it actually encompasses.

For example, an arbitrator may have issued a decision at the outset of an arbitration on a motion for a temporary restraining order (TRO), injunction, attachment, or other provisional relief, which normally would be called an Interim Award. Section 18 of the NJRUAA permits a prevailing party to apply to a court to enforce this ruling as if this were a final award (*see below*), while the remainder of the arbitration continues. The Emergency Interim Award of an emergency arbitrator appointed under the forum's rules may include language indicating that the full arbitral panel, once appointed, may revisit portions of the interim award, in which case some federal



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courts have held that the award is not final and is not subject to interlocutory court confirmation or vacatur.³

Similarly, based on the parties' agreement and an arbitrator's order, the merits issues presented may be separated, or bifurcated, from issues of damages, attorneys' fees, or other remedies, just as in court. In those situations, the decision at the first stage may be termed a partial award, as distinct from a final award, and may be subject to Section 18 also, so long as the findings are not characterized as preliminary or tentative and subject to change based on further evidence, set offs, arguments, or briefing.

Supplemental "awards" may not be recognized.⁴

The FAA does not have a provision analogous to Section 18, but courts bound by the FAA may address the issues similarly.⁵ Arbitration forum rules also have variations on the same theme.

As noted below, an award other than a final award—as opposed to an interlocutory order subject to change—may be subject to judicial enforcement, vacatur, or modification, and subject to the strict time limits governing review of a final award. The parties and arbitrator must be aware of these distinctions and their consequences, lest a failure to seek court relief from a partial award is later determined to have waived rights of review because it is interpreted as a final award subject to judicial action. Parties need to be alert to the need to file a protective application in court to modify or vacate, when there is doubt.

The state and federal statutes have different terminology and time limits for dealing with an award, of any sort. Therefore, it will be important to know whether the NJRUAA or FAA applies and how time limits will be applied in the court you are in.⁶

What triggers the need to apply to a court? An award first must be made and noticed to the parties in accordance

with the terms of the relevant statutes. Section 2 of the NJRUAA specifies how notice is to be given and what constitutes notice. The FAA tends to rely on the Federal Rules of Civil Procedure for such issues. One of the advantages of arbitrating under theegis of an established tribunal is that its rules constitute part of the parties' agreement, *see, e.g.*, AAA Commercial Arbitration Rules, R-1(a), to the means of notice and various time limits. The award also must be entered as a judgment of the court to which an application to confirm may be made, as specified in the governing contract and a forum's rules.

Modification of Award by Arbitrator

Even before a party seeks judicial relief (or while such application is pending), the party may request that the arbitrator (as opposed to the court) modify or correct the award where, as specified in Section 20 of the NJRUAA and some forum rules: there is an evident mathematical or typographic error; the award is not final, in that it has not decided a claim submitted; the award is "imperfect in a matter of form;" or to "clarify" the award. The FAA does not have a similar provision, but the FAA does not prohibit such motions, and they may be made pursuant to various forum rules or case-made exceptions to *functus officio*. These exceptions to *functus officio* are not an opportunity to reargue the merits of the decision.

An application to the arbitrator under Section 20⁷ must be made within 20 days after the aggrieved party receives notice of the award. Given the tight limits to file an application to vacate, modify, or change an award under the FAA, any application under Section 20 or the applicable tribunal rule must be presented and decided on an expedited schedule. The time limit to move to vacate or modify the award, once the arbitrator has resolved the application under Section 20, starts once

the revised award is "modified or corrected."⁸

The major arbitration forums also permit the parties to agree to an arbitral appeal and provide access to an appellate panel of senior arbitrators, to review a final award. This agreement may be part of the parties' contract or an agreed term in a preliminary scheduling order.⁹

Applications to a Court

What Court/Vicinage?

Once the parties have been provided notice of the award, pursuant to Sections 9 and 19 of the NJRUAA, assuming no forum appeal or application to modify has been made to the arbitrator (as above), the parties must decide whether to comply with the award or to apply to a court for relief.¹⁰ If the latter, the first question is where to apply?

If the parties had been compelled to arbitrate by a state or federal court in New Jersey, which court would have had personal jurisdiction over the parties and which action would be stayed pending arbitration, the parties logically would return to that court.

Otherwise, they may have a choice among courts with jurisdiction. Section 26 of the NJRUAA says that agreeing to arbitrate in New Jersey "confers exclusive jurisdiction on the [Superior Court] to enter judgment on an award pursuant to this act," in a county specified in Section 27: where the New Jersey Court Rules would locate venue, as agreed in the parties' arbitration contract, or where the arbitration was held. The statute does not specify Law Division or Chancery.

Federal district court also may be possible. If the parties satisfy the requirements of subject-matter jurisdiction over the controversy to be in federal court, then sections 9, 10 and 11 of the FAA provide they may go to the district where the award was made, *i.e.*, the District of New Jersey for arbitrations seated in New Jersey. On a motion to confirm

Although arbitration is considered private, and the arbitration contract may have required confidentiality or the parties may have entered into a consent award in the arbitration to produce discovery on a confidential basis and to maintain the hearings as confidential, they often do not take the extra step in the order to require that the award and post-award proceedings be kept confidential.

and enter judgment pursuant to Section 9, the prevailing party also may go to the court specified in the parties' contract.

If permitted, given the forum defendant rule in cases arising under diversity jurisdiction, a party responding to a summary action in state court may remove to federal court if there is subject-matter jurisdiction and case law indicates a federal court might provide a more favorable forum on the motion.

The Process

If the application for relief is made in state court, whether a new action or to reopen the prior action, Section 5 of the NJRUAA requires that an application is made in New Jersey Superior Court by commencing a summary action pursuant to R. 4:46-1, by filing a proposed order to show cause, verified complaint and certification. Although the rules permit *ex parte* submission of the proposed order to show cause, since it does not yet contain a schedule for opposition and the return date and does not provide for any relief, good practice suggests that the papers be served by email on all counsel contemporaneously with being filed with the court. In practice, the proceedings will be expedited, though the return date may evolve into a settlement conference and an adjournment for a plenary or other hearing.

The moving party must serve the other parties with the signed order, which then constitutes process—which would be set out in the applicable form of order to show cause. As noted above, per Section 26, personal jurisdiction is presumed by selecting New Jersey as the

arbitration site in the arbitration contract, but personal or substitute service must still be accomplished according to the applicable court rules, unless waived.

An application for relief made in federal district court is made by motion, not by filing a complaint (although that may be accepted by the court). The papers must be filed and served in accordance with Section 9 of the FAA and federal procedure for electronic filing and Fed. R. Civ. P. 4 and 5. Because the FAA does not provide for federal subject-matter jurisdiction for domestic arbitrations, any application not relying on a prior action to compel or stay arbitration must independently satisfy the standards for diversity of citizenship or other basis for subject-matter jurisdiction.¹¹ The Third Circuit has held that a court may not look through the arbitration on a post-award motion to find federal-question subject-matter jurisdiction.¹²

The papers required in federal court on a motion to confirm or modify are identified in Section 13 of the FAA: the arbitration agreement; the award; and the papers and order filed on the application to confirm. Failure to include these may result in dismissal of the motion.

Confidentiality (Not Presumed)

The papers filed in support of any application must necessarily include a copy of the arbitration award. Although arbitration is considered private, and the arbitration contract may have required confidentiality or the parties may have entered into a consent award in the arbitration to produce discovery on a confidential basis and to maintain the hear-

ings as confidential, they often do not take the extra step in the order to require that the award and post-award proceedings be kept confidential. Even if they did take that extra step, that order and agreement will not in itself suffice to maintain the confidentiality of the award once filed in court.

One way to assist in this regard (unless the arbitral forum has a different rule requiring or prohibiting confidentiality) may be to have the arbitrator issue a non-confidential summary award to which is attached the reasons for the award. Thus, only the summary may be required to be filed on a motion to confirm.

However, if any confidential part of the award, the hearings, or the exhibits is necessary to make out a case to modify or vacate the award, it is extremely unlikely that the parties will be able to protect an entire award, transcript or exhibits. In any case where identifiable trade secrets or other proprietary information is actually at risk, the parties must follow the court's procedures to request that the materials be redacted and filed under seal.¹³ Even post-award proceedings may require disclosure of confidential portions of the award or arbitration proceedings.¹⁴

Timing

The NJRUAA and FAA have different time limits for making an application – and different time limits, still, for whether the application is to confirm an award or to modify, correct, or vacate an award.

Section 22 of the NJRUAA does not provide a time limit within which a

party must apply to confirm and enter judgment on the award. Because Sections 23 and 24 specify that any application to vacate, modify or correct the award must be “filed within 120 days after the aggrieved party receives notice of the award,” or a modified or corrected award, the aggrieved party cannot wait until the prevailing party moves to confirm—and then raise the grounds for vacatur in a counterclaim or affirmative defense. The application must be filed (and served) within the required time.¹⁵ This is not necessarily the rule in New York State,¹⁶ and lawyers more familiar with the CPLR may be caught unawares expecting that a similar leniency applies here.

The times under the FAA are different in minor but important respects—and also raise the problem of an aggrieved party not moving quickly enough. Section 9 of the FAA provides that the prevailing party may move to confirm the award “within one year after the award is made.” Note that it is when the award is *made*, not when it is filed, served, or received. An aggrieved party must file and serve the notice of motion to modify or vacate the award pursuant to Section 12 within three months after the award is “filed or delivered.” Problems can arise in calculating the three months.¹⁷ As with the NJRUAA, an aggrieved party cannot necessarily wait until a motion to confirm has been filed.¹⁸

Standards (A Summary)

Both Section 22 of the NJRUAA and Section 9 of the FAA provide, respectively, that an award “shall” or “must” be confirmed unless it has been modified, vacated, or corrected.

The standards for vacating an award in Section 10 of the FAA are: fraud, corruption, undue means, partiality or bias of the arbitrator, misconduct prejudicing the rights of any party or where the arbitrators exceeded their powers, or “so imperfectly executed [their powers] that

a mutual, final, and definite award upon the matter submitted was not made.”

The standards for vacatur are similar under Section 23 of the NJRUAA, but also include the absence of an agreement to arbitrate (Section 23(a)(5)) and the absence of proper notice (Section 23(a)(6)). Consistent with forum rules and caselaw, Section 23(a)(5) provides that a defense under that subsection is waived unless raised at the “beginning of the hearing.”

Manifest disregard of the law has not been accepted in New Jersey courts or the Third Circuit as a basis for vacating an award.¹⁹ However, the NJRUAA permits the parties, when adopting the NJRUAA in their contract, to expand the bases for vacating an award (*i.e.*, the standard of review) to include additional grounds, such as legal error, as long as they are not inconsistent with the FAA.

An award may be modified or corrected under Section 24 of the NJRUAA and Section 11 of the FAA on grounds not affecting the merits similar to the exceptions to *functus officio* in Section 20 of the NJRUAA and caselaw: evident miscalculation, misdescription, typographic error, awarding relief on a claim not submitted or failing to make an award on all claims.

Once confirmed, an award must be entered as a judgment. Not all court orders on awards are appealable.²⁰

Remand/Rehearing

In many instances, the court may make the mathematical or other ministerial correction required by its decision on a motion, as required under Section 24(b) of the NJRUAA and permitted in Section 11 of the FAA, without remanding to the arbitrator. The award is then confirmed and judgment entered.²¹

However, where the arbitrator has omitted to decide a matter, or the award is incomplete or ambiguous, the court may remand for correction of the errors on the exception to *functus officio* that

the arbitrator had not completely exercised his or her authority.²² Some arbitration forum rules provide for such a ruling. Where the award is vacated because of bias, partiality, or arbitrator misconduct, the court may order a new arbitration with a different arbitrator as per Section 23(c) of the NJRUAA.

Conclusion

As illustrated by cases, reported and unreported, the steps required once an interim, partial, or final award is issued have caught more than a few parties in their intricacies. Attention to their details, and the cases that have interpreted and applied them, is important. Steps not taken timely may be costly. ◊

Endnotes

1. The New Jersey Revised Uniform Arbitration Act, N.J. S.A. 2A:23B-1, *et seq.* (NJRUAA) and the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (FAA) are addressed in this article by their respective acronyms and section numbers without official cites. Other categories of arbitration, *e.g.*, based on labor laws, remedial statutes, or court rules, may be governed by other statutes, *e.g.*, N.J.S.A. 2A:23A-1, *et seq.* (APDRA); N.J.S.A. 2A:24-1, *et seq.* (prior NJAA); 9 U.S.C. § 201, *et seq.* and the New York Convention, and the times and terms in each. For applicable contracts, in the absence of a specific choice of law for the arbitration, the NJRUAA is the default.
2. *See, e.g., Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, 943 F.2d 347 (3d Cir. 1991); *Kimm v. Blisset, LLC*, 388 N.J. Super. 14 (App. Div. 2001).
3. *See, e.g., Al Raha Group for Tech. Servs. V. PKL Servs.*, No. 18-4194, 2019 U.S. Dist. LEXIS 156249 (N.D. Ga. Sept. 6, 2019) (noting the qualification in the above text, even while agreeing that some injunctive awards may be

- “final” for purposes of immediate review under the FAA).
4. See, e.g., *Kimm v. Blisset, LLC*, 388 N.J. Super. 14 (App. Div. 2001).
 5. See, e.g., *Moyer v. Van-Dye-Way Corp.*, 126 F.2d 339 (3d Cir. 1942). But see *On Time Staffing, LLC v. Coast to Coast Installations, Inc.*, No. 09-4158, 2009 U.S. Dist. LEXIS 94626 (D.N.J. Oct. 8, 2009) (remanding for evaluation of potential set-offs), citing *Marron v. Snap-On Tools, Co.*, No. 03-4563, 2006 U.S. Dist. LEXIS 523 (D.N.J. Jan. 9, 2006) (contrasting a preliminary clause construction “award” with an interim award on a separate and independent claim).
 6. Although the FAA applies in state court as to its substantive provisions and regarding potential preemption issues, see, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984), whether the FAA’s procedural provisions apply in state court, preempting the NJRUAA, may be a different question. Some state courts have suggested the FAA’s time limits apply, e.g., *Matter of Ames v. Garfield*, 11 Misc. 3d 1051 (A) (S. Ct., N.Y. Co. 2006), others say not, e.g., *Moscatiello v. Hilliard*, 595 Pa. 596, 604-05. 939 A.2d 325 (2007). In an unpublished opinion, the Appellate Division held that there was no preemption. *Chakrala v. Bansal*, No. A-78-11, 2013 N.J. Super. Unpub. LEXIS 2337 (N.J. Super. Ct. App. Div. Sept. 24, 2013) (“partial final award” as to merits followed by “final award” as to attorneys’ fees), *certif. denied*, 217 N.J. 293 (2014). Courts have distinguished between state and federal rules regarding filing and service. See *Levy v. Wells Fargo Advisors, LLC*, No. Misc. 16-171, 2016 U.S. Dist. LEXIS 144642 (E.D. Pa. Oct. 18, 2016), citing *Hakala v. J.P.Morgan Sec. Inc.*, 186 Fed. Appx. 131 (2d Cir. 2006).
 7. Tribunal rules may have different time limits. E.g., AAA Commercial Arbitration Rules, R-50 (20 calendar days); ICDR Arbitration Rules, Article 33 (30 calendar days); JAMS Comprehensive Arbitration Rules & Procedures, Rule 25 (award is final after 14 days unless an application is made for a “correction”). The bases for the application may vary from the NJRUAA or court opinions governing proceedings in this jurisdiction.
 8. N.J.S.A. 2A:23B-23(b) & 24(a).
 9. See, e.g., American Arbitration Association Optional Appellate Rules, A-1; JAMS Optional Arbitration Appeal Procedures. During the pendency of the appeal, the award may not be final for statutory purposes. See *Demuth v. Navient Sols., LLC*, No. 17-675, 2017 U.S. Dist. LEXIS 129461 (W.D. Pa. Aug. 15, 2017) (dismissing federal complaint when AAA appeals process not complete).
 10. A motion to confirm and enter judgment on the award may be appropriate, even with mutual compliance, for purposes of estoppel or claim preclusion.
 11. 28 U.S.C. § 1332. See *Bartkus, Sher & Chewning*, New Jersey Federal Civil Procedure, Chapter 1 (jurisdiction) (2020 ed.).
 12. See *Goldman v. Citigroup Glob, Mkts, Inc.*, 834 F.3d 242 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 2159 (2017). Other circuits have held otherwise.
 13. See N.J. Ct. R. 1:38-11; 4:10-h; & 1:2-1; N.J. D. Ct. L. Civ. R. 5.3(c). The Third Circuit recently noted the proper, more rigorous standard for determining what materials may be redacted or filed under seal. See *Pennsylvania Nat’l Mut. Cas. Ins. Co. v. New England Reinsurance Corp.*, 794 Fed. Appx. 213 (3d Cir. 2019), citing *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 670 (3d Cir. 2019).
 14. See, e.g., *AT&T Corp. v. Public Serv. Enters. of Pa.*, No. 99-4975, 2000 U.S. Dist. LEXIS 44649 (E.D. Pa. Apr. 12, 2000); *Lederman v. Prudential Life Ins. Co. of Am., Inc.*, 385 N.J. Super. 307 (App. Div. 2006) (noting public access issues).
 15. See, e.g., *The Port Auth. of N.Y. & N.J. v. Police Benevolent Ass’n, Inc.*, 459 N.J. Super. 278 (App. Div. 2019) (noting exceptions). As illustrated by this case, the choice of law may be critical.
 16. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Fireman’s Fund Ins. Co.*, 121 A.D.2d 529, 504 N.Y.S.2d 24 (2d Dept. 1986). The cases appear not to be uniform in this regard.
 17. See Fed. R. Civ. P. 6(a); *Stevens v. Jiffy Lube Int’l, LP v. Black Fire energy, Inc.*, 911 F.3d 1249 (9th Cir. 2019) (motion a day late).
 18. See, e.g., *Prasad v. Investor Assocs., Inc.*, 82 F. Supp. 2d 365 (D.N.J. 2000). Cf. *Robinson v. Littlefield*, 626 Fed. Appx. 370, 374 (3d Cir. 2015).
 19. See *Trentina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*, 125 N.J. 349 (1994); *Whitehead v. Pullman Grp., LLC*, 811 F.3d 116, 121 (3d Cir. 2016).
 20. Compare 9 U.S.C. § 16(a)(1)(E) with N.J.S.A. 2A:23B-28(a)(5). See *Virgin Islands Housing Auth. v. Coastal Gen. Const. Services Corp.*, 27 F.3d 911, 914 (3d Cir. 1994) (remand appealable); see also *Hayes v. Turnersville Chrysler Jeep*, 453 N.J. Super 309 (App. Div. 2018) (motion deadline missed). Cf. *Accenture LLP v. Spreng*, 647 F.3d 72, 77 (3d Cir. 2011) (court decision on a procedural arbitrator order not an appealable final award); *Cardillo v. Clerk*, 756 Fed. Appx. 150 (3d Cir. 2018) (no “appeal” to federal court).
 21. N.J.S.A. 2A:23B-25(a); 9 U.S.C. § 13.
 22. See, e.g., *Trentina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*, 125 N.J. 349, 363 (1994); N.J.S.A. 2A:23B-23(c); 9 U.S.C. § 10(b).