

## Fixing ‘Unfixable’ Errors in Arbitration Awards

By Jack Levin

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Imagine that you are a pilot, physician, lawyer, accountant, engineer, military commander, plumber, teacher, or anyone whose job is to make decisions. Now imagine that you have made one such decision, and you then realize that you have made a mistake. What if the rules of your profession or business forbade you from correcting that mistake, even when you discovered it immediately and even when the correction would be simple?

In the courts, when judges make mistakes, there are mechanisms for those mistakes to be corrected—motions for reconsideration and appeal. These are not available in arbitration. The ancient doctrine of *functus officio* removes the arbitrator’s power to act once the final award issues.

With minor exceptions, an arbitrator who has rendered a final award has no power to act further, even to correct a serious error. This problem is compounded by the fact that in arbitration there is no appeal to the courts to correct mistakes.

This seemingly counter-intuitive limitation serves a highly desirable goal—finality. In court litigation, the appeal process can take many months and even years. Making the arbitrator’s award almost bullet-proof against attack avoids time-consuming post-award proceedings, but it comes at a cost.

The rules of major arbitration institutions continue to limit post-award corrections to clerical/typographical errors, computational mistakes, interpretation of ambiguous language, and inadvertent failure to address claims.

An award can be vacated by a court for fraud, corruption, evident partiality, misconduct, and exceeding power. Some jurisdictions also recognize vacatur on the ground of “manifest disregard of the law,” where

an arbitrator knows the relevant, applicable law but deliberately ignores it.

However, this ground is not universally recognized and requires showing intentional or reckless flouting of the law, not merely an error in interpretation. In no case can courts revise awards on the merits or for errors of law. These narrow grounds reflect the strong federal policy favoring arbitration finality.

Although arbitrator error is uncommon, when a final award does contain a significant mistake, finality becomes a defect rather than a virtue. Error alone will not cause an award to be vacated, but correctness matters beyond legal enforceability. Serious uncorrectable error understandably may leave the affected party feeling unheard and unjustly treated.

The least any system of dispute resolution should do is to leave parties with a sense that they have been dealt with fairly. When this does not happen, the reputation of arbitration suffers. Some lawyers and clients avoid arbitration for precisely this reason. Others decline to use sole arbitrators, preferring the comparative safety of three-arbitrator, or tripartite, panels, although those can be much more costly and less efficient.

Still, even with the risk of an erroneous final award, parties and their counsel continue to prefer arbitration for its advantages in many types of disputes.

The good news is that compromising accuracy for finality is an unnecessary trade-off. Although



Courtesy photo

**Jack Levin, mediator and arbitrator, formerly partner at Covington.**



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arbitration rules still provide relief in only very narrow categories, the parties themselves can agree on solutions to the problem of potential arbitrator error while avoiding significant expense and delay. Finality can be preserved without the risk of an irrational award. Without that risk, the advantages of arbitration become even more compelling.

### **The Arbitration Clause Can Provide Early Protection**

Dispute resolution clauses are written before disputes arise. In some situations, the parties can anticipate the type and scope of the disputes they may have. This makes it easier to decide in advance between one and three arbitrators and other conditions of the arbitration.

Usually, though, the parties cannot anticipate the disputes, and so, the drafting decisions may be more a reflection of the initial power dynamics between contracting parties than an assessment of what process will achieve the best and most efficient results when a dispute arises. The stronger party may negotiate for a more expensive process.

The burden of paying three arbitrators can be daunting. Combine that with a "loser pays" attorneys' fees provision, and a panel of three can be a strong disincentive for the weaker party to fight at all.

Parties are not likely to give up on their negotiating advantages at the time the clause is drafted, but when an actual dispute arises, smart counsel might use some imagination and review the clause for possible modification. Does the clause still serve the parties? Is the dispute too small to bear the expense of three arbitrators? Is speedy resolution desirable? A sole arbitrator may be faster, but then the parties inevitably worry about a sole arbitrator getting it wrong.

Concerns about the risks of finality do not favor one side over the other. It is impossible to predict which side will be harmed by arbitrator error.

Even experienced litigators tend to forget that arbitration is contractual. Arbitration clauses are contracts, and contracts can be changed even after a dispute has arisen. Diligent counsel might want to pause before an arbitration and consider what best serves their clients under the existing circumstances.

As shown below, parties can agree on words that enable them to identify and provide for the quick correction of error without impairing the benefits of finality in a final award.

### **Existing Safeguards**

- **Three Heads Are Better Than One.** As noted, cautious counsel often choose the tripartite panel. Three arbitrators provide built-in deliberation and review – reducing the risk that a single perspective will miss an important point of law or fact. The collective judgment of three experienced professionals offers parties greater confidence that the award will be well-reasoned and accurate. While this comes at a higher cost, many parties consider it a worthwhile investment for significant disputes.

- **The Tentative Award.** Even if parties do not request it, the arbitrator has the power to issue a tentative award. This gives the parties an opportunity to review the arbitrator's thinking and protect against error in the final award. The downside is that parties may be tempted to flyspeck and re-argue every aspect of the draft decision. This can be time-consuming and distracting. Still, tentative awards can be useful where a dispute involves detailed and technical aspects that might benefit from pre-award attention. In these situations, the arbitrator may submit a draft for some, but not every, aspect of the award.

- **Appeals in Arbitration.** Major arbitration institutions offer appellate panels of experienced former judges to review awards. These serve an important function in certain types of cases, particularly where the stakes justify an extra layer of arbitration despite the additional time and expense.

- **Institutional Rules Permitting Limited Review.** Before a final award issues, most arbitration institutions have some administrative review procedure, which can vary in rigor. But even the closest attention to an award may not reveal what the arbitrator has missed. If there is a significant error embedded in the award, administrative review is unlikely to catch it. Only counsel will know.

The arbitration institutions do acknowledge that some mistakes are worthy of attention. Commercial Rule R-52 of the American Arbitration Association is an example of a rules-based approach to mitigating error, permitting parties to request that an arbitrator “interpret the award.” The prior rule only permitted modification of awards for clerical, typographical, or computational errors. However, Rule 52 still notes that “The arbitrator is not empowered to re-determine the merits of any claims already decided.”

Other arbitration institutions have rules with similar provisions, but the most significant limitation remains: arbitrators cannot re-determine the merits of claims already decided. The interpretation/clarification power is strictly for addressing ambiguities in what was already decided, not for reconsidering substantive decisions.

These existing mechanisms, while helpful in limited circumstances, remain inadequate to address substantive errors on the merits. Parties deserve a process that better serves their expectations for justice.

### **A Comprehensive Solution: Motions for Reconsideration**

Although not yet adopted by the arbitration institutions, the motion for reconsideration is a simple solution that improves arbitration generally and levels the risk between sole and tripartite panels. It is not a new idea. It is a common-sense approach, one that is built into most court rules but not yet a feature of arbitration rules.

In April 2021, the New York City Bar Association issued a thorough and thoughtful report, “The Functus Officio Problem In Modern Arbitration and a Proposed Solution (the “New York City Bar Report”). It proposed a modification of arbitration institution rules to permit parties to authorize the arbitrator to correct a mistake affecting the outcome of an award. The New York City Bar Report provides well-considered language that can be tailored for such agreements.

To discourage gamesmanship and preserve efficiency, reconsideration provisions can include safeguards, including a single opportunity to seek such relief, time limits for filing motions, the requirement of specific grounds (e.g., material errors of law or fact affecting the outcome), and cost-shifting. Such limitations preserve the benefits of finality while providing a targeted remedy for significant error.

### **A Personal Experience With a Motion for Reconsideration**

Five years before the New York City Bar Report, I served as sole arbitrator in a dispute between two global firms. Their arbitration clause included this simple language:

The arbitrator shall reach a reasoned decision and shall deliver a written opinion setting forth findings of fact, conclusions of law and the rationale for their decision. The arbitrator shall reconsider the decision once upon the motion and at the expense of a Party.

The arbitration had been pending for more than two years. The evidentiary hearing took more than two weeks. The award was over 125 pages. As permitted by the clause, each side sought reconsideration but only on selected issues. The order on the reconsideration motion was issued only three months after the final award. Every issue was addressed. Only one resulted in a modest change in the calculation of damages.

The order on the reconsideration motion strengthened the final award on the issues raised. The final award was not challenged in court. Finality, efficiency, and justice were served. Most importantly, the reconsideration process was voluntary. No arbitration institution had to approve.

When all is said and done, the best processes are the ones that give parties confidence and a sense that they have been fully and fairly heard. The best outcome is one where the losing party understands the result and does not believe that the cost of moving to vacate is worth the time and money. Arbitration institutions may yet change their rules, but, fortunately, as always, parties can make their own agreements.

The beauty of arbitration is that the power to fashion the process is in the hands of the parties. They should use that power—whether at the drafting stage or by mutual consent once a dispute arises—to obtain all the advantages of a process tailored to the unique features of their dispute and the needs of the parties. A motion for reconsideration is a powerful solution to a problem that has bedeviled the arbitration process. Parties should consider using it.

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